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Joseph W. Dellapenna

Abstract

For those who are not familiar with international law, just what it is or how it operates is often a puzzle. Some will doubt whether there even is such a thing, or, as it is often put, whether international law really is law. To answer this question, one must consider the forms that international law takes and how it functions. This analysis begins with a consideration of how law works in general and then proceeds to examine international law to consider how it resembles and how it differs from the law most people—lawyers and non-lawyers alike—are familiar with. Much international law remains customary. Even when a norm of customary international law has been determined with some certainty, the customary form of enforcement—claim and counterclaim among states—does not provide a neutral enforcement mechanism. The mechanism favors those with power and resources. Without a neutral enforcement mechanism, there is always the suspicion that national interest overrides any real commitment to law. And without a neutral enforcement mechanism, international law ultimately has nothing better to offer for punishing violations than the law of the vendetta.

The institutional limitations of international law—including both custom and treaties—have always been most clear during periods of major crisis. International law is not an illusion, but it is a primitive system with definite limits on its effectiveness. As a result, while international law by itself cannot solve the world's problem, international law is an essential element of any solution. What is necessary to make international law more effective is a fully developed institutional framework, particularly for any serious or enduring crisis, although that framework might not come into being until after the crisis emerges. To get beyond the limitations of current international law, states must combine the sophisticated insights of international lawyers with the practical structures of political actors through institutions for managing or resolving conflicts before they escalates to injurious levels.

The Forms of International Law

Joseph W. Dellapenna^{*}

I. INTRODUCTION

My work largely focuses on fresh water and fresh water governance. Fresh water is the second most important of the natural resources essential for human survival and thriving. Only air is more ubiquitous, essential, or variable than water. Among water's many qualities, one that causes innumerable disputes and perhaps occasional conflict is that water moves, and in moving ignores human boundaries. The most cordial and cooperative of neighboring states have had difficulty in arriving at mutually acceptable arrangements to govern transboundary waters even in humid regions where fresh water is usually sufficient to satisfy most or all needs.¹ Even units of a federal union located in a humid region have engaged in long and bitter political and legal struggles over the waters they share.² When one adds in aridity, conflicts can become endemic and intense despite otherwise friendly relations or even membership in a federal union.³ Yet the ambulatory nature of water creates a need for cooperation among the same groups who are contending over it. In fact, considerable evidence suggests that cooperative solutions to water problems are more likely than prolonged conflict.⁴

Looking at the resulting problems in an international context raises questions about how to structure coop-

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¹ See, e.g., JOHN V. KRUTILLA, *THE COLUMBIA RIVER TREATY: THE ECONOMICS OF AN INTERNATIONAL RIVER BASIN DEVELOPMENT* (1967); *THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES* 3 (Ralph Zacklin & Lucius Cafilisch eds. 1981).

² See, e.g., *Wisconsin v. Illinois*, 388 U.S. 426 (1967); *New Jersey v. New York*, 345 U.S. 369 (1953); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Wisconsin v. Illinois*, 281 U.S. 179 (1930); *Missouri v. Illinois*, 200 U.S. 496 (1906).

³ The interstate dispute over the lower Colorado River has been before the Supreme Court of the United States eight times; the most important decisions in this series are: *Arizona v. California*, 373 U.S. 546 (1963); *Arizona v. California*, 283 U.S. 423 (1931). The dispute between Colorado and Kansas over the Arkansas River has lasted even longer than the dispute between Arizona and California over the Colorado River. *Kansas v. Colorado*, 475 U.S. 1079 (1986); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Kansas v. Colorado*, 206 U.S. 46 (1907). Also consider India, which has had numerous interstate as well as international, disputes over water. See M. Bashir Hussain, *The Law of Interstate Rivers in India: Principles of Equitable Apportionment of River Waters*, 17 *INDIAN J. INT'L L.* 41 (1977).

⁴ See Joseph W. Dellapenna, *Population and Water in the Middle East: The Challenge and Opportunity for Law*, 7 *INT'L J. ENVT. & POLLUTION* 72, 82-83 (1997); Aaron T. Wolf, *Conflict and Cooperation along International Waterways*, 1 *WATER POL'Y* 251, 251-52 (1998).

eration in a way that increases trust and eliminates water as a source of contention. The world's experience has disclosed that while international law by itself cannot solve this problem, international law is an essential element of any solution.⁵ For those who are not familiar with international law, just what it is or how it operates is often a puzzle. Some will doubt whether there even is such a thing, or, as it is often put, whether international law really is law. The question has been asked increasingly emphatically at least since John Austin in the nineteenth century.⁶ To answer this question, one must consider the forms that international law takes and how it functions. This analysis begins with a consideration of how law works in general.

II. WHAT MAKES LAW LAW?

The question of whether international law really is law is a question of legitimacy—whether the international law and international legal processes are accepted as justified in prescribing and enforcing norms.⁷ Legitimacy is partly a function of perceived fairness in procedures and partly a function of perceived rightness (at least in general) of result. Societies whose governance is perceived as legitimate can carry on for decades or centuries without necessarily making particularly good decisions; when societies come to reject the legitimacy of their institutions, its governance structures collapse rather quickly from what often appear in hindsight to be rather slight shocks.⁸ This section will discuss the reasons why so many people question the legitimacy of international law.

This question of legitimacy for international law arises in large measure because many people have in mind a specific model of how law works when they describe something as a law and some claim of right or obligation as legal. This model envisions a legislature acting formally to create a highly determinate rule enforced by a policeman. As George Jackson put it, “The ultimate expression of law isn't order, it's a prison.”⁹ This notion of law is called “legal positivism” because it focuses attention solely on “positive” law, law that is formally enacted and formally enforced. John Austin was the foremost proponent of legal positivism writing in English in the nineteenth century.

⁵ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Dellapenna, *supra* note 4, at 89-91.

⁶ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 122-25 (H.L.A. Hart ed. 1955).

⁷ Daniel Bodansky, *The Concept of Legitimacy in International Law*, in *INTERNATIONAL LAW* 309 (Rüdiger Wolfrum & Volker Röben eds., 2009). *See also* Rolf H. Weber, *New Sovereignty Concepts in the Age of the Internet?*, 14 *J. INTERNET L.* no. 2, at 12 (July 2010). *Cf.* Daithí Mac Síthigh, *More than Just Names: The Introduction of Internationalised Domain Names and the Reform of Generic Top-Level Domains at ICANN*, 18 *INT'L J.L. & INFO. TECH.* 274 (2010) (attributing ICANN's problems to growth of a perceived lack of legitimacy).

⁸ *See* Joseph W. Dellapenna, *Behind the Red Curtain: Environmental Concerns in the End of Communism*, in 2 *J. EURASIAN LAW* no. 3, at 1 (2009). *See generally* CRANE BRINTON, *THE ANATOMY OF REVOLUTION* (rev. ed. 1965).

⁹ GEORGE JACKSON, *BLOOD IN MY EYE* 119 (1972).

Austin defined law as “the command of a sovereign” to be enforced by some form of sanction.¹⁰ By this theory, the practice of law pertains to the identifying the commands of an identified sovereign and properly using those commands to achieve a desired result. Austin himself concluded that international law simply cannot be law, but was merely “positive morality,” because he was unable to identify a sovereign who issued commands or formal legal mechanisms for enforcing such commands.¹¹

Most people who live under highly developed national legal systems are probably comfortable with the foregoing description of what law is and how it operates. Reflection, however, discloses that this model does not explain what we call “law” even in national legal systems. Consider the mundane examples of traffic laws. In the United States, nearly everyone drives faster than the legal speed limit and there could never be enough police to compel people to drive at or below that limit. If the government attempted to do so, it would fail because too many are violating the law. The best that can be achieved is to keep most people driving not very much faster than the speed limit through selective enforcement targeted at those who violate the limit too egregiously.¹² Yet the legally prescribed limit remains “the law”; no one can avoid conviction for speeding on the basis that the law is not effectively enforced or that the designated speed limit is not “the law.”

Contrast speed limits with traffic lights. People in the United States seldom simply drive through red lights (although they sometimes cheat a little). Yet if nearly everyone were to disregard them, the laws on driving through those lights could no more be enforced than the speed limits. Most people do not drive through red lights from self-interest: Driving through a red light is more dangerous than speeding, and would be suicidal if nearly everyone did so. When only a few are violating a rule, a few police are adequate to enforce the rule. Yet one’s response to another’s driving through a red light is not simply that the act is dangerous. People see driving through a red light as anti-social behavior and support the law as law. According to H.L.A. Hart, the twentieth-century’s leading legal positivist, the decision to obey traffic signals, and the sense of moral outrage against those who do not, is legal and not merely a moral because drivers would refer to the law to explain their actions and thoughts.¹³

¹⁰ AUSTIN, *supra* note 6, at 133, 201.

¹¹ *Id.* at 134-42. See generally ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009); MALCOLM N. SHAW, *INTERNATIONAL LAW* 2-12 (3rd ed. 1991); Robert MacLean, *Does Anyone Still Ask the Question: “Is International Law Really Law?”*, 1991 JOURNAL OF LEGAL EDUCATION 230.

