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TREATIES AS A SOURCE OF GENERAL RULES OF INTERNATIONAL LAW*

by

Anthony A. D'Amato**
Of
The New York Bar

I. INTRODUCTION

In 1955 the International Court of Justice rendered its highly significant decision in the Nottebohm case.[1] Cited in the opinion were the Bancroft treaties[2] and the Pan-American Convention of 1906.[3] Judge ad hoc M. Guggenheim, dissenting, stated that he considered it incorrect to regard the eighteen or so Bancroft treaties[4] "as constituting a precedent" for the decision inasmuch as they were bilateral treaties involving neither of the parties to the Nottebohm case.[5] Indeed, the use of a set of treaties and a unilateral convention by the Court as the only specific precedents cited came as a surprise to many observers. Professor Josef Kunz has commented that the Bancroft treaties were "binding only on the contracting parties" and thus "not pertinent" to the Nottebohm case.[6] He concludes that there is no international law precedent for Nottebohm.[7] This is a startling conclusion, given the significance of the case.

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**A.B., Cornell; LL.B., Harvard.

1. [1955] I.C.J. Rep. 4.

2. Id. at 22-23. See, e.g., Treaty With the North German Union, Feb. 22, 1868, 15 Stat. 615, T.S. No. 261.

3. August 13, 1906, 37 Stat. 1653, T.S. No. 575.

4. [1955] I.C.J. Rep. at 41.

5. Id. at 59.

6. Kunz, The Nottebohm Judgment (Second Phase), 54 Am. J. Int'l. L. 536, 557 (1960).

7. Ibid. The same conclusion is reached in Goldschmidt, Recent Applications of Domestic Nationality Laws by International Tribunals, 28 Fordham L. Rev. 689 (1960).

But it would be an inaccurate conclusion, given the hypothesis that treaties are capable of constituting precedents of general international law binding on nonsignatories.

The Nottebohm case is by no means an isolated example of such use of treaties. The reports of international tribunals often have reference to citations of treaties introduced by the parties as support for their contentions although the parties were not signatories of the treaties:[8] Colombia cited a large number of extradition treaties in the Asylum case,[9] which the International Court of Justice found inapposite to the question of diplomatic (nonterritorial) asylum without stating whether such treaties were irrelevant as precedent.[10] Some courts have found that similar provisions in many extradition treaties have become applicable to states which have not expressly accepted the treaties.[11] On its first decision, the Permanent Court of International Justice inferred from treaties creating the Panama and Suez Canals a rule that a state remains neutral even though it allows passage through an international waterway of ships carrying munitions to belligerents.[12] In the Lotus case[13] the Court interpreted the intended scope of rules in a large number of treaties, though refusing to make any deductions therefrom because the treaty provisions neither related to common-law offenses nor to collision cases.[14] Other examples of the use of treaties as general precedents by international arbitral and judicial tribunals have been cited.[15] Particularly in the large number of

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8. See Sørensen, Les Sources Du Droit International 95-98 (1946).

9. [1950] I.C.J. Rep. 266, 277.

10. Ibid. See also the Court's remarks at ibid. in reference to the "inconsistency in the rapid succession of conventions on asylum" -- implying that if consistent they would have been relevant as a source of law.

11. Extradition Case (Germany and Czechoslovakia), [1919-22] Ann. Dig. 259 (No. 182); In re Fernando Benet, [1925-26] Ann. Dig. 301 (No. 225); In re Tsiaras, [1929-30] Ann. Dig. 276 (No. 173); In re Placido Martinez Areal, [1929-30] Ann. Dig. 277 (No. 174); In re Vilca, [1931-32] Ann. Dig. 293 (No. 156).

12. The Wimbledon, P.C.I.J. Rep., Ser. A, No. 1, at 25 (1924).

13. P.C.I.J., Ser. A, No. 10 (1927).

14. Id. at 27.

15. See Kopelmanas, Custom as a Means of the Creation of International Law, 18 Brit. Yb. Int'l. L. 127, 136-37 (1937); Hudson, The Law Applicable By the Permanent Court of International Justice, in Harvard Legal Essays 133, 149 (1934). In Chrichton v. Samos Navig. Co., [1925-26] Ann. Dig. 3 (No. 1), the Mixed Court of Appeal in Egypt held that an international convention to regulate salvage on the high seas was applicable to Egypt which had not expressly adhered to the treaty.

treaties relating to international rivers have writers begun to discern the emergence of a requirement of arbitration or negotiation if the upper riparian threatens substantial diversion of the waters.[16]

It may in any case be unwise to dismiss the considered judgment of the International Court of Justice in the Nottebohm case quite as easily as does Kunz. Indeed the Court may be thought to have extended an implied invitation to writers reflecting on its decision to analyze the question whether treaties may constitute precedents in international law binding on nonsignatories.[17]

II. SCOPE OF STUDY

In this paper we are considering not the treaty alone, but the implementation of the treaty in actual practice,[18] and I will be contending not merely that a large number of treaties create a rule, but that a single, isolated treaty on an issue should contain as much precedent value before an international tribunal as the practice it includes would have contained, had the practice occured in absence of the treaty[19] -- and in some cases, for reasons that will later be

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16. See Laylin, Indus River System--Comments, /1960/ Proceedings Am. Soc'y. Int'l. L. 144. In Briggs, The Law of Nations 274 (1952) the rule of absolute sovereign control is stated. But Professor Briggs has indicated to me that this will be modified in the next edition.

17. Dr. C. Wilfred Jenks has pleaded for a greater study of law-making treaties "in transforming the scope and content of international law . . . ." Janks, The Conflict of Law-Making Treaties, 30 Brit. Yb. Int'l. L. 401, 402 (1953).

18. Proof of such practice should not be strictly required. There is a very strong presumption that if nations sign a treaty, they intend to implement it and may be taken to have done so. It would be very difficult to find evidence of practice in accordance with treaty provisions since such practice, being required or privileged by law, would not normally be recorded.

19. It is clear that the International Court of Justice may apply treaties as precedents for nonsignatories, as it in fact did in Nottebohm. It may apply Article 38(1)(b) of the Statute of the International Court of Justice which because of its loose wording may as easily admit of treaties as precedents for "international custom" as it admits of the decisions of municipal courts as contended by Lauterpacht, Decisions of Municipal Courts as a Source of International Law, 10 Brit. Yb. Int'l. L. 65 (1929). Or it may simply apply international law, which Hudson has shown the nature of the Court compels it to do, despite the seemingly restrictive wording of Article 38. Hudson, The Law Applicable By the Permanent Court of International Justice, in Harvard Legal Essays 133-34 (1934). Alf

shown, more precedent value than the practice; that there is no difference in kind between one and one hundred treaties; that the same logical explanation applies to all, though the decisive power of one hundred treaties is necessarily stronger than the power of one.

I wish to attempt a theoretical explanation of the power of treaties to extend their rules to nations not parties to them -- to rationalize, in a nonpejorative use of that term, the Court's citation of the Bancroft treaties in Nottebohm and its use of treaty provisions in other cases -- and to provide a basis for the continued use of the contents of treaties in assessing the requirements of international law. Thus this paper is basically argumentative -- it attempts to state what the law ought to be by demonstrating that the law as it is logically compels the adoption of the present thesis.

At the turn of the century, it appears, a large number of publicists essayed the rudiments of a view that treaties "are in some sense a fountain of law to others than the signatory states."[20] But then there appeared the writings of W.E. Hall, who viewed treaties as contracts and laid down the Anglo-American view of the subject which has persisted rather steadily since then. Treaties, wrote Hall, are either declaratory of law, or in derogatory of it, or "mere bargains" in which, without reference to law, something has been bought for a price.[21] Many writers since Hall have adopted this line of thought, with the result that treaties are broadly believed to be all but irrelevant to international law -- for if a treaty can be either in confirmation or derogation of existing law, then barring a statement within the treaty as to which of the alternatives is the case, an observer must look outside the treaty to discover the law. The treaty, then, has been entirely irrelevant to determination of the law.

Some writers following after Hall have argued that a treaty must be in derogation of existing law, for otherwise there would be no need to enter into the agreement. But it seems clear that such a view is not in accord with practice. It may easily be said that "when the law is uncertain, practical men will naturally seek to clarify the position by making special arrangements."[22] Even where the law is clear it may be reasonable for the parties to desire

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Ross has demonstrated that no statement of sources of the law can be exhaustive, for "the doctrine of the sources can never rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove." Ross, A Textbook of International Law 83 (1947).

20. Hall, International Law 7 (8th ed. Higgins 1924). The writers included Calvo, Ortolan, Hautefeuille, Despagnet, and Bluntschli. Gihl, International Legislation 54 n.2 (1937). See also Pradier-Fodere, Droit International Public (1885); Fauchille, Traite de Droit International Public (1922).

21. Hall, International Law 8 (8th ed. Higgins 1924).

22. Jenks, State Succession in Respect of Law-Making Treaties, 29 Brit. Yb. Int'l. L. 105, 138 (1952).

evidence as concrete as a signed statement of intent. Certainly it would be assuming too much to declare that states are invariably aware of what the customary international law is in the absence of a treaty -- in instances of doubt or difficulties of determination it must be appealing to take the relatively simple step of making an agreement which will be binding whatever the custom proves to be.

I do not suppose that Hall's original statement is entirely unreasonable. One may argue, however, that it has proven rather a sterile line of thought, and by its general acceptance has discouraged views which might have been more fruitful, depriving the international law of benefits which the consideration of treaty provisions might have produced.

Specifically, with the emergence of new problems and new solutions to old problems, the needs and possibilities of law constantly change. How, then, is a nation to deal with a problem when custom is outmoded? How, in the absence of an international legislature, can unworkable customary law be changed? A nation can, if it wishes, simply act illegally. But more often it will prudently conclude a treaty or treaties.

Indeed, most of the substantive rules regulating international affairs today are found in the myriad treaties concluded between and among nations. Customary international rules make up only a small portion of the operative international norms, and daily the sphere of treaty regulation intrudes on what is left of the area of customary practice. Some arenas of international law have developed so completely in modern times that they have been preempted entirely by treaties. For example, it would be hard to find customary rules regulating flights through the airspace in the sense of "custom" apart from treaty. Treaties have given rise to the international rule of sovereignty over the superjacent airspace. But "it would betray confusion of thought," states Hyde, "to intimate that in the absence of agreement there is, in an international sense, no law of the air."[23] This law of sovereignty, binding on all nations, has not arisen from the classic usage-into-custom pattern of customary international law. Bilateral and multilateral treaties have been concluded on this and thousands of subjects, and the rule-making potentialities of these treaties thus becomes an important question in the ordering of international life. To hold uncompromisingly to the Hall position that these treaties are nothing more than contracts, to declare that a nation lacking a specific treaty must abide by hundred-year-old custom even if several treaties have pre-empted the field in more recent years, is to give the "dead hand" of custom unreasonable sway over modernized and progressive agreements.[24] If

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23. 1 Hyde, International Law 604 (2d ed. 1947). See also Note, National Sovereignty of Outer Space, 74 Harv. L. Rev. 1154, 1163-65 (1961).

24. There are also wide areas of the law where customary rules are so broad as to be useless in the solution of particular cases. For example, there is a lack of customary law in the case of diplomatic envoys in regard to the extent of diplomatic

indeed most of the developments in international matters in the last half century have been treaty developments, to deny their relevance to international law would be to nullify the effects of recent legal thinking and international events and refuse the courts benefit from them. It would seem that the carefully considered opinion of the treaty makers deserves some weight, particularly if it is widespread and reflected in several treaties and agreements.

It is, of course, much easier simply to declare that no amount of contracting can change existing law, and that in the absence of a specific treaty hundred-year-old custom emerges again to rule the parties. Certainly the ease of this reasoning lends it a surface attractiveness, and I do not promise an equally facile theory. Rather, an examination must be made in some detail of the nature of a treaty and the nature of customary law, as well as the kinds of treaties that are capable of rule-making power, and finally, of the compatibility of the present thesis with the goals of international law.

