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SYNOPSIS OF THE AREA OF ARGUMENT

The area of study decided upon for this dissertation involves a combination of public international law and jurisprudence. It takes as its starting point the model of a legal system devised by Hart, consisting of primary rules of obligation supplemented by secondary rules. This general survey of Hart's work leads on to a detailed examination of his treatment of international law: a treatment which it should be said rests on the assumption that since the primary/secondary rule analysis enables law to be elucidated rather than defined, then there is no necessity to describe international law in its terms.

This assumption is for the most part borne out by Hart's analysis of international law except in so far as the following assertions are concerned:

- (i) international law has no rule of recognition/basic norm
- (ii) international law is as a consequence a set of rules not a legal system.

Indeed, this gives rise to the line of argument that occupies the first section of this dissertation: the attempt to provide answers for certain problematical questions that flow naturally from the above statements.

- (a) The first concerns the applicability of Hart's primary/secondary rule model to international law.
- (b) If it may be used, then does international society bear out Hart's description of it as a community governed solely by a set of the most necessary primary rules?
- (c) Or is Hart wrong in his assumptions, so that it may well prove possible to discern evidence of secondary rules and in particular an emergent rule of recognition?

It is with the establishment of a rule of recognition (or the impossibility of so doing) that the second portion of this research is concerned. It considers in detail the claim of United Nations resolutions to form in some way the content of such a rule. In the course of this process, academic opinion on the matter is taken into account, as well as the views of states as expressed within the international community. From this evidence a solution is sought to the many uncertainties besetting the rule of recognition.

- (a) Is it possible to construct a rule of recognition (whether in terms of United Nations resolutions or an alternative such as custom) for international law?
- (b) Or do the workings of international society bear out Hart's propositions that the sole factor which dictates whether or not a rule is a rule of international law is acceptance by the community of states as a whole?

It is believed that by seeking an answer to such questions, there will eventually emerge a picture of international law whose details may or may not be compatible with that of Hart's. If this does prove to be so, then this does nothing to invalidate Hart's primary/secondary rule model. Instead it merely alters the range of its applicability and enables us to speak of the international legal 'system' and its growing sophistication.

(It may well prove helpful to read Chapter X of Hart's 'The Concept of Law' as a necessary background to this dissertation).

CHAPTER I

INTRODUCTION

Professor H.L.A. Hart, one of the twentieth century's leading positivists, published in 1961 his exposition of the conceptual framework of a legal system. It was entitled 'The Concept of Law'. The ideas contained in this book have been widely acclaimed as making a valuable and indeed an outstanding contribution to the sphere of legal theory. 1. In particular, Hart's system of primary and secondary rules has served as a powerful tool of analysis whereby the workings of a municipal legal system may be made clear.

The study that follows takes as its starting point 'The Concept of Law' and the primary/secondary rule analysis that is its crux. No attempt will be made to undermine the standing of the primary/secondary rule concept as a tool of analysis re municipal law systems - a task, it may be added, that has already been undertaken. 2. Instead, the purpose of what follows is to ask whether Hart's concept of law provides us with a concept of international law. Or, to put the matter more precisely, what we are seeking of Hart is an answer to the following questions:

- (i) What does Hart have to say about international law?
- (ii) How relevant is it?

-
1. See the host of reviews published concerning this book. For example:- Bodenheimer, 10 U.C.L.A. Law Review. p.959(1962); Morris, 75 H.L.R. p.1460 (1962); Ross 71, Yale L.J. p.1185 (1962)
 2. R.H. Dworkin, 'Is law a System of Rules?' 'Essays in Legal Philosophy p.25.

- (iii) Does Hart deal with international law in terms of the primary/secondary rule concept?
- (iv) If not, why not?
- (v) Is it possible to deal with international law in terms of the primary/secondary rule concept?
- (vi) What, if anything, does this add to our knowledge of international law?

But such questions as these make little sense without some background information regarding Hart and 'The Concept of Law'. Moreover, it is this which our introduction aims to supply.

The Positivist School 3.

Initially, some explanation seems necessary of our opening description of Hart as 'one of the twentieth century's leading positivists'. Positivism is one of the blanket terms of jurisprudence used theoretically to cover all those legal theorists of a certain persuasion. Any discussion of positivism will almost inevitably contain references to certain leading members of this school such as Austin, Kelsen and Hart. It seems important therefore to examine the term 'positivism' as a term of classification which might denote certain attitudes and ideas that would to some extent colour anything written in the positivist vein.

Certain writers, of whom Friedmann is one, seem to believe it possible to trace the growth of positivism in the

'displacement of a loosely organised secular or ecclesiastical international order by the

3. For a more detailed analysis of positivism, see Friedmann, 'Legal Theory' (5th edition), section 4, chapters 21-25, pps. 253-311.

modern national state.' 4.

This led to the growth of state awareness and the increasing state orientation of important matters, resulting in an abandonment of natural law philosophies with their stress on the origin of law in a higher supranational system. Instead, positivism emerged with its placement of the state at the hub of legal activity and reasoning.

Inter-related with this ability to indicate the origins of positivism, is the ability to describe certain features which serve to distinguish the positivist outlook:-

'The separation, in principle, of the law as it is and the law as it ought to be, is the most fundamental philosophical assumption of legal positivism.' 5.

Thus, it is said to be an assumption common to positivist writers, that there is a need to distinguish law which has gone through the necessary law creating processes that exist within a particular society, and those values which underlie the life of that particular society. So, a positivist will contend that a law loses none of its validity even though it may infringe the current values of the day. Indeed, Hart has himself defended certain Nazi ordinances whose validity as law was challenged in view of their patent immorality. 6.

4. *ibid.* p. 256

5. *ibid.* p. 257

6. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 1957 - 8, pps. 593-629.

Though it may prove possible to make certain generalisations about the term 'positivism', the feasibility of so doing has been called in doubt. Robert Summers asked the question 'What is positivism?.... and reached the following conclusion ...

'Today, this phrase is used to describe so many different things that it surely deserves to be junked.' 7.

He goes on to list some of the divergent viewpoints that the term 'positivism' is used to cover.

(i) Law as it is can be clearly distinguished from law as it ought to be.

(ii) Force or power is the essence of law.

(iii) Law is a self sufficient closed system which does not draw on other disciplines for any of its premises.

Hart has also differentiated five separate meanings which are commonly subsumed under this blanket term 'legal positivism'.⁸

Thus, to class Hart as a positivist may be both a constructive and a destructive move. On the one hand, it may shed some light on the influences to be seen at work in Hart's writing, such as the separation of the 'is' and the 'ought' ⁹. Whilst, on the other hand, it may serve to obscure since positivism is not a precise enough term.

7. R.S. Summers, *New Analytical Jurists*, New York Univ. Law Review (1966), Vol.41, p.889.

8. Mentioned by Friedmann, *op.cit.* at p.256.

9. This is clearly seen at work in 'The Concept of Law' where Hart rejects any attempt to invalidate a law which is dependent on its breach of moral rules.

Summers overcomes this problem by taking the various 'members' of the positivist fraternity, such as Austin, Grey, Hohfeld, Hart and Dworkin, and dividing them into the new and old schools. He admits that old and new have certain factors in common such as the separation of the 'is' and the 'ought', plus an analytical method of approach. The latter relates to the idea implied in the term "positivism" (positum ... a laying down) that law is the product of some definite process or pattern of behaviour, which it is possible to isolate in order to achieve a proper appreciation of the law. Indeed, these factors make such writers distinctive from those of other schools.

However, Summers believes that the term positivism has been misapplied to such a degree that he prefers to refer to such writers as Austin and Hart as analytical jurists, with a division into old and new analytical jurists. 10. The latter, including Hart, are distinguishable from the former in various ways. They include the participation by the new analytical jurists in 'a wider variety of analytical activities than their predecessors'. 11. They show an increased interest in the process of conceptual analysis or rather the analysis of the use of words.

Moreover, the techniques of the new analytical jurists have gained in sophistication compared to that of Austin and his fellows. Various flaws in methodology have been corrected.

10. Summers, op.cit. p. 865 et seq.

11. Summers, op.cit. p. 865

To give one example, the earlier analytical jurists were, in Summers' opinion, 'plagued by a reductionist impulse which tended to obscure important differences and even ignore some things altogether'. 12. Austin reduced all laws to commands, neglecting such phenomena as rules, principles and regulations. 13. Modern positivists, however, recognise these pitfalls and thus to a great extent avoid them.

Thus it seems possible to list the 'pedigree' of Hart as a jurist, in the following fashion:-

Hart is a positivist; but in view of the many uses to which this term is put, it is probably more apt to describe him as an analytical jurist or perhaps an analytical positivist. Whichever term is used to describe Hart - analytical jurist/positivist, he is a member of that school of jurisprudence which numbers among its members John Austin and among its basic tenets the separation of the 'is' and 'ought'.

Hart's classification as an analytical jurist has been accepted by many writers including Hart himself. In an article entitled 'Analytical Jurisprudence in the Mid-Twentieth Century' 14. he discussed some of the tasks that face the analytical jurist.

12. Summers, op.cit. p.882.

13. A fault that Hart himself is aware of, when he constructs his critique of Austin. See chapters 2 & 3, 'The Concept of Law'

14. Hart; Analytical Jurisprudence in the Mid-Twentieth Century, University of Pennsylvania Law Review (1957), Vol. 105, p.935.

'It seems to me that similarly in pursuing analytical inquiries we seek to sharpen our awareness of what we talk about when we use our language. There is no clarification of concepts which can fail to increase our understanding of the world to which we apply them.' 15.

The analysis of concepts such as 'law', 'right', 'duty', and 'obligation' is the very task which Summers noted as being the preoccupation of the new analytical jurists. Indeed, Hart has elaborated upon what exactly this task of conceptual analysis entails.

'The position usually is that we can distinguish for any concept a standard case and then the phenomenon of vagueness shows itself in the fact that there are strains in our thought, and so in our language, inclining us to assimilate to the standard case those cases which have only some of these features - there is also a counter strain inclining us to withdraw the concept in the absence of certain of these features. The analytical task here, having established the features which constitute the paradigm case, is to examine the various motives that may incline us one way or the other in dealing with the borderline case.' 16.

This statement of Hart's is quoted at length in the belief that it is important in gaining some understanding of the background to analytical jurisprudence. For, if in describing Hart we seek to use the term 'analytical jurist' (as opposed to the broader term 'positivist'), then who better to tell us what this brand of jurisprudence entails than Hart?

15. ibid. p.967

16. ibid. p. 968

Indeed, he has provided us with the valuable information that the main preoccupation of this particular 'school' is conceptual analysis - that is:

- (i) the elucidation of the standard case for any particular concept,
 - (ii) coupled with a consideration of those instances that fall within the penumbra of the concept;
- a thought to bear in mind as we move on to a closer consideration of his work.

The Concept of Law

It seems a necessary preface to any detailed discussion of Hart's attitude toward international law to consider the line taken by his argument in 'The Concept of Law' as a whole, so as to put this more complex assesement into context.

The task that Hart sets himself to achieve at the outset of his work, is '... to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system ...'. 17. As a starting point, he takes the Austinian definition of law as an order backed by a threat. His aim in so doing is to pinpoint the flaws in this seemingly attractive theory in the hope of constructing in its place a more accurate analysis of the term 'law'.

The criminal law most closely bears out the characterisation of law as a command backed by a threat. Thus, one may have the command - do not kill - followed by the threat - or else

17. Concept of Law p.17.

you will be punished. However, as Hart makes plain, it is when one moves beyond the criminal law that the command theory is stretched to its limits. Rules which confer the ability to enter into contracts or to make a will do not fit comfortably into the mould of the command, since the failure to comply with such rules results in the nullity or non-effectiveness of the proposed transaction. 18. As for customary law, here it is difficult to pinpoint the command in which the custom originated, forcing one to speak in terms of tacit commands. 19. Moreover, attempts to fit the spectrum of legal rules into the notion of the command produce so called explanations that have the air of being extremely contrived. The treatment of nullity as a sanction is but one example; the activities which the rules of contract, etc., are designed to promote are worthwhile activities (as opposed to those activities which the criminal law is designed to discourage) where the use of a sanction seems particularly inappropriate. 20.

Having dealt with the inadequacy of the command to encompass the variety of legal rules that exist, Hart goes on to deal with the concept of the Austinian sovereign. The sovereign is that entity within a state which issues the commands and to whom there is a habit of obedience. This, in its turn, begs an explanation of several phenomena of a legal system. These include the continuity of legal rules. The fact that rules survive from one sovereign to the next without a fresh command defies explanation in these particular terms.

18. *ibid* p 28 et seq.

19. *ibid* p 43 "

20. *ibid* p 33 "

So also does the fact that the orders of a new sovereign may be regarded as law from the very outset of his reign without the development of a habit of obedience to that particular sovereign. If Austin were correct, it would seem logical for there to be a hiatus between the departure of the old sovereign and the accession of the new, whilst it was adjudged whether a habit of obedience had been established.

Having found the Austinian model of a legal system an imperfect tool for analysis, Hart proceeds to put forward his own elucidation of the concept of 'law', based on the shortcomings of Austin's theory. For the command of a sovereign backed by a threat, Hart substitutes a system of primary and secondary rules designed to display with greater accuracy how exactly a legal system works. 21.

Primary rules of obligation are characteristic of a society in the early stages of its development. The individuals who are members of such a loosely structured society in its embryonic days, will concern themselves with the most basic of rules, such as prohibitions on the use of violence and the sanctity of property. It is only when such a society expands that the inadequacies of primary rules alone become apparent. Such a system is static in that there is no indication whether a tentative rule has or has not become a primary rule, other than its general acceptance among members of that group. Nor is there any authoritative means of determining whether a primary rule has been breached. Moreover, the existence of primary rules of obligation alone produces stagnation, in that there is no one method whereby redundant rules may be eliminated and the new ones take their place. To meet these inadequacies

21. *ibid* Chapter V entitled 'Law as the Union of Primary and Secondary Rules'.

within the system, secondary rules eventually evolve. They contrast with primary rules in the following fashion, ridding the system of its previous flaws:

'Under rules of the one type' which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private.' 22.

Once Hart has elucidated his 'key to the science of jurisprudence,' he goes on to discuss a number of issues that arise out of his use of the primary/secondary rule model. These include such matters as the necessary requirements for the existence of a legal system and the open texture of legal language. 23.

In conclusion, Hart spends time exploring the areas of relationship between law and morals, shedding some light on the characteristic features of moral rules as well as the minimum content of natural law. 24.

22. *ibid* p 78, 79.

23. For Hart's detailed discussion of these matters, with which this thesis is not directly concerned, see Chapters VI, VII, *Concept of Law*.

24. Similarly, see Chapters VIII and IX.

International Law

The claims of international law to be regarded as 'law' have provided the subject matter for many a learned argument. Austin was led to classify the law of nations as positive morality, a conclusion that appears inevitable in the light of the definition of law that he adopted. 25. Bentham also found international law wanting in some of those ingredients which he considered necessary to warrant the title 'law'. Yet it was he who termed it international law on the following ground: that the analogy between it and municipal law was sufficient to accord it the title. 26.

Indeed, this is not to give the impression that international law is short of supporters of its claim to be a genuine legal system. Almost no great treatise on this particular subject is without its justification of the title 'international law'. 27. Points of dissimilarity between the municipal and international systems such as lack of a legislature and a police force are rationalised and explained. In fact, there is a great temptation to adopt the views advanced by Glanville Williams 28. who believes the question is basically one of semantics. A definition of law will either encompass international law or exclude it. Thus whether or not international law is law, is all a matter of the definition of 'law' chosen.

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25. This is so since Austin's definition of law is dependent upon a sovereign of some nature with power to command; a commodity which international law sadly lacks.
26. Principles of Morals and Legislation, XVII, 25 n. 1.
27. See Oppenheim's International Law (7th edition), Vol. I, Chapter I, Sections 1-10.
28. 22 B.Y.I.L.(1945) pps. 146-163. 'International Law and the controversy concerning the word 'law' '.

Though this is an extremely ingenious solution to the whole controversy, it neglects a vital factor - that law is a serious discipline. Hart himself makes this very point:-

'The short way suggested would indeed be appropriate if we were dealing with a proper name. If someone were to ask whether the place called London is really London, all we could do would be to remind him of the convention and leave him to abide by it or choose another name to suit his taste'. In contrast 'the extension of the general terms of any serious discipline is never without its principle or rationale, though it may not be obvious what that is.' 29.

It is in this frame of mind that Hart in his final chapter approaches the stumbling block of international law and its place within his theory of law.

Now as has been seen, Hart has put forward a theory to explain how a legal system functions, a theory that treats of law entirely in terms of municipal law. However, be this as it may, it would be logical to expect Hart to treat international law in those self-same terms of primary and secondary rules. Yet, as can be seen from Hart's final chapter, this does not prove to be the case.

'Though the idea of the union of primary and secondary rules has these virtues, and though it would accord with usage to treat the existence of this characteristic union of rules as a

sufficient condition for the application of the expression 'legal system' we have not claimed that the word 'law' must be defined in its terms. It is because we make no such claim to identify or regulate in this way the use of words like 'law' or 'legal' that this book is offered as an elucidation of the concept of law, rather than a definition of 'law', which might naturally be expected to provide a rule or rules for the use of these expressions.' 30. Thus, Hart has made it plain that he does not regard the union of primary and secondary rules as a definition of law. Nor does he intend to use this union to provide a means whereby the legal status or otherwise of international law may be determined. Instead, Hart contents himself with the following task:-

'We shall enquire into the detailed character of the doubts which have been felt, and, as in the German case, we shall ask whether the common wider usage that speaks of 'international law' is likely to obstruct any practical or theoretical aim'. 31.

With this as the task in hand, Hart proceeds to investigate various specific problems that have arisen with regard to international law. The first is expressed in the question 'How can international law be binding?' This problem is stated in more precise terms by Hart as follows:-

'This doubt would be more candidly expressed in the form 'Can such rules as these be meaningfully and truthfully said ever to give rise to obligations'. As the discussions in the books show, one source of doubt on this point is simply the absence from the system of centrally organised sanctions'. 32.

30. ibid p. 208

31. ibid p. 209

32. ibid p. 212

That a sanction is not a necessary ingredient of the concept of 'having an obligation' or 'being bound' is an idea that Hart has elaborated at length in the main body of the 'Concept of Law! Its basis lies in the distinction made by Hart between the external and internal views of obligation. Thus an outside observer may conclude after a study of a given society that an individual who infringes rule x will receive a punishment in the form of sanction Y. However, obligation also has an internal aspect. Individuals within a given society obey rules for a variety of motives of which the fear of punishment may be one - but it is not the sole nor the over-riding motive. 33.

Hart also advances another reason why sanctions - which undoubtedly do play some role within a municipal system - do not and indeed should not have the same relevance with regard to international society.

'The answer to the argument in this form is to be found in those elementary truths about human beings and their environment which constitute the enduring psychological and physical setting of municipal law. In societies of individuals approximately equal in physical strength and vulnerability, physical sanctions are both necessary and possible. They are required in order that those who would voluntarily submit to the restraints of law shall not be mere victims of malefactors who would, in the absence of such sanctions reap the advantages of respect for law on the part of others without respecting it themselves.' 34.

33. This idea of the internal and the external view of obligation is discussed by Hart at p. 79 onwards.

34. Concept of Law p. 213.

In contrast, the structure of international society is in Hart's opinion so unlike that of a society made up of individuals that any attempt made by states to punish a breach of international law by the use of force is a very uncertain exercise. An erring state may have at its disposal such enormous potential as to render any attempted sanction on the part of other states completely ineffective; a situation that could hardly ever occur within a municipal system. 'Hence the organisation and use of sanctions may involve fearful risks and the threat of them add little to the natural deterrents' 35.

Thus sanctions along the lines of those employed within individual state systems are inappropriate with regard to international society. Yet their lack does not in any sense make international law less binding. States may consider and in fact do consider themselves bound by international law. As has been stated their motivations may be various - be they economic or purely a matter of self interest. But there is no case - according to Hart - for denying^{that} international law is binding. Nor does its lack of sanctions, given the nature of international society, allow any judgment to be made as regards its inherent legality.

It has previously been mentioned how Hart found Austin's notion of sovereignty wanting in many respects. To Austin, the sovereign was above the strictures of the law. Now members of the international community are frequently referred to as sovereign states, thus leading individuals to speculate as to whether such sovereign entities may be above the law. But to Hart's way of thinking this is a distortion

of the true issues. Sovereignty to him is a concept which may only be evaluated in the light of international law and not as a entity apart. Indeed, sovereignty is that measure of autonomy possessed by a state insofar as it is not irreconcilable with international law. However, the assumption that the sovereignty of a state was such as to put it above the law, led to the formulation of many ingenious theories designed to explain why states for the most part adhered to the rules of international law. These theories include among their number the concept of auto-limitation which regarded all obligations as imposed by states upon themselves. 36. Also prevalent was the idea that international law was based on the consent by sovereign states to be bound by a particular rule of law. 37. But as Hart points out these explanations fail to correspond with the facts as they stand.

'A detailed scrutiny of the claim that all international obligation arises from the consent of the party bound, cannot be undertaken here, but two clear and important exceptions to this doctrine must be noticed. The first is the case of a new state. It has never been doubted that when a new, independent state emerges into existence, as did Iraq in 1932, and Israel in 1948, it is bound by the general obligations of international law including, among others, the rules that give binding force to treaties'. 38.

The second case concerns the state which acquires maritime territory after having previously been land-locked. It is clear that this is enough to make it subject to all the rules of international law relating to territorial waters and the high seas.

36. The principal exponents of this view are Jellinek and Triepel. For a brief analysis of their theories see Friedmann op.cit p.575.

37. For two outstanding cases on this point see The Lotus P.C.I.J. Series A. no.10.; R.v. Keyn 1876 2 Ex.Div.63.

38. Concept of law p. 221.

Nor is Hart alone in this opinion, support being forthcoming from Starke in his book 'Introduction to International Law'.³⁹. In these circumstances it appears that Hart's notion of sovereignty as an idea whose bounds are dictated by international law rather than an absolute phenomenon is much nearer the truth.

Another factor which has undermined the status of international law is the effort on the part of many academics to align it with morality. This process may be the direct line taken by Austin who classified international law as positive morality. Alternatively authors such as Brierly have contended that underlying the international system as a whole is a conviction on the part of states that they have a moral obligation to obey the rules. ⁴⁰. Hart faults this attempted mingling of law and morality. To him international law is an entity apart from morality for several reasons. Initially there is the fact that states accuse one another of breaches of the law and not morality in the cases that come before international tribunals; plus the factor that, in Hart's opinion, the rules of international law are morally indifferent. To his mind, it is inconceivable that the highly complex and technical rules of international law could ever be regarded as having moral weight.

'We expect international law, but not morality, to tell us such things as the number of days a belligerent vessel may stay for re-fuelling or repairs in a neutral port'. ⁴¹.

39. Starke gives examples of how a state may well be bound without its consent: see pps. 27-28.

40. See Brierly 'The Basis of Obligation in International Law' Chapter 1.

41. Concept of Law. p 224. - 18 -

The final factor that weighs against any attempt to class international law as morality, is the possibility that the rules of international law might at some time in the future be the subject of legislative change. If these rules were indeed moral rules the very process of legislative change would be anathema to them.

The final topics that concern Professor Hart in relation to international law are the various analogies that have been drawn between it and municipal law. Various scholars in an attempt to show how closely the two systems parallel each other, have tried to show how familiar municipal law institutions - such as statutes - have their equivalent within the international structure. 42. Hart is of the following opinion concerning such analogies.

'Yet some theorists, in their anxiety to defend against the sceptic the title of international law to be called 'law' have succumbed to the temptation to minimise these formal differences and to exaggerate the analogies which can be found in international law to legislation or other desirable formal features of municipal law'. 43.

To prove his point, Hart concentrates on one particular analogy.

'Kelsen and many modern theorists insist that, like municipal law international law possesses and indeed must possess a 'basic norm' or what we have termed a rule of recognition, by reference to which the validity of the other rules of the system is assessed,

42. See Hudson 'International Legislation' - pp: xiii - xix - for the theory that multi-lateral treaties are a form of legislation within the international community.

43. Concept of Law p. 226

and in virtue of which the rules constitute a single system'. 44.