¹² See Note, *Laws That Are Made to Be Broken: Adjusting for Anticipated Noncompliance*, 75 MICH. L. REV. 687 (1977).

¹³ H.L.A. HART, *THE CONCEPT OF LAW* 136-37 (1961).

Now consider the more subtle situation with the law applicable to a contract or to a tort. Contracts, voluntarily defined and assumed obligations, are an essential feature of modern life. Without compliance with contracts, the planning necessary for modern economies would be impossible. Every developed state has a well-developed law of contracts, and this law tends to be highly technical. Yet business people, let alone consumers and others who might find themselves enmeshed in disputes relating to contracts, often know nothing about these technicalities, or, even worse, “know” something about these technicalities that is false. As a result, one study of the contracting process in Wisconsin found that at between 60% and 75% of the contracts made in the state between wholesalers and retailers (depending on the nature of the industry) were not valid under the state’s law of contracts, largely because of errors in the process of contract formation.¹⁴ Such “legal” problems are probably typical of contracts in most places around the world. Yet business between wholesalers and retailers in Wisconsin or elsewhere does not suffer.

Contracts actually are enforced not so much by formal law as by informal sanctions based on the sense of the relevant community, and such enforcement often turns out to mean radically different results than would be achieved were the parties to resort to legal processes.¹⁵ A decision to resort to litigation is a signal of a far greater problem than mere failure to fulfill a particular promise; it signals a decision to break off all relations and to impede the possibility of entering into future relations with the person being sued.¹⁶ Karl Llewellyn, the principal drafter of the Uniform Commercial Code (“UCC”) that now provides the law of sales of goods throughout the United States, embraced the reality that the law of contracts is found in commercial practice rather than in legal technicalities by dispensing with the formalities of contract formation in favor of a very flexible standard that would rarely fail because of ignorance of the law.¹⁷ The relevant provision is UCC § 2-204:

§ 2-204. Formation in General.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

¹⁴ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

¹⁵ Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

¹⁶ Ian R. Macneil, *Contracts: Adjustments of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

¹⁷ On the role of Karl Llewellyn and the UCC generally, see Eugene F. Mooney, *Old Contract Principles and Karl’s New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILLANOVA L. REV. 213 (1966).

(3) Even though one or more terms are left open a contract for sale does not fall for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Provisions such as this can hardly be characterized as “commands of a sovereign” without seriously distorting the actual functioning of the legal system. Such rules rather accept that the parties themselves form a community and within that community create law for themselves.¹⁸ While this truth is seldom explicit in the common law, it is the central tenet of contract law in the civil law tradition.¹⁹ Such rules indicate, again, that the true basis of contracts and commercial law is the social sense of legitimacy granted to or withheld from particular voluntary conduct, just as it is with speed limits and traffic lights.

The Austinian paradigm that so many now seem to think of as the “natural way” to think about law is a relatively recent idea; it essentially strips the notion of law down to organized coercion or the threat of organized coercion: a “command,” of a “sovereign,” backed by a “sanction.”²⁰ As this brief discussion demonstrates, this is a wholly inadequate notion of what law is and how law operates. The point was perhaps best captured in an observation by Professor A.L. Goodhart: “It is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion.”²¹ Even modern positivists have conceded as much when they embrace a normative explanation of positive law that does not depend on an identifiable “sovereign” or the presence or absence of a “command” or a “sanction.” Thus Hans Kelsen has developed a widely influential positivist theory where legitimacy derives from a “*grundnorm*” (a “basic norm” or “basic law”) that in turn just is, or at least is derived from social notions that are not explicable in legal terms.²² H.L.A. Hart also developed a positivist approach to law that seeks to explain the origins and functions of law without reliance on a coercion theory of law. Hart posits a “habit of obedience” as the source of law and legitimacy.²³ These theories, particularly Hart’s “habit of obedience,” seem inadequate to capture the sense of legitimacy that underlies law, yet they are closer to the reality

¹⁸ Melvin A. Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

¹⁹ See, e.g., CODE CIVILE § 1134 (France) (“Legally formed agreements have the force of law for the parties.”); CÓDIGO CIVIL § 1545 (Chile) (same); OTTO KAHN-FREUND, CLAUDINE LÉVY, & BERNARD RUDDEN, A SOURCE-BOOK ON FRENCH LAW 315-48 (2nd ed. 1979); Hiroshi Wagatsuma & Arthur Rosett, *Cultural Attitudes towards Contract Law: Japan and the United States Compared*, 2 PAC. BASIN L.J. 76 (1983).

²⁰ See AUSTIN, *supra* note 6, at 133, 201. In this context, it does not matter whether the sovereign is conceived of as divine or human, natural or abstract.

²¹ ARTHUR L. GOODHART, *LAW AND THE MORAL LAW* 17 (195e). See also HART, *supra* note 13, at 20-25; David M. Trubek *et al.*, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 420-21 (1994).

²² HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 58-63 (Bonnie Litschewski Paulson & Stanley Paulson trans. 1992).

²³ See HART, *supra* note 13, at 77-96.

of what law is and why it is effective than a simple notion of command or sanction that are popularly thought of as constituting law.

Clifford Geertz, the noted anthropologist, reached a somewhat similar conclusion when he described “law” as an organic mechanism whereby certain claims of right are elevated to the status of socially established norms and other claims of right are denied standing; it is a means for society to make sense of things.²⁴ When normative judgments are truly accepted as law, generally few will violate the norms and those who do will pay a higher price than someone who violates a mere social or moral convention. The price might well be exposure to official coercion, but it might also entail other social means of enforcement such as public censure or even ostracism.

This leaves us with a question: What is the function of formal law, of law on the books? History provides an answer. Informal law functions successfully when each person in a particular community knows the others in the community and what they are doing, each depends on the others for a wide range of social supports, and each realizes that overreaching too far or too often will cost them the social supports that he or she needs to survive or to thrive. As a society becomes larger and social interaction becomes less personal, the complex web of mutual reciprocities that ensures compliance with the customary rules of the society breaks down. Formal law, particularly written formal law with specialized processes to make and enforce law, arises as a response to that breakdown.²⁵ Formal law provides a means to achieve adequate certainty and predictability of right and obligation to people in such a society. This was as true of Hammurabi’s Babylon or the Rome of the *Decemviri* as it was of medieval Islam or medieval Europe.²⁶ A good example is the process, described by David Trubek and his co-authors, whereby during the last 20 years, under the impact of the creation of the European Union with its “single market” and the resulting competition from English, Dutch, and American law firms, the French method of dealing with hostile corporate takeovers through informal arrangements among a few leading men has broken down to be replaced, both nationally and

²⁴ CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 175 (1983). See also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 5-8 (1987); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

²⁵ See generally Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 KY. L.J. 809 (2000); Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 889-903 (2007).

²⁶ For a brief description of such a transformation in Tunisian society under the impact of European colonialism, see Habib Attia, *Water Sharing Rights in the Jerid Oases of Tunisia*, in *PROPERTY, SOCIAL STRUCTURE, AND LAW IN THE MODERN MIDDLE EAST* 85, 96-105 (Ann Elizabeth Mayer ed. 1985). An interesting problem not considered here is how a nation like China has managed to get along for millennia with very little in the way of formal law, although even China (both the People’s Republic of China and the Republic of China on Taiwan) is now committed to the creation and effectuation of formal legal processes. See, e.g., VICTOR LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* (1978); Joseph W. Dellapenna, *The Role of Legal Rhetoric in the Failure of Democratic Change in China*, 2 BUFF. INT’L L.J. 231 (1996).

extranationally, by a highly formal set of legal rules and institutions that mirror the similar institutions that were created as 90 years earlier in the United States and perhaps 10 years earlier in the United Kingdom.²⁷

Opportunities to create certainty and at least the appearance of determinate outcomes knowable in advance multiplied enormously with the invention of the printing press. That invention made possible not only the mass distribution of “law” in a way not before possible, it married formal law to the centralized state for it made centralized control possible, but only if legal actors (lawyers, jurists, and lay people who pay attention to formal law) were required to follow the letter of the law. From this possibility arose the characteristic form of modern law: nationally unified legal systems that claimed a monopoly over legal questions.²⁸ From these beginnings, intended to enable autocratic rulers to rule *by* law, emerged the important modern notion of the rule *of* law (the *Rechtsstaat*).²⁹ As this conclusion suggests, I do not denigrate the formal processes of law. Certainty and predictability are important values, particularly for those of who seek to make firm plans for the future. Formal law also serves the valuable social end of ensuring that the state itself abides by the law created by the state and by society. This brief introduction allows a more nuanced and sophisticated exploration of the nature, functions, and failures of international law.

III. INTERNATIONAL LAW AS LAW

International law operates on much the same basis as national law.³⁰ It also experiences some of the same pressures to change and develop in the direction of greater formalism. International law until recently involved only a relatively small and structureless society of states. The United Nations was created at the end of World War II with only 51 members (Switzerland chose to stay out of the United Nations and a handful of defeated Axis states were excluded). The current membership of the United Nations approaches 200 with only one significant *de facto* state, the Republic of China (Taiwan), remaining outside the organization.³¹ Changes in the United Nations and in other

²⁷ Trubek *et al.*, *supra* note 21, at 431, 441-47.

