LEGITIMACY IN THE INTERNATIONAL SYSTEM

*By Thomas M. Franck**

INTRODUCTION

The surprising thing about international law is that nations ever obey its strictures or carry out its mandates. This observation is made not to register optimism that the half-empty glass is also half full, but to draw attention to a pregnant phenomenon: that most states observe systemic rules much of the time in their relations with other states. That they should do so is much more interesting than, say, the fact that most citizens usually obey their nation's laws, because the international system is organized in a voluntarist fashion, supported by so little coercive authority. This unenforced rule system can obligate states to profess, if not always to manifest, a significant level of day-to-day compliance even, at times, when that is not in their short-term self-interest. The element or paradox attracts our attention and challenges us to investigate it, perhaps in the hope of discovering a theory that can illuminate more generally the occurrence of voluntary normative compliance and even yield a prescription for enhancing aspects of world order.

Before going further, however, it is necessary to enter a caveat. This essay attempts a study of why states obey laws in the absence of coercion. That is not the same quest as motivates the more familiar studies that investigate the sources of normative obligation.[1] The latter properly focus on the origins of rules—in treaties, custom, decisions of tribunals, *opinio juris*, state conduct, resolutions of international organizations, and so forth—to determine which sources, qua sources, are to be taken seriously, and how seriously to take them. Our object, on the other hand, is to determine why and under what circumstances a specific rule is obeyed. To be sure, the source of every rule—its *pedigree,* in the terminology of this essay—is *one* determinant of how strong its pull to compliance is likely to be. Pedigree, however, is far from being the only indicator of how seriously the rule will be taken, particularly if the rule conflicts with a state's perceived self-interest. Thus, other indicators are also a focus of this essay insofar as they determine the capacity of rules to affect state conduct.

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[1] *See especially* Schachter, *Towards a Theory of International Obligation,* 8 V A. J. INT'L L. 300 (1968).

This essay posits that, in a community organized around rules, compliance is secured—to whatever degree it *is*—at least in part by perception of a rule as legitimate by those to whom it is addressed. Their perception of legitimacy will vary in degree from rule to rule and time to time. It becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.

Legitimacy is used here to mean that quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.* Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights. The elements of right process that will be discussed below are identified as affecting decisively the degree to which any rule is perceived as legitimate.

I. WHY A QUEST FOR LEGITIMACY?

Why study the teleology of law? What are laws *fori* What causes obedience? Such basic questions are the meat and potatoes of jurisprudential inquiry. Any legal system worth taking seriously must address such fundamentals. J. L. Brierly has speculated that jurisprudence, nowadays, regards international law as no more than "an attorney's mantle artfully displayed on the shoulders of arbitrary power" and "a decorous name for a convenience of the chancelleries."[2] That seductive epigram captures the still-dominant Austinian positivists' widespread cynicism towards the claim that the rules of the international system can be studied jurisprudentially.[3]

International lawyers have not taken this sort of marginalization lying down. However, their counterattack has been both feeble and misdirected, concentrating primarily on efforts to prove that international law is very similar to the positive law applicable within states.[4] This strategy has not been intellectually convincing, nor can it be empirically sustained once divine and naturalist sources of law are discarded in favor of positivism.

That international "law" is not law in the positivist sense may be irrefutable but is also irrelevant. Whatever label is attached to it, the normative structure of the international system is perfectly capable of being studied with a view to generating a teleological jurisprudence. Indeed, international law is the *best* place to study some of the fundamental teleological issues that

[2] J. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 13 (1944) (quoting Sir Alfred Zimmern).

[3] Austin believed that law was the enforced command of a sovereign to a subject. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); *see also* Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AJIL 405, 410 (1984). This Austinian view has been widely shared by critics. See, however, H. L. A. HART, THE CONCEPT OF LAW, ch. 10 (1961); and Williams, *International Law and the Controversy Concerning the Word 'Law,'* 22 BRIT. Y.B. INT'L L. 146(1945).

[4] For the best recent exposition of this view, see A. D'AMATO, *IS International Law Really Law?,* in INTERNATIONAL LAW: PROCESS AND PROSPECT 1 (1987).

arise not only in the international, but also in national legal systems. This makes it odd that it is not more frequently used as a field for investigation.

