Fairness in International Law and Institutions

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feared that to do otherwise would open the floodgates of uncontrollable global change and conflict. But the fairness discourse does not invariably favor stability. In legal terms, even the sanctity of contract may be challenged by claims of 'unjust enrichment' and that of treaties ('*pacta sunt servanda*') by claims of justice based on 'impossibility of performance' or 'fundamental change of circumstance.'[44]

The 'social conception' of law as structured discourse does not solve these order—change tensions. The law tries to be fair for utilitarian and moral reasons, but just as producing a 'good' Bordeaux wine may lead to intense difference of opinion as to how much (if any) Merlot to add to the Cabernet, so in seeking to decide what is fair, there may be differences about the optimum proportions of legitimacy and justice. That tension can be managed as long as its elements are understood.

[44] For incorporation of notions of superseding 'justice' in the Vienna Convention on the Law of Treaties, 1978, see Arts. 44(3)(c) ('unjustly'); 46(2) ('good faith'); 53 ('conflicts with a peremptory norm'); 60(1) ('material breach'); 61(1) ('impossibility of performance'); and 62(1) ('fundamental change of circumstances').

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Legitimacy and Fairness

An extensive recent empirical study of the factors which encourage individuals in American communities to obey the law, reaches a conclusion which is poignantly relevant to the community of nations:

> If people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligation to follow legal rules. They will feel personally committed to obeying the law, irrespective of whether they risk punishment for breaking the law. This normative commitment can involve personal morality or legitimacy. Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior.[1]

In the preceding chapter it was argued that fairness is a composite of two independent variables: legitimacy[2] and distributive justice.[3] Fairness discourse is the process by which the law, and those who make law, seek to integrate these variables, recognizing the tension between the community's desire for both order (legitimacy) and change (justice), as well as the tensions

[1] Tom Tyler, *Why People Obey the Law*, 3–4 (1990).

[2] For a different definitional approach, see David Beetham, *The Legitimation of Power* (1991). There is a large and rapidly growing legal literature on legitimacy in the global literature. Recent examples include: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); David Kennedy, *International Legal Structures* (1987); D. Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law,' 4 Eur J Intl L 1 (1993).

[3] For a good discussion of the difficulty encountered in any abstract attempt to define 'justice' across cultural barriers, see David Miller, *Social Justice* (1976), especially the discourse 'On Three Types of Justice.' Nevertheless, in the deontological world of international diplomacy, justice-based claims are in practice made and acceded to without an agreed *a priori* definitional guide to the content of 'justice.' This can be dismissed as a mere rhetorical ploy, a figure of advocates' speech, but as later chapters of this work seek to demonstrate, fairness claims based on the legitimacy and/or distributive justice of the claim are remarkably effective in persuading states to do what they ought to do, rather than whatever they can get away with. This suggests, empirically, that the capacity of legitimacy and justice to pull towards voluntary agreement (with a proposed text) or compliance (with an actual text) is based on unexamined mutual assumptions about these components of fairness that make them not only admissible but effective in the making and applying of laws. At the very best, the introduction of fairness discourse into a treaty negotiation, or into litigation, encourages a response based on a different view of the requisites of fairness. It rarely leads to a blank stare followed by the question 'What has fairness got to do with the matter?' To the contrary (expounding the view that 'justice' is a useless, subjective and misleading notion) see ch. 5 of John Stuart Mill, *Utilitarianism*.

between differing notions of what constitutes *good* order and *good* change in concrete instances.

In this chapter we shall define further the legitimacy component of fairness. The degree to which a rule is perceived as legitimate is itself affected by certain intrinsic properties both of that rule and of the process by which it was made, and the process of its interpretation by judges and officials.[4] Legitimacy is that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with 'right process.'

1. LEGITIMACY, COMMUNITY, AND THE SOCIAL CONTRACT

As noted in Chapter 1, fairness discourse presumes community. Legitimacy can only be accorded to rules and institutions, or to claims of right and obligation, in the circumstance of an existing community. It is only by reference to a community's evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court's judgment, or a citizen's claim on a compatriot, or a government's claim on a citizen, is *legitimate*. When it is asserted that a rule or its application is legitimate, two things are implied: that it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote voluntary compliance by those to whom it is addressed. It is deserving of validation.

International law, even more than any individual state's legal system, needs this element of promotion of voluntary compliance because of the relative paucity of modes of compulsion. In any community, however, whether national, local, or international, the sense of community is buttressed by a high level of voluntary rule compliance. Legitimation thus serves to reinforce the perception of *communitas* on the part of community members.

If legitimacy validates community, community must be present for legitimacy to have content. There must be right process as defined by a community. To understand legitimacy it is necessary to recapitulate the wellspring of association, beginning with the notion of a social contract. The social contract is by no means the only basis for an associational *polis*; family is another example. However, the social contract is the only associational theory relevant to the inter-state system, and thus warrants our attention. The same social needs which propelled Greek city-states, the people of Prussia, and the inhabitants of the thirteen American colonies to a common association also compel the states of the world at the end of the second millennium. While most literature about the social contract addresses

[4] Thomas M. Franck, *The Power of Legitimacy Among Nations*, 41–195 (1990).

the formation of a community by persons, contractarian theory is also readily applicable to, and influential in, the evolution of a community of states. Beginning with Hobbes' *The Leviathan*,[5] social contract theory was progressively refined by Locke's *The Second Treatise of Civil Government*,[6] Rousseau's *Social Contract*,[7] and Kant's *The Foundations of the Metaphysics of Morals*.[8]

Locke, like Hobbes, asserted as his starting point that persons are by nature free, equal, and autonomous beings.[9] From this he inferred that restrictions on persons' liberty and autonomy can only be the consequence of their agreement to empower a common authority. This is precisely how Grotius and succeeding generations of international lawyers have described states in the global system: free, equal, and autonomous. Locke observed, however, that persons agree to empower common authority in order to ensure that common concerns for safety and peace can be satisfied by collective protective measures. Once a person joins such an association of politics, he or she submits to the determinations of the community made in accordance with its institutional processes.[10] Rights are thus defined, acquired, and protected through the legitimate and legitimating processes of the community. As a theoretical framework this is largely applicable to states, which join in common protective measures and institute institutional processes to secure safety, peace, and the promotion of prosperity.

A century after Locke, Rousseau described the social compact as 'a form of association which defends and protects with all common forces the person and goods of each associate.'[11] This social contract, he argued, gives back to each member of the community, in somewhat altered form, that which each member has freely decided to delegate to it. Each acquires the rights which each deeds to all others. All thereby gain the equivalent of everything which they give up. In addition, each one gains an augmented collective force for the preservation of what he or she has.[12] Implicit in the evolution from 'state of nature' to civil society is that each must learn to act on principles: 'to consult reason before listening to inclination.'[13]

[5] Thomas Hobbes, *The Leviathan* (1651), reprinted in 3 *The English Works of Thomas Hobbes* (W. Molesworth ed., 1841).

