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Custom on a Sliding Scale

Frederic L. Kirgis
Washington and Lee University School of Law, kirgisr@wlu.edu

be any more successful in its attempt to use the Court's Judgment to sway public opinion in the United States and in other states.[25]

Against such gains must be weighed the loss in respect for the ICJ when it acts like a court in name but not in deed. These cases of compulsory jurisdiction display the Court in its weakest and least effectual role. In these circumstances, the ICJ does not truly adjudicate disputes, if "adjudication" has anything to do with a decision that actually settles a matter.

Plainly, much of the blame for the loss in respect for the Court rests on the shoulders of noncomplying defendant states that are failing to observe Article 94(1) of the Charter. Some fault, too, lies with applicant states that use the Court as a public forum when they know that the ICJ has little practical chance of effectively resolving a dispute. Realistically, it may be time for us to recognize that, given the present context of world politics, the compulsory jurisdiction provisions of the ICJ Statute are simply overoptimistic and that the surer and better role for the Court is in the adjudication of cases jointly submitted by willing states. It may be time, too, for the ICJ to contemplate a strategic retreat and in cases of compulsory jurisdiction to be willing to contemplate a doctrine of judicial restraint when it seems unlikely that its decisions will be respected in practice.

MARK WESTON JANIS*

CUSTOM ON A SLIDING SCALE

Every student who has ever taken a traditional international law course has learned Manley Hudson's four elements for the emergence of a rule of customary international law:

> (*a*) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
>
> (*b*) continuation or repetition of the practice over a considerable period of time;
>
> (*c*) conception that the practice is required by, or consistent with, prevailing international law; and
>
> (*d*) general acquiescence in the practice by other States.[1]

In the give-and-take of international relations, and in the jurisprudence of the International Court, these elements have been compressed into two: consistent state practice and Hudson's third element, the *opinio juris*.[2] In

[25] For some of the public relations efforts of Nicaragua with respect to the Court's Judgment, see The Times (London), July 28, 1986, at 5; and *id.*, July 30, 1986, at 5.

* Professor of Law, University of Connecticut.

[1] [1950] 2 Y.B. INT'L L. COMM'N 26, UN Doc. A/CN.4/SER.A/1950/Add.1.

[2] *See especially* North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 41–44 (Judgment of Feb. 20).

Military and Paramilitary Activities in and against Nicaragua,[3] the Court has raised the question whether—or at least to what extent—each of these two elements must be established so as to demonstrate that a restrictive rule of customary international law exists.

The Court found a rule of custom coinciding with Article 2(4) of the United Nations Charter, requiring states to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. In addition, the Court found customary duties on the nonuse of force that are more specific than Article 2(4). This it did without any reference whatsoever to the ways in which governments actually behave. Instead, after noting that both parties accepted the treaty obligation of Article 2(4), the Court focused on the *opinio juris,* which it found primarily in resolutions of the UN and OAS General Assemblies.[4]

In particular, the Court relied on the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[5] This resolution was adopted by consensus and has a distinctly legislative tone, using mandatory language throughout. If the Court had been able to point to consistent state practice buttressing the articulated norms of the declaration, there would be nothing startling about using the declaration to supply the elusive subjective element. In fact, of course, the declaration's norms regarding the nonuse of force and nonintervention are difficult to reconcile with some conspicuous examples of state conduct, including conduct by both parties to this case.

The Court relied on the same declaration, along with other international instruments, to establish the principle of nonintervention.[6] It did ask in this instance whether practice is sufficiently in conformity with these declarations to result in a rule of custom.[7] Curiously, it did not attempt to answer its own question. Instead, it defined the principle as a restrictive custom, and examined state practice only to see whether a permissive modification had been established for intervention in support of rebel forces. Even on this point, the Court focused on the lack of proffered legal justification when intervention has occurred in such cases.[8] In other words, it dealt only with the lack of *opinio juris* for such a permissive course of conduct.

When issues of armed force are involved, it may well be that the need for stability explains an international decision maker's primary reliance on normative words rather than on a combination of words and consistent deeds. In another vital area, human rights, the same thing has happened. The Universal Declaration of Human Rights has come to be regarded as an authoritative articulation of customary international law, at least with respect

[3] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

[4] *Id.* at 101–02, paras. 191–92.

[5] GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970).

[6] 1986 ICJ REP. at 106–07, paras. 202–04. [7] *Id.* at 107–08, para. 205.

[8] *Id.* at 108–09, paras. 206–08.

to the most fundamental rights, no matter how widespread or persistent the nonconforming state conduct may be.[9] It is understandable that decision makers would tend to find customary rules in these areas. The alternative would be an international legal order containing ominous silences—where treaty commitments cannot be found—concerning the ways in which states impose their wills on other states or on individuals.