Up to a point, the Austinians are empirically right. The international system of states *is* fundamentally different from any national community of persons and of corporate entities. It is not helpful to ignore those differences or to cling to the reifying notion that states are "persons" analogous to the citizens of a nation. Some of the differences are of great potential interest. In a nation, Machiavelli noted, "there cannot be good laws where there are not good arms."[5] In the international community, however, there are ample signs that rules unenforced by good arms are yet capable of obligating states and quite often even achieve habitual compliance. The Austinians, beginning with a defensible empirical observation about the difference between national laws and international rules, deduce from the difference that rules governing conduct which are not "law" in the positivist sense cannot usefully be studied as a system of community-based obligations. It is *this* deduction—not the empirical observation—which is wrong.

Indeed, it is precisely the curious paradox of obligation in the international rule system that should whet our speculative appetite, provoking the opening, not the closing, of jurisprudential inquiry. *Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of scn^ereign states?* Perhaps finding an answer to this question can help us to find a key to a better, yet realistic, world order. The answer, if there is one, may also incidentally prove useful in designing more widely obeyed, less coerced, laws for ordering the lives of our cities and states.

A series of events connected with the role of the U.S. Navy in protecting U.S.-flagged vessels in the Persian Gulf serves to illustrate the paradoxical phenomenon of uncoerced compliance in a situation where the rule conflicts with perceived self-interest. Early in 1988, the Department of Defense became aware of a ship approaching the gulf with a load of Chinese-made Silkworm missiles en route to Iran. The Department believed the successful delivery of these potent weapons would increase materially the danger to both protected and protecting U.S. ships in the region. It therefore argued for permission to intercept the delivery. The Department of State countered that such a search and seizure on the high seas, under the universally recognized rules of war and neutrality, would constitute aggressive blockade, an act tantamount to a declaration of war against Iran. In the event, the delivery ship and its cargo of missiles were allowed to pass. Deference to systemic rules had won out over tactical advantage in the internal struggle for control of U.S. policy.

Why should this have been so? In the absence of a world government and a global coercive power to enforce its laws, why did the U.S. Government, with its evident power to do as it wished, choose to "play by the rules" despite the considerable short-term strategic advantage to be gained by seizing the Silkworms before they could be delivered? Why did preeminent

[5] N. MACHIAVELLI, THE PRINCE 71 (L. de Alvarez rev. ed. 1981).

American power defer to the rules of the sanctionless system? At least part of the answer to this question, quietly given by the State Department to the Department of Defense, is that the international rules of neutrality have attained a high degree of recognized legitimacy and must not be violated lightly. Specifically, they are well understood, enjoy a long pedigree and are part of a consistent framework of rules—the *jus in hello*—governing and restraining the use of force in conflicts. To violate a set of rules of such widely recognized legitimacy, the State Department argued, would transform the U.S. posture in the gulf from that of a neutral to one of belligerency. That could end Washington's role as an honest broker seeking to promote peace negotiations. It would also undermine the carefully crafted historic "rules of the game" applicable to wars, rules that are widely perceived to be in the interest of all states.

Such explanations for deferring to a rule in preference to taking a short-term advantage are the policymaker's equivalent of the philosopher's quest for a theory of legitimacy. Washington voluntarily chose to obey a rule in the Persian Gulf conflict. Yet it does not always obey all international rules. Some rules are harder to disobey—more persuasive in their pull to compliance—than others. This is known intuitively by the legions of Americans who deliberately underreport the dutiable price of goods purchased abroad, and by the aficionados who smuggle Cuban cigars into the country behind pocket handkerchiefs, but would not otherwise commit criminal fraud. That some rules *in themselves* seem to exert more pull to compliance than others is the starting point in the search for a theory of legitimacy.

The questions raised by such examples of obedience and disobedience, however, are more interesting when examined in the context of the international than of the national community. It is the voluntariness of international compliance that heightens the mystery and lures us with the possibility of discovery. Thus, while the Austinians are right in pointing to important differences between the place of law in national society and the place of rules in the society of nations, those differences do not justify the closing of the international rule system to jurisprudential inquiry.

Indeed, such inquiry into the international system ought to be aided by the insights developed by the study of national and subnational communities. Research into the teleology of national legal systems has led the way to a recognition of the role of legitimacy, as distinct from coercion, as the key to legal order and systematic obedience. While most students of national systems, except perhaps for a few Utopians such as Foucault,[6] agree with Machiavelli that governance requires *some* exercise of power by an elite supported by coercive force, few any longer believe the Austinians* claim that this necessary condition is also a sufficient one. Having reached this

[6] Foucault rejects all notions of dominance, whether embodied in theories of sovereignty (divine rule, autocracy, "public rights** and so forth) or embraced in "mechanisms of discipline,** including, for example, "power that is tied to scientific knowledge.** He visualizes, instead, a new form of "right,*' which is antidisciplinarian and divorced from concepts of sovereignty. M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 106-08 (C. Gordon ed. 1980).