III. THE PARITY OF CUSTOM AND CONVENTION

International law has allowed for a curious inroad into the maxim pacta tertiis nec nocent nec prosunt[25] in that it is said that when a rule is repeated in a large number of treaties the rule "passes" into customary law, or that when an important multilateral convention has been in existence for some time, its provisions become absorbed into the stream of customary international law.[26] Yet

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immunities, the immunities of the subject of the receiving state, the immunities of persons combining diplomatic and consular functions, immunities in respect of movable and immovable property, immunities in actions brought in connection with non-diplomatic activities (e.g. commercial) of the envoy, the aspects of express and implied renunciation of immunity, and matters relating to execution, setoff, counterclaim, etc. These have been pointed out by Lauterpacht, Decisions of Municipal Courts as a Source of International Law, 10 Brit. Yb. Int'l. L. 65, 87-88 (1929). If a treaty to which the diplomat's state and the receiving state have signed is silent on any of these points, it is likely that a court would have resort in part to other treaties between different states in order to find some precedent for deciding the issue. Hyde has pointed out that as a practical matter conventional rules have influenced non-signatories and acted to modify "the customary right of jurisdiction which a State may have been supposed to possess in relation to such /consular/ officers." 1 Hyde, International Law 142 (2d 2d. 1947).

25. Treaties do not impose any burden, nor confer any benefit, upon third parties.

26. See 1 Calvo, Le Droit International 136 (3d ed. 1880); Kopelmanas, Custom as a Means of the Creation of International

the manner in which the treaty rule becomes a customary rule has not been examined satisfactorily by publicists. There is great disagreement as to the amount of time which must elapse, for example, before such treaties become absorbed into customary law. Dr. Jenks regards the pace as very slow; he states that it is doubtful that by the time of the first Wold War the 1856 Declaration of Paris had acquired the status of customary law.[27] But Corbett writes that the terms of the Declaration of Paris became part of the customary law of nations by the time of the Spanish-American War, when the United States Department of State may be taken to have assented by issuing such rules to American diplomats.[28] Schwarzenberger pinpoints the time at which a rule becomes transformed into international customary law as the time it "begins to be considered self-evident and is discarded in drafting as redundant . . . ."[29] But surely it is strange to look to the treaties themselves as evidencing a time when the old treaty rules have passed into customary law, since the contracting parties are free, by virtue of the freedom of contract, to accept or reject the old rules. The one thing that customary law by and large does not do is tell nations what to put in their treaties.

On closer examination it is found that the language of publicists is far from clear on the process of transformation of treaty into custom. Corbett refers to provisions in consular treaties regarding the exercise of jurisdiction over merchant vessels in foreign ports as "now in the process of hardening into law."[30] Pradier-Fodere indicates that a uniform resolution of a matter in a series of treaties "interprets" (traduisant) the opinion of nations on the matter.[31] Fauchille omits to mention any

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Law, 18 Brit. Yb. Int'l. L. 127, 136-38 (1937); Sorensen, Les Sources Du Droit International 95-98 (1946).

27. Jenks, State Succession in Respect of Law-Making Treaties, 29 Brit. Yb. Int'l. L. 105, 108 (1952).

28. Corbett, The Consent of States and the Sources of the Law of Nations, 6 Brit. Yb. Int'l. L. 20, 27 n.2 (1925). In the Nuernberg judgment, it was held that the rules of land warfare in the Hague Convention of 1907 "were recognized by all civilized nations" by 1939 "and were regarded as being declaratory of the laws and customs of war . . . ." Office of U.S. Chief of Counsel for Presecution of Axis Criminality, Nazi Conspiracy and Aggression: Opinion and Judgment 83 (1947).

29. Schwarzenberger, The Inductive Approach to International Law, 60 Harv. L. Rev. 539, 563 (1946).

30. Corbett, The Consent of States and Sources of the Law of Nations, 6 Brit. Yb. Int'l. L. 20, 24 (1925).

31. 1 Pradier-Fodere, Droit International Public 85 (1885); cf. 1 Calvo, Le Droit International 136 (3d ed. 1880).

"hardening" process, simply saying that identical stipulations in consular, extradition, and copyright treaties, for example, give birth to a rule of customary law.[32] In the Wimbledon case the Court applied conventions relating to other waterways to the case at hand and found the treaties to be "illustrations of the general opinion."[33] In the Mavromatis case, a general conclusion was based on the "reservation made in many arbitration treaties," although citations were not given.[34] Yet the International Court has not applied the psychological element, opinio juris, to any of these cases, and thus Sørensen finds it difficult to explain the cases other than by considering it a matter of the relatively free discretion of the Court.[35]

It is submitted that jurists who have had occasion to deal with the question of the "passage" into customary law of provisions in treaties have not yet fully examined the matter and have for the most part covered a very nebulous idea with words such as "hardening" and "transformation." It is inherently difficult to find evidence that provisions in a treaty have become part of customary international law in the sense of usage and opinio juris; this is due to the fact that the nations concerned with the particular activity are usually the signatories or later ratifiers of the multi-lateral convention, or the signors of bilateral treaties. And since these treaties usually have not expired, it is natural that the involved nations consider their obligations to stem from the treaty rather than from a Platonic sort of international law which the treaties have created. Further, the great divergencies of view as to the length of time it takes for the treaties to "ripen" into customary international law bears witness to the inability to find any evidence external to the treaty of such process of ripening.[36] These considerations show the difficulty of proving that treaties have entered into the stream of customary international law in the sense that the jurists making the claim think of customary law. But the fact still remains that

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32. 1 Fauchille, Traite de Droit International Public 45-46 (1922). A further example of a lack of reference to a temporal process of "passage" occurs in the Muscat Dhows (France v. Great Britain) case, in Scott, Hague Court Reports 95 (Perm. Ct. Arb. 1916), where it was held that principles in capitulation treaties contained the general law on the point. Cf. The Paquete Habana, 175 U.S. 677 (1899); Pollock, The Sources of International Law, 2 Colum. L. Rev. 511, 512 (1902).

33. P.C.I.J., Ser. A, No. 1, at 25-28 (1923).

34. P.C.I.J., Ser. A, No. 2, at 35 (1924).

35. Sørensen, Les Sources du Droit International 98 (1946).

36. Alf Ross has noted that to refer the binding force of multilateral conventions on nonparties "to a later formulation of customary law will often be illusory." Ross, A Textbook of International Law 84 (1947).

the courts and writers in the field regard similar provisions in a large number of treaties or a provision in a large multilateral treaty as having a thrust on the universal international law. Is it not possible to conclude that the treaties themselves have become recognized - albeit dimly -- as sources of the law of nations in much the same manner that the practice of states, absent a treaty, becomes binding?

I have often wondered if there does not exist too much of a fondness for the purity of customary law, and a resulting distaste for the intricacies of treaty law. Jurists seem often to claim too much for customary law. For example, Oppenheim and others[37] say that it is a rule of customary international law that treaty obligations are binding. But how could this statement be proved? It is just as easy to say that treaty law accounts for the binding force of treaty law, or of customary law. Or that the norm pacta sunt servanda applies equally to treaty law and custom. The same fondness for customary law may lie behind the attempt to find the "passage" into such law of repeated treaty provisions, even in the face of extreme difficulty in explaining how this comes about.

International rules as to the interpretation of treaties are not themselves traceable solely to customary rules. International law indicates "when an agreement becomes binding, how it is to be interpreted during its effective life, and how it may be terminated."[38] But these rules did not come about merely because of the way in which nations in practice felt an obligation to interpret the treaties; they also derived from rules found by the courts to be most consistent with the intention of the parties. The fact that a court examines a treaty does not mean that its finding is necessarily a rule of customary international law. Indeed, most of the rules of treaty interpretation are probably traceable to treaties, as Schwarzenberger suggests.[39] Later treaties may spell out, for instnace, what is meant by a most-favored nation clause in an earlier treaty, and in the constant process of revision of treaties by nations general rules emerge. It is treaty law that has laid down the most-favored nation standard containing the features that the standard "is incompatible with discrimination against the beneficiary, that it does not exclude discrimination in favor of the beneficiary, that third States constitute the tertium comparationis, and that it does not require compliance with any definite and objective rules of conduct."[40] These rules of law are not customary in origin, but rather indicate that a great amount of international

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37. Oppenheim, Internation Law 28 (8th ed. Lauterpacht 1955); see, e.g., Kunz, The Nature of Customary International Law, 47 Am. J. Int'l. L. 662, 665 (1953).

38. Jessup, A Modern Law of Nations 125 (1948).

39. Schwarzenberger, The Most-Favoured-Nation Standard in British State Practice, 22 Brit. Yb. Int'l. L. 96, 117 (1945).

40. Id. at 119-20.

law is traceable rather directly to treaties which are not necessarily required to have the express consent of the parties in a particular litigation in order for the treaties to be relevant to their case.

In sum, my intention is to suggest, not that treaties can form or pass into customary law, or even that they pass after a certain amount of time into a comparable treaty law, but that treaties, from the very first treaty on a question, are useful as precedents before courts and form an international treaty law, its force varying with the number or breadth of the treaties, which is comparable to, and as valid as, customary law.

It has been said that there is doubt whether, despite the myriad treaties on extradition, a state has an obligation to extradite in the absence of a treaty. Does this quite reasonable doubt indicate authority against the thesis of this paper? I think not. Rather it seems to be an illustration of the situation described above -- the separateness of treaty law and customary law.

To the extent that an international tribunal might now hold that there is no duty of extradition in the absence of a treaty, the decision may be explained as the result of the presence of the contrary right of asylum in customary international law.[41] It is of course easier for a rule of law to become binding on all states if there is no ingrained rule to the contrary. Here, if the question were only one of extradition or nonextradition, the various treaties by now would probably have set up a different treaty practice for nations. But the customary right of asylum had to be worn down and offered considerable resistance to the rule of extradition. Specifically, it might be said that implicit in the terms of the normal extradition treaty is the safeguarding of the right of asylum in cases where the exact treaty provisions are not met. This contrary presumption is not true of many other areas of international relations. But even despite the presure of the rule of asylum, a number of cases have indicated that the recurrence of similar provisions in extradition treaties has set up a duty of extradition.[42] And, very significantly, there is an increasing sense of duty to conclude an extradition treaty -- Hyde says it has become regarded almost as an unfriendly act for one state persistently to refuse to enter into an extradition treaty with another.[43] The paucity of cases on the extradition of common criminals, as opposed to political refugees, about whom the treaties are not uniform, further

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41. See Finch, The Sources of Modern International Law 56 (1937); Morgenstern, 'Extra-Territorial' Asylum, 25 Brit. Yb. Int'l. L. 236 (1948).

42. See Extradition Case (Germany v. Czechoslovakia), [1919-22] Ann. Dig. 259 (No. 182); In re Fernando Benet, [1925-26] Ann. Dig. 301 (No. 225); In re Tsiaras, [1929-30] Ann. Dig. 276 (No. 173); In re Placido Martinez Areal, [1929-30] Ann. Dig. 277 (No. 174); In re Vilca, [1931-32] Ann. Dig. 293 (No. 156).

43. 2 Hyde, International Law 1014 (2d ed. 1947). See also Finch, The Sources of Modern International Law 57 (1937).

suggests that there is considerable inroad on the right of asylum in practice. "In actual fact," Morgenstern observes, "'common' criminals are usually surrendered."[44]

It seems clear that the matter of extradition is an example of a simple clash which the above discussion of the parity of treaty law and customary law explains and which parity is in turn clarified by the clash. Customary law and treaty law are two separate and comparable forces at work. They happened, in the matter of extradition to have precisely opposing points of view. The fact that nations appear lately to feel an obligation to conclude extradition treaties indicates that treaty law may be gradually taking precedence over customary law on this question.

