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chief emphasis upon the philosophical basis of international law, such as James Lorimer in his *Institutes of the Law of Nations*, have had ideas of their own as to the higher law from which international obligations are derived. [22]

c. The Grotians. Another group of writers, designated as "Grotians," have been said to "stand midway" between the Naturalists and the later group known as Positivists. However, Vattel, the leading writer of this school, was far from being true to Grotius either with respect to his concept of the natural law or to the conclusions which might be drawn from the natural law.

(1) Owing to the practical use made of his treatise by statesmen, the name of Emer de Vattel came to be better known in the world of international relations than that of Grotius himself. Recognizing the need of a new treatise on the law of nations, Vattel believed it more expedient to popularize a volume entitled *Jus gentium* which was published in 1749 by the German philosopher Wolff. However, in doing so, Vattel expressly rejected the concept which Wolff had advanced of a great republic or commonwealth of the nations, a world-state having authority over its component members. Instead, he preferred to relate international obligations to the theory of primitive society which had become the popular source of the rights and duties of individual men.

(2) Vattel began with a recognition of the state as a corporate person having an understanding and will of its own as well as obligations and rights. He then argued that:

> . . . . as men are subject to the law of nature, and as their union in civil society cannot exempt them from the obligation of observing those laws, the whole nation, whose common will is but the outcome of the united wills of the citizens, remains subject to the laws of nature and is bound to respect them in all its undertakings . . . . [23]

However, the law of nature could not be applied to nations without taking into account the changes called for by the fact that nations, not individuals, were the subjects of the law. It was this adaptation of the law of nature to nations which constituted what Vattel believed to be Wolff's contribution to a system of international law, and which constituted in turn Vattel's own contribution. [24]

(3) The system proposed by Vattel is elaborate and complex, but it is important because of the great influence exercised by him upon the subsequent development of international law. Few of the statesmen and jurists who quoted his authority in later years foresaw the consequences of his enthronement of the sovereignty and independence of states. Vattel marked the demise of the long-established distinction between a just and an unjust war. Each prince was to be allowed to be the judge of his own case, and the community was to accept his decision on the assumption that he knew what was best for his own interests. Thus, a liberty denied by the law of nature to individual citizens was reserved by Vattel to states, by taking into account the changes in the natural law when applied to them.

d. The Positivists. A third group of writers has been classified as Positivists, or the Positive School. It was to be expected that with the growing intercourse of states and the greater stability in international relations that followed the Peace of Westphalia there should be increased interest in the substantive body of international law. Bynkershoek, a Dutch publicist, writing between 1702 and 1737, substituted reason for the law of nature, and held that *reason* and *usage* constituted the two sources of international law. Permanent usage would appear to embody the dictates of reason, representing as it does the collective reason of successive generations and of various nations. In this way Bynkershoek was able to appeal directly to custom in support of certain claims, and he went so far as to assert that there was no law of nations except between those who voluntarily submitted to it by tacit agreement. [25] John Jacob Moser, a prolific German writer of the middle of the eighteenth century, pointed the way to the more modern concept of international law by concerning himself solely with the accumulation of treaties and usages which, in the form of precedents, gave a positive character to international law. This Positivist approach has become the predominant school of thought in the twentieth century.

Section II. SOURCES AND EVIDENCES OF INTERNATIONAL LAW

1-5. General. *a.* A brief examination of the various theories and schools generally associated with the jurisprudential development of international law is essential to its study. Though such an analysis will reveal a widespread agreement among states that rules are necessary in order to control and govern international conduct, a difference of opinion often results when attempts are made to articulate these rules and define the process through which they are formulated. Accordingly, it is essential that attention be focused on the very core of this controversy—the sources and evidences of international law.

b. When the Permanent Court of International Justice was established pursuant to Article 14 of the League of

22. The influence of Lorimer was significant. He was one of the few writers to foresee the need of international legislative, judicial, and executive institutions as essential conditions for the maintenance of peace. His conception of the moral basis of international law was in line with present-day conceptions of the inadequacy of the appeal to utilitarian motives.

23. *E. Vattel, Le Droit Des Gens* § 5 (1758).

24. The reader will note that Vattel's law of nature differs fundamentally from the Christian concept of natural law, founded not upon contract but upon the application of the law of God to human relations. *See supra* note 14.

25. *C. Bynkershoek, Quaestionum Juris Publici Libri Duo, Lib. I, Cap 10* (1737), in *Classics of International Law* (1930); *Bynkershoek, De Foro Legatorum, Cap.* III, § 10, and *Cap.* XIX, § 6, in *Classics of International Law* (1946).

Nations Covenant in 1920, [26] a major question for resolution was the law to be applied by the court in deciding matters that came before it and the authorities to be consulted in determining that law. This problem was answered in Article 38 of the statute creating the court. When this body was recognized as an organ of the United Nations, Article 38 of its statute was made an integral part of the statute of the International Court of Justice. [27] Article 38 in its present form provides as follows:

1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations;

d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

By the inclusion of subparagraph 1d, Article 38 has introduced and combined in paragraph 1 the evidences of international law, together with the three sources listed in subparagraphs 1a, b, and c. A proper analysis of the law requires that a distinction be made between the former and the latter.