conclusion, most students of law, power and structure in society have sought to identify other characteristics that conduce to the rule of law. Ronald Dworkin identifies three such *characteristics: fairness, justice* and *integrity* (the last being a principled, more sensitive variant of consistency).[7] Jiirgen Habermas emphasizes the role of discursive validation, following the tradition of Aeschylus and Aristotle.[8] Important scholarship on contract theory has demonstrated that coercion need not be an essential element in ensuring the efficacy of a contract, which is more accurately seen as self-enforcing obligation.[9] In fact, much recent work focusing on the phenomenon of obedience and obligation in national societies concerns itself primarily with noncoercive factors conducing to consensual compliance.

While some such studies have emphasized the role of strategic concepts that gain voluntary compliance by mutualizing advantage, others, beginning with the seminal work of Max Weber,[10] have emphasized the role of *legitirnacy* and *legitimation.* Weber's analysis stressed process legitimacy. He hypothesized that rules tend to achieve compliance when they, themselves, comply with secondary rules about how and by whom rules are to be made and interpreted. In his view, a sovereign's command is more likely to be obeyed if the subject perceives both the rule and the ruler as legitimate. Somewhat different concepts of legitimacy have been developed by Habermas[11] and by neo-Marxist philosophers.[12] Oscar Schachter, working in the field of international normativity, has elucidated and emphasized the

[7] R. DWORKIN, LAW'S EMPIRE 176-224 (1986).

* According to Habermas:

> Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. *Legitimacy means a political order's worthiness to be recognized.* This definition highlights the fact that legitimacy is a contestable validity claim; the stability of the order of domination (also) depends on its (at least) de facto recognition. Thus, historically as well as analytically, the concept is used above all in situations in which the legitimacy of an order is disputed, in which, as we say, legitimation problems arise. One side denies, the other asserts legitimacy. This is a *process . , . ,*

J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178-79 (T. McCarthy trans. 1979).

[M] Kronman, *Contract Law and the State of Nature,* 1 J. L., ECON. & ORG. 5 (1985).

[10] Weber postulates the validity of an order in terms of its being regarded by the obeying public **as in some way obligator)' or exemplary" for its members because, at least in part, it defines "a model" which is "binding" and to which the actions of others "will in fact conform." At least in part, this legitimacy is perceived as adhering to the authority issuing an order, as opposed to the qualities of legitimacy that inhere in an order itself. This distinction between *an* order (command) and *the* order (authority) is easily overlooked but fundamental. 1 M. WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31 (G. Roth & C. Wittich eds. 1968). For a critique, see Hyde, *The Concept of Legitimacy in the Sociology of Law,* 1983 Wis. L. REV. 379.

[1] * "WThat are accepted as reasons and have the power to produce consensus . . . depends on the *level of justification* required in a given situation." J. HABERMAS, *supra* note 8, at 183.

[12] Hyde, for example, believes that the concept of legitimacy should be abandoned and replaced by investigation of "rational grounds for action." Hyde, *supra* note 10, at 380. *See also* Bos, *Friede Durch Volkerrecht—Oder Durch Volkerlegitimitatt,* 17 NEDERLANDS TljDSCHRIFT VOOR INTERNATIONAAL RECHT 113 (1970).

role of "competence and authority" in endowing a rule with capacity to obligate.[13] All have in common, however, their emphasis on noncoercive factors as conducing to rule-compliant behavior.

It thus appears that, despite its residual Austinian propensities, national jurisprudence has quite a bit to say to the international system precisely because there is empirical evidence that, in both systems, noncoercive factors play an important part in conducing to rule/law-compliant behavior. The special value to both national and international jurisprudential inquiry of studying the international system, however, lies in its unalloyed noncoercive state. While the dependence of the international system on voluntary compliance is often (and justly) perceived as a weakness, it happens to afford a singular opportunity. Critics of efforts to study legitimacy as a noncoercive factor conducing to compliance in national legal systems have been able to argue that this factor necessarily eludes researchers because it cannot be isolated from other, authoritarian, elements compelling obedience.[14] That critique loses its force, however, in the international context. Thus, the operation of the noncoercive element, or, specifically, *legitimacy*, becomes easier to isolate and study in the interstate system than in societies of persons, where the coercive sovereign always lurks in the background.