To Hart this search for a basic norm is so much wasted effort in so far as international law is concerned. This is in view of the fact that a rule of recognition,

'is not a necessity, but a luxury found in advanced social systems whose members come not merely to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity'. 45.

Hart believes that international society has not yet reached the stage of sophistication that warrants the presence of a basic norm. Not that this makes international law any the less binding in Hart's eyes. Indeed the only tangible consequence of such a lack is that 'such rules', that is those of international law, 'do not form a system but a mere set'. 46.

With these points, Hart brings his chapter on international law to a close. He stresses the innate danger of drawing formal analogies between the international and municipal systems. Instead he prefers to stress the analogies of content that exist between the two systems. To him, this is a much more fruitful source of comparison. It is on this note that Hart concludes his chapter.

44. *ibid* p. 228

45. *ibid* p. 229

46. *ibid* p. 229

'Bentham, the inventor of the expression 'international law', defended it simply by saying that it was 'sufficiently analogous' to municipal law. To this two comments are perhaps worth adding. First that the analogy is one of content not ^{of} form: secondly that, in this analogy of content, no other social rules are so close to municipal law as those of international law'. 47.

47. *ibid.* p231.

C H A P T E R I I

Now that some of the necessary background has been given, an attempt may be made to examine the rationale behind Hart's chapter on international law. Probably the most pertinent question to ask at this juncture is Hart's purpose in writing this chapter. The aim of 'The Concept of Law' as a whole seems to be straightforward enough:-

'For its purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word (law) can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system . . . ' 1.

This 'improved analysis' may be described as an elucidation of the word 'law', not a definition.

Besides this central theme, Hart does have another less vital task in hand:-

'At various points in this book the reader will find discussions of the borderline cases where legal theorists have felt doubts about the application of the expression 'law' or 'legal system' but the suggested resolution of these doubts which he will also find here, is only a secondary concern of the book.' 2.

This idea of the elucidation of a concept together with a discussion of its more dubious applications fits in with the description given of the working methods of the analytical

1. Concept of Law p.16, 17.

2. *ibid.* p.16.

jurist. It is also a subject to which Hart has given some considerable thought. In a review of 'Dias and Hughes on Jurisprudence', Hart pointed out that it was 'important in jurisprudence to notice certain cardinal features of language'. 3. One of these was the fact that 'words are vague'. Hart expanded this by adding' . . . they have only a core of settled meaning, but beyond that a penumbra of borderline cases which is not regimented by any conventions. . . '4.

In the light of this, it appears that what is achieved in 'The Concept of Law' is an analysis of the structure of law as it is epitomised within a municipal legal system. In addition, various secondary issues are considered including the aptitude of the expression 'international law'. This investigation is conducted on the basis of whether or not the 'common wider usage that speaks of 'international law' is likely to obstruct any practical or theoretical aim'. 5.

All this is so since Hart believes it well - nigh impossible to pinpoint certain features and insist on their presence before the terms 'law' / 'legal system' may be employed. He justifies this belief as follows:-

' . . . but I am not sure that in the case of concepts so complex as that of a legal system we can pick out any characteristics, save the most obvious and uninteresting ones and say they are necessary. Much of the tiresome logomachy over

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3. Hart 'Dias and Hughes on Jurisprudence' J.S.P.T.L. p. 144 (1957-8)
 4. ibid. p.144.
 5. Concept of Law p. 209.

whether or not 'international law' or 'primitive law' is really law has sprung from the effort to find a considerable set of necessary criteria for the application of the expression 'legal system'. Whereas I think that all that can be found are a set of criteria of which a few are obviously necessary (e.g. there must be rules) but the rest form a sub-set of criteria of which everything called a 'legal system' satisfies some but only standard or normal cases satisfy all'. 6.

So whilst Hart regards it as a feasible task to elucidate the core or paradigm case of any particular concept - the task that takes up the bulk of his time in 'The Concept of Law' - he does not regard the characteristics of the standard case as dictating when or where not to use the expression 'law'. So it appears that when Hart examines international law, it is not his intention to insist on the presence of primary or secondary rules in order to allow the use of the term 'international law'. Instead, he concentrates on the practicalities of using the expression.

Once Hart's underlying purpose has been decided then the issues that he touches upon in this final chapter become those that are usually raised when the question arises as to the legal potential of international law. They include such matters as:-

- (a) the problem of sanctions in relation to the binding nature of international law;
- (b) the problem of sovereign states, including such theories as that of auto-limitation;

6. Hart 'Theory and Definition in Jurisprudence'
Problems of Psychotherapy and Jurisprudence p.251 (1954)

- (c) the analogies drawn between international and municipal law.

The manner in which he disposes of such matters has been previously discussed. The conclusions that he reaches are as follows. Of greatest significance is what Hart does not say; that is, he never categorically asserts that international law is 'law! What he does say is that international society is such that sanctions are not factors which are necessary in order that international law may be regarded as binding or a source of obligation. Hart shows, moreover, how the existence of sovereign states may effectively be reconciled with the existence of a regime of international law, whilst the idea that the rules of international law are moral precepts is shown not to accord with the facts, nor the nature of the rules which govern international society. Yet, even in the light of all this, Hart never asserts outright the legal nature of international law. Instead, he contents himself with saying that '....no other social rules are so close to municipal law as those of international law'. 7.

How then does Hart regard international law? He views those rules which govern the behaviour of states as a set of rules and not as a system, basing his conclusion on the fact that in his estimation, international law lacks a rule of recognition:-

'.... but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules.' 8.

7. Concept of Law p. 231

8. *ibid.* p.230, 231

If one accepts Hart's categorisation of the rules of international law as a set of rules, can one assume that such rules are binding? Hart seems to imply that this is indeed the case:-

'The rules of the simple structure are, like the basis rule of the more advanced systems, binding if they are accepted and function as such.' 9.

This also carries the implication that one must equate the simple structure or simple social structure with international society as it exists at present. Another reference is made as regards the binding quality of such rules, again without a direct reference to international law.

'Yet if rules are in fact accepted as standards of conduct and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules, even though, in this simple form of social structure, we have not something which we do have in municipal law, that is the rule of recognition.' 10.

So the picture that Hart gives of international law is of a set of binding rules whose content is closely analogous to that of municipal law.

9. *ibid.* p.230

10. *ibid.* p.229

Whether or not the above description is an accurate representation of international law is the next matter to be investigated. In the critiques that there have been of Hart's work, his treatment of international law is scarcely mentioned. In fact, one of the few exceptions is an article by Anthony D'Amato entitled 'The Neo-Positivist Concept of International Law.' 11. This article is particularly surprising in that it has several harsh things to say concerning Hart's opinions vis-à-vis international law.

The portion of Hart's argument that particularly irritates D'Amato relates to international law and the rule of recognition.

'...Professor Hart argues that there is no unifying rule of recognition specifying sources of international law, and providing criteria for the identification of its rules. But how can international law then be termed 'law'?' 12.

Hart's answer to this problem is, as has been seen, simple enough. It is to regard international law as a set of rules not a system: a set of rules that are, ~~however~~, binding. International law is merely regarded as approximating to that simple form of society where a rule of recognition has not yet emerged.

To D'Amato such a line of reasoning leads to inescapable conclusions:-

'....international law becomes law at the price of conceding that it is a primitive kind of law, lacking in rules of recognition'. 13.

The suggestion is made that international law is 'basically

11. 59 A.J.I.L. p.321 (1965)

12. *ibid* p. 322

13. *ibid* p. 322

incomplete and thus deserving of less respect on the part of states than ordinary municipal law'. 14.

So the stage is reached where it can be said of international law, as Hart has, that it lacks a rule of recognition and therefore becomes a set of rules. As a set of rules it becomes a brand of second class law, at least according to D'Amato. But though D'Amato roundly condemns Hart for what he has to say and the fashion in which he chooses to state the rule of recognition, he does not attempt to investigate in depth whether what Hart has to say is true.

To do so involves an attempt to find the solution to the following problems:-

- (1) Does international law possess a rule of recognition? The claim by Hart that international law does not and indeed need not possess a rule of recognition/basic norm, is by no means original. The self same attitude is taken by Gihl in an article entitled 'The Legal Character and Sources of International Law' :-

'International law is customary law, it is impossible to find any 'foundation' for this law, whether in the will of the state or in any 'basic norm', which gives its rules validity as rules of law' 15.

But it is the consequences of such a lack, according to Hart's scheme of things that makes it so far reaching.

14. *ibid.* p.322.

15. 1 *Scandinavian Studies in Law* p.69 (1957).

(2) If there is no rule of recognition, does international law consist of a binding set of rules? This is how Hart describes international law; a logical conclusion once the presence of a rule of recognition has been discounted. Yet, is this a conclusion that corresponds to the workings of international law as we know it today?

Therefore it is our intention to pursue these two lines of reasoning, at first in a general fashion, since they may offer an accurate assessment of the status of international law. Yet if this appears not to be the case, then the way is clear for a more detailed consideration. However, before we can so do, an even more important matter must be attended to; that is whether or not we may refer to international law in terms of primary and secondary rules. Hart refutes the idea that he has provided a definition of law. This may in turn lead us to surmise that the search for a rule of recognition, besides other secondary rules, is an inappropriate exercise.

C H A P T E R III

Wittgenstein in his treatise 'Philosophical Investigations' 1. provided what he described as a solution to the problem of universals. Universals are certain general expressions such as 'games' and 'beauty'. When dealing with general expressions such as these the tendency is to look for certain common characteristics that will enable us to subsume many entities under the common term. To quote Wittgenstein:-

'We are inclined to think that there must be something in common to all games, say, and that this common property is the justification for applying the general term 'game' to various games.' 2.

However, Wittgenstein refutes this idea as tending to create too much confusion. Instead, he substitutes his theory of family resemblances.

Within a general concept such as 'games' there exist the various members of that family. Whereas it is not possible to isolate common characteristics, it may be the case that certain 'family resemblances' will exist making it appropriate that a certain item be included within a general concept:-

'....games form a family the members of which have family likenesses. Some of them have the same nose, others the same eyebrows and others the same way of walking; and these likenesses overlap.' 3.

'Law' is a general concept akin to that of 'games'. Hart

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1. Philosophical Investigations, 2nd edition, Oxford, 1958.
 2. ibid., Blue Books, pps. 17-18
 3. ibid., pps 17-18.

has chosen to analyse this concept in terms of primary and secondary rules in the fashion previously considered. The conclusions he reaches relate to those paradigm cases of law - municipal systems. Yet there are other types of law including international law.

Now international law is undoubtedly very akin to municipal law. Hart himself admits this:-

'.... no other social rules are so close to municipal law as those of international law.' 4.

Moreover, states in their dealing with one another constantly refer to international law as consisting of legal rules binding upon themselves. 5.

Given this admitted affinity between municipal and international law and their undoubted resemblances, it appears that any analysis of law as a concept must take account of international law. There are enough family resemblances between the two to make international law a necessary constituent of the concept 'law'. Even Hart seems tacitly to admit that 'international law' falls within the genus 'law', given the fashion in which he rebuts those arguments which have been used to challenge the status of international law as law.

4. Concept of Law p.231.

5. For a demonstration of the way in which states regard international law in this concrete fashion see: Jessup 'Modern Law of Nations'; Chapter 1.

Yet what Hart does dispute is the validity with which his scheme of primary and secondary rules may be applied in order to establish whether or not the rules of international law constitute either law or a legal system.

'....though it would accord with usage to treat the existence of this characteristic union of rules as a sufficient condition for the application of the expression 'legal system' we have not claimed that the word 'law' must be defined in its terms.' 6.

Thus, it seems wise to clarify the position and consider what exactly are the problems which face us. There exists initially the general idea of law of which it seems agreed that international law forms a part. This follows on Wittenstein's idea of family resemblances since international law consists of binding rules and is considered as law by those who have dealings with it.

But there is also a concept of law as postulated by Hart in terms of primary and secondary rules. Since international law is part of the general idea "law" then it seems logical that it should also to some degree be encompassed by Hart's concept of law. Hart has denied any attempt to define law in terms of primary and secondary rules, and this we accept. But we do have an analysis of law in terms of primary and secondary rules. It is reasonable to surmise from this that Hart's analysis can be applied to some degree to international law.

6. Concept of Law p. 208.

Hart's consideration of international law in his final chapter seems to a great extent directed to asserting the right of international law to be included within the general idea of law. The lack of sanctions is shown not to destroy conclusively the family resemblance to law.

Yet given this, Hart does not try to deal with what seems to be a separate issue, which is, that given that international law is within the concept 'law' then it should also be accommodated within the concept of law. The fact that Hart's concept of law is not a definition does not, it seems, destroy the validity of this point.

So it seems logical in view of what has been said to expect at some point that Hart will somehow fit international law within his frame-work of primary and secondary rules. Indirectly, he does this, though his approach is far from straightforward. Hart denies that international law possesses a rule of recognition and as a consequence defines it as a simple social structure with all that that entails.

It appears therefore that a study of international law in terms of primary and secondary rules is a valid task to undertake for two reasons:-

- (a) because international law is part of the general idea of law and therefore should also be a part of the concept of law.
- (b) because Hart himself treats international law in terms of primary and secondary rules.

Before pursuing this line of reasoning, it is just as well to establish what exactly Hart has to say of international law in terms of his concept of law. His first assertion is that no rule of recognition exists within the international system. It will be recalled that the rule of recognition is the key secondary rule which makes it possible to identify the rules of the system. 7. If no such secondary rule exists then this has implications for the whole of international law.

Within the terms of Hart's concept of law, international law emerges as a set of rules of binding quality regulating relations between states. Secondary rules are by implication totally lacking. Instead there exists within international society a legal structure which corresponds to that

'simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.' 8.

If this is an accurate description of the international legal system it seems logical to expect ^{that} it will exhibit, at least to some degree, the defects of a simple social structure as listed by Hart. Those defects consist of:

- (i) uncertainty 9.
- (ii) inefficiency 10.
- (iii) static character of the rules. 11

7. Concept of Law p.92.

8. Concept of Law p.209.

9, 10, 11. These characteristic defects of a set of rules and their causes are discussed by Hart at pp. 89-91.

Therefore it ought to prove possible - given the applicability of Hart's system of primary and secondary rules to international law - to give some indication whether or not the international system does suffer from these defects. This presents us with one aspect of Hart's theory that is worthy of examination.

If we pass over the question as to whether or not international law possess the characteristic defects of a simple social structure, then we are faced with the additional question of how accurate, or rather how appropriate, is Hart's description of international law as a set of rules. What makes a rule a rule of international law is in Hart's view its acceptance as such.

'In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not' 12.

The practice or rather the behaviour of states in accepting a rule as a rule of law is all important in Hart's analysis.

Yet this seems to simplify what may not be in every respect a simple issue. Given the basic premise that

'.... rules of the simple structure are binding if they are accepted and function as such....' 13.

then difficulties begin to arise. The concept of acceptance is deceptively straightforward. There are various difficulties associated with its usage. For example, it is not made clear what breadth of acceptance is necessary within the international community. Nor is it clear whether acceptance by the

12. Concept of Law. p.229.

13. ibid, p.230.

majority of states on a single occasion ... such as might be forth coming in the United Nations is sufficient to create a rule of law.

Another consequence of this stress on acceptance is that it appears possible to list facets of international law where obligation does not originate in acceptance. For example, one may refer to treaty obligations where the power to bind seems to rely more on the format of the treaty, than the element of acceptance. 14. The same may well be true of general principles of international law, since how is it possible to show their acceptance as binding.

Moreover, Hart dismisses in no uncertain fashion potential claimants to the rule of recognition in international law.

These include the following:-

'States shall behave as they have customarily behaved.' 15.

Now the basic task of the rule of recognition is to enable the identification of other rules of the system. The rule of recognition, with this end in mind, will as a consequence set out the criteria which will allow the existence of the rule of law to be ascertained. The example just quoted sets out no such criteria though it does refer to custom. This raises the question as to whether it is possible to use those criteria which are regarded as the basis of custom to form the content of a rule of recognition.

14. Though states do undoubtedly show a certain degree of acceptance by putting their signatures to a treaty, the power to bind also stems from the particular form a treaty takes, its structure, as well as the customary rule 'Pacta sunt servanda'.

15. Quoted by Hart at p.228 of the Concept of Law, but formulated by Kelsen in the 'General Theory of Law and State'. p.369. - 36 -

Again, if we accept Hart's premise that there is no rule of recognition within the international system, he does not assume that this is by any means a permanent state of affairs. Indeed, he infers that treaties may well provide the content of a rule of recognition if it could be shown that they were binding on states who were not signatories to the convention.

'It is true that, on many important matters, the relations between states are regulated by multi-lateral treaties, and it is sometimes argued that these may bind states that are not parties. If this were generally recognized, such treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules.' 16.

But how are we to know when international law has reached such a stage of development that it may validly claim to possess secondary rules? Hart does not deny the possibility, but neither does he give any indication as to just how it will be achieved. The closest Hart comes to providing an answer is when he indicates that no rule of recognition may exist until that rule's criteria have won the acceptance of the officials of a particular system.

'In this more complex system, only officials might accept and use the system's criteria of legal validity.' 17.

16. Concept of Law p.231

17. Concept of Law p.114

Hart seems therefore to have provided us with what seems at first glance an inadequate explanation of the workings of international law.

- (a) Hart describes international law as a set of rules. Indeed he infers that it is organised along the lines of a simple social structure. If international society is on a par with the simple social structure then Hart explains the fact that it possesses binding rules of law on the basis of acceptance on the part of states of certain rules as binding. Yet this leaves us with the problem of how exactly it is possible to analyse this idea of acceptance.
- (b) Hart does concede that it is possible for international society to acquire the cornerstone of a more sophisticated social structure i.e. secondary rules and more particularly a rule of recognition. But again there is the problem of just how to assess whether or not a rule of recognition exists.
- (c) Among matters to be considered in the chapters that follow are whether or not resolutions of the General Assembly are binding and thus constitute a potential rule of recognition. But since Hart dismisses the claim of treaties to form the crux of the basic norm then it seems possible that the same mode of reasoning can be used to dismiss claims on the part of resolutions of the General Assembly. Hart states that treaties are binding because one of the set of rules of international law is 'pacta sunt servanda'. Thus it seems

possible that Hart might say that resolutions of the General Assembly are binding because one of the set of rules of international law is 'res sunt servanda'. Just how we may distinguish the generalised concept of acceptance which adds another rule to the set from the acceptance of officials which may generate a rule of recognition is far from clear.

Thus, it seems safe to conclude that Hart's mode of analysis of international law seems to present, at least on first examination these difficulties of interpretation described. The prime difficulty is that of identifying a rule of recognition.

The first of Hart's premises to be put to the test is that which equates international law with a set of rules. In so doing, it will be conceded at least for the purpose of this particular chapter that no rule of recognition exists within international society. Therefore, it seems appropriate to expect international society to exhibit those defects which are described by Hart as a consequence of a set of rules. These defects take the following form:-

- I uncertainty - which arises from the lack of an authority able to state categorically whether a particular rule is a rule of that set.

- II inefficiency - which arises from the lack of an agency which is especially empowered to ascertain with finality and authority whether there has been a breach of a particular rule.

- III static nature - which arises from the lack of a process whereby new rules may be introduced and old rules eliminated.

Though it is easy enough to list these defects and indeed to attempt to evaluate whether or not they exist within international society, there is a general criticism that may be made of the whole process. This relates to the fact that Hart, when he described these defects which were the direct result of the existence of a set of rules, was concerned with the interaction of municipal law and individuals, not states and international law. Thus, the difficulty arises as to whether or not it is possible to draw a parallel between these two situations. Hart himself has pointed out the danger of expecting what is familiar on a municipal law level - such as sanctions-to be reproduced within the international community, since the 'climate' and the demands of states are in a great many respects opposed to those of individuals. International law relies to a great degree on the extent to

which states are willing and able to curb their various activities, whereas within a municipal system with a strong, central government, the part played by individual compliance assumes a secondary character.

The 'simple social structure' that Hart describes as governed by primary rules of obligation alone, is a society of individuals totally lacking in any variety of officialdom. Patterns of behaviour are regarded as acceptable or not within the particular grouping, but there is no authoritative way of ascertaining whether or not a rule is a rule within the particular grouping. Indeed, whether a particular rule has been breached, or whether a common process has developed to eradicate rules which are no longer pertinent, is also open to conjecture.

These tasks are essentially those of officials within any organised community. So in order to achieve the transformation from a primitive set of rules to a legal system it seems that there must be in existence a class of officials in order to achieve the aims set out by the secondary rules. This ties in with what Hart has to say concerning the 'two minimum conditions necessary and sufficient for the existence of a legal system' 1. They are the following:-

'On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.' 2.

1. Concept of Law p.113
2. ibid. p.113

So the 'simple social structure' becomes identifiable in human terms with a loose grouping of individuals totally lacking any central organisation or official class. Though, as Hart admits, there may be a generalised pressure exerted by the 'law abiding majority' on the minority who might not wish to conform.

But, granted that this is the picture as it exists in human terms, may it be transferred on to an international level?

May we expect to see:-

- a. a loose grouping of states,
- b. a lack of officials,
- c. the three key defects of uncertainty, inefficiency and static tendencies, -

exhibited by an international society which is governed, in Hart's opinion, by a set of rules? Hart never ventures to equate the 'simple social structure' with international law in terms of a direct comparison, that is by showing a lack of officials or the inefficiency of its rules, he is merely concerned to show that the international structure might function perfectly well without a rule of recognition. In fact the nearest he comes to equating the two is in this manner:-

'The absence of these institutions means that the rules of states resemble that simple form of social structure consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.' 3.

Indeed, when Hart uses the word 'resemble' he is probably stating the case in as strong a fashion as possible.

There are undoubtedly facets where the two situations - municipal and international - will not correspond at all. In a municipal situation Hart states that those items which the rules will first seek to control, are the use of force, and the infringement of rights over property. Undoubtedly the same cannot be expected of the rules of international law. Indeed, the use of force is probably one of the most ill-regulated aspects of international law. 4.

There are, however, two aspects of Hart's model that it appears must be translated in some degree onto an international level. The first of these is the necessity for some kind of official. This is because officials seem a very necessary adjunct to the existence of secondary rules. This does not automatically mean that international law must possess some form of government since it is only at a municipal law level that the term 'official' has become synonymous with government. What it does mean is that there must be some class of persons (since these are the representative voices of states) whose authority is such that they as a group may be responsible for the formation of secondary rules. The states of which they are officials must then obey the rules which are valid according to the criteria accepted by the officials.

As for the qualities or rather the flaws said by Hart to be displayed by a society based on a set of rules, these too may be expected to be reproduced in some shape or form. This is so since the flaws are not inherent within the particular society, that is, they do not arise out of the very nature of

4. For example the lack of clarity that surrounds the use of force by a State in self-defence (art. 51 of the Charter of the United Nations); the seeming lack of rules applicable in cases of civil war. A good discussion of the whole problem is contained in Chapter XVI - D.W. Greig - International Law (1970). 43 -

human beings. A set of rules produces uncertainty basically because there are no officials to say what shall be adjudged as a rule. The differing character of states and individuals may well effect the way the officials are organised, but it does not seem to alter the fact that without officials of some description, the set of rules will produce a condition of uncertainty, etc., within that particular society. Therefore, it appears perfectly feasible to investigate whether international society displays those weaknesses that Hart attributes to a society governed by a set of primary rules of obligation. Such an investigation will be on two levels:-

- (1) an exploration into whether international society is plagued by uncertainty, inefficiency and a static nature arising from the existence of a set of rules;
- (2) an inquiry into whether international society possesses officials of any nature, since the question may be posed whether officials and a set of rules of international law are compatible.

It seems at first glance that international law is the epitome of a set of rules characterised by the above-mentioned weaknesses. Since there is no international legislature, rules tend to be accepted within the framework of international law in a random fashion so that at some junctures it is impossible to determine what the law is within a particular sphere. This is particularly true of those sensitive areas of international behaviour - such as the law of the sea - where special interests of states are affected. 5. All this seems calculated to win international law the description of being uncertain.

5. Note the reluctance of states to commit themselves to a hard and fast rule regarding the extent of territorial waters: e.g. Geneva Convention on the Territorial Sea where states failed to reach agreement on this point. (Official Records Vols I - VII.)