When the stakes are not as high, international decision makers have not been as quick to find restrictive customary rules. The classic example is found in the *North Sea Continental Shelf Cases,*[10] where the Court found neither adequate state practice nor the necessary *opinio juris* to establish the equidistance principle as customary international law for continental shelf delimitation between adjacent states. The *Lotus* case[11] is another example. Analogous were the *Fisheries Jurisdiction* cases,[12] where the Court found a permissive custom (in effect, the absence of a restrictive custom) allowing preferential fishing rights for coastal states. The restrictive custom the Court did find—based on high seas fishing rights and therefore inconsistent with extended exclusive fishing rights asserted against longstanding foreign fishing interests—simply drew on well-established state practice and *opinio juris.*[13]

Since the *Nicaragua* case stresses *opinio juris* at the expense of state practice, one should ask whether there is precedent for the converse: a focus on state practice without paying attention to governmental assertions and acquiescences that would establish an *opinio juris.* Eminent writers have long taken the position that from widespread, consistent state practice one may infer a belief that the practice is required or permitted by law, at least if there is little or no evidence of a contrary belief by the relevant actors.[14] This has

[9] The Declaration has often been cited in subsequent declarations and resolutions. This is evidence of state practice in one sense, but it does not reveal how governments actually act. For discussion of the Declaration's effect as custom, see, e.g., Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character,* in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 32–37 (B. Ramcharan ed. 1979). In United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 42 (Judgment of May 24), the Court treated the fundamental principles in the Universal Declaration as legal norms standing on their own and capable of being applied to state-supported conduct.

Another explanation of the Universal Declaration's normative significance is that it serves as an interpretation and elaboration of the references to human rights in the UN Charter. *See, e.g.,* the official Canadian view in 1980 CANADIAN Y.B. INT'L L. 326.

[10] 1969 ICJ REP. 3.

[11] 1927 PCIJ, ser. A, No. 10.

[12] Fisheries Jurisdiction Case (UK v. Ice.; FRG v. Ice.), 1974 ICJ REP. 3 and 175 (Judgments of July 25).

[13] The Court's holding on the merits has been overtaken by subsequent state practice. What is important here is the Court's methodology in a case that involved armed confrontation on only a small scale, between states that were normally allies.

[14] *See, e.g.,* H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 380 (1958); C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 62 (1965); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (3d ed. 1979); Baxter, *Treaties and Custom,* 129 RECUEIL DES COURS 25, 69 (1970 I). *Cf.* C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 253–54 (1964); C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 441 n.19 (rev. ed. 1968). To the contrary, see Akehurst, *Custom as a Source of International Law,* 47 BRIT. Y.B. INT'L L. 1, 32–34 (1974–75).

not been lost on the International Court. In some cases it has given legal significance to consistent state practice, without examining *opinio juris.*[15] This seems inconsistent with *Nicaragua* and the cases stressing the need for an *opinio juris.* The cases can be reconciled, however, if one views the elements of custom not as fixed and mutually exclusive, but as interchangeable along a sliding scale.

On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris,* so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.

Exactly how much state practice will substitute for an affirmative showing of an *opinio juris,* and how clear a showing will substitute for consistent behavior, depends on the activity in question and on the reasonableness of the asserted customary rule. It is instructive here to focus on rules that restrict governmental action. The more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable. The converse, of course, will be true as well. If the activity is not so destructive of widely accepted human values, or if the asserted rule seems unreasonable under the circumstances, the decision maker is likely to be more exacting in finding the necessary elements for the rule. A reasonable rule is always more likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.[16]

These points may be illustrated by a relatively simple diagram (fig. 1, p. 150). It depicts a sliding scale for establishing a custom that restricts states' freedom of action. The vertical axis measures the frequency of consistent state practice by the relevant actors in any given case. The horizontal axis measures the demonstrated strength of the *opinio juris* in that case. The curves C_1 and C_2 are restrictive custom curves in two paradigm cases: C_1

[15] *See* The S.S. Wimbledon, 1923 PCIJ, ser. A, No. 1, at 25; Nottebohm Case (Liechtenstein v. Guat.), Second Phase, 1955 ICJ REP. 4, 22 (Judgment of Apr. 6). *See also* Dissenting Opinions of Judges Lachs and Sørensen in the North Sea Continental Shelf Cases, 1969 ICJ REP. at 218, 231, and 241, 246–47.

[16] *See* C. JENKS, *supra* note 14, at 254; *cf.* M. SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL 110–11 (1946). This probably explains the readiness of international tribunals to accept, as custom, the major substantive provisions of the Vienna Convention on the Law of Treaties. See Sinclair, *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation,* 78 ASIL PROC. 271, 273 (1984), for a partial list of decisions. Some of the principles set forth in the Fisheries case (UK v. Nor.), 1951 ICJ REP. 116 (Judgment of Dec. 18), may also be explained in this way. Examples are the principle that a baseline does not have to follow all the contours of the coast and the factors that determine the validity of straight baselines.

