Custom, Power and the Power of Rules

International Relations and Customary International Law

This book sets out to explain the most foundational aspect of international law in international relations terms. By doing so it goes straight to the central problem of international law – that although legally speaking all States are equal, socially speaking they clearly are not. As such it is an ambitious and controversial book which will be of interest to all international relations scholars and students and practitioners of international law.

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International Relations and Customary International Law

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It is true that politics are not law, but an adequate notion of a body of law cannot be gained without understanding the society in and for which it exists, and it is therefore necessary for the student of international law to appreciate the actual position of the great powers of Europe.

John Westlake, *Chapter on the Principles of International Law* (Cambridge: Cambridge University Press, 1894) 92

Law is regarded as binding because it represents the sense of right of the community: it is an instrument of the common good. Law is regarded as binding because it is enforced by the strong arm of authority: it can be, and often is, oppressive. Both these answers are true; and both of them are only half truths.

Edward Hallett Carr, *The Twenty Years' Crisis* (2nd ed.) (London: Macmillan, 1946) 177

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Foreword

The subject of customary international law as a general phenomenon is hardly more suitable for graduate research students in international law than Fermat's last theorem used to be for their counterparts in mathematics. The central puzzles of a discipline, which generations of its senior professionals have failed to solve, are usually better approached from the edges, and indirectly. Light may thus be shed on the centre, but there is less risk of complete failure. So when Michael Byers came seeking to work on custom it seemed sensible to look not frontally at the 'problem' as such, but at a number of examples of different kinds of custom in transition, at different contexts where, we could be relatively sure from the *communis opinio*, a particular customary rule existed and had changed. What were the factors that had produced the change; how had they interrelated; what influence did the 'structure' of the particular problem exercise – for example, what difference did it make on the evolution of a particular institution or custom that the issue characteristically arose in one forum (national courts in the case of state immunity, foreign ministries in the case of the breadth of the territorial sea)? At least it was a starting point.

It says much for the energy and initiative of its author that the resulting book tackles these particulars within the framework of a study seeking to show the ways of international lawyers to the scholars of international relations. Of course international relations has been studied within the disciplines of history, ethics and law for as long as those disciplines have existed. But there was a particular point in focusing on 'international relations'. As a self-conscious academic discipline it is of recent origin and has its own special history and orientation. The history is tied up with the failure of idealism, legalism and the League of Nations. So far as international law is concerned, its orientation is, or at least was, strongly influenced by the fact that early exponents such as Hans Morgenthau were versed in the subject and saw themselves as reacting from it – not so much in its lower reaches, those parts of the routine conduct of diplomatic and inter-state relations which the first generation scholars rarely

reached, and which could safely be left to be 'influenced' by international law, but in the great affairs of state, and in particular in relation to the use of force. There was tension between the claim of international law, as embodied in the Charter and in decisions of the International Court, to regulate the use of force and the assertions of certain most powerful States, and of certain of their scholars, that force could be used in international relations as a matter of policy on any sufficient occasion, and that the language of diplomacy on those occasions was merely cosmetic. A further feature of the international relations literature has been its dominant focus in and on the United States. True, the involvement of the United States as superpower in any case can always be presented as involving a difference of kind, and it may indeed do so. But the combined emphases on the use of force and on the United States produced, at least until recently, a view of the world amongst international relations scholars which had a quite different feel – as if arising from a studied determination to grasp only one part of the elephant.

For a variety of reasons this situation is changing, and more balanced appraisals of the links between international law and international relations are becoming possible. Dr Byers' study is one such appraisal; but it also makes a contribution to an understanding of the process of international law, a process which is something more than a flux. While doing more than he started out to do, it also demonstrates, on modest assumptions as to the underpinnings of international law, its distinct character and power – though not by any formal proof. One result is to suggest a need to recast the tradition of realism itself in more realistic, that is to say in more comprehensive and representative, terms.

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Preface

At the beginning of his or her career, every international lawyer has to grapple with the concept of customary international law, with the idea that there are informal, unwritten rules which are binding upon States. This is because there remain important areas of international law, such as the laws of State responsibility and State immunity, where generally applicable treaties do not exist. And despite the lack of an explicit, general consent to rules in these areas, no international lawyer doubts that there is a body of law which applies to them.

I stumbled into the quagmire of customary international law very early in my legal career, in the autumn of 1989. It was during the second year of my law studies when, as a member of McGill University's team in the Jessup International Law Moot Court Competition, I was assigned to write those sections of our memorials that concerned customary international law. Having written what I thought was a thorough analysis of '*opinio juris*' (i.e., subjective belief in legality) and State practice concerning the issue of maritime pollution in the Antarctic, I was struck by how difficult it was to explain this 'law' to my teammates. They, quite rightly, were concerned about how to present our arguments in a convincing manner, and theoretical discussions of subjective belief seemed far too amorphous to take before judges. In the end, we decided to focus on what States had actually done – i.e., State practice – rather than what States may or may not have believed they were required to do. Not surprisingly, this incident left me convinced that there was something wholly unsatisfactory about traditional explanations of customary international law.

At the same time, the problems of customary international law seemed related to a more general problem that I had already encountered. Having come to the study of law after a degree in international relations, I soon began to identify the distinction between '*opinio juris*' and 'State practice' with the distinction between international law and international politics, between what States might legally be obligated to do, and what they actually did as the result of a far wider range of pressures and opportunities. Moreover, the lack of interest in international law among most of the

international relations scholars I had encountered, combined with the apparent lack of interest among most international lawyers in the effects of political factors on law creation, suggested to me that there was something unsatisfactory in this area as well.

In the intervening decade, thinking about the relationship between international law and international politics has advanced significantly, to the point where interdisciplinary studies now constitute an important part of both academic disciplines. Relatively few international relations scholars still doubt whether international law actually exists. Instead, they are increasingly interested in regimes, institutions, the processes of law creation, and in why States comply with rules and other norms.