IV. SOME DEFINITIONS

A. Treaties

Hereinafter when the word 'treaty' is used, it is intended to mean any international agreement. Jessup writes: "It is of no legal consequence . . . whether an agreement between or among states is called a treaty, a convention, a statute, an agreement, a protocol, or a covenant or charter."[45]

B. Source

The term 'source of law' has been subjected to vast criticism, for it has been said to denote ambiguously the cause of international law, its origin, its basis of validity, evidence as to its content, and its 'immediate,' 'formal' or 'material' source.[46] Professor Brigs has mentioned that the meaning assigned to the term 'source' is "often colored by . . . doctrinal predispositions as to the basis of legal obligations in international law."[47] A certain amount of common sense may go a long way toward obviating these apparent difficulties with language. Thus a proposal that treaties are a source of international law means that courts, international lawyers, and state

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44. Morgenstern, The Right of Asylum, 26 Brit. Yb. Int'l. L. 327, 329 (1949).

45. Jessup, A Modern Law of Nations 123 (1948); see Myers, The Names and Scope of Treaties, 51 Am. J. Int'l. L. 574 (1959).

46. See Corbett, The Consent of States and the Sources of the Law of Nations, 6 Brit. Yb. Int'l. L. 20, 22-27 (1925); Gihl, International Legislation 1 (1937); Sørensen, Les Sources du Droit International 13-27 (1946).

47. Briggs, The Law of Nations 44 (2d ed. 1952).

department officials will look to treaties in order to determine "what are the rules of international law on a given question at any particular time."[48]

A further clarification is needed with respect to the present thesis: that while treaties are quite often referred to as "sources of international law,"[49] writers for the most part are referring to treaties as obligatory only for the signatory states and therefore are referring to the realm of 'conventional' as opposed to 'customary' law.[50] The present paper attacks this usage, and in referring to treaties as a source of law means that a treaty signed only by states A and B may be a source of rules -- though not the only source and in any given case perhaps not the most important -- for states C, D, and E as well.

C. Evidence

It is not unusual for writers to state that treaties may be evidence of international law. However, the meaning that the overwhelming majority intend is rather like the meaning of 'evidence' in the statement, "a lawyer's opinion is evidence in the state of the law." Evidence in that sense is a sort of weak indication but little more. It is not even accurate to say, in that sense, that treaties are evidence of international law, since, as Hall pointed out, signatories may have no intention of embodying the law.[51] And even should they state the intent to do so they well might be entirely in error.

A preferable meaning for the word 'evidence' would be that employed in Article 38 of the Statute of the International Court of Justice, which states that the Court shall apply "international

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48. Id. at 43. Alf Ross in part expresses the meaning of "sources" as "the general factors (motive components) that determine the concrete content of law in international judicial decisions." Ross, A Textbook of International Law 83 (1947).

49. Briggs, The Law of Nations 45 (2d ed. 1952); Oppenheim, International Law 27 (8th ed. Lauterpacht 1955).

50. Some writers go even further, stating that it is inaccurate to say that treaties set up 'particular' law since the only rule of international law involved therein is that treaties bind the signatories, not that a rule within a treaty is itself a 'rule' of international law. See, e.g., Corbett, The Consent of States and the Sources of the Law of Nations, 6 Brit. Yb. Int'l. L. 20, 27-29 (1925).

51. Hall, International Law 7-8 (8th ed. Higgins 1924).

custom, as evidence of a general practice accepted by law." In this sense evidence becomes a synonym for "source," since in effect a court looks to international custom in order to find evidence of legal precedent for determining the rights and duties of states. Lauterpacht has indicated with respect to municipal decisions that it is excess verbalization to distinguish between custom and evidence of custom.[52]

V. THESIS LIMITED TO LAW-MAKING TREATIES

A. A Treaty Need Not Be a Contract

The Anglo-American view that treaties have no effect on third parties -- except in the third-party beneficiary situation, which is excluded from this paper because such treaties apply only to particular third parties and are not potential sources of general rules applying to all states -- derives in large part from the eagerness to equate treaties with municipal-law contracts.[53] This attitude tends to obscure the true nature of treaties, by providing too facile an analogy. It is true that treaties are agreements, but so also is a Constitution an agreement among the citizens. The Charter of the United Nations is an example of a treaty agreement that much more closely resembles a Constitution than a contract. Statutes are also agreements -- bargains between legislators, and compromises between departments of the sovereign power in a state, such as the system of checks and balances in the United States. Similarly, treaties are agreements between sovereigns, and many multipartite conventions resemble legislation much more than they resemble contracts -- Manley O. Hudson has collected over a thousand of these in his volumes entitled International Legislation. Unlike contracts, treaties may create new sovereign states, mandates and trust territories; they may create international waterways, servitudes, and other permanent changes in status.[54] They may establish international tribunals and other bodies with general rule-making authority. Nor are treaties interpreted as are contracts: for example, the rules relating to duress are entirely different, and the doctrine of clausula rebus sic stantibus if applied to common-law contracts "would have a devastating effect."[55] In dealing with

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52. Lauterpacht, Decisions of Municipal Courts as a Source of International Law, 10 Brit. Yb. Int'l. L. 65, 81-82 (1929).

53. See, e.g., Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, in Symbolae Verzijl 153, 154-57 (1958), stating without reasons that treaties are no more a source of law than contracts are in private law.

54. See McNair, The Functions and Differing Legal Character of Treaties, 11 Brit. Yb. Int'l. L. 100, 103-04 (1930).

55. McNair, So-Called State Servitudes, 6 Brit. Yb. Int'l. L. 111, 122 (1925).

the conflict of law-making treaties, exclusive reliance cannot be placed on municipal contract analogies.[56] The fact that travaux preparatoires are relevant in treaty interpretation is not more analogous to examining the intent of the parties to a contract than it is to looking to the intent of a legislature or the purpose of the framers of a Constitution. In sum, the effect of treaties in international law should not be prejudged on the basis of an apparent similarity with the simple municipal-law contract.

B. Kinds of treaties -- Bargain or Common Aim

What sort of treaty may contain potential objective rules of international law? This question is by no means a new one to international jurisprudence; it was considered as early as 1877 by Bergbohm[57] and in 1899 by Treipel.[58] These writers and the Italian school[59] created a classification distinguishing between rechtsgeschaeftlichen and rechtssetzende treaties, the former corresponding to a contract in municipal law and the latter to an act of the legislature.[60] This distinction has pervaded international literature[61] but it has been for the most part a solely verbal distinction in Anglo-American writings.[62] Thus Oppenheim[63] and Brierly[64] accept certain treaties as 'law-making,' but do not draw consequences at all different from them than they draw from 'contract' treaties. Lord McNair finds that the law-making treaties have an effect on third parties, but he confines his inquiry to huge multilateral conventions or to situations where the effect is a particular one, such as creating a status for the Aaland islands.[65]

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56. Jenks, The Conflict of Law-Making Treaties, 30 Brit. Yb. Int'l. L. 401, 406 (1953).

57. Bergbohm, Staatsvertraege und Gesetze Als Quellen des Voelkerrechts 79 (1877).

58. Triepel. Volkerrecht und Landesrecht 53 (1899).

59. See Heilborn, Grundbegriffe des Voelkerrechts 40 (1912).

60. These are more familiarly denoted as Vertrag (contract type) and Vereinbarung (legislative type). See McNair, The Functions and Differing Legal Character of Treaties, 11 Brit. Yb. Int'l. L. 100, 105-06 (1930); Lauterpacht, Private Law Sources and Analogies of International Law sec. 70 (1927).

61. See, e.g., Starke, Treaties as a 'Source' of International Law, 23 Brit. Yb. Int'l. L. 341 (1946); Levi, Law-Making Treaties, 28 Minn. L. Rev. 247, 250-54 (1944).

62. A slight exception is Levi, supra note 61.

63. Oppenheim, International Law 28 (8th ed. Lauterpacht 1955).

64. Brierly, The Law of Nations 59 (5th ed. 1955).

65. McNair, supra note 60, at 114-16.

But the continental jurists did not elaborate the distinction between contract and law-making treaties solely for verbal purposes; they considered that a difference in kind between the types of treaties led to different juristic results as to the effect on nonsignatories.

Perhaps the simplest distinction that could be offered is that law-making treaties lay down a general rule of conduct or rights and privileges and duties binding on both parties which is to take effect upon ratification or conclusion of the treaty and continue in effect. Ordinary contractual treaties lack such a rule. Rather they are addressed to an exchange of dissimilar goods, as in the case of a sale, or of dissimilar practices, as when nation A agrees not to divert water that flows into nation B if nation B, the lower riparian, grants navigational access to the sea. Conveyances, or in general dispositive treaties are of this contractual type. Jessup writes that "some agreements are essentially contracts, as, for example, agreements for the sale of surplus war supplies, loan agreements, or agreements for the maintenance of national monuments or memorials."[66] Treaties which relate to a determinate business, such as a treaty of servitude, may be excluded for the purpose of this paper, even though they often have obvious effect on nonsignatories since they affect status.[67]

Bergbohm, and later Lord McNair, distinguish contract from law-making treaties in that in the former each party wants something that the other party has and is willing to give up something else in return. Thus the arrangement is one of mutual exchange.[68] It may be noted that such an arrangement could not lead to a change in general law without the most disruptive and unsettling results for everyone concerned. For example, if nations A and B have agreed that A will give so many bushels of wheat to B each year for five years in return for so many of B's sheep each year. It does not become a rule of law that every nation must sell wheat for sheep or that such agreements must be made in five year units or that the wheat-to-sheep ratio must be the same for all nations. Scelle sums it up by saying that contractual treaties "realize a particular juridical operation" and "disappear as soon as that operation is realized." Law-making treaties "present an entirely different interest of stability and generality. They aim to establish a rule of law and are true legislative acts."[69]

It seems irrelevant to draw a distinction between multilateral and bilateral treaties, although this is often done.[70] If state A signs a bilateral agreement with B, B signs a similar agreement with C, and C signs a similar agreement with A, the effect is exactly

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66. Jessup, A Modern Law of Nations 123-24 (1948).

67. See O'Connell, The Law of State Succession (1956).

68. See McNair, supra note 60, at 101-05.

69. Scelle, Le Pacte des Nations et Sa Liaison avec le Traite de Paix 49 (1919).

70. See, e.g., Starke, supra note 61; McNair, supra note 60.

the same as if A, B and C joined in a multilateral convention; the same reasoning applies to a sixty nation multilateral convention. The difference is only one of degree -- the rule of law will gain increasing force with an increase in the number of states involved, just as does a rule of customary law, but the form of the treaty which assures their participation is not relevant.

Treaties which lay down a rule for both parties have the power to lay down an ordering different in kind from contract treaties. Here nation A does not give up something in exchange for a right for something belonging to B, but rather each nation joins with the other in proclaiming a rule which is binding on both. It is not accurate to speak here of exchange -- since the same thing does not change hands, or if it did would be merely a futile gesture as exchanging a dollar bill for a dollar bill. Professor Fuller has elaborated the distinction between organization by reciprocity and organization by common aim.[71] "To make organization by reciprocity effective the participants must want different things," he writes; organization by common aims requires that the participants want the same thing or things."[72] Gihl has tried to break down the fundamental difference between these two types of agreement by the argument that in both situations the parties want the same things: in the law-making treaty they want the same rule, while in the contract treaty they both want the "whole of the arrangement comprised in their agreement."[73] But this criticism, as Levi tends to suggest,[74] is irrelevant: of course in each situation, since A and B are entering into a treaty, both may have consented to the whole of the arrangement. The distinction is that in one case they expect to derive from their agreement different things and in the other case the same thing or things. As may be imagined, the distinction usually becomes very clear in practice.

