THE LEGAL CHARACTER AND SOURCES OF INTERNATIONAL LAW

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I

THE TERM "INTERNATIONAL LAW" means the body of rules of law which apply within the International Community or Society of States.[1]

This definition presupposes that the states constitute a society and that this society has a legal system, International Law or the Law of Nations. This is another way of saying that international law exists, that there is a body of rules, having the character of rules of law, which regulate the relations of States *inter se*.

It is, however, not unusual for treatises on international law to begin by discussing whether any such thing as international law really exists, whether the rules of international law really are legal rules, and so on, after which they often proceed to discuss what is the "foundation" or "basis" of international law. Such an approach may seem strange, as the authors in question generally go on to present international law as performing in the international sphere the functions typical of a legal system, and thus as being a very real factor in international life and an integral part of social reality. It may therefore seem to be—and in fact is—superfluous to question the legal character of the rules of international law or the existence of international law. Why then do authors customarily ask themselves these questions and, having answered them affirmatively, spend much time searching for the "foundation" of international law? The reason is, of course, that they note the absence in the international sphere of the powers which they are accustomed to see upholding the municipal law of states, a legislative, judicial and executive power. "Ni législateur, ni juge, ni gendarme."

So long as the naturalist doctrine prevailed, the problem did not exist. For Grotius, following as he did the tradition handed down from Aristotle, law had its origin in man's social and rea-

[1] The present essay is based on ideas which are to be found in my *International Legislation* (1937) and which have been further developed under the influence of Ago's *Scienza giuridica e diritto internazionale* (1950).

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sonable nature and was thus in the first place a law of nature *(jus naturale)*. This law of nature applied both within states and between states. But side by side with the law of nature there was a law, *jus voluntarium*, which had been created by human measures and which thus closely corresponded with what was later called positive law. This *jus voluntarium* consisted partly of the *jus gentium*, a customary law common to all peoples and binding on states also, and partly of the municipal law of each individual state, the *jus civile*. Grotius, in conformity with an established conception of both Roman and canon law, regarded customary law as resting on *tacita pacta* and ultimately on a principle of natural law, *pacta sunt servanda*. For him, therefore, there was no doubt as to the legal character of international law. The same view is held by later writers on the subject down to Vattel, who followed the lines laid down by Grotius. It should be noted here that for these older writers the law of nature, in spite of its origin in *recta ratio*, was not merely an ideal law but a living, effectively maintained law which appeared in the practice of states, and the dividing line between the law of nature and customary law was somewhat vague.[2] The essential difference no doubt seemed to them to be that natural law, as springing from man's nature, had a character of necessity, while the *jus voluntarium* was freely created *propter utilitatem*.

A break with the Grotian approach was made by Hobbes, who by defining law as the command of a superior authority had such an immense influence on future thinking. "Law, properly," he wrote, "is the word of him that by right hath command over others." This does not mean that Hobbes denied the existence of a natural law. In the international sphere, where there was no superior authority, only the natural law derived from man's nature applied. Positive law, on the other hand, was found only *within* states. So long as the law of nature was regarded as an effectively functioning system of law, it meant no danger to international law that certain authors, such as Hobbes, Spinoza or Pufendorf, regarded it as consisting exclusively of natural law. But the position of international law became precarious immediately the naturalist approach began to be undermined. Broadly speaking, naturalism was able to hold its own during the seventeenth and eighteenth centuries, but towards the end of the latter century it was shaken by the criticisms of Hume and Bentham.

[2] This has been pointed out especially by Giuliano in his work *La comunità internazionale e il diritto* (1950).

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These criticisms became the basis for the doctrines of Austin, who declared that all law is positive and, like Hobbes, defined law as a command of a supreme authority to its subordinates: "Laws properly so called are a species of commands." "Every positive law, or every law simply and strictly so called, is set by a sovereign person or a body of sovereign persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." As states are not subject to any superior authority, international law could not, in Austin's view, be law in the true sense: it was only "positive morality".

On the continent the supremacy of natural law was overthrown by the Romantic and nationalist ideas which appeared in the wake of the Revolutionary and Napoleonic wars. Interest came to be focused on the individual character of nations, and the Romantic and anti-rationalist tendencies of the day undermined the belief in an innate character common to all mankind. Romanticism gave birth to the so-called historical school. In spite, however, of its criticism of the naturalist approach, this school took up a position not so distant from the law of nature as might be thought. It is true that it did not concede that law had any origin in man's nature, but its standpoint was anything but positivist. Thus, for Puchta and Savigny law originated in the "soul of the people" or "consciousness of the people", which was alive and active in all the members of the nation, and legislation, if it was not to be directly harmful, must be an expression of this "national consciousness". Savigny, however, also taught that such a common legal consciousness might obtain in the international sphere, among states, and he could therefore recognize the existence of a law of nations.[3]

In the spiritual life of the nineteenth century romanticism was gradually replaced by positivism, the doctrine which recognized no other source of knowledge than experience; consequently, and rightly, it considered that science should only concern itself with what is given by experience, in other words it held that all science should be empirical. But in jurisprudence the term positivism came to have a special significance. In this field a positivist approach meant one which only recognized the existence of positive law, this term being generally taken, for linguistic reasons (Latin *positum*), to mean a law which was set *(gesetzt)*, that is to say decreed, embodied in a statute. A rule of law ought therefore to arise as a result of a decision, an act of will. From whom did

[3] Savigny, *System des heutigen Römischen Rechts*, I (1840), pp. 32 et seq.

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this act of will emanate? Obviously from the state. Consequently law was an expression of the "will of the state". The fact that the state, being an institution, could not possess a will in the psychological sense and that the will of the state was thus only a fiction, an expression designed to cover all the forces thought to create and maintain law in a community, was no doubt clear to the majority, although there were a certain number who had succumbed to the mythological conceptions which were not altogether uncommon at the time. At any rate they conceived of rules of law as imperatives directed from the rulers of the state to their subordinates, imperatives of which the "binding force" was explained by reference to the subjects' duty to obey or to the compulsive powers of the state. Thus a definition of law was arrived at which fell into line with that given by Hobbes and Austin.

What then was the situation in the international community, where there was no authority, superior to the states, which could deliver imperatives to them? As we have seen, Austin denied that international law was a true system of law. The existence of a law of nations was also denied by representatives of the school of thought so influential in Germany which, basing itself on Hegel, preached the absolute power of the state, e.g. Lasson.[4] Another form of this approach was expressed by the view that international law was "external municipal law", that is to say rules by which the state itself regulated its relations with foreign powers. This view, which was represented by, among others, Albert Zorn, also involved a denial of the existence of any unitary system of rules of law binding on states and thus of international law in the proper meaning of that term.[5] However, it never won any considerable support and may now be regarded as exploded.

The doctrines which in varying degrees denied the existence of international law were so obviously in conflict with reality that it is understandable that only in exceptional cases were they accepted by jurists. On the other hand, jurists were faced by a difficult problem through the "positivist" tenet that the will of the state was the basis of law and the rules of law were commands issued by a superior authority. It was indeed incontestable that there was no supreme body placed in authority over states. How then could there be any rules of law binding on states? It was

[4] Lasson, *Princip und Zukunft des Völkerrechts* (1871).
[5] Zorn, *Grundzüge des Völkerrechts* (2nd ed. 1903).

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this problem which gave rise to the many confused attempts to find a "basis" for international law.

An attempt to derive international law from the will of the state may probably be seen in the opinion, common in Anglo-Saxon doctrine during the nineteenth century and often expressed by British courts, that the basis of international law is the "common consent" of states. This opinion is connected with the thesis that the legislative power of Parliament also rests ultimately on "the common consent of the community", which appears in an "unwritten law" or customary law. The opinion may also be connected with the idea, which Grotius inherited from antiquity, that all customary law rests on "tacit agreement", *tacita civium conventio*, as Hermogenianus expressed it (Dig. 1. 3. 35). The difference, however, is that for Grotius the "tacit agreement" derived its validity from the naturalist tenet *pacta sunt servanda*, while for the British jurists "the consent of states" is a pure fact which in some way or other makes international legal rules binding, without its really being possible to understand why this is so.[6]

In Germany also there were a number of theories which attempted to derive the binding force of international law from the will of the state. Among these was Jellinek's well-known attempt to base international law on the "auto-limitation" of the state, an attempt which was fairly generally considered to be unsuccessful: an obligation derived from "auto-limitation" could never be anything but illusory.[7]

As it was found impossible to base the binding nature of international law on the will of the individual state, an attempt was made to explain it in a different way, namely by reference to the combined will of a number of states (an idea which we have already met in the "common consent" of Anglo-Saxon doctrine). This view was partly based on Bergbohm's teaching about international agreements as sources of international law. Bergbohm, a prominent representative of the "positivist" approach in the strict sense to which he gave pregnant expression in the dictum that all law must be "gesetzt wenn gleich nicht gesatzt", objects to the view that states as sovereign bodies cannot be bound by rules of law by stressing that they can, nevertheless, be bound by their own will:

[6] See e.g. Oppenheim, *International Law* (7th ed. 1948), p. 9. Cf. Brierly, "Le fondement du caractère obligatoire du droit international", *Académie de droit international, Recueil des cours*, vol. 23 (1928: III), pp. 478 et seq., and Ago, *op. cit.*, p. 21.