International lawyers, for their part, are demonstrating an increasing interest in international relations theory. Regime theory and institutionalism, in particular, are now being applied by a number of legal academics in their work on international law. Yet, though a vast amount has been written about customary international law, relatively few writers have examined the relationship between law and politics within this particular context. In an area of law that is constituted in large part by State practice, and which would therefore seem particularly susceptible to the differences that exist in the relative affluence or strength of States, this would seem to be a serious omission. Fortunately, calls are now being made to remedy the situation, with Schachter, among others, writing that the 'whole subject' of the 'role of power in international law . . . warrants empirical study by international lawyers and political scientists'.[1]

The time may be particularly ripe for such an investigation of the role of power in customary international law. The international situation has changed profoundly in recent years, not only as a result of the end of the Cold War, the disintegration of the Soviet Union and the demise of most command economies. The earlier process of decolonisation, the acquisition by non-industrialised States of a numerical majority in many international organisations, and the economic resurgence of Western Europe and the Pacific Rim have all contributed to reducing and rearranging relative power advantages and disadvantages. As a result of these new power relationships, new ideas such as the concept of democratic governance in international law are appearing, and the extreme politics of East–West, North–South confrontation have at last given way to a more complex situation which may be more conducive to objective academic analysis.

These dramatic changes may also be at least partly responsible for the increasing interest that many international relations scholars have in international institutions and international law. Numerous new interna-

[1] Schachter (1996) 537.

tional institutions are appearing at the same time that many old institutions are becoming more effective. The international system is, arguably, becoming more refined, complex and less dependent on applications of raw power. As we reach the turn of the century, international relations scholars clearly find themselves having to address such new complexities.

Within this new environment, this book seeks to provide a balanced, interdisciplinary perspective on the development, maintenance and change of customary international law. By doing so, it hopes to assist both international lawyers and international relations scholars better to understand how law and politics interact in the complex mix of '*opinio juris*' and 'State practice' that gives rise to customary rules.

This book is a substantially revised version of a PhD thesis that was submitted to the Faculty of Law at the University of Cambridge on 1 May 1996. The thesis was supervised by Professor James Crawford and examined by Dr Vaughan Lowe and Professor Bruno Simma in Munich, Germany on 16 July of that same year. An earlier attempt at expressing some of the ideas developed in the thesis was published in November 1995 in the *Michigan Journal of International Law*. That article, entitled 'Custom, Power and the Power of Rules: An Interdisciplinary Perspective on Customary International Law', represented an early state of my thinking on the interaction of law and politics within the context of customary international law. Many of my ideas have changed since that article was published and my thesis submitted: some have been developed further, several have been abandoned and a few have been replaced. This book is also a much more extensive treatment of the issues.

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Acknowledgments

The writing of a doctoral dissertation and its subsequent modification is often portrayed as a lonely experience, as much a test of one's fortitude in dealing with intellectual seclusion as a test of academic ability. Fortunately, this has not been my experience. I benefited greatly from the assistance, encouragement and friendship of many individuals, only a few of whom I am able to thank here.

During the course of writing my dissertation and in subsequently seeking to improve upon it my work received much needed criticism from the following people: Philip Allott, Blaine Baker, Ian Brownlie, Bob Byers, James Crawford, Deborah Cresswell, Anthony D'Amato, Anne Denise, Carol Dixon, Emanuela Gillard, Peter Haggenmacher, Benedict Kingsbury, Martti Koskenniemi, Heike Krieger, Claus Kress, Susan Lamb, Vaughan Lowe, Susan Marks, Frances Nicholson, Georg Nolte, Geneviève Saumier, Jayaprakash Sen, Bruno Simma, Stephen Toope, Thomas Viles and Arthur Weisburd. I thank them all.

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Although I never asked him to comment on my work, Venkata Raman allowed me to read his own doctoral thesis on customary international law and to test my amateurish lecturing skills on his students.

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This book is dedicated to my parents, Brigitte and Bob Byers, with love.

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Abbreviations

AC	*Appeal Cases*
All ER	*All England Reports*
CTS	*Canada Treaty Series*
DLR	*Dominion Law Reports* (Canada)
F. 2d	*Federal Reports* (United States of America), Second Series
F. Supp.	*Federal Reports* (United States of America), Supplement
FAO	United Nations Food and Agriculture Organisation
FSIA	Foreign Sovereign Immunities Act (1976, United States of America)
GAOR	United Nations *General Assembly Official Records*
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILM	*International Legal Materials*
ILR	*International Law Reports*
Keesing's	*Keesing's Contemporary Archives* (now *Keesing's Record of World Events*)
LNTS	*League of Nations Treaty Series*
Moore	Moore, *A Digest of International Law*
NAFO	North Atlantic Fisheries Organisation
NZLR	*New Zealand Law Reports*
PCIJ	Permanent Court of International Justice
QB	Court of Queen's Bench (England)
S. Ct	*Supreme Court Reports* (United States of America)
SC	*Statutes of Canada*
SCR	*Supreme Court Reports* (Canada)
Stat.	Statutes
UKTS	*United Kingdom Treaty Series*
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

UNTS	*United Nations Treaty Series*
USC	*United States Code*
Whiteman	Whiteman, *A Digest of International Law*
WLR	*Weekly Law Reports*

Part 1

An interdisciplinary perspective

1 Law and power

The International Court of Justice has observed that international law is not a static set of rules, that it undergoes 'continuous evolution'.[1] The evolution of international law is a subject that has absorbed international lawyers for centuries, for, among other things, the way in which law develops and changes clearly determines the rules that are applicable today.[2] This book addresses one particular characteristic of the evolution of international law, namely that it does not occur in a legal vacuum, but is instead circumscribed and regulated by fundamental rules, principles and processes of international law. One such process is the process of customary international law, which is also referred to here as the 'customary process'. This process governs how one particular kind of rules – rules of customary international law – is developed, maintained and changed.[3]

Unlike treaty rules, which result from formal negotiation and explicit acceptance, rules of customary international law arise out of frequently ambiguous combinations of behavioural regularity and expressed or inferred acknowledgments of legality. Despite (or perhaps because of) their informal origins, rules of customary international law provide substantive content to many areas of international law, as well as the

[1] *Barcelona Traction Case (Second Phase)* (1970) *ICJ Reports* 3, 33.