It will be recalled that the characteristic of uncertainty rests on there being no means of determining what is and is not a rule of that particular set of rules. Becoming a part of that set of rules is dependent upon acceptance. Thus, it is not possible to ask oneself what it is that makes a particular rule binding or valid, instead the rule will merely gain acceptance and function as such.

Now it can be said that international law is uncertain since at times it is very difficult to make out what the rule is in relation to a particular situation. But whether international law is uncertain in the sense that it is difficult to say why a rule is binding or valid, is a proposition that is open to argument. When asked why a particular rule of international law is valid or binding the usual reply is that that rule is a rule of customary international law. It could be said that any uncertainty that exists within the international community arises not from the lack of criteria for determining whether a rule is indeed a rule of public international law, but from the scope for uncertainty that lies within that criterion, that is, custom. In the 'North Sea Continental Shelf Case', 6. the court was asked at one stage to determine whether what is commonly known as the 'equidistance method' of measuring the extent of the continental shelf was a rule of customary international law. 7. There was no argument in the court that if the equidistance method was a custom, it would be binding. 8.

6. I.C.J. Reports, 1969, p.3.

7. This is explained in Act 6 (ii) of the Convention on the Continental Shelf adopted in Geneva in 1958.

8. See I.C.J. Reports p.28. (1969).

The elements to which the Court looked in order to establish whether or not a customary rule existed were:-

- (i) sufficient practice by States over an adequate period of time:

'Although the passage of only a short period of time is not necessarily ... a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question, ... State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform ...' 9.

- (ii) belief that the practice concerned is obligatory:

'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'. 10.

On application of these tests, the Court decided that there was no rule of customary international law in existence.

9. *ibid.* p.43

10. *ibid.* p.44

Therefore, if international law is said not to betray uncertainty, then this is tantamount to saying that international law is possessed of a rule of recognition framed in terms of custom, a proposition that Hart vigorously denies . A rule of recognition also seems to eliminate the possibility of there being a set of rules. This question of uncertainty raises two separate issues. If there is a set of rules then there should be some indication of the uncertainty which is a necessary characteristic of a set of rules. Since this appears to be in doubt then a second issue arises - which will be examined at a later stage - as to whether international law is a system and not a set of rules, possessing a rule of recognition.

The second weakness that is characteristic of a set of rules is their static nature. Facilities are lacking whereby a rule which has outgrown its usefulness may be eliminated and a more suitable rule introduced. Once again this seems to be characteristic of international law where there exists no central agency to control the introduction and elimination of rules of international law. Instead, the situation is much less well defined, the process a lot more gradual. Brierly introduced his treatment of international waters and territorial seas in a fashion which reflects this situation: 'The law governing the delineation of these areas has been in course of formation during the past three centuries' 11.

11. Brierly, 'The Law of Nations', p. 194.
See also D'Amato 'The Concept of Custom in International Law' where the whole process of formulation and change in custom is discussed.

Though international law does have this aspect whereby any changes in the rules may only be achieved very gradually, it is a problem that is being increasingly alleviated by the use of international conferences and international organisations. New situations that call for new or modified rules of international law are being met as they arise, and indeed even anticipated. During the nineteen sixties the exploitation of outer space was pioneered by both the Americans and the Russians. There was in the light of this advance an immediate response on the part of the United Nations which initiated a committee to formulate rules governing the use of outer space. 12. The end result was a number of resolutions and multilateral treaties designed to regulate the behaviour of states. 13. Now, if international law is to be described as static, one would not anticipate that there would be a deliberate and co-ordinated attempt on the part of the majority of states to provide rules for a situation which actively involved - and this was likely to be the situation for a great number of years - only a mere handful of the international community as a whole.

Nor is this an isolated instance of an international organisation taking the initiative. The United Nations has been the instigator of restatements of the law in other spheres.

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12. General Assembly Committee on the Peaceful Uses of outer Space set up in 1958 by Resolution 1348 (XIII).
 13. These include Resolution 1962 (XVIII): Declaration of Legal Principles Governing the activities of states in the exploration and use of outer space; the Outer Space Treaty, 1966.

The United Nations Declaration and Covenants on Human Rights 14. have been another venture where the aim has been to achieve a statement of those fundamental rights and freedoms of the individual - instead of allowing them to develop piecemeal as would seem to be more logical if international society was infected by that static quality that is said to be part and parcel of a set of rules. Yet international law does seem able to produce rules to meet a specific need.

The international conference is another weapon whereby any tendency on the part of rules of international law to stagnate may be rectified. One of the most well known of these conferences was the nineteen fifty eight Geneva Conference on the Law of the Sea, 15. when four conventions were adopted on:-

- (I) territorial waters,
- (II) high seas,
- (III) fishing,
- (IV) continental shelf,

Eighty-five nations attended this conference and the four conventions were the result of their deliberations. The Convention on the High Seas was said in its preamble to be 'generally declaratory of established principles of international law'. The other three conventions may be regarded as indicating what the law is, regard being paid to the number of ratifications each has received. Nor is the international conference an isolated gesture that occurs once in a lifetime. Already plans are underway for another international conference on the law of the sea to take place in 1974, in Caracas.

14. U.N. Doc. A/811, Dec. 16, 1948. For the text of the Covenants, see 61 A.J.I.L. p 861 et seq. (1967).

15. U.N. Conference on the Law of the Sea, Geneva, February, 24th - April, 27th 1958, Official Records, Vols. I-VII; U.N. Doc A/Conf. 13/37-43. See also 52 AJIL & pps.834-861(1958)

Other matters have been dealt with through the medium of the international conference. In 1961 an international conference held at Vienna adopted a convention on Diplomatic Relations, 16. Whilst in 1963 a meeting of states was held at Tokyo to formulate the terms of a convention on 'Offences and Certain Other Acts Committed on Board Aircraft'. 17.

November, 1972 saw the conclusion of a 'Convention on the Dumping of Wastes at Sea' - designed to 'promote the effective control of all sources of pollution of the marine environment', 18. whilst in 1969 an international conference was held under the aegis of the Inter-Governmental Maritime Consultative Organisation 'to consider the adoption of a convention or conventions on questions relating to marine pollution damage.' The result was an 'International Convention relating to intervention on the High Seas in cases of Oil Pollution Casualties'. 19.

Though it is possible to list these international conferences and thus illustrate that the international community is far from static in its outlook, a word should be said about the rules so introduced into the community. Any new law which is promulgated by Parliament is binding on the community once it has passed through its various stages. The international conference and its end product, the convention, may not in every circumstance be binding on the community of states as a whole.

16. U.N. Doc. A/CONF. 20/13 April 16th, 1961; 55 AJIL p 1064 et seq. (1961)

17. ICAO Doc. No. 8364 (1963); 58 AJIL p566 et seq. (1964)

18. 11. ILM 1294 (1972), 67 AJIL. 626 et seq (1973)

19. 64 AJIL p 471 et seq. (1970).

Thus, if we take as an example the four Geneva Conventions on the Law of the Sea, it will be recalled that the convention on the High Seas was described as 'generally declaratory of established principles of international law' and thus might be said to be binding since it reflects customary international law. As for the other three conventions, though they might reflect what the majority of states think is or should be the law, they are initially only binding on the states which ratify them. It is only when they can be said to be representative of customary international law ~~will~~ those rules ^{be} binding on all states.

Thus, new rules are capable of being introduced, but the extent to which they bind the community as a whole may vary. However, a degree of flexibility is present and to such extent as to render the description of the international community as static an extremely dubious proposition. The fact that the means of introducing change into international law are not on a par with that of municipal law may, it seems, be explained. The particular character of international law allowing as it does states a great freedom of action could not, it seems, tolerate a legislature. Therefore, the most convenient means of altering the law is thereby ruled out for use in the international community. Thus, though various states may co-ordinate their efforts to change the law and may as a result become bound, there is always likely to be some state outside the ambit of this process which will become bound, if at all, only by the operation of external forces such as custom.

The final characteristic weakness of a set of rules is said to be the inefficiency that is rife within such a structure. This inefficiency is the result of a lack of a means whereby the breach of a rule may be authoritatively determined. Again this seems very true of international law. There are constant wrangles between states as to whether or not a state has contravened a rule of public international law. But, it may be claimed that this charge can be rebutted simply by naming certain judicial bodies that do exist within international society. These include:-

- (I) International Court of Justice
- (II) Permanent Court of Arbitration
- (III) The European Court of Human Rights
- (IV) Court of Justice of the European Communities

In addition, treaties and international agreements may make provision for other ad hoc tribunals to be instituted, in the event of a disagreement or else for an arbitrator to be appointed.²⁰

Therefore, it is possible to produce evidence of judicial activity taking place within the international community, and yet still have a situation where states haggle over who is and who is not the law breaker. This is because there is no obligation on a state to submit its disputes to be determined judicially. A state may bind itself, for example, under the 'optional clause' of the International Court of Justice, to accept some form of compulsory jurisdiction, but that is a decision for the state itself to take. If states do decline to accept any judicial solution of a dispute, then this condition of uncertainty does indeed result. ²¹.

20. An example of this is a treaty concluded between Switzerland and the United Kingdom providing for peaceful settlement of disputes. Here there are provisions for setting up an arbitral tribunal. see 4 I.L.M. p.949 (1965)

21. e.g. Iceland in UK/FGR v Iceland. ICJ Reports p.12(1972), where Iceland did not enter an appearance.

Having discussed the weaknesses which appear to be inherent in a set of rules, it has become clear that international law possesses those weaknesses only insofar as its structure dictates that this should be so. The very way the rules are ascertained within the system gives the law its air of inefficiency. Whilst the fact that it is not made obligatory on states to utilise the various judicial organs that exist, gives international law its air of uncertainty.

But there is another matter to consider in deciding whether the rules of international law correspond to those of a simple social structure. This is the problem of whether a class of officials exists within the international community. It seems clear at the outset of any such inquiry that there is an organised band of officials that exist within most municipal systems whose co-ordinated behaviour may bring into being secondary rules. Now officials as they exist within a municipal law system are usually the judges and those who legislate. Whether the description may be extended beyond these groups, Hart does not make clear; though it is to be expected that such officials will be limited in number, Judges must apply agreed standards when they administer the law as must legislators when they enact the same. As Hart states ...

'Its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.' 22.

But we are not concerned at this stage whether there is this requisite common acceptance - on an international level - which in any event may be a hard thing to prove. Instead, we shall be content to investigate whether there are any international officials at all, since the presence of officials seems incompatible with the existence of a simple social structure:- 'In the simple structure, since there are no officials ...' 23. Their existence might go some way to showing that international law is not a set of rules.

Undoubtedly, international law is not so uncoordinated that there are no individuals placed in positions of particular authority. Its courts each have their complement of judges whose task it is to apply the law between states when such a need arises.

When necessary representatives are available to negotiate some change in the law or else to participate in the day to day running of international organisations such as the United Nations or any of the specialised agencies; tasks that seemingly have the aura of officialdom. Every state possesses a body of men - statesmen and lawyers - who are concerned with achieving the smooth running of international law, in much the same way as municipal law officials. They are the negotiators when disputes arise, the representatives at international conferences.

23. *ibid.* p. 114.

So, although it is impossible to define 'an official' there are undoubtedly certain connotations surrounding the word. These include the holding of some public office or position above the rank of the ordinary citizen. If this is the idea in Hart's mind when he refers to officials of the system, then his suggestion that international law possesses no such individuals seems hard to understand. There are individuals who hold offices in relation to international law and are responsible for its administration. To them, it appears proper to give the title of officials of the system. 24.

24. See Jessup, 'The Reality of International Law' 118 Foreign Affairs (1940).

C H A P T E R V

What follows is an examination of international society, aimed at deducing whether or not the presence of secondary rules may be discerned. The need for such an investigation stems from the previous chapter where an attempt was made to see how closely international society is on a par with the simple social structure. The gaps in such an argument were apparent. Yet it is felt that this is not sufficient to disprove Hart's characterisation of international law as a set of rules. If it may be shown that not only does international society lack the characteristics of a simple social structure, but in fact possesses the characteristics of a more sophisticated social system, i.e. secondary rules, then it appears grave doubts must arise regarding the accuracy of what Hart has to say "a propos" international law.

Therefore we will proceed with the task in hand, by quoting Hart's description of that group of secondary rules, known as the rules of change.

'The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules'¹

Such rules of change may be very simple or very complex; the powers conferred may be unrestricted or limited in various ways: and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms, the procedure to be followed in legislation.

1. Concept of Law p. 93.

Included among this category of secondary rules are private law rules of contract and property which are considered by Hart "as an exercise of limited legislative powers by individuals". 2.

The rules of change, it will be recalled, are intended to rid the simple social structure of that static quality which tends to be rife in a situation where there is no agency empowered to introduce new rules into the system. In municipal law societies, the body which most commonly fulfils this task is a legislature. So, in England, it is the two Houses of Parliament ^{and monarch} which carry out this role. Therefore we must direct our efforts towards locating the existence of a similar 'institution' in international society. The likelihood of this function being the prerogative of a single state ... as could be the case with an individual ... seems to be highly improbable, so much so that it may be ruled out. So the search will be for a body of states, empowered to introduce new rules of international law.

A promising sphere of investigation appears to be that of multi-lateral treaties which also go under the title of 'international legislation'. This title is reserved for a particular group of treaties; those to which a great many states are party. Hudson, in a series compiled by him under the title 'International Legislation' which is devoted to the study of such treaties, believed the term to be harmless enough.

'The term "international legislation" seems to describe, more accurately than any other, the contributions of international conferences at which states enact a law which is to govern their relations'. 3.

2. *ibid.* p. 94.

3. M.O. Hudson 'International Legislation', Volume 1, 1919 - 1921, Introduction p. xiii.

So it appears that that increasingly common product of the international conference, the multi-partite agreement, may well hold the key to the rules of change. Other writers are aware of the significance of such treaties. Starke calls them "law-making treaties" and qualifies the use of this term by his insistence that a law making treaty must 'be adopted by almost all the great states of the world'. 4.

In order to judge how successfully multi-lateral treaties might fulfil the requirements of the rules of change, it is our intention to examine some examples. In 1958 the United Nations sponsored conference on the law of the sea was attended by 85 nations, the outcome of which was four conventions, each concerned with a specific area of the law of the sea:

- (I) Territorial Sea and Contiguous Zone,
- (II) High Seas,
- (III) Fishing and conservation of the Living Resources of the High Seas,
- (IV) Continental Shelf,

The rules in these particular conventions were intended to bring the rules relating to the law of the sea into line with modern conditions. Those states which ratified the various conventions were considered bound. For many this meant the acceptance of new obligations and an appropriate amendment of their municipal legislation. Thus the preamble of the 1964 United Kingdom Continental Shelf Act states its purpose to be.....

'to enable effect to be given to certain provisions of the Convention on the High Seas done in Geneva on 29th April, 1958; ' 5.

4. Starke 'Studies in International Law' p.84.
5. 1964 ch. 29.

Yet there are problems attached to associating international conferences and their end-product, the multi-lateral treaty, with the rules of change. It was established by Hart that the rules of change should be associated with a body, in this instance a body of states. Though it is admitted that international conferences do have a profound effect on the law, yet we are faced with the basic dilemma that the body of states which produces a multi-lateral convention on the law of the sea may well not be that same body of states which produces a multi-lateral convention on the use of outer space. The membership of international conferences does not remain constant. Undoubtedly there will be a hard core of states, such as the United States and the U.S.S.R., who will invariably be represented. But beyond this core, smaller states may or may not take part, as their interests dictate.

Thus, though it appears that a state which participates in an international conference may well incur fresh obligations, the way in which such new rules are introduced does contrast sharply with municipal systems, so much so that it leads us to question whether or not true rules of change are in operation. The rules of change are concerned with a body empowered to introduce new primary rules. On an international level the body responsible for introducing such changes in the law as there are, will not be permanent. It will be subject to constant changes. Contrast with this a municipal law legislature where the body or institution is permanent, only its membership will fluctuate.

Another difficulty which must be faced is that law-making treaties are binding only on those states who agree to be bound. This principle which has always held good in international law, is repeated in the Vienna Convention on the Law of Treaties. Article 34 provides:-

'A treaty does not create either obligations or rights for a third state without its consent'. 6.

Yet in municipal law systems, the idea that a new primary rule might bind only those individuals who so consented, would be viewed as completely unacceptable. But this is so on an international level. Even those states participating in an international conference will not be obligated unless they are parties to the treaty that results, whilst non-participants are totally unaffected in their future behaviour.

It follows from this, therefore, that the multi-lateral treaty falls short of the ideal envisaged by Hart's rules of change in various ways. Indeed it has been suggested that the placement of the multi-lateral treaty in the role of "law-making" treaty or "international legislation" is a retrograde and a misleading step. Jennings has the following observations to make on the subject:-

'The use of the soubriquet "international legislation" for multi-lateral treaties is an example of wish fulfilment that has been allowed to become almost scientifically respectable. This search for the statute substitute has tended to obscure the true nature of treaties themselves.' 7.

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6. U.N. Doc A/CONF 39/27, May 23, 1969; 63 AJIL p.875 et seq (1969)
 7. Jennings 'Recent Developments in the International Law Commission' 13 I.C.L.Q. p 388, (1964).

Hart is also aware of the liberality of this term 'international legislation'. He is of the opinion that only when such treaties are binding on all states, and not merely ~~parties to these~~ treaties, could they in fact be described as legislative enactments. 8.

This statement by Hart highlights the difficulty posed by any attempt to isolate secondary rules in international law. There is the constant effort to find parallels between municipal and international law. We are aware that a legislature satisfies the requisites of the rules of change, yet the international community possesses no such definite institution. Instead, we are presented with a number of alternatives none of which is entirely satisfactory. The international conference/multi-lateral treaty is an example in point.

We must ask ourselves whether the divergencies that exist between Hart's description of the rules of change and the multi-lateral treaty may be adequately accounted for; or whether this is merely an exercise in drawing parallels that do not exist. Faced by the situation where international society appears to be populated by a series of 'ad hoc' legislative bodies, an explanation may be offered. This consists in a denial of the necessity of any of those characteristics commonly associated with legislative bodies.

'It is certainly not necessary that a legislative agency be permanent nor that it be endowed with general powers, nor that it proceed in any particular manner nor that it have authority over states not represented nor that the result of its efforts when agreement is reached become immediately executory'. 9.

8. Concept of Law p.231

9. Hudson op.cit. Introduction p. XIV

Notice may also be taken of the fact that Hart's description of the rules of change does not make it imperative that such a body be permanent. So it might be maintained that the particular demands made by states precludes the existence of any such permanent bodies, since any such institution would be considered incompatible with the sovereignty of states.

There is the additional point made by Hart that the powers conferred by the rules of change might well be restricted in some fashion. So we surmise that this may well be the case with the international conference/multi-lateral convention. The power to change the law is restricted to those states parties to international conferences whilst the law is changed only for the states which are parties to the convention.

So though it is indeed possible to take Hart's description of the rules of change and to fit its provisions in with the functions of international conferences, the accuracy of such a move is open to debate. But what cannot be denied is that international conferences do undoubtedly meet the demand for change to satisfy new circumstances that exists in international law, even though that introduction of new rules may hold good merely for states parties to the convention. Moreover, the process that is instigated by the treaty may be taken a step further. If a sizable number of states confer and agree that the law on a particular topic isA.....B.....C.....D, this is likely to influence the behaviour of other states. Thus the multi-lateral treaty which is binding for the parties to it, may become generally binding if its precepts are so widely adopted as to be transformed into custom. This is the view

taken by Pollock:-

'There is no doubt that when all or most of the great powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected in the absence of prompt and effective dissent by some power of the first rank, to become part of the universally received law of nations within a moderate time'. 10.

Moreover, the operation of such a process is confirmed by the writer D' Amato who speaks of it in the following fashion:-

'.....generalizable provisions in bi-lateral and multi-lateral treaties generate customary rules of law binding upon all states' 11.

So we may remark on the fact that although the multi-lateral treaty is designed primarily to change the obligation incumbent upon the parties to that agreement there may be a consequential effect, in that the behaviour of non-parties may subsequentially be altered through the permeation of those treaty rules into customary international law. What we have said concerning this process will suffice at this stage in our argument, until it can be discussed in greater detail at some later point.

10. Pollock 'The Sources of International Law' 2 Col. L.R. pps. 511-512 (1902)

11. Concept of Custom in International Law p. 104.

To conclude this enquiry into the existence or non-existence of rules of change in international law, the following comments are offered as giving an accurate assessment of the situation. That it is indeed possible to alter the rules of international law by a process of conscious effort, must, it is believed, be admitted. But whether that process accords with the description of the rules of change, is, it appears, a matter of conjecture. True, the shortcomings of international law may be rationalised, but there may be a degree of artificiality in such a move.

There is the additional complication in that what was intended originally to affect the conduct of a limited number of states, may well have repercussions on the international community as a whole. The explanation offered was in terms of custom. The significance of such behaviour in terms of the rules of change may be such that we are forced to regard the whole of international society as that body which is capable of introducing new primary rules of obligation. Nor is this to concede Hart's argument that international society is a simple social structure. Since to regard international society in this fashion, would be to regard it as behaving in a co-ordinated manner. Not every rule that is set out in a multi-lateral treaty becomes a rule of customary international law. Instead there is a conscious decision on the part of states as to the rules which gain this degree of generality. But it is our intention to pursue this line of enquiry at a later stage. If, however, one chooses to regard states as a whole as constituting the agency whereby new primary rules of obligation are set on foot, then it is possible to assign a different role to the multi-lateral treaty. As was remarked at the outset of

our discussion, also included among the rules of change are the rules of contract. It is therefore possible to view the multi-lateral convention as a form of international law contract. Indeed to do so has long been the habit with some international law writers. Gihl in an article in Scandanavian Law Studies stresses the resemblance between contracts and conventions. 12. The multi-lateral treaty as an international law contract would thus be a means whereby a state might vary its obligations under general international law. But according to Hart's description of the secondary rules of change, multi-lateral treaties would still be encompassed by the rules of change.

RULES OF ADJUDICATION

It has been demonstrated how the society of states as a whole, in addition to sizeable groupings of states, might be regarded as the agency of Hart's rules of change. The rules of adjudication are the next characteristic group of secondary rules relating to Hart's model of a legal system to be considered. These rules, designed to remove the inefficiencies that are the bane of a less sophisticated society, are to be recognized from the following description:

They empower 'individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.' 13. Moreover such rules 'define the procedure' to be utilised in such a context. However, it is not the aim of the rules to impose a duty to adjudicate, instead they confer judicial powers and give judicial declarations about the breach of an obligation an especial status.

12. See Scandanavian Law Studies Vol. 1. p. 51 (1957)

13. Concept of Law p.94.

The operation of these secondary rules may easily be discerned within a municipal legal system. Their hallmark is a well-ordered system of courts enjoying a well-defined jurisdiction. The contrast with international law is immediate. Here there is no hierarchy of courts designed to win respect for the law to the highest degree. Instead we are faced with a haphazard arrangement whereby there exist a number of tribunals whose tasks may vary dramatically, though the following loose categorizations may be used .

(I) permanent tribunals ... among these we may number such courts as the International Court of Justice,

(II) regional tribunals these include the European Commission and Court of Human Rights, in addition to the Court of Justice of the European Communities.

(III) ad hoc tribunals these bodies are set up on various occasions so as to deal with either a specific breach of obligation i.e., the Nurmemberg Tribunal, or alternatively to deal with a particular class of dispute 14.

Although the contrast with municipal law is considerable, it still cannot be denied that those courts which do serve international society are fulfilling the functions envisaged by the rules of adjudication. They or rather their officials determine whether or not there has been a breach of a primary rule of obligation.

14. e.g. US/Mexican Claims Commission

The constitutional document of the best known of these courts, the international Court of Justice, makes this plain:

Article 36(2)

"The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

Yet this extract from the Statute also highlights the overwhelming difference between the practice of municipal and international courts, the need for consent. Before an international court may become seized of a dispute, it must secure the consent of the states concerned to the exercise of its jurisdiction. Thus the provision of Article 36(1) of the International Court of Justice.

'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force'.

But this is not to deny the fact that a species of compulsory jurisdiction does exist in international law. Once a state has agreed to accept the jurisdiction of institutions

such as the European Court of Human Rights, or has made a declaration under the optional clause of the ^{Statute of the} International Court of Justice, then this signifies its intention to accept the jurisdiction of the court on future occasions without the need for any additional consent on its behalf.¹⁵ But no state can be forced to conclude such an agreement. The need for consent freely given is paramount.