Yet there is a stronger motivation for studying legitimacy in the international system than the academic objective of creating a bridge from national to international speculative jurisprudence. A teleology that makes legitimacy its hypothetical center envisages—for purposes of speculative inquiry—the possibility of an orderly community functioning by consent and validated obligation, rather than by coercion. This is surely the realistic approach to an international jurisprudential teleology: one that examines the objective properties of the global rule system so as to study whether and how it may advance or perfect itself in accordance with the propensities of those observable properties. That inquiry begins with the unexplained, yet evident, paradox that autonomous actors systematically engage in rule-determined conduct, not infrequently in the face of a strong countervailing desire to pursue realizable short-term gratification in violation of the rules.

Admittedly, the rule system of the community of states is far from perfected: absence of rules and disobedience continue to be important dissonant features. But it is too readily assumed that these deficiencies are attributable primarily to the lack of an Austinian sovereign with police powers. The weakness of this explanation is its failure to account for significant deviance: that many rules are obeyed much of the time. What if, instead, rule disobedience, or a rule void, were attributable—in whole or in part—not to the absence of coercive power to enforce the rules but to the perceived lack of legitimacy of the actual or proposed rules themselves and of the rule-making and rule-applying institutions of the international system? Put another way, perhaps failure to obey the rules can best be studied through a better understanding of its opposite: voluntary deference to them.

[13] Schachter, *supra* note 1, at 309.
[14] Hyde, *supra* note 10, at 411-17, 422-25.

That might be rather good news. Since the world is not about to create a global supersovereign with overriding enforcement powers, it might be encouraging to know that these are not the prerequisites of a developed, functioning international community. It would be even more helpful to know that the global system of rules could be further refined and developed, even in the absence of the Austinian factors, by augmenting the legitimacy of rules and institutions. It would spur the social imagination to realize that the creation of a global regime with enforcement power might only be the final culmination of a process capable of gradually perfecting the community, not the sine qua non for system building.

If such a noncoercive, or voluntarist, community were a reasonable goal of the study of legitimation, the resulting society of states would still not resemble the modern nation. In place of coercion, there is only the claim to compliance, based on social entitlement, which a legitimate rule makes on, and on behalf of, all members of the community. In this sense, the international community more closely resembles a membership club with house rules. Membership confers a desirable status, which is manifested when the members have internalized socially functional and status-rooted privileges and duties. Membership is reinforced by valid governance, shared experience, reciprocal gestures of deference and recognition, common rituals, mature common expectations and the successful pursuit of shared goals. Obedience to law, in contrast, at least in part is a recognition of the coercive power of the organized state.

In both the state and the voluntarist international system, obedience to commands is evidence of the existence of an organized community. The international community, however, does not closely resemble the modern state, precisely because the activist state exists to issue and enforce sovereign commands, while the more passive international community exists to legitimize, or withhold legitimacy from, institutions, rules and its members and their conduct. The legitimacy of a rule, or of a rule-making or rule-applying institution, is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy: that is, in accordance with right process.

What "right process" means in practice is the subject of the remainder of this essay. Pursuing this line of inquiry, we will focus most of our attention on the legitimacy of *rules,* although attention will also have to be paid to the legitimacy of those institutions and processes through which the rules come into being. In our inquiry we will begin with the rules themselves: their literary structure, origins, internal consistency, reasonableness, utility in achieving stated ends and connection to the overall rule system, and the extent to which their origins and application comport with the international community's "rules about rules." It is the underlying hypothesis of this essay that rules, to varying degrees, contain the determining elements of their own legitimacy.

If legitimacy can be studied, it can also be deliberately nourished. There lies the practical rationale of this inquiry. Someday, perhaps, the international system will come to have law and legal institutions that mirror their

domestic counterparts. But that is not now, and it is not likely to be in the foreseeable future. H. L. A. Hart put it more gently: "though it is consistent with the usage of the last 150 years to use the expression 'latv' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions ha[s] inspired misgivings, at any rate in the breasts of legal theorists."[15] Such misgivings, however, are not a cause for despair, nor should they be the end of the road of theoretical inquiry. On the contrary, the misgivings are valid but, for that very reason, are precisely the right starting point in the search for those elements which conduce to the growth of an orderly voluntarist international community and system of rules.

Four elements—the indicators of rule legitimacy in the community of states—are identified and studied in this essay. They are *determinacy, symbolic validation, coherence* and *adherence* (to a normative hierarchy). To the extent rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands. To the extent these elements are not present, rules seem to be easier to avoid by a state tempted to pursue its short-term self-interest. This is not to say that the legitimacy of a rule can be deduced solely by counting how often it is obeyed or disobeyed. While its legitimacy may exert a powerful pull on state conduct, yet other pulls may be stronger in a particular circumstance. The chance to take a quick, decisive advantage may overcome the counterpull of even a highly legitimate rule. In such circumstances, legitimacy is indicated not by obedience, but by the discomfort disobedience induces in the violator. (Student demonstrations sometimes are a sensitive indicator of such discomfort.) The variable to watch is not compliance but the strength of the compliance pull, whether or not the rule achieves actual compliance in any one case.