²⁸ See generally Ronald Collins & David Skover, *Paratexts*, 44 STAN. L. REV. 509 (1992).

²⁹ See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 110 (1992); Harold J. Berman & John Witte, jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1573 (1989); Trubek *et al.*, *supra* note 21, at 420-26. See generally Martti Koskenniemi, *The Future of Statehood*, 32 HARV. J. INT'L L. 397 (1991); Béla Pokol, *Law as a System of Professional Institutions*, 8 CONN. J. INT'L L. 507 (1993).

³⁰ See generally J.L. BRIERLY, THE LAW OF NATIONS 49-56, 68-71 (Sir Humphrey Waldock ed. 1963); FRANCK, *supra* note 5; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 45-62 (1995); A.D. MCNAIR, THE LAW OF TREATIES 757-64 (2d ed. 1961); Anthony D'Amato, *Is International Law Really Law?*, 79 NW. U.L. REV. 1293 (1985); Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 DUKE J. COMP. & INT'L L. 35 (1994); Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377 (1989); J.S. Watson, *A Realistic Jurisprudence of International Law*, 30 Y.B. WORLD AFF. 265 (1980).

³¹ See AMOS YODER, THE EVOLUTION OF THE UNITED NATIONS SYSTEM (3rd ed. 1997). (Switzerland joined in 2002, after the Yo-

international structures have transformed the international legal system from the relatively simple forms of the past to an increasingly diverse and complex community of actors who too often no longer know much about each other. The United Nations and other international organizations also count as full players (“legal persons”) in the international legal system.³² Rapidly proliferating non-governmental and other official and semiofficial participants are also now playing a distinct albeit subordinate role.³³ Even natural and artificial persons (people and corporations) are now recognized to some extent as participants in the international legal community.³⁴

This growing community of states and other entities introduced into international legal processes a larger variety of sharply differentiated cultural traditions than the smaller group of states from before World War II. These differences were further accentuated by the division of the world into contending ideological camps.³⁵ This is precisely the setting in which the participants can be expected to welcome the emergence of more specialized and more

der book was published).

³² See, e.g., Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 ICJ 174. See generally JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005); PETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES (1994); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 219 (1987) (“RESTATEMENT (THIRD)”); Bin Cheng, *Introduction to Subjects of International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 23 (Mohammed Bedjaoui ed. 1991) (“ACHIEVEMENTS AND PROSPECTS”); Henry G. Schermers, *International Organizations*, in ACHIEVEMENTS AND PROSPECTS, *supra*, at 67.

³³ PIERRE-MARIE DUPUY & LUISA VIERUCCI, NGOs IN INTERNATIONAL LAW (2008); Asher Alkoby, *Global Networks and International Environmental Lawmaking: A Discourse Approach*, 8 CHI. J. INT’L L. 377 (2008); Kenneth Anderson, *What NGO Accountability Means—and Does Not Mean*, 103 AM. J. INT’L L. 170 (2009); Angela M. Banks, *The Growing Impact of Non-State Actors on the International and European Legal Systems*, 5 INT’L L.F. 293 (2003); Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 BROOK. J. INT’L L. 139 (2005); Steve Charnowitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348 (2006); Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 191 (2001); Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: The Changing Landscape of International Law*, 39 CORNELL INT’L L.J. 243 (2006); Matthew Schaefer, *The Role of Non-Governmental Organizations in Canada-U.S. Relations*, 30 CAN.-U.S. L.J. 69 (2004); Karla W. Simon & Nasira B. Ravzi, *International Non-Governmental Organizations*, 41 INT’L LAW. 525 (2007); Tanya D. Sobol, *An NGO’s Fight to Save Ukraine’s Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 COLO. J. INT’L ENVTL. L. & POL’Y 123 (2006); Debora Spar & James Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations*, 3 CHI. J. INT’L L. 171 (2002). The awkward phrase “non-governmental organizations” (NGO’s) persists because the term is used in the UN Charter. UN CHARTER, art. 71.

³⁴ See, e.g., The Danzig Railway Officials Case (Poland v. Danzig), PCIJ, Series B, no. 15 (1928), reprinted in 4 INT’L L. REP. 287. See generally RESTATEMENT (THIRD), *supra* note 32, §§ 701 to 703; Antonio Cassese, *Individuals*, in ACHIEVEMENTS AND PROSPECTS, *supra* note 32, at 113; Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT’L L. 25 (2010); Dinmukhamed Eshanov, *The Role of Multilateral Corporations from the Neoinstitutionalist and International Law Perspectives: The Concept of the Three-Level Game*, 16 NYU ENVTL. L.J. 110 (2008); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241 (2001); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302 (1999). See also François Rigaux, *Transnational Corporations*, in ACHIEVEMENTS AND PROSPECTS, *supra*, at 121 (denying that corporations are “subjects or quasi-subjects” of international law).

³⁵ Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1217 (1967) (discussing the problems of making decisions in international forums in an ideologically divided world). See also ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); DIETER SCHRÖDER, DIE DRITTE WELT UND DAS VÖLKERRECHT (1970); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); Study Comm. of Int’l L. Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.862 (2006); Xue Hanqin, *Chinese Observations on International Law*, 6 CHINESE J. INT’L L. 83 (2007).

formal legal structures.³⁶ That has certainly happened at the regional level—consider, for example, the Association of Southeast Asian States, the European Union, or the North American Free Trade Association—as well as globally for specialized forms of activity—for example, the International Atomic Energy Agency, the International Civil Aviation Organization, and the World Trade Organization. Still, in large measure, the international legal system remains institutionally underdeveloped and decentralized.³⁷ In short, international law in many respects still is a primitive legal system.³⁸

The international legal system viewed as a whole lacks the superstructure of specialized institutions—executive, legislative, judicial, and administrative—found in modern national legal systems. But to conclude from this lack that international law is not really law is to confuse particular institutional arrangements with what law really is and how it really operates.³⁹ Modern legal systems function in far more complex ways than a simplistic focus on “positive law” suggests, a way that implicates a perhaps remote link to custom as a primary source of law. For if one asks why do you obey a law and the answer is because the legislature (or whatever) enacted it, why should we care that the legislature enacted it? If the answer is because the constitution says so, why should we tolerate the rule of the living by the dead?⁴⁰ The answer is and must be custom, just as it is with why speed limits are not enforced effectively. Moreover, the absence of formalized courts, legislatures, and executives no more indicates an absence of law in the international system than the absence of those institutions indicated the lack of law in pre-industrial socie-

³⁶ See generally Dellapenna, *supra* note 25; Kontorovich, *supra* note 25, at 889-903.

³⁷ See, e.g., SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY MAKING 107-08 (2003); ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW (2007); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); INTERNATIONAL GOVERNANCE AND LAW: STATE REGULATION AND NON-STATE LAW (Jonathan Verschuuren & Hanneke van Schooten eds. 2008).

³⁸ Yoram Dinstein, *International Law as a Primitive Legal System*, 19 NYU J. INT'L L. & POLITICS 1 (1986). See also BRIERLY, *supra* note 30, at 71-78; HART, *supra* note 13, at 77-96; HANS J. MORGENTHAU, POLITICS AMONG NATIONS 265 (4th ed. 1967); MARK WESTON JANIS, INTERNATIONAL LAW 4, 6-7 (5th ed. 2008); HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 108-09 (Bonnie Litschewski Paulson & Stanley Paulson trans. 1992). For arguments against this view, see B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 47-55 (1993); A.I.L. Campbell, *International Law and Primitive Law*, 8 OXFORD J. LEG. STUD. 169 (1988).

³⁹ Thus, John Austin concluded, “The so-called law of nations consists of opinions or sentiments current among nations generally. It is therefore not law properly so called, but rather positive moral rules which are laws improperly so called.” JOHN AUSTIN, 1 JURISPRUDENCE 184 (5th ed. 1885). See also FRANCIS A. BOYLE, WORLD POLITICS AND INTERNATIONAL LAW 3-16 (1985); GOLDSMITH & POSNER, *supra* note 37; HART, *supra* note 13, at 77-96; MORGENTHAU, *supra* note 38, at 265; KELSEN, *supra* note 38, at 108-09; Omar M. Dajani, *Shadow or Shade? The Roles of International Law in the Palestinian-Israeli Peace Talks*, 32 YALE INT'L L.J. 61 (2007); Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, 1 INT'L J. GLOBAL ENVTL. ISSUES 264, 265-69 (2001); Antonio T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005); MacLean, *supra* note 11; George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002).

⁴⁰ See HERBERT SPENCER, ON SOCIAL EVOLUTION: SELECTED WRITINGS 221-22 (John D.Y. Peel ed. 1972). See also GOETHE, FAUST: EINE TRAGÖDIE (1808) (“Statutes and laws through all the ages, / Like a transmitted malady you trace; / In every generation still it rages, / And softly creeps from place to place”).

ties the world over.⁴¹ The international system's less formal processes similarly are law and must be examined carefully to learn both its capabilities and its limitations.