To those familiar with the municipal law system of adjudication, this stress on the importance of consent may appear a retrograde factor. Yet within a state the predominance of centralised government over the individual ensures that breaches of the law are brought before the courts and punished. The nature of international law is such that there is no one central organisation with the power to do likewise on an international scale. Yet the concept of consent is by no means a stranger to municipal law. In civil proceedings cases are not automatically litigated before the courts. Indeed, it is common for such cases to be settled out of court, at the discretion of the disputants. Moreover, it is common for a commercial agreement between individuals to provide for the appointment of an arbitrator, if any dispute should arise, with no initial recourse to the courts.

Once the greater freedom allowed to states in their dealings with the courts is understood, then we may go on with our consideration of the rules of adjudication. The whole matter rests on the particular nature of states and their resistance to any move which might be construed as an infringement of

15. Though note that in the case of the International Court of Justice, a state may limit the Court's compulsory jurisdiction by means of reservations.

For a case illustrating this point see Norwegian Loans Case. ICJ Reports n.37 (1957).

their sovereignty. To this must be added the fact that no one state or institution is strong enough to take upon itself the punishment of so-called wrongdoers. So on occasions breaches of international law may well go unpunished as a consequence. But once the truth of such remarks is accepted, then the rules of adjudication are seen to operate unimpeded on those occasions when states are susceptible to their provisions.

The courts can and do make determinations on whether a primary rule of obligation has been breached. There do exist fairly complex procedural rules which dictate the organisational aspects of such an adjudication. Thus Articles 2 to 34 of the Statute of the International Court of Justice concern themselves with such matters as the number of judges that must be present, and the method of their appointment. Whilst Articles 39 to 64 set out the languages to be employed by the Court, the representation allowed to contestant states, and the scope of the final judgement.

The value of a judicial decision in international law is said by some to be very marginal in view of the lack of a system of binding precedent. But the self-same situation will prevail in a civil law system. In addition this is not to imply that a decision is only of significance to the parties directly concerned. Article 59 of the Statute of the International Court of Justice might seem to imply this is the case:

'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

But this does not prevent other states from regarding what the Court, and indeed every such tribunal, has to say as a valuable indication as to the development of the law. An example is the North Sea Continental Shelf cases 16. Where what the Court had to say regarding the customary law relating to the extent and the delimitation of the continental shelf was of significance for every coastal state and not merely the parties to the dispute. Nor is it the custom for any international law court to deviate indiscriminately from what it has said in the past.

Therefore it appears that the following conclusions may be drawn concerning the possession by international society of secondary rules of adjudication. Such rules do appear to exist. There are some inconsistencies surrounding this proposition such as the ability of a state to elude the court's jurisdiction if it so desires. But even such behaviour on the part of a state does not prevent its condemnation by states as a whole if they believe it to be in breach of an obligation under international law.

C H A P T E R VI

The focal point of Hart's whole scheme of analysis is the rule of recognition. It is the function of this rule to indicate the criteria necessary to constitute a rule, a valid rule of law within a particular legal system, thus eliminating the uncertainty that will otherwise prevail. To quote an example, within the English legal system, enactment of a rule by Parliament is a source of valid rules of law and in consequence an element of the rule of recognition. 1. This is borne out by Hart's description of the kingpin of his model of how a legal system works. It 'will specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.' 2.

Now Hart does not believe that a rule of recognition automatically exists wherever binding rules of law exist. Indeed, a rule of recognition is not a necessary condition for the existence of rules of obligation. Instead, it ranks as a 'luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity.' 3.

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1. Other elements include judicial decisions and custom p. 98.
 2. Concept of Law p. 92.
 3. ibid p. 229.

Therefore, a society may exist where there is no rule of recognition. This will be reflected in the running of its affairs in that there will be no positive way of determining whether a rule is indeed a rule of the system. Moreover, what rules there are will constitute not a system but a set. This is because the rule of recognition provides the vital element of cohesiveness that binds rules together. A prime example of such failings is, according to Hart, international law. Here, the 'rules which are in fact operative, constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties'. 4.

At an earlier stage in our argument, we undertook a survey of international law in order to try to discover whether it betrayed those characteristics which are said to be a feature of a society lacking a rule of recognition. It was concluded that this was not the case. Thus, the logical step is now to ask ourselves whether the contrary is true and that Hart has been mistaken in his evaluation of international law. To do so will involve an enquiry as to the existence or otherwise of a rule of recognition.

The difficulty of trying to isolate such a feature has been commented upon earlier. Though Hart stressed the importance of gaining official approval for an emergent rule of recognition, he did not indicate how it was possible to distinguish this from the acceptance of officials of a rule of customary international law. The two processes appear to be very closely related. So if officials en masse

4. *ibid.* p.231.

accepted the binding force of resolutions of the United Nations, there appears nothing to identify this either as an addition to the set of customary rules or a rule of recognition.

Probably the easiest way of discovering whether or not international law has a rule of recognition, is to focus on a particular aspect of the rule, which is the following. The analysis of a legal system in terms of primary and secondary rules will always produce a basic norm whose content is directly related to the content of the other secondary rules. We shall take as an example the English legal system. Here the rules of change are embodied in the enactment by Parliament and Queen of legislation, whilst the rules of adjudication are dependent upon the judicial system. This in its turn is reflected in the rule of recognition. This states that among the criteria for identifying valid rules of law are enactment by both Houses of Parliament as well as authoritative statement in a judicial decision. The same process will presumably be reflected in international law.

Therefore we will now proceed to examine the suggested formulations of the secondary rules of change and adjudication in order to see whether they give any indication as to the content of the rule of recognition. It will no doubt be recalled that what change there was in international law was for the most part achieved through multi-lateral treaties. Now, so that the rule of recognition may fulfil the objectives set for it, it must of necessity

'..... specify some feature or features possession of which by a suggested rule is taken as a conclusive

affirmative indication that it is a rule of the group to be supported by the social pressure it exerts'. 5.

Such a feature in the present example would be the setting out of the potential rule in a multi-lateral treaty. Thus any rule contained in a multi-lateral treaty might be regarded as a binding rule of international law.

Now it is apparent that it is not possible to assert that any rule originating in a multi-lateral treaty is a valid rule of law. Besides the difficulty of deciding what is and what is not a multi-lateral treaty, there is also evidence that the rules that such a treaty sets out are regarded as binding only on the parties to that treaty. 6. The very object that a rule of recognition sets out to achieve is thus defeated since there is no certainty as to what is and is not a valid rule of law.

Several writers 7. have noted that the multi-lateral treaty is often used as a vehicle to introduce what is not already law into the system. The effect of such a move may vary. Sometimes the only entities affected are the states-parties to that particular treaty. However it may be that a rule first set out in a multi-lateral treaty will have repercussions on a much greater scale. That rule may become a binding rule of international law. This is on account of the adoption of that particular rule into the body

5. *ibid.* p.92.

6. article 34, Vienna Convention on the Law of Treaties U.N. Doc A/CONF. 39/27, May 23rd 1969.

7. See. Baxter - 'Multi-lateral treaties as evidence of customary international law' 41 B.Y.I.L. p.275(1965/66)

of customary international law. In consequence it has been said of treaties that their pattern 'rather than their substance influences the law much in the manner of a trade custom in municipal law.' 8.

Basically, therefore, the authority of a treaty rests on custom. It is a rule of customary international law that states ... *pacta sunt servanda* (treaties are binding), whilst the propagation of a treaty rule is, if not already binding, dependent on custom. Treaties are a valuable sounding board for state opinion, as D'Amato has so recently pointed out. 9. Moreover they are probably most akin to contracts in the way they operate. They provide the opportunity whereby a state may escape the inadequacies of existing international law, whilst paving the way for what may well be a new rule of customary law. But what is plain, is that the multi-lateral treaty is totally unsuited to play any part with regard to the rule of recognition.

The other possible guide to the formulation of a rule of recognition is the rule of adjudication. Here the criterion for a valid rule of law rests on its pronouncement by a court of law within the international community. Hart says the following of the rules of adjudication:

'Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so, because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are.' 10.

8. Parry 'Sources and Evidences of International Law', p.54

9. D'Amato 'Concept of Custom in International Law' p.103 et.seq.

10. Concept of Law p.94.

Here we have a problem regarding this expression 'authoritative determinations' since there is no overt system of precedent in international law. Instead, decisions of the courts usually take effect only between the parties to the dispute. Thus the determination is binding between the parties, but not immediately on any larger scale. Any increase in the sphere of a rule's effectiveness is usually attributed to custom. It is undeniably true that there is a much greater significance to be attached to judicial decisions than a merely bi-lateral effect. Other states will invariably adjust their conduct so as to bear out what the court has said. 11. Whether this should be accounted for in terms of custom, or whether there is some rudimentary rule of recognition which allows states to treat the courts pronouncements as indications of valid rules of law, is hard to tell. If the latter is indeed the case then though a rule of recognition may exist it will be extremely circumscribed in its effect, if one has regard to the very few occasions on which the processes of the courts are utilised. If the former is more accurate in its description, then this leads to the inescapable conclusion that it is only in terms of custom that a rule of recognition may be expressed.

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11. See the Anglo-Norwegian Fisheries Case I.C.J. Reports p.116 (1951). The substance of this judgement is repeated in article 4 of the Geneva Convention on the Territorial Sea and Contiguous Zone 1958.

Such a proposition as the one above is emphatically rejected by Hart. Indeed he has this to say of a rule of recognition expressed in terms of custom:-

'States should behave as they have customarily behaved.'

'.... it says nothing more than that those who accept certain rules must also observe a rule that the rules ought to be observed. This is a mere re-duplication of the fact that a set of rules are accepted by states as binding rules'. 12.

What Hart seems to be saying is that when one has a set of rules, as he maintains is the case with international law, then there is no need for an additional rule which asserts the necessity to abide by the other rules. Indeed it does not appear possible to argue with such logic. But Hart has always described the rule of recognition as indicating what is and what is not a valid rule. The basic norm quoted by Hart was never intended to serve such a purpose. 13.

So we are forced to conclude that Hart has dismissed the need for a rule of recognition/basic norm without considering whether or not a formulation in the terms of his description is a feasible proposition. As we have seen the only possible basis for such a formulation must be custom. This would become the criterion of legal validity. Acceptance as a custom within the international law involves two processes, according to orthodox scholarship:

- (i) practice over a period of time by the generality of states.

12. Concept of Law P.230

13. It gives no indication of the criteria which mark out a valid rule of law.

- (ii) opinio juris ... practice by states in the belief that what they do is demanded by the law. 14.

More recent research, particularly that of D'Amato has suggested that the vital ingredients of custom may be more accurately described as:-

- (i) articulation - which is the notice that a particular act will have legal implications
- (ii) action - which makes concrete what has previously been articulated. 15.

However custom is analysed, there remains the argument that it is a long-drawn out and imprecise process lacking the certainty that is a feature of municipal law. A potential rule of law that embarks on the uncertain journey of customary law formation may emerge only after a considerable period of time as a valid rule of law, and then perhaps not with complete certainty. Yet the same is true, although to a lesser degree of a municipal legal system. If we take as an example one of the components of the English rule of recognition i.e. enactment by both Houses of Parliament, then we will see that it is not possible to say that a potential rule of law which embarks on the Parliamentary process will inevitably emerge as a valid rule. It may suffer defeat in a division in either House; it may be deferred through lack of time. Moreover, passage through Parliament may be an extremely time-consuming business. The rule of recognition merely enables it to be said of a rule that emerges successfully at the end of the

14. See Hudson on Customary International Law U.N. Doc. A/CN. 4/16 (3 March, 1950) 5.

15. D'Amato op.cit. p. 73 et seq. 'A Reformulation of the Theory of Custom'.

Parliamentary process that it may be regarded as a valid rule of law. In like fashion, it seems to be possible to maintain that custom is akin to the Parliamentary ordeal from which a valid rule may eventually emerge.

Custom may on occasions be an extremely unsatisfactory agency whereby to introduce new rules of international law. In this context, the long debates surrounding the law of the sea are a prime example. Yet international law is never so imprecise and unco-ordinated as Hart seeks to make out. The idea that Hart seeks to foster that rules are absorbed into the international system merely on the basis of acceptance by the international community en masse, is based on his characterisation of the society of states as a simple social structure. Yet the process of law-formation is nothing like as 'primitive' as Hart would have us believe. States are well aware of the repercussions their behaviour may produce. They are fully cognizant of the fact that custom is the objective standard used throughout the international community in order to determine the existence of a rule of law. Acceptance of a rule is not sufficient; instead states consciously direct their conduct toward securing the establishment of a particular norm, and its maintenance once established. Thus, the State Department of the United States refused to countenance the uncompensated appropriation of Cuban property in America since this might have been construed as a departure from traditional policy which demands 'prompt, adequate and effective compensation'.¹⁶.

16. For a Summary of this view see letter of State Department to House Committee on Foreign Affairs 14 I.L.M. p.1038 (1965).

Therefore it appears that Hart's thesis, based on its characterisation of international law as a set of rules, is not supported by practical observation. Not only are states capable of directing the growth of international law, but they also use custom as an overall test of legal validity. It is not sufficient that states accept a certain articulation of a legal rule as Hart suggests is the case. Nor does Hart explain those instances that occur in international law where a state will be judged to be bound without the least show of acceptance on its part; particularly where general principles of law are concerned. Thus it appears undeniably true that there is a rule of recognition in international law, whose content is based on custom and to a lesser degree, judicial decisions. Nor is this an isolated observation. D'Amato, in his evaluation of the concept of custom places it in a similar role.

'We must bear in mind that custom is indeed a secondary rule of law-formation. It can account, in Hart's words quoted previously, for the introduction, ascertainment, variation, or elimination of primary rules.' 17.

Moreover he also observes that general principles and judicial decisions have a part to play in constructing the rule of recognition since they may to a very limited degree indicate what is and is not a valid rule of law.

C H A P T E R VII

Having discussed the feasibility of custom constituting the content of the rule of recognition, it is our intention to consider the part of one other candidate. If it could be shown that those pronouncements that emanate from the United Nations are in fact immediately binding upon States, then there would exist an unimpeachable content for a rule of recognition 1. - resolutions of the General Assembly.

Before embarking on a consideration of the possible form such a rule of recognition might take, it must first be decided whether any case may be made out as regards the legislative potential - limited or otherwise - of the United Nations. At first sight the prospects in this connection seem far from promising especially in view of those talks which preceded the establishment of the United Nations. For among the many proposals received was one by the Philippines to this effect:-

'The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the organisation after such rules have been approved by a majority vote of the Security Council. Should the Security Council fail to act on any of such rules within a period of 30 (thirty) days after submission thereof to the Security Council, the same should become effective and binding as if approved by the Security Council'. 2.

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1. D'Amato op.cit. Suggests at p.44 that General Assembly resolutions may well be acquiring the status of secondary rules.
 2. 9 UNCIO Docs. 316 (1945)

This proposal was rejected by twenty-six votes to one.

Yet any belief that this must put an end to speculation as regards the potential legislative force of United Nations resolutions is not well-founded. Indeed over the years since the inception of the United Nations, discussion in relation to the status and effect of United Nations resolutions has increased, until it has become possible to discern three main bodies of opinion as regards their working.

These are the following:-

1. General Assembly resolutions are valuable items of evidence in the development of a rule of customary international law.
2. Certain resolutions of the General Assembly are binding - a variety of reasons which vary from resolution to resolution conspire to make this so.
3. Certain resolutions of the General Assembly are binding - there is a factor (consensus) which is common to certain resolutions and makes them binding. Thus such binding resolutions are a new source of international law.

We will now consider these views in greater detail, noting the support that each of them has attracted. The view which accords United Nations resolutions an evidentiary role is fairly widely supported. Professor Johnson in an article entitled 'The Effect of Resolutions of the United Nations' 3. is a typical exponent. Resolutions, in his opinion, have a purely marginal role to play in the shaping of international law.

3. 32 B.Y.I.L. p.97 (1955/56)

Such resolutions are in no sense to be regarded as a 'source' of law. Instead, they are proof of the content of law whose 'source' rests on a totally different basis.

'In our view, while it would be true to describe resolutions of the General Assembly as a 'subsidiary' means for the determination of rules of law' within the meaning of article 38(1)(d) of the Statute of the International Court of Justice, it would be wrong to ascribe to them a higher status than that or to imply that they are in themselves sources of international law'. 4.

By far the leading exponent of according evidentiary status to General Assembly resolutions is Rosalyn Higgins. She has demonstrated very ably how the process of discussion of various issues among states and the passage of resolutions in the General Assembly may help to formulate a practice that may emerge as a rule of customary international law. 5.

Indeed, there is no denying the fact that when the majority of states meet and give their opinions on a particular matter in addition to formulating a resolution on the topic - this appears to be very pertinent evidence as to what exactly the law is or will be in the near future. This will be so even though no so-called legislative power is vested in the particular body.

Thus Rosalyn Higgins says of United Nations resolutions which concern us, as opposed to the evidentiary value attached to a state's speeches, voting etc....

'... the Assembly certainly has no right to legislate in the commonly understood sense of the term.

4. *ibid.* p.116

5. Higgins 'Development of International Law through the Political organs of the United Nations' Introduction.

Resolutions of the Assembly are not yet per se binding though those rules of general international law which they may embody are binding on member states, with or without the help of the resolution.

But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence'. 6.

Another adherent of this attitude is Clive Parry. In his book 'Sources and Evidences of International Law' he rejects the need 'to ponder on the binding force of resolutions of the General Assembly.' Instead, to his mind, 'it all falls adequately into place as part of the practice of States'. 7.

We shall now consider that approach which regards some resolutions of the General Assembly as binding though for a variety of reasons. This is stated at its most basic in an article by Blaine Sloan, 8. in which he isolates certain areas of United Nations business where resolutions have the power to bind states. These include the establishment of subsidiary organs (Article 22) and the power to approve agreements (Articles 63 and 85), the power to bind being inherent in the terms of these articles and the Charter itself.

This idea has been researched in great detail by the jurist Castaneda. 9. He has set out groups of resolutions possessed of common characteristics such as 'resolutions that determine the existence of facts or concrete legal situations'.

6. *ibid.* p.5.

7. Parry *op.cit.* p.113

8. Blaine Sloan 'Binding Force of a 'recommendation' of the General Assembly of the United Nations'. 25 B.Y.I.L. p.1. (1948).

9. Castaneda - 'Legal Effects of United Nations Resolutions'- Columbia University Press (1969).

As for the binding qualities of each particular group of resolutions, each will probably depend on varying factors and circumstances that are particular to that group, within which the juridical value of a resolution may vary. The following extracts from Castaneda's book serve to illustrate his point of view:-

'The multi-form diversity of resolutions and their unequal juridical value have made it difficult to evaluate their function as a source of international law.' 10.

Yet '..... certain groups or types of resolutions were identified which, observation shows, produce for a variety of reasons and circumstances, concrete juridical effects of very different kind and degree that sometimes may be characterised as mandatory'. 11.

The working of this whole theory becomes much more comprehensible if made with reference to a specific example taken from Castaneda's book. One of the groups of resolutions mentioned, is that group 'which contains declarations or other pronouncements of a general nature'. 12. The resolutions encompassed within this group include the following:-

a) Resolution 95(i)

The General Assembly affirmed without reservation the Nuremberg principles.

b) Resolution 375 (iv)

Draft declaration on the Rights and Duties of States. The General Assembly considered this 'a notable and substantial contribution towards the progressive

10. *ibid.* p.2.

11. *ibid.* p.16.

12. See also p.165 onwards.

development of international law and its codification, and as such commended it to the continuing attention of member states and of jurists of all nations'. 13.

From the fashion in which these resolutions are worded, Castaneda considers it possible to conclude 'the extent to which their provisions constitute existing law'. Their content can and does reflect for the most part customary international law and such is binding, whilst the resolutions ~~themselves are~~ described by Castaneda as having 'a fully probative legal value' 14. - that is they are persuasive evidence that the rule of law does exist.

Castaneda's theory as to the binding qualities of certain groups of United Nations resolutions is to a certain extent supported by other writers. Thus Rosalyn Higgins admits the power of resolutions to bind when they refer to internal and other matters:-

'It is necessary at this point to ask ourselves if political organs do in fact have the authority to proscribe rules of law, or may they only recommend solutions? That they have authority for internal prescription is not in doubt similarly it may be observed that political organs sometimes make declarations of consciously legal content - the declaration on the Nuremberg principles and the resolutions of sovereignty over natural resources may both be cited as examples'. 15.

Finally, we must investigate a recent and very radical approach to the problem of the status of United Nations

13. *ibid.* p. 173.

14. *ibid.* p. 172.

15. Higgins *op.cit.* p.4.

resolutions - an approach which accords them in certain circumstances a limited legislative competence. The originator of this theory was Blaine Sloan who concluded after an examination of the San Francisco records and a study of pre-United Nations practice, that it was not possible to attach any fixed meaning to the term 'recommendations' as used in international law.

'..... there is sufficient contrary usage to cast a reasonable doubt on the assumption that 'recommendation' under Articles 10 - 14 of the Charter, can obviously have no legal effect'. 16.

This is important in that many who deny resolutions of the Assembly legislative effect, rest their cases for so doing on the use of the term 'recommendation' in the relevant articles. 17.

Blaine Sloane was indeed, prepared to advance his views a stage further with the following expression of opinion:-

'Although a large majority support the view that most recommendations have no legal force, opinion also prevails that General Assembly recommendations possess moral force and should as such exert great influence. it is submitted that this moral force is in fact a nascent legal force'. 18.

Blaine Sloan justifies this assertion by reference to the particular position occupied by the General Assembly within international society.

16. Blaine Sloan op.cit. p.10.

17. For example Oppenheim's 'International Law', 7th edition, Vol. 1. p.392 (1948) where it is asserted that the Assembly has no power to adopt decisions binding on members (except when given power).

18. Blaine Sloan op.cit. pps. 31-32.

'As the most nearly representative organ of the international community' it may 'impose its will in limited fields'. 19.

The limitation arises from such principles as 'sovereign equality' and 'domestic jurisdiction'. But in certain areas this sovereignty has been abridged - there

'the General Assembly acting as agent of the international community may assert the right to enter the legal vacuum and take a binding decision'. 20.

In more recent years, the legislative worth of United Nations resolutions has been championed by the American jurist Falk. His views are set out in the main in an article entitled 'The Quasi-Legislative Status of United Nations Resolutions'. 21. The reasoning on which Falk bases the claims of General Assembly resolutions to be - in certain circumstances - legally binding, is very much akin to that of Blaine Sloan. For inasmuch as that writer foresaw the erosion of sovereignty, Falk believed that this concept has now been so radically encroached upon, as to occasion a shift in the basis of obligation in international law.

No longer does Falk consider it accurate to refer to the consent of states - whether express or tacit - as the 'fons et origo' of the power of international law to bind. The traditional viewpoint as expressed in the Lotus, has ceased to hold good in Falk's eyes. This maintained that

'The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or

19. *ibid.* p. 23

20. *ibid.* p. 24

21. 60 A.J.I.L. p. 782 (1966)

by usages generally accepted as expressing principles of law and established in order to regulate 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.' 22.

Instead, the situation of international society as it stands at present is envisaged as demanding a more flexible and realistic concept from which to derive binding legal force. This need is answered by the concept of consensus, which Falk believes is being readily acknowledged by the community of nations as a much more acceptable basis of legal obligation. There is a discernible trend from consent to consensus as the basis of international legal obligation. As to what exactly is entailed by the notion of consensus Falk never makes particularly clear. Though he does imply that the idea is a complex one which encompasses many variable factors including political overtones. 23.

'Unless a consensus formulated in a claim to govern national action transcends the fissures of the cold war and finds a basis for agreement among the principal states, it does not satisfy pre-conditions for legislative action in the United Nations setting.' 24.

There must be political consensus to support a quasi-legislative claim .

22. P.C.I.J. Ser. 4., No. 10, p.19 (1927).

23: For a better idea of the factors involved, see Falk's analysis of specific resolutions e.g. Res. 1653(XVI) concerning the use of nuclear weapons: op.cit. p.786 et seq. C.F. D'Amato op.cit. p.33 onwards, where he discusses the problem of defining consensus.