Each rule has an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule. This pull power is its index of legitimacy. For example, the rule that makes it improper for one state to infiltrate spies into another state in tfae guise of diplomats is formally acknowledged by almost every state, yet it enjoys so low a degree of legitimacy as to exert virtually no pull towards compliance.[16] As Schachter observes, "some 'laws/ though enacted properly, have so low a degree of probable compliance that they are treated as 'dead letters' and . . . some treaties, while properly concluded, are considered 'scraps of paper.' "[17] By way of contrast, we have noted, the rules pertaining to belligerency and neutrality actually exerted a very high level of pull on Washington in connection with the Silkworm missile shipment in the Persian Gulf.

The study of legitimacy thus focuses on the inherent capacity of a rule to exert pressure on states to comply. This focus on the properties of rules, of course, is not a self-sufficient account of the socialization process. How rules

[15] H. L. A. HART, *supra* note 3, at 209.

[16] Permissible activities of diplomats are set out in Article 3 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, TIAS No. 7502, 500 UNTS 95. Obviously, these do not include espionage.

[17] Schachter, *supra* note 1, at 311.

are made, interpreted and applied is part of a dynamic, expansive and complex set of social phenomena. That complexity can be approached, however, by beginning with the rules themselves. Those seemingly inert constructs are shaped by other, more dynamic forces and, like tree trunks and seashells, tell their own story about the winds and tides that become an experiential part of their shape and texture.

II. DETERMINACY AND LEGITIMACY

What determines the degree of legitimacy of any particular rule text or rule-making process? Or, to ask the same question another way: what observable characteristics of a rule or of a rule-making institution raise or lower the probability that its commands will be perceived to obligate? It is to such questions that the remainder of this analysis is addressed. One could approach the social phenomenon of noncoerced obedience directly, through such various openings as are afforded by the study of myths, game theory or contractarian notions of social compact. Instead, these and other socializing forces will be approached indirectly, through a unifying notion of *rule legitimacy;* that is, by approaching dynamic social forces through those rules which the society chooses to obey or to regard as obligatory. It should be borne in mind, however, that the norm-centered question—what is it about the properties of a rule that conduces to voluntary compliance?—is merely the lawyer's approach to larger sociological, anthropological and political questions: what conduces to the formation of communities and what induces members of a community to live by its rules?

Let us begin by examining the literary properties of the text itself that conduce to voluntary compliance or induce a sense of obligation in those to whom the rule is addressed.

Perhaps the most self-evident of all characteristics making for legitimacy is textual *determinacy.* What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance.

To illustrate the point, let us compare two textual formulations defining the boundary of the underwater continental shelf. The 1958 Convention places the shelf at "a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[18] The 1982 Convention on the Law of the Sea, on the other hand, is far more detailed and specific. It defines the shelf as "the natural prolongation of . . . land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured," but takes into

[18] Convention on the Continental Shelf, Art. 1, Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311.

account such specific factors as "the thickness of sedimentary rocks" and imposes an outermost limit that "shall not exceed 100 nautical miles from the 2,500 metre isobath/' which, in turn, is a line connecting the points where the waters are 2,500 meters deep.[19] The 1982 standard, despite its complexity, is far more determinate than the elastic standard in the 1958 Convention, which, in a sense, established no rule at all. Back in 1958, the parties simply covered their differences and uncertainties with a formula, whose content was left in abeyance pending further work by negotiators, courts, and administrators and by the evolution of customary state practice.[20] The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.

Indeterminacy, however, has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve the conflicts between the demands of a rule and their desire not to be fettered, by "interpreting" the rule permissively. A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one.

A good example of this consequence of determinacy is afforded by the recent litigation between Nicaragua and the United States before the International Court of Justice. From the moment it became apparent that Nicaragua was preparing to sue the United States, State Department attorneys began to prepare the defense strategy. One option considered was invoking the "Connally reservation," which, as part of the U.S. acceptance of the jurisdiction of the International Court of Justice, specifically barred the Court from entertaining any case that pertains to "domestic" matters *as determined by the United States.*[21] Yet the American lawyers chose not to use this absolute defense.[22] Instead, they tried in various other ways to challenge the Court's authority. They argued that the dispute was already before the Organization of American States and the UN Security Council; that it was

[19] United Nations Convention on the Law of the Sea, Art. 76, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982).