[6] John Locke, *Two Treatises of Government* (1690) (W. Carpenter ed., 1955).

[7] Jean-Jacques Rousseau, *On the Social Contract* (1762) (D. Cress trans./ed., 1983).

[8] Immanuel Kant, *The Foundations of the Metaphysics of Morals* (1785) (T. Abbott trans., 1873), reprinted in *The Essential Kant*, 295–360 (A. Zweig ed., 1970).

[9] Locke describes our natural condition—i.e. our status as free and equal beings—as the state of nature. It is a state of perfect freedom, whereby we order our actions and dispose of our possessions as we see fit. It is a state of equality, 'wherein all the power and jurisdiction is reciprocal' and creatures of the same species are 'equal one amongst another without subordination or subjection.' See Locke, *supra* note 6, 118. The state of nature is only bound by the laws of nature, which proscribe each person from divesting another of the inalienable rights to life, liberty, and property. Ibid., 119–20.

[10] Ibid.

[11] Rousseau, *supra* note 7, 24.

[12] Ibid.

[13] Ibid., 27.

Kant also takes up the notions of contract and of principled conduct as a hallmark of a civil society. Persons commit themselves to act in accordance with general principles which are commonly, intuitively recognized and which must not be self-contradictory.[14] In effect, each individual agrees, as the price of association, to 'act according to that maxim which you can at the same time will to be a universal law.'[15] This 'categorical imperative' enables the individual to coexist with others in a community in accordance with mutually recognized coherent principles of general application.[16]

Thus was the idea of common association for protection, peace, and prosperity joined to notions of principle, reciprocity, and law which made the association not only generally beneficial but also fair to its members. Historically, contractarianism emphasized legitimacy in defining a community of rights and of the means to assert and defend those rights.

It is self-evident that contractarian theory readily explains the origins, if not the modern nature, of international law and organization. States, too, have been seen by international legal theory as free and autonomous international 'persons' associating for limited utilitarian purposes in a community to which they delegate certain powers so as to secure, in return, the benefits of peace, order, and mutual support. Such pooling of certain incidents of sovereignty, international legal thinkers have traditionally averred, occurs in the circumstances, and to the extent, of freely-given assent. Moreover, each state in recognizing the rights of all others gains credible recognition of its own rights. From this it follows that states, like persons in the state of nature, are equal in their 'statehood,' which is restrained only to the extent that they have agreed voluntarily to be associated in a common enterprise and have defined the limits on their rights and autonomy in a reciprocal fashion. As the Permanent Court of International Justice said in the *Lotus* case: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.'[17] Professor Henkin has summarized this historic view in his 1989 General Course: 'States make law by consent, by agreement. Inter-State law is made, or recognized, or accepted, by the "will" of States. Nothing becomes law for the international system from any other source.'[18]

This historic approach to sources of international law seems a good starting point for any discussion of legitimacy. If legitimacy is 'right process' then process analysis must take account of these contractarian underpinnings. Although the sweeping statements of the Permanent Court in 1927 and of Professor Henkin in 1989 are not beyond critique in the light of recent practice, both nevertheless make clear the basic principle that state consent is the condition historically deemed necessary, but not necessarily sufficient, for any demonstration of rule legitimacy.

A second, concomitant, historically recognized principle is that once consent has been given, the consenting state is bound to act in accordance with that to which it has agreed (*pacta sunt servanda*). Logically, however, this principle presents a conundrum: the obligation of *pacta sunt servanda* itself cannot be derived from state consent. This, in turn, suggests that the 'right process' of the community of states, as also of persons, must posit another basis of common obligation, another 'source' of legitimate authority. Here again, analogies can be drawn with domestic legal theory, particularly to the jurisprudence of H. L. A. Hart who, moving beyond Locke and the early contractarians, identified membership in a community as entailing the fundamental associative obligation to abide by the norms which define that community. Chief among these, in the community of states as in a nation of persons, is the obligation to respect legal commitments.[19] In Hart's view, the consent of a member of a community to a particular rule or exercise of authority is not necessary in a strictly contractarian sense but may be assumed, at least in matters pertaining to common governance, as an implied condition of membership of the community.

So far we have considered four paradigms of 'right process', operating principles which legitimate the international system of rules and rule-making. These four 'rules about rules' are: (1) that states are sovereign and equal; (2) that their sovereignty can only be restricted by consent; (3) that consent binds; and (4) that states, in joining the international community, are bound by the ground rules of community. Once a state joins the community of states (today an inescapable incidence of statehood) the basic rules of the community and of its legitimate exercise of community authority apply to the individual state regardless of whether consent has been specifically expressed.

[14] For an explication of the categorical imperative see Kant, *supra* note 8, 317–24.
[15] Ibid., 324.
[16] For a discussion of the relevance of John Rawls' Theory of Justice to the 'society' of states, see A. D'Amato, 'International Law and Rawls' Theory of Justice,' 5 Denver J Intl L & Poly 525 (1975).
[17] The *Lotus* case (*France* v. *Turkey*), PCIJ, Series A, No. 10 (1927), 18.
[18] Louis Henkin, *International Law: Politics, Values and Functions*, 216 Recueil des Cours 46 (1989: 4).
[19] H. L. A. Hart, *The Concept of Law*, 208–31 (1961); Ronald Dworkin, *Law's Empire*, 195–202 (1986).

2. THE INDICATORS OF LEGITIMACY

In the preceding section we examined some theories of the origins of community and its close relation to the formation of associative principles: in H. L. A. Hart's terms, the community's creative formation around 'unifying secondary rules of recognition.'[20] In both mature domestic communities and in the emergent international community, these secondary rules determine and *legitimate* the processes and primary rules by which a community regulates itself. As Professor David Caron has pointed out, an important aspect of these rules about rules is that they reinforce the associative urge by promoting a belief in the fairness of the process by which specific laws are made and applied.[21]

We shall now examine the legitimacy of the primary rules, the ordinary laws, whether made by legislatures, bureaucrats, judges, or plebiscites, which the rule-making process of the community generates. Obviously, rules made in violation of the community's secondary rules of reference, for example by a body or functionary not duly authorized to make such rules by the community's constitutive code, will be perceived as lacking legitimacy. However, a rule's conformity with associative secondary rules is only one of the determinants of that rule's legitimacy. Each rule, whether a law of the state or a customary law or treaty of the international community, is likely to be perceived as more or less legitimate in accordance with four variables. These four indicators of legitimacy are: *determinacy*, *symbolic validation*, *coherence*, and *adherence*. Measuring the legitimacy of a rule is not a purely theoretical exercise. The extent to which any rule exhibits these qualities will determine its legitimacy.[22] The more plausible a community's perception of a rule's legitimacy, the more persuasive that rule's claim to fairness, the stronger its promotion of compliance, and the firmer its re-enforcement of the sense of community.

a. Determinacy

Textual determinacy is the ability of a text to convey a clear message, to appear transparent in the sense that one can see through the language of a law to its essential meaning. Rules which have a readily accessible meaning

[20] Hart, ibid., 209.