A different objection might be raised along these lines: that even though A and B had the common aim to set down a rule of law in a treaty, and both sides did in fact sign such a treaty, nevertheless there may be an underlying bargain if either side paid something extra to the other to induce it to sign the treaty. The answer to this is that it, also, is logically irrelevant. The motives of A and B may be entirely different for entering into a treaty. A, for instance, might like to sign treaties, while B might be generally intractable, and do nothing unless payment is offered. Or, A may be a better bargainer than B, or may be mistaken as to the desirability of signing the treaty. But the resulting rule of law given effect by the treaty is the same for both sides -- if not, of course, it is not a law-making treaty. The fact that the rule of law is the same for both sides is the operative fact, just as it is in municipal law where the motives of legislators in swapping votes or pleasing

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71. Fuller, The Forms and Limitations of Adjudication 4 (limited publication 1959).

72. Id. at 5.

73. Gihl, International Legislation 12 (1937).

74. See Levi, supra note 61, at 250-51.

minority groups in the constituency are irrelevant to the application of resulting legislation.

The difference between law-making treaties and simple agreements of exchange is outlined at this point not only to emphasize that the present thesis is concerned primarily with the law-making treaties, but also to provide a basis for analogizing treaties with statutes at a later time.[75]

VI. TREATIES AND CUSTOM COMPARED

A. Theory of the Tacit Treaty

A few decades ago a few writers of positivist convictions publicized the theory that international custom is in fact tacit treaty, distinguishable from treaties "strictly so-called" only by its form.[76] The idea was not new. It dated back to Grotius, Bynkershoek, and Vattel, but the dualistic doctrine contributed to its revival.[77] The theory went out of favor, and it has been until recent years fashionable to discredit it along with the general discrediting of the "exaggerated regard for sovereignty"[78] thought to underlie the theories of its proponents. The doctrine of tacit

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75. Infra, at 39-40.

76. See Cavaglieri, Corso di Diritto Internazionale 56-62 (3d ed. 1934); Strupp, Les Regles Generales du droit de la paix, in 47 Recueil des Cours 263, 301-12 (1934); 1 Anzilotti, Cours du Droit International 73-76 (1929). Strupp says that international rules taken as a whole form a treaty in the large sense, composed of formal treaties and tacit treaties, Strupp, supra at 298-301; see Sørensen, Les Sources du Droit International 17 (1946).

77. Grotius, De Jure Belli Ac Pacis, Prolegomena, secs. 1, 17 (1646); Vattel, Le Droit des Gens sec. 25 (1758); Madison, Examination of the British Doctrine (1806), in 2 Letters and Other Writings of James Madison 229, 262 n.* (1867)(references to Bynkershoek). See also Strupp, Elements du Droit International Public (1927); Lawrence, The Principles of International Law 95 (7th ed. 1915); 1 Westlake, International Law 14 (1904); Hershey, The Essentials of International Public Law 19-20 (1921); Corbett, The Consent of States and the Sources of the Law of Nations, 6 Brit. Yb. Int'l. L. 20, 25 (1925).

78. Lauterpacht, Decisions of Municipal Courts as a Source of International Law, 10 Brit. Yb. Int'l. L. 65, 83 (1929).

treaties has been labelled "purely fictitious"[79] or, alternatively, criticized on specific grounds which have a surface plausibility. In the latter manner Brierly writes that the theory of implied consent as the basis of custom fails to explain why international law is binding and observed by other nations which cannot be said to have consented expressly or impliedly.[80] "A customary rule," he states, "is observed not because it has been consented to, but because it is believed to be binding. . . ."[81] Such a criticism misconstrues the tacit treaty theory. The theory does not hold that in order for nation D to be bound by a rule of customary law nation D must itself have consented impliedly to the rule. Rather, once a rule has become customary among nations A, B and C, the general doctrine of international law will apply such a rule to nation D. The reason for Brierly's confusion appears to be his own conception that the words 'consent' and 'treaty,' once mentioned, must be strictly limited to the participants of the consent or the signatories of the treaty.[82] It is clear that this reasoning, if it is the source of Brierly's confusion, is circular.[83] While international custom is grounded in the consent of specific nations, it comes to be of general validity, even as applied to nations who have given no tract of consent. This is true in practice whatever theory is given to explain it -- the

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79. Kunz, The Nature of Customary International Law, 47 Am. J. Int'l. L. 662, 664 (1953).

80. Brierly, The Law of Nations 52 (5th ed. 1955).

81. Id. at 53.

82. This is indeed Triepel's view of customary law -- that it becomes particular law applying only to the tacitly agreeing states. Triepel, Volkerrecht und Landesrecht (1899). It is this type of extreme view for which most writers blame the positivists.

83. Brierly, Kelsen, and Gihl have made the same unwarranted extension of the idea of tacit treaty to new states or one which has had no opportunity to agree tacitly to a practice -- as a nation which has just been given an outlet to the sea and is deemed subject to the international rules regarding the seas. See Brierly, supra note 80, at 53; Kelsen, Principles of International Law 312 (1952); Gihl, International Legislation 13 (1937). These writers assert that new nations old nations in new circumstances could not possibly have consented, expressly or tacitly, to the long-developed customary practice. But here again the same error has been made and the same answer applies. Whatever the reasons for a nation's submission to international law, the tacit treaty theory simply points out that consent is at the root of the original formation of customary law, and that law, once formed, may be applied to nations previously entirely uninvolved.

One writer has argued that some law-making treaties must have a direct effect on new states; he is impatient with the long process of these treaties becoming "absorbed" into customary international law. Jenks, State Succession in Respect of Law-Making Treaties, 29 Brit. Yb. Int'l. L. 105, 107-08, 142 (1952).

last states involved will be bound by international custom. It may be helpful to consider that the first states have in a sense acted as representatives for the entire body of states in the matter.[84] To say, as Brierly does, that the rule is observed "not because it has been consented to, but because it is believed to be binding" is really only to say that it has become international law. How it became so is still the question, and it seems that at some point in the development the important factor was consent.

B. Consent in Treaty and Custom

The controversy just examined has proceeded for the most part on assertions and counter-assertions by publicists who have had an axe to grind with respect to positivivism and dualism. But a recent article by MacGibbon in the British Yearbook has demonstrated that the element of consent at the basis of international custom is indeed the true explanation of such custom.[85] MacGibbon's article is so documented and well-reasoned that it is difficult to believe that future discussion of customary international law will ever again assume the form it took prior to the publication of his paper. For present purposes it will suffice to examine MacGibbon's principal contentions with respect to general customary international law.[86]

MacGibbon relies heavily on a statement of Sir Gerald Fitzmaurice that is well worth quoting again:

> Where a general rule of customary law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.[87]

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84. Indeed, there is nothing strange about one nation acting as a representative for later nations in consenting to a practice. The same is very much the basis of the power of judicial decisions -- the parties to a case present arguments that are presumably more or less representative of the views of all states, and the decision rendered becomes a precedent for all nations.

85. MacGibbon, Customary International Law and Acquiescence, 33 Brit. Yb. Int'l. L. 115 (1957).

86. MacGibbon devotes considerable space to the law of prescription, which is excluded from the scope of the present paper because of the specificity of effect of such law.

It is clear that consent is at the heart of the matter. The opposite of consent, or protest, has the contrary effect of disestablishing the practice as legal. The presence of consent or acquescence, however evidenced, tends to endow the practice with a general stamp of approval, and after a reasonable period of practice tends to throw the burden on other states to protest. Absent protest, a law is formulated binding on the world community.

The problem of how to find evidence of this consent and what to do with the notion of opinio juris in this regard was considered in detail by MacGibbon and shall be examined shortly. For the present, however, let us assume it is possible to show consent to a practice by a state. Under this assumption, consider the relation between custom and treaty in the following hypothetical examples:

(a.) The United States launches a number of reconnaisance satellites over a continuous period of time to fly over the airspace of the Soviet Union for the purpose of photographing Russian military installations. Although able to do so, Russia decides not to shoot down or otherwise interfere with these flights.

(b.) The United States and Russia sign a treaty, one provision being that neither nation will interfere with reconnaissance satellites launched by the other. The United States then launches a number of such satellites over a continuous period of time, and Russia does not interfere with them.

1. Duration of the Consent. -- One of the apparent differences between the above two cases seen at first glance is that in case (a.) Russia seems to be tacitly agreeing indefinitely to satellite overflights, a precedent obliging her to permit them henceforward, while in case (b.) she agrees conditionally until such time as she might choose to terminate the treaty.

To answer this problem, reference must be had to the basic norm of international law: pacta sunt servanda.[88] From the consent view

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87. Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, 30 Brit. Yb. Int'l. L. 1, 68 (1953).

88. Writers have disagreed whether it is, in fact, the basic norm. However there seems to be little else it can be called and little that can be accomplished without it. It is a moral and a legal norm. Openheim and others have called it a rule of customary international law, implying that customary law is on a higher plane than treaty law. See Gihl, International Legislation 14 (1937); Anzilotti, Cours de Droit International 44 (1929). But cf. Jones, The 'Pure' Theory of International Law, 16 Brit. Yb. Int'l. L. 5, 10 (1935). This approach is erroneous both logically and historically. Treaties were among the first international acts; states would give assurances to diplomatic envoys of other states. See Schwarzenberger, International Law 24 (4th ed. 1960). Logically it would be contradictory if a

of international law it is seen that this is the norm which gives custom its binding force. Thus, in case (a.), if Russia allows four satellites to fly over its airspace, tacit consent enjoins it from shooting the fifth. Similarly, pacta sunt servanda requires that Russia keep its treaty obligations in case (b.). Russia would be violating essentially the same norm whether it broke a treaty to fire on the satellite or violated a custom to which they had tacitly acquesced.

A more difficult question arises if the treaty is of limited duration, explicitly extending for, say, two years. If at the end of that time Russia informs the United States that the treaty will not be renewed and that further flights will be interfered with, she would be within her rights according to the original agreement. For the United States, in consenting to a two-year limit, impliedly consented to the possibility of an opposite rule at the end of two years. But a similar result could be arrived at by custom. Russia could submit initially a conditional protest -- a protest that the United States stop its flights after two years, though they may continue in the interim. Even in this case of limited duration treaties, there is great similarity therefore between their operation and the operation of custom. However, it is only reasonable to consider such treaties very limited in the effect they may exert on customary international law, for if a treaty promises less than a universal rule of law, it cannot, barring special circumstances, be considered the equivalent of customary practice. Most law-making treaties, however, and to a slightly lesser extent those treaties that extend for a given period of time with the proviso that they are to continue in force indefinitely unless notice be given in advance of termination, set up rules that purport to remain in existence indefinitely. Such treaties are closest to customary practice.

2. Time at Which the Consent is Given. -- Barring the question of limited duration treaties, the differences between case (a.), overflights permitted, and case (b.), overflights permitted by treaty, are slight, and in many situations or instances would favor case (b.).

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different rule could replace pacta sunt servanda, which is an idea implied by saying that it is a mere rule of customary law. Pacta non sunt servanda would frustrate all international law based upon consent. Nations would not bother to promise anything since such promises would have no force. Thus nothing would be accomplished and the capacity to enter into agreements would be lost. It is hard to see how such a logically unimaginable result could ever be formed through the ordinary processes of customary law, much less the process of treaty law-making, since the latter would make the rule inconsistent on its face -- i.e., "I promise not to obey any more promises." Hobbes showed that agreement or contract is the primary means whereby man can extricate himself from the warlike state of nature. If the agreements are not kept, there is a return to war. International life would be impossible without the binding force of promises underlying tacit consent as well as constituting express consent.

For example, in case (b.) Russia's consent is unequivocal. Secondly, there is explicit reciprocal consent by the United States, rather than consent implied because the United States is the acting nation.[89] Finally, from a practical standpoint in the modern world, it would be dangerous if situations analogous to case (a.) were to be the usual way of creating law. The United States would be risking the destruction by Russia of the satellites and moreover the heightening of international tension. Making certain of Russia's consent before launching obviates this danger.