24. *ibid.* p. 788.

Moreover, there is the problem of what evidence can be produced by Falk to justify his assertion that the basis of obligation in international law has shifted. It appears that Falk relies on the actual nature of international society in order to justify his claims.

'If international society is to function effectively it requires a limited legislative authority, at minimum, to translate an over-riding consensus among states into rules of order and norms of obligation despite the opposition of one or more sovereign states'.²⁵.

Additional weight is given to Falk's argument by an opinion recorded in the United States Supreme Court in the Sabbatino case. ²⁶. Here the Court held that

'..... the traditional rules of international law imposing a duty on an expropriating government to pay an alien investor 'prompt, adequate and effective compensation' were no longer supported by the consensus of sovereign states and as a result the validity of such rules was in sufficient doubt as to make them inapplicable to the dispute.' ²⁷.

Given the truth of what Falk has stated, then various far-reaching consequences result. Since the binding nature of international law rests on the notion of consensus whilst General Assembly resolutions may on certain occasions be expressive of the consensus of opinion that exists among states, then it seems possible to claim a limited legislative

25. *ibid.* p. 785

26. *Banco Nacional de Cuba v Sabbatino.* 376 U.S. 398.

27. *Falk op.cit.* p. 785.

competence in relation to the latter.

'It does not, however, seem extravagant to claim that the Assembly is in a position to play a crucial role on a selective basis in adapting international law to a changing political environment; that is, to participate in the essence of the legislative process at work in rudimentary form in international society.' 28.

28. *ibid* p. 790. Though note that this legislative process will only be seen at work in certain areas of international behaviour where the claims of sovereignty are weakest.

C H A P T E R VIII

Reference was made in the previous chapter to those bodies of academic opinion currently expressed in relation to United Nations resolutions. To recap, three distinct lines of thought emerged with regard to the role played by such resolutions. They were credited

- (1) With a purely evidentiary function;
- (2) With a circumscribed power to bind;
- (3) With a power to bind based on the premise that United Nations resolutions were a new source of law - in certain circumstances.

However, the task we set ourselves was to attempt to evaluate whether the position of United Nations resolutions is such that they might provide the content for a rule of recognition of international law. On the basis of each of the above opinions, the following may be said with regard to the existence of a rule of recognition:

- (1) If the resolutions of the General Assembly merely have an evidentiary role to play, then this merely serves to stress the role of custom in international law. In addition, it brings us back to the question already posed as to whether custom may constitute the content of a rule of recognition in international law.
- (2) Though certain General Assembly resolutions may be binding, the factors to which can be attributed the source of such a binding quality may vary considerably. Thus, no single element may be isolated, the presence of which will invariably indicate a binding resolution.

- (3) Certain resolutions of the General Assembly are binding. The factor which indicates that a resolution may be regarded as binding is consensus.

Our initial task will be to ascertain, if this is possible, whether any of the above bodies of opinion is capable of providing the substance for a rule of recognition. This will be achieved by examining each view in the light of those factors which according to Hart prove the existence of a rule of recognition. It will be recalled that Hart described his rule of recognition in the following fashion: that it would ... "specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts." 1. Moreover, as societies grow more sophisticated so too, in Hart's view, does the rule of recognition.

'In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice or, their relation to judicial decisions'. 2.

Indeed, to summarise what has been said at an earlier stage with regard to the rule of recognition, the following criteria must be discernable in order to prove its existence:

- (a) There must be a feature whose presence is taken as indicating that a rule is a valid rule of law of the particular society.

1. Concept of Law p. 92

2. Ibid. p. 92

- (b) There must be acceptance of the rule on an official level. This must be a concerted acceptance by the officials of the system concerned. 3.

When the necessary features of the rule of recognition have been outlined, it can be seen that the isolation of this factor may well prove an onerous task. Indeed, within the municipal system of a developed society one may work on the premise that such a rule does exist and that its discovery will prove a fairly easy task. In contrast, Hart has raised grave doubts over whether such a rule exists within the international scheme. Moreover, the chances seem to be that even if this proves not to be the case with international law, any such rule of recognition may well be in its formative stages and as a result exceedingly hard to detect. 4.

Bearing this in mind, it seems sensible to discuss another approach that might be taken towards this whole problem. This alternative approach concerns the question of 'sources' of law. The term 'source of law' according to Hart may refer to 'one of the criteria of legal validity accepted in the legal system in question.' 5. Since, therefore, the rule of recognition 'specifies the criteria of legal validity', then it seems that the rule of recognition is a statement of those sources of law within a particular system. 6. Once a certain process is accepted as a source of law it becomes worthy of inclusion within the rule of recognition. Thus, within the municipal system of the United Kingdom, statute, judicial decision and custom are said to be sources of law.

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3. For a discussion of these criteria - p.113 - *Concept of Law*.
4. Indeed, it may well be that an emergent rule of recognition is indistinguishable from custom. See p.38
5. *Concept of Law* p.98.
6. 'Sources of law' in the sense of formal sources of law; i.e. the processes whereby a rule may be created a rule of law. 94

They also rank for inclusion within the rule of recognition.

So if it is possible to prove that resolutions of the General Assembly are a 'source' of law, then presumably a convincing case may be made out for their constituting the possible content of a rule of recognition. Yet it appears that we are once more faced with an impasse in the shape of how to prove the existence of a new source of law.

This problem was recently considered by Onuf in his article entitled 'Professor Falk on the Quasi-Legislative Competence of the General Assembly' 7.

Two factors emerge from his argument as necessary in order to prove the authenticity of a new source of law. These are:-

- (1) legitimacy
- (2) effectiveness. 8.

Of these, legitimacy is stressed by Onuf as the more important factor, by which he understands the following:-

'The legitimacy of a new source of law must be provided for in a rule of law arising from an already legitimate source'. 9.

Onuf then goes on to elaborate this idea.

'The requisite endowment of legitimacy might come in the form of a multilateral treaty or Charter amendment. It might come in the form of Foreign Office statements and speeches by major officials of virtually all states proclaiming or acknowledging General Assembly legislative competence. It could come in the form of a General Assembly resolution or resolutions, unanimously accepted

7. 64 A.J.I.L. p.349 (1970)

8. Onuf considers Falk to have dealt satisfactorily with this element and so declines to discuss it in any detail. It appears to involve an examination of the factors that go towards constituting the rules in question, rules that

9. *ibid.* p. 354. are acted upon.

and subsequently undisputed, specifically providing for the legal effect of future resolutions meeting various requirements. But most likely it would come in the form of generalised community acceptance of the claim advanced by various community members that a goodly number of resolutions meeting certain conditions are in fact binding on all members. More specifically, if overwhelmingly adopted resolutions are subsequently referred and responded to as binding in themselves and if these references and responses are not disputed or better are acknowledged in later resolutions, legitimacy can be inferred from consensus without formal expression of consent'. 10.

The passage just quoted is intended to do no more than stress Onuf's contention that in order for there to emerge a new 'source' of law, it must trace its origin from an already established source of law, such as custom or treaty.

So in order to ascertain whether any of the three approaches outlined can provide a possible basis for distinguishing a rule of recognition we must examine each of the views expressed in the terms set out both by Hart and Onuf.

The views of these two individuals do to some extent parallel each other. Both involve a degree of official acceptance of a certain rule - though Hart would probably construe acceptance in a much stricter fashion than Onuf - still there is a resemblance.

To make this line of enquiry clearer, let us apply the necessary criteria in relation to that body of opinion which views resolutions of the United Nations as valuable evidentiary factors as regards the development of a customary rule of

10. *ibid.* p.354.

international law. There is no claim that resolutions are binding in their own right, instead they contribute toward creating a binding rule of law.

To regard resolutions in this fashion is to satisfy neither the criteria of Hart or Onuf. To amplify this somewhat, it will be recalled that the task of a rule of recognition is to specify some feature or features whose possession will indicate the existence of a valid rule of law. Here the expression in a resolution does not give its content the force of law. Instead, it merely indicates that binding force may be acquired by the opinions expressed in the resolution - if they acquire by constant adoption and repetition the force of customary international law. Thus, legal validity in this instance will be acquired not by the passage of a resolution but by its acceptance as a statement of custom. The factor which indicates the presence or absence of legal validity is custom, whose claim to form the content of the rule of recognition has been considered previously.

Nor does this method of regarding resolutions of the United Nations as of an evidentiary character fare any better with regard to Onuf's criteria for constituting a source of law. Such resolutions are regarded merely in the guise of affirming what is regarded as an established source of law-custom.

So it appears that if we are to regard resolutions as serving an evidentiary role within the sphere of international law, then all claims to their constituting an emergent rule of recognition or source of law must be disregarded. Instead, this viewpoint merely strengthens the claim of custom as the content of any rule of recognition. It is custom which is

used as the standard by officials for assessing a rule's legal potential and the fact that it is contained in a resolution merely gives an added weight and impetus to this process.

The view that regards certain resolutions of the General Assembly as binding, appears initially a much more promising prospect.

Groups of resolutions have been pinpointed by writers such as Castaneda - which share certain common features, including the power to bind. Though perhaps to state that such resolutions are binding is to state the position a trifle too baldly. Indeed, Castaneda contents himself with stating that certain groups of resolutions produce

'.... concrete juridical effects of very different kind and degree that sometimes may be characterised as mandatory'. 11.

Moreover, the basis from which this juridical effect emanates varies with the particular groups of resolutions delimited. Castaneda, who has made an exhaustive investigation into this particular theory sets out the following six distinct groups of resolutions -

- (a) Resolutions that pertain to the structure and operation of the United Nations.
- (b) Resolutions (certain) concerning international peace and security.
- (c) Resolutions that determine the existence of facts or concrete legal situations.
- (d) Resolutions whose binding force rests on instruments other than the Charter.

11. Castaneda op.cit. p.16.

- (e) Resolutions that express and register agreement among the members of an organ.
- (f) Resolutions that contain declarations or other pronouncements of a general nature. 12.

Of the circumstances which combine to produce the juridicial effects of each of these groups, the following is of necessity a brief account.

- (a) These resolutions may be categorised as internal since they relate to the structure and operation of the Organization. They are said to account for almost four-fifths of resolutions adopted. They relate to those everyday matters of the running of the United Nations. Examples include the appointment of a new Secretary-General or the admission of a new member state.

The basis on which the mandatory character of such resolutions is founded, is as follows:-

'..... The Charter expressly established the mandatory character of the majority of resolutions that pertain to the internal activity of the organisation'. 13.

- (b) This group of resolutions and indeed the remaining groups may be characterised as 'external', since they relate to the achievement of the aims of the Organization - the maintenance of international peace and security in this particular instance. The binding force of this particular group of resolutions if they emanate from the Security

12. For a detailed analysis of each of these groups, together with examples of their contents - see Castaneda op.cit.

13. Castaneda op.cit. p.24 See chapter 2 for the whole of the discussion relating to 'internal resolutions'.

Council is derived from article 25 of the Charter.

This reads as follows:-

'Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. '

Where a resolution relating to international peace and security emanates from the General Assembly (Uniting for peace procedure) Castaneda seems less sure of its ability to bind. However, he conceives that in this connection a customary rule has been engendered within the organisation aimed at enlarging the competence of the United Nations. 14.

(c) These particular resolutions are concerned with concrete applications of the rules of the Charter. For example Resolution 1542 (XV) established the non-self-governing nature of certain Portuguese territory, and in consequence an obligation to transfer information as demanded by the Charter. Here a binding obligation that is implicit in the Charter is given application in a definite situation. The resolution that gives it application is in itself binding. 15.

(d) The mandatory force of this particular group of resolutions originates not in the Charter, but rests on some other international instrument such as a treaty. Thus under the terms of the Italian Peace Treaty, there was provision in the event of disagreement between the parties concerned to accept recommendations put forward

14. For a discussion of this and other matters relating to this particular category of resolutions - see Chapter 3 'Certain Resolutions concerning International Peace and Security'.

15. See Castaneda op.cit. p. 117 et.seq.

by the General Assembly. Such recommendations were indeed contained in Resolution 289 (IV), and were subsequently adopted by the parties. 16.

- (e) The resolutions which make up this group are in Castaneda's opinion significant in that they have as their content

'an informal agreement, explicit or tacit, among the members of an organ or an international organisation'. 17.

Indeed, to the extent that a resolution is the result of an agreement, giving it form, the resolution can have binding force. To show resolutions of this particular nature in operation reference should be made to those resolutions which are concerned with such matters as the distribution of vice-presidencies of the organisation. Here the agreement is to the allocation of a number of posts among various regional groups. The terminology of these resolutions indicate that they are intended to be binding. However, it should be borne in mind that resolutions within this particular classification enjoy a status that occurs merely in exceptional situations. 18.

- (f) Resolutions included within this final category are best described in the terms chosen by Castaneda.

'The essential nature of the resolutions under study here, no matter how they are designated, is that they do not create law, but they recognise and declare it. Their basic content consists of either customary rules or general principles of law. The purpose of incorporating these customary

16. *ibid* p. 139 et seq.

17. *ibid* p. 150

18. *ibid* p. 150 et seq.

rules or general principles into resolutions is not to attribute legal value to them in the same way of converting into a rule or binding principle something that was previously neither, but rather to fix, clarify and make precise their terms and scope. Stated succinctly, 'Assembly resolutions do not create law, but they may well authoritatively prove its existence.' 19.

From this it appears that Castaneda takes the view that the General Assembly may well give that stamp of approval which in many instances converts a practice into a custom, though the situation is far from clear since the United Nations may well be the originator of certain expressions of a legal situation. 20.

Probably the following is the clearest representation of how Castaneda views the situation.

- (1) Where a resolution expresses a widely accepted rule of customary international law, then the binding force of that resolution rests on that rule.
- (2) Where the content of a resolution has yet to achieve the status of customary international law, the role of the resolution is as follows:-

'The General Assembly does not possess legislative competence universally committing the states concerned. A certain amount of law - creating power cannot be denied to the General Assembly because in those cases which might give rise to doubt whether a rule belongs already to international law or is still 'ius cons tititandum', a formal declaration of the General Assembly might make the rule concerned enter into the recognised sphere of

19. *ibid.* p.171

20. Note the part played by the United Nations in creating a legal regime for outer space. This has sometimes been characterised as creating 'instant customary law'. See Cheng 'Instant International Customary Law'. *Indian Journal of International Law*. p.23 (1965)

From the foregoing analysis, it can be seen that the majority of the categories of resolutions classed by Castaneda as binding rest their effect on some concrete agency, usually treaty. This is true of categories a - d. As for group e, the exceptional status of an implied agreement is given to a resolution. Whilst group f relies - albeit not exclusively - on the binding force of custom. Bearing in mind Hart's requisites for a rule of recognition, groups a - d give no indication of United Nations resolutions' suitability for this role, since the mark of legal validity originates in treaty. The group e, does admit that resolutions may possess some independent capacity to bind of their own accord. Yet the actual sphere of operation of this group is so small and its dependence on agreement so stressed as to eliminate almost entirely the competence of the Assembly to bestow legal validity. As for group f, here some of the power to bestow legal validity rests on custom, whereas any power that a resolution itself may have to endow a rule with legal validity is very indeterminate indeed - as is shown by the language employed by Castaneda.

To summarise, therefore, it is clear that group e and to some extent group f appear to some degree to advance the role of the resolution to allow it to enjoy some independent operation. Yet this does not appear to be sufficient to satisfy Hart's criteria for the rule of recognition though it may indicate some progress in this direction especially in relation to group f.

21. Memorandum of Dutch Government quoted by Castaneda op.cit. p. 169.

Here the evidentiary role of the resolution is advanced so that it may be a deciding factor in the process of the creation of rules of law, though we cannot thereby contend that statement in a resolution of the Assembly invariably allows a rule to be considered as part of international law.

C H A P T E R IX

The chapter which follows, will be devoted to an evaluation of that final body of opinion put forward in connection with the role played by resolutions of the United Nations. This attributes binding force to certain resolutions. However, here the source of that binding force is constant in each instance - it rests with one factor - consensus. It is asserted that consensus is the new basis of obligation in international law taking over this role from the traditional basis of obligation - consent. Thus resolutions which are backed by the consensus of states, may be said to be binding.

It is acknowledged by Falk that General Assembly resolutions backed by consensus probably have a more positive role to play in selected areas of international law - for example matters relating to outer space - rather than those spheres more traditionally associated with international law 1. - such as the law of the sea.

'It does not, however, seem extravagant to claim that the Assembly is in a position to play a crucial role on a selective basis in adapting international law to a changing political environment'. 2.

What is important to note as regards these particular views is that a 'limited legislative competence' is being claimed for resolutions of the United Nations. Resolutions are to be regarded in certain circumstances as binding in their own right and not because of the operation of some intermediate agency such as custom or treaty. Whether or not a resolution may be regarded as binding is dictated by two factors,

1. This is so because where the vital interests of states such as economic or territorial interests, are not impinged upon states are likely to be a great deal more accommodating.

2. Falk 'On the quasi-legislative competence of the General Assembly' 60 A.J.I.L. p.790 (1966).

- (i) the presence or absence of consensus on behalf of the States voting.
- (ii) the particular area of behaviour to which the resolution relates. 3.

Our enquiry must now be directed as to how well this theory satisfies those criteria laid down for the existence of a rule of recognition. There is indeed in this instance the specification of a particular feature - consensus - whose presence may be indicative of legal validity. But it does not seem possible to conclude that consensus inevitably indicates a binding rule. Moreover, has there been any indication on the part of officials of the system that consensus as a binding source of obligation has received acceptance?

However, it appears that by far the most urgent task is to enquire how precise a concept is consensus on which to base a rule of recognition. It is a relatively easy task to decide whether ^{the} rule has been enacted in a statute and thus acquired legal validity. This is one of the criteria of the English municipal law rule of recognition. The situation seems to become slightly less clear cut when one is dealing with a concept such as consensus. There is no difficulty in concluding whether or not a resolution has successfully passed through the General Assembly. Yet not every such resolution will bind, merely those that display the additional element of consensus. Therefore, in order to conclude which resolutions are binding, it must be established what exactly is entailed by the notion.

Onuf commenting on the idea of consensus brands it as "an elusive concept". 4.

3. There are no particular guidelines, other than those mentioned, as to what those areas will be.

4. Onuf op.cit. p. 350, where he compares it with consent.

An investigation into Falk's analysis of the term bears out this evaluation. It appears that a consensus in order to bestow legal validity must

- (i) gain at least two thirds of the votes in the General Assembly.
- (ii) 'overcome the fissures of the Cold War' i.e. gain the support of the Great Powers and the majority of the members of the major power blocs within the United Nations.

An analysis of consensus in these terms raises various problems:

- (a) may the opposition of a Great Power effectively destroy a consensus?
- (b) is the opposition of lesser States of any relevance when assessing whether or not a consensus exists ?
- (c) how does absence on the part of a Great Power rank in these circumstances? 5.

The situation is even further complicated by an inference on Falk's part that the actual quality of legislative effect may vary. This is implicit in his reference to certain resolutions as enjoying a 'weak legislative effect'. 6.

From the foregoing discussion it seems possible to reach various conclusions regarding the concept of consensus and the rule of recognition. Consensus, of all the views examined, comes closest to satisfying the requisites for a rule of recognition.

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5. For a full discussion of these and other problems surrounding the term 'consensus' see D'Amato 'On Consensus, C.Y.I.L. p.141 (1970)
 6. Falk op.cit. p. 787. This is said in relation to certain resolutions concerned with nuclear testing and non-proliferation.

Here is an element whose presence is said to indicate binding legal effect. However, a closer examination of the concept shows that the situation is not so straightforward. The difficulty of arriving at precise evaluation of consensus has been shown. Even when a resolution is passed unanimously, which would appear to be indication enough of the consensus of states, it does not appear to be possible to classify that resolution as binding. There is the additional problem of whether consensus is effective merely in selected areas of international law which seems to be the suggestion. Moreover, it also appears conceivable that the actual legislative effect may vary in quality.

In view of the imprecise nature of consensus and its apparent difficulty of application, the case that may be made out for its constituting the content of the rule of recognition appears to be very weak. A more balanced view may possibly be obtained by taking into account one of those truisms that is so often used in relation to international law. When examining custom as a possible candidate for the rule of recognition, the imprecision that is inherent in its very nature was remarked upon. If consensus is indeed a new basis of obligation in international law as Falk asserts - then the likelihood is that it also would share this lack of precision which seems to be a necessary feature of international law. The contrast between this and the certain content of municipal law is extreme. Yet it raises the basic dilemma of whether or not it is fair to expect the same degree of precision from both systems. The very fact that international law is concerned with states who are in their turn eager to protect their freedom of action seems to argue against anything like the degree of rigidity on an international scale as can be

perceived on a municipal level. It also indicates that there will be certain areas where states are much more zealous guardians of their position than ⁱⁿ other less controversial spheres of behaviour.

The imprecision that has been remarked with regard to consensus may be to some extent explained upon another basis. It has been remarked that consensus as a source of obligation in international law is a new departure. Traditionally, the binding quality of international law was thought, and indeed in many instances is still thought, to rest on consent. If consensus is emerging as a concept to challenge the position of consent, then it seems fair to expect that those elements included within the ambit of consensus may still be in the process of development and as a consequence uncertain.

Though this may go some way toward settling those doubts felt in relation to the notion of consensus, there does appear to be a practical solution to the problem of ascertaining the validity or otherwise of resolutions of the General Assembly backed by consensus. This task can be tackled in two distinct fashions:-

- (1) this involves the second limb of Hart's test for a rule of recognition - acceptance by officials of the system. If it can be shown that those who administer the international legal system, recognise the legal validity of resolutions backed by consensus, then this is very persuasive evidence that a rule of recognition to this effect may well exist.
- (2) Alternatively, it has been asserted by Falk that consensus is a new basis of obligation insofar as the international system is concerned and in their turn resolutions backed by consensus are a new

source of law. The truth of this assertion may to some degree be ascertained by means of those tests set out by Onuf with a view to detecting the evolution of a new source of law. The crux of these tests is whether a new source of law has originated and its legitimacy ^{has been} provided for in an already accepted source of international law i.e. custom or treaty. In order to conclude whether or not this is the case official practice must be examined as regards consensus and an effort made to evaluate whether or not a customary rule of international law or treaty exists to this effect.

So it appears that that body of opinion which assigns to resolutions of the General Assembly backed by consensus, some embryonic legislative effect, does, on initial examination, at least, go some way to satisfying the criteria of Hart and Onuf. The stage has now been reached where it is possible to draw the following tentative conclusions as regards the suitability of resolutions of the General Assembly to form the content of a rule of recognition for the international system.

- (1) Resolutions regarded as a valuable factor in the development of customary international law. Here traditional concepts of international law have been adapted and evolved in order to cope with a new factor - resolutions of the General Assembly.

This view admits the importance of the United Nations in that it provides a convenient forum where the majority of states may express their opinion. However, its resolutions have validity only in so far as they may help to accelerate the development of customary international law. Therefore since resolutions of the General Assembly have no separate identity as such, their usefulness as means of ascertaining the validity or otherwise of a legal rule is non-existent. Instead, international law is still dependent on custom as the mark of a legal rule.

(2) Resolutions regarded in certain circumstances as binding. It is possible for a variety of factors to conspire in order to make a resolution of the General Assembly binding. This has been amply demonstrated by Castaneda. Indeed, it is probable that the binding nature of many of these groupings would be accepted without any dispute by a large proportion of international lawyers - for example those resolutions relating to the internal functions of the United Nations.

Yet once again the independent validity enjoyed by resolutions is minimal. Instead their binding nature relates to traditional factors such as custom or treaty.

However, in his treatment of one particular group of resolutions - those that contain 'declarations or other pronouncements of a general nature' - Castaneda puts forward an interesting point of view. It was seen in an examination of this particular grouping that much of their validity can be found to originate in the area of customary international law. Yet it is possible for a resolution of this nature to be indicative of emergent customary international law. In these circumstances, Castaneda suggests that the statement of such rules in a resolution can mark their transformation into the full status of customary international law. Admittedly, it is not suggested that resolutions have the power to make law. They may be regarded as the official stamp whereby a rule of law becomes binding and as a consequence so too does the resolution in which it is contained. Though this may advance somewhat the evidentiary role assigned to resolutions, it does little

to displace the importance of custom, and very little to advance the candidature of resolutions of the General Assembly as a suitable subject for a rule of recognition.