[2] For an historical overview, see Wilhelm Grewe, *The Epochs of International Law* (trans. Michael Byers) (Berlin: Walter de Gruyter, 1999).

[3] On the distinction between custom as process and custom as rules, see, e.g., Sur (1990) 1er cahier, 8; and pp. 46–50 below. This book focuses on the customary process as it operates in respect of generally applicable rules. The process may operate in a similar but more restricted manner in respect of rules of special customary international law. Special customary international law involves rules which apply among limited numbers of States, often as exceptions to rules of general customary international law. States within such a limited group remain governed by any generally applicable rule in their relations with any States outside that group. Special customary international law is sometimes referred to as 'regional customary international law' because it often develops among States which are in geographical proximity to one another. However, issues which are particular to limited numbers of States and therefore likely to attract special customary rules are not always confined to single regions. For explanations of special customary international law, see Cohen-Jonathan (1961); Guggenheim (1961); D'Amato (1969); Akehurst (1974–75a) 28–31; and Sur (1990) 2e cahier, 3 and 12–13.

procedural framework within which most rules of international law, including treaty rules, develop, exist and change. Customary rules are particularly important in areas of international law, such as State immunity and State responsibility, where multilateral treaties of a general scope have yet to be negotiated. They are also important in areas, such as human rights, where many States are not party to existing treaties nor subject to the relevant treaty enforcement mechanisms. Finally, customary rules would seem to exist alongside many treaty provisions, influencing the interpretation and application of those provisions, and in some cases modifying their content.[4]

The customary process and other fundamental rules, principles and processes of international law are, in terms used by Keohane, 'persistent and connected sets of rules . . . that prescribe behavioral roles, constrain activity, and shape expectations'.[5] In other words, they are normative structures which regulate applications of what international relations scholars usually refer to as 'power'. This book examines the relationship between international law and power, in its most general sense, within the confines of the process of customary international law. Still more specifically, it focuses on the interaction, within that process, between certain principles or basal concepts of international law, such as jurisdiction and reciprocity, and non-legal factors, such as the differences in wealth and military strength which exist among States.

In examining the relationship between law and power within the process of customary international law, this book adopts an interdisciplinary perspective which seeks to combine aspects of the history, theory and practice of international law with certain elements of international relations theory and methodology. There are four reasons why such a perspective seems desirable. First, both international relations scholars and international lawyers are concerned about the relationship between power and normative structures, although they characteristically adopt different approaches to that relationship, and the subject of power. Secondly, a study of the role of power in customary international law transcends any distinction between the two disciplines, in part because of the particular expertise of international relations scholars in the study of power, and that of international lawyers in the rules, principles and processes of international law. Thirdly, although it may be relatively easy to make a distinction between the politics of law-making and the legal determination of rules when dealing with legislatively enacted, executively decreed, or judge-made law, the linkages between these activities

[4] See pp. 166–80 below. On the continuing importance of customary international law, see generally Danilenko (1993) 137–42. [5] Keohane (1989b) 3.

would seem to be much stronger in custom-based legal systems like the process of customary international law. Customary law is constantly evolving as the relevant actors, whether States or ordinary individuals, continually engage in legally relevant behaviour.[6] As a result, change in these systems is often gradual and incremental, whereas legislatively enacted or executively decreed law tends to change less often, and, when it does change, to do so more abruptly. Finally, inequalities among actors may have a greater effect on customary law-making than on law-making in other areas due, in part, to the lack of formalised procedures in this area and to the central role played by behaviour in the development, maintenance and change of customary rules.

In examining the role of power in its most general sense, this book considers power to involve the ability, either directly or indirectly, to control or significantly influence how actors – in this case States – behave. In an attempt to avoid reductionism, this book does not put forward a precise definition of power. However, it does emphasise that there is an important distinction to be made between non-legal power and the rather more specific kind of power that resides in rules.

Power may be derived from a variety of sources. For example, power derived from military strength gives some States the option of using force to impose their will, and the ability to resist the efforts of others to impose theirs. Similarly, power derived from wealth gives some States the capability to impose trade sanctions and to withstand them, to withhold Most Favoured Nation status or not to care whether that status is granted. Power derived from wealth may also enable States to support effective diplomatic corps which can monitor international developments and apply pressure, based on all the various sources of power, in international organisations such as the United Nations.[7] These different sources of power would seem to be important within the customary process because they determine, either separately or cumulatively, whether and to what degree different States are able to contribute to the development, maintenance or change of customary rules.

Power derived from military strength and wealth is clearly not the only kind of power at work in international society. For example, power might also devolve from moral authority, which could be defined as the ability to appeal to general principles of justice. In the human rights field it is possible that the existence of a high degree of moral authority in support of some customary rules has discouraged States which might otherwise have

[6] They are, in this sense, both creators and subjects of the law. On this '*dédoublement fonctionnel*' see Scelle (1932/34) 2ème partie, 10–12; and Scelle (1956).