[7] Jellinek, *Die rechtliche Natur der Staatsverträge* (1880).

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> The very idea that, by establishing a law among the nations, a law above the nations would be set up, which must be incompatible with their freedom, independence or sovereignty, appears to be obscure. It is surely without prejudice to their independence if they act in accordance with their own will. Or are they really to deny their own will simply because the will of a greater or lesser number of other states has precisely the same content? International law need not always be an alien will, and it is, like any law, only will, not power and coercion.

In the same work Bergbohm puts forward his view that international agreements fall into two categories, which are entirely different as to their aim, their import, and their significance for "objective international law", namely, (*a*) agreements which include legal transactions *(Rechtsgeschäfte)*, which provide the basis for or cancel subjective rights of states; such agreements, where the states occupy the position of legal persons *(Rechtssubjekte)* and which are most closely to be compared with the contracts of private law, cannot constitute sources of "objective international law"; (*b*) agreements which contain legal rules, which states thus expressly agree to set up as norms for their conduct for the future; the content of these agreements is the common recognition of or declaration of principles of law, so that they are really improperly designated "contracts" *(Verträge)*, and the theory of contracts is quite inapplicable to them. In relation to these agreements the states are not legal persons, but "legislative factors"; they ought, as far as possible, to use this means of creating "a reliable objective law" for international relations in spheres where a sufficiently developed and clear customary law does not exist.[5]

This doctrine of Bergbohm's as to the existence of two kinds of international agreement plays an important role in Triepel's well-known *Vereinbarungstheorie*, in which the view of the basis of the binding force of international law alluded to above is fully developed. In this author's last work the theory is, briefly, as follows: All rules of law are expressions of will. The rules of law are formed by a declaration of will, according to which something shall be a law. The will from which the rule of law derives is called the source of the law. Just as in the case of municipal law, the rules of international law derive from the will of the state. But in international law this will, which is to create obligations for a number of states, cannot be the will of a single state. But

[5] Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877), pp. 18 et seq., 77 et seq.

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if the will of any single state cannot create international law, then there remains only one conceivable course, namely to suppose that a common will, born of the fusion of individual wills, is able to carry out this task. Only the common will of a greater or smaller number of states can be the source of international law. As a means of forming such a union of wills he considers the *Vereinbarung*, a term which is employed in German jurisprudence to designate a real union of wills in contradistinction to "contract", which, in this view, signifies an agreement between several persons, comprising declarations of will having mutually opposed contents. Such a *Vereinbarung* is to be found in treaties, wherein several states adopt a rule which is to determine their lasting conduct for the future. It is of no importance whether treaties are concluded between a large number of states or just two or three, so long as they only comprise rules of law, i.e. objective law. In the same way international customary law has arisen, namely, by agreements reached by conclusive acts.[9]

The weak points in this theory are obvious, and they have often been pointed out; the union of the wills of the various states into a collective will in the *Vereinbarung* is pure mysticism; this *unio mystica* has the obvious intent of making the rules of international law emanate from a will, which is that of the state itself and yet independent of the state, in order thus to explain how they can be at one and the same time an expression of the will of the state and binding for the state. But this attempt to overcome the difficulties connected with auto-limitation is doomed to failure. As long as the *Vereinbarung*, and therewith the rules of international law, base their claim to validity exclusively on the will of the state, their position, obviously, is precarious; they endure no longer than the state wills. Furthermore, it may be objected to Triepel's theory that it does not explain the existence of a general international law. Even international customary law becomes particular law for Triepel, its rules apply only to the states which, by conclusive acts, have declared their adherence to the "tacit agreements" upon which they rest—a view that is at variance with reality.

Nevertheless, Triepel's theory won considerable support among jurists. On the whole, the idea that rules of international law rested on "the consent of states" or agreements between states was characteristic of the "positivist" approach which largely domi-

[9] Triepel, "Droit international et droit interne", *Académie de droit international, Recueil des cours*, vol. I (1923), pp. 82 et seq.

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nated the teaching of international law during the latter part of the nineteenth century and down to the First World War. This conception had a number of consequences, among these being that it makes international customary law a result of *tacita pacta*. The entry of new states into the international community takes the form of an agreement between the existing members of that community and the new state, by which the newcomer is recognized as a member of the international community but on the other hand engages itself to observe the rules of international law. The recognition is thus of a constitutive nature. These statements have nothing to do with reality but have been constructed in order to maintain the postulate that all international law arises from the will of the state.

Even apart from its lack of accord with reality, the theory that international law rests on agreements is problematic in another respect. Declarations of will are, of course, in themselves pure facts which have legal effects only because some rule of law gives them such effects. Mutual undertakings or statements in which the parties declare their agreement on some matter lead to binding agreements only because the rules of law give them this effect, subject to certain conditions. The same difficulty also arises in the attempt to derive rules of law from the commands of an authority. Even those who consider that rules of law are commands and that commands can create law would probably admit that not all commands issued by a person who has power over another are rules of law. If a thief enters a post-office brandishing a revolver and orders the staff to hand over the cash, this command is not a rule of law in the same sense as a law which is promulgated after having been duly adopted by Parliament. There must therefore be a criterion by which one may distinguish between legitimate and illegitimate commands. Assuming that one does not want to equate irresponsible exercise of power with rules of law, the person commanding must be in some way or other legally qualified if his commands and expressions of will are to be capable of creating law, and this qualification must of course follow from a rule of law. Thus we see that Hobbes defines law as "the word of him that *by right* hath command over others". For Hobbes the powers of the law-giving ruler rested on the social contract, which like the contract of Grotius was based on natural law.

Fact in itself can never create law. The weakness in the positivist approach lay in the very assumption on which the system was based, in the idea that the whole legal system could be reduced

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to a product of certain facts and that its character of "law" was due precisely to its having been produced by these facts.[1] The obvious impossibility of deriving a norm's character of law or its "validity" from the mere material fact which is assumed to have given rise to it became the starting point for a critical revision of positivism and, *inter alia,* for Kelsen's theory of the *Stufenbau des Rechts.* The mere fact that a person issues a command can never give the content of this command the character of a valid norm, of a rule of law. For a command to have any legal significance it is necessary that there should be some legal rule which gives the person in question the power to issue commands with the effect that a valid norm arises in the legal system in question; this norm must in its turn obtain its validity from another valid norm, and so on. In this way one would get a *regressus in infinitum* which must be broken in some way, and this is done by postulating a basic norm on which the validity of the whole legal system is founded but which cannot itself be traced back further in a legal sense. This basic norm must consequently be of a purely hypothetical character.[2]

What then, according to Kelsen's theory, is the situation in international law? For Kelsen, the distinguishing feature of law is that it is a "coercive order": the rules of law must be connected with a sanction. From the viewpoint of the legal system, force must be either a sanction or a delinquency. In the international field, according to Kelsen, sanctions exist in the form of war, provided that the war is regarded as a *bellum justum* (an opinion which Kelsen regards as being at any rate possible, although he admits that the opposite view could also be defended), and in the form of reprisals. The difference between the municipal law of states and international law would consist in the degree of centralization as regards the use of force: within the state, force is monopolized by the community, but in the society of states a legitimate use of force may be made by the subjects of the law, the individual states. Kelsen admits, however, that from a scientific standpoint no definite answer can be given to the question of the rôle of war and that political considerations mainly decide the standpoint adopted. The view that international law is a real legal system thus becomes a hypothesis.[3]

According to Kelsen the basic norm itself is also a hypothesis.

[1] Ago, *op. cit.*, p. 30.
[2] Kelsen, *General Theory of Law and State* (1946), pp. 110 et seq.
[3] Kelsen, *op. cit.*, pp. 328 et seq.

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What then is the basic norm of international law? Anzilotti, who adopted the idea of the basic norm while strongly emphasizing its hypothetical character, considered that it was the tenet *pacta sunt servanda,* and at one time Kelsen himself seems to have had the same thought.[4] This agreed with the idea, fostered by the positivist school, that international law consisted exclusively of agreements and that customary law rested on *tacita pacta.* The idea that the basic norm of international law was *pacta sunt servanda* therefore gained much support among members of this school (Cavaglieri, Strupp etc.). It means nothing more than that the basis for the validity of international agreements and therefore for international law itself is the postulate that international agreements are binding, and it may seem as if little had been gained in this way. The realization that international customary law does not rest on agreements and that the tenet *pacta sunt servanda* is itself a rule of customary law led to new formulations of the basic norm. Kelsen himself has now decided on a formula which takes account of usage as the fact which is the origin of the rules of international law: "States ought to behave as they have customarily behaved."[5] Among other formulae may be mentioned Lauterpacht's *voluntas civitatis maximae est servanda,*[6] and Bourquin's "Dans la mesure de sa compétence spatiale et temporelle, la loi doit être obéie universellement et continuellement".[7] In actual fact these formulae tell us nothing more than that the rules of law should be followed, which is a truism, since in every rule of law there is an implicit assumption that it is to be followed. No purpose is served by duplicating a rule of law by, for example, adding to the commandment "Thou shalt respect the territory of other states" (assuming that this is a rule of law) the sentence

[4] Anzilotti, *Corso di diritto internazionale* (1923), pp. 40 et seq.; Kelsen, *Allgemeine Staatslehre* (1925), pp. 174 et seq.