[21] Professor Caron puts it thus: 'There is . . . a forward looking aspect to legitimacy in that legitimacy also is a property of a rule or rule-making institution which itself solidifies the rule or encourages recourse to the rule-making institution.' David Caron, 'The Legitimacy of the Collective Authority of the Security Council' (Ms. 1993).

[22] This argument is developed *in extenso* in Thomas M. Franck, *The Power of Legitimacy Among Nations*, chs. 4–11 (1990).

and which say what they expect of those who are addressed are more likely to have a real impact on conduct.

To illustrate the point, let us compare two textual formulations defining the boundary of the underwater continental shelf. The 1958 Convention places the shelf at 'a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.'[23] The 1982 Convention on the Law of the Sea, on the other hand, is far more detailed and specific. It defines the shelf as 'the natural prolongation of . . . land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured,' but takes into account such specific factors as 'the thickness of sedimentary rocks' and imposes an upper limit: not [to] exceed 100 nautical miles from the 2,500 metre isobath,' which, in turn, is a line connecting the points where the waters are 2,500 meters deep.[24] The 1982 standard, despite its complexity, is far more determinate than the elastic standard in the 1958 Convention, which, in a sense, established no rule at all. Back in 1958, the parties simply covered their differences and uncertainties with a formula whose content remained in abeyance pending further work by negotiators, courts, and administrators and by the evolution of customary state practice.[25] The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.

Indeterminacy, however, has costs. Indeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify noncompliance. Conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule towards compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve conflicts between the demands of a rule and their desire not to be fettered by 'interpreting' the rule permissively. A less elastic determinate rule is more resistant to such an evasive strategy than an indeterminate one.

A good example of this consequence of determinacy is afforded by the litigation in the 1980s between Nicaragua and the United States heard in

[23] Convention on the Continental Shelf, Art. 1, Apr. 29, 1958, 15 UST, 471, TIAS No. 5578, 499 UNTS 311.

[22] United Nations Convention on the Law of the Sea, Art. 76, opened for signature Dec. 10, 1982, UN Doc. A/CONF.62/122, reprinted in The United Nations, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982).

[25] For a legislative history and analysis of the provisions of the 1958 Convention see M. M. Whiteman, 'Conference on the Law of the Sea: Convention on the Continental Shelf,' 52 Am J Intl L 629 (1958).

the International Court of Justice. From the moment it became apparent that Nicaragua was preparing to sue the United States, State Department attorneys began to prepare the defense strategy. On one hand, the US had accepted the compulsory jurisdiction of the Court under Article 36(2) of its Statute and was thus bound to respond to the suit. On the other hand, Washington was extremely reluctant to have its Nicaraguan strategy reviewed by judges, least of all by those of the World Court. One option considered was to invoke the 'Connally reservation,' which, as a caveat to the US acceptance of ICJ jurisdiction, specifically barred the Court from entertaining any case pertaining to 'domestic' matters *as determined by the United States.*[26] Yet the American lawyers chose not to use this absolute defense.[27] Instead, they tried to challenge the Court's authority in various other ways. They argued that the dispute was already before the Organization of American States and the UN Security Council; that it was not a legal dispute at all, but a political one;[28] that Nicaragua, having failed to perfect its acceptance of the Court's compulsory jurisdiction, had no right to implead the United States. The failure of the lawyers to use the Connally shield is all the more remarkable because, while the reservation gave the United States a self-judging escape from the Court's jurisdiction, all the other defenses left the key jurisdictional decision up to the Court, which rejected every one.[29] Had the US Government simply faced the Court with a 'finding' that the mining of Nicaragua's harbors was a 'domestic' matter for the United States, that would have ended the litigation. Instead, the United States went on to lose, not only on the matter of jurisdiction, but eventually also on the merits.[30]

The failure of the United States to use its Connally shield is a form of tribute to the determinacy of the term 'domestic.' What lawyer would want to stand before the fifteen judges of the ICJ and argue that US bombing of Nicaraguan harbors was a domestic matter? When a rule is so inelastic that certain legal arguments purporting to be based on it become laughable, the rule may be said to have determinacy. The greater its determinacy, the more

[26] 92 Cong. Rec. 10,694 (1946).

[27] As I have written elsewhere: that the Connally Reservation did not license the United States to refuse to litigate *any* case for *any* reason whatsoever, that a 'good faith' caveat was to be implied, is to be given some support by the fact that Connally was not invoked by US lawyers to withdraw the Nicaraguan case from the ICJ's jurisdiction. T. M. Franck & J. M. Lehrman, 'Messianism and Chauvinism in America's Commitment to Peace Through Law,' in *The International Court of Justice at a Crossroads*, 3, 17 (L. Damrosch ed., 1987).

[28] The United States announced that the case involved 'an inherently political problem that is not appropriate for judicial resolution,' Department Statement, Jan. 18, 1985, Dept St Bull, No. 2096, March 1985, 64, reprinted in 24 ILM 246, 246 (1985); 79 Am J Intl L 438, 439.

[29] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), *Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, 392.

[30] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment, ICJ Reports 1986, 14

legitimacy the rule exhibits and the more it pulls towards compliance. The community expects legitimate obligations to be honored. To fail to honor them is, in most circumstances, to be seen to act unfairly and anti-systemically. Fortunately, states (like persons) are generally reluctant to incur the opprobrium which such conduct would provoke.

The element of determinacy which affects a rule's legitimacy also has its impact on perceptions of the rule's fairness, for the evident reason that it is thought fairer to impose rights and duties which can be understood and anticipated by those to whom they are addressed than to impose rights and duties which leave the reader unable to anticipate the vagaries of its interpretation by bureaucrats, police, or judges. By the same token, a rule will be thought to be fairer if its determinacy makes it harder for scoff-laws to evade it by using clever sophistry.

Paradoxically, when laws (including international laws) introduce a 'fairness' standard into the text, thereby formally inviting fairness discourse, this may involve some detriment to the determinacy of a rule, in so far as that discourse encourages examination not only of the rule's legitimacy, but also of its distributive justice. A 'fair compensation' standard is not only about legitimacy (in requiring payment for a thing taken) but also about just deserts. Obviously, it is less determinate than one which fixes compensation numerically. Here is another instance in which legitimacy and justice, as elements of fairness, may need to be reconciled in fairness discourse, as they have been in many of the compensation arbitrations discussed in Chapter 15 below. In certain circumstances, moreover, the legitimacy costs of introducing less determinate elements of distributive justice into the text of a rule, or into the ambit of a rule-making process, are more than balanced by the gains achieved when that law's standard opens a more generous fairness discourse, one leading to a perception that the rule is not merely legitimate but also implements a prevailing socio-moral value.