However, classic theory would hold that case (a.) would tend to generate international custom, and not case (b). (Of course several other nations or several more acts would be required, in the usual case, before a rule of noninterference with reconnaissance satellites would achieve universal recognition as binding.) Is it not unreasonable to find a complete absence of rule-making force in the second set of facts? The only great difference is a formal one -- that Russia's consent was received in advance rather than 'discovered.' The operative, substantive facts are the same. Underlying the treaty, so to speak, is the practice of the states. The only element that has shifted is the time in which consent is given. In the first case the acting country, the United States, has impliedly consented to reciprocal acts by Russia simply because the United States launched the satellite. Russia's consent to the same principle is also implied. Thus there is in this tacit agreement a union of wills -- that reconnaissance satellites may travel unmolested. In case (b) the same proposition is explicit. Indeed, it may here be seen that custom resembles treaty practice in a very real sense.[90] The treaty is a formal agreement to do acts which are in respect the same as acts which could form custom in the absence of treaty -- the same pressures and motives may be inferred to exist in the states which perform these acts. In other words, absent the treaty, the parties would have felt a growing need to do things in the way they legalized through the treaty.

In 1806 Madison suggested this line of thought. "One evidence of general consent," he wrote, "is general usage, which <u>implies</u> general consent." The rhetorical question followed: "Can <u>express</u> consent be an inferior evidence. . . ?"[91]

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89. It shall later be considered what happens when A's action is consciously in derogation of existing law. See <u>infra</u>, p. 30. When A does so act, can we readily infer consent from A's act that other nations may also break the law?

90. An <u>unratified</u> treaty, if nevertheless implemented for some reason or other by the formulating states, would similarly have the element of underlying custom. There would be a question, though, whether the unratified treaty might indicate consent or the absence of consent.

91. Madison, <u>Examination of the British Doctrine</u> (1806), in 2 Letters and Other Writings of James Madison 262 (1867). Compare Corbett, <u>The Consent of States and the Sources of the Law of Nations</u>, 6 Brit. Yb. Int'l. L. 20, 25 (1925): "Custom proves the achievement of general consent. Treaties, considered as agreements, are acts of consent; considered as documents, they are records or evidence of consent."

3. Opinio Juris Reduced to Consent. -- We have discussed, then, the similarity of consent in treaty and custom, in that consent may certainly exist in both, may be clearer in a treaty, and is perhaps different only as to the time it becomes evident. Still, there is another matter which may be raised concerning a possible difference between the types of consent in cases (a) and (b), one which goes to the question of its quality.

Under the classic theory, customary international law is composed of two elements:

1. usage -- the repetition of similar acts by various states.

2. opinio juris sive necessitatis -- the habit of doing certain actions "under the aegis of the conviction that these actions are legally necessary or legally right."[92]

The important question here is the nature of this latter psychological element. Under the analysis of MacGibbon, the rather artificial psychological element[93] is replaced by the concepts of consent and acquiescence. It might be helpful to present the consent thesis in a somewhat diagrammatic form. Let us denote nation A as the acting state and nation B as the state which is 'involved' in this action. Nation C is totally uninvolved, unconcerned, and unaffected by the acts of A. There are three kinds of international acts possible -- act X might be the sending of a satellite over the other nation. This is a simple act, since B need do nothing positive in the way of acquiescence to allow this act to take place. Act Y requires the positive cooperation of state B. For example, by force majeure a vessel of A must dock within the territorial sea of B, and B assumedly must cooperate in the docking of the vessel. The trickiest act is act Z, which is abstention from acting. In the Lotus situation, act Z would mean that state A abstained from exercising criminal jurisdiction over a national of B, who on the high seas was responsible for a collision involving a vessel of A.

When the opinio juris is thought of in terms of obligation, as MacGibbon tends to view it,[94] proof would be required that when A performed act X, B would be obliged not to interfere. An immediate difficulty of course is that if B does not interfere, there is little chance of discovering whether such inaction is due to a belief that interference is illegal or simply not worth the trouble and effort. Nevertheless, there is some slight assumption that might be made. The fact that B was aware of the act and did not complain tends to show that B thought the act legal. Of course,

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92. Oppenheim, International Law 22 (8th ed. Lauterpacht 1955).

93. Cf. Sørensen, Les Sources du Droit International 100-01 (1946).

94. MacGibbon, supra note 85, at 126. The more usual, though strictly speaking inaccurate, way to interpret opinio juris is to conceive of it in terms of a right or an obligation to act in conformity with international law. See Oppenheim, supra note 92, at 22.

this is very flimsy evidence, particularly in the case of a new act, such as the flight of a satellite, where there is no international law. Here it is especially difficult to come to any conclusion as to B's state of mind on the question of legality, since even if B were aware of the problem, B could not discover what international law would hold on the problem, as there would be no international law on the problem. However, a state would likely protest if it objected to the action and felt protest reasonable, for fear that not doing so would establish an unwanted precedent.[95]

On A's side, to conceive of the act in terms of a claim of right presents similar difficulties. How is it discoverable whether A did act X because A felt it was legal to do so, or because it desired to enough to act in a way it felt illegal, or that it acted without any consideration of the legality?

In regard to act Y it is perhaps slightly less difficult to find opinio juris. The fact of B's action might be prima facie evidence of a feeling on B's part that B ought to assist. However, this manner of reasoning has drawbacks also, as it views nations as basically unfriendly, acting only in response to legal obligation.

In practice, the only use of opinio juris by the International Court of Justice occurred with respect to act Z.[96] In situation Z, state B is totally unaffected in a physical sense. What has transpired is simply that nation A has not acted with respect to a national of B. This is the most extreme situation. It is highly unlikely that any evidence of state of mind can be found with respect to B, the nation whose state of mind might have been construed in situations X or Y. Therefore the Court could not hope to find anything of international precedent value in examining the practices of B. It had to look to state A. But state A, by hypothesis, did nothing. Here the Court laid down the requirement of opinio juris -- that A's abstention would have to be proved to

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95. Joseph Kunz has noted the problem of the original formulation of a norm of customary law. When there is no prior law on a point, "the very coming into existence of such norm would presuppose that the states acted in legal error." Kunz, The Nature of Customary International Law, 47 Am. J. Int'l. L. 662, 667 (1953). But after criticizing the Kelsen and Verdross explanations, Kunz concludes that it is "a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution." Ibid. I submit that the opinio juris approach here is a blind alley; attention rather should be focused on tacit consent and a presumption that such consent is given if the act is of an international character.

96. Apart from the individual opinion of Judge Negulesco in the Advisory Opinion concerning the European Commission of the Danube, P.C.I.J., Ser. B, No. 14 (1927), the only emphasis of psychological element of custom by the International Court has been in the Lotus case. Sørensen, Les Sources du Droit International 109-10 (1946).

have been in response to a conviction of an international law requirement for abstention on A's part. Since A is the 'actor' it would also be possible for the Court to see if A abstained under a claim of right, but while logically possible, this is absurd in practice. No nation would feel the need to proclaim that it has a legal right not to exercise criminal jurisdiction over the national of another state in such a situation. The Court's use of opinio juris in this, the most extreme situation does not logically compel the use of opinio juris in situations X and Y. Indeed, as MacGibbon has shown, international tribunals have not resorted in practice to this artificial element advanced by the test writers.

MacGibbon's essay demonstrates that the operative fact about the reactions of B to the acts by A is whether or not B consented to the acts. In the older terminology, the wording would have been: whether there existed a tacit treaty between A and B. The opinio juris is a by-product, as it were, of this consent: "Acceptance of a course of conduct as lawful seems necessarily to involve the further otiose conviction that participants in the course of conduct are entitled to act as they are doing; and this in turn appears to leave little alternative to submission in the belief that submission is obligatory." And, it must be remembered, the opinio juris is really needed as evidence of the consent only in the extreme case where there is the absence of a positive act by the 'acting' state.

The foregoing analysis should not be compared with the formation of general international law by treaty. Consent by way of a tacit treaty (custom) is not different in kind from consent in an express treaty. The element referred to as opinio juris is only a by-product of consent used to give clear evidence of the consent. But in situation Z, where the opinio juris is particularly relevant, a treaty would obviate the need for such opinio juris. Thus if A agreed with B that neither would extend criminal jurisdiction over nationals of the other involved in collisions on the high seas, positive proof would be therein available of the consent. No operative facts would change. A would feel an obligation, under international law, not to exercise such jurisdiction. Similarly, in cases X and Y, A can proceed under a claim of right, and B is under an express treaty obligation to allow and assist A's acts. It might be argued that, absent the treaty, A might feel the opinio juris not to exercise jurisdiction over the nationals of B, C, or D, while with the treaty A merely feel committed to a "particular" law obliging A not to exercise such jurisdiction with respect to nationals of B only. But this argument is no proof against the present thesis, which contends that if A and B sign such a treaty, the treaty tends to establish international law for all nations to the same degree that the development of a custom between A and B with respect to their own nationals would tend to form international law binding on all nations. Thus under the present thesis, if A signs such a treaty with B, there is some precedent -- namely, the treaty itself -- for requiring A and B, as well as C and D, not to exercise jurisdiction over nationals of any other state who are involved in collisions on their own flag vessels on the high seas.

4. Proof of Consent and the Class of Acts to Which Consent May be Given. -- MacGibbon's thesis, so complete in its analysis of opinio juris, does not seem adequately to explain the operation of proof of acquiescence or consent. When does usage become binding upon states? In situations X, Y, and Z outlined above, there is usually no pressing need for states A or B to make legal claims about the validity or invalidity of their actions. How then is a "claim of right" and consent to that claim of right evidenced? One way would be for the nations to say so, diplomatically or otherwise. But as we have seen, there is no obvious motive for the states to make such claims. Another way would be for A to execute an act and B to protest initially but eventually cease protesting while A continues the act. This situation, which is probably relatively rare, would present evidence that A continues to act under a claim of right, since A's attention was drawn to the question of legality by B's protest. Protest is indeed a useful device for proving that the act is done under a claim of right, but MacGibbon does not appear to have successfully resolved the dilemma that this creates; namely, that the only clear cases then where A is acting under a claim of right are the cases where B protests. And yet it is precisely these cases which are practically useless for proving the existence or nature of an international rule simply because A's assertion of right is cancelled by B's equally valid assertion that A lacks right.

It appears, therefore, that (1) protest is the most valuable, or one of the most valuable, of tools for discovering whether a nation acts under a claim of right or submits under a felt duty, but (2) protest serves to cancel out the ability of the act to shape custom binding upon all nations. Another approach is needed to determine legal consent or acquiescence. I submit the following one, which appears to be consistent with judicial decisions:

A presumption of consent is set up wherever a state executes an act which is capable of having international legal repercussions.[97] For example, the denial by State A of a passport to one of its nationals is not generally considered to be an act coming under international law. But if a passport to leave state A is arbitrarily denied to a national of state B, such an act is capable of being regulated by international law. For there is a felt effect, a repercussion, on state B, even in this rather extreme case where the effect is on a national of B. If state B has knowledge of this act yet fails to protest, state B is presumed to have acquiesced, and a rule of international law is on its way toward crystallization, to the effect that aliens have no right of egress. Admittedly, the test of an act being generally viewed as coming within or without international law is not a static test, for the same reason that the sphere of international law is not static. But this is not to say that the definition is circular, for it is not the opinion of A or B alone which is relevant, but the opinion of the court, publicists, and nations. The content of treaties will play a substantial role

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97. Manley O. Hudson has used the phrase "a type of situation falling within the domain of international relations" in an otherwise restrictive view of the elements necessary to establish a rule of customary international law. See U.N. Doc. A/CN. 4/16 (1950), at 5.

in indicating the expanding scope of international acts. But for the most part the scope will be clear enough: an act of sending up a missile over another country would unquestionably be of international character; similarly, questions affecting the seas, outer space, diplomatic questions, etc., would easily be determinable as to their international legal character.

