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"GENERALLY ACCEPTED" INTERNATIONAL RULES

Louis B. Sohn*

Ted Stein was one of my most brilliant students at Harvard some ten years ago, and in his last year there I asked him to assist me in the preparation of my Hague lectures on the settlement of disputes relating to the interpretation and application of treaties. His special assignment was to check almost 5,000 treaties registered with the League of Nations, to find all the clauses on the settlement of disputes, and to provide a methodology for their classification and analysis. He prepared an excellent file of the relevant clauses with an elaborate retrieval system for each important element as well as thoughtful memoranda on the critical issues.[1] Thereafter, I followed with great interest his career in the Department of State and later in academia and, as I expected, he fufilled his early promise of becoming a scholar able to throw light on a wide range of topics. As his last contribution before his untimely death related to the formation and application of an important principle of customary international law,[2] I thought it appropriate to continue his research by discussing a related area mentioned in his paper.[3]

It is universally agreed that "usages generally accepted as expressing principles of law"[4] constitute one of the main sources of international law.[5] It is the purpose of this paper to investigate how a rule becomes "generally accepted" as a part of customary international law. There are several different ways in which international law deals with this subject. Ordinarily, a rule is considered generally accepted when it is supported by constant practice of states acting on the conviction that the practice is obligatory.[6] Alternatively, an international agreement sometimes incorpo-

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1. *See* Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, in 150 HAGUE ACADEMY, RECUEIL DES COURS 273, n. 1 (1976).

2. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L. J. 457 (1985).

3. *See id.* at 472, 476 ("generally applicable international law"; "generally applicable rule of customary international law").

4. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 18 (Judgment of September 7), *cited by* Stein, *supra* note 2, at 459, n.5.

5. In a similiar spirit, the Statute of the International Court of Justice refers to "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, art. 38, para. 1b. For text of the Court's statute, see Statute of the International Court of Justice, 59 Stat. 1055; T.S. 993.

6. *See* J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 61 (C. Waldock 6th ed. 1963) (the existence of an international custom is established by "a

rates certain rules as ones considered to be generally accepted;[7] or an agreement is considered as declaratory of certain generally accepted rules binding on all states.[8] In addition, international agreements may also provide that rules to be adopted by an international organization shall be considered as generally accepted (unless a state expressly opts out).[9] Occasionally, an international agreement that is not yet in force may become binding on all states because of its adoption by a consensus, signifying its general acceptance.[10] Finally, a resolution of an international organization, adopted by consensus, or a nearly unanimous decision, may declare that a rule has become generally accepted.[11]

One of the major elements determining the obligatory character of a particular rule of customary international law is its generality. As Brierly once noted, "what is sought for is a general recognition among states of a certain practice as obligatory."[12] It is not clear how generally accepted the practice of the states must be, but "universality is not required."[13] Two main factors need to be taken into account: first, express acceptance of the rule by a reasonable number of states belonging to various regional groups and representing different political, economic and ideological approaches; second, aquiescence by other states.[14] The fact that a few states object to the establishment of a new rule or to a revision of an old one does not prevent the birth of the rule. At most, a persistent objector—as discussed by Ted Stein[15]—is not bound by the rule; that state cannot, however, prevent the emergence of the rule binding all non-objecting states.

In some cases, the general acceptance of a rule is strengthened by its endorsement by a multinational treaty. In particular, several recent instruments declare certain "generally accepted international rules" or "standards" or "regulations" as binding upon parties to these instruments, or as

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general recognition among states of a certain practice as obligatory").

7. For instance, the 1958 Convention on the High Seas states in its preamble that its provisions are "generally declaratory of established principles of international law." Convention on the High Seas, April 29, 1958, 13 U.S.T.S. 2312, 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 82.

8. *See* President Reagan's statement, *infra* note 31.

9. *See* T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 76–85 (1969); Gutteridge, *Notes on Decisions of the World Health Organization*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 277–84 (S. Schwebel ed. 1971).

10. *See* decisions cited in Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U. L. REV. 271, 276–79 (1985).

11. *See* Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 33-35 (1965). *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14–15, 14 n.5 (3d ed. 1979).

12. *Supra* note 6.

13. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (3d ed. 1979)

14. *See* Texaco Overseas Petroleum et al. v. Libyan Arab Republic, International Arbitral Tribunal, 17 I.L.M. 1, 27-31 (1978).