As we shall see in Chapter 3, the introduction of a formal system of equity into legal systems is a particular instance of the effort to make law fairer by introducing elements of justice. Indeed, to the extent that equity successfully loosens the law's rigidities by introducing notions of justice, a heightened public perception of fairness may result. Courts which decide cases using equitable principles, however, run the risk of achieving a more just result at the cost of undermining their own legitimacy in the community and opening their decisions to criticism on the ground of indeterminacy. In both the international and the national communities a strong belief continues to prevail that judges ought to apply the law, and not to impose their personal notions of justice. Legitimacy, right process, and ultimately fairness itself may be seen as requiring judges to bridle any manifest propensity to 'do justice': at least, in the sense of a judge's idiosyncratic definition of justice which is contrary to standards established in agreements or by state practice.

At the same time, manifestly unjust results also erode the public perception that decisions were made by right process. This conundrum cannot be resolved; it can only be managed by the persuasive quality of discourse. Judges try to mitigate undesired side-effects of doing justice by protesting that those rules of equity which they apply are just as determinate as those of the traditional black-letter law: a defense which, as a matter of logic, is not easily sustained and, if sustained, would rob equity of its very *raison d'être*. The power of a court to do justice depends, rather, on the persuasiveness of the judges' discourse, persuasive in the sense that it reflects not their own, but society's value preferences.

In a sense, judges who flex the excessive rigidity of determinate rules to achieve just results perform a function which, historically, is associated with juries and assessors. (One recalls the classic jury verdict: 'My Lord, we find the defendant who stole the horse not guilty.') Few systems of law could survive, however, without some such recourse to remedial justice in instances where providing recourse to it is discursively persuasive.

b. Symbolic Validation

Determinacy communicates meaning. Symbolic validation communicates authority. Both affect the legitimacy of a rule or a rule-making or implementing process, its capacity to pull towards compliance. Both thereby also reinforce the sense of a 'rule community'.

A rule is symbolically validated when it has attributes, often in the form of cues, which signal its significant part in the overall system of social order. Ritual and pedigree are examples of cues which signal that a rule should be obeyed because otherwise the fabric of social order might be unraveled. Continuity signals stability of expectations, the aspect of fairness served by legitimacy.

Symbols also signal that authority is being exercised in accordance with right process, that it is institutionally recognized and validated. There are many examples of ritual and other symbolic reinforcement of legitimacy in the international system. Thus, the United Nations Organization is authorized to fly its own flag, not only at headquarters but over regional and local offices around the world.[31] The flag has been used at the instigation of the Secretary-General to immunize such UN battle-front operations as clearing sunken ships from the Suez Canal in 1956, protecting members of the Palestine Liberation Organization being evacuated from Lebanon in 1983 and, more recently, bringing relief supplies to civilians in the former Yugoslavia and in Somalia.[32] The United Nations also issues stamps[33] which are not only accepted for mail delivery by member states, but also generate an annual independent income of approximately $10 million.[34] Peacekeeping forces and truce observers under UN command and wearing UN symbols are stationed between hostile forces in Kashmir,[35] the Golan Heights,[36] Cyprus,[37] Lebanon,[38], Iran–Iraq,[39] and Croatia.[40] They are lightly armed, if at all, and palpably unable to defend themselves in the event of renewed hostilities; but, with their distinctive emblems, they have come to symbolize the world's interest in the continuance of an agreed truce or armistice. The blue and white helmets and arm bands also symbolize a growing body of rules applicable to peacekeeping operations, manifesting and emphasizing the authority of forces which are usually neither as numerous, nor as well armed, as those amonst whom they must keep peace. Their role is purely, and effectively, symbolic of the desire of bitter enemies, and of the international community, for respite from combat. Yet their presence has a far more inhibitory effect on the behavior of states than can be explained by their minimal coercive power.[41] It is these forces' perceived

[31] The General Assembly adopted and authorized the use of the United Nations flag on Oct. 20, 1947. See G. A. Res. 167, 2 UN GAOR (96th plen. mtg.) 338–9. UN Doc. A/41 (1947).

[32] For the Secretary-General's operation to remove ships sunk in the Suez Canal during the 1956 war, see 1956 UNYB 53–5; and GA Res. 1121, 11 UN GAOR Supp. (No. 17), 61, UN Doc. A/3386 (1956). The Secretary-General also authorized, with the 'support' of the Security Council, the flying of the UN flag on ships which would evacuate armed elements of the PLO from Tripoli. See UN Docs. S/16194, S/16195, 38 UN SCOR (Res. & Dec.), 5–6, UN Doc. S/INF/39 (1983). For a discussion of the UN relief operations in the former Yugoslavia and in Somalia see ch. 9 below.

[33] The United Nations Postal Administration was established on Jan. 1, 1951. See GA Res. 454, 5 UN GAOR Supp. (No. 20), 57–8, UN Doc. A/1775 (1950).

[34] The estimated 1986–7 net revenue from the sale of postage stamps was $8,667,700. See Advisory Committee on Administrative and Budgetary Questions, First Report on Proposed Programme Budget for the Biennium 1986–1987, 40 UN GAOR Supp. (No. 7), 209, UN Doc. A/40/7 (1985).

[35] The origin of the United Nations Military Observer Group in India and Pakistan (UNMOGIP) is found in a resolution of the UN Commission for India and Pakistan. See 3 UN SCOR Supp. (Nov. 1948), 32, UN Doc. S/1100, para. 75 (1948). The Security Council subsequently authorized its operation. See SC Res. 91, para. 7, 6 UN SCOR (Res. & Dec.), 1, 3, UN Doc. S/INF/6/Rev.1 (1951).

[36] The Security Council established the UN Disengagement Observer Force (UNDOF) for the Golan Heights on May 31, 1974. See SC Res. 350, 29 UN SCOR (Res. & Dec.), 4, UN Doc. S/INF/30 (1974).

[37] The United Nations Force in Cyprus (UNFICYP) was formed by the Security Council on Mar. 4, 1964. See SC Res. 186, 19 UN SCOR (Res. & Dec.), 2–4, UN Doc. S/INF/19/Rev.1 (1964).

[38] The United Nations Interim Force in Lebanon (UNIFIL) was created by the Security Council on Mar. 19, 1978. See SC Res. 425, 33 UN SCOR (Res. & Dec.), 5, UN Doc. S/INF/34 (1978).