[7] See Franck (1995) 481.

opposed those rules from so doing. It might also have discouraged them from openly engaging in violations of those rules, and from admitting to concealed violations.[8] Power devolved from moral authority, and an associated shift in international society's perceptions of justice, may also have played a role in the process of decolonisation.[9]

The legitimising and constraining effects of the international legal system are less noticeable than power derived from military strength, wealth or even moral authority, although they are perhaps equally important. They are important because States pursue their self-interest in a variety of ways. States will occasionally apply raw, unsystematised power in the pursuit of a particular, often short-term goal. However, the application of raw power through the direct application of military force or economic coercion tends to promote instability and escalation. It is neither subtle nor, in many cases, particularly efficient. More frequently, States will apply power within the framework of an institution or legal system. States seem to be interested in institutions and legal systems because these structures create expectations of behaviour which reduce the risks of escalation and facilitate efficiency of action. Institutions and legal systems promote stability, thus protecting States which recognise that, in future, they could find themselves opposing any particular position they currently support, and *vice versa*.[10]

However, a legal system such as the international legal system does more than simply create expectations and promote stability. It also fulfils the essentially social function of transforming applications of power into legal obligation, of turning 'is' into 'ought' or, within the context of customary international law, of transforming State practice into customary rules. Legal obligation represents a society's concerted effort to control both present and future behaviour.[11] International society uses obligation to confer a legal specificity on rules of international law, thus distinguishing them from the arbitrary commands of powerful States and ensuring they remain relevant to how States behave.

[8] The prohibition against torture is probably the best example of such a rule. See Rodley (1987) 63–4. See also the discussion of Burma's reservation to Art. 37 of the 1989 Convention on the Rights of the Child, note 35, p. 136 below.

[9] On the history of decolonisation, see, e.g., Fanon (1991). For a philosophical examination of moral authority as a source of power, see Nietzsche (1913).

[10] This latter insight is generally attributed to Rawls: see Rawls (1971). See also Franck (1995) 99. The creation of institutions and legal systems by States would thus seem to be motivated by long-term calculations of self-interest. On the creation of institutions, see generally Keohane (1989d); and Young (1989) 1–6. For further discussion of the benefits offered by institutions, see: pp. 107–9 below.

[11] On the distinction between legal obligation and other forms of obligation, see generally Finnis (1980) 297–350.

In many instances obligation will also provide correlative rights to apply power within certain structures using certain means. For example, in international society the obligation not to exercise military force against another State except in self-defence serves to legitimise, at least to some degree, the use of force by a State against insurgents within its own territory.[12]

Within the process of customary international law, States apply power in order to develop, maintain or change generally applicable rules, or even to cause such rules to lose their legal character.[13] In doing so they may also be acting to protect and promote established sources and means of applying power from the pressures of an ever-changing world or, conversely, to challenge those very same sources and means of application.

Numerous attempts have been made to identify the basis of obligation in international law.[14] And from these attempts, one thing appears clear: that the basis of obligation is located anterior, not only to individual rules of international law, but even to the processes that give rise to those rules. As Triepel wrote in 1899:

> Immer und überall wird man an den Punkt gelangen, an dem eine rechtliche Erklärung der Verbindlichkeit des Rechtes selbst unmöglich wird. Der 'Rechtsgrund' der Geltung des Rechts ist kein rechtlicher.[15]

It would therefore seem that the question of how applications of power can generate obligation cannot be answered by international lawyers operating strictly within the confines of their own discipline. Instead, this question would seem to require international lawyers to consider non-legal factors and non-legal relationships, to regard international law as but one part of a larger international system, and to apply concepts and methods which, although familiar to other disciplines, are largely alien to their own.

However, instead of exploring the basis of obligation in international law, this book assumes that States are only bound by those rules to which they have consented. This consensual or 'positivist' assumption is not as narrow as it might seem, for it admits that consent may take the form of a general consent to the process of customary international law, of a diffuse

[12] On the use of force, see generally Brownlie (1963).

[13] Higgins ((1994) 19) has written: 'To ask what is evidence of practice required for the loss of obligatory quality of a norm is the mirror of the evidence of practice required for the formation of the norm in the first place.'

[14] See generally Brierly (1958).

[15] Triepel (1899) 82. My translation reads: 'One will always invariably arrive at the point where a legal explanation of the obligatory character of the law becomes impossible itself. The legal basis of the validity of the law is extra-legal.' For an attempt to locate the basis of obligation *within* processes of law creation, see Schachter (1968).

consensus rather than a specific consent to individual rules. In other words, by accepting some rules of customary international law States may also be accepting the process through which those rules are developed, maintained or changed, and thus other rules of a similar character.[16]

This consensual assumption does not in itself raise the question of the basis of obligation in international law, for as Fitzmaurice explained:

> [Consent] is a *method* of creating rules, but it is not, in the last resort, the element that makes the rules binding, when created. In short, consent could not, in itself, create obligations unless there were already in existence a rule of law according to which consent had just that effect.[17]

This book focuses on identifying and explaining the customary process through which *individual* rules and principles acquire obligatory character, and on exploring how principles of international law qualify applications of power within that process. That said, if the customary process is an integral part of international society, it would seem likely that the basis of obligation in international law also lies within the social character of inter-State relations.

International relations scholars have traditionally had little time for such questions. Instead, they have regarded international law as something of an epiphenomenon, with rules of international law being dependent on power, subject to short-term alteration by power-applying States, and therefore of little relevance to how States actually behave.[18] International relations scholars have tended to focus on the ability of States to control or influence *directly* how other States behave, through factors such as wealth, military strength, size and population.

However, some international relations scholars have more recently observed that certain applications of power may give rise to normative structures, and that these structures in turn sometimes affect State behaviour. Some of these same scholars have also concluded that these normative structures are in some way related to international law. The work of these particular international relations scholars is considered in some detail in chapter 2 of this book, which concludes that most of them have yet to take the additional, necessary step of recognising that the obligatory character of rules of international law renders those rules less vulnerable

[16] See Lowe (1983a); Raz (1990) 123–9; Allott (1990) 145–77; Sur (1990) 2e cahier, 5 and 10; and pp. 142–6 below. For particularly clear statements as to the consensual approach to customary international law, see *Lotus Case* (1927) PCIJ Reports, Ser. A, No. 9, 18, quoted at p. 142 below; *Nicaragua Case (Merits)* (1986) *ICJ Reports* 14, 135 (para. 269); Corbett (1925); van Hoof (1983) 76ff; Sur (1990) 2e cahier, 4–5; and Wolfke (1993a). For consensual ('contractual') language from international relations scholars, see Keohane (1993); and Kratochwil (1993).