[5] Kelsen, *Theory of Law and State,* p. 369. The idea that the basic norm of international law is the binding force of customary law is one which is found in several other authors, *inter alios* Morelli (*Nozioni di diritto internazionale,* 2nd ed. 1947, p. 11) and Guggenheim (*Lehrbuch des Völkerrechts* I, 1947, p. 10). The view that *pacta sunt servanda* is a rule of customary law and that consequently treaties have a secondary position in relation to customary law has also been expressed by Ago ("Le délit international", *Académie de droit international, Recueil,* vol. 68, 1939: II, p. 529) and by myself (*International Legislation,* pp. 18 et seq.). The view that international customary law is based on international agreements is, moreover, refuted by other authors and may probably be regarded as by now exploded.

[6] Lauterpacht, *The Function of Law in the International Community* (1933), p. 422.

[7] Bourquin, "Règles générales du droit de la paix", *Académie de droit international, Recueil,* vol. 35 (1931: I), p. 80.

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"Thou shalt follow this rule". This so-called basic norm cannot of course give a rule of law greater binding force than it already has, nor can it give the character of law to a rule which is not already a rule of law.

Kelsen's theory seems to be a completely logical development of positivism, using this term in its narrow sense as given above, and *die reine Rechtslehre* seems already to exist *in nuce* in Hobbes' definition: "Law, properly, is the word of him that by right hath command over others." If we start from the assumptions that rules of law are "positive" in the sense that they are "set", created by human agency, and that a fact cannot of itself constitute the basis for the validity of the norms which have been brought into being by it, inasmuch as such a basis can only be obtained from a norm which gives the fact in question the capacity to give rise to valid norms, then the conclusions drawn by Kelsen are inescapable. Thus the reasoning ends, paradoxically enough, in the assumption of a norm which is not "positive", not, in other words, created by a fact which has been given by a previous norm the capacity of giving rise to rules of law and which itself constitutes the basis for the validity of the whole legal system. If we go on to point out that the objective existence of such a basic norm cannot be proved and that it can only be set up as a juristic hypothesis, we make the validity of positive law as a whole, or in other words its existence as law, hypothetical. And this hypothesis cannot even be verified, but is and remains an arbitrary assumption.[8]

In the classical doctrine, international law—even "positive" international law if one includes in this term customary law and treaties—was rooted in the law of nature. In later times, with the search for the "foundation" of international law, a certain tendency towards naturalism has become evident; attempts are made to seek the basis of international law in morality and so on. Among the representatives of this approach Brierly and Verdross may be mentioned.

Brierly holds that the basis of law must be sought in something lying outside law itself, and this basis he finds in morality. The obligation to obey the law is a moral duty and this obligation is the basis for the binding force of law. International law, like all other law, is ultimately founded on a moral obligation.[9] Here it must be said that if the obligation to obey laws is a moral duty

[8] Cf. Ago, *Scienza*, pp. 38 et seq.

[9] Brierly, op. cit., *Académie de droit international, Recueil*, vol. 23, pp. 546 et seq.; "Règles générales du droit de la paix", same *Recueil*, vol. 58, p. 34.

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the obligation to follow each particular rule of law must also be a moral duty, and these rules then become purely moral rules. If we regard law as a system of rules distinct from morality Brierly has not succeeded in finding any basis for this system; he has not succeeded in building a bridge between morality and law.

The same must be said about Verdross's argument which, using the basic norm, places law in an ideal world, "im objektiven Reiche der Werte". Ultimately law rests on morality (or the law of nature). In this way a *regressus in infinitum* is avoided. Originally Verdross assumed that the basic norm bound up with the law of nature was *pacta sunt servanda*. Now he considers that the basic norm is a liability to follow certain general principles of law which live in the common legal consciousness of the nations. But if these legal principles belong to the international law which is found in empirical reality, if states actually follow them because of the requirements of the "legal consciousness" or in other words follow them in the conviction that they are effective rules of law, then they would seem to be customary rather than natural law and the statement that they should be followed is just as tautologous as, for example, the formula of Bourquin quoted above. It tells us nothing beyond what these principles themselves tell us. Verdross has succeeded no better than Brierly in establishing any connection between the international law applied in fact (and in this sense positive) and natural law.[1] A standpoint similar to that of Verdross is adopted by Charles de Visscher, with his theory that the basis of international law, as of all law, is the "idea of justice".[2]

Certain theories which seek to base the binding force of law, including international law, on a sociological basis are, in spite of their claims to realism, fairly close to the old law of nature. The most prominent example is the theory constructed by Duguit and represented in international law doctrine by Scelle. Duguit's theory is based on the assertion that solidarity is a general law for human co-existence; this he regards as an empirically estab-

[1] Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), pp. 21 et seq., *Völkerrecht* (1950), pp. 30 et seq.

[2] "Dans l'ordre international comme dans l'ordre interne, la base véritable ou le fondement dernier du droit se trouve dans l'idée de justice, conçue non comme un sentiment subjectif, mais comme une notion objective ou idéale, dont la valeur reste indépendante des représentations assurément variables et plus ou moins imparfaites que s'en forment les consciences individuelles." Ch. de Visscher, "Contribution à l'étude des sources du droit international", *Recueil Gény* (1934) III, p. 392.

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lished fact, but it has rather the character of a postulate. On this solidarity rests law, which is an "objective law" *(droit objectif)* and is entirely independent of the state but has binding force on the state—or, more accurately, on its rulers, for Duguit does not recognize the state as a reality. States (or their rulers) have the task of realizing objective law, and laws and decrees which diverge from this are not legitimate—a somewhat extreme naturalistic idea. As solidarity is universal among mankind it must exist in the international sphere also and there, too, rules of law, viz. rules of international law, must apply, the chief of these rules being that treaties should be observed. These rules, however, are not directed to states but to the individuals of which they consist.

Quite apart from the dubious character of the very starting point of Duguit's theory, it is difficult to see through what mysterious forces solidarity, as a pure fact, can give rise to any binding rules of law. It is not possible to assert that just because solidarity exists among men they should be or are under the obligation to act in any way whatsoever. Sociology, of course, can only throw light on purely factual situations and events, and, if human beings act in a way which does not agree with the qualities he ascribes to them, no sociologist in the world can do anything about it. Instead he must revise his theories.

That law is part of the social reality and that law and social conditions react mutually on each other is obvious, just as it is obvious that sociological, psychological and historical viewpoints can be applied to law and can throw light on the creation of legal rules, their development and maintenance, their social effects and so on. Studies of this kind can throw light on many circumstances connected with law, for example the problem of obedience to law. Among such studies is the explanation given by Alf Ross of the "validity" or "obligating force" of law, or rather of the belief in this validity or obligating force, an explanation which in his earlier works on legal philosophy Ross also examines with regard to international law.[3] The explanation is based on the thesis that the real foundation for this "obligating force" is in fact an idea or feeling of obligation or of "duty" which is induced by upbringing, social surroundings, fear of sanctions etc. Ross's theory opposes the metaphysical conceptions which dominated legal philosophy in earlier times and occasionally appear even

[3] Ross, *Lærebog i Folkeret* (3rd ed. 1953), pp. 51 et seq.

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today, for example in Verdross. These metaphysical conceptions, Ross maintains, should be abandoned and "obligation" should be regarded purely as a phenomenon of social psychology. To this may be added the reflection that what Ross is explaining is not "obligation", which indeed according to his reasoning is not reality at all, but the feeling of obligation. To feel obligated is of course not the same as to be obligated. Ross's presentation is certainly an interesting contribution to the psychology both of the feeling of obligation and also of obedience to law, and consequently also to the elucidation of the way in which the legal order is maintained; but does it tell us very much about law itself, as law appears in social reality and as an object for jurisprudence?

If jurisprudence aspires to be a science it must obviously concern itself with phenomena which appear in reality and are accessible to experience. But then one may ask oneself: With what phenomena is jurisprudence concerned? The answer is obviously: legal phenomena, rules of law, judgments and so on. One may ask also: Are these phenomena "real", so that they can be made the object of empirical research?