Modern political and legal theory today generally bottoms all law on the consent of the governed.⁴² While the roots of the centrality of consent to international law are different from the roots of the centrality of consent for national law, international law too rests on the consent of the participants—classically nation states. Some today argue to rooting international other than in the consent of states, including religion revelation,⁴³ natural law,⁴⁴ or the consent of the global population rather than of states.⁴⁵ None of these alternatives has gained any traction among

⁴¹ See MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* (1968). For examples of pre-industrial legal systems, see PAUL M. BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* (1989); DAVID M. ENGEL, *CODE AND CUSTOM IN A THAI PROVINCIAL COURT: THE INTERACTION OF FORMAL AND INFORMAL SYSTEMS OF JUSTICE* (1975); M.B. HOOKER, *ADAT LAW IN MODERN INDONESIA* (1978); LI, *supra* note 26; KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASELAW IN PRIMITIVE JURISPRUDENCE* (1941); LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990).

⁴² See, e.g., DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008); ADAM PRZEWORSKI, *DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT* (2010). See generally ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004); MARK B. BROWN, *SCIENCE IN DEMOCRACY: EXPERTISE, INSTITUTIONS, AND REPRESENTATION* (2009); ROBERT A. DAHL, *PREFACE TO DEMOCRATIC THEORY* (2006); *DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE* (Robert D. Grey ed. 1997); *DEMOCRATIC THEORY TODAY: CHALLENGES FOR THE 21ST CENTURY* (April Carter & Geoffrey Stokes eds. 2002); PAULINA OCHOA ESPEJO, *TIME OF POPULAR SOVEREIGNTY: PROCESS AND THE DEMOCRATIC STATE* (2011); ROBERT E. GOODIN, *INNOVATING DEMOCRACY: DEMOCRATIC THEORY AND PRACTICE AFTER THE DELIBERATIVE TURN* (2008); STEPHEN J. HOOD, *POLITICAL DEVELOPMENT AND DEMOCRATIC THEORY: RETHINKING COMPARATIVE POLITICS* (2004); MATTHEW HUMPRHEY, *ECOLOGICAL POLITICS AND DEMOCRATIC THEORY: THE CHALLENGE TO THE DELIBERATIVE IDEAL* (2007); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* (2003); *TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon 2002); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 NYU L. REV. 461 (2003); Alía Adserà, Charles Boix, & Mark Payne, *Are You Being Served? Political Accountability and Quality of Government*, 19 J. LAW ECON. & ORG. 445 (2003); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Lynn A. Maguire & E. Allan Lind, *Public Participation in Environmental Decisions: Stakeholders, Authorities and Procedural Justice*, 3 INT'L J. GLOBAL ENVTL. ISSUES 133 (2003); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002); David Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Peter Vanderschraaf, *Game Theory, Evolution, and Justice*, 28 PHILOS. & PUB. AFF. 325 (2000).

⁴³ This view is particularly alive among adherents of Islam. See C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 131-32 (1988). See also B.D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION—A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS* (2002); *RELIGION AND INTERNATIONAL LAW* (Mark W. Janis & Carolyn Evans eds. 2004).

⁴⁴ JANIS, *supra* note 38, at 62-69. See, e.g., MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 8-9, 22 (2008); Josef Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 947 (1961); Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT'L L.J. 413 (2002); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 119 YALE L.J. 1762, 1765 (2009). Authorities trace this line of thinking back at least to Hugo de Groot ("Grotius") and Emerich de Vattel, the founders of modern international law in the seventeenth and eighteenth century.

⁴⁵ See, e.g., MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005); Alkoby, *supra* note 33; Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT'L L. & INT'L REL. 151 (2008); Ashfin Akhtarkhavari, *The Global Compact, Environmental Principles, and Change in International Environmental Politics*, 38 DENV. J. INT'L L. & POL'Y 277 (2010); Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173 (2010); Andreas Buss, *The Preah Vihear Case and Regional Customary International Law*, 9 CHINESE J. INT'L L. 111, 117-18 (2010); Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71; Daniel Ryan Koslosky, *Ghosts of Horace Gray: Customary International Law in Human Rights Litigation*, 97 KY. L.J. 615 (2009); Christiana Ochoa, *The Individual and International Law Formation*, 48 VA. J. INT'L L. 119 (2007); Mark Toufayan, *Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age*, 31 MICH.

governments,⁴⁶ international organizations, or international tribunals and thus will not be considered at length here. Instead, the following sections will follow the short, definitive statement of the forms of international law found in

Article 38 of the *Statute of the International Court of Justice*:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The remainder of this chapter will consider these classic sources of law in the order listed in the statute of the court.

IV. INTERNATIONAL CONVENTIONS

By international conventions, Article 38 means any form of voluntarily expressed international agreement. Even a unilateral oral declaration can create an obligation under international law if the government on the behalf of which the declaration was made intends to subject itself to an obligation.⁴⁷ As this suggests, there is no particular form required and, from the perspective of an international tribunal rather than a national court, compliance with national legal requirements is not required so long as the government's representative meant the declaration or exchange to create an international obligation.⁴⁸

The relation of international agreements to the consent of participating states is clear. International agreements, like private contracts, provide the law for the parties thereto.⁴⁹ So clearly is this understood that nations usually comply with their international agreements without requiring any steps to enforce the agreement—unless the state has a proper basis for questioning the validity or meaning of the agreement or for an internationally recognized legal excuse for non-compliance. These possibilities are enshrined in two well-known Latin maxims: *pacta sunt*

J. INT'L L. 307 (2010); Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 EUR. J. INT'L L. 387 (2010).

⁴⁶ This is particularly true for newly independent states. See Xue, *supra* note 35, at 84-87.

⁴⁷ The Maritime Delimitation & Territorial Questions Case (Qatar v. Bahrain), 1994 ICJ 112; The Nuclear Test Case (Australia v. France), 1974 ICJ 253, 267; The Legal Status of Eastern Greenland Case (Denmark v. Norway), 1933 PCIJ (ser. A/B) no. 53.

⁴⁸ RESTATEMENT (THIRD), *supra* note 32, § 312. See generally Charles Lipson, *Why Are some International Agreements Informal?*, 45 INT'L ORG. 495 (1991).

⁴⁹ See the text *supra* at notes 18-19.

*servanda*⁵⁰ (agreements are to be observed) and *rebus sic stantibus*⁵¹ (so long as things remain the same, in other words, unless there is a sufficiently substantial change in circumstances). What brings these two apparently contradictory principles together is an implied obligation to interpret and perform international agreements in good faith.⁵² There can be complex questions about whether the state parties had actually reached an agreement, what the agreement means, and whether there is a legally valid excuse from compliance. Many international agreements also resolve the problem of enforceability by providing for compulsory arbitration or other means.⁵³

Today, the answers for the most part are found in the rules gathered in the *Vienna Convention on the Law of Treaties*.⁵⁴ Left unanswered by the *Vienna Convention* is why treaties are legally binding or how they create law. For private contracts, their binding nature comes from some underlying body of law.⁵⁵ The same is true for the international legal effect of international agreements. The underlying body of law is not, cannot be, just another treaty, and the *Vienna Convention* does not claim to provide the legal basis for enforcing other agreements. The underlying law that gives legal effect to international agreements is customary international law, just as custom ultimately underlies positive law within a national system.⁵⁶ This is made clear when one discovers that the *Vienna Convention* itself has now been widely recognized as being binding, at least for most of its provisions, as customary law on nations that have not ratified it.⁵⁷ But unlike positive law in a national legal system, customary law is not merely a

⁵⁰ I.I. Lukashuk, *The Principle Pact Sunt Servanda and the Nature of Obligation under International Law*, 83 AM. J. INT'L L. 513 (1989). For its modern expression, see *Vienna Convention on the Law of Treaties*, signed 23 May 1969, art. 26, 1155 UNTS 331 (*Vienna Convention*); RESTATEMENT (THIRD), *supra* note 32, § 321.

⁵¹ Detlev T. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT'L L. 459 (2004). *See, e.g.*, The Gabčíkovo-Nagymoros Case (Hungary v. Slovakia), 1997 ICJ 7, ¶¶ 102-104; The Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1973 ICJ 3, ¶¶ 31-45. For its modern expression, see *Vienna Convention*, *supra* note 50, art. 62; RESTATEMENT (THIRD), *supra* note 32, § 336. *See generally* Mark Bennett & Nicole Roughan, *Rebus sic Stantibus and the Treaty of Waitangi*, 37 VICTORIA U. WELLINGTON L. REV. 505 (2006); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

⁵² *Vienna Convention*, *supra* note 50, art. 31; The Case on Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 ICJ no. 136, ¶ 145; The Gabčíkovo-Nagymoros Case (Hungary v. Slovakia), 1997 ICJ 7, ¶ 142. *See generally* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration*, 35 YALE INT'L L.J. 283, 311-14 (2010); Lukashuk, *supra* note 50, at 513.