This presumption seems to accord with the large claims made for the operation of customary international law by textwriters who certainly do not cite judicial opinions for every proposition advanced. However, the test of presumed consent does not cover the Lotus situation, since there inaction could not be said to have an unambiguous "effect" on the international scene. Thus the present test does not contradict the reasoning of the Court in the Lotus case, the only case examining the psychological element in custom which the presumed-consent test replaces in all but Lotus situations.

This presumption forces states to protest or submit to practice which will become custom-forming. It would be just as logical to have a presumption in favor of protest unless consent is manifested. But such a presumption would not accord with results reached in most cases before international tribunals and cases involving international law before municipal tribunals. For these tribunals have not had much difficulty in finding a transition from usage to custom, which difficulty would be painfully obvious if the presumption were reversed.[98]

As mentioned above, there remains some problem in determining which acts are of international character, especially since the scope of international law may be expanding to encompass acts which were heretofore thought to be entirely within the sovereignty of a state -- for example, the diversion of water from a transboundary river at a point within the land area of the upper riparian. With regard to treaties, however, the difficulty is obviated. If a matter is included in a treaty, then -- with one proviso[99] -- the matter is ipso facto of international character.

In sum, the differences between treaty and custom are that the treaty is a more reliable instrument of the evidence of international practice, of consent, and of international character of the act. The similarities are the most crucial: both are based on consent, and both involve practices undertaken in response to the compelling force of the norm pacta sunt servanda. Both can encompass a large number of nations in the first instance, and both may affect a large number of third states. Therefore, whether the practice of states in the

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98. In the Justice trial at Nurenberg it was pointed out in an implicit adoption of a passage from Hyde (Hyde, International Law 9 (1945)) that a binding rule of law could become established by "the failure of interested States to make appropriate objections to practical applications of it. 3 Trials of War Criminals Before the Nurenberg Military Tribunals 967 (1950).

99. The proviso is that a treaty may "include" a matter by stating that it is within the domestic jurisdiction of the signatories and thus subject to no international regulation by the treaty.

international arena be consented to latently or patently, the practice itself together with the consent should be regarded as precedent for rules of international law. This is not to say that treaties are a form of customary international law, or vice versa. Rather, they are on a par with each other and should thus be considered as precedents for international law decisions.

C. The Role of Treaty and Custom in the Formation of New Law

1. In General. -- Nations sometimes enter into a treaty expecting or even saying that they are departing inter alia from the customary rule, but do not intend that the general rule of international law be changed as a result of the treaty departure. For example, Article I of a treaty may recite the general rule of international law, and Article II may spell out an exception limited to the signatories. The problem presented is the effect to be given to the signatory states' view that the international rule should remain the same for everyone else. It is a logical corollary of the present thesis that the parties to a treaty should be denied the power of 'removing the effect' of their treaty on the general rule of law. Nations A and B ought not to be permitted to deviate from the rule at the expense of depriving other nations (in the absence of other treaties) of the new accommodation between A and B. An international community is best made possible if rules of law tend to become general -- that what is true for A and B becomes an addition to previous practices and tends to be a thrust toward a general rule. Certainly this is the effect in the absence of a treaty: a change of practice between A and B would have international customary repercussions on the underlying international rule. Even if A and B issue statements that the rule of law for all other nations remains the same and is unaffected by the difference evidenced in the customary practice between A and B, an international tribunal would have no difficulty in holding such statements irrelevant -- the operative fact being that the practice of A and B showed a tendency to change the international rule itself. The only difference, again, that the treaty makes is that consent to the practice was achieved before, and not during, the practice.

But at this point the reader might nevertheless object: Do not A and B have the freedom and right to make a contract deviating from the international rule inter sese? Why should they be burdened with the necessary corollary that their contract is a precedent for a change in the underlying rule for other states? The answer is, I think, that the problem is not one of freedom of contract; it is international law, and not A and B, which indicates what the effect shall be of A's and B's actions on nations not party to the treaty between A and B. And international law ought, consistently, to say to A and B that they cannot have their cake and eat it too -- if they in fact change an international rule to suit themselves, other nations may benefit from the change. Otherwise it would be like giving effect to dictum of the most flagrant sort -- that A and B do one thing, but lay down, not an irrelevant, but an opposite, rule for nonparties. The principle of freedom of

contract still allows A and B to make treaties with the other states, incorporating a rule that is opposite from the A-B rule. In this manner they can isolate their own treaty. But this burden of effort should be on A and B since they are claiming the benefit of international law in their use of a treaty.

It should be emphasized that all these cases are extreme ones, used to demonstrate a thesis. Nations usually would be happy, for instance, if the general rules they adopt in treaties were extended to all nations; a rule is essentially a reciprocal accommodation. Moreover, a single attempt by A and B to set up a treaty differing from the underlying customary (or treaty-established) rule would have little effect in changing the underlying rule. A clearly established rule of international law will not be overthrown because of one bilateral treaty to the contrary, any more than it would be overthrown by a contrary practice developing between two states. But if there are many treaties of the A-B type, or if there is multilateral agreement, then the customary rule may be held to be changed. And if this occurs, the treaties are proof positive that the other states did approve of the A-B 'deviation.'

2. The Problem of Change in the Law.[100] -- Deserving of special attention is the situation in which by general acknowledgement there has been established a fairly clear rule of customary international law in a given area. If A and B conclude a treaty setting up a rule that derogates from this customary law, then, to the extent that this treaty is given effect as precedent for nonsignatories, is not the treaty illegal? To state the matter differently: It may be argued that classic theory allows A and B to make a conventional rule between themselves that differs from the general customary rule precisely because the conventional rule does not have legal effect on states other than A and B. If it did have such an effect, to that extent it could be argued that there is a violation of the existing customary rule.

Two approaches shall be offered to meet this objection. The first corresponds to the argument that has been advanced in this paper. The second is a modification which might appeal to the reader who decides not to accept the present thesis in its full form.

(1) The problem of bringing about peaceful change in international law, absent a super-legislation, raises greater logical obstacles with respect to custom than it does in the case of treaties. If nation A acts in a manner opposed to the rule of customary law -- for the only way to change customary law is to initiate a contrary practice -- such an act will be illegal with

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100. In 1836 Wheaton wrote that treaties have an effect on third parties if they relax the "rigor of the primitive law of nations in their favor." Wheaton, The Elements of International Law 50 (1st ed. 1836). But Wheaton omitted this observation from the last edition revised by himself, (1846).

respect to the rest of the international community. But if nation A enters into a treaty with nation B allowing such an act, then the ensuing act is illegal -- as stated above -- with respect to all members of the international legal community except B. Thus there is slightly less illegality about the act when a treaty precedes it. In most cases B is likely to be the nation most affected by the act, so that the interests of C, D, and E are not so gravely affected by the breach of international customary law. Further, in many situations A will sign a treaty with the several nations affected, which again removes the brunt of the illegality with respect to the states most affected and involved.

But there is a more significant obstacle if changes in the law are to be brought about by the process of custom -- an obstacle that does not seem to have been noticed by the publicists. It is black-letter law that actions, in order to become customary and thus obligatory for other states, must be done "under the aegis of the conviction that these actions are legally necessary or legally right."[101] Yet given the hypothesis that nation A wants to change the law by acting in a manner contrary to the clear customary rule on the subject, it is difficult to see how A could think its actions were anything but illegal and wrong under international law. Since A, again by hypothesis, is the first nation to act in contravention of international law, black-letter law would ascribe no force to the change of custom by A's acts, since A lacked the requisite psychological intent to act in conformity with the law. Thus the underlying customary law is totally unaffected by A's acts. By extension, when B does the same acts that A did, B likewise will have no effect on the underlying customary rule. The only conclusion from this is that, once established, a customary rule cannot be changed by the forces of custom.

Under the argument advanced in this paper, however, if nation A signs a treaty with B that A may do an act which would be contrary to the customary rule, at least A has the psychological assurance of acting correctly under the treaty. In this sense, A has a claim of right to do the acts allowed by the treaty, the claim traceable back to international law and pacta sunt servanda. Thus international law has furnished a way for A to do the act under a claim of right, a way which is logically impossible to do legally in absence of a treaty. And indeed, it may be argued that this is precisely what has happened under international law. In modern times, states have realized in many areas that the customary rule is outmoded, but rather than try to break down the customary rule by illegal actions which theoretically could not have an effect on changing the customary rule, the states have entered into treaties with other states who are principally involved in the contemplated action allowing such action. Nations have turned to treaties because the process of customary law does not allow for change and modernization of the customary law. In these circumstances, it would be anomalous to deny effect to the thousands of treaties, intended by the parties to bring about a change in the customary law, by pretending that the treaties are nonexistent

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101. Oppenheim, supra note 92.

except as to the signatories.

(2) A second way to deal with the problem of the illegality of a treaty with respect to third parties would be to deny to the first few treaties laying down a rule that is in clear derogation of international law any effect on third parties. When these treaties are made public (by deposit with the United Nations or otherwise), other nations have the opportunity and obligation to give them scholarly and diplomatic consideration because the treaties are clearly stated and carefully concluded statements by the signatories as to what good practice is between them. Schwarzenberger writes that "none of the members of the international society can help being acutely interested in. . .the arrangements made between other States and the concessions made by them to each other."[102] After the passage of some time, and after the provisions have had a chance to sink into the prevailing international thought -- and assuming little or no protest from other states -- then the entire body of the similar provisions in these treaties effect a change in the particular international rule.

It is perhaps a matter of the quantity of the treaties containing similar provisions and the time that has elapsed since the first treaty to have such a provision was ratified. No hard and fast rule may be given when the difference in degree (the number of treaties) becomes a difference in kind (a change in the general international law). But this problem is one that must always be faced, whether new customary practices are being compared with old ones, or whether new treaties -- however theoretically affecting custom -- are being compared with the old rule. The basic problem with the second alternative theory is that a difference in degree is held at some point to become a difference in kind. Although this might indeed explain what international tribunals have done when faced with a large number of citations of treaties, the explanation seems at once less logical in a strict sense and more palatable in an immediate sense.

To deny that the principle of pacta tertiis can be entirely and comfortably reconciled with the modern world -- in which most nations find it prudent to embody what they feel ought to be done and what they might well do anyway in treaty form -- is quite possible. But to deny that treaties ought to have an effect on custom is to risk stagnation of customary international law.

VII. TREATIES AND SETTLEMENTS

A. The Nature of Settlements

Although many treaties may be concluded with an intention to depart inter alia from the customary rule of law, and many may be

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102. Schwarzenberger, The Most-Favoured-Nation Standard in British State Practice, 22 Brit. Yb. Int'l. L. 96, 98 (1945).

concluded without much consideration of what the law is, there exist a very significant number of bilateral or multilateral treaties concluded as a compromise or settlement of the parties' divergent opinions as to what actually is the underlying international rule. What has ordinarily occurred in these cases is the rise of a dispute, its passage into diplomatic channels, its examination in legal terms, and finally the agreement to settle the matter by treaty.

A clear preliminary warning must be given against the idea that treaty settlements are precisely the same as, say, a judicial decision on the dispute. The operation of reaching the decision is rather different. Should one hundred thousand acre-feet of water per month be the source of a dispute between states A and B, and should the diplomats of both states concede that an international tribunal would be about sixty per cent likely to decide for state A, the resulting treaty may well give sixty thousand acre-feet to A and fourty thousand to B. Before a tribunal the decision is much less apt to be so like a compromise.