[17] Fitzmaurice (1956) 9, emphasis in original.

[18] See pp. 21–4 below.

to short-term political changes than the other, non-legal factors they study.[19]

Not surprisingly, the idea of obligation as a control on power has not only arisen with regard to international law. Hohfeld, for example, developed the idea of 'legal powers' in the context of private law.[20] For Hohfeld, a legal power was the ability of one actor to rely on existing law to change or use a legal relationship with another actor to his own benefit. Although a legal power of this kind was held by an individual actor or group of actors, by implication it was based upon another kind of power, that of obligation residing in rules.

Weber, despite placing an emphasis on 'commands' and 'office', used the concept of 'legitimacy' in a manner which underlined the special character of rules and the processes by which they are created. He wrote: 'Today the most common form of legitimacy is the belief in legality, i.e., the acquiescence in enactments which are formally correct and which have been made in the accustomed manner.'[21]

Hohfeld's use of 'legal power' and Weber's use of 'legitimacy' may be contrasted with the use that Franck has made of the concept of 'legitimacy' in international law. Franck considered legitimacy to be derived, not only from the processes of rule creation, but from a number of other factors as well. These factors include 'internal coherence', which is inherent in rules themselves, and 'ritual and pedigree', which are associated with, but not an intrinsic part either of rules or of the processes of rule creation.[22]

When Franck discussed rule creation he did so using modified versions of Hart's concepts of secondary rules and rules of recognition.[23] According to Franck: 'A rule has *greater* legitimacy if it is validated by having been made in accordance with secondary rules about law-making.'[24] In addition, 'there is widespread acceptance by states of the notion that time-and-practice-honored-conduct – pedigreed custom – has the capacity to bind states'.[25] This 'rule of recognition' is part of a larger 'ultimate rule of recognition',[26] which in turn is but one of several ultimate rules. These rules, which are 'irreducible prerequisites for an international concept of right process'[27] and *not* derived from any *legal*

[19] See also Byers (1997b). It is also this distinction between the non-legal power wielded by States and the obligation that resides in rules that enables this book to avoid a risk that may be inherent in any general definition of a potential causal factor in international relations, i.e., of losing sight of the causal factor amongst its potential results.

[20] See Hohfeld (1913–14) 44–5; and Hohfeld (1923) 50.

[21] Weber (1954) 9. See also Weber (1968) 31–6; and Allott (1990) 133–66.

[22] Franck (1990). See also Franck (1995) 30–46.

[23] See Hart (1961).

[24] Franck (1990) 193, emphasis added.

[25] Franck (1990) 189.

[26] Franck (1990) 189.

[27] Franck (1990) 194.

process, are the sole source of legitimacy within the process whereby particular, primary rules are created.

This book agrees that legitimacy may originate from many sources. However, it adopts a narrower approach than Franck and focuses on the legitimising effects of the customary process as such, on the effects of that process in transforming applications of power into obligation in the form of customary rules.[28] In doing so this book takes the additional step of examining how four principles of international law qualify applications of power *within* the customary process, in order to determine whether some rules of customary international law have more-or-less independent causal effects on the efforts of States to develop, maintain or change other customary rules. This book does not address the larger issue of the effects of customary international law on State behaviour more generally.

The term 'principles' is used to indicate that the rules under examination are rules of a general character. As the Chamber of the International Court of Justice in the *Gulf of Maine Case* explained:

> [T]he association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character.[29]

Yet such principles are not, in Danilenko's words, 'just broad ideas formulated by abstract reasoning and logical constructions'.[30] Instead, they 'find their specific expression in a number of technically more precise norms' and remain 'rules of conduct having all the essential qualities of law'.[31]

Chapters 4 to 7 of this book explain how the principles of jurisdiction, personality, reciprocity and legitimate expectation affect the application of power by States as they seek to develop, maintain or change rules of customary international law. Although these four principles are too general in character to impose specific normative requirements on States, they nevertheless constitute a firmly established framework within which other, more precise customary rules may develop, exist and change. As a framework within which rules of international law evolve, they affect how States are able to participate in the customary process, both in terms of

[28] It will later become apparent that this focus is consistent with this book's suggestion that even the principles which provide a framework for the international legal system are derived from the customary process, and are not external to it. See pp. 159–60 below.

[29] *Gulf of Maine Case* (1984) *ICJ Reports* 246, 288–90 (para. 79). On the chamber procedure within the ICJ, see Art. 26 of the Statute of the International Court of Justice; Schwebel (1987); Oda (1988); and Ostrihansky (1988).

[30] Danilenko (1993) 8.

[31] Danilenko (1993) 8.

how they may apply non-legal power, and in terms of their effectiveness in so doing.

Chapter 4 begins by considering the principle of jurisdiction. It suggests that this principle may either facilitate or hinder the application of power within the customary process, depending on whether that power is applied within, or in close proximity to, the territory of the power-applying State. Chapter 5 considers how the principle of personality may qualify the application of power by limiting the range of potential participants in the customary process, and by increasing the scope of State interests and the range of legally relevant behaviour through the mechanism of diplomatic protection. Chapter 6 considers the operation of the principle of reciprocity within the process of customary international law. In doing so it focuses on the role of claims, such as claims to persistent objector status, and the effect that the principle of reciprocity has upon those claims. Lastly, chapter 7 considers various ways in which the principle of legitimate expectation may act to prevent or retard the development or change of customary rules.