⁵³ *See, e.g.*, *Marrakesh Agreement Establishing the World Trade Organization*, approved 15 April 1994, Annex 2 (on dispute settlement), reprinted in 33 INT'L LEGAL MAT'LS 1125, 1226-47 (1994), available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm. RESTATEMENT (THIRD), *supra* note 32, § 902.

⁵⁴ *Vienna Convention*, *supra* note 50.

⁵⁵ *See, e.g.*, *E. Gerli & Co. v. Cunard SS Co.*, 48 F.2d 115 (2nd Cir. 1931) ("Some law must impose the obligation [of a contract], and the parties have nothing to do with that; no more than with whether their acts are torts or crimes).

⁵⁶ *See, e.g.*, Zhu Lijiang, *Chinese Practice in Public International Law*, 9 CHINESE J. INT'L L. 607, 608 (2010) (identifying *pacta sunt servanda*—the obligation to observe international agreements—as a rule of customary international law). *See also* Burke-White & von Staden, *supra* note 52, at 312 (concluding that the obligation of good faith performance is part of customary international law); Henning Grosse Ruse-Khan, *A Real Partnership for Development? Sustainable Development as a Treaty Objective in European Economic Partnership Agreements*, 13 J. INT'L ECON. L. 139, 164 n.111 (2010) (same). *See generally* Bing Bing Jia, *The Relations between Treaties and Custom*, 9 CHINESE J. INT'L L. 81 (2010). On private contracts, see the text *supra* at notes 14-24.

⁵⁷ The Avena Case (Mexico v. United States), 2004 ICJ REP. ¶ 83; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*

deep background to treaties. It is very much in the foreground as a direct source of legal obligation as well as the underlying matrix in which international agreements are imbedded.

V. CUSTOMARY INTERNATIONAL LAW

Customary international law is more complex and uncertain than formal agreements like treaties or conventions. Customary international law consists of the practices of states undertaken out of a sense that the practice is required by law (*opinio juris sive necessitatus*, often referred to as simply *opinio juris*).⁵⁸ If these two elements combine, law results regardless of how long—or how briefly—the practice has continued.⁵⁹ This is consistent with the standards for finding a binding custom in national law.⁶⁰ Such customary law is binding because the participating states have expressly or implicitly consented to the rule.⁶¹ References to law connect a customary practice to a sense of legitimacy, and thus constitute the practice as law in a highly decentralized and institutionally undeveloped system like international law (or among subsistence farmers or nomadic tribesmen).

An analogy suggested some 90 years ago by Pitt Cobbett, an English professor of international law, makes clearer the process by which customary international law develops.⁶² Suppose, as a result of global climate change, people begin to settle a newly thawed island in two villages. A meadow emerges between the two villages, with no road across the meadow. People initially tend to wander at will in order to go from one village to the other. Gradually, most people come to follow a particular path. Perhaps it is the shortest route, or perhaps it is the easiest route, or

579-80 (6th ed. 2003); RESTATEMENT (THIRD), *supra* note 32, Pt. III *Introductory Note*, at 145. *See also* US Dep't State, *Vienna Convention on the Law of Treaties FAQ*, available at <http://www.state.gov/s/l/treaty/faqs/70139.htm>.

⁵⁸ The North Sea Continental Shelf Case (Federal Rep. of Germany v. Denmark & Netherlands), 1969 ICJ 3, 44; The SS Lotus Case (France v. Turkey), PCIJ, Ser. A, no. 10, at 18, 28 (1927). *See generally* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 1-10 (1971); G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 75-77, 81-82 (1993); GOLDSMITH & POSNER, *supra* note 37, at 23-43; HENKIN, *supra* note 30, at 29-37; RESTATEMENT (THIRD), *supra* note 32, § 102(2); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 1-51, 58-64, 66-67, 96-98 (2nd rev. ed. 1993); Luigi Condorelli, *Custom*, in ACHIEVEMENTS AND PROSPECTS, *supra* note 32, at 179; Guzman, *supra* note 39, at 141-57; Kontorovich, *supra* note 25, at 873-75; A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 U. PA. J. INT'L L. 295 (2009).

⁵⁹ The North Sea Continental Shelf Case (Federal Rep. of Germany v. Denmark & Netherlands), 1969 ICJ 3, 43; The Right of Asylum Case (Colombia v. Peru), 1950 ICJ 266, 276-77; D'AMATO, *supra* note 58, at 56-58; DANILENKO, *supra* note 58, at 77-81; WOLFKE, *supra* note 58, at 59-60; Guzman, *supra* note 39, at 157-59.

⁶⁰ *See, e.g.*, Trepanier v. Volusia Cnty., 9665 So. 2d 276, 289-93 (Fla. Ct. App. 2007); McDonald v. Halvorson, 308 Or. 340, 780 P.2d 714 (1989); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

⁶¹ The SS Lotus Case (France v. Turkey), 1927 PCIJ Ser. A, no. 10, at 18 ("The rules of law binding upon States ... emanate from their own free will."). *See also* The Case of Military and Paramilitary Activities in & against Nicaragua (Nicaragua v. U.S.), 1986 ICJ 4, ¶¶ 183-190. *See generally* GOLDSMITH & POSNER, *supra* note 37, at 26-35; WOLFKE, *supra* note 58, at 50, 160-67; Guzman, *supra* note 39, at 154-71. *But see* Helfer, *supra* note 45.

⁶² 1 PITT COBBETT, LEADING CASES ON INTERNATIONAL LAW 5 (4th ed. 1922) (I have adapted it somewhat to the modern condition.) *See also* D'AMATO, *supra* note 58, at 51, 88; WOLFKE, *supra* note 58, at 52-56, 160-68; Martti Koskenniemi, *The Normative Force of Habit: International Custom and Social Theory*, 1 FINN. Y.B. INT'L L. 77 (1990). *See generally* Robert C. Ellickson, *The Evolution of Social Norms*, in SOCIAL NORMS 35 (Michael Hechter & Karl-Dieter Opp eds. 2001).

perhaps it is the route most convenient to the heaviest walkers—walkers whose tread wears a path more decisively into the land. For whatever reason, a definite path will emerge, and gradually it will become a road. Eventually, everyone will agree that this road is the right way to travel from village to village. When, at some point, people begin to object that people who follow other paths are trespassers, we have a legal and not merely a factual claim. If that claim is accepted by the people living on the island, we have a customary rule of law, even though no one can say precisely when this rule took hold.

Customary international law emerges in an analogous process, developing through a process of claim and counterclaim between states.⁶³ Often the states involved reach a consensus, expressed through an exchange of diplomatic notes or other means, about what each state is entitled to do in the circumstances at hand. When a state undertakes an action that affects other states, the other states will either acquiesce in the action or take steps to oppose it, usually at first through rhetorical strategies; if the matter is important enough to an objecting state, it eventually will escalate its opposition by imposing a variety of sanctions up to the possibility of military operations. Regardless of which state prevails, over a period of time a pattern of practice emerges that allows one to predict how states will behave. If nothing more were involved, one might well question whether this were anything that could properly be termed law, yet beginning with the simplest rhetorical strategies and continuing right through to outright war, states on both sides of a controversy refer to international law as a primary justification of their claims and their practices.⁶⁴ Diplomats know very well the difference between appeals to law, appeals to morality, and appeals to expedience; they often express these different propositions at appropriate points in their statements and assertions.

Customary international law works satisfactorily when there are only a few participants in a particular international process (a regional or special custom) or when general customary international law operates without major controversy either because there is a broad consensus on what is proper under the circumstances or because other states are unwilling to challenge the one or few states with a strong interest in the matter.⁶⁵ The major analytical dif-

⁶³ BARRETT, *supra* note 37, at 111-18; GOLDSMITH & POSNER, *supra* note 37, at 45-78; WOLFKE, *supra* note 58, at 56-58; Christine Chinkin & Romana Sadurska, *The Anatomy of International Dispute Resolution*, 7 OHIO ST. J. DISPUTE RESOL. 39, 70-74 (1991); Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Test in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955).

⁶⁴ See generally ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963) ("HIGGINS, POLITICAL ORGANS"); *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAY IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* (Michael Byers ed. 2000); Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1 (1970). See also HART, *supra* note 13, at 222-225; WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 21 (2nd ed. 1991).