15. Stein, *supra* note 2, 458.

establishing the norms which parties are entitled to apply to other parties.[16] Thus, parties to the United Nations Convention on the Law of the Sea, agreed that "[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply with . . . all generally accepted international regulations relating to the prevention of collision at sea," even if the flag states of these ships did not ratify the convention to which those regulations are annexed. This method of incorporation by reference dispenses with the ratification of the documents referred to in the basic convention and broadens the circle of states to which these documents apply. A state's consent to these documents is not absent; it is given indirectly by accepting the new convention.

Some international instruments dealing with matters of a highly technical nature, which need to be frequently amended because of new technological or scientific developments, provide for changes by an international organization which become binding on parties to the basic convention at a specified date, except for those states which notify the organization before this date that they cannot accept the new regulations in whole or in part. All states that keep silent become bound, without any further action on their part.[17] These rules thus become generally accepted, without need for specific ratification by any party to the basic convention. The consent is thus given in advance, subject to the right to opt out.

Sometimes an international convention proclaims that it is declaratory of preexisting rules of international law. If there is general consensus that such a statement is not self-serving, but reflects the fact that the convention codifies prior practice, making the rules clearer and more precise, the rules contained in that convention are then considered as binding not only on states that are parties to these conventions but also on all other states. Thus, the 1958 Convention on the High Seas specifies in its preamble that its

16. *See e.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 21, paras. 2 and 4; art. 39, paras. 2a and b; art. 41, para. 3; art. 58, para. 3; art. 60, paras. 3, 5 and 6; art. 94, paras. 2a and 5; art. 211, paras. 2, 5 and 6c; and art. 236, para. 1a. U.N. Doc. A/CONF. 62/122 (1982); 21 I.L.M. 1261 (1982).

17. *See, e.g.*, Convention on International Civil Aviation, Dec. 7, 1944, arts. 12, 37, 38, 90, 61 Stat. 1180; T.S. No. 1591, 15 U.N.T.S. 295. Concerning the implementation of these articles see 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 12 (1968). *See also* T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 57–85 (1969). For a recent example of this kind of a provision, see Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980 T.I.A.S. No. 10240, which in article IX(6) provides that conservation measures adopted by the commission become binding upon all parties 180 days after notification, except that, if a Member of the Commission, within 90 days after notification, "notifies the Commission that is is unable to accept the conservation measures, in whole or in part, the measure shall not, to the extent stated, be binding upon that member." *Id.*

provisions are "generally declaratory of established principles of international law."[18] Even without such a declaratory statement, some international treaties, or at least certain of their basic provisions, have been accepted as generally binding formulations of customary international law. Thus, the basic obligations under the Charter of the United Nations—to settle international disputes by peaceful means and to refrain in international relations from the threat or use of force—have been accepted not only by states members of the United Nations, but have been relied upon also by non-member states, or have been imposed upon them.[19] In the *North Sea Continental Shelf Cases,*[20] the International Court of Justice held that several articles of the Convention on the Continental Shelf were regarded as "reflecting, or as crystallizing, received or at least emergent rules of customary international law."[21]

Once this had been accepted, it proved relatively easy for the International Court of Justice to hold that a rule that is conventional in origin can pass into the general *corpus* of international law and be accepted as such by the *opinio juris* and thus "become binding even for countries which have never, and do not, become parties to the Convention."[22] The court added that this "constitutes indeed one of the recognized methods by which new rules of customary international law may be formed."[23]

The issue then had to be considered whether one needs to wait for the treaty to come into force in order for its customary law to become binding. That issue first arose with respect to the Convention of the Law of Treaties, which was adopted in 1969 but came into force only in 1980.[24] The International Court of Justice already in 1971 found it possible to declare that the rules laid down in that convention "concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote)

18. *See supra* note 7.

19. U.N. CHARTER art. 2, paras. 3 and 4. For text of the Charter, see 59 Stat. 1031, T.S. 993. The Charter also contains the "revolutionary" provision that the United Nations shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be neccesary for the maintenance of international peace and security. U.N. CHARTER art. 2, para. 6. *See* Comment, *Revolutionary Creation of Norms of International Law,* 41 AM. J. INT'L L. 119, 123–26 (1947)

20. North Sea Continental Shelf (W. Ger. v. Den. and Neth.), 1969 I.C.J. 3, 39 (Judgment of Feb. 28).

21. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471; T.I.A.S. No. 5578; 49 U.N.T.S. 311.