The principles of jurisdiction, personality, reciprocity and legitimate expectation are singled out for examination because they represent important points of State interaction. For example, boundaries, State and diplomatic immunities and extraterritorial applications of national laws all involve issues of jurisdiction.[32] Nationality, diplomatic protection, human rights and the rights and obligations of international organisations all involve issues of personality.[33] Reciprocity is an important aspect of the law of treaties, of persistent objection and other issues of opposability, and of the process of customary international law generally.[34] Legitimate expectation is involved in the doctrines of *pacta sunt servanda* and estoppel and provides the basis for the law of State responsibility.[35] That said, this book does not presume that these four principles are the only principles which qualify applications of power within the process of customary international law. There may be other such principles and even the principles identified here may themselves change over time.

These four principles also play an important role in defining or characterising a central concept of international law, which is statehood. According to this concept, States have jurisdiction and full international legal personality, the combination of which gives them the competence to control their territory and to represent themselves and their nationals in international law. As a result of their full international legal personality States are also formally equal. This 'sovereign equality' entitles them all

[32] See pp. 53–74 below. [33] See pp. 75–87 below. [34] See pp. 88–105 below.
[35] See pp. 106–26 below.

to the same general rights and subjects them all to the same general obligations, as ensured by the principle of reciprocity. The principle of legitimate expectation, which subsumes both explicit and inferred consent, ensures that States are not subject to the application of rules of international law unless they consent.[36]

Given their role in defining or characterising statehood, these four principles may well be necessary prerequisites of modern international society. They may, as 'a set of norms for ensuring the co-existence and vital co-operation of the members of the international community',[37] be 'dictées par les exigences de la coexistence entre Etats'.[38] However, this does not mean that the source of these principles is necessarily different from that of other customary rules. As the International Law Commission has observed:

> [I]t is only by erroneously equating the situation under international law with that under internal law that some lawyers have been able to see in the 'constitutional' or 'fundamental' principles of the international legal order an independent and higher 'source' of international obligations. In reality there is, in the international legal order, no special source of law for creating 'constitutional' or 'fundamental' principles.[39]

It is entirely possible that international society could have developed differently from the way that it in fact did, with a correspondingly different, or modified, set of principles.[40] Notwithstanding, since States recognise that these principles, like the concept of statehood, are necessary to the current system, they almost always behave in a manner which is supportive of them.

There is, however, a distinction to be made between these principles and *jus cogens* rules which, as will be explained in chapter 10, are also reflective of important State interests.[41] As Thirlway explained:

> [T]he concept of *jus cogens* is roughly the equivalent on the international plane of *ordre public*, whereas [these principles concern] not whether it is in the interests of the international community that States should be permitted to agree to a certain

[36] For an extensive analysis of the requirements of statehood, see Crawford (1979), especially 32–3.

[37] *Gulf of Maine Case*, 299 (para. 111). The Chamber (at 300, para. 113) referred to one such necessary prerequisite, namely 'that [maritime] delimitation, whether effected by direct agreement or by the decision of a third party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result'. This rule, in turn, might be seen as falling within the scope of the principle of legitimate expectation. See generally pp. 106–26 below.

[38] Sur (1990) 2e cahier, 1. My translation reads: 'dictated by the demands of co-existence among States'. Lowe ((1983a) 211) has written of a 'logical necessity which demands that, if a legal system exists at all, some basic rules must be admitted'.

[39] (1976) 2(2) *Yearbook of the International Law Commission* 85–6.

[40] See Thirlway (1972) 30.

[41] See Lowe (1983a) 211; pp. 183–95 below.

end, but what are the concepts of international law which exist so undeniably that States cannot agree to ignore them . . . In short, derogations from principles of the class we are considering are not permitted, not because they are matters of *jus cogens*, nor because they enshrine some sort of *jus naturale*, but because they are such that derogation from them implies a denial that they are *jus*, with consequences for the whole international community.[42]

Some working assumptions

In selecting the principles of jurisdiction, personality, reciprocity and legitimate expectation for examination, this book makes several assumptions. These assumptions, which are based in part upon the relationship of these principles to the concept of statehood, are made in order to impose manageable limits on this book's exploration of the interaction of power and obligation in the development, maintenance and change of customary rules. The first of these assumptions is a statist one, in that this book assumes that States are the principal actors in the process of customary international law.

Clearly, States are not the only actors of importance on the international stage. International organisations, transnational corporations, currency speculators, insurgents, criminals, terrorists and human rights groups are all able to influence other international actors, including States, in important ways. Yet, as Higgins has explained: 'States are, at this moment of history, still at the heart of the international legal system.'[43] States are the only holders of full international legal personality, and as such it is they which are principally responsible for the behaviour that makes and changes international law, however much that behaviour may itself be influenced by the activities of non-State actors.[44]

Thus, one particular consequence of the statist assumption is that it precludes consideration of those non-State actors that operate entirely within individual States, influencing what those States perceive and manifest their interests to be. The way that competing interests are balanced at the national level in order to determine which interests are expressed internationally is clearly relevant to understanding why States behave the way they do. Yet an examination of the role of such internal non-State

[42] Thirlway (1972) 29–30. [43] Higgins (1994) 39.

[44] See pp. 75–87 below. In the context of customary international law, see Villiger (1985) 4. For similar statist positions adopted by 'realist' international relations scholars, see, e.g., Morgenthau (1954); Schwarzenberger (1964) 13–15; and Waltz (1979) 93–7; for commentary, see Rosenberg (1994a) 10–15. For examples of non-statist 'realist' approaches, which are only just beginning to appear, see Strange (1988); and Haufler (1993) 94. For an author who considered the behaviour of non-governmental organisations relevant to the process of customary international law, see Gunning (1991).

actors would involve a level of analysis very different from that adopted here, for this book focuses on how the customary process transforms *external* expressions of State interest into rules of customary international law. It assumes, at least initially, that individual State interests have already been determined within the State, in any variety of possible ways.[45]

The second assumption made by this book has already been mentioned above: it is a consensual or 'positivist' assumption to the effect that States do not in general become subject to legal obligations without their consent. However, this consent may take the form of a general consent to the process of customary international law, of a diffuse consensus rather than a specific consent to individual rules.[46]

The third assumption is a classic 'realist' assumption, namely that States act in more-or-less self-interested ways and that the primary way in which they promote their self-interest is through applications of power.[47] In fact, all three of these assumptions coincide with fundamental assumptions made by that dominant school of international relations scholarship which is referred to as 'realism',[48] with the statist and consensual assumptions also being important aspects of many modern conceptions of international law.