⁶⁵ See generally BARRETT, *supra* note 37, at 120-22; GOLDSMITH & POSNER, *supra* note 37, at 35-38; LOUIS HENKIN, *HOW NA-*

ference between a special custom and a general custom is that a special custom binds only states that can be shown actually to have consented to the custom, while a general custom is presumed to bind a state unless the state can show that it has consistently resisted (or objected to) the custom.⁶⁶ Thus to determine whether customary international law exists and what its content is requires diplomats, international tribunals, lawyers, and scholars to examine a wide variety of sources of state practice; finding evidence regarding the reasons for the practice is more challenging.⁶⁷

A widespread pattern of treaties or other international agreements may demonstrate that a practice is so widely followed that it has become a rule of customary law binding even on states not party to the treaty.⁶⁸ Under some circumstances, even an unratified treaty is indicative of customary law.⁶⁹ General Assembly resolutions and resolutions of other international organizations are strong evidence that states consider a particular rule to be a legal obligation, leaving to be determined whether state practice actually is consistent with this *opinio juris*, although diplomats, lawyers, scholars, and even international tribunals often overlook the question of whether state practice is actually consistent with such resolutions.⁷⁰ Even unilateral acts of states can demonstrate that the particular state

TIONS BEHAVE: LAW AND FOREIGN POLICY 25-26, 47, 89-98, 320-21 (2nd ed. 1979); Ian Brownlie, *The Reality and Efficacy of International Law*, 52 BRIT. Y.B. INT'L L. 1 (1981); Guzman, *supra* note 39, at 159-61; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

⁶⁶ The Right of Passage over Indian Territory Case (Portugal v. India), 1960 ICJ 6, 39-43; The U.S. Nationals in Morocco Case (France v. United States), 1952 ICJ 21, 199-200; The Fisheries Case (United Kingdom v. Norway), 1951 ICJ 116, 131; The Right of Asylum Case (Colombia v. Peru), 1950 ICJ 266, 268-69, 276-78; D'AMATO, *supra* note 58, at 223; DANILENKO, *supra* note 58, at 109-13; RESTATEMENT (THIRD), *supra* note 32, § 102 comments c, d; WOLFKE, *supra* note 58, at 58-61, 66-67, 86-90, 160-68; Buss, *supra* note 45; Condorelli, *supra* note 58, at 202-07; Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005); Guzman, *supra* note 39, at 164-71; Kontorovich, *supra* note 25, at 874-77, 909-10; Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147 (1996).

⁶⁷ See generally DANILENKO, *supra* note 58, at 82-128; LEVI, *supra* note 64, at 36-38; WOLFKE, *supra* note 58, at 8-29, 67-85, 116-159; Condorelli, *supra* note 58, at 187-92.

⁶⁸ See, e.g., The North Sea Continental Shelf Case (Federal Rep. of Germany v. Denmark & Netherlands), 1969 ICJ 3, 31, 42-43; The Wimbledon Case (United Kingdom, France, Italy & Japan v. Germany), PCIJ, ser. A, no. 1, at 25; The Panevezys-Saldutiskis Ry. Case (Estonia v. Lithuania), 1939, ser. A/B, no. 76, at 51-52; The Pacquett Habana, 175 U.S. 677, 687-88 (1900). See D'AMATO, *supra* note 58, at 103-66; DANILENKO, *supra* note 58, at 156-72; A.D. MCNAIR, THE LAW OF TREATIES 216-18 (2nd ed. 1961); RESTATEMENT (THIRD), *supra* note 32, § 102 comment f; WOLFKE, *supra* note 58, at 68-72; José E. Alvarez, *A Bit on Custom*, 42 NYU J. INT'L L. & POL. 17 (2009); Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65 (2007); Guzman, *supra* note 39, at 161-64; Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994); Stephen C. McCaffrey, *The Restatement's Treatment of Sources and Evidence of International Law*, 25 INT'L LAW. 311, 319-21 (1991); Grigory Tunkin, *Is General International Law Customary Law Only?*, 4 EUR. J. INT'L L. 534 (1994).

⁶⁹ See, e.g., The Delimitation of the Continental Shelf Boundary Case (Libya v. Malta), 1985 ICJ 13, 29-34; The Gulf of Maine Case (Canada v. United States), 1984 ICJ 246, 294-95 (merits); The Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1973 ICJ 3, 18; Advisory Opinion on the Status of Namibia, 1971 ICJ 16, 47. See generally Ian Sinclair, *The Impact of the Unratified Convention*, in REALISM IN LAW-MAKING 211 (Adriaan Bos & Hugo Siblesz eds. 1986); Louis B. Sohn, *Unratified Treaties as a Source of Customary International Law*, in REALISM IN LAW-MAKING, *supra*, at 231.

⁷⁰ The Military & Paramilitary Activities in Nicaragua Case (Nicaragua v. United States), 1986 ICJ 14, 99-100; Advisory Opinion on the Western Sahara, 1975 ICJ 12, 31-37; U.N. GA Res. 3232, 32d sess., Preamble (Nov. 12, 1974). See generally HIGGINS, POLITICAL ORGANS, *supra* note 64, at 1-10; RESTATEMENT (THIRD), *supra* note 32, §§ 102(3), 103(2)(c); OSCAR SCHACH-

embraces a particular customary rule of law.⁷¹

The process of determining customary international law, even when successful, is “inelegant.”⁷² It often leaves gaps and ambiguities in the law. Treaties and other international agreements only sometimes fill these gaps or clarify the ambiguities. Despite the obvious difficulties in determining the precise content of customary international law, the system has been remarkably successful. No form of international life could exist without a shared set of norms that are largely self-effectuating in the conduct of that life.⁷³ Only by focusing exclusively on the relatively few, albeit highly dramatic, situations where international law has failed can one gain the impression that the system is ineffective.⁷⁴

Successful areas of customary law often are codified under United Nations or other auspices, a codification made possible precisely because the rules are so seldom questioned and so generally followed.⁷⁵ The principal organ through which the United Nations begins such a codification is the International Law Commission, a body created by the General Assembly in 1947 to help codify and “progressively develop” customary international law.⁷⁶ The Commission consists of 34 jurists and diplomats who represent a broad range of legal cultures and political ideologies. As a result, consensus often comes after years of debate, a process that lends a high degree of credibility to the resulting codification. Upon reaching a conclusion, the Commission reports its findings to the General Assembly, which may or may not take steps to turn the finding (usually termed “draft articles”) into a legally binding instrument. In fact, the rules assembled by the Commission often are accorded “quasi-legal effect” as rules of international

TER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 84-101 (1991); F. BLAINE SLOAN, *UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD* (1991); WOLFKE, *supra* note 5, at 79-84, 100-04; Joseph Isanga, *Counter-Terrorism and Human Rights: The Emergence of a Customary Rule of International Law from U.N. Resolutions*, 37 *DENV. J. INT'L L. & POL'Y* 233 (2009); McCaffrey, *supra* note 68, at 323-24, 326-30; Stephen M. Schwebel, *United Nations Resolutions, Recent Arbitral Awards and Customary International Law*, in *REALISM IN LAW-MAKING*, *supra* note 69, at 203; Weisburd, *supra* note 58.

⁷¹ See, e.g., *The Nuclear Tests Case (Australia & New Zealand v. France)*, 1974 ICJ 255, 267-70. See generally WOLFKE, *supra* note 58, at 77-78; Krzysztof Skubiszewski, *Unilateral Acts of States*, in *ACHIEVEMENTS AND PROSPECTS*, *supra* note 32, at 221; Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 *AM. J. INT'L L.* 1 (1977).

⁷² JANIS, *supra* note 38, at 56-57. See also GOLDSMITH & POSNER, *supra* note 37, at 23-43; Condorelli, *supra* note 58, at 181-83; Kontorovich, *supra* note 25; Robert Kolb, *Selected Problems in the Theory of Customary International Law*, 50 *NETH. INT'L L. REV.* 119 (2003).

⁷³ J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 86-90 (2nd ed. 1991). See generally REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger & Peter Mayer eds. 1993); Norman & Trachtman, *supra* note 39.

⁷⁴ GOLDSMITH & POSNER, *supra* note 37, at 40-43; MORGENTHAU, *supra* note 38, at 283; POSNER, *supra* note 11; SCHACHTER, *supra* note 70, at 227-46.

⁷⁵ DANILENKO, *supra* note 58, at 130-56; SCHACHTER, *supra* note 70, at 66-81; Condorelli, *supra* note 58, at 192-94; Kontorovich, *supra* note 25, at 903-06.

⁷⁶ UN CHARTER, art. 13(1); *Statute of the International Law Commission*, 59 *State* 1031, TS no. 993, 33 UNTS 993 (1945) (“*Statute*”). See generally ARTHUR WATTS, *THE INTERNATIONAL LAW COMMISSION* (1999); UN SECRETARIAT, *THE INTERNATIONAL LAW COMMISSION FIFTY YEARS AFTER: AN EVALUATION* (2000); Condorelli, *supra* note 58, at 194-97.

law even before they take the form of a binding legal document.⁷⁷

Even when a body of customary law has been codified, however, parts (even a great deal) of it often survive as customary law. Thus, while the law of the sea has been codified in a series of international conventions, much of this highly successful body of law remains customary if only because many states have declined to ratify some or all of these conventions.⁷⁸ Another example is the virtual outlawry of chemical weapons despite the inability of the international community to ratify a treaty dealing with more than a small part of that concern.⁷⁹

Customary international law empowers international actors by legitimating their claims, but it also constrains them by limiting the claims they are allowed to make.⁸⁰ Customary international law is, in some respects, ill-fitted to perform these functions as it frequently is ill-defined and uncertain. These are characteristics of all customary law, and not just customary international law. Identifying when a practice has crystallized as customary law and the precise content of such customary law has been difficult, requiring research into the proffered reasons for a practice in what often are obscure sources. Furthermore, turning as it does on a question of motive, any examination of the primary evidence for a customary rule is often inconclusive. That, plus the lack of a neutral enforcement mechanism, makes exclusive reliance on customary international law both undesirable and impossible.