- (3) Resolutions regarded as binding if backed by the consensus of states. Here resolutions - backed by consensus - do enjoy an independent validity of their own. They possess the power to bind states in their own right. As such they come closest to fulfilling the role of rule of recognition - subject of course to the flaws noted in the preceding analysis of these views.

Of these three bodies of opinion, two stress the role of custom, the third the independent power of resolutions to bind; two seem inadequate to meet the demands of the rule of recognition, the third apparently has some potential. What must now be ascertained is which of these is closest to the realities of the situation, if any indeed is. In order so to do, it is intended to proceed in the following fashion.

It is intended to deal initially with those views which stress the independent power of General Assembly resolutions to bind and to constitute a new source of law. How far does this represent the truth of the matter?

The emphasis laid both by Hart and Onuf on the need for acceptance on behalf of officials of the international system whether of the rule of recognition or the new source of law, is the key factor here.

So can it be established

- (a) whether international officials accept as a standard for the assessment of legal validity the approval by a resolution of a rule - a resolution backed by the consensus of states.
- (b) or whether a customary rule has emerged which recognises such resolutions as a new source of law. 7.

If the position is not that suggested by Falk, then is it indicative of either of the two alternative viewpoints considered. Both of these stress the part played by custom to a greater or lesser extent and if they appear to be more indicative of the situation, then once again we are thrown back on the view that custom is seemingly the only possible candidate ^{to provide} the content of a rule of recognition.

7. Though we are seeking to find some degree of official acceptance in order to constitute United Nations resolutions as part of the rule of recognition, we are still faced with the following dilemma. Any evidence that may go toward the proof of this point may also be regarded by Hart as a mere addition to the set of rules that make up international law. see p.38

C H A P T E R X

In the light of all that has been said, we will now proceed to examine the views expressed by states in relation to the nature of United Nations resolutions. One of the most fruitful sources of opinion are the debates which take place within the United Nations itself. Here States are often led to make statements regarding the fashion in which they treat resolutions. Obviously it is not possible to examine all those debates which have taken place within the Organization. Instead, our research has been confined to the General Assembly itself, together with the Sixth or Legal Committee. Moreover, as has been seen, the great majority of resolutions that are passed relate to procedural matters which are internal to the workings of the Organization. Indeed, the areas of debate that particularly concern us relate to those areas - specifically pinpointed by Falk - where development of international law would be suited to the practices of the United Nations. 1. These areas include the law relating to outer space and its exploration, self-determination and principles relating to friendly relations between States, where the political sensitivities of states might be expected to be at a minimum.

It should be stated at the outset of this examination into those views expressed with regard to the nature of General Assembly resolutions, that no state credited such resolutions with no effect whatsoever. Undoubtedly they carry some weight with virtually every state though to what extent and of what nature remains to be seen.

1. See p.105

The manner in which states regard resolutions falls into certain classifications. This became particularly clear when the Sixth Committee was considering the principles of international law relating to friendly relations between states. These particular debates stretched over a period of eight years and provide much useful information as to how exactly the opinions of states are ranged. Though as the debates progressed it could be remarked that states did not always remain constant to their views - but this was true only of a small minority.

Before an analysis is made of the bodies of opinion expressed by states with regard to the status of resolutions, the following point should, it is believed, be made. Much of what states said in this particular context was directed toward a specific form of resolution - the declaration. The declaration is usually regarded as enjoying an authority greater than that of a resolution plain and simple; though what exactly this authority is, is far from clear. The most that can be said is that declarations were not originally intended to be legally binding - though it is feasible that this position may have altered somewhat, as our investigations may reveal.

The main categories of opinion that emerged on analysis of debates within the United Nations were as follows:-

- (a) Those states which accorded certain resolutions (in particular declarations) some 'psychological' value.
- (b) Those states which accorded certain resolutions (in particular declarations) some legal value.
- (c) Those states which regarded resolutions as not legally binding.
- (d) Those states which expressed the opinion that the content of certain resolutions was such that it might be expected to be obeyed.

What proceeds is an attempt to amplify these views with an indication of the amount of support they attracted.

With regard to (a), it should be made clear at the outset that the number of states who actively supported this viewpoint were relatively few in number. They included Brazil and France. Moreover, the actual significance of this 'psychological' value and what exactly it entailed never became very clear. 2. The Report of the Sixth Committee for the Seventeenth Session contained the following statement:

'Some representatives made the point that a declaration though lacking in any obligatory force, would have great psychological value, it would be a guide and a source of inspiration for States, peoples and individuals. To spread knowledge of the declaration and instruct the public in its contents could not fail, in the long run, to form opinion.' 3.

Another affirmation of this state of affairs was given forceful expression by the French delegate to the Sixth Committee:

'..... a declaration which technically speaking was merely a recommendation by the General Assembly could have no great legal value, no matter how important its subject or how large the majority by which it was adopted. To argue that it could acquire binding force or become a source of international law was to make a mockery of the rules governing the creation of international law. For all its psychological value, such a declaration would of necessity be devoid of any binding force ...'4.

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2. Perhaps a comparison might be drawn between it and 'opinio juris', the psychological element in custom.
 3. Report of the 6th Committee, 17th Session, Document A 5356. para. 43.
 4. 6th Committee, 17th Session, 767th meeting, para.4., Mr. Patey (France) (A/C6/SR732-777)

The state representative of Brazil, Mr. Amado, gave his support within the Sixth Committee to a statement of opinion along similar lines.

'A declaration on the principles of international law concerning friendly relations and co-operation among states, while having no binding force, would have great psychological value, and would do for relations among States what the Universal Declaration of Human Rights did for individual rights: it would guide and inspire states, peoples and individuals. Its dissemination and teaching would be bound in the long run to mould opinion.' 5.

It seems fair to conclude that the 'psychological' value that certain states consider that resolutions of the General Assembly enjoy in certain circumstances may be rationalized in this fashion. Resolutions, or more especially declarations, are not considered to be legally binding; yet neither are they completely worthless. For what the majority of states agree to be a common expression of their views on a certain matter is bound to be persuasive in guiding a state's future behaviour. In such a situation, a declaration is a statement of aims, an ideal with which a state may be expected to act in accord - inasmuch as this may be feasible. Hence the references to the Universal Declaration of Human Rights which in its original form as a resolution of the General Assembly did not bind states. However, such has been the 'psychological' value of this declaration that states have adhered to the ideals stated therein to such effect that many consider them to have evolved into rules of customary international law. 6.

5. 6th Committee, 17th session, 756th meeting, para 13 (A/C6/SR732 - 777) Mr. Amado (Brazil)

6. Hence the highly persuasive, though not legally binding nature of such resolutions c.f. the distinction between legal and material sources of law. See Parry, Sources and Evidences of International Law pl.

Another line of argument that attracted its fair share of support from among interested states was that of proposition (d); that declarations are of such a character that they may reasonably be expected to be obeyed by states. Yet even so, declarations were not regarded as legally binding per se, albeit that their passage might raise such an expectation of obedience. This is clear from the views of the Ukrainian representative to the Sixth Committee.

'Although a declaration did not bind states as an agreement bound parties, United Nations experience had shown that its adoption was a solemn act and that it had much greater force than a mere recommendation. The organ adopting a declaration - in the present case the General Assembly - expected the signatories to meet that declaration's requirements.' 7.

Insofar as these views go they seem to a certain degree a statement of the obvious since it appears reasonable to expect a state which has voted positively in favour of a measure to obey its terms. The majority of African members of the United Nations gave their support to Resolution 1514 (XV) against colonialism and have continually insisted on adherence to its terms. However, since a declaration is credited with no power to bind states legally, then must it be concluded that those states who abstain or cast a negative vote do not expect to be bound. This seems to be the inference that may be drawn from the behaviour of those states who opposed Resolution 1514.

However, it is probably true to say that the body of opinion which most accurately conveys the role of resolutions - if

7. 6th Committee, 17th Session, 757 meeting, para. 16, Mr. Nedbailo (Ukrainian Soviet Socialist Republic) (A/C6/SR732-777)

accuracy may be assessed on sheer weight of numbers - is proposition (c). The majority of this support was drawn from the moderate faction of the United Nations including such Great Powers as the United Kingdom.

Proposition (c) accords resolutions of the General Assembly no positive legal force. However, it does allow them a position of influence with regard to the development of international law by more traditional means - i.e. custom.

'His delegation therefore did not accept the proposition that General Assembly resolutions could by themselves create international obligations, even for those states which supported them. They could not therefore be regarded as in themselves a separate source of international law They might, however, in appropriate circumstances provide positive evidence that a given principle or rule of law was regarded by the international community at large as binding upon it' 8. (New Zealand representative)

Emphasis is given to the supposedly non-binding nature of resolutions of the General Assembly, and such statements are made frequently in the reported speeches of representatives.

Somalia :-

'Although General Assembly resolutions did not constitute rules of international law' 9.

But accompanying such a denial of the inherent legal nature of resolutions is more often than not the affirmation that such resolutions do have a role to play - usually that of a secondary and evidentiary nature.

8. *ibid* 766th meeting, para. 21, Mr. Brady (New Zealand) (A/C6/SR 732 - 777)

9. *ibid* 766th meeting, para 54, Mr. Darman (Somalia) (A/C6/SR 732 - 777)

Australia:-

'The utmost that could be said on the effect of a declaration of legal principles had been said in the passage quoted by the Indonesian representative, at the 809th meeting from Philip C. Jessup's book 'A Modern Law of Nations' in which such declarations were described as 'persuasive evidence of the rule of law'' 10.

Austria:-

'To be sure, neither the Sixth Committee nor the General Assembly could create new rules for such rules could only obtain their legally binding force from a treaty or international custom....' 11.

Probably the position is best set out in the Report of the Sixth Committee to the General Assembly.

'Although a declaration set out in a General Assembly resolution does not bind states in the same way that an agreement binds the parties to it, the adoption of such a declaration nevertheless would have much greater force than that of a mere recommendation. It might not be considered, prima facie, as a formal source of law, but it might become one if recognised by states as a rule of international law and adopted by them in practice, in which case its provisions would become provisions of customary law.' 12.

The final proposition (b) expresses the views of those states which accorded resolutions of the General Assembly - usually confined to declarations - some positive legal value. The number of states involved were comparatively few in number and usually belonged to that sector of the United Nations which included emergent African states and the more radical entities.

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10. 6th Committee, 18th Session, 817th meeting, para. 17, Sir Kenneth Bailey (Australia)
 11. ibid 818 meeting, para. 22, Mr. Kirchsclaeger(Austria)
 12. Report of 6th Committee, 18th Session, Doc A/5671.para.38.

India - to give but a single example - expressed the following opinion.

'.... the various General Assembly resolutions adopted by a very large majority could obviously be a source of international law. Indeed, that law was the expression of the will of the majority of states and the progressive development of international law prescribed in Article 13 of the Charter, could be nothing but the formulation of new rules of law.' 13.

The delegate from Iran to the Sixth Committee also suggested an argument along similar lines.

'It was difficult to see why a General Assembly resolution approved by an over-whelming majority should not constitute a source of international law ...' 14.

Though these states argue that resolutions may be a source of international law, various issues are left uncertain. These include the size of the majority necessary in order for a resolution to become binding. Moreover, it is not made clear why such resolutions are a source of international law. A connection with Article 13 of the United Nations Charter is hinted at, but its actual scope is not made clear.

In a discussion which took place in the Sixth Committee on Resolution 2131 (XX) on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, 15.

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13. 6th Committee, 17th session, 770th meeting, para 9. Mr. Mishra (India) (A/C6/SC 732 - 777).
 14. *ibid* 762 meeting, para. 29, Mr. Mirfenderesk, (Iran) (A/C6/SC732 -777)
 15. Passed at the 1408th plenary meeting of the General Assembly - 21st December, 1965.

there emerged the dichotomy that exists between those who attribute legal force to certain resolutions of the General Assembly and those who do not. Various African representatives were quite prepared to accord Resolution 2131 (xx) binding force with little explanation as to where this power to bind originated. 16.

Whereas the Norwegian delegate, Mr. Motzfeldt, speaking with reference to Resolution 2131 emphasized the importance of resolutions as an element of State practice. He then went on to state:-

'That import, however, should not be exaggerated. The General Assembly was not - at any rate not yet - an international legislative assembly. Despite their great political and moral value, its resolutions were not immediately binding as rules of positive international law'. 17.

These ideas are reflected in the opinions of Sir Kenneth Bailey, representative of Australia. He reaffirms that

'... recommendations of the General Assembly, of themselves, could not create general international law'. 18.

But this is modified somewhat by the fact that

'... a virtually unanimous recommendation might constitute such cogent evidence of the practice of states that it could, of itself, provide substantial proof of the rules of general international law.' 19.

16. See speech of delegate from the United Republic of Tanzania - Mr. Maliti - 6th Committee, 21st session, 934th meeting, para. 43.

17. 6th Committee, 21st session, 934 meeting, para. 49, Mr. Motzfeldt (Norway).

18. *ibid.* 935th meeting, para. 5, Sir Kenneth Bailey (Australia)

19. *ibid.* para. 5.

This places the resolution in the role of an evidentiary instrument operating within the traditional modes of development of international law; that is the position stressed by proposition (c).

Before concluding this presentation of those bodies of opinion expressed in relation to the status of resolutions of the General Assembly, some mention should be made of the value attached by member states to the process of 'consensus'. The business of the Sixth Committee is on certain occasions conducted on the basis of 'consensus'. It was employed when formulating declarations relating to Outer Space and the matter of Friendly Relations between States. The process operates in the following fashion. The Sixth Committee or else one of its sub-committees will discuss the views of states on a particular area of international affairs. Where there is agreement between states, there is said to exist a 'consensus'. No vote will be taken on the matter.

It will be recalled that Falk attributed to consensus - as understood by him - the role of a new basis of obligation in international law. But consensus as it operates within the United Nations seems to deviate from Falk's own conception. It is feasible or at least appears to be so, for a consensus to exist with the active opposition of some states. This is according to Falk. Yet 'consensus' as it is understood within the Sixth Committee requires unanimity, that is total consent on the part of member states.

Perhaps this divergence is best explained in the following fashion. Consensus as employed by Falk relates to the passage of resolutions within the Assembly. Enough affirmative votes will evince a consensus and thus create the power to bind.

In contrast 'consensus' as it is utilised by the Sixth Committee is a process whereby agreement is reached as to the international position on a certain matter. Its use is in the process of the formulation of the resolution. 20.

Though there is this basic divergence between the uses of the term 'consensus', it seems worthwhile to quote from the reported meetings of the Sixth Committee the particular fashion in which 'consensus' is regarded. The Italian delegate is led to point out that

'... by adopting the 'consensus' method, the Special Committee had acted in such a way as to give any Declaration adopted on the basis of the Special Committee's work a particular legal value'. 21.

Other states such as Australia, Canada, New Zealand and the United States of America chose to express themselves in a somewhat more moderate fashion. This is borne out by extracts taken from the speech of the New Zealand delegate to the Sixth Committee.

'... texts which were achieved by consensus which expressed the views of the international community as a whole had real value as evidence of international law'. 22.

There appears to be an inference that a text adopted by a process of consensus within the Sixth Committee may enjoy a particular status - either legal or evidentiary - which does not accrue where the method of consensus is not used.

20. Its use is in indicating the area of agreement among states rather than the measure or degree of agreement.

21. 6th Committee, 20th session, 881st meeting, para. 35, Mr. Sperduti (Italy).

22. *ibid.* 887th meeting, para. 49, Mr. Beeby (New Zealand).

Whether or not this reasoning may be extended so that a resolution accepted by the vast majority of states or else the unanimous vote of states may be regarded as a source of law remains to be seen.

Undoubtedly special value is attached to 'consensus' as employed by the Sixth Committee - though what exactly that value is remains uncertain. In these circumstances, how certain can one be about the role played by consensus (interpreted in a different fashion) within the General Assembly?

INTERNATIONAL COURT OF JUSTICE

An attempt was made in the preceding pages to analyse the behaviour of states in order to arrive at some conclusions concerning the status of resolutions of the General Assembly. In order to supplement these views a review was undertaken of opinions expressed outside the United Nations. More specifically reference was made to the various South-West Africa cases which have come before the International Court of Justice, in order to see whether any additional opinions on the status of General Assembly resolutions were forthcoming.

The reason for choosing these particular cases was as follows. One of the arguments advanced by the applicant states, Ethiopia and Liberia, in their submission to the Court was breach by South Africa of a norm of universal applicability condemning apartheid as illegal. The norm had originated in numerous resolutions of the General Assembly which had outlawed apartheid. South Africa had consistently voted against such resolutions, but not so the majority of other states.

In their pleadings before the Court the following contention was made by the Applicants:

'The Applicants contend that the Court should confirm the role of international consensus as a source of international law within the meaning of Article 38 of the Statute of the Court and within clear practical limitations. 'Consensus' is used by the applicants to refer to an overwhelming majority, a convergence of international opinion, a predominance of view; it means considerably more than a simple majority, but something less than unanimity'. 1.

This would result in those General Assembly resolutions backed by consensus being declaratory of international law.

1. 1966 I.C.J. Reports, 4.

The actual issue contained in this claim was never decided upon since the Court ruled against the applicants as not enjoying a proper interest in the subject matter of the case. However, this did not prevent various judges from commenting on the matter. Probably the most cogent reasoning was that of Judge Jessup in his Dissenting Opinion.

'... I do not accept Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law ('norm') ... (T)he argument of Applicants seemed to suggest that the so-called norm of non-discrimination had become a rule of international law through reiterated statements in resolutions, of the International Labour Organisation and of other international bodies. Such a contention would be open to ... (the) attack ... that since these international bodies lack a true legislative character, their resolutions alone cannot create law ...' 2.

Rejection of the claim of international organizations to create legal norms was forthcoming from Judge Van Wyk in his Separate Opinion. In an examination of the relevant pronouncements he considered them as unable to create at law

'any rules of conduct binding upon the Respondent'. 3.

Judge Tanaka in his Dissenting Opinion adds his weight to these views though with some modifications

'Of course, we cannot admit that individual resolutions, declarations, judgements, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is, the repetition of the same practice;'. 4.

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2. South West Africa Case (second phase) 1966 I.C.J. Reports p.441 (Judge Jessup - dissenting opinion).
 3. *ibid.* p. 171 (Judge Van Wyk - separate opinion)
 4. *ibid.* p. 292 (Judge Tanaka - dissenting opinion)

What can be gathered from these various opinions expressed before the International Court of Justice is that

- (1) No individual resolution of an international organization is binding per se
- (2) Neither will the constant repetition of a resolution give it some 'legal quality'. 5.

Other South West Africa cases seem to bear out these views. The 1955 case concerned with Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa is relevant in this context. 6. Here both Judge Klaestad and Judge Lauterpacht concluded that resolutions of the United Nations are not legally binding - though there may be exceptions.

Lauterpacht states his position in no uncertain terms.

'The absence, in general, of full legal binding force in the resolutions of the General Assembly is a proposition so fundamental and rudimentary that an attempt to apply and circumscribe it need not be regarded as dangerous or unhelpful. ' 7.

Though this is qualified at a later stage by Lauterpacht who emphasises that this is not to say such resolutions are completely worthless. He considers that an obligation exists on behalf of each and every state to study and act in good faith as regards the terms of a resolution.

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5. Though if States modify their practice to fit in with what the resolution/or resolutions demand then this may give rise to a rule of customary international law. See Tanaka supra.
 6. 1955 ICJ Reports P.68 et seq.
 7. ibid p.92 (Judge Lauterpacht - separate opinion)

Similar views were expressed by Judge Klaestad when considering whether the Union of South Africa was subject to more onerous obligations under the United Nations than under the League of Nations. He considered this was not the case since resolutions of the General Assembly were not of the same character as those of the League. Of the former, he said that they 'are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character But a duty of such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation and it does not in any case involve a binding legal obligation to comply with the recommendation.' 8.

It is however, conceded by Klaestad that an obligation exists to consider the recommendation in good faith.

Another important case outside the line of South West Africa cases where the status of a resolution was involved was that of Certain Expenses of the United Nations. 9. Here the International Court of Justice was considering whether or not certain resolutions authorising expenditure by the United Nations were indeed concerned with legitimate expenses of the Organization.

The Court eventually gave an affirmative reply to this question, but not without several dissenting opinions being recorded. The prevailing view as regards the resolutions concerned was that they were operative even in relation to those states who voted against them. Sir Gerald Fitzmaurice in his Separate Opinion stated that there was an 'intention to impose a definite financial obligation on Member States,' and that 'this intention must be deemed to have extended to covering the payment by member States of their apportioned shares,

8. *ibid* p.88 (Judge Klaestad - separate opinion)

9. 1962 ICJ Reports p.151

irrespective of how their votes were cast on any given occasion, at any rate as regards all the essential activities of the Organization ...' 10.

Yet since this case concerned the financial obligations of the members of the Organization, and so relates to the internal functions of that body, this may explain Fitzmaurice's treatment of the resolutions as obligatory. 11.

However, among the Dissenting Opinions some judges disputed the stand taken by Fitzmaurice. For instance, Judge Koretsky took the view that 'the resolutions under assessment by the Court were not mandatory.'

'The General Assembly may only recommend measures. Expenses which might arise from such recommendations should not lead to an obligatory apportionment of them among all members of the United Nations.' 12.

If a conclusion is to be drawn as to the status of General Assembly resolutions, then it would appear from the evidence above, that one point is certain—that no binding force is attached to these resolutions (with the possible exception of resolutions relating to the internal functions of the United Nations).

10. *ibid* p.211 (Sir Gerald Fitzmaurice - separate opinion)

11. See back p.99

12. *ibid* p.287 (Judge Koretsky - dissenting opinion)

C H A P T E R X I

It is proposed at this juncture in our argument to pause and attempt to assess what conclusions - if any - may be drawn from the preceding discussion. It will be recalled that our examination was undertaken with a specific aim in mind. That aim was as follows:-

To discover

- (a) whether international officials accept as a standard for the assessment of legal validity the approval by resolution of a rule - a resolution that is backed by the consensus of states
- (b) or whether a customary rule has emerged which recognizes such resolutions as a new source of law.

Various sources of evidence have been examined in the preceding pages in an attempt to reach some conclusions on the matter. As has been indicated, there appears to be a great deal of similarity between the types of evidence needed to establish either proposition (a) or (b). The former calls for proof of official acceptance, whilst the latter, in seeking to prove the existence of a rule of customary international law, will also rely heavily on pronouncements by individual officials, speaking on behalf of their states.

In seeking confirmation of one or other of these propositions, the following areas have been examined in the hope that they might yield some information on the subject.

- (1) Academic opinion,
- (2) Official opinion as given in the United Nations,
- (3) Official opinion as given in the International Court of Justice,

These sources - though by no means completely comprehensive - were considered to be areas where any indication as to the status of General Assembly resolutions might be expected to evolve.

The results of the analysis may be stated as follows.

Academic Opinion

As was seen, academic opinion inclined towards assigning resolutions an evidentiary role. This view is qualified some what by the fact that the bulk of jurists are prepared to concede that certain categories of resolutions, such as those concerned with the internal workings of the Organization, may be binding. But the reasons for their binding quality may be traced to those more conventional sources of international law and do not rest with the resolution per se.

There did occur some exceptions to this generalisation of academic opinion. The most notable of these was Falk whose views have been set out and extensively discussed. Views of this nature, however, certainly appeared to be in the minority.

True, certain writers such as Castaneda took a more ambivalent approach to the matter and hinted at a potential for certain General Assembly resolutions whose operation was never made completely clear.

In the light of these statements of academic opinion, it is suggested that the following conclusions may be drawn as to the status of General Assembly resolutions - that the bulk of opinion assigns to them an evidentiary and not a legislative role.

The Opinion of States as given within the United Nations.

As was seen from our analysis of individual state opinion, there emerged four main bodies of opinion expressed on this particular matter. Though all those states who gave an opinion were agreed that resolutions were not totally without value, those who considered them to be legislative in effect were in

a considerable minority'. Indeed, it was clear that none of the Great Powers took so radical a view; instead its chief exponents were the emergent states such as Tanzania and Nigeria.

In addition, the importance enjoyed by the process of 'consensus' was the subject of divided opinion among states. However, those states who considered that a pronouncement backed by 'consensus' might bind states were in a definite minority.