To this it may be answered that it is undoubtedly possible to determine by empirical means that in a human community there is in operation a body of rules which gives rights to entities, whether individuals or collective bodies, by virtue of which they can put forward claims against other entities who have corresponding obligations—claims to the effect that these other entities must perform certain services, carry out or abstain from certain actions etc.—and which gives these entities, described as "subjects of law", the power to create certain definite situations by declarations of will, and so on. These rules are called rules of law and the system they form constitutes a system of law. There seems to be no reason why one should not speak of rules of law as "real", as "existing" or as "valid". The validity of rules of law and their reality are two names for the same thing. It is difficult to see why a juristic thesis which attempts to give a picture of reality should need to present rules of law as a kind of reflex of certain psychological situations. Jurisprudence is sometimes described as a "normative" science. If, however, by this it is meant that the statements made by jurisprudence consist of norms, the description cannot be correct. Scientific statements must deal with reality, and norms are not statements about reality. On the other hand the norms themselves, that is to say the rules of law, are at least

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in a certain sense real even if they are only ideas in the mind, and they can therefore be made the object of scientific statements. To use a simile which may perhaps appear rather bold, one might say that rules of law are objects for jurisprudence in the same way as plants are objects for botany or animals for zoology. The validity of rules of law, therefore, does not have any metaphysical significance; it only means that the rules form an integral part of social reality. There is no need whatever for the jurist to puzzle his head over the "nature" of law, and from the juridical point of view the question of the "foundation" of law is only an illusory problem. All that the jurist has to do is to establish the existence of certain rules of law. In some cases it may be found that rules of law derive from (or are based on) other rules of law which give certain facts (e.g. legislative enactments) the capacity, as "formal sources of law", to give rise to law; but it is far from always being so. In any case it must be established by empirical means whether the rule in question really "exists", that is to say actually functions as law, is positive law in the wider meaning of this term. If we seek the "foundation" for the validity of the rule of law in another, "valid" norm, this norm in its turn requires a valid norm as foundation; and sooner or later we come, as Kelsen's theory conclusively proves, to a norm for which no such foundation can be shown. It is one of Kelsen's many services to jurisprudence that he has shown that the problem of the foundation for the validity of rules of law is the same for municipal law as for international law, and that therefore no dissimilarity in this respect can be used to deny to international law the character of real law.

However, we have seen that the very dissimilarities which exist between international and municipal law have given rise to doubts about the legal character of international law and to persistent attempts to find a "foundation" for international law. Writers have felt able to state that municipal law emanates from the will of the state through legislative measures in which that will manifests itself as commands proceeding from a superior authority and that it is maintained by the authority of the state in the form of law courts, police, bailiffs etc.; they have found it characteristic of law that it is maintained through compulsion exercised by the state, that the legal system is a "coercive order", and they have asserted that the rules of law are directed to the courts, not to the public, that they are in fact rules concerning the use of compulsive power by the state, that rules enacting sanc-

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tions are the true rules of law, and so on. It is because international law lacks these qualities that its character of law is denied or questioned. Now, to this it may be said that the term "law" is of relatively subordinate importance: international law remains the same whether it is called law or not. But on the other hand it cannot be denied that the word "law" enjoys a special respect and that it is perhaps not always without importance for the maintenance of international law that those who in practice are charged with the exercising of international law, mainly the governments of states, are convinced that it is real law. This is of course not a decisive reason why international law should be described as law; it depends on whether international law falls under the concept "law" as this should properly be defined. It may perhaps be said that it is free to anyone to define "law" as he wishes and thus also to define the law as a coercive order upheld by the power of the state. Such a definition, however, appears somewhat arbitrary and artificial. It would exclude from the term "law" systems of rules which have essential features in common with what is generally accepted as "law" and which correspond to the description we have given above of law, such as this appears as an integral part of social reality and as an object for jurisprudence.

In actual fact the conception of law which holds it to be an expression of the will of the state or the will of the legislator, or regards rules of law as directed to courts or as rules concerning the use of compulsive power exercised by the state, seems to imply a considerable overestimation of the importance of the state to the legal system. It is a recognized fact that it is difficult to regard the law as an expression of the will of the state or of will at all. Therefore a Swedish jurist, Professor Olivecrona, has described rules of law as "independent imperatives", in order to emphasize that in spite of their imperative form they do not constitute commands directed from one person to another.[4] It is, moreover, difficult to understand by what magic forces a command can create law or how a system of sanctions can give rise to anything but calculations about what risks one may venture to take or how to behave in order to go free.

It is perhaps natural for jurists to overestimate somewhat the part played in the legal system by the state and especially by the courts, although so obviously exaggerated a statement as that the

[4] Olivecrona, *Law as Fact* (1939), pp. 42 et seq.

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law is nothing but a prophecy of what the courts will do could hardly be made except in a land where the common law prevails and where law is therefore mainly judge-made. In actual fact, legal questions of exactly the same kind as those which are solved by courts are solved daily and hourly by private persons themselves, sometimes through recourse to arbitration but also to an enormous extent through agreements reached by the parties, possibly with the aid of lawyers. One may perhaps say that the courts are always there as the *ultima ratio,* but this has not always been the case.

Law is older than the state. Even in primitive stages of the history of communities, in communities without any real state organization in the form of legislative, judicial and executive authorities, there has been a law, and this law has been created and maintained by the members of the community, the subjects of law, themselves. This law has had the character of custom, and customary law is still found today, even in highly developed communities, side by side with the written law. For the "positivist" school, according to which all law emanates from the will of the state or the government, customary law has always been a hard nut to crack and positivists have tried to prove that it derives its "validity" from some sort of governmental authorization or through the practice of the courts, and so on—explanations which, however, seem to be mere devices intended to preserve the theory intact.

International law is customary law. It is impossible to find any "foundation" for this law, whether in the will of the state or in any "basic norm", which gives its rules validity as rules of law. Nor is this necessary. It is sufficient to be able to establish its existence by empirical means. If we can establish that states invoke international law when raising against other states claims which have the character of legal claims; that these claims are either admitted or rejected on typical legal grounds; that states refer to legal grounds in justifying their behaviour; that they accuse other states of offences against international law and that the accused states defend themselves with legal arguments, never with the argument that international law does not exist; and that arbitral tribunals set up by states decide disputes between them on legal grounds—that states, in brief, behave and act as if international law was a real law and also regard it as such: in other words, if we can establish that international law functions as law in a community of which the states are the members, then it is

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not very realistic to deny the existence of international law. For rules of law do not exist in any other sense than that they function as such.

As the interrelations of states are regulated by law they form a society: *ubi societas, ibi jus,* or conversely, *ubi jus, ibi societas.* But the society of states is undoubtedly a primitive community. It is not justified, as is sometimes done, to object to this that the members of the community of nations are civilized states. Even if the community of nations consisted entirely of civilized states, which is not at present the case, this would not mean that the society formed by these states might not be primitive. And it would be difficult to deny that a community where law consists exclusively of customary law and which lacks legislative and executive organs and has no courts other than arbitral tribunals whose competence is based on agreements concluded between the parties, is primitive. It is obvious that the community of nations displays very important dissimilarities with more developed communities, especially with a modern state. The difference lies above all in its extremely defective organization. Another dissimilarity which has been emphasized by Brierly is the following. In general, municipal law has to deal with millions of individuals who, it is true, display mutual dissimilarities but among whom the similarity from the point of view of the community is so overwhelming that to a large extent the law can regulate their relations by means of abstract rules in which the individuals are treated as examples of types. In other words, it is not difficult, even for a quite extensive body of rules, to maintain the principle of equality before the law, although here, too, cases may occur where *summum jus est summa injuria.* The subjects of international law, which of course consist mainly of states, are comparatively few and they display very great mutual differences in respect of size, population, historical tradition and civilization, geographical situation and material resources etc., and these differences lead also to differences regarding interests and aspirations. From this Brierly draws the conclusion that international law cannot make use of uniform rules to the same extent as municipal law. It must pay considerable regard to the so-called vital interests of states and to the particular situations in which the different states find themselves.[5]

The observation made by Brierly seems to me accurate. As far

[5] Brierly, *The Outlook for International Law* (1944), pp. 39 et seq.

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as international law is concerned, the consequences would appear to be that the necessarily uniform rules which constitute general international law must be comparatively few in number. For it is part of the concept "general international law" that the rules belonging to it must apply to all alike, whereas rules which in a more special way regulate individual situations must belong to particular international law. General international law forms, so to speak, the frame within which international relations move. After this it is for the states, by entering into mutual agreements, to regulate their relationships in greater detail with a view to securing their individual and varying interests.

International agreements exist in immense numbers and concern a great variety of subjects, covering practically every aspect of social relations. The great majority are bilateral, and in addition there are agreements concluded between states belonging to a certain group, for example the Scandinavian countries. Particular importance attaches to the large number of multilateral treaties or conventions concluded from the middle of the nineteenth century onwards. These instruments provide for a more or less complete regulation of certain matters of importance in international relations. In some cases these instruments have been adhered to by a very large number of states and, at least in certain cases, are in principle open to all. They are often called "law-making treaties" *(traités-lois)*, as to some extent they are a substitute for the legislation which does not exist in the international community. Such treaties do not, however, differ in principle from bilateral treaties; like these they are to be compared with private law contracts and are as little binding on non-participants. In so far as their contents can be described as rules of law they are particular international law. Only customary law constitutes international law proper, a law for the society of states.

Despite this, however, treaties are often described as sources of international law.