These coinciding assumptions reflect this book's effort to keep its initial examination of the relationship between power and obligation within the confines of traditional conceptions of international relations and international law. A consideration of some possible implications of more recent theoretical developments is left to the later stages of this book. The assumptions are thus analytical aids which may later need to be discarded or modified in order to accommodate further complexities or changes in international society, or in our understandings of it – but only once the essential aspects of the relationship between power and obligation in the customary process are understood.

At this point, three additional assumptions should perhaps also be made explicit. This book assumes that an international legal system exists, that most States and scholars are in general agreement about many aspects of that system, and that these generally agreed aspects may be relied upon for the limited purpose of facilitating a study of the interac-

[45] Some legal scholars, such as those making up the 'New Haven School' and more recent 'liberal' authors, have sought to break down the divide between the determination of interests nationally and internationally. See, e.g., Lasswell and McDougal (1992) vol. 1, 417–25; Reisman (1992) 122; Slaughter Burley (1993); Slaughter (1995); Koh (1996); and Koh (1997). Some international relations scholars have sought to do likewise. See, e.g., Nye (1988); Cowhey (1993); Knopf (1993); Risse-Kappen (1994); Powell (1994); as well as the literature on epistemic communities, note 58, p. 141 below.

[46] See p. 142–6 below.

[47] See, e.g., Carr (1946) 85–8; Morgenthau (1954) 5–8; and, more recently, Keohane (1989d).

[48] See pp. 21–4 below.

tion of power and obligation in the process of customary international law. Although it is possible that some international relations scholars may find these latter three assumptions disconcerting, within the confines of this book it would be impractical to establish a basis for each and every one of the many rules or principles to which reference is made.

Power and the study of international law

Apart from the possible relevance of this book to the work of international relations scholars, it is also hoped that its general conclusion – that the outcomes which result from the customary process reflect the ability of legal obligation, in certain situations, to qualify or condition the application of non-legal power by States – will encourage international lawyers to pay more attention to non-legal factors, as well as to the work of their colleagues in the discipline of international relations.

Most international lawyers assume that international law affects how States behave. As a result of this general assumption, they tend to have a somewhat more extended understanding of power than most international relations scholars. From an international lawyer's perspective, rules of international law have a certain 'power' of their own, which is necessary to constrain or facilitate State action. Yet international lawyers have not given much consideration to the possible connections between obligation and the non-legal forms of power traditionally studied by international relations scholars. Indeed, most of them have seemed reluctant to investigate how power might affect obligation, and, more precisely, how it might affect processes of law creation.[49] It is possible that such a focus on 'law as rules' may be a necessary aspect of their work.[50]

This book accepts that it is difficult and perhaps undesirable for international lawyers to consider the effects of non-legal power when determining the existence and content of rules. However, it argues that international lawyers would nevertheless benefit from a broader perspective on the legal system within which they operate, and that consideration of the effects of non-legal power would in no way undermine the inherent stability and determinacy of international law. This book thus seeks to develop one way in which the disciplines of international relations and international law might together explore and conceptualise the functional character of power within international society generally – even though it restricts its own examination of power to the context of customary international law. And for this reason, this is not a book about customary international law in the strict, normative sense. This book does not put

[49] See pp. 35–40 below. [50] See pp. 46–50 below.

forward a theory of customary international law as that law is dealt with by international courts and tribunals. Instead, it steps back from the examination of customary law as rules and considers the ways in which the interaction of power with normative structures affects how customary rules are developed, maintained and changed. That said, it is hoped that this somewhat different perspective will cast some light on a few of the more traditional theoretical controversies which bedevil this particular area of international law.

An additional argument in favour of such an approach is that international lawyers are sometimes required to perform tasks which are not strictly legal in character. For example, an international lawyer may be called upon to advise a State on its long-term policy in respect of an issue of legal concern. As chapter 6 will seek to demonstrate in its discussion of the principle of reciprocity, in such instances an understanding of the processes which give rise to international law may be as important as an expertise in legal rules themselves.

Despite the apparent reluctance of many international lawyers to investigate the role of non-legal power, some international lawyers have certainly sought to defend the 'relevance' of international law against realist international relations scholars and other sceptics.[51] Moreover, debates about the role of non-legal power constitute an important, although rarely acknowledged part of the discourse of modern international law.[52] Chapter 3 examines how the discipline of international law has dealt with the issue of non-legal power, while at the same time considering how and why most international lawyers remain unaccustomed to thinking about how such applications of power might generate international law.

Of the relevant developments within the discipline of international law, perhaps the most interesting involves the fact that a small but growing number of international lawyers has recommended the adoption of interdisciplinary approaches so that non-legal factors may be incorporated into explanations of the international legal system. For instance, Henkin has commented:

> Lawyer and diplomat . . . are not even attempting to talk to each other, turning away in silent disregard. Yet both purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other.[53]

[51] See, e.g., Fried (1968); Henkin (1979); D'Amato (1984–5); Boyle (1985); and Brownlie (1988). [52] See pp. 40–6 below..

[53] Henkin (1979) 4. It may be noted that Henkin assumed that diplomats operate strictly within the sphere of 'international relations', and that they are therefore synonymous with traditional international relations scholars. However, many diplomats are international lawyers by training, and most deal regularly with aspects of international law.