It appears from this that the bulk of state opinion was such as to assign resolutions of the General Assembly an evidentiary and not a legislative role.

Official Opinion as given in the International Court of Justice.

The International Court of Justice has never explicitly given its views as to the character of resolutions of the General Assembly. The matter has, however, arisen indirectly on a number of occasions, allowing Judges who feel so inclined to express an opinion on the matter. The position is once again far from clear. It does seem true to say that the majority view is that which does not consider resolutions as binding on members of an international organization. Exceptions are made to this proposition as was seen in the Expenses case where it was the opinion of some that even dissenting states might be bound by such a procedural resolution.

Most Judges seemed to consider that resolutions were for the most part not binding on dissenting states nor, it seemed, those states who voted in their favour. Yet this did not as a consequence produce a situation where resolutions were completely without worth. States were under an obligation, so it appeared, to act in good faith as regards their terms.

Thus the bulk of official opinion seemed to regard resolutions as lacking in legislative effect.

From ~~these~~ individual conclusions it seems that a general conclusion may be framed to the effect that

- (a) official opinion does not indicate - nor for that matter does academic opinion - that those individuals who are responsible for the functioning of the international system have accepted as a test of legal validity - passage in a resolution of the General Assembly,
- (b) nor does that opinion indicate the emergence of a rule of customary international law which credits those resolutions backed by consensus as a new source of law.

In an article on 'Consensus' Antony D'Amato reaches similar conclusions in this respect.

'There is in short no metarule of the legislative effect of declarations of consensus. Thus, since consensus itself is not a metarule but merely a definition of what we mean by the expression 'international law', we are forced to conclude at the present time that a dissenting state is not bound by a General Assembly resolution. Whether the assenting states are bound inter se will have to await the consensual development or rejection of a meta-rule to that effect.' 1.

Our investigation into the status of General Assembly resolutions has forced us to conclude that they enjoy no independent legal value. Instead, we seem forced to conclude that their value lies in the contribution such resolutions make in influencing the behaviour of states, and ultimately toward the development of customary international law through

1. D'Amato 'On Consensus' 8 Canadian Y.I.L. p.141 (1970).

the practice of states. This attitude is summed up in a statement made by Sir Kenneth Bailey, Australian delegate to the Sixth Committee.

'Recommendations of the General Assembly, of themselves, could not create general international law; ... But a virtually unanimous recommendation might constitute such cogent evidence of the practice of States that it could, of itself, provide substantial proof of the rules of general international law.' 2.

This is so given the fact that certain resolutions - most importantly those described by Castaneda - may for various reasons be described as binding.

If this is an accurate statement of the position, then it must be concluded that if a basic norm does exist within the international system, it must and can only be custom. On all the evidence considered, no other conclusion seems possible.

In view of this, we are once more placed in the dilemma as to whether or not custom may provide the content of a rule of recognition of the international system. Hart believes that this is not a feasible proposition and prefers to think of rules of international law being accepted piecemeal within the system. So the question occurs as to whether or not it is possible to glean a solution to these problems. What follows is an attempt so to do.

It is intended to concentrate still on resolutions of the General Assembly. It has been shown that it is not possible to discern a general rule within the international system that gives resolutions of the General Assembly power to bind - and thus creates a rule of recognition. Instead, we shall now

2. 6th Committee, 21st session, 935th meeting, para. 5., Sir Kenneth Bailey (Australia).

concentrate on individual resolutions of the General Assembly relating to specific areas of international behaviour. These areas are as follows :-

- (1) Space - with particular reference to Resolution 1962 (XVIII) 3. which was passed unanimously by the General Assembly.
- (2) Self-determination - and the leading resolution on this particular topic Resolution 1514 (XV) 4. passed with nine abstentions.
- (3) Friendly relations between states - and Resolution 2625 (XXV) 5. passed unanimously.

The fact that each of these resolutions attracted virtually whole-hearted support from the Assembly is important in that it indicates that seemingly the terms of the resolution accord with the opinions of member states on the particular matter.

We shall then examine the resolutions with a view to finding an answer to these following questions.

- A) Was the resolution binding on states when passed by the General Assembly? If so, why was this the case? This may appear a strange question to pose in the light of the preceding investigation. However, it is feasible that although a general rule of the type envisaged by Hart does not exist, individual resolutions might in particular circumstances be binding immediately on their passage through the Assembly.

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3. Passed at 1280th plenary meeting of the General Assembly - 13th December, 1963.
 4. Passed at 947th plenary meeting of the General Assembly - 14th December, 1960
 5. Passed at 1883rd plenary meeting of the General Assembly - 24th October, 1970.

If this is indeed the case, then an isolation of the factors which produce such a result is called for, together with appraisal of what exactly their significance is for the international system.

- B) Has the resolution become binding since its passage? If so, why is this the case? An attempt will be made to discover whether the resolution has acquired its binding nature merely by a process of individual acceptance on the part of states - as Hart suggests is the case.

'The rules of the simple social structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such.' 6.

Alternatively, have the terms of the resolution come to be regarded as binding since they accorded some overall criteria operating within the international system - that is custom.

It is hoped that such questions will give us some indications into the workings of international law and an ultimate solution to the problem of whether or not a rule of recognition exists.

The first set of resolutions to be considered are those concerned with the exploration and use of outer space. The most important of these are generally regarded as Resolution 1721 (XVI) 7. and Resolution 1962 (XVIII) entitled 'A Declaration of Legal Principles governing the activities of states in the Exploration and Use of Outer Space.' This latter resolution is the culmination of several years of effort on the part of the Committee on the Peaceful Uses of Outer Space. 8.

6. Concept of Law p.230

7. Adopted at the 1085th plenary meeting of the General Assembly - 20th December, 1961.

8. Committee was established by Resolution 1348 (XIII) in 1958 - 792nd plenary meeting of the General Assembly - 13th December, 1958.

Resolution 1962 (XVIII) was passed unanimously when presented to the General Assembly and was hailed as a major step in the development of international law. But the problem that first confronts us is whether or not this resolution was immediately binding on those states who voted in its favour; in this particular instance, all those states represented within the General Assembly.

We have seen that there is no general rule to this effect. Yet various statements made on the passage of this resolution indicate that this may indeed be an exceptional case. Particular attention should be paid to those attitudes displayed by the representatives both of the United States of America and the U.S.S.R. 9.

A statement was made in the First Committee by the American representative to the effect that the United States of America

'.... considered that the legal principles contained in the operative part of the draft declaration reflected international law as accepted by the members of the United Nations. The United States intended to respect them and hoped the conduct they recommended in the exploration of outer space would become the practice of all nations.' 10.

Whereas the Soviet Delegate, though he declined to comment on the legal potential of the resolution did undertake the following pledge on behalf of the Soviet Union that it would

'... respect the principles enunciated in the draft declaration if it were unanimously adopted.' 11.

9. Important because at the time these two countries were the sole space powers. They alone were concerned with the exploration of space.

10. First Committee official Records, 18th session, 1342nd meeting, para. 4, Mr. Stevenson (U.S.A.).

11. *ibid* - para. 17, Mr. Fedorenko (U.S.S.R.).

In contrast, the reported speeches of other delegates on the terms of the resolution show that the American view is by no means universally held. The French representative stated that

'(I)n as much as it will only be the subject of a General Assembly resolution and not of international agreements, it will, in point of fact, merely represent a declaration of intent ...;' 12.

Whilst the Australian delegate referred to the resolution as 'not creative of legal duties'. 13.

Indeed, the Polish Chairman charged with preparing the terms of the resolution characterized it as

'a guiding document.' 14.

Indeed, if regard is had to the tenor of the debates leading to the formulation of Resolution 1962(XVIII) the American view seems to be a minority opinion. Sir Patrick Dean, the United Kingdom spokesman stressed at a First Committee meeting in 1961 the importance of establishing a legal regime for outer space. Yet he regarded this as a gradual process which the United Nations might aid by laying down 'certain broad legal principles' which should be viewed as 'injunctions of great weight and as useful steps towards such a legal regime.' 15.

12. Committee on the Peaceful uses of Outer Space ,
24th meeting, 18th session, November 22, 1963,
Mr. Arnaud (France).

13. ibid Mr. Hay (Australia)

14. ibid Mr. Lachs (Poland)

15. First Committee official Records, 16th session, 1210th
meeting, para. 30, Sir Patrick Dean (United Kingdom).

Moreover, in the First Committee debate which preceded the submission of the draft declaration to the General Assembly, it was stressed that the declaration was merely a declaration of principles and would require a more effective statement in order to be considered binding. Mr. Forthomme, the Belgian representative, was echoing the sentiments of many delegates when he said

'(I)f the General Assembly approved the draft declartion, however, it would thereby be assuming the obligation to continue the work and ensure that the general principles contained therein were elaborated so that they could be put into practical effect through specific legal procedures.' 16.

From this we are led to conclude that on its passage by the General Assembly Resolution 1962 (XVIII) was not binding on the members of the Organization. This accords with Fawcett's view of Resolution 1962 (XVIII) as 'for the most part a declaration, not of rules of international law, but of directive principles.' 17.

But we now have to consider whether there have been any subsequent developments which have altered the status of the principles contained in the resolution. In this context, it is worth considering resolution 1963(XVIII). 18. Here the General Assembly

'Recommends that consideration should be given to incorporating in international agreement form, in the future as appropriate, legal principles governing the activities of states in the exploration and use of outer space. '

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16. First Committee Official Records, 18th session, 1344th meeting, para. 3., Mr. Forthomme (Belgium)
 17. Fawcett 'International Law and the Uses of Outer Space' Chapter 1. p.16.
 18. Passed at the 1280th plenary meeting of the General A. Assembly - 13th December, 1963 A/RES/1963 (XVIII).

This is what various delegates had hinted was necessary in order to create principles which were legally binding. 1966 saw the creation of such an agreement with the conclusion of the Outer Space Treaty. 19. Its terms closely parallel those of Resolution 1962 (XVIII) and indicate slight or no advance from this position. For this reason, among others, it has been criticized by Fawcett as a 'retrograde step'. 20.

Be this as it may, the Treaty stands as a reiteration for the most part of Resolution 1962(XVIII). It creates binding obligations for those states who become parties to it, but does it make any more universally applicable the principles it contains? This is unfortunately a very difficult question to which to frame an answer. The only fashion in which those principles governing outer space might operate with regard to all states is - according to the international system - through the medium of custom. In order to establish a customary rule of international law, two factors are necessary, usage and the belief that such a usage is demanded by law. In relation to Outer space, the matter of usage poses a number of problems, not the least of which is the fact that very few states engage in space activities. This makes it difficult to establish any consistent pattern of practice on the part of the majority of states, though it is probably true to say that the minority of states which engage in the exploration of space do adhere to those principles which have been pronounced on the subject.

19. Signed 27th January, 1967, Entered into force 10th October, 1967.

20. Fawcett, op.cit., Chapter 1, p.16.

It therefore appears far from clear whether the directives set out in Resolution 1962(XVIII) have acquired the character of law or have remained the guiding principles that they were initially judged to be. We have seen how by employing that traditional standard of international law - custom - there appears to be inadequate evidence on which to reach a conclusion. On the credit side, we have

- (1) the overwhelming support given to the General Assembly resolutions on space
- (2) the conclusion of a treaty on the matter
- (3) the adherence by the existing space powers to these principles.

But balanced against all this is the lack of actual usage on the part of states. The problem is whether acceptance on such a scale as has occurred with these General Assembly resolutions can be said to constitute 'law' without any basis in the form of usage. 21.

It will be recalled that when Hart dealt with the adoption of rules into international society he denied the existence of a rule of recognition. Instead, he stated that

'The rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such.' 22.

This implies that it is open to states to say that they accept Rule X as binding and as long as its terms are kept then that rule is a rule of international law.

Yet we have witnessed an instance where the states representing the majority of mankind showed their acceptance of certain principles set out in Resolution 1962(XVIII).

21. See D'Amato 'The Concept of Custom in International Law' Chapter 3, p.56 et seq. As has been seen he has adapted the traditional criteria used to discover a customary rule of international law. On the basis of what he says the scarcity of practical examples would, perhaps, appear not all that important.

22. Concept of Law. p.230 - 142 -

That acceptance, however, was not binding on those states; and this lack of binding force cannot simply be traced to a decision of the states not to be bound. Reasons were advanced and above all was the recommendatory nature of United Nations resolutions. There seems, indeed, to be a basic inconsistency between what Hart says is the case and what states do.

The idea is present in connection with Resolution 1962(XVIII) that it is not open to states to accept a rule as binding - and it will immediately be so regarded. True, states can make such statements on their own behalf as did the United States of America. But the reaction of the majority was more guarded and pervaded by the idea that some format had to be observed before a rule might be binding. This is particularly marked in the stress on the need to conclude a treaty.

Faced by the Space Treaty of 1966, it might appear that Hart's standards have been satisfied. The signatories to the treaty have accepted its principles and will consider themselves bound. They will keep the terms of that treaty and thus its principles will function as binding. But still we have not established binding rules of international law, though it cannot be denied that the parties to the treaty are bound. In order to prove a rule of international law what we were searching for was proof of custom and since the evidence does not appear conclusive then we were unable to reach any firm conclusions.

So it appears that in relation to those principles guiding the use of outer space, there have been two opportunities for states - if they behave as Hart believes them to do - to create for themselves rules of international law and on neither occasion does this seem to have occurred. Instead there appears

to be the inference that some outside criteria exists by
which potential international law must be adjudged.

C H A P T E R XII

The reasoning applied in the preceding pages will now be tested in relation to a particularly controversial area of international law - that of self-determination. The leading resolution in this context is Resolution 1514(XV) which asserted the following right to have universal operation.

'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' 1.

Resolution 1514 (XV) passed by a vote in the General Assembly, recorded 89 favourable votes together with nine abstentions. Those member States abstaining included the United States of America and the United Kingdom - two of the so-called Great Powers whereas those member States from emergent areas such as Africa were whole-hearted in their support for the measure.

The background to the eventual formulation of the resolution is interesting in that it illustrates the feeling that surrounds this topic. All the relevant discussion took place - not before one of the specialised committees of the United Nations, but the General Assembly. Indeed, the topic was put before the Organization by the Russian premier. 2.

The whole tone of the debates that occurred is emotional in the extreme. African delegates denounced the rigours of colonialism, whilst the former colonial powers attempted to defend their records.

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1. Resolution 1514(XV) , para. 2.
 2. Resolution 1514(XV) grew out of a proposal presented to the General Assembly by Nikita Krushchev, Premier of U.S.S.R. in his address to that body on 23rd September, 1960.

In consequence, there is a marked absence of reference to the legal standing or indeed legal potential of those principles which were to form the content of Resolution 1514(XV). The whole emphasis is political - or indeed propagandist.

Therefore, we find ourselves hard-pressed to answer whether those principles contained in Resolution 1514(XV) were binding after their approval by the General Assembly. The few delegates who considered the matter seemed of the opinion that the resolution ranked as a statement of aims. The Libyan delegate referred to 'the moral effect of such a declaration',³ a sentiment which was echoed by the Pakistan spokesman's reference to the 'moral command which will issue from this Assembly.'⁴ The New Zealand delegate considered that the task of the resolution was to place 'on record an optimum standard of attainment'⁵, whilst the Swedish representative understood its terms to be a 'statement of general objectives' not an 'act of legislation'.⁶

The view that Resolution 1514 (XV) was not binding immediately on its passage by the General Assembly is strengthened in the light of the American and British abstention. It seems unlikely that measures which do not attract the support of two of the most powerful members of the Organization, can be regarded as law. ⁷ Indeed, Miss J.A.C. Gutteridge, the one-time representative of the United Kingdom before the Sixth Committee, asserted that Resolution 1514(XV) was in its terms inconsistent with the Charter, a fault which reduced it in her eyes to 'essentially a political document', an opinion

3. General Assembly, 15th Session, 929th plenary meeting 30th November, 1960 para. 25. p.1035.

4. ibid 930th plenary meeting, 1st December, 1960, para.65, p.1059

5. ibid 932nd plenary meeting, 2nd December, 1960, para.13, p.1074

6. ibid 946th plenary meeting, 14th December, 1960, para.16, p.1266

7. D'Amato 'On Consensus' Candarian Y.I.L. p.141 (1970) - 146 -

which re-iterated an earlier view taken by Professor Jennings. 8.

All this evidence suggests that the right of self-determination did not rank as a legal right either prior to or after the passage of Resolution 1514 (XV). Yet this is not to under-estimate the role played by the principle of self-determination. Mention is made of it in the articles of the United Nations Charter. 9. Among the list of Purposes of the Organization set out in Article 1, is the admonition to members to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.'

Moreover, on various occasions during the history of the Organization the right of self-determination has been asserted. During its Eighth Session, a resolution came before the General Assembly which recognized 'the right of the peoples of Morocco to complete self-determination in conformity with the Charter.' 10. This failed to gain the requisite two-thirds majority. Support for the right of self-determination in Tunisia also failed to muster the necessary support. 11. However, by its fifteenth session, the General Assembly was prepared to recognize - with the necessary two-thirds majority - the right of the people of Algeria to self-determination. 12.

8. J.A.C. Gutteridge - The United Nations in a Changing World - Chapter IV p.63.

9. See Article 55 of the United Nations Charter.

10. G.A.O.R. 8th session, agenda item 57, p6 (A/2 526), para.11. Rejected 455th plenary meeting of the General Assembly.

11. Once more a draft resolution failed to obtain the necessary majority. See G.A.O.R. 8th session annexes, agenda item 56, p.5. Rejected 457th plenary meeting of the General Assembly (A/2530) para. 7.

12. Resolution 1573 (XV) See also Resolution 1724(XVI) which affirmed the right to self-determination, basing itself on Resolution 1514(XV).

All this is indicative of the fact that support for the right of self-determination was growing, together with an awareness of its potential as a legal right. Resolution 1514 was yet another step in this direction. Indeed, Rosalyn Higgins takes the view that although this resolution was not binding, it has done a lot to develop international practice. 13.

It appears therefore that the weight of available evidence must lead us to conclude, that Resolution 1514(XV) did not crystallize the principle of self-determination into a legal right - though opinions do differ on this point. Probably Resolution 1514(XV) may be regarded as a water shed in the development of state practice. Indeed, it was after this statement of principle that the right to self-determination in Algeria was affirmed.

It now appears logical to enquire whether self-determination has subsequently achieved the status of a legal right. Because of the controversial nature of self-determination, this is an exceedingly difficult question to answer. But various pieces of information have been forthcoming which do at least provide some valuable indications of how the situation has developed.

The first of these is the frequency with which Resolution 1514(XV) is cited within the Organization. In an analysis conducted into the re-citation of General Assembly resolutions, this particular resolution topped the list, with a total of 95 citations. 14.

13. See Rosalyn Higgins *op.cit.* Chapter 1, p.104.

14. See Bleicher 'Legal Significance of re-citation of General Assembly resolutions' 63 *A.J.I.L.* p.456 (1969).

This was an average 13.57 citations per session, well above the next highest rate of citations which was that of 4 per session (Resolution 1654(XVI))' 15. Indeed, Resolution 1654(XVI) traces its origins from Resolution 1514 (XV) since the former is concerned with the setting up of a Special Committee in order to facilitate the implementation of the latter.

The occasions on which the right of self-determination was considered relevant were for the most part concerned with the rights of existing colonies to independence. More unusual was the crisis over Southern Rhodesia where a former colony declared itself independent. However, government in this particular instance was centred in the hands of the white minority, which prompted the United Nations to allege this to be a breach of the right of the black majority to self-determination. 16.

Another area where the right of self-determination enjoyed some prominence was before the Sixth Committee. It was one of the seven principles of international law concerning friendly relations and co-operation among states, being considered by the Committee. Views as to the exact nature of this right were varied, though growing support attached to its categorization as a legal right.

The Report of the Special Committee delivered to the Twenty-fourth Session of the General Assembly bears out this opinion.

'Most of the representatives speaking on the subject considered the self-determination of peoples a legal right, the existence of which was generally recognized.

15. Full title of resolution is 'The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and people.'

16. The significance of Resolution 1514(XV) in a non-colonial situation e.g. Bangladesh, was uncertain for a long time. see I.L.M. (1972) p.119 et.seq.

The nature of the principle as a legal right was attested to in various international instruments including the Charter of the United Nations and the many resolutions of the General Assembly'. 17.

Among those Member States which expressed such a view were the Ukraine and Yugoslavia.

There were other states, however, who were more cautious in their approach to this problem. Some representatives, including the United Kingdom delegate, refused to be drawn on the matter, contenting themselves with reference to the 'principle' of self determination. 18. Others asserted the political nature of previous resolutions and that only then was attention being given to those legal aspects of self-determination.

'The text of that Declaration (on Granting of Independence to Colonial Countries and Peoples 1514(XV)) was a great political document, which, however, should have no more than persuasive force in discussions of the legal elements of the principle.' 19.
(Canadian representative).

Accordingly, it is interesting to consider the manner in which the principle of self-determination was expressed in the Friendly Relations Declaration (Resolution 2625(XXV)). Are its terms a complete departure from those of Resolution 1514(XV)? If this is so, is it due to the fact that Resolution 1514(XV) was merely a political statement of the principle of self-determination whose legal elements and indeed whose existence as a legal right is only now becoming obvious?

17. Report of the Special Committee, Supplement no, 19 (A/7619), para. 152 (24th session).

18. See speech of the United Kingdom delegate to the Sixth Committee, 20th session, 890th meeting, 3rd December, 1965, para. 15-20

19. Records of the Sixth Committee, 21st Session, 928th meeting, 9th November, 1966, para 3 p.165.

The initial remarks of Resolution 2625 (XXV) concerning the 'principle of equal rights and self-determination of people' are as follows.

'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter'.

Compare this with Resolution 1514(XV) which declares that

'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

Though these two statements do not correspond in toto, it appears that there is a great degree of similarity between the two provisions - a similarity that extends to other provisions. Thus Resolution 2625(XXV) stresses the duty of a state to abstain 'from any forcible action which deprives peoples' of their right to exercise the principle of self-determination. A similar sentiment is expressed in Resolution 1514(XV) though in what appears to be a more militant fashion.

'All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence

It appears impossible to deny the parallels that may be drawn between Resolutions 1514(xv) and 2625(XXV). Yet this is not to deny the fact that each document is different in outlook to its fellow. Resolution 1514(XV) strikes a propagandist note - as seems only logical in the light of its background.

In contrast, the tone of Resolution 2625(XXV) is much more moderate as befits a document drafted over a number of years by the Sixth Committee. The references to 'immediate steps' and that

'Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence' have disappeared. Instead their place is taken by much more sedate and well-thought out provisions.

'The territory of a colony or other non-self-governing territory has, under the Charter of the U.N., a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.'

In the light of the above comparison, it seems fair to say that the terms of both Resolution 1514(XV) and 2625(XXV) do to some degree reflect one another, although Resolution 2625(XXV) probably contains the more comprehensive analysis of self-determination. Above all, the right of self-determination has remained constant - even insofar as the wording of both resolutions is identical in some respects. Indeed, all the indications seem to be that some time after the passage of Resolution 1514(XV) the right of self-determination became a legal right. This is not to say that the provisions of 1514(XV) as such became binding, merely the right of self-determination which it elaborates whilst subsequent practice on the part of states and its inclusion in Resolution 2625(XXV) have served to make clear the range of application of the principle.

If it is accepted that self-determination is a legal right, then Resolution 2625(XXV) is a means whereby that legal right is delimited to some extent. The bounds of self-determination are set out, whereas before merely the right existed.

But the matter that should really concern us - given the fact that self-determination exists as a legal right - is when exactly this was achieved. It can be said with some confidence that this 'transformation' occurred between the passage of Resolution 1514 and Resolution 2625. There seems to be evidence to support this view. Rosalyn Higgins says of self-determination:-

'It therefore seems inescapable that self-determination has developed into an international legal right and is not essentially a domestic matter. The extent and scope of the right is still open to some debate.' 20.

In addition, she refutes the claim that Resolution 1514(XV) is binding per se. Self-determination has become a legal right because

'that Declaration, taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination'. 21.

Indeed, it appears more than likely - and the matter cannot be stated with greater certainty - that self-determination became a legal right soon after the passage of Resolution 1514(XV). The Organization of American States, two years after the passage of Resolution 1514, referred to self-determination as

'a basic part of the juridical system that governs relations among the republics of the hemisphere and

20. Rosalyn Higgins op.cit Chapter 3, p.103.

21. ibid p.104.

makes friendly relations among them possible.' 22.