[39] See Report of the Secretary-General, UN Doc. S/20093 (Aug. 7, 1988); SC Res. 619 (Aug. 9, 1988) (creating the force); GA Res. 42/233 (Aug. 17, 1988) (funding the force).

[40] The United Nations Protection Force was created by S/RES/742 of Feb. 21, 1992.

[41] For a discussion of the noncoercive role of UN peacekeeping forces see Brian Urquhart, *A Life in Peace and War* 287–8, 342–3 (1987).

legitimacy, symbolically validated, which serves as their shield and which usually induces more powerful forces to defer to their intangible authority. However, when such forces are stationed between antagonists which have not yet resolved to stop fighting, that symbolic authority cannot readily be converted into actual military power to compel compliance. Rather, the symbolic currency tends to be devalued by those incidents in which a symbolic UN force suddenly finds itself a third-party combatant.

The United Nations and its agencies also maintain headquarters and regional facilities that are accorded limited extraterritoriality and immunities.[42] These have symbolic as well as practical significance. The extension of diplomatic immunity to top UN officials, a privilege usually reserved for representatives of states, symbolizes the emergence of the Organization as an autonomous international actor, with its own pedigree, capable of making and applying rules of international governance. The functions and privileges of the global and regional agencies' resident representatives, stationed in the capitals of various countries, already closely resemble those of the ambassadors of states. While this gradual accrual of symbols of sovereignty by the UN is still vigorously resisted by some states (not least by the US) the momentum in that direction is inexorable given the importance of the tasks which states increasingly assign to the Organization. In the building of power, as in other kinds of architecture, form tends to follow function.

Symbols of pedigree and rituals are also firmly embedded in state diplomatic practice. The titles ('ambassador extraordinary and plenipotentiary'), prerogatives, and immunities of ambassadors, consuls, and others functioning in a representative capacity are among the oldest of symbols and rites associated with the conduct of international relations. The sending state, by the rituals of accreditation, endows its diplomats with pedigree. They become a symbolic reification of the nation ('full powers' or *plenipotentiary*), a role which is ritually endorsed by the receiving state's ceremony in accepting the envoy's credentials.[43] These men and women are not merely couriers, although facilitating the transmission of messages between governments is an important part of their function. They are endowed with privileges and immunities which are deeply rooted in time-honored tradition and practice but which have continuing practical utility.

[42] See Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly Feb. 13, 1946, 21 UST 1418, TIAS 6900, 1 UNTS 1 (entered into force for the United States Apr. 29, 1970). See also Agreement Regarding the Headquarters of the UN, June 26, 1947, United States—United Nations, 61 Stat. 3416, TIAS 1676, 11 UNTS 11 (entered into force Nov. 21, 1947). See further Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly Nov. 21, 1947, 33 UNTS 261.

[43] See Mary Jane McCaffree & Pauline Innis, *Protocol, The Complete Book of Diplomatic, Official and Social Usage*, 87–104 (1985).

The objective of symbolic validation is to emphasize those cultural-anthropological aspects of rules which, in all societies, tend to give them a *gravitas* not found in *ad hoc* or opportunistic exercises of authority. A study of the legitimacy of imperial authority in ancient China observes that rituals and symbols, 'by endowing authority with mystical values and legitimacy, serve not merely to reflect authority but also to recreate and reinforce it. By such means the extent to which people are persuaded to accept a given authority goes far beyond the obedience normally elicited by force.'[44]

In the international rule system, as in most national legal systems, the law accords a particular veneration to rules which have withstood the test of time. Age is respected in laws even more than in persons, in both cases not always deservedly. Even unjust old rules, however, have a high degree of compliance pull just because, being old, they are thought to be like the beams of an old house. Their legitimacy may be what holds up the whole structure and to remove them may jeopardize that structure.

When old rules are violated (as, in recent years, by impatient revolutionary regimes such as those of Iran and Libya)[45] the international community tends to respond by rallying around the rule, as the Security Council[46] and the International Court of Justice[47] demonstrated when the Iranian regime encouraged the occupation of the US Embassy in Tehran. It is of more than passing interest that, from the expressed perspective of almost all governments, the legitimacy of the venerable rules immunizing diplomats totally trumped the efforts by Iran to argue from a fairness perspective in exculpation of the embassy hostage-taking. Neither the ICJ nor the Security Council were inclined even to consider whether the actions of the Iranian militants who seized US diplomats could be justified, or mitigated, by taking into account the prior assistance given by the US embassy to the atrocity-prone SAVAK secret police of the Iranian Shah.[48] Diplomatic immunity is perceived as far too central to the system to be permeable by circumstantial claims of distributive, or in this case retributive, justice. A rigid rule of diplomatic immunity has emerged, not because the system has ignored countervailing claims of justice advanced by Iranian students, or irate landlords in New York, Geneva, or Bangkok who have failed to collect rent

[44] Howard J. Wechsler, *Offerings of Jade and Silk*, 21 (1985).

[45] For a discussion of the Iranian hostages incident see L. Gross, 'The Case of United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures,' 74 Am J Intl L 395 (1980). For an analysis of the Libyan violations see R. Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience,' 79 Am J Intl L 641 (1985).

[46] SC Res. 457, 34 UN SCOR (Res. & Dec.), 24, UN Doc. S/INF/35 (1979) (adopted unanimously).

[47] See *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 Dec. 1979, ICJ Reports 1979*, 7; *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, 3; *United States Diplomatic and Consular Staff in Tehran; Order of 12 May 1981, ICJ Reports 1981*, 45.

[48] 1979 ICJ 7, paras. 22, 23, 31; 1980 ICJ 3, paras. 34–6; SC Res. 457, *supra* note 46.

due from tenants who happen to be diplomats or international civil servants, but because, discursively, the community has become convinced that these justice claims must not be allowed to override legitimate diplomatic usage. Rather, the justice claims must be addressed in some other context[49] less injurious to a venerable and still important institution of diplomacy and authority.

c. Coherence

The perceived legitimacy of rules depends also on the generality of the principles which the rules apply. At the lowest end of this generality spectrum is the bill of attainder, which is regarded as so illegitimate as to be prohibited by the United States Constitution. The negative perception of illegitimacy and unfairness derives from a rule's lack of generality; it is expressly made applicable only in one instance. Such laws are evidently unprincipled; they do not treat likes alike and they therefore lack coherence. They fail to connect with the skein of general legal principles which make up the body of the law.

Coherence is a key factor in explaining why rules compel.[50] A rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every 'similar' or 'applicable' instance. This is the opposite of what Dworkin calls 'checkerboarding,'[51] which, he asserts, gives rise to a greater sense of unfairness than a result which is manifestly uniform in its coverage even if unfavorable to one's interest. 'Even if I thought strict liability for accidents wrong in principle,' he states, 'I would prefer that manufacturers of both washing machines and automobiles be held to that standard rather than that only one of them be. I would rank the checkerboard solution not intermediate between the other two [no strict liability and universal strict liability] but third, below both, and so would many other people.' Such 'compromises are wrong, not merely impractical.'[52] They are lacking in legitimacy, and thus lack also fairness.