[20] For a legislative history and analysis of the provisions of the 1958 Convention, see Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf* 52 AJIL 629 (1958).

[21] 92 CONG. REC. 10,694 (1946).

[22] As I have written elsewhere:

> That the Connally Reservation did not license the United States to refuse to litigate *any* case for *any* reason whatsoever, that a "good faith" caveat was to be implied, is to be given some support by the fact that Connally was not invoked by U.S. lawyers to withdraw the Nicaraguan case from the I.CJ.'s jurisdiction.

Franck & Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law,* in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 3,17 (L. Damrosdi ed. 1987).

not a legal dispute at all, but a political one;[23] that Nicaragua, having failed to perfect its acceptance of the Court's compulsory jurisdiction, had no right to implead the United States, The failure of the lawyers to use the Connally shield is all the more remarkable because, whereas the reservation gave the United States a self-judging escape from the Court's jurisdiction, all the other defenses left the key jurisdictional decision up to the Court, which rejected every one.[24] Had the U.S. Government simply faced the Court with a "finding" that the mining of Nicaragua's harbors was a "domestic" matter for the United States, that would have ended the litigation. Instead, the United States went on to lose, not only on the matter of jurisdiction, but also, eventually, on the merits.[25]

Why was the Connally shield rejected? The answer, surely, lies in its determinacy. Anyone reading its language would instantly understand that the reservation, while rather open-ended, nevertheless was not intended to cover such matters as the CIA's alleged mining of the harbors of a nation with which the United States was not at war. Although the term "domestic matter" is not so determinate as to bar all differences of interpretation—that, after all, is why its interpretation was reserved to the U.S. Government and not left to the Court—*no* reasonable interpretation of the concept could be stretched to cover the events in question. The U.S. legal strategists, anxious to do everything possible to stay out of court, nonetheless were unwilling to subject their client to the obloquy that would have ensued had the Connally shield been deployed. Interest gratification, convenience and advantage were sacrificed so as not to be seen as absurd.

Such foreboding of shame and ridicule is an excellent guide to determinacy. If a party seeking to justify its conduct interprets a rule in such a way as to evoke widespread derision, then the rule has determinacy. The violator's evidently tortured definition of the rule can be seen to exceed its range of plausible meanings.

Thus, while it may be true in theory, as Wittgenstein has charged, that no "course of action could be determined by a rule because every course of action can be made out to accord with the rule,"[26] some rules are less malleable, less open to manipulation, than others. Although Wittgenstein's point has merit—and has recently been wittily adumbrated by Professor Duncan Kennedy[27]—in practice, determinacy is not an illusion. No verbal formulas are entirely determinate, but some are more so than others.

[25] The United States announced that the case involved "an inherently political problem that is not appropriate for judicial resolution." Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64, 64, *reprinted in* 24 ILM 246, 246 (1985), 79 AJIL 438, 439.

[24] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

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

[26] L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 81, para. 201 (G. E. Anscombe trans. 1953).

[27] Kennedy, *Towards a Critical Phenomenology of Judging,* 36 J. LEGAL EDUC. 518 (1986).

The degree of determinacy of a rule directly affects the degree of its perceived legitimacy. A rule that prohibits the doing of "bad things" lacks legitimacy because it fails to communicate what is expected, except within a very small constituency in which "bad" has achieved a high degree of culturally induced specificity. To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds. These bookends should be close enough together to inhibit incipient violators from offering self-serving exculpatory definitions of the rule. When almost everyone scoffs at such an exculpation, the outer boundary of the rule's determinacy has been established.

There is another sense in which determinacy increases the legitimacy of a rule text. A rule of conduct that is highly transparent—its normative content exhibiting great clarity—actually *encourages* gratification deferral and rule compliance. States, in their relations with one another, frequently find themselves tempted to violate a rule of conduct in order to take advantage of a sudden opportunity. If they do not do so, but choose, instead, to obey the rule and forgo that gratification, it is likely to be because of their longer term interests in seeing a potentially useful rule reinforced. They can visualize future situations in which it will operate to their advantage. But they will only defer the attainable short-term gain if the rule is sufficiently specific to support reasonable expectations that benefit can be derived in a contingent future by strengthening the rule in the present instance.