II

The sources of international law are in fact the subject of different opinions, and the discussion of the problem is not helped by the fact that the term "source of law" itself has several different meanings.

From time to time it is said that statutes, ordinances, and custom are sources of law. It is, however, clear that this use of

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the term "source of law" cannot be regarded as correct. Statutes, ordinances, custom etc. are of course the law itself, and it seems meaningless to describe the law as a source of itself. A "source of law" should logically mean something from which the law derives its origin, something which gives rise to law.

With greater plausibility, legislation has been described as a source of law. Legislation is a method for forming law, usually provided for in the country's constitution (written or unwritten), which contains provisions in accordance with which decisions of certain authorized organs of the state result in the creation of statutes, decrees etc. These decisions are thus facts to which the constitution gives a law-making effect. Legislation is itself regulated by rules of law and is thus a formal source of law or, to put it more exactly, acts of legislation are formal sources of law. For probably the best definition of sources of law is that they are facts to which rules of a legal system add the effect that they give rise to or change or cancel rules of law in this system. Viewed from another standpoint, these facts may also be said to constitute evidence or criteria that the rules in question are valid law within the legal system in question.

In addition, however, we speak also of material sources of law, meaning by this the circumstances which historically have been the reason for the coming into existence of rules of law with this or that content. These circumstances may obviously be of the most varied character, religious beliefs and political ideologies, public opinions and prevailing power relations, all sorts of factors connected with social psychology, general social interests or class interests and prejudices, historical events, traditions and experience etc. The field is so wide that the list could be endless.

It seems justifiable to state that only formal sources of law are sources of law in the true sense. The so-called material sources of law cannot in themselves create law. None of the factors just mentioned, whether separately or together, whether it be social necessity, public opinion or the intentions of the law-giver or anything else which historically has contributed to bring a law into being, can in itself give rise to any law unless there is a legislative act. There is no rule of law, and for that matter no rule of any other kind, which says that one or more of these factors, whether separately or in combination with others, shall give rise to law. And as only a rule of law can give facts any juridical content, one is forced to the conclusion that "material sources of law" cannot in themselves make a rule into a rule of law, or in

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other words constitute the foundation for the claim of any rule to be valid law.

Article 38 of the Statute of the International Court of Justice at The Hague is often stated to be informative as regards the sources of international law. The same provisions were to be found in the Statute of the Permanent Court of International Justice. Here we should note that the provisions in question do not deal directly with sources of law in the formal meaning given above, but with the rules by which the Court must judge cases. From them, however, one should be able to draw certain conclusions concerning the sources from which the rules flow or, looking at the matter from another point of view, concerning the criteria which international law uses in order to distinguish rules belonging to it. It should further be observed that Art. 38 of the Statute does not prove that the rules in question constitute international law any more than do the provisions sometimes found in treaties of arbitration or compromises concerning the rules which the arbitral tribunal is to apply. For the competence of an international tribunal rests on the mandate given it by the parties through the treaty of arbitration, and the parties are not debarred from authorizing the tribunal to decide the case by other rules than those of international law. The same applies to the Hague Court, whose competence rests on the agreement between the parties by which the Court is authorized to decide disputes arising between them, or a certain dispute, in the manner stated in the Court's Statute.

Article 38 of the Court's Statute reads as follows:

> 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.

Thus clauses (*a*)–(*d*) of the first paragraph of the article state the rules which the Court is normally to apply in its judicial activity. When seeking guidance from these for judging the ques-

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tion of the sources of international law we must first and foremost disregard what is stated in clause (*d*), since the formulation of this clause clearly shows that what are referred to are not rules of law but subsidiary means which the Court has to use in order to establish what the rules of international law are. In the Roman Empire doctrine was a formal source of law by virtue of the laws by which the courts were directed to follow the opinions of certain great jurists, and in Anglo-Saxon common law precedents are formal sources of law by virtue of the rule *stare decisis*. Elsewhere, however, such a state of affairs is unusual: in any case it does not exist in international law. Neither the doctrines embodied in the writings of authorities on international law nor judicial decisions are sources in the formal sense of rules of law, they are only sources of knowledge concerning international law and they do not in themselves give rise to international law. As regards decisions of international tribunals, in particular, it must be pointed out that these have contributed to the development of international law in a very much smaller degree than the national courts have contributed to the development of municipal law. Such decisions are comparatively few and date from a fairly late period, when the development of international law was already far advanced. In addition there is the fact that international courts, as just remarked, derive their competence from the parties through the agreement concluded between them and in principle their decisions have no effect except for the parties (cf. Art. 59 of the Statute of the Hague Court). It is therefore explicable and right that the Statute of the Court should place judicial decisions on a par with doctrine as sources of knowledge concerning international law. It is the opinions of the courts with which we are concerned and, just as in the case of jurists, the influence of international courts must depend on the power of their arguments to convince, and ultimately on the quality of the judges, which may vary much from one court to another. This does not mean that court decisions and doctrine, along with much else, may not constitute "material sources of law", and that, in particular, decisions of national courts, like other state acts, may not be elements in a usage which develops into international custom.

Turning now to the other clauses, we find under (*a*) and (*b*) the phenomena which are generally described as sources of international law, namely international conventions and international custom; it is of course to be noted that what the Court applies are rules of law, not the "sources" from which they flow.

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If we now compare the formulation of clauses (*a*) and (*b*) in Art. 38: 1, there is one dissimilarity which immediately meets the eye, namely that an international convention may be made the basis of a decision by the Court only provided that it contains rules which are expressly acknowledged by the parties to the existing dispute, while no such condition is made with regard to international custom. The condition set up for the applicability of international conventions is clearly due to the fact that conventions, being contracts, are not binding for states other than those between which they have been concluded and which have thus expressly acknowledged the provisions contained in them *(pacta tertiis nec nocent nec prosunt).*

What is most important is that no such condition has been made as regards international custom. Custom is said to be "evidence of a general practice accepted as law". It is not required that there should be any express recognition by states in order that this practice or, in other words, international custom shall be binding upon them. As pointed out above, the extreme positivist opinion which seeks to base all international law on the "consent of states" has tried to establish that the rules of international custom are based on "tacit agreements" between states. But in reality it is not possible to prove that these rules came into existence in such a way. This is shown by, among other things, the fact that a new state entering the community of nations at once becomes bound by the rules of international custom and it is never suggested that any of these rules would not be binding on it. It never happens that the state's consent is sought or that it enters into any agreement on the matter with the already existing states. On the other hand, the new state is not bound by any international convention already in force unless it expressly adheres to it. International custom constitutes general international law, a real law for the society of states. From this it follows that the dictum *pacta sunt servanda* cannot be the "basic norm" of international law, it is itself a rule of international custom.

In relation to international custom, treaties are a secondary source of law, existing so to speak on a different plane from custom. Their relation to custom is that of a *lex specialis, quae derogat legi generali.* If, as has been maintained here, only custom can be regarded as international law in the proper sense, the expression "general international law" is a pleonasm. It ought to be sufficient to describe international custom simply as "international law", or conversely to allow "international law" to mean

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international custom. Both in the literature of international law and in the terminology of international courts one can note a tendency, rather indefinite it is true, to distinguish between international law and treaties; and especially the expression *le droit des gens*, which corresponds to the *jus gentium* of the older writers, is used, so far as I have been able to find, almost exclusively of international customary law. Probably the same is the case with the English term "the Law of Nations". It is characteristic that the expression *le droit des gens* (and not *le droit international*) is used when it is a question of an offence against the oldest and best established of all the rules of international customary law, that concerning diplomatic immunity. On the other hand it is clear that the sanctity of treaties rests on the rule of customary law, *pacta sunt servanda*. The violation of a treaty is likewise always an international delinquency (in the sense of a delinquency against international custom).

Thus international law is customary law. What does this imply and whence does international custom derive its origin—in other words what is its "source"? Article 38: 1 (*b*) of the Statute of the International Court of Justice says that the Court applies "international custom as evidence of a general practice accepted as law". The phrasing of this clause seems strange. A general practice is assumed to be accepted as law and it is clearly this "law" that constitutes the international custom. But "custom" is said to constitute "evidence" of this law and therefore "custom", which generally means "customary law", must here signify something else, since evidence cannot be identical with what is to be proved. But the court is said to apply this custom, which constitutes evidence, although common sense would suggest that it applies the "law" which is to be proved. The only rational idea which can be extracted from this confusion is that the court is to apply international custom which is constituted by a practice accepted as law, and the Statute has therefore adhered to the frequently held view that customary law is made up of two elements, a continual practice or usage *(usus)* and a conviction that this practice is law *(opinio juris sive necessitatis)*.