VI. GENERAL PRINCIPLES OF LAW

International agreements cover a growing area of international legal concerns, while customary international law covers much of the rest. Neither body of law, however, pretends to be comprehensive, leaving gaps on partic-

⁷⁷ FREDERICK L. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING: DOCUMENTS, COMMENTS, AND QUESTIONS 250-51 (1977).

⁷⁸ *Convention on the Continental Shelf*, opened for signature, April 29, 1958, 499 UNTS 311; *Convention on Fishing and Conservation of the Living Resources of the Sea*, opened for signature, April 29, 1958, 559 UNTS 285; *Convention on the High Seas*, opened for signature, April 29, 1958, 450 UNTS 82; *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature, April 29, 1958, 516 UNTS 205; *UN Convention on the Law of the Sea*, opened for signature, April 30, 1982, 1833 UNTS 3. On the continuing importance of customary law in the law of the sea, see *The Delimitation of the Continental Shelf Boundary Case (Libya v. Malta)*, 1985 ICJ 13, 29-34; *The Gulf of Maine Case (Canada v. United States)*, 1984 ICJ 246, 295 (merits); *The North Sea Continental Shelf Case (Federal Rep. of Germany v. Denmark & Netherlands)*, 1969 ICJ 3, 31. See generally RESTATEMENT (THIRD), *supra* note 32, §§ 513 comment j, 514 comment a, 515 reporters' note 1, 523 comment b; Condorelli, *supra* note 58, at 184-85, 197-200.

⁷⁹ See David Kennedy, *The Jurisprudence of Non-Proliferation: Taking International Law Seriously*, 2 TRANSNAT'L L. & COMP. PROB. 357, 373-74 (1992); David A. Koplow, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, 15 YALE J. INT'L L. 1, 19-20 (1990). See generally Julie Dahlitz, *The Role of Customary Law in Arms Limitation*, in THE INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT 157 (Julie Dahlitz & Detlev Dicke eds. 1991).

⁸⁰ Haas, *supra* note 30, at 401-02. See also Marwa Daoudy, *Hydro-Hegemony and International Water Law: Laying Claims to Water Rights*, 10 WATER POL'Y Supp. 2, at 89, 94 (2008); Norman & Trachtman, *supra* note 39; Guzman, *supra* note 39. See generally REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 73.

ular points that must be filled through recourse to “general principles of law recognized by civilized nations.”⁸¹ At one time the phrase “civilized nations” was meant to limit reference to nations within the European cultural sphere.⁸² Today, the source of general principles of law could be more aptly described as those found in “representative legal systems,” which in turn are drawn from all corners of the globe.⁸³ Oscar Schachter has gone further, suggesting that there are in fact five types of general principles applied by international decision makers:⁸⁴ (1) principles of municipal law “recognized by civilized nations”; (2) general principles of law “derived from the specific nature of the international community”; (3) principles “intrinsic to the idea of law and basic to all legal systems”; (4) principles “valid through all kinds of societies in relationships of hierarchy and co-ordination”; and (5) principles of justice founded on “the very nature of man as a rational and social being.”

Recourse to general principles of law reflects a conclusion that if all (or nearly all) national legal systems embrace a point of law, nations can hardly complain if that point of law is applied in their relations with other nations. General principles could almost be seen as special sort of custom, with the incorporation of the legal principle into national law as state practice and its use as implicit consent to the validity of the legal principle.⁸⁵ Yet not all of Schachter’s schematic of “general principles” can be easily linked back to some sort of implicit consent and therefore some commentators describe “general principles” as a form of “nonconsensual” international law⁸⁶—something of an oxymoron for classical international law. Soviet scholars argued that “general principles of law” required proof that the principle had been accepted as a rule of customary international law or authorized by a treaty.⁸⁷ Such a reading would render art. 38(1)(c) utterly superfluous. Instead, demonstrating that a general principle of law exists requires a comparative inquiry into the legal practices of representative legal systems (no one could claim to have examined all legal systems), and no inquiry at all into whether a state has actually intended or consented to having that principle applied in their interstate relations. Such consent as one might conclude applies is strictly implicit or even assumed.

⁸¹ *Statute*, *supra* note 76, art. 38(1)(c). See also Advisory Opinion on the International Legal Status of Southwest Africa, 1950 ICJ 128, 148; *The Paquete Habana*, 175 U.S. 677, 700 (1900). See generally SCHACHTER, *supra* note 70, at 50-55; Ford, *supra* note 30; Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe; Self-Contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 503-05 (2006).

⁸² Buss, *supra* note 45, at 114 (“Even at the end of the nineteenth century the members of the ‘Society of Civilized Nations’ were considered to be those States which had a Christian tradition; all others were considered to be of inferior rank.”). See also M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT’L L. 269, 289 (2010).

⁸³ HENKIN, *supra* note 30, at 39-40; SCHRÖDER, *supra* note 33, at 41-44; Bassiouni, *supra* note 82, at 289; Buss, *supra* note 45, at 119.

⁸⁴ SCHACHTER, *supra* note 70, at 50

⁸⁵ Buss, *supra* note 45, at 116-17.

⁸⁶ JANIS, *supra* note 38, at 58-62.

⁸⁷ GRIGORY I. TUNKIN, *THEORY OF INTERNATIONAL LAW 200* (William Butler trans. 1974). See also Sean Kanuck, *Sovereign Dis-course on Cyber Conflict under International Law*, 88 TEX. L. REV. 1571 (2010).

While general principles of law can be useful for filling gaps in international law, their utility is limited. The wider the range of legal systems examined, the less specific any agreement among them on legal principles are likely to be. Thus, an arbitral tribunal held that limitations on the timeliness of the presentation of a claim applied between states even without proof of an agreement or custom because the temporal limitations were a general principle of law.⁸⁸ The tribunal had to determine whether the delay in the instant case was so long as to have imposed an unreasonable burden or risk on the other state.⁸⁹ More recently, some scholars have attempted to identify “global administrative law principles” by recourse to general principles of administrative law found in national legal systems.⁹⁰ When state practice internationally is not consistent with even clearly identified general principles applied in national law, presumably state practice (customary law, perhaps) prevails over the general principles.⁹¹

VII. THE WORK OF THE MOST HIGHLY QUALIFIED PUBLICISTS

International legal processes, particularly regarding determining whether there is a binding custom or general principle of law, requires extensive surveys of state practice, national laws, and the reasons underlying the practices and national laws. Legal advocates and tribunals seldom have the time or resources to do such surveys thoroughly, and any such survey from an advocate is likely to be suspect as a self-serving inquiry into the evidence. The international legal system therefore turns to the work of the leading scholars of international law (the “most highly qualified publicists” as the *Statute* phrases it) for evidence of what the law is, as opposed to what they think the law should be.⁹² Reliance on the “most highly qualified publicists” for research and analysis of the primary sources of evidence of what customary international law actually is does not authorize scholars to create law accord-

⁸⁸ The Gentini Claim, Italy-Venezuela Mixed Claims Comm’n (1903), in H. RALSTON & W. DOYLE, *VENEZUELAN ARBITRATIONS OF 1903*, at 720, 725 (1904)..

⁸⁹ *Id.* See also JANIS, *supra* note 38, at 60-61.

⁹⁰ See, e.g., Thomas D. Wuertenberger & Maximilian C. Karacz, *Using an Evaluative Comparative Law Analysis to Develop Global Administrative Law Principles*, 17 MICH. ST. J. INT’L L. 567 (2009).

⁹¹ But see Beth van Schaak, *Crimen Sine Lege: Judicial Law Making at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008) (calling for the application of a general principle of law in the face of a contrary state practice).

⁹² *Statute*, *supra* note 76, art. 38(1)(d). See, e.g., *The North Sea Continental Shelf Case (Federal Rep. of Germany v. Denmark & Netherlands)*, 1969 ICJ 3, 33-35; *The Paquette Habana*, 175 U.S. 677, 700 (1900). See generally JANIS, *supra* note 38, at 83-86; RESTATEMENT (THIRD), *supra* note 32, § 103(2)(d); SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 614-16 (2nd ed. 1985); SCHACHTER, *supra* note 70, at 38-39; WOLFKE, *supra* note 58, at 76-77; Cesare P.R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 NYU J. INT’L L. & POL. 755 (2009); Mustapha Sourang, *Jurisprudence and Teachings*, in *ACHIEVEMENTS AND PROSPECTS*, *supra* note 32, at 283. How one comes to be “most highly qualified” is itself an interesting and often undeveloped question. See Sarah Ludington & Mitu Gulati, *A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debt*, 48 VA. J. INT’L L. 595 (2008); A. Mark Weisburd, *Reflections on a Convenient Untruth*, 48 VA. J. INT’L L. 641 (2008).

ing to their notions of what the law ought to be,⁹³ although this can be a fine distinction in practice.