This is not to say that such treaties should have less weight than judicial decisions. Perhaps there is even reason to argue that, being in some sense more practical and being the decision of the parties involved, they should have more weight. But there is no real necessity to decide. The important matter is that, though different in some respects from judicial decisions, such treaties are similar in others and should not be overlooked as evidence of what in fact is operative international law. Indeed, international tribunals are themselves set up ordinarily by treaties, and it is logically awkward to maintain that their decisions are far-reaching while the instruments that set them up are not. In practice, of course, there is no such awkwardness simply because people are psychologically prepared to accept judicial decisions as precedent-setting. But in practice also may many of the similarities between settlement treaties and judicial decisions be seen. Practically speaking, treaty settlements of disputes are merely short-cut substitutes for judicial decisions. Neither is there much difference between the two nations agreeing to have a judge decide the dispute, and agreeing to let two foreign-office officials decide by drawing up a treaty. Like judges, the treaty-makers consider the position of existing law and work out a settlement based upon law that is, in its compromises, likely to be more practical than a decision. Like a court, in this type of treaty, they will try to 'find' law rather than 'make' it. Both a decision and a treaty are in this sense 'evidence' of law. One ought not make too much of the word 'evidence' in this connection; what is here argued is that such a treaty is valuable precedent for third parties, just as the judicial decision is precedent for parties other than the plaintiff and defendant.

The treaty need not, of course, state a broad rule on its face in order to be labelled 'law-making'; one may be implied from the dispositions under the treaty. When the treaty is the result of a settlement, what the parties have actually done -- not necessarily the wording -- may be generalized into a rule of law. That is, the rule is deduced from the treaty as a whole and perhaps from the actual implementation as well. For example, the United States-

Mexico treaty of 1906[103] does not say that the United States has a duty not to divert water from the Rio Grande. Indeed the contemporaneous Harmon doctrine[104] stated that the United States had a sovereign privilege to divert such water. However, the treaty specifically provided for the guaranteed delivery to Mexico of a certain amount of water in the Rio Grande. Taken as a whole, the treaty cuts against the contention of the United States that sovereignty allows diversion from a river without regard to hardships felt therefrom by the lower riparian.[105] Thus a treaty which appears to be a 'contract' may, taken in a broader sense, indicate the view of the parties as to the requirement of international law. Of course, when dealing with such a treaty it is relevant to consider whether there was a quid pro quo felt to be the equivalent of the 'concession.' In this case, if the United States agreed not to divert water in return for the disavowal of outstanding Mexican claims against the United States, and if the parties at the time felt this to be an even exchange, no broad principle is deducible from such an exchange which would be relevant to the Harmon question. Lacking such evidence of bargaining, however, the treaty will be a reliable reflection of the opinions of a number of diplomats, lawyers, and legislators, and perhaps large segments of the populace of the nations as well. As such it should be accorded some influence in international law.

But why, it might be asked, should a settlement be at all regarded as evidence or a source of international law while in municipal law settlements are not precedents for judicial decisions? There are, perhaps, no strong reasons why municipal settlements are not more important. Practice might easily have evolved to the contrary. Had there been a custom of recording out-of-court settlements in early English law, subsequent courts, particularly when faced with issues which had no judicial precedent, most probably would have looked to the reports of the out-of-court settlements as precedent. Parties certainly act on the basis of these settlements; money changes hands; and all in all the settlements are very good evidence of what two opposing lawyers agreed was the force or state of the law in regard to their particular case. Such settlements are more apt to be well-considered than some statements found in treatises; the latter may be written as fancy or responsibility dictates, but there is no cash payment if the statement is wrong. Since most cases filed in court are settled out of court, there would have been a huge body of testimonial evidence to the actual operative rules of law in society had publishers of legal decisions extended their publication to settlements. In a different context, a writer on the Nurenberg trials said: "I need not repeat what has so often been emphasized, that to construct a system of common or customary law

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103. Treaty With Mexico concerning Equitable Distribution of Waters of the Rio Grande, May 21, 1906, 34 Stat. 2953, T.S. No. 455.

104. 21 Ops. Att'y Gen. 274 (1898).

105. This conclusion is documented later. See <u>infra</u> at 34-36.

must necessarily involve a system of law reporting."[106] The importance of this factor is too easily taken for granted. While common-law will not suffer irreparable damage if it is denied access to reports of settlements -- simply because of the large number of decisions and statutes -- international law in which most of the action is taken through treaties should not thoughtlessly overlook the relevance of a treaty settlement as persuasive evidence of what the parties agreed shall be, and has been, the operative rule of international law.

B. EXAMPLES -- Diversion of Water from Transboundary Rivers

A set of examples of the sort of settlements by treaty to which I refer has arisen out of disputes over transboundary rivers, and one of these, the Indus River dispute, has been much in the news lately, A detailed examination of some of these river agreements should serve to clarify the argument being presented. Initially, several questions may be asked: Does an upper riparian have a duty under international law not to make substantial diversions which would cause damage to the lower riparian? Is there simply a duty to work out an equitable arrangement with the lower riparian, whatever it may be? Or is the Harmon doctrine of absolute sovereignty the rule of international law? It is not so much relevant what the answers are as, finally, how and from what sources have the answers been obtained.

1. United States-Mexico. -- The Harmon opinion was delivered in December, 1895, when the question of diversion of the Rio Grande was becoming the serious center of a dispute between the United States and Mexico. But an indication of the non-adoption of Harmon's absolute sovereignty principle was the action of the United States in enjoining a private company from building a dam at Elephant Butte, on the Rio Grande within the United States. In 1906 the two countries concluded a treaty, wherein the United States agreed to deliver a stated amount of acre-feet of Rio Grande water to Mexico annually. The treaty was highly detailed, and did not refer to broad principles of law except to disclaim any legal basis for Mexican damage claims against the United States. The treaty included concessions by both sides: Article II stated that the United States would bear all the expense of construction of a dam which would operate on the Rio Grande where it is part of the boundary. Mexico, on the other hand, waived all damage claims arising from the diversion of water by citizens of the United States.

Taken alone, it is difficult to draw any generalization that could lead to a rule of international law with regard to this treaty. The negotiations and final treaty reveal too many exchanges and concessions by both sides, and it is very hard to determine what weight was given by the parties' understanding of the international

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106. Wright, Foreword to XV United Nations War Crimes Comm'n, Law Reports of Trials of War Criminals xv (1949).

law requirement in absence of a treaty. It is possible to note the closeness of time between the Harmon doctrine and the treaty, and conclude that the United States did not in fact rely on the absolute sovereignty principe, for indeed the treaty "in fact apportioned the water."[107] One writer says of the treaty that "although the United States Government formally reserved its legal position, the actual dispute was settled by a rational agreement," and that "the United States Government did not act upon his [Harmon's] opinion in their relations with Mexico. . . ."[108] But if Mexico 'paid' for the treaty insofar as it derogated from what the United States would have done in exercise of absolute sovereignty, very little can be deduced from the fact of the signing of the treaty. On the other hand, nations often behave in a very practical manner; it may have been true that Mexico was able to bargain for a better than 'equitable' arrangement in return for allowing the United States to place in the treaty the disclaimer that the treaty should not be evidence of any legal concession by the United States. This would not have been an unreasonable stand by Mexico -- if she secured the substance of what she wanted, what difference would it make if the United States could recite words in a treaty disclaiming any legal obligation to do what the United States in fact did? A legal advisor to the State Department has written that "it is necessary to distinguish between what states say and what they do."[109] In this mode of analysis, it would be possible to conclude that the treaty of 1906 was in fact a settlement, and bears witness to an understanding by both countries that some kind of equitable approtionment is required by international law.

Further support for this view may be derived from testimony before the Senate Committee on Foreign Relations which helped clear the way for the ratification of a treaty with Mexico limiting river diversions and setting up joint development and diversion projects.[110] The State Department testified that international law requires that the United States cannot refuse to arbitrate a demand by Mexico for additional waters of the Colorado.[111] Counsel for the United States section of the International Boundary Commission testified in part that Attorney General Harmon's opinion "has never been followed either by the United States or by any other country of which I am aware."[112]

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107. Griffin, Legal Aspects of the Use of Systems of International Waters, S. Doc. No. 18, 85th Cong., 2d Sess. 10 (1958).

108. Smith, The Economic Uses of International Rivers 145-46 (1931).

109. Griffin, supra note 107, at 9.

110. Treaty With Mexico, Nov. 14, 1944, 59 Stat. 1219, T.S. No. 944.

111. Hearings Before the Senate Committee on Foreign Relations on Treaty With Mexico Relating to Utilization of Waters of Certain Rivers, 79th Cong., 1st Sess., pt. 5, at 1762 (1945).

112. Id., pt. 1, at 97-98.

These statements are helpful authority for the proposition that the 1906 settlement was required by international law and can thus be used as evidence of it. The 1906 treaty as a whole may well be an instance of Thalmann's general conclusion that "treaties concerning international waterways are therefore not so much the expression of a view deviating from generally accepted principles, but are rather a concrete application of them."[113]

2. United States-Canada. -- Concurrently with the Mexican negotiations, the United States was involved in diversion problems with Canada. What was the effect of the Harmon opinion, which had been drafted with the Mexican situation in mind, in the Canadian deliberations? No written statement by any of the United States negotiators has been found which indicates that the resulting Boundary Waters Treaty of 1909[114] was intended to incorporate the Harmon rule of absolute sovereign control over diversions.[115] The Canadian understanding was probably that it was not so intended.[116] But Article II of the treaty does reserve to each Party "the exclusive jurisdiction and control over the use and diversion. . . of all waters on its own side of the line. . . ." Yet in the same sentence it is provided that injured parties on either side of the boundary line are entitled to sue in local courts (of the other side) for damages resulting from any diversion. This might be interpreted to read consistently with "exclusive jurisdiction" in that neither Canada nor the United States may tell each other what to do, but will have to pay compensation for any injuries suffered. Griffin reads the article more liberally; he does not see in the treaty any preclusion of resort to international channels by government espousal of claims in the event that injury results from diversion and the local courts do not provide a remedy.[117] This is in part substantiated by the remarks of Secretary Root before the Senate Committee on Foreign Relations, what the phrase giving jurisdiction to local courts was inserted merely to expedite proceedings.[118] In sum, although this treaty contains a general rule-type statement in Article II, it is far from clear what is intended -- the Harmon rule or a modification.

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113. Thalmann, Grundprinzipien des Modernen Zwischenstaatlichen Nachbarrechts 136 (1951).

114. Treaty With Great Britain Concerning Boundary Waters and Questions Arising Along the Boundary between the United States of American and Canada, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

115. Griffin, supra note 107, at 61.

116. Id. at 50.

117. Id. at 62.

118. Hearings on Senate Res. 278 Before the Subcommittee of the Senate Committee on Foreign Relations, 62nd Cong., 2d Sess. 1006 (1911).

Article II excepts from its scope other provisions in the Boundary Waters Treaty, and these other provisions are of importance. Article VI subjects two rivers, the St. Mary (which flows north into Canada) and the Milk (which flows south into the United States) to the principle of equal apportionment. Another special agreement concluded contemporaneously with the treaty was the modification by the United States of the Minnesota project, which had proposed to divert waters for the generation of electricity, so as to provide for diverting only an amount of water which would not materially interfere with Canadian public use of any of the waters.[119] A study of the circumstances surrounding the United States-Canada negotiations and ensuing treaty does not lead to any conclusive results concerning the question whether these nations entered into a settlement, in part or entirely, which was the best view of either side as to the requirements of international law in the absence of settlement. Yet the facts again show that, despite what the parties said, numerous provisions and agreements were made which are "inconsistent with the theory that the territorial sovereign can do as he pleases with the water upon his own territory."[120]

3. India-Pakistan. -- Even in a recent diversion dispute, it is difficult to uncover what the parties had in mind when they made various agreements. When Pakistan became a separate state in 1947, an untouched question was what would happen to the various river systems crossing the boundary. There was a period when the two nations exchanged notes and gave mutual assurances, from 1947 to 1951. Then in September 1951 India announced that she would diminish waters running down into Pakistan for Indian irrigation, in the exercise of her absolute sovereign rights.[121] There was then a temporary truce as a United States-sponsored Lillienthal proposal was studied, but in 1954 India announced that she could not accept these proposals.[122] A timely study by the International Law Association resulted in some agreements in Dubrovink, however. Between 1954 and 1958, India progressively increased its withdrawals, yet did so "for the most part under ad hoc agreements with Pakistan which related the increases to Pakistan's ability to effect replacement with equivalent supplies from Pakistan's western rivers."[123] In the New York conference of the International Law Association in 1958, India and Pakistan agreed to a proposal that the United Nations Charter's Article 33 procedures be followed,

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119. Simsarian, The Diversion of Waters Affecting the United States and Canada, 32 Am. J. Int'l. L. 488, 495 (1938).