That international customary law consists of the practice of states is probably fairly evident, as is also the fact that it is not every state practice which may be a custom. It must be a state practice qualified in a particular way, and this qualification is evidently to be sought in some characteristic quality in the state practice in question, in other words in something which distin-

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guishes the states' exercise of it. It then appears natural to assume that the characteristic feature lies in the fact that states exercise it as law, in other words in the conviction that it is law. Customary law would thus, in conformity with the usual conception, consist of a general practice *(usus),* which is exercised by states in the belief that in so doing they are acting legally—which in other words is connected with *opinio juris sive necessitatis.* We come therefore to the conclusion that the practice of states, when connected with *opinio juris,* constitutes evidence or a criterion of a rule of customary international law, and the clause in the Statute of the Court should properly have read: "The Court applies international custom, of which a general practice accepted as law is evidence."

This, however, does not tell us anything about the origin of international custom or its "source". How does international custom arise? It seems obvious that actual usage plays a part in the process, just as it does when custom arises in a primitive community, or for that matter in any community, even today. A certain course of action, at first undertaken by some individual or by a number of persons, is repeated and imitated by others; it becomes a usage, it is taken as something which is normal, something which people expect to be done in similar circumstances in the future as in the past, something which ought to be done. In other words it becomes a custom. There is no "tacit agreement": the usage comes into being as the result of a number of unilateral acts. Somebody must have made a beginning, others have followed, and when the usage has been in existence for some time and has become fairly generally accepted, *opinio juris sive necessitatis* arises, so that a custom exists. This is of course a highly compressed account of what happens, and it is far from certain that matters have always proceeded in this way. An edict from some chief or influential person, discussions between members of the community, something resembling legislative measures, may have played a part even in primitive communities, although the memory of it has been lost, and it is the usage which maintains the rule of law. Often it is impossible to know when and why a usage has arisen and when and why it has become a custom.

It may be presumed that custom arises in the international community in a similar way. We must remember that when the modern community of independent states was formed at the beginning of modern times there was already a body of rules of

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law which were to some extent international in character, rules to the development of which as custom not only states but also other corporations and even individuals (nobles etc.) had contributed and which the community of states could take over. But it is obvious that after the modern society of states had been completed, with the result that only states were international persons, only the action of states could contribute to the development of international custom. By "actions of states" in this connection we mean actions by organs which are acting on behalf of a state, governmental authorities whose actions are imputed by international law to the state as state actions. What organs of the state might be involved here? According to the "positivist" school, which regards international customary law as being a result of agreements between states, only those state organs which have the right to represent the state in relations with foreign powers (the head of the state, the foreign minister, in certain cases diplomats and military commanders etc.), can contribute to the development of international custom. But this opinion is undoubtedly fallacious. Since usage is built up by unilateral acts on the part of states, there is no reason why the measures of any state organ whatever should not be able to contribute to the development of international custom; and in fact this is probably the case, at least in principle. T. E. Holland makes the following characteristic comment:

> The ignorance which certain of my critics have displayed of the nature and claims of international law is not a little surprising. Some seem to identify it with treaties, others with "Vattel". ... Most of them are under the impression that it has been concocted by "bookworms", "jurists", "professors" or other "theorists", instead of, in the fact, mainly by statesmen, diplomatists, prize-courts, generals and admirals.[6]

To this it may be added, of course, that not only prize-courts and military commanders but also ordinary courts and civilian officials have contributed to the development of international law by their actions, and also that legislative measures in the field of international relations (territorial waters or rights of aliens, to take a couple of obvious examples) may have the same effect. Here it is a question of national legislation and national courts, and obviously the laws thus arising do not constitute rules of

[6] Holland, *Letters to "The Times" upon War and Neutrality* (1914), p. 105.

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international law any more than the court decisions in question constitute precedents of international law. We recall the opinion of the Permanent Court: "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."[7] These laws, legal decisions, administrative measures etc., have legal significance within the respective municipal systems of law, but from the viewpoint of international law they are pure facts. It is precisely in the capacity of facts that they contribute to the development of international custom, and this happens only if, by being repeated and copied by other states, they come to form part of a general international practice accepted as law in the interrelations of states. It is true that the condition that this practice must be general does not mean that it must have been exercised by all states. This is shown by the fact that international customary law is binding *en bloc* on new states which have not been in a position to exercise practice in the international sphere to any material extent. On the other hand protests made by one or more states against a practice exercised by other states may prevent this practice from developing into international customary law, and states frequently make use of this means. It does not, however, follow from this that a failure to protest would mean an acceptance of measures taken by other states. The rule *qui tacet consentire videtur* does not apply without modification in international law. On the whole it is difficult to draw any conclusion from the fact that a state has taken up a passive attitude. This circumstance is illustrated by an interesting opinion of the Hague Court in the "Lotus" case. It had been maintained by the French Government that the rare occurrence of questions of jurisdiction in cases of criminal responsibility for the collision of vessels proved that states had accepted the principle of the exclusive competence in such cases of the state whose flag the vessel was flying, and that there was thus a positive rule of international law to this effect. The Court said:

> In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found in the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal

[7] Publications of the Permanent Court, Ser. A, no. 7, p. 19.

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> proceedings and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.[8]

On the other hand it also emerges from the Court's opinion that in certain circumstances the omission of states to act may, just as much as their actions, constitute evidence of a rule of international law. The decisive factor seems to be the existence of *opinio juris sive necessitatis.*

At all events it is clear that in certain cases usage is custom, in certain cases it is not, and also that in certain cases usage develops into custom, in certain cases not; but what causes usage to become custom is not perhaps equally clear. It is often said that existence for a certain length of time means that a usage becomes custom, or that such a period is required for that purpose, and it is indeed quite possible that a connection between the *diuturnitas* of the usage and the custom often exists. But this is not always so, as is shown by a case where the coming into being of a rule of international law has been witnessed by the generation now living. There is perhaps reason for dwelling for a moment on this event.

When at the beginning of this century the first practical airplanes were constructed and the possibilities offered by flying for civil and military purposes began to be glimpsed (although scarcely anyone could foresee the enormous development which has since taken place in this field), international lawyers began a lively discussion of the legal status of the air. Naturally the discussion was principally concerned with the question of the powers of states over the air above their territories. For example, could a state forbid and prevent the flight of a foreign airplane over its territory? Marked differences of opinion emerged; some writers proclaimed "the freedom of the air" (by analogy with "the freedom of the sea"), others asserted the complete sovereignty of the state over the air space above it, others again pleaded the sovereignty of the state in combination with the right of aircraft to *innocent passage,* and so on. The debate went on without any agreement being achieved until the First World War broke out. Then the question was solved immediately, as a result of the fact that the majority of states, both belligerent and neutral, issued laws and

[8] Publications of the Permanent Court, Ser. A, no. 10, p. 28.

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ordinances under which flight over their territories was forbidden, or at any rate was made subject to the permission of the state, in a way which showed without any doubt that the state had complete sovereignty over the air space above it. And there the matter has since rested. The question which had been discussed for so long was solved at once when the states themselves took action in the matter and reams of learned writings were rendered fit only for the waste-paper basket.

Here, without any doubt, was a rule of international law, a usage connected with *opinio juris sive necessitatis,* "a general practice accepted as law", and this customary rule had arisen in a few days or weeks. One might perhaps say that the rule had existed in latent form before, that it was only a consequence of the territorial sovereignty of states, and so on, although it was only when war broke out that states had cause to apply it. It is easy to say this afterwards, but why did nobody know about it at the time? A customary rule which is unknown to the subject competent to exercising it can scarcely be said to exist at all. One can perhaps say that it was a new rule of law which appeared ready-formed. That this happened was clearly due to the fact that when war broke out all states at once became aware of the necessity of regulating their air space and possibly closing it to foreign aircraft, and to that extent it was necessity or the common interest of all states which dictated the development of the law. Presumably it is often the case that the suitability or necessity of a certain practice or the general opinion about its suitability, its agreement with the interests of all states or the common interest of the whole society of states, has been the cause of a certain practice becoming a customary rule or has at any rate contributed to the process. But often entirely different factors may have been decisive, for example power relations. It is probable that powerful states have exercised a greater influence over the development of international law than small states. In many cases the coming into being of a rule may be a sign of a kind of state of equilibrium, brought about because the rule has appeared so essential for the interests of a state that the state has been prepared to resort to force, if need be, in order to maintain it, while other states have been too little interested or too weak to oppose it by force. Examples of this are to be found in the development of the law of maritime war, which was always marked by strong differences of interest between belligerent and neutral states but which resulted in a kind of compromise by which the belligerents kept the powers

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which were of real military importance but relinquished those powers which were of minor importance from the military point of view. The actual distribution of power was more important than the opinion of a numerical majority of states. Thus opposition from the strongest naval power, Britain, was sufficient to prevent the rule that neutral convoys were immune from search from becoming a general rule of international law, although it was accepted by practically all the Continental powers. Although the interests and needs of states, the suitability of a certain rule or general conviction of the suitability, justice or necessity of the rule and similar circumstances may, together with many others, enter as motives in the development of international customary law, we should not draw from this the conclusion that rules of international law derive their validity or their character of law from "necessity" or "suitability", from international solidarity or "the general legal consciousness", still less from "the idea of justice" or any other lofty and noble ideas. Then, as regards *opinio juris et necessitatis,* which together with practice is an element which constitutes customary law, this opinion probably means that the rule in question is a rule of law which must be followed, and there is no reason why we should not interpret this view in accordance with its content. In other words it is a result of a development which has given rise to the rule.