1-6. Sources of International Law. *a.* In general, international law is based on the common consent of states in the international community. Determination as to whether such consent exists in a particular case or situation is a question of fact. Thus, the three primary sources of international law are those channels through which a state might give its expressed or implied consent. These sources are international agreements (treaties), customary norms, and general principles of law common to all "civilized" states. Consent with regard to this latter source is more implied than expressed and is said to exist because states, having incorporated these principles into their domestic law, are deemed to have consented to their use as principles of international law. [28] Each of these sources merits separate discussion.

b. International agreements. Without question, international agreements now stand as the primary source of international law. [29] The subject of treaties is extensively dealt with in chapter 8. Thus, for the present discussion, it is sufficient to simply describe the role such agreements play as a source of international jurisprudence. A treaty may (1) declare, expand, or modify an existing rule of customary international law; (2) abrogate such a rule as between parties; or (3) provide a rule of law where none previously existed. Accordingly, treaties may take precedence over all other sources of international law in determining the international obligations of all signatory states. An often stated rule is that only states party to the agreement are bound by its terms; treaties cannot control the actions of nonparties. Many modern jurists and publicists contend that international agreements may also establish rules for nonparties in two ways. First, many treaties contain provisions that purport to merely codify existing rules of customary international law. These rules are followed by the contracting parties, not only because the rules are part of the treaty, but also because they would be considered as binding international law even in the absence of any treaty. Naturally, the greater the number of states party to the treaty, the more often the agreement will be recognized as binding and the more likely it will be universally accepted as declaratory of a rule of customary international law. [30] Secondly, nonparty states may have a strong incentive to follow the treaty practice of the states party to the agreement. There has been a substantial increase in the frequency and importance of agreements made not by two or three states as a matter of private business, but by a considerable proportion of states at large for the regulation of matters of general and permanent interest. Such acts are often the result of congresses or conferences held for that purpose, and they are framed to permit the subsequent concurrence of states not originally parties to the proceedings. [31] When all or most of the major powers have deliberately agreed to these rules, they will have a very great influence among even those states which have never expressly adopted them.

c. Custom. Until fairly recently, custom had been, quantitatively, the primary source of international law, a position now assumed by international agreements. Notwithstanding this fact, however, custom still exists as an important and vital source of international jurisprudence. This results partially from the fact that it is through custom that treaties are interpreted. Of greater importance, however, is the fact that many of the legal concepts contained in such treaties can be considered as binding on even nonparties, *if* these agreements are deemed to be merely a codification of already existing customary international law. Given this fact, the lawmaking process of

26. For a brief account of its establishment *see 6 Hackworth, Digest of International Law* 67-68 (1943).

27. 59 Stat. 1031, T.S. No. 993. For a synopsis comparing the language of each of these statutes, *see I. Schwarzenberger, International Law* 573-588 (2d ed. 1949). The organization and activities of the International Court of Justice are discussed more fully in chapter 9, *infra*.

28. This consent is particularly evident in Article 38 of the Statute of the International Court of Justice. This authorizes the Court to resort to "general principles" in deciding disputes placed before it.

29. *W. Friedmann, O. Lissitzyn, & R. Pugh, International Law* 64-68 (1969), [hereinafter cited as *Friedmann*].

30. For recent references to international agreements as evidencing the state of customary international law *see* Letter from Secretary of State Rusk to Attorney General Kennedy (Jan. 15, 1963), *reprinted in Int'l Leg. Mat'ls* 527-528 (1963). For instance it is stated that the 1958 Convention on the Territorial Sea and the Contiguous Zone ". . . must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law of the subject at the present time." *Id.* at 528.

31. The 1949 Geneva Conventions resulted from an international conference of this nature. Similar diplomatic conferences are currently being held in order to supplement these international agreements.

custom remains a particularly significant source of international norms.

(1) Though custom is often viewed as a somewhat nebulous legal source, this need not be the case. Custom arises when a clear and continuous habit of doing certain actions has grown up under the conviction that these actions are, according to international law, obligatory. It is state practice accepted as law between states. [32] The two great difficulties with respect to the concept are generally considered to be difficulty of proof and the difficulty of determining at what stage custom can be said to have truly become authoritative law. Accordingly, it is helpful to view such a determination as a factual one. As in the case of most factual determinations, there are a number of criteria to be studied in order to resolve the issue. Judge Manley O. Hudson, former U.S. member of the International Court of Justice, has suggested the consideration of the following in determining the existence of customary rules of international law:

(a) Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;

(b) Continuation or repetition of the practice over a considerable period of time;

(c) Conception that the practice is required by, or consistent with, prevailing international law;

(d) General acquiescence in the practice by other states. [33]