In terms of practical examples, the acceptance of a legal right of self-determination gathers impetus after the Declaration of 1960. Witness the example of Algeria where the right of self-determination was asserted contemporaneously with the Declaration on self-determination. 23. Close on its heels came the re-affirmation of this right in a Security Council resolution on Angola. 24. A committee was set up by the General Assembly in order to ensure the implementation of the Declaration on self-determination 25. Moreover, as Southern Rhodesia progressed toward independence, the behaviour of the United Kingdom was censured as not fulfilling the terms of the Declaration on self-determination in that the vast majority of the African population were being denied equal rights and liberties under the constitution at that stage.

All this led Rosalyn Higgins to the opinion that it was 'academic to argue that as General Assembly resolutions are not binding nothing has changed'; 26. that self-determination remains a principle and not a legal right. Though self-determination, it may be conceded, is a legal right and became so soon after 1960, this is not to say that as a legal right, its scope is undisputed. Its application to the so-called colonial situation is straight-forward enough, in that it asserts the rights of the majority within a given unit.

22. Organization of American States - 8th meeting - Uruguay, January 22-31, 1962 - OAS official Records OEA/Ser.F/11.8 -; 56 AJIL p.607 (1962).

23. See back p.147

24. 9th June 1961 S/4835

25. Resolution 1654 (XVI) 27th November, 1961

26. Rosalyn Higgins, op.cit, Chapter 3, p.101.

However, its operation is apparently far from clear in situation where a group within an area seeks to break away, as did the Bengalis in Pakistan. Here the scope of the legal right of self-determination remains unsure. 27.

Yet if self-determination became a legal right soon after the 1960 Declaration, to what may we attribute its acquisition of binding force?

Now if Hart is correct in his description of how 'international law' comes into being, a rule is binding if it is accepted and functions as such. Undoubtedly the idea of self-determination has been accepted by the international community for a great many years. For proof of this one merely has to look to the Charter of the United Nations. Yet it is only recently that self-determination has come to function as a legal right and be considered as binding, after its statement in Resolution 1514 and its constant re-citation in the Assembly as applicable in various 'colonial' situations.

There must be some explanation for the gap between these two occurrences. The concept of self-determination has been agreed upon for many years, yet its emergence as a legal right has been delayed until states have shown both by word and deed that there is sufficient usage for it to be regarded as binding.

Logically if Hart was correct in what he said then there should be continuity between acceptance and its function as a rule of law.

27. See p. 163

If there is a gap between these two processes, then why is this the case? Let us for the moment take the example of self-determination.

- (1) There has been for many years acceptance of the principle of self-determination
- (2) It is only after the 1960 Declaration that self-determination seems to have achieved the status of a legal right.
- (3) The step from (1) to (2) was achieved because of the factor called practice. Only when self-determination had attained the status of a custom by means of practice could it be described as binding.

Indeed, it appears that Hart has neglected this factor (3), It is not enough for a rule to be accepted as if it were binding. It may only be described as part of international law when the criteria for establishing a customary rule of international law - practice / opinio juris are satisfied.

C H A P T E R XIII

Resolution 2625(XXV) - official title 'A Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States' - is our final choice of resolution for discussion and analysis. Adopted unanimously by the General Assembly, this declaration had as its purpose, 'the progressive development and modification of the following principles'.

- (a) The principle that states shall refrain in their international relations 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 purpose of the United Nations;
- (b) The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
- (c) The duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the Charter;
- (d) The duty of States to cooperate with one another in accordance with the Charter;
- (e) The principle of equal rights and self-determination of peoples;
- (f) The principle of sovereign equality of States;
- (g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community would promote the realization of the purposes of the United Nations. 1.

1. Resolution 2625(XXV), preamble.

The first thought that occurs on reading these principles and the manner in which they are elaborated upon in Resolution 2625(XXV) is the familiar ring that many portions possess. An explanation is forth-coming in that each of these principles originates in the Charter and in some instances-the principle to refrain from the use of force is one example-even before this. Other matters expounded within Resolution 2625(XXV) have been the subject of discussion and frequent resolutions within the General Assembly. In this context we may mention the assertion that

'a war of aggression constitutes a crime against the peace, for which there is responsibility under international law.'

Immediately this brings to mind the War Crimes Tribunals and their setting up at the conclusion of the Second World War. There are also echoes of the Organization's own deliberations on this topic when concerned with the operation of the Nuremberg Tribunal. (RES. 95(i)). 2.

Similarities occur in the elaboration of other principles, between previous pronouncements of the General Assembly and the terms of Resolution 2625(XXV). Indeed, as was pointed out in our discussion of the concept of self determination, the spirit and sometimes even the words of Resolution 1514(XV) are repeated in Resolution 2625(XXV).

The presence of this air of deja vu leads us to ask whether this air of familiarity is an indication that Resolution 2625(XXV) is binding. It seems logical to expect that this might prove the case with a resolution that re-iterates much that is familiar in international law. Yet, a look at the debates which preceded the drawing up of this resolution seem to prove the contrary. Over and over again, it is asserted by

2. Passed at 55th plenary meeting of the General Assembly - 11th December, 1946.

representatives to the Sixth Committee (where the resolution originated) that the resolution that results from their deliberations will not be binding. A cross-section of their views makes this plain.

'In other words, a resolution or a declaration did not become a rule of international law merely because it was adopted by the General Assembly, and was not binding even on the States Members of the United Nations'. 3.

(Sir Kenneth Bailey ... Australia)

'.... His delegation therefore did not accept the proposition that General Assembly resolutions could by themselves create international obligations, even for those states which supported them. ' 4.

(Mr. Brady ... New Zealand)

Again,

'a declaration, which technically speaking was merely a recommendation by the General Assembly, could have no great legal value, no matter how important its subject or how large the majority by which it was adopted.'5.

(Mr. Patey ... France)

'However valuable its content, no declaration was endowed with legal force. '6.

(Mr. Njo-Lea ... Cameroon)

'.... everybody knew that General Assembly resolutions did not bind member states. ' 7.

(Mr. Vasquez ... Columbia)

True there were some states who asserted their belief that resolutions might indeed be binding, but these were in a minority. 8.

3. Sixth Committee, 17th session, 758th meeting, 13th November, 1962, para. 14. (A/C6/SR 732 - 777). Sir Kenneth Bailey -
(Australia)

4. ibid. 766th meeting, 26th November 1962, para.11,
Mr. Brady (New Zealand)

5. ibid. 769th meeting, 27th November, 1962, para 4, Mr. Patey
(France)

6. ibid para. 34, Mr. Njo-Lea (Cameroon)

7. ibid 770th meeting, 30th November, 1962, para. 15,

8. see back p. 120 - 159 - (Mr. Vasquez (Columbia))

Resolution 2625(XXV) is judged on the evidence of what states have had to say during the course of its formulation, a declaration without the power to bind.

Yet we are aware that many of the principles that have been elaborated upon within this resolution are binding rules of international law. Take as an example the duty to refrain from the use of force. As early as 1928 the ~~Brand~~^{Brand}-Kellogg Pact was making such an obligation incumbent upon states. 9. Indeed the probabilities are that even at this early stage, this principle was well on the way to being a rule of international law. Whilst the terminology of Article 2(4) of the United Nations Charter seems to settle the matter beyond all shadow of a doubt. 10.

So it seems that we are faced with the following dilemma: that although much of the content of the resolution is well-established in international law, the resolution itself, if the opinion of states is to be believed, is not binding. However it does appear feasible to offer an explanation of this state of affairs. The answer is thought to lie in the preamble which prefaces the resolution. This speaks in terms of 'the progressive development and codification' of the seven principles under discussion.

'Codification' and 'progressive development' refer to particular processes which are employed by those whose task it is to secure the advancement of international law.

9. U.K.T.S. 29 (1929) Cmd. 3410; L.N.T.S. 57.

10. 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'.

A valuable commentary on the scope of these processes and the need which they satisfy, has been provided by Jennings. 11. It is to this that we now turn.

'Codification' Jennings concludes, 'means any systematic statement of the whole or part of the law in written form and that does not necessarily imply a process which leaves the main substance of the law unchanged, even though this may be true of some cases.' 12. In stressing this degree of innovation that may be part and parcel of any codification Jennings points out that 'codification properly conceived is itself a method for the progressive development of the law.' 13.

Progressive development instead of focusing its activities on an already 'well-developed sphere of law' concentrates instead on an area of law which is not 'highly developed or formulated in the practice of states.' It aims to establish new rules with a view to channelling the future behaviour of states. 14.

Having gained some insight into the significance of the terms 'codification' and 'progressive development', consideration of Resolution 2625(XXV) may be renewed. From what has been said, it seems that the mention of these two processes in relation to this resolution may be of some importance. In order to explore this further, we may ask ourselves whether Resolution 2625(XXV) amounts to

- (a) a codification
- (b) a progressive development
- (c) a combination of both processes - as the preamble would have us believe.

11. Jennings - 'Progressive Development of International Law and its Codification' 24 B.Y.I.L. p.301 (1947).

12. *ibid* p.301

13. *ibid* p.301

14. *ibid* p.301

On the evidence of a first reading, it appears that what we have is a codification. As has already been pointed out, there is much in this resolution which is a duplication of already existing rules of international law. Many of its provisions merely re-emphasise what is already set out in the Charter of the United Nations. A critique of the impact of this so-called Friendly Relations declaration has summed up the provisions relating to the duty to cooperate as an accurate reflection of the obligation under the Charter to cooperate. 15. Whilst the principle of sovereign equality of states is said to be 'an important affirmation of article 2 paragraph 1, of the Charter.' 16.

However, closer study reveals that the originators of this resolution have not been content merely to reiterate the terms of the Charter. Take for example that section which deals with non-intervention. This represents a concerted effort on the part of states to isolate the legal elements of this principle. Previously, states had been content to busy themselves with doctrinaire pronouncements on this topic, such as that contained in Resolution 2131(XX). 17. What has been embarked upon here is attempt to eschew political bias, and instead develop a cohesive body of law on this particular topic. In the context of non-intervention, this task proved harder than most, with the Committee ranged between those who favoured wholesale adoption of Resolution 2131(XX) and those who opposed it. The outcome was a compromise. Yet compromise or not, it shows what the Committee sought to achieve, the legal definition of certain principles, rather than their mere re-iteration.

15. Rosenstock 'Declaration of Principles of International Law concerning Friendly Relations' 65 AJIL p.729 (1971)

16. *ibid.* p.733.

17. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. - 162 -

However, given the lack of progress in the sphere of non-intervention, the cause of self-determination appears to have been advanced.

The previous chapter, it will be recalled, traced the emergence of self determination into a legal right. Here the process is advanced a stage further. The point had been reached when it was no longer adequate to state that peoples had a right to self-determination; more was needed in the shape of an 'in-depth' legal analysis. Resolution 2625(XXV) goes, at least some way towards achieving this. To illustrate this point, let us refer to the controversy that has always existed over whether or not the right of self-determination may be asserted in a situation other than a colonial situation. Paragraph seven of that portion dealing with self-determination is said on 'closer examination of its text' to 'reward the reader with an affirmation of the applicability of the principle to peoples within existing states and the necessity for governments to represent the governed.' 18. If this reading of the text is accurate, then this appears to be an advance ... or perhaps more accurately ... an attempt at advancing the law in relation to self-determination. It can be viewed as an effort to resolve the problem of whether self-determination has any applicability beyond the colonial situation. The answer provided here is 'yes'. Just how states will view this clarification of the principle will have to be gauged on their subsequent behaviour. Thus, when Bangladesh asserted that its declaration of independence from Pakistan was a vindication of its right of self-determination, the

18. Rosenstock op.cit p.732.

international community treated this claim with caution. The United Nations does finally appeared to have recognised the truth of this claim, and as a consequence the success achieved by Resolution 2625 (XXV) in advancing the cause of self-determination. 19.

All this discussion must, it is believed, lead to the inevitable conclusion that Resolution 2625 (XXV) is in part a codification and in part a progressive development. Whether the degree of progressive development is merely that degree of latitude allowed for within the process of codification, as was indicated by Jennings, or whether it exceeds those limits, is hard to decide. The innovations when they occur can be quite far-reaching. Probably, the Polish delegate to the Sixth Committee best summed up the Committee's achievement.

'.... the principles of the United Nations Charter, which had become a part of existing international law as soon as the Charter had been drafted, were binding on all states whether members of the United Nations or not. Many changes, however, had occurred since 1945. Some of the principles in the Charter therefore needed amplification: others needed study from a new point of view; still others, hardly formed in 1945, had - as the representative of Japan had said - matured into legal concepts. For example, the principle of self-determination had already been maturing for a long time before it had been set down in the Charter.' 21.

Though we may have satisfied ourselves as to the role fulfilled by Resolution 2625 (XXV), we still have to reconcile these two points of view concerning this resolution.

19. See I.L.M. (1972) p. 119 et seq.

21. 6th Committee, 17th session, 760th meeting, 15th November, 1962, Mr. Lachs (Poland) (A/C6/SR 732-777)

- (a) the view that Resolution 2625(XXV) is not binding; gleaned from Sixth Committee debates.
- (b) the view that the content of resolution 2625(XXV) is partially though not completely binding. That part of it which reflects customary international law has the power to bind states. Whilst the remainder is an attempt to direct the future practice of states in their dealings with one another.

The answer seems to lie in the fact that only that portion is binding which reflects what is well-established practice among states i.e. customary international law. The statement of such binding rules, or indeed potentially binding rules, in a resolution in no way accounts for their binding quality. Nor will it suffice to make potentially binding rules, binding. What was needed, as was constantly stressed by delegates to the Sixth Committee, was that these principles had gained, or might in the future gain, the status of rules of law through the medium of one of the accepted law creating processes i.e. custom. Though this is not to dispute that inclusion in a resolution might be regarded as valuable evidence of the standards of behaviour that states regarded as acceptable. Yet this was no more than a step towards the proof of a rule of customary international law.

The above deserves to be contrasted with what Hart has to say concerning international law.

'The rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such'. 22.

Here we have acceptance in that resolution 2625(XXV) was adopted without dissent. Yet states are unwilling to consider themselves bound. If Hart is to be believed, international law is no more than a set of rules intended to govern a simple social structure. Acceptance should be

sufficient. Yet the behaviour of states seems to belie this. States demand that in order for them to be bound, the power to bind must come from a source other than that of mere acceptance. Sir Kenneth Bailey, when dealing with the ways in which a rule acquired obligatory force in international law, out-lined the following possibilities.

'The rule was either embodied in a treaty entered into in accordance with the constitutional processes of the parties; or it ^{was} generally acted upon in the practice of states out of a conviction that states were bound so to act; or it was adopted by a judicial or similar tribunal authorized to declare and apply the law'. 23.

Nowhere is it indicated that acceptance is enough to bind states to a particular pattern of behaviour. Instead there are certain criteria that states expect to be fulfilled before they consider themselves bound. This seems to be completely contrary to any picture of international society as a simple social structure. Since these criteria do undoubtedly exist, then this suggests there is some measure of agreement among those who represent states. i.e. their officials as to the content of these criteria. Indeed, the whole process is reminiscent of that which occurs within a municipal law system which possesses a rule of recognition.

23. 6th Committee, 17th session, 758th meeting, 13th November, 1962, para. 13. (A/C6/SR 732-777)

S U M M A R Y

It is believed that from the examination of Resolutions 1514, 1962 and 2625 the following propositions may be said to sum up the situation.

- (1) None of these resolutions was binding immediately on its passage through the General Assembly.

The only possible exception was with regard to Resolution 2625 some of whose content might be described as binding. The explanation for this lies in the fact that the resolution was in some instances re-iterating well-established rules of customary international law. In no respect did the presence of these rules in a General Assembly resolution explain their binding quality.

- (2) However, it was possible to conclude that in certain instances the contents of a particular resolution, whether in whole or part, had become binding after its passage. 24. The reasons for this are most important.

Hart suggests that this is so since the rules have been accepted and are seen to function as binding rules of international law. He does not concede the presence of any outside criteria whereby one may predict that a rule will be a rule of international law.

24. See back p. 153 et seq

However, as has been pointed out, the behaviour of states does not seem to accord with this idea of Hart's. States would willingly show their acceptance of certain codes of behaviour set out in resolutions, yet not consider this sufficient to create binding rules.

What was necessary was for states to see whether the rules in question fulfilled the criteria for establishing themselves as rules of customary international law. This was a concerted view whether expressed by state representatives or judges of the International Court of Justice. 25.

Hart compares the rules of international law to the rules of etiquette. 26. There is no way in which one may predict what will or will not be regarded as 'good manners' - only time will tell. In contrast, though the process may be unsatisfactory and even uncertain, it is custom, seen as a definible process, which enables one to say what is or is not a rule of international law. It enables one to say what is or is not a binding rule.

25. See back p. 114 et seq.

26. Concept of Law p. 228.

Conclusion

It is appropriate, at the conclusion of this research, to look back over the preceding chapters and try to gauge what has been achieved. It will be recalled how we began our analysis with a consideration of Hart's conception of international law. In this there occurred several statements on the part of Hart - not the least of which was that international law consisted of a set of rules - which seemed worthy of closer examination.

Before such a programme of investigation got under way, some time was devoted to deciding whether or not Hart's system of primary and secondary rules was appropriate for use in international law. What emerged was that there was no overwhelming reason why this should not be done. In fact quite the opposite seemed to be true. Moreover, in the process of so deciding, other items of information were forthcoming, including the intangible nature of the rule of recognition. Indeed, although Hart regarded the emergence of such a rule as dependent on the acceptance of officials, it was seen how, on an international level, this was hardly distinguishable from the emergence of a rule of customary international law. There appeared to be no reason why Hart might not dismiss the potential content of a rule of recognition as nothing more than an addition to the set of international law rules.

Putting this to one side, an analysis of international law in terms of primary and secondary rules yielded some very interesting results. The premise that international law

is a set of primary rules was tested against the characterisation of such a society as described by Hart. The two were found not to correspond to a very significant degree. Defects such as uncertainty and inefficiency were found to be present only in situations where they appeared unavoidable given the particular nature of international law.

Even more significant was the existence of secondary rules corresponding to the secondary rules of change and adjudication: though these had not developed to quite the degree of sophistication encountered among municipal law secondary rules. Yet undoubtedly the rules were there, so that already our understanding of international law was advanced.

However, it is on the central issue of whether or not international law may lay claim to a rule of recognition that we intend to dwell. Various sources were considered that might potentially provide the content for such a rule.

They included (i) judicial decisions,
(ii) custom,
(iii) multi-lateral treaties,
(iv) resolutions of the United Nations,

Of these, multi-lateral treaties and judicial decisions possessed the weakest claims. The former, it was decided, could be disregarded; the later, whilst it could be used to ascertain a rule of international law was regarded as being of marginal importance given the scarcity of judicial decisions.

This left us with the two main candidates, custom and United Nations resolutions. Now a detailed examination was made regarding the status and effect of U.N. resolutions and

whether they might be regarded as binding. Without going into the evidence once again, it emerged that resolutions of the United Nations were regarded as binding immediately on their passage through the Organization only by a minority of states and academics. If the opposite had proved to be the case then it might have been possible to say that officials had accepted as a rule of recognition, passage in a resolution of the U.N.

At this point we were left with the alternative that:-

- (a) either custom formed the content of the rule of recognition, a prospect that Hart dismissed out of hand,
- (b) or there was no such rule and Hart was correct when he described rules as being accepted piecemeal within the international system.

The latter proposition was tested in relation to various U.N. resolutions where states had shown their acceptance of a measure by means of an affirmative vote in the General Assembly. If what Hart said was accurate then states it seems, would show by their behaviour that such rules were binding. This was shown not to be the case. States stressed time and time again that something more than acceptance was needed to bind their actions, and that something was more often than not custom.

Now Hart insisted in the Concept of Law that a rule of recognition/basic norm expressed in terms of custom would be no more than a statement of the obvious. He quotes an example of this:-

'States should behave as they customarily behaved.' 1.

1. Concept of Law p.228.

Yet, as was pointed^{out} the particular fashion in which this rule of recognition is framed is not the manner in which one would expect such a rule to be expressed. One would rather that it specified the feature or features that will indicate the presence of a valid rule of law, which it does not appear to so. If one were instead to substitute the rule that a valid rule of law is one which has fulfilled the tests for customary international law, then would this stand the test of being a valid rule of recognition?

The point should, it is believed, be made that there does not appear to be any prima facie reason for excluding custom from the rule of recognition. Custom can and in the case of English law does play some part in the content of the rule. Hart admits this to be the case. 2. Then why can it not play a similar role in international law? Admittedly, as a concept for assessing what is and what is not a valid law, custom is more uncertain than most. Yet it is the criterion used by officials of the international system to decide what is international law, as such officials make plain. 3. Moreover, writers such as D'Amato seem to agree with this key role that is given to custom:

'We must bear in mind that custom is indeed a secondary rule of law formation. It can account ... for the introduction, ascertainment, variation or elimination of primary rules.' 4.

Any process that can account for the ascertainment of rules must of necessity be encompassed by the rule of recognition.

2. *ibid* p. 92.

3. See back p. 119 *et seq*

4. D'Amato *op.cit.* p.44.

Therefore, it appears that we are faced with a circuitous argument from which it appears impossible to break out. Hart says custom may not form the basis of a rule of recognition. Custom is the main way in which international law is ascertained. But Hart states that it is not possible to state a rule of recognition in such terms with the result that international law is dependent on acceptance for the promulgation of its rules. Yet it has been shown that acceptance in its most basic sense is not the manner in which rules of law are adopted. Something more is required and that something is custom. This must therefore lead to the conclusion that either it must be possible to formulate a rule of recognition for international law in terms of custom; or that there is some flaw in the actual structure of the rule which will not allow it to take into consideration factors such as custom. But since Hart does insist that custom can be accommodated within the rule, then a formulation must be possible: one that states that the test of a valid law is its acceptance as a rule of customary international law.

ABBREVIATIONS USED

A.J.I.L.	American Journal of International Law
B.Y.I.L.	British Yearbook of International Law
C.L.J.	Cambridge Law Journal
C.Y.I.L.	Canadian Yearbook of International Law
Cal.L.R.	Californian Law Review
Duke L.R.	Duke Law Review
G.A.O.R.	General Assembly - Official Records
H.L.R.	Harvard Law Review
I.C.A.O.	International Civil Aviation Organization
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
J.S.P.T.L.	Journal of the Society of Public Teachers of Law
M.L.R.	Modern Law Review
N.Y. Univ.L.R.	New York University Law Review
O.A.S.	Organization of American States
P.C.I.J.	Permanent Court of International Justice
Proc. A.S.I.L.	Proceedings of the American Society of International Law.
T.G.S.	Transactions of the Grotius Society
U.C.L.A. Law Review	University College of Los Angeles Law Review
U.K.T.S.	United Kingdom Treaty Series
U.N.C.I.O.Doc.	-United Nations Conference on International Organization, Documents.
Univ.Penn.L.R.	-University of Pennsylvania Law Review
Wash.& Lee L.R.	-Washington & Lee Law Review
Yale L.J.	Yale Law Journal

Combinations of letters and numbers e.g. A/1234 refer to U.N. Documents.

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Resolution 375(IV)	Draft declaration on the rights and duties of states
Resolution 1348(XIII)	Sets up Committee on the Peaceful Uses of Outer Space.
Resolution 1514(XV)	Declaration on Self-determination
Resolution 1542(XV)	Concerning non-self-governing status of certain Portuguese territory
Resolution 1573(XV)	Right of Algerian people to self-determination
Resolution 1653(XVI)	Use of nuclear weapons
Resolution 1654(XVI)	Special Committee to implement Resolution 1514(XV)
Resolution 1721(XVI)	Peaceful uses of outer space
Resolution 1724(XVI)	Right of Algerian people to Self-determination
Resolution 1962(XVIII)	Declaration of legal principles governing activity of states in exploration and use of outer space
Resolution 1963(XVIII)	Need for international agreement on exploration and use of outer space
Resolution 2131(XX)	Declaration on the admissibility of intervention in the Domestic Affairs of states.
Resolution 2625(XXV)	Declaration of principles on Friendly Relations between states