An international law example illustrates this point. Imagine an attempt to deal with Third World debt relief. One compromise proposal would forgive all the unrepaid loans of some nations, for example those with names starting with the letters A to M. A 'principle' based arbitrarily on the alphabet would be perceived as especially unfair because it is both illegitimate and unjust. It

[49] Host countries, for example, establish procedures by which claims of unpaid rent can be addressed to the sending state of a defaulting diplomat.

[50] See Dworkin, *supra* note 19, 190–2. Dworkin uses the term 'integrity' to mean coherence.

[51] Ibid., 179.

[52] Ibid., 182.

is illegitimate because the alphabet as a basis for allocating benefits is not a principle in use anywhere; it fails to connect with the fabric of the law. That fabric is woven by many intersecting principles which are in common usage. That rule of allocation would also be perceived as unjust because the allocational results of applying the alphabetic principle violates the maximin principle by increasing the wealth of some debtors, regardless of their ability to pay, while denying all relief to others who may be more needy or more deserving. The allocation of debt relief would be perceived as unjust because it leads to unconscionable, frivolous results. In this example, legitimacy critique and justice critique lead to identical conclusions. Of course, this does not mean that these two indicators would necessarily operate in perfect harmony to produce some other perfectly fair allocation of debt relief.

Evidently, coherence has to do with capability of generalization. This important point, however, needs to be carefully qualified. That likes be treated alike does not mean that legal principles must strive for uniformity at all costs. It does mean that when distinctions are made, they must themselves be explicable by reference to generally applied concepts of differentiation. The General Agreement on Tariffs and Trade of 1947[53] illustrates these aspects of coherence. Its most basic provision is the most-favored-nation (MFN) clause which (contrary to its name) seeks to preclude favoritism. It prohibits members from giving benefits to some but not all trading partners.[54] As long as this rule is applied consistently, it appears to be coherent, and thus legitimate. In recent years, however, it has become evident that the MFN provision, if applied consistently to all nations, would undermine rather than advance GATT's primary purpose of globalizing trade. In practice the MFN provision would tend to increase the volume of trade by unjustly diminishing the trading prospects of some fifty less developed member countries. GATT therefore adopted a Generalized System of Preferences (GSP) for these special cases.[55] It allows developed states temporarily to permit preferential access to products of only some states, particularly the 'least developed.'[56] While GSP is inconsistent with MFN, it coheres with the underlying purpose of GATT: to increase trade for *all* nations. GSP thus advances the real objectives of GATT. It also establishes a standard for distinction between those members to whom MFN is applicable and those temporarily benefitted by GSP. That standard

[53] General Agreement on Tariffs and Trade [hereinafter GATT], Oct. 30, 1947, 61 Stat. (5), (6), TIAS No. 1700, 55 UNTS 188–316.

[54] Ibid., Art. 1(1).

[55] GATT Contracting Parties, Decision of Nov. 28, 1979, Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, GATT, Basic Instruments and Selected Documents, 26th Supp. 203 (1980). See also J. Jackson & W. Davey, *Legal Problems of International Economic Relations*, 1149 (2nd edn., 1986).

[56] Decision of Nov. 28, 1979, ibid., paras. 1 and 6.

connects coherently with boundaries commonly used in other sets of regulations to demarcate coverage.

At the heart of GSP is a desire to advance distributive justice while minimizing the concomitant discounting of the GATT system's legitimacy. This objective is pursued by making the special treatment of some states, in spite of GATT's underlying principle of MFN, as coherent as possible. Exceptions to MFN are made by GSP, but are themselves expressed in a generalized principle which is explicitly and coherently related to the underlying purposes of the MFN rule. This form of 'coherent exception' illustrates how law seeks to reconcile legitimacy and justice in the discursive pursuit of generally perceived fairness. Thus, a law requiring that domestic pets be licensed is likely to be perceived as more legitimate if applicable not only to dogs but to all animals, from llamas to cats, for which owners ought to be held accountable. By the same token, however, the perception of the licensing law's fairness would probably be greater if justice-based exceptions were incorporated in respect of pets (birds, tropical fish) which are permanently confined within the home.

Redistributive principles such as those which underlie GSP are commonplace in the international rule system. They connect with distinctions which, although superficialy creating inconsistencies within rules and the application of rule systems, nonetheless leave the rules coherent and legitimate, while also making them in practice more amenable to justice-based claims. In other words, the checkerboarding is redeemed by being based on a principle of exception which is consistent with the real intent of the general rule and which also connects with the skein of principled exceptions to other rules. It is quite common for global assessments (for example, the dues levied on UN members for the general budget by the General Assembly) to be based on a general rule which is subject to a principled exception in favor of the least developed member states.

Another example is discussed in Chapter 5. A matter currently of great interest in the international community (as indicated by a growing number of claims) is the secession of minorities within independent states. What rule of law should be applicable to these post-colonial claims of self-determination? In Chapter 5 it will be argued that there is no possibility that any single rule can result from the fairness discourse now underway, but that the world nevertheless cannot defer indefinitely the creation of normative guidance for this burgeoning phenomenon which frequently has destructive consequences. What may emerge, however, is a general rule on self-determination adumbrated by a large number of important justice-based exceptions. If both the rule and the exceptions are sufficiently determinate and coherent, such a normative deconstruction of the self-determination problematic could reconcile the competing demands for legitimacy and justice—order and change—thereby promoting both the perception of the law's fairness

and better prospects for compliance. At least, this would be a reasonable expectation of such a fairness discourse.

The legitimacy of rules is augmented when they incorporate principles of general application. General application requires not only that likes are treated alike, but also that the principles of allocation and exclusion underlying a rule are in general use, so connecting the rule to the skein of the law. This second aspect of coherence, the connectedness of rules as a factor in their legitimacy, reflects the relationship between legitimacy and community. Legitimacy must be manifested by the relationship between any given rule and the rule system of the international community. Rules become coherent when they are applied so as to preclude capricious checkerboarding. They preclude caprice when they are applied consistently or, if inconsistently applied, when they make distinctions based on underlying general principles which connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system. The resultant skein of underlying principles is an aspect of community, which in turn confirms the status of the states which constitute that community. Validated membership of the community accords equal rights and obligations derived from its legitimate rule system.