Let us, consider the case of a foreign ambassador's son who has murdered someone in Washington, D.C. He is about to be "booked" by the District police when a message arrives from the State Department demanding his release. The Secretary of State announces that the culprit is to be sent home. Hearing of this, the public understandably is outraged; members of Congress complain to the President. Patiently, the Secretary of State explains that "almost all" states "almost always" act in accordance with the universal rules of diplomatic immunity, which protect ambassadors and their immediate family from arrest and trial.[28] Although in this instance, the Secretary continues, the rule does seem to work an injustice, in general it operates to make diplomacy possible. By gratifying popular outrage and violating the rule this time, the United States would weaken the rule's future utility, its reliability in describing and predicting state behavior. Alternatively, by acting in compliance with the rule, even at some short-term cost to its self-interest, the United States will reinforce the rule text and thus its future utility in protecting U.S. diplomats and their families abroad.[29] Indeed, a study by a committee of the British House of Commons—conducted after a shot from

[28] Vienna Convention on Diplomatic Relations, *supra* note 16, Arts. 31, 37.

[29] The Department of State, on Aug. 5,1987, submitted its views on a " 'bill to make certain members of foreign diplomatic missions and consular posts in the United States subject to the criminal jurisdiction of the United States with respect to crimes of violence.' " The Department (Ambassador Selwa Roosevelt) "could not support the proposed legislation becau se it would be detrimental to U.S. interests abroad." If enacted, the law "would place the United States in violation of its international obligations" and would invite more harmful reciprocal action. Contemporary Practice of the United States, 82 AJIL 106, 107 (1988). For the text of Ambassador Roosevelt's statement, see also DEP'T ST. BULL., No. 2127, October 1987, at 29.

the Libyan embassy ("People's Bureau") on April 17, 1984, killed an on-duty London policewoman—came to something very like this conclusion despite the inflamed state of public opinion.[30]

Note, however, that this thoughtful argument by the Secretary against interest gratification only makes sense if the son's immunity is seen as part of a clearly understood normative package, that other countries will refrain from arresting members of the families of U.S. ambassadors on real or trumped-up charges. Such expectations of reciprocity are important threads in the fabric of the international system; but before an expectation of reciprocity can arise, there must be some mutual understanding of what the rule covers, what events constitute "similar circumstances.*' If the contents of the rule are vaguely defined and fuzzy—if some countries in some instances have extended immunity to the ambassador's children while others have not, or have done so only if no capital crime is involved, or only if the child was actually working for the embassy, or have not extended immunity to second sons, or daughters or stepchildren—the impetus for gratification deferral in the instant case would diminish. The demand for the trial of the ambassador's son might then be both reasonable and irresistible. It could quite easily be defended as not violating a "real" rule. The argument could also be made that bringing the son to trial would create no more hazards for American diplomats abroad than were already posed by the vagueness of the rule. If a norm is full of loopholes, there is little incentive to impose on oneself obligations that others can evade easily.

An excellent example of this cost of indeterminacy is offered by the rules prohibiting and defining aggression that were approved in 1974 by the General Assembly after some 7 years of debate. Among the actions branded as aggression is the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State." Almost in the same breath, however, the text states that nothing in the foregoing "could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . ; nor the right of these peoples . . . to seek and receive support." To confuse matters further, another article declares that no "consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression"; and yet another adds that in "their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions."[31] Interrelated they may be, but like a tangled skein. Do they prohibit or encourage aid by one country to an insurgent movement in

[5I>] H.C. FOREIGN AFFAIRS COMMITTEE, FIRST REPORT, THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, REPORT WITH ANNEX; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE; MINUTES OF EVIDENCE TAKEN ON 20 JUNE AND 2 AND 18 JULY IN THE LAST SESSION OF PARLIAMENT, AND APPENDICES (1984). *See also* Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience,* 79 AJIL 641 (1985).

[51] Definition of Aggression, GA Res. 3314, 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1974).

another? It is not that the individual mandates and caveats are opaque, but that, seeking to reconcile irreconcilable positions, they contradict one another. Such a muddled obligation, one would expect, could have little effect on the real-world conduct of states; and one would be right.

It happens—by way of contrast—that, in international practice, the rules protecting diplomats, as codified by the Vienna Convention, have a very high degree of specificity,[32] and they are almost invariably obeyed. So, too, are the highly specific rules, in another Vienna Convention, on the making, interpreting and obligation of treaties.[33] Among other subjects covered by determinate rules that exert a strong pull to compliance and, in practice, elicit a high degree of conforming behavior by states are jurisdiction over vessels on the high seas, and in territorial waters and ports,[34] jurisdiction over aircraft,[35] copyright and trademarks,[36] and international usage of posts,[37] telegraphs, telephones[38] and radio waves.[39] There is also a high degree of determinacy in the rules governing embassy property,[40] rights of passage of naval vessels in peacetime,[41] treatment of war prisoners[42] and the duty of governments to pay compensation—even if not as to the *measure* of that compensation—for the expropriation of property belonging to aliens.[43]

[32] *See* Vienna Convention on Diplomatic Relations, *supra* note 16, Arts. 27, 28.