22. North Sea Continental Shelf Cases, 1969 I.C.J. at 41.

23. *Id.* For an excellent description of the process of "coalescence" through which a genuine *communis opinio juris* has come into being in this instance, see North Sea Continental Shelf, 1969 I.C.J. 3, 156-58 (Vice President Koretsky, dissenting).

24. Vienna Convention on the Law of the Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, *reprinted in* 63 AM. J. INT'L L. 875 (1969).

may in many respects be considered as a codification of existing customary law on the subject."[25]

The Court had to face the issue twice in connection with the United Nations Convention on the Law of the Sea.[26] In a case decided at the beginning of the Third United Nations Convention on the Law of the Sea, at which this convention was drafted, the Court stated that it was premature to examine the proposals submitted to that conference, as they "must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law"; the Court added that it cannot "anticipate the law before the legislator has laid it down."[27] In a later case, however, when the drafting of the convention was far advanced but when the convention was not yet signed, the Court stated that, even if the parties had not asked it (in the special agreement submitting the case to the Court) to base its decision in part on "the new accepted trends in the Third United Nations Conference on the Law of the Sea," it would have taken *proprio moto* account of the progress made by the conference.[28] The Court explained that "it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law."[29]

The Court is thus willing to pay attention not only to a text that codifies preexisting principles of international law but also to one that crystallizes an "emergent rule of customary law." It seems, therefore, that once a principle is generally accepted at an international conference, usually through consensus,[30] a rule of customary international law can emerge without having to wait for the signature of the convention. The fact, however, of the convention signature by a large number of states[31] confirms

25. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (Advisory opinion of June 21).

26. *Supra* note 16.

27. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 23–24 (Judgment of July 25).

28. Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 38 (Judgment of Feb. 24).

29. *Id.* at 38.

30. According to Article 161(8)(e) of the United Nations Convention on the Law of the Sea "consensus" means the absence of any formal objection. *See supra* note 16.

31. For instance, the United Nations Convention on the Law of the Sea was signed by 159 states. Although the United States did not sign the convention because of its opposition to provisions relating to deep seabed mining, President Reagan announced on March 10, 1983, that the United States accepts other provisions of the convention "which generally confirm existing maritime law and practice and fairly balance the interests of all states." U.S. Oceans Policy: Statement by the President, 83 DEP'T ST. BULL. No. 2075, at 70 (1983).

that the provisions of the convention have been generally accepted by the overwhelming majority of the members of the international community, and constitutes clear evidence that there is an *opinio juris* that these provisions are generally acceptable, and that indeed they have been generally accepted. Later ratification of the convention by many states further confirms this fact of general acceptance not only of the general principles of the convention but also of all its detailed provisions designed to implement these principles.

Apart from drafting multilateral law-making conventions, international organizations in recent years have developed other methods for updating customary international law. In particular, the United Nations—in the General Assembly of which practically all the states of the world are now represented—can supplement the treaty-making process by adopting declaratory resolutions which, if accepted by an overwhelming majority of the General Assembly, usually by consensus or by an almost unanimous vote, can also constitute "generally accepted" principles of international law. In this way the General Assembly has been able to adopt basic international instruments on human rights,[32] to elaborate the basic principles which govern relations between states,[33] to define agression,[34] to develop the rules governing the exploration and use of outer space,[35] to confirm the rules for the protection of the environment,[36] and to establish

32. Universal Declaration of Human Rights, G. A. Res. 217(A), 3 U.N. GAOR Res., at 71–77, U.N. Doc. A/810 (1948). It was implemented by the two International Covenants on Human Rights and some fifty other instruments. Human Rights: A Compilation of International Instruments, U.N. Sales Pub. No. E.83.XIV.1 (1983). As the Court of Justice of the European Communities has stated, "fundamental human rights form an integral part of the principles of law, the observance of which [the Court] ensures," using as guidelines "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories." J. Nohl, Kohlen-und Baustoffengrosshandlung v. Commission of European Communities, 1974 E. Comm. Ct. J. Rep. 491, 507 (Judgement of May 14).

33. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970). It contains a far-reaching implementation of the fundamental principles embodied in articles 1 and 2 of the Charter of the United Nations which impose upon all states the following duties: to refrain from the threat or use of force, to settle their international disputes by peaceful means, to co-operate with one another, to promote the realization of equal rights and self determination of people, to respect the principle of sovereign equality, and to fulfil in good faith the obligations assumed by them under the Charter.