By focusing on the connections between specific rules and general underlying principles, we have emphasized the horizontal aspect of our central notion of a community of legitimate rules. However, there are vertical aspects of this community that have even more significant impact on the legitimacy of rules.

d. Adherence

'Adherence' is the vertical nexus between a single primary rule of obligation ('a state's territorial sea extends seaward to a distance of twelve miles') and a pyramid of secondary rules governing the creation, interpretation, and application of such rules by the community. The legitimacy of each primary rule depends in part on its relation (adherence) to these secondary rules of process. Primary rules unconnected to secondary rules tend to be mere *ad hoc* reciprocal arrangements. Often these prove perfectly capable of obligating the parties; they may even connect coherently to other rules. However, rules are better able to pull towards compliance if they are demonstrably supported by the procedural and institutional framework within which the community organizes itself, culminating in the community's ultimate rule, or canon of rules, of recognition.

In most national communities, a law draws support from its having been made in accordance with the process established by the constitution, which is the ultimate rule of recognition. Thus, an ultimate rule of recognition might prescribe the processes by which the constitution can be amended, laws are

enacted, and courts are to function. Secondary rules of recognition elaborate this process, often by such maxims as *audi alterem partem* or 'no taxation without representation.' The legitimacy of each primary rule (a municipal tax code, for example) accrues as it can be shown that its adoption was not merely *ad hoc* but in conformity with the secondary and ultimate rules of recognition.

The international community also has such secondary rules of recognition. As well as legitimating the primary rules, secondary rules are the parametric sinews of the system, which manifest the normativity of interactions between states, providing evidence of a *community* which defines, empowers, and circumscribes statehood, and supporting a public perception of the law's fairness.

Again, *pacta sunt servanda* serves as an example. *Why* are treaties universally regarded as binding? The answer is not merely that states have made this the subject of a primary rule of obligation. It is true that treaties are made with solemn commitment. The Vienna Convention on Treaties[57] embodies the principle that commitments must be honored. However, if the adherence to the Vienna Convention by member states were the sole source of *pacta sunt servanda*'s legitimacy, then a state which did not ratify, or which renounced, the Convention would be free to disregard all its treaty obligations. Intuitively, we know that this is not the case. Rather, states regard themselves as bound by their treaty commitments, whether or not they are parties to the Vienna Convention, because they recognize that their obligation to act in accordance with those commitments derives not from their specific consent to the secondary rule of recognition, but rather from their membership of a community of which the sanctity of treaty obligations is the normative cornerstone. Indeed, it is a state's membership of the community of nations—as evidenced by the recognition accorded it by other states and by membership of the UN—which endows that state with the legitimate capacity to enter into treaties, as well as imposing on it the legitimate obligation to carry them out faithfully.

One recent instance of this perception of an international rule, as an obligation superior to the specific acquiescence of any particular state, is found in the advisory opinion of the International Court of Justice on April 26, 1988, at the request of the United Nations General Assembly.[58] At issue was a conflict between provisions of a US law (which required the closing of the Observer Mission of the Palestine Liberation Organization)[59]

[57] Vienna Convention on the Law of Treaties, 1969. UN Doc. A/CONF.39/27 (1969). 18 UNTS 232. Reprinted in 8 ILM 679 (1969), 63 Am J Intl L 875 (1969), Art. 26.

[58] GA Res. 42/229B (Mar. 2, 1988).

[59] The Observer Mission status was created by GA Res. 3237, 29 UN GAOR Supp. (No. 31) at 4, UN Doc. A/9631 (1974). The closure of the mission is required by the *Anti-Terrorism Act* of 1987, title X of the *Foreign Relations Authorization Act, 1988* and *1989*, Pub. L. No. 100–204, tit. X, sec. 1001, 101 Stat. 1331, 1406 (codified at 22 USCA secs. 5201–3 (West Supp. 1988)).

and the obligation assumed by the US as party to the UN Headquarters Agreement.[60] The Court stated unequivocally that it was 'the fundamental principle of international law that it prevails over domestic law,'[61] and that 'provisions of municipal law cannot prevail over those of a treaty.'[62] The US judge (Stephen M. Schwebel) added that 'a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations' under a treaty.[63] Unanimously, the Court accepted that a clear limitation on the sovereignty of states is imposed by membership of the international community.

The significance of this finding extends far beyond the issues in that dispute. The Court confirms the words of Professor H. L. A. Hart, who pointed out more than thirty years ago that the 'view that a state may impose obligations on itself by promise, agreement, or treaty is not . . . consistent with the theory that states are subject only to rules which they have thus imposed on themselves.'[64] Rather, '*rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do.'[65] The only evidence of the existence of such ultimate rules of recognition is that states habitually act in accordance with them and courts give them effect. Of what, then, does the ultimate canon consist?

The components of this canon are referred to in international law as 'peremptory norms', rules by which other rules are validated or invalidated—a sort of customary constitution of the international community, rather like the canons of the unwritten British constitution. Like most constitutions, its provisions may vary from time to time in response to changing community values, but its content is not easily changed. It can only be hypothesized and demonstrated circumstantially by habitual state deference.

Obviously, the rule that treaties are binding is a peremptory norm. Yet the Vienna Convention, in restating this, also notes that a treaty is *void ab initio* if it 'conflicts with a peremptory norm of general international law.'[66] A treaty which authorized genocide, for example, would be invalid for this reason. So also would be a treaty which provided that treaties were not to be binding.

[60] See Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, TIAS No. 1676, 11 UNTS 11 (entered into force Nov. 21, 1947).

[61] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 ICJ 12, 34, para. 57 (Advisory Opinion of Apr. 26).

[62] *Greco-Bulgarian 'Communities,'* 1930 PCIJ (ser. B) No. 17, 32 (Advisory Opinion of July 31).

[63] 1988 ICJ 42 (Schwebel, J., sep. op.).

[64] Hart, *supra* note 19, ch. 10.

[65] Ibid.

[66] Vienna Convention on the Law of Treaties, Art. 53, opened for signature May 23, 1969, UNTS Regis. No. 18, 232, UN Doc. A/CONF.39/27 (1969), reprinted in 8 ILM 679 (1969), 63 Am J Intl L 875 (1969).

As Judge Rudolf Bernhardt has written, 'there exist some international law rules, embodied either in fundamental treaties or in customary law, or both, which must be considered *jus cogens*, i.e. as peremptory norms of international law which are superior to any treaty and other . . . norms, and which can be modified solely by the emergence of new peremptory norms.'[67] Thus the community's secondary rules of recognition impose a communitarian obligation on states to abide not only by treaties but also by that other set of rules which emerges from global recognition that they are *jus cogens*. The ultimate canon of rules also establishes that states, unless they persistently object, are bound to obey rules established by general custom of state practice.