Similarly, Slaughter Burley has written:

> Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another. At the very least, they should aspire to a common vocabulary and framework of analysis that would allow the sharing of insights and information. If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior . . . From the political science side, if law – whether international, transnational or purely domestic – does push the behavior of States toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables.[54]

Unfortunately, neither Henkin nor Slaughter Burley have applied this suggested interdisciplinary approach to the processes of international law creation, or, more specifically, to the process of customary international law.

An attempt has been made by Setear to apply game theory to the law of treaties, and to treaties generally.[55] In doing so he helped to clarify the linkages between game theory and a new area of international relations theory called 'institutionalism', as well as the linkages between game theory and international law. Setear also derived several useful insights into how treaty law is developed and changed, for example, that the progressively increasing degrees of interaction and obligation which are sometimes apparent in the different phases of treaty-making may be explained on the basis of multiple plays of a 'game'.[56]

However, Setear's general conclusion – that treaties, and by implication all rules of international law, are based on the calculations of States that their long-term interests are best served through the co-operative creation of such normative structures – was not surprising. Most international lawyers have long accepted that States are not only the subjects, but also the creators, of international law, that international law is consequently not imposed on States but is, instead, the result of co-ordinated or at least (in large part) common behaviour, and that rules of international law therefore reflect the long-term interests of most, if not all, States.[57]

Setear failed to recognise that the central point of consent-based theories of international law is that a State, by consenting, binds itself to behave in a certain manner *even if* it subsequently changes its mind about the desirability of that behaviour. He argued that a rule acquires

[54] Slaughter Burley (1993) 205–6. [55] Setear (1996). [56] Setear (1996) 193–201.
[57] See, e.g., Oppenheim (1905) 4–18; Scelle (1932/34) 7–14; and Dahm (1958) 7–14.

predictive force through 'iteration', i.e., by being the focus of repeated interactions. He did not consider the role that might be played by legal processes, and the international legal system as a whole, in giving rules of international law an obligatory character and thus a unique ability to qualify the short-term behaviour of States.[58] Nevertheless, his article represents an important step forward in the interdisciplinary effort to explain how international law is made, and the role that it plays in international relations more generally.

Bodansky has posed a number of important questions about the customary process which clearly call for the adoption of an interdisciplinary approach. He asked:

> [W]hat economic, social, psychological, and political processes explain the emergence of customary norms? To what extent, for example, do customary norms emerge as a result of calculations by states of rational self-interest? To what extent are they imposed by powerful states[?][59]

This book attempts to answer some of these questions, to reach beyond the confines of the discipline of international law, and to do with the process of customary international law what Henkin and Slaughter Burley have suggested should be done generally, and what Setear has attempted to do in the different context of treaty law. As Bodansky has indicated, there is a need 'to ascertain . . . not merely what international lawyers think about the concept of custom, but how custom actually operates'.[60]

Opinio juris, the customary process and the qualifying effects of international law

The central aspect of this book's explanation of the way in which power and obligation interact within the process of customary international law concerns the element of *opinio juris*. It is argued here that *opinio juris* is the key element in the transformation of power *into* obligation – or in traditional terminology, of State practice into rules of customary international law. However, *opinio juris* is far more difficult to identify and define than general, framework principles of international law. Although most international lawyers agree that *opinio juris* plays a role in transforming State practice into rules of customary international law, they have not been able to agree on its character, nor to resolve many theoretical problems associated with it. Chapters 8, 9 and 10 review the more important of those theoretical problems as well as some of the attempts that have been made to

[58] For a more detailed critique, see Byers (1997b).
[59] Bodansky (1995) 668.
[60] Bodansky (1995) 679.

resolve them. In doing so they advance an alternative explanation of *opinio juris*, and thus of the process of customary international law.

According to this explanation, *opinio juris* itself represents a diffuse consensus, a general set of shared understandings among States as to the 'legal relevance' of different kinds of behaviour in different situations. In short, only that behaviour which is considered legally relevant is regarded as capable of contributing to the process of customary international law. This diffuse consensus, these shared understandings of legal relevance, would seem to be based on the general acceptance by States of the customary process, as signalled by their reliance on customary rules and their acknowledgment of the potential validity of claims made by other States based on similar rules. And, although these shared understandings apply generally to all State behaviour, they are not static, but instead undergo subtle modifications as the international system evolves.

This book goes on to argue that the customary process operates to maximise the interests of most if not all States by creating rules which protect and promote their common interests. In effect, the customary process measures the legally relevant State behaviour which has occurred in respect of any particular issue in order to determine whether a particular interest is widely shared. This measurement is made possible by the fact that States generally behave in accordance with their own perceived interests, in so far as they are able to manifest them. In other words, States either support, are ambivalent towards, or oppose potential, emerging or existing customary rules and usually behave accordingly. Anything a State does or says, or fails to do or say, therefore has the potential to be considered legally relevant, and thus to contribute to the development, maintenance or change of a rule of customary international law.

Since the customary process involves a measurement of the State behaviour which has occurred in respect of particular issues, it might seem that those States which are capable of engaging in more behaviour than others will have an advantage in developing, maintaining or changing customary rules to protect and promote their own particular interests. But though this may be true to some degree, the effect of disparities among States is qualified in this context by fundamental principles such as those of jurisdiction, personality, reciprocity and legitimate expectation. This qualification is able to occur because one result of the measurement of legally relevant State behaviour in respect of potential or existing customary rules is that those rules which have attracted relatively more supporting, and relatively less opposing, behaviour are generally more resistant to change than other customary rules. These relatively more resistant rules include the principles that are singled out for examination here. It is these principles' relatively high degree of resistance to change

that enables them to qualify applications of power in the development, maintenance and change of other, usually less resistant customary rules, and thus to promote the general stability of the international legal system. And it is these principles' relatively high degree of resistance to change – and the very real effects that it has on applications of non-legal power – which leads this book to suggest that international relations scholars and international lawyers would both benefit were they to devote more attention to this and other aspects of the interface between international politics and international law.