The above reasoning seems therefore to lead to the following conclusions:

(1) In certain cases usage gives rise to international customary law, in other cases it does not. But there is no rule of international law, or indeed any rule at all, which determines *when* usage shall give rise to custom or *that* usage shall give rise to custom.

(2) Together with usage (as a purely factual phenomenon) there are a number of other purely factual phenomena, state interests, power factors, general opinion, historical events etc., which in various combinations contribute to the creation of international custom, and custom can even arise without any usage. The coming into existence of a customary rule is an historical process which, in certain cases at least, can be demonstrated by purely historical methods, but there is no rule of law which determines when these factors shall give rise to international custom. All these different factors, like purely factual usage, are material sources of international custom. But as the process is not regulated by law these factors are juridically irrelevant and the so-called material sources of law are not sources of law in a juridical or true meaning.

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(3) When a usage is combined with *opinio juris sive necessitatis* a rule of customary law exists, and it is probably justifiable to say that a usage reflects a customary rule if it is connected with a practically universal *opinio juris*. Can we draw the conclusion from this that *opinio juris* makes a factual usage a rule of law and that *opinio juris* is the "source" of international customary law in a formal sense? Scarcely: *opinio juris* is based on the assumption that a rule is a rule of law and is a result of this circumstance rather than the reverse. For *opinio juris* to be a formal source of law would presume a rule of international law which made it one. But what would such a rule look like? "Act in accordance with your conviction of what is right"? Such a rule bears all the signs of being a moral rule rather than a rule of law, and by its appeal to the individual view of justice it does not correspond even to Brierly's opinion that the moral duty to obey the law is the basis of international law as of all law. It might be possible to assume that there was a rule of international law which deals with the sources of international law and which says that when a usage is connected with *opinio juris* an international custom arises. But such an assumption is scarcely in accordance with reality, since custom can clearly arise without any preceding usage and *opinio juris* is based on the assumption that a rule of law already exists.

We are therefore driven to the conclusion that no source of law in a formal, that is to say proper, sense for international customary law can be pointed to. International customary law simply exists, and that indeed is quite sufficient.[9]

On the other hand it seems justifiable to say that, when a general usage in the international sphere, or state practice, is connected with *opinio juris et necessitatis,* international customary law exists. This is a statement about a fact and as such almost a truism, since a usage of this kind, "a general practice accepted as law", is by definition a custom. The usage or practice *(usus)* connected with *opinio juris* is, then, not a source of law but a criterion, or evidence, of the rule of customary law which it should be possible with the aid of this criterion to establish empirically. But although we have thus certain criteria to follow this is no easy task. International law is state practice and state practice consists of measures by states, but states do not

[9] Ago has presented the theory of the spontaneous origin *(formazione spontanea)* of the rules of law in a very interesting manner (*Scienza,* pp. 78 et seq.).

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always act in accordance with international law. Sometimes the actions of states are breaches of international law and often they are irrelevant to international law in that they belong to the wide area which is not regulated by international law but are, as the phrase goes, matters of domestic jurisdiction. A course of action which conflicts with current international law may be the first step towards a new development of the law. When seeking to find evidence of a rule of international law in the actions of states or their failure to act, it is of decisive importance to determine whether this action or passivity is connected with *opinio juris*. But it is not often easy to know whether the actions of states are dictated by legal viewpoints or by interests, whether they are acting in a certain way because they consider themselves justified or under obligation to act in that way or are acting from entirely different reasons, whether their neglect to act is due to a feeling of obligation or to opportunism; and likewise the attitude of other powers to the measures taken, their way of reacting or failing to react may depend on widely different causes. Their possible failure to react with protests, reprisals etc. may be due to their finding the measures lawful but it may also be due to political reasons, fear of superior force, the existence of alliances or traditional friendships, the hope of some service in return at a later time, etc. In order to trace a rule of customary law from state practice one must therefore not only establish the behaviour of the states as this appears in the government's actions, legislation, judicial decisions etc. but also the motive of the action; and this must obviously be done by historical methods in much the same way as when one is writing diplomatic history, by examining diplomatic correspondence, government declarations, notes exchanged during an international conflict or dispute, and so on. This is a difficult and time-consuming method which may possibly be used by somebody who is carrying on special researches but would be difficult for anyone writing a textbook on international law or for a court having to decide in an international dispute. In practice these would have to content themselves with the subsidiary means which are indicated in Article 38: 1 (*d*) of the Court Statute, that is to say judicial decisions and the teaching of qualified publicists—means which clearly must be used in a critical spirit. However, general international law consists of a comparatively small number of rules which, taken as a whole, are probably well known and generally accepted, although their application in a concrete case may be the subject of different opinions.

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As already pointed out, there are no "tacit agreements" between states which form a basis for customary law. It is precisely the absence of reciprocity—the circumstance that customary rules are binding in themselves without any promise of reciprocity on the part of other states—which makes international custom international law in the proper sense, a law for the international community.

On the other hand, reciprocity is the characteristic feature of international agreements (treaties etc.), whether they are expressly based on a mutual exchange of services or the parties set down in them a uniform rule for their future behaviour in a certain respect. It is true that a distinction has been drawn between these two types of international agreements, in that the latter type are described as "law-making treaties" and only the former as contracts. But the so-called law-making treaties, too, imply mutual undertakings to observe for the future a certain behaviour and are essentially contracts. This, as pointed out above, also applies to the often very important multilateral conventions, adopted during the last few decades at international conferences, which are what most people have in mind when they speak of "law-making treaties". Neither international conferences nor international organizations such as the United Nations have any legislative competence.

The international conventions and international custom referred to in clauses (*a*) and (*b*) of Article 38:1 of the Statute of the International Court are generally supposed to constitute rules of international law (though according to the view presented here only custom is general international law). But in clause (*c*) of the same article the Court is referred to a third type of rules, namely "general principles of law recognized by civilized nations". One may then ask: is this a third "source" of international law or, to put it more accurately, a third type of rules of international law which the Court has the right to apply along with custom and conventions, which together are often said to constitute positive international law? On this question and on the nature of "the general principles of law" there has been a very lively discussion, in the course of which marked differences of opinion have emerged.

What types of "principles of law" are meant in Article 38:1 (*c*) of the Court Statute is, however, shown fairly clearly by the *travaux préparatoires*. In the committee of jurists set up by the League of Nations, which prepared the draft statute of the Permanent Court of International Justice established in accordance

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with Article 14 of the League Covenant, a good deal of apprehension was expressed that owing to the incompleteness of international law the Court would in certain cases be unable to find any rules of law to judge by and that owing to this it would be necessary to pronounce a *non liquet* in these cases. These fears were, it is true, unfounded: if there are no rules of international law a court can always arrive at a decision by rejecting the plea of a claimant as lacking support in international law. In such cases the defendant's position cannot be regarded as in conflict with the law, as it cannot be contrary to rules of law which do not exist. In this connection one of the members of the committee referred to the principle by which the plaintiff must prove his contention under penalty of having his case refused. However, the great majority of the committee held to their belief in the insufficiency of positive international law, which made it necessary for the Court in certain cases to resort to rules of law other than international custom and conventions and the result of this was that the Court was authorized to apply, in addition, the principles of law mentioned in Article 38:1 (*c*) of the Court Statute, "the general principles of law recognized by civilized nations". The minutes of the committee of jurists show that by this was meant principles of law which are recognized by civilized nations *in foro domestico,* i.e. in their municipal law.

To some degree this solution represents a compromise, a middle way: owing to "the gaps in international law" it was felt that the competence of the court could not be confined to making judgments according to positive international law, i.e. according to custom and conventions, but on the other hand it was not designed to give free rein to the law-making activity of the Court and the Court had to content itself with applying principles of law which could be established as common to the municipal law of all civilized nations and were therefore positive law, though not positive international law.

There is nothing intrinsically strange about such a provision. It not infrequently happens that the parties in an international treaty of arbitration call upon or authorize the tribunal to apply certain rules which need not necessarily be in accordance with international law, and the court, whose competence is dependent on the agreement concluded between the parties, then has to act in accordance with it. The competence of the Hague Court also depends on agreements reached between the parties, among them the so-called "optional clause" in Article 36 of its Statute, which

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is nothing but a multilateral treaty of compulsory arbitration. Even if we interpret the provision to mean that the Hague Court (the Permanent Court and its successor, the International Court of Justice) is thereby authorized to apply rules which do not form part of international law, it would not be particularly remarkable, apart from the fact that it proceeds from a fallacious assumption about the existence of "gaps in international law", which might possibly lead to a *non liquet*. The clause has, however, been taken as a basis for considerably more far-reaching opinions, both as regards the nature of international law and as regards the competence of international tribunals with regard to the application of law, and it is really around this that the discussion has revolved.