This was reiterated by the ICJ in the case brought by Nicaragua against the United States, in which the US, despite its vehement objections, was held subject to an extensive array of customary law.[68] Similarly, a new nation cannot object to an established rule of customary law solely on the ground that the new member state has not consented to it. The customary rule that the location of a boundary which follows the course of a river does not change as a result of a sudden change in the course of the river[69], for example, does not depend for its legitimacy on the consent of any state. On the other hand, it is generally acknowledged that a treaty may suspend, as between the parties to it, the operation of a customary rule of law, providing that the customary rule is not *jus cogens*.

Other parts of the ultimate canon can be deduced from states' practice in adhering to it *as an incident of statehood* rather than as a consequence of their specific consent. New states are deemed to acquire all the equal and universal rights and duties of statehood: not because they have specifically agreed to this but as an incidence of membership in the community of states.[70] Similarly, new states may 'inherit' rights and duties from a 'parent' state[71] not—or not soley—by virtue of their specific consent to that

[67] R. Bernhardt, 'Customary International Law: New and Old Problems,' 19 Thesaurus Acroasuum 204, 209 (1992). See also L. Hannikainen, *Peremptory Norms* (Jus Cogens) *in International Law* (1988).

[68] *Military and Paramilitary Activities in and against Nicaragua, Merits*, *supra* note 30.

[69] 1 Lassa Oppenheim, *International Law*, 697 (R. Jennings & A. Watts 9th edn., 1992).

[70] It is a well established principle that a new state to the international community is automatically bound by the rules of international conduct existing at the time of admittance. See 1 Lassa Oppenheim, *International Law*, 17–18 (H. Lauterpacht 8th edn., 1955). Even G. I. Tunkin concedes that if it enters 'without reservations into official relations with other states,' a new state is bound by 'principles and norms of existing international law.' See G. I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law,' 49 Cal L Rev 419, 428 (1961).

[71] There has been wide debate over which rights and obligations a successor state can inherit from its parent. The nineteenth-century doctrine of universal succession maintains that all the rights and duties of the parent pass to the successor. See Okon Udokang, *Succession of New States to International Treaties*, 122–4 (1972). At the other extreme is negativist theory, which holds that a successor inherits no rights and obligations, but begins with a *tabula rasa*. See Daniel P. O'Connell, *State Succession in Municipal Law and International Law*, 14–17 (1967). The truth lies somewhere in between, with certain rights and duties of the parent devolving upon the successor. See Oppenheim, ibid., 120. Hart further points to evidence that changes in a state's circumstance may automatically accord it new rights and duties, for example when it acquires new territory giving it a coastline. Hart, *supra* note 19, 221.

inheritance but as a concomitant of their recognized statehood. Successor governments also automatically inherit rights and obligations.[72]

A final example of a part of this ultimate canon is the notion of state equality. UN Charter Article 2(1) specifically restates this rule, and no state since Hitler's Germany has claimed anything to the contrary. All states are bound by a rule of state equality—that is, equality of entitlements—as a consequence of membership of the community of nations. In the words of US Chief Justice John Marshall in an 1825 decision, *The Antelope*, 'No principle of general law is more universally acknowledged than the perfect equality of nations.'[73] A state may agree by treaty to surrender to another state some of its incidents of sovereignty, but as long as it remains an accepted member of the international community, its rights (for example, not to be the object of another state's aggression) cannot be extinguished.

These rules spell out associative rights and obligations, to use Dworkin's term,[74] which attach to all states by virtue of their status as validated members of the international community. Only by stretching the notion of 'consent' beyond its definitional limits can these specific associative obligations and entitlements be said to have been assumed or bestowed consensually, even though they may sometimes be restated in a treaty. They are 'associative'[75] or communal in the sense that their legitimacy is bestowed not by specific consent of states, but by status. Thus, the obligation to honor treaties is acquired associatively, rather than by specific consent, and is owed generally towards all members of the community. This is universally acknowledged. It is inconceivable, for example, that a state would announce its intention no longer to be bound by treaties or custom. The obligation, moreover, cannot be extinguished by renouncing a consent which was never given, but only by extinguishing the status which is the real basis of the obligation.

Rules deriving from such 'associative' secondary rules of recognition, and ultimately from the community's ultimate canon of peremptory norms, inherit from that lineage a degree of legitimacy, and in all likelihood the general perception of their fairness will be heightened, in contrast to *ad hoc* arrangements. No isolated rule appears effective to its subjects. Therefore,

[72] *Tinoco* case (*Great Britain* v. *Costa Rica*), 1 R Intl Arb Awards 369 (1923), reprinted in 18 Am J Intl L 147 (1924).

[73] *The Antelope*, 23 US (10 Wheat.) 66, 122 (1825).

[74] Dworkin, *supra* note 19, 196.

[75] Ibid., 197.

rules strive to manifest their place in a long hierarchical pyramid of authority. Thus, the preambles of Security Council resolutions usually set out at length all those provisions of the Charter which authorize the Council to act. They also recite all the previous relevant resolutions in which the Council has manifested its authority. The evident purpose is to emphasize the resolution's legitimacy and thereby to encourage compliance by the larger community of states to which it is addressed.

3
Equity as Fairness[1]

> In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of process. If one consolidates the past and calls it law he may find himself outlawing the future.
>
> Judge Manfred Lachs[2]

Since the cold war, the role of international law has become both wider and more secure. As a result of this, lawyers have been able to take a greater interest in the *quality* of international law. Whereas it was once common for international lawyers to devote much effort to defending the 'law-likeness' of their subject, that battle has long been won. The newly widespread application of legal principles in the conduct of global systemic relations has thus both allowed and obliged lawyers to turn their professional attention to the issue of the fairness of international law.

As noted in the preceding chapters, fairness is a composite of two independent variables: legitimacy and justice. We turn now to an examination of the role of justice. One (at present the most highly developed) approach to an inquiry into the justice of international law is to study the emerging role of *equity* in the jurisprudence of international tribunals.

In its international as in its domestic legal context, equity is sometimes derided as a 'contentless' norm amounting to little more than a license for the exercise of judicial caprice. This criticism, while addressing a potential problem, ignores the very real 'content' attributed to equity by scholars and international courts, arbitral proceedings, and organizations. In fairness discourse, the most restrained justice-based claims may be advanced in the form of equity, which embodies a set of principles designed to analyse the law critically without seeming to depart too radically from the traditional preference for normativity in the exercise of authority, nor to present too bold a challenge to the community's expectations of legitimacy in legal rules and processes.

This chapter surveys the development of equity in the international system since the turn of the century. First, it will discuss equity as an instance of 'law

[1] This chapter is the fruit of a research project undertaken by the author jointly with Dennis M. Sughrue, then a Fellow of the NYU Center for International Studies, and published jointly in 81 Georgetown LJ 563 (1993).

[2] Judge Manfred Lachs, President of the ICJ, Commemorative Speech at the United Nations General Assembly (Oct. 12, 1973).