This possibility opens up two interesting aspects for finding secondary sources of international law practice: recourse to international or national tribunals; and private organizations for the study of international legal issues. International law, unlike the common law, does not have a formal rule of precedent.⁹⁴ Nonetheless, judges or arbitrators generally are experts on customary international law so that their opinions are the “opinions of highly qualified publicists.”⁹⁵ Thus other courts, diplomats, and scholars frequently refer to such opinions of evidence of what international law is.⁹⁶ It is important to remember that these decisions do not make law or bind other courts, or even the same court. Given the prestige of the particular members of a court, the opinion might, however, carry great weight in determining whether there is in fact a customary rule of law or an applicable general principle.⁹⁷

Another particularly influential form of expert opinion is a report or “codification” of one or another of the international associations of legal experts that have flourished since the nineteenth century. Leading examples are *l’Institut de droit international*, the Inter-American Bar Association, the International Bar Association, and the International Law Association.⁹⁸ While these groups have no official standing as lawgivers, the importance of the opinions of the “most highly qualified publicists” in customary international legal processes give them an importance that would be remarkable for a similar group in a national legal system. Their opinions carry special weight because of the stature of the members who worked on these projects, and because the approval of the end result carries the imprimatur of a large and diverse body of expert opinion.

The International Law Association, a highly-regarded nongovernmental organization of legal experts founded in 1873, has been particularly influential. One of its best known and most influential efforts was the *Helsinki Rules on the Uses of the Waters of International Rivers*,⁹⁹ which the Association approved in 1966. The *Helsinki Rules* were the first attempt by any international body to codify the entire law of international watercourses. The rules heavily influenced state practice as well as the efforts of other international associations in examining the law

⁹³ *Statute*, *supra* note 76, art. 38(d).

⁹⁴ *Id.*, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

⁹⁵ Romano, *supra* note 92, at 763-64.

⁹⁶ ROSENNE, *supra* note 92, at 611-14, 616-19; Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT’L L.J.* 1014 (2007); C. Leah Granger, *The Role of International Tribunals in Natural Resource Disputes in Latin America*, 34 *ECOLOGY L.Q.* 1297 (2007); Guzman, *supra* note 39, at 174-75.

⁹⁷ JANIS, *supra* note 38, at 84-86; SCHACHTER, *supra* note 70, at 39-43.

⁹⁸ See RESTATEMENT (THIRD), *supra* note 32, § 103 reporters’ n. 1.

⁹⁹ INTERNATIONAL L. ASSOC., *THE HELSINKI RULES ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS*, REPORT OF THE FIFTY-SECOND CONFERENCE (Helsinki 1966).

of internationally shared fresh waters.¹⁰⁰ The UN's International Law Commission based its 1997 *Convention on the Law of Non-Navigational Uses of International Watercourses*¹⁰¹ on the *Helsinki Rules*. In 2004, the International Law Association revised the *Helsinki Rules* to produce the *Berlin Rules on Water Resources*,¹⁰² an even more comprehensive summary of the customary international law applicable to all waters. Whether the *Berlin Rules* will be as influential as the *Helsinki Rules* remains to be seen.

VIII. PROCEEDING EX AEQUO ET BONO

The second paragraph of article 38 of the *Statute of the International Court of Justice* provides that, if the parties to the proceedings agree, the court can decide a case *ex aequo et bono* (“according to what is fair and good”).¹⁰³ This invites decision according to personal notion of justice, that is, on non-legal grounds of fairness. Such an invitation is quite different from recourse to “equity” or “equitable” as the standard under an international rule of law. “Equity” or “equitable” under a rule of law is a legal standard for which, over time, specific criteria develop and which must be applied like any other rule of law might be applied.¹⁰⁴ Because of the freedom accorded decision makers, deciding *ex aequo et bono* requires express consent by the state parties to the dispute. Such a power has rarely been conferred on an international tribunal, and never on the International Court of Justice.¹⁰⁵

IX. SUMMARY

Even when a norm of customary international law has been determined with some certainty, the customary form of enforcement—claim and counterclaim among states—does not provide a neutral enforcement mechanism. The

¹⁰⁰ Charles B. Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 NAT. RESOURCES J. 155, 155-77, 213-16 (1996); Stephen M. Schwebel, *Third Report on the Law of Non-Navigational Uses of International Watercourses*, UN Doc. A/CN.4/348, [1982] II YB INT'L L. COMM'N 65, 83-84, 87-88. Only four years after the International Law Association approved the *Helsinki Rules*, the UN General Assembly instructed the International Law Commission to draft a set of articles based upon the *Helsinki Rules*. *Progressive Development and Codification of the Rules of International Law Relating to International Watercourses*, G.A. Res. 2669 (XXV), 8 Dec. 1970, U.N. Doc. A/8028.

¹⁰¹ *UN Convention on the Law of Non-Navigational Uses of International Watercourses*, approved by the General Assembly, 21 May 1997, UN Doc. No. A/51/869, reprinted in 36 INT'L LEGAL MAT'LS 700 (1997).

¹⁰² INTERNATIONAL L. ASSOC., *THE BERLIN RULES ON WATER RESOURCES, REPORT OF THE SEVENTY-FIRST CONFERENCE* (Berlin 2004).

¹⁰³ *Statute*, *supra* note 76, art. 38(2). See generally JANIS, *supra* note 38, at 70-71; Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621 (2008).

¹⁰⁴ See, e.g., *The North Sea Continental Shelf Case* (Federal Rep. of Germany v. Denmark & Netherlands), 1969 ICJ 3, 46-48, 53; *The Diversion of Water from the Meuse Case* (Netherlands v. Belgium), PCIJ ser. A/B, no. 70, at 73, 76-78; *Barbados v. Trinidad & Tobago*, 2006 PCA ¶¶ 240-242, reprinted in 45 INT'L LEG. MAT'LS 800, 839 (2006). See also JANIS, *supra* note 38, at 71-82; SCHACHTER, *supra* note 70, at 55-61; Alvarez, *supra* note 68, at 77; Jonathan Charney, *Progress in International Maritime Boundary Limitation Law*, 88 AM. J. INT'L L. 227 (1994); Trakman, *supra* note 103, at 627-29; Andrew P. Tuck, *The “Fair and Equitable Treatment” Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia, and Panama*, 16 L. & BUS. REV. AM. 385 (2010).

¹⁰⁵ JANIS, *supra* note 38, at 71.

mechanism favors those with power and resources. Without a neutral enforcement mechanism, there is always the suspicion that national interest overrides any real commitment to law. And without a neutral enforcement mechanism, international law ultimately has nothing better to offer for punishing violations than the law of the vendetta.¹⁰⁶ The institutional limitations of international law have always been most clear during periods of major crisis.¹⁰⁷ This is true as well for treaties if the treaty does provide an adequate enforcement mechanism. A related problem for treaties as they proliferate is the creation of overlapping and not entirely consistent legal regimes that cause conflicts and disputes about which treaty regime is to take precedence.¹⁰⁸

International law is not an illusion, but it is a primitive system with definite limits on its effectiveness.¹⁰⁹ As a result, while international law by itself cannot solve the world's problem, international law is an essential element of any solution.¹¹⁰ What is necessary to make international law more effective is a fully developed institutional framework, particularly for any serious or enduring crisis, although that framework might not come into being until after the crisis emerges. To get beyond the limitations of current international law, states must combine the sophisticated insights of international lawyers with the practical structures of political actors through institutions for managing or resolving conflicts before they escalates to injurious levels.

¹⁰⁶ Dellapenna, *supra* note 39, at 268. In international legal practice, the vendetta is call "*retorsion*." See HEATHER BEACH *et al.*, TRANSBOUNDARY FRESHWATER DISPUTE RESOLUTION: THEORY, PRACTICE, AND ANNOTATED REFERENCES (2001); B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 47-55 (1993); HENKIN, *supra* note 30, at 60-62; Richard B. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1 (1982); Chinkin & Sadurska, *supra* note 63, at 57-60; L. Waldron Davis, *Reversing the Flow: International Law and Chinese Hydropower Development on the Headwaters of the Mekong River*, 19 N.Y. INT'L L. REV. 1, 41-62 (2006); Rosalyn Higgins, *Legal Responses to the Iranian and Afghan Crises*, 74 AM. J. INT'L L. 248 (1980); Marla Radinsky, *Retaliation: The Genesis of a Law and the Evolution toward International Cooperation: An Application of Game Theory to Modern International Conflicts*, 2 GEO. MASON U. L. REV. 52 (1994). See also MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL (Geir Ulfstein ed. 2007).

¹⁰⁷ GOLDSMITH & POSNER, *supra* note 37, at 45-78; MORGENTHAU, *supra* note 38, at 282.

¹⁰⁸ See Study Comm. of Int'l L. Comm'n, *supra* note 35.

¹⁰⁹ See the authorities collected *supra* at note 38.

¹¹⁰ FRANCK, *supra* note 5; Dellapenna, *supra* note 4, at 89-91.