120. Smith, op. cit. supra note 108, at 147.

121. See Government of Pakistan, The Indus Basin Irrigation Water Dispute passim (Official Document 1952).

122. Laylin, Indus River System--Comments, in [1960] Proceedings of the Am. Soc'y of Int'l. L. 144, 147.

123. Id. at 148.

and after a period of negotiations the dispute was reconciled by the signing of the Indus Waters Treaty.[124] Although India argued throughout the proceedings that under a Harmon-type doctrine of absolute sovereignty she was entitled to withdraw any water, she did make the concessions outlined under pressure of world public opinion.[125] Counsel for Pakistan were confident that if the matter went before an international tribunal the tribunal would not hold the strict Harmon doctrine applied, but the preliminary stumbling block was that India would not agree to arbitral jurisdiction.[126] If a treaty does result from these negotiations which provides for equitable treatment in light of the particular circumstances of each river, it may be deduced that India felt that if she did not sign such a treaty world public opinion would require her to submit to arbitration or to the International Court of Justice over the matter, and that this might result in a judgment worse from India's standpoint than the treaty. Similarly, Pakistan may be surmised to have decided that the uncertainty of an international arbitration should give way toward the effort to agree upon a concrete treaty which would avoid further friction between the parties.

The conclusions above reached with regard to the United States-Mexico, United States-Canada, and India-Pakistan river disputes have been tentative and uncertain. The materials available on these negotiations are probably as extensive as any available on many other treaty negotiations. It is difficult to assess the various motives of the parties involved, if indeed strict assessment is desirable or even accurate. Perhaps with respect to river disputes a generalization might be made that seems to follow from the fact that more than sixty states riparian to international rivers have made arbitral commitments with one or more of their neighbors, whereas only fifteen instances have been found where states have made no such commitments[127] -- that by virtue of the process of settlement and avoidance of litigation, there may be said to have been created a rule of international law negating the Harmon doctrine. It may be accurate that "the frequency with which treaties on the utilization of boundary waters on modern state boundaries are concluded indicates that the prohibition of the unrestricted diversion of water corresponds to a universal legal principle."[128]

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124. Pakistan-India, Indus Waters Treaty, Sept. 19, 1960, in 55 Am. J. Int'l L. 797-822 (1961).

125. Interview With Professor Roger Fisher, of Counsel to Pakistan, March 19, 1961.

126. Ibid.

127. Laylin, supra note 122, at 147 n. 18.

128. Thalmann, op. cit. supra note 113, at 136.

VIII. TREATIES AND STATUTES

During an inquiry into the effect of a treaty on nonsignatories, a parallel situation in municipal law may be noticed: the effect of a statute of one jurisdiction on a judicial decision in a separate jurisdiction. It is becoming commonplace for courts in the United States to cite statutes in other jurisdictions in order to reach a result similar to such statutes judicially.[129] Statutes have been responsible for giving rise to civil and criminal conspiracy laws, and the statutes of frauds and uses have often been invoked in principle although not enacted in the particular jurisdiction.[130] Married women's acts, for example, have had enormous effect on the law of torts, domestic relations, etc.[131]

It is more important to note the reasons for such use of statutes in common-law cases than to cite examples of such use. Landis gives the example of Rylands v. Fletcher to show an important reason for citation of a statute. This case, which has had an enormous impact on American tort law, was based on analogies with wild animals. If Parliament in 1868 had adopted a rule similar to the Rylands decision, Landis notes, even if it had been the result of a thorough inquiry by a Royal Commission, and even if it had been approved by the same lords in the House of Lords who voted for Fletcher's claim, such a statute in the Blackstonian-oriented nineteenth century would have "caused no ripple in the processes of adjudication either in England or on the other side of the Atlantic . . . ."[132] The lesson about the wastefulness of ignoring so much legal thinking has in large part been learned since 1868, and it is now seen that the policy reasons which ought to underly judicial decision may be as validly evidenced by statutes as by previous judicial decisions. Indeed, the public policy of a nation is more democratically and at least prima facie more accurately represented in legislation than it is in judicial decision.

I would like to suggest that treaties of a law-making sort are, rather than being similar to contracts, very similar to statutes and should be similarly used -- as precedent for decisions affecting third parties.

It would be unenlightening to label as a contract the agreement that becomes a statute -- the agreement between Congress and president on a bill. Rather, there is a unity of wills in regard to the common aim. A law-making treaty (defined earlier[133] where

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129. See, e.g., Second Bank-State Street Trust Co. v. Pinion, 170 N.E.2d 350, 353-54 (Mass. 1960).

130. See generally Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213 (1934).

131. Id. at 223.

132. Id. at 221.

133. Supra at 13-14.

the many differences between it and a contract were more fully discussed) much more closely resembles that sort of an agreement than it does a contract. Its signatories are sovereign states on an equal footing; when these states agree on a rule binding for them the situation is very different from that which occurs when two men make a contract between themselves.[134] It is very much like a situation when a court agrees on a decision, or legislators agree on a law, or perhaps when the people and their legislators make an agreement which defines or by referendum approves of a municipal law statute.[135] Even in voting, the people elect legislators to do the public will; the resulting legislation binds both the people and the legislators. In a parallel manner the treaty binds its signatories and can hold legal sway over as large numbers of people as municipal legislation.

But even if treaties were as similar to contracts as to statutes, their close resemblance to statutes argues for their being treated as are statutes. Manley O. Hudson published a collection of some thousands of treaties entitled International Legislation; it is this aspect of treaties that should not be ignored in judicial practice. Since legislation itself has been recognized as a fit precedent in judicial decisions, ought not treaties to be accorded comparable recognition on the plane of international law?

IX. THE BROADER VIEWPOINT -- SOME QUOTATIONS

To extend to treaties recognition as sources of law would not, I think, be inconsistent with the broad aims of international law. Law itself exists because of the social nature of states; "given the idea of a community the idea of law follows as an immediate corollary."[136] Individuals as well as states have social needs and are interdependent in the community.[137] In Brierly's words, "the existence of some kind of international law is simply one of the

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134. As Professor Roger Fisher has shown, it makes much more sense to regard international law as analogous not to minicipal law as between persons, but to those areas of municipal law where a sovereign is one of the parties in litigation. This would apply more to legislation than to contract. Fisher, Bringing Law to Bear on Governments, 74 Harv. L. Rev. 1130 (1961).

135. Scelle has pointed out, for example, that in a court composed of several judges a majority judgment, though based on agreement, is hardly a contract. He holds the same to be true for an act of legislation. See Scelle, Theorie Juridique de la Revision des Traites 38-45 (1931).

136. Corbett, The Consent of States and the Sources of the Law of Nations, 6 Brit. Yb. Int'l. L. 20, 22 (1925).

137. Garner, Book Review, 26 Am. J. Int'l. L. 433 (1932).

inevitable consequences of coexistence in a world of a plurality of states necessarily brought into relations one with another."[138] Unless law in general serves the purposes of making an international community possible, it defeats itself. For men only obey the law when they respect it, and they respect it when they can associate with the purpose of the law, which is to promote the community.[139] Within a nation, this purpose is safeguarded to a large extent by a legislature responsive to the needs and desires of the community as a whole. But internationally, the absence of a world legislature calls for particular attention to the compatibility of any proposed or existing source of law to the general purpose of the international community.

Treaties are inherently peaceful (treaties of alliance, if universally extended, would leave no enemies to the alliance) and inherently accommodative. These broad qualities serve to identify treaty law with the purposes of international law. A number of writers have noticed these characteristics and have elaborated on them. Thus, with regard to treaties as a source of general law, Madison wrote that they are formed in a

> mutual spirit of liberality and accommodation. . . necessarily founded in principle of reciprocal justice and interest. . . . [In the negotiation of treaties of peace and treaties of commerce] the respective efforts and interests of the parties form those mutual checks, require those mutual concessions, and involve those mutual appeals to a moral standard of right, which are most likely to make both parties converge to a just and reasonable conclusion. Nor is a sense of character without its effect on such occasions. Nations would not stipulate in the face of the world things, which each of them would separately do, in pursuit of its selfish objects.[140]

Also in the nineteenth century Calvo stated his agreement with Heffter that the texts of treaties are the most evident witnesses of "l'accord des gouvernements."[141] This sense of the compatibility of treaties and the improvement of international relations has been well restated by Hyde in 1940:

> Bi-partite as well as multi-partite treaties are useful repositories and enlightening vehicles of areas the acceptance of which by the international

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138. Brierly, Outlook for International Law 4 (1944).

139. Jenks, The Scope of International Law, 31 Brit. Yb. Int'l. L. 1, 4-7 (1954).

140. Madison, Examination of the British Doctrine (1806), in 2 Letters and Other Writings of James Madison 229, 263 (1867).

141. 1 Calvo, Le Droit International 136 (3d ed. 1880).

> society may be anticipated when they are worthy of it and when the success of the contractual experiment encourages the assumption of like obligations throughout its membership. Agreements between States are thus becoming increasingly regarded as the sources of law. . . .[142]

Finally, a quotation from Doctor Jenks, written in 1952, which applies equally to bilateral treaties:

> The obligations of multipartite legislative instruments are not, however, badges of continuing servitude; they are a necessary part of full cooperation in the international community and participation in them must therefore be regarded as one of the hallmarks of emancipation. . . . We live in an age of rapid economic and social change, and if our legal system fails to respond to the widely felt and urgent needs of a developing international society, both its authority as a legal system and the prospect of developing a peaceful international order will be gravely prejudiced.[143]

X. CONCLUSION

Unless treaties are accepted as a source of law for nonparties, international law will anomalously apply custom formulated a half century or more ago instead of the rules found in treaties, which have taken the place of custom in recent years. And as the conclusion of treaties becomes more commonplace, changes in the law will be reflected entirely in the treaties. Thus in many instances the application of the old customary rule will mean that the new standard of conduct prescribed in the treaties will be overlooked. International law will, perhaps dangerously, apply outmoded rules of conduct to new situations. For unless the present thesis is accepted, the only way to change customary international law (apart from a multilateral convention adopted by each and every existing state) would be through the process of usage accompanied by a claim of right consented to by the involved states -- a process which may lead to friction, miscalculation, misunderstanding, and over-assertiveness in order to gain desired concessions. Nor would the claim of right be more than an empty claim, or the action in derogation of custom be anything but illegal. Should the development of international law be halted when nations secure the consent of other nations in advance of practice by way of treaty? Has the

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142. 1 Hyde, International Law 10 (2d ed. 1947).

143. Jenks, State Succession in Respect of Law-Making Treaties, 29 Brit. Yb. Int'l. L. 105, 108, 110 (1952).

jurisprudence of international law placed states A and B in the position that if they conclude a secret treaty, a court may view the ensuing practice as a usage and may give it international effect in shaping customary law, whereas if the treaty were revealed to the world the same practice following the treaty would be dismissed as irrelevant to general international law?

The practice of international tribunals as well as states indicates that the maxim of pacta tertiis has not been strictly followed. But the lack of a theoretical explanation why it ought not to be followed has resulted in some inconsistencies of application as well as indeterminacy of predictability of international law. Landis wrote of statutes in 1934 that "perhaps, the major portion of the law is now skeletonized between the covers of the statute book."[144] The same is true of treaty law today; collections of treaties in force far exceed any library shelf of commentaries on customary international law. The vast treasures and resources of these treaties, representing the deliberate results of negotiations between states, should not be by-passed in the serious study of rules to guide the rights and duties of states.

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144. Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213 (1934).