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.