34. Definition of Agression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

35. Declaration of Legal Principals Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A/5515 (1963).

36. Declaration on the Human Environemnt, in REPORT OF THE UNITED NATIONS CONFERENCES ON THE HUMAN ENVIRONMENT, U.N. Doc. No. A/CONF.48/14 at 2-5 (1972), noted with satisfaction in G. A. Res. 2994, 27 U.N. GAOR Supp. (No. 30) at 42, U.N. Doc. A/8730 (1972). Concerning the law-making character of this declaration, see Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423 (1973)

institutions for promoting international trade between the developed and the developing countries.[37] All these documents have by now been generally accepted even if at their birth there have been some doubts about their normative character.[38] Frequently, states which were originally reluctant to accept these instruments have later become their most vociferous supporters, relying strongly on these instruments in condemning their violations by other states.[39] Consequently, as the Secretariat of the United Nations explained, a declaration "may be considered to impart . . . a strong expectation that Members of the international community will abide by it," and "in so far as the expectation is gradually justified by State practice, a declaration' may by custom become recognized as laying down rules binding upon States"[40] The general rule, of course, applies to all such declarations: to become binding they must be generally accepted as legally binding by the members of the international community, either at the time of their adoption or by subsequent practice of a reasonable number of states, evidencing their willingness to conform to the principles contained in a declaration and by general acquiescence by other states.

It has been noted in this paper that the methods of developing new rules of customary international law have greatly changed since the Second World War. These changes have not been imposed on states by any external authority; they are the result of a voluntary acceptance by states of the need to adapt the methods of law-creation to the needs of the rapidly growing and changing world community. Any prior restrictions on the law-creating process were self-made, and they can be changed by the very method that established them in the first place. The rules contained in Article 38 of the Statute of the International Court of Justice[41] were appropriate at the time of their adoption, and they are flexible enough to allow new ways of ascertainment of the existence of a rule of customary international law. States are free to decide at any time, by the same method by which customary law is made, i.e., by "general practice accepted as law," that the

37. Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly, G.A. Res. 1995, 19 U.N. GAOR Supp. (No. 15) at 1, U.N. Doc. A/5815 (1965). One of the principal duties of this United Nations organ is to "formulate principles and policies on international trade and related problems of economic development." *Id.*, para. II.3(b). *See, e.g.*, Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 35 U.N. GAOR Annex (Agenda Item 61(c)) U.N. Doc. A/C.2/35/6 (1980), *adopted by* G.A. Res. 35/63, 35 U.N. GAOR Supp. (No. 48) at 123, U.N. Doc. A/35/48 (1980)).

38. *See*, e.g., Sohn, *A Short History of United Nations Documents on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: EIGHTEENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 39, 67–71 (1968).

39. *See*, Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 19–20 (1978)

40. Memorandum of the Office of Legal Affairs of the Secretariat, U.N. Doc. E/CN.4/L.610, para. 4, (quoted in 34 U.N. ESCOR Supp. (No. 8) at 15, U.N. Doc. E/3614/Rev.1 (1962)).

41. *Supra* note 5.

methods of formulating new rules of law which were developed in recent years are legitimate methods of law-creation. There is no rule of international law preventing all states meeting in a conference, or an assembly of an international organization, to agree that henceforth they will use certain methods of law-creation and will consider themselves bound by the rules established through that method. In fact, as shown above, they have actually done this very thing explicitly in several instances, and it is quite likely that the use of such new methods will increase in the future.

In his article cited above, Ted Stein has noted this "great change in the dominant mode of identifying generally binding rules of international law."[42] His article was devoted to finding a way to accommodate the lone "persistent objector," who either does not like a new method or a new rule elaborated through such method. He was right that the easier it becomes to develop new principles and rules of international law, the more a safety valve is needed to safeguard national sovereignty and vital state interests. A state needing time to adapt to a new situation can obtain temporary dispensation from a new rule by lodging its objections and explaining the reasons for them. Later, by "mutual accommodation, reasonableness and cooperation,"[43] a solution can be found to enable the state concerned to submit to the rule, if necessary, with some generally acceptable modifications. *Ex concordia jus oritur.*

42. Stein, *supra* note 2, at 464.

43. *See* Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 at 23.