Together with the opinion that the Hague Court is authorized by Article 38 of its Statute to apply, in addition to custom and conventions, general principles of law which are common to the municipal law of civilized peoples (which is the only conclusion which can be drawn from the clause and its *travaux préparatoires*), the following opinions are found: (*a*) that international law includes, besides custom and conventions, yet another element which is not of a positive law type, viz. the general principles of law, and (*b*) that there is a general rule according to which international tribunals may, together with international custom and conventions, apply rules which lie outside international law and serve to fill in gaps in international law, namely general principles of law. It is clear that these two opinions are mutually incompatible: if the general principles of law belong to international law they cannot serve to fill in gaps in that law.

A leading representative of the idea that the general principles of law form part of international law as a non-positive element is Verdross, who has even made this idea the basis of his whole system. In one of his latest works he expounds the matter by saying that in order to determine the content of the basic norm of international law we must proceed from "jenen Rechtsgrundsätzen welche die Kulturvölker übereinstimmend anerkennen, da sich die Normen des positiven Völkerrechts erst auf Grund des übereinstimmenden Rechtsbewusstseins der Völker herausgebildet haben".[1] Thus it need not even be a question of principles of law which are to be found in the positive law of civilized nations: the principles are to be found in something so nebulous as "the general legal consciousness". Verdross also maintains that "die überein-

[1] Verdross, *Völkerrecht* (2nd ed. 1950), p. 31.

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stimmenden Rechtsgrundsätze der Völker" (to which belongs, among other things, the tenet *pacta sunt servanda)* constitute "eine Positivierung des Naturrechts".[2] The character of naturalism which distinguishes the "general principles of law" is for that matter insisted upon both by the representatives of the modern "renaissance of natural law", who consider that they have evidence in Article 38:1 (*c*) of the Court Statute that international law contains an element of natural law, and by the spokesmen of the positivist approach, who cite the naturalist character of the general principles of law as evidence of the untenability of the view that these principles constitute a third type of rules of international law by the side of the "positive" rules in custom and conventions. Verdross refers to the old international law of the Mediterranean civilization which grew out of the *jus gentium* of antiquity, and points out that the same process was repeated during the Middle Ages, when the new law of nations developed on the basis of the common legal principles of the Christian peoples. There is undoubtedly a kernel of truth in this historical approach. As far as one can tell, modern international law has developed from a kind of medieval *jus gentium,* consisting of rules of law which were common at any rate to the Christian peoples of Western Europe and which were municipal law just as much as they were international law. But this *jus gentium* had the character of custom, and the rules which remained or were developed from it and which formed international law in the modern society of independent states, were also customary in character. That principles which generally occur in the municipal law of civilized nations are also found in international law is therefore only natural, especially as international law has continued to receive considerable accessions from municipal systems of law, particularly Roman law. How are we to conceive of rules of law which belong to international law and are consequently binding on states but are nevertheless not positive law, at least in the sense that they are actually observed, which in this case must mean that they are custom? It appears impossible that rules of law binding on states could exist unless the states themselves had knowledge of their existence and of their binding character as far as they themselves are concerned or, in other words, unless the states were convinced that the rules in question were binding on them. But how are they to demonstrate this conviction otherwise than by following

[2] Verdross, *op. cit.,* p. 13.

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these rules, at least in general? But if they follow a rule in the conviction that it is a rule of law it is then, of course, a customary rule. It appears incredible that a rule could be a rule of law valid for states if they had no knowledge of its existence or if in spite of such knowledge they consistently disregarded it. From this one must draw the conclusion that international law embraces custom (general international law) and conventions, but nothing else. This opinion is also held by the Hague Court, which on one occasion (in its Advisory opinion concerning the nationality decrees issued in Tunis and Morocco) stated that international law —using this expression in its wider sense—embraces customary law and general as well as particular treaty law.[3] Thus the Court does not reckon as international law the general principles of law which it has the right to apply in accordance with Article 38:1 (*c*) of its Statute.

Another view agrees with what, so far as can be judged, is the sense of Article 38 of the Statute, in so far as it presumes that "the general principles of law" do not belong to international law and therefore may be used by international tribunals to fill in the gaps in this law, but in addition it assumes that the tribunals have the right to apply such principles, extraneous to international law, owing to a general rule of law, thus without the parties in the dispute having given an authorization such as exists in Article 38:1 (*c*), which clause is therefore really superfluous. The rule which is alleged to give international tribunals this power is often said to belong to international customary law.

In support of this opinion it is stated that international tribunals have often referred to "general principles of law". It is undoubtedly true that international tribunals have not infrequently referred to or have been authorized to apply general principles of law under various designations (*"les principes généraux de droit"*, *"les principes universellement admis"*, "principles of justice", "principles of universal jurisprudence", *"les principes généraux de la justice et de l'équité"*, etc.). But to the extent that the court has been authorized in an agreement concluded between the parties to apply such principles, one cannot of course speak of a customary rule, and even when arbitral tribunals have had such authorization they have usually judged the case simply in accordance with international law. Even where courts have themselves referred to "general" or "universally recognized" principles,

[3] Publications of the Court, Ser. B, no. 4, p. 23.

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it has been a question of rules which for reasons indicated above are to be found both in international law and in the legal systems of the individual states, and it may therefore have been a rule of international law that the court applied. Cases where an international court or arbitral tribunal has really applied a general principle of law which does not already belong to international law are probably extremely rare.[4] In this connection we may also recall that international arbitral tribunals in former times sometimes conceived their task to be mediators between the parties rather than to reach a strictly legal decision. The term "legal dispute" was not then so strictly defined as it has become since agreements on compulsory arbitration came on the scene and the tasks of international arbitral tribunals, like those of the Hague Court according to the so-called optional clause in its Statute, came to be defined as the settlement of legal disputes, which means that the dispute must be settled in accordance with international law. For when the parties bind themselves to refer *legal disputes* to judicial decision, when in other words they turn to a tribunal in order to get their rights, neither more nor less, they are asking for what is due to them in accordance with the law, and the tribunal, whose powers are determined by the terms of reference stated by the parties, must act in accordance therewith. The tribunal cannot be regarded as acting in accordance with the intentions of the parties if it seeks the bases of a judgement outside the boundaries of existing law, unless, that is, it has obtained the authorization of the parties to do so. As the competence of the tribunal is based exclusively on the agreement reached between the parties it appears impossible that there should be any rule of international law under which the tribunal would be able to judge according to rules which had not been envisaged by the parties, rules which are not binding on states in their mutual relations—for if they were they would of course be part of international law—and of the importance of which for their relations with each other the parties may be quite unaware.

One is therefore forced to the conclusion that Article 38:1 (*c*) of the Court's Statute is a special provision by which the states adhering to the Statute have authorized the Hague Court to apply in the disputes that they refer to it principles of law which are

[4] Kopelmanas, "Quelques réflexions au sujet de l'art. 38, 3°, du Statut du CPJI", XLIII, *Revue générale de droit international public* 1936, pp. 285 et seq.; "Essai d'une théorie des sources formelles du droit international", XXI, *Revue de droit international* 1938, pp. 100 et seq.

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generally recognized in the municipal law of civilized nations. But such a special provision does not justify any further conclusions either regarding the nature of international law or regarding the powers possessed in general by international tribunals.

Sometimes we hear references to "principles of international law" (*"les principes du droit international"*). These principles are quite simply rules of international law, rules belonging to general international law, or in other words international custom. This is the opinion of the Hague Court also: "The Court considers that the words 'principles of international law', as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States."[5] If there is any difference between these principles and other rules of international law it could only be that the "principles" are rules of greater importance and scope. Thus the difference is entirely relative. In certain cases one may set up a kind of hierarchy of rules in such a way that a number of rules refer to special cases of a matter which is regulated by a principle of general international law. For example, the detailed rules to be found in the XIIIth Hague Convention, 1907, concerning the right of warships of belligerent nations to enter and remain in neutral ports constitute special applications of the general principle that neutral territory may not be used as a base for operations of war, and so on. Here, when it is a matter of determining the content of international customary law, a problem arises. In order to decide what is international custom it is necessary to take as the starting point the conduct of states in special cases, and to a certain extent it then becomes a matter of judgment how one is to formulate the rule which may be derived therefrom. One finds, for example, that, in wartime, neutral states forbid the arming and egress from their ports of vessels which are suspected of being intended for participation in hostilities and one also finds that they issue these prohibitions because they regard it as their duty to do so under international law. Is this practice an expression of a rule based on a belief that neutral states are under the obligation to forbid the rearming etc. of such vessels, or of a general principle that a neutral state has the duty of preventing its territory being used as a base for operations of war? It is obviously impossible in a purely logical way to proceed to general rules from the more special rule. On the other hand it ought

[5] The Permanent Court in the Lotus Case, Publications of the Court, Ser. A, no. 10, p. 16.

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to be possible to draw certain conclusions concerning the meaning which states attach to their measures, from diplomatic correspondence, declarations of governments, notes of protest and replies thereto etc., and perhaps also by comparing the practice of states in this case with their practice in other neutrality questions. As always when it is a matter of determining the content of international customary law, the problem is historical in nature.

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