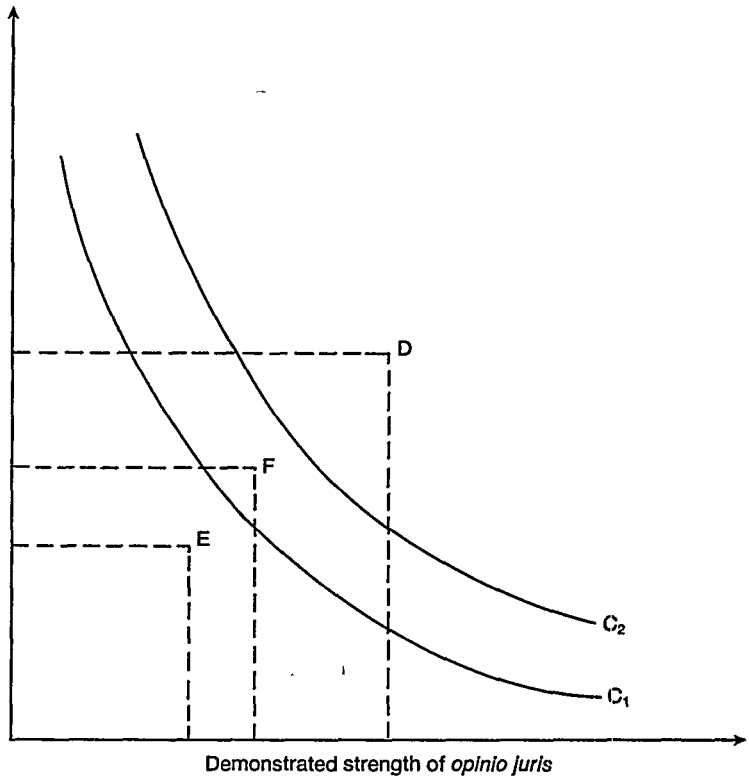

FIGURE 1
RESTRICTIVE CUSTOM CURVE

exemplifies the case of destabilizing or morally distasteful activity (for example, the *Nicaragua* case or a case of systematic governmental detention of individuals without trial); C_2 exemplifies the routine maritime boundary dispute, where the parties are not threatening to use force against each other. In each case, any combination of actual practice and articulated *opinio juris* falling to the northeast of the relevant restrictive custom curve (for example, at point D) establishes the restrictive customary duty. Any combination of actual practice and articulated *opinio juris* falling to the southwest of the relevant restrictive custom curve (for example, at point E) does not rise to the level of custom. A combination falling at point F would establish a restrictive custom in a case like *Nicaragua,* but not in a more routine instance. It is assumed in each case that the asserted customary rule is reasonable under the circumstances.

The diagram, of course, does not provide a quick and easy solution to difficult cases. It simply illustrates what international decision makers such as the International Court tend to do when a restrictive customary rule is at issue. Most importantly, it provides a means for visualizing the de facto sliding scale that combines actual state behavior with observable *opinio juris.*

It also helps explain how the Court in the *Nicaragua* case found customary rules restricting the threat or use of force in the circumstances presented to it.

FREDERIC L. KIRGIS, JR.*

THE *NICARAGUA* CASE AND THE DETERIORATION OF WORLD ORDER

For all their greatness, democracies historically have difficulty in perceiving and deterring totalitarian aggression. William Stevenson reminds us in *A Man Called Intrepid* that debate raged within the United States as to whether we should enter World War II on the side of England even after the rest of Europe had fallen to the Nazis. The American ambassador to England cautioned against such entry, arguing that England was militarily doomed. President Roosevelt, who had months earlier secretly committed U.S. intelligence assets to British support, felt that he did not have the necessary popular support to enter the war. And the British were so concerned about American indecisiveness that even after Pearl Harbor they executed a covert operation to persuade Hitler to declare war on the United States, which, of course, he did before America entered the war against Germany.[1]

This historic difficulty of the democracies, which is rooted in a healthy abhorrence of war and a mirror imaging of the good faith motives of others, is placed under particular stress when aggressive attack is concealed. Traditionally, aggression has meant armies openly on the march across international boundaries. Hitler could delay the democracies' understanding of the attack on Poland by staging a fake Polish attack on Germany. But within a week the resulting misinformed *New York Times* story on the Polish raid and expected general Polish attack was swept aside as the reality of Panzer armies and Stuka attacks against Poland brought home the Nazi aggression.[2] As Afghanistan should remind us, such open aggressive attacks can still take place; and when they do, they are generally perceived as aggression. But more often in the contemporary international system, aggressors rely on sophisticated and secret support for terrorist attacks, coups or protracted guerrilla "liberating struggles." By denying these attacks, the aggressors seek to compound the problem of the world community in responding to them and to receive the protection of the very system of world order they are attacking. Sadly, there is every indication that the strategy of secret war is working to inhibit the democratic response and deterrence of aggressive attack. More ominous for the future of world order, this strategy of secret warfare is destroying the very fabric of the international immune system against aggressive attack as the secret attack blends in with a background

* Professor and Dean, Washington and Lee University School of Law; Board of Editors.

[1] *See* W. STEVENSON, A MAN CALLED INTREPID 82–84, 114, 123, 299–300 (1976).

[2] *Id.* at 45.