(2) As can be seen, the essence of customary international law lies not only in the existence and universal application of the custom but likewise in the fact that it is accepted as obligatory by the nation states of the world, or at least a substantial number of these states. Thus, it is the view of most international jurists that when a custom satisfying the definition in Article 38 of the I.C.J. Statute is established, it constitutes a general rule of international law which, with a single exception, applies to every state. This exception concerns the case of a state which, while the custom is in the process of formation, clearly and consistently registers its objection to the recognition of the practice as law. [34] In the *Anglo-Norwegian Fisheries* case, the Court, in rejecting the so-called ten-mile rule for bays, said: "In any event, the ten mile rule would appear to be inapplicable as against Norway, inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." [35] Even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru, which, far from having by its attitude adhered to it, has on the contrary repudiated it. [36]

(3) These pronouncements seem to indicate clearly that a customary rule may arise, notwithstanding the opposition of one state, or perhaps even a few states, provided that the necessary degree of acceptance is otherwise reached. Moreover, they also seem to indicate that the rule so created will not bind those states objecting to it. In other words, there appears to be no majority rule with respect to the formation of customary international law. Conversely, it clearly appears that if a custom becomes established as a general rule of international law, it will bind all states which have not opposed it whether or not these states played an active role in its formation. This means that in order to invoke a custom against a state, it is not necessary to specifically show the acceptance of the custom as law by the state. Acceptance of the custom will be presumed, thereby binding the state, unless it can show evidence of its actual opposition to the practice in question.

(4) In applying a customary rule, the Court may well refer to the practice, if any, of the parties to the litigation in regard to the custom. However, it has never treated evidence of their acceptance of the practice as a *sine qua non* when applying the custom to them. [37]

(5) One aspect of the legal basis of custom which is currently of particular importance is the position of the new states, with regard to existing customary rules of international jurisprudence. As will be shown in chapter 8, new states generally begin with a clean slate apropos treaties, although they very often assume many of the treaty obligations formerly applicable to them as territories. The suggestion has been made that this same approach should be taken with relation to customary international norms. [38] This suggestion has, quite naturally, proven to be most attractive to states evolving from colonial regimes. [39]

(6) An examination of several cases is helpful in demonstrating some factors which various courts considered in ruling upon the existence of customary rules of international jurisprudence.

(a) THE PAQUETE HABANA
THE LOLA
United States Supreme Court, 1900.
175 U.S. 677, 20 S. Ct. 290.

Mr. Justice Gray delivered the opinion of the court.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two-thirds of her catch, the other

32. *H. Kelsen, supra* note 1, at 307.

33. Quoted in *Friedmann, supra* note 29, at 36.

34. *C. Waldock, General Course in Public International Law* 49 (1962).

35. Anglo-Norwegian Fisheries Case, [1951] I.C.J. 131.

36. Colombian - Peruvian Asylum Case, [1950] I.C.J. 277.

37. *C. Waldock, supra* note 34, at 50.

38. Socialist publicists are the primary proponents of this suggestion. They are most critical of European and Western states attempting to "impose" norms of general international law upon the evolving states of Asia and Africa.

39. A more complete explanation of this Soviet approach toward customary international law occurs *infra* at paras. 1-12 *et seq.*

third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

* * * *

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master, on behalf of himself and the other members of the crew, and her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of $490; and the Lola for the sum of $800. * * *

* * * *

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law notably in 2 Ortolan, Règles Internationales et Diplomatie de la Mer, (4th ed.) lib. 3, c. 2, pp. 51-56; in 4 Calvo, Droit International, (5th ed.) §§ 2367-2373; in De Boeck, Propriété Privée Ennemie sous Pavillon Ennemi, §§ 191-196; and in Hall, International Law, (4th ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our country and generally throughout the civilized world.

[The Court then proceeds to "trace the history of the rule" through an extensive examination of state practice, beginning with the issuance of orders by Henry IV to his admirals in 1403 and 1406.]

Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England, or by any other nation. And the Empire of Japan, (the last State admitted into the rank of civilized nations,) by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that "the following enemy's vessels are exempt from detention"—including in the exemption "boats engaged in coast fisheries," as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission." Takahashi, International Law, 11, 178.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.

* * * *

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

* * * *

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson commanding the North Atlantic Squadron, to "immediately institute a blockade of the north Coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west." Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22, the President issued a proclamation, declaring that the United States had instituted and would maintain that blockade, "in pursuance of the law of the United States, and the law of nations applicable to such case." 30 Stat. 1769. And by the act of Congress of April 25, 1898, c. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. 364.

On April 26, 1898, the President issued another proclamation, which after reciting the existence of the war, as declared by Congress, contained this further recital: "It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. 1770. But the proclamation clearly manifests the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

* * * *

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case, Ordered, that the decree of the District Court be reversed, and the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

[Dissenting opinion of Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice McKenna, omitted.] [40]

(*b*) In The *Scotia*, [41] the court dealt with the question whether international law required sailing vessels to carry colored lights instead of white ones. In this particular case, the court based its determination that such a rule did exist on the fact that numerous maritime states had imple-

[40]. The reader's attention is directed toward the fact that this case will also be referred to in connection with the discussion in chapter 2 regarding the relationship between international and U.S. law.

[41]. *The Scotia* [1801] 81 US 822 (14 Wallace 170).