[33] *See* Vienna Convention on the Law of Treaties, Arts. 6, 55, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), *reprinted in* 8 1LM 679 (1969), 63 AJIL 875 (1969).

[34] United Nations Convention on the Law of the Sea, *supra* note 19.

[35] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, TIAS No. 6768, 704 UNTS 219.

[36] Universal Copyright Convention, July 24, 1971, 25 UST 1341, TIAS No. 7868 (revised version of 216 UNTS 132).

[37] *See* UNIVERSAL POSTAL UNION CONST., July 10, 1964, 16 UST 1291, TIAS No. 5881, 611 UNTS 7.

[38] *See* Telegraph and Telephone Regulations, with appendices, annex, and final protocol, Apr. 11, 1973, 28 UST 3293, TIAS No. 8586.

[39] *See* International Telecommunication Convention, Oct. 25, 1973, 28 UST 2495, TIAS No. 8572.

[40] *See* Vienna Convention on Diplomatic Relations, *supra* note 16, Art. 22 (which provides for inviolability of diplomatic missions and imposes a special duty on states to protect premises of missions on their territory). *See also* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, TIAS No. 8532, 1035 UNTS 167 (which criminalizes violent attacks upon the official premises of internationally protected persons).

[41] The right of innocent passage was specifically provided for in Article 14 of the Geneva Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, and by Article 17 of the UN Convention on the Law of the Sea of 1982, *supra* note 19.

[42] *See* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135. For a complete treatment of war prisoners, see N. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (J 987).

[43] As to compensation for expropriated property, there is agreement in principle, but disagreement as to the measure of compensation. *See, e.g.,* Charter of Economic Rights and Duties of States, Dec. 12, 1974, Art. 2(2)(c), GA Res. 3281, 29 UN GAOR Supp. (No. 31) at 50, UN

What is interesting about these examples is that the high degree of textual determinacy goes together with a high degree of rule-conforming state behavior. When determinacy is absent, it is unlikely that states will have compunctions about not complying with the rule. Indeed, some rules are probably written with low determinacy so that noncompliance will be easy.

A good example is the abortive effort by the United Nations to draft a code for the prevention and punishment of terrorism. In 1972, at the initiative of Secretary-General Kurt Waldheim, the General Assembly tried its hand at devising a set of rules requiring states to act in concert against what was perceived as a global problem.[44] Two years of negotiations demonstrated the difficulty of coming to a commonly acceptable definition of the activity to be prohibited.[45] The Government of Senegal, for example, proposed on behalf of the Non-Aligned Group that the prohibition should include "acts of violence and other repressive acts by colonial, racist and alien regimes against peoples struggling for liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms." The same group urged an exception in favor of those committing terrorist acts on behalf of "the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination," in recognition of "the legitimacy of their struggle, in particular the struggle of national liberation movements."[46] The Soviet Union demanded exemption from the prohibition on terrorism for "acts committed in resisting an aggressor in territories occupied by the latter, and action by workers to secure their rights against the yoke of exploiters."[47]

Understandably, the United States and other Western countries took the position that these exculpatory caveats, if adopted, would shape a definition

Doc. A/9631 (1974). *See also* Resolution on Permanent Sovereignty over Natural Resources, GARes. 1803, 17 UN GAORSupp. (No. 17) at 15, UN Doc. A/5217 (1962). Article 4 of the latter states in part concerning expropriation: "In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.** *But see* Resolution on Permanent Sovereignty over Natural Resources, GA Res. 3171, 28 UN GAOR Supp. (No. 30) at 52, UN Doc. A/9030 (1973). Article 3 "affirms** that "each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures."

[44] UN Docs. A/8791 and A/8791/Add. 1 (1972).

[4ri] *See, e.g, Ad Hoc* Committee on International Terrorism, Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII), UN Docs. A/AC. 160/1 and Adds. 1-2(1973).

[Au] UN Doc. A/AC.160/3/Add.2, at 3 (1973).

[47] UN Doc. A/AC.160/2, at 7 (1973). However, Ambassador Oakley has reported a new Soviet "awareness that distinctions must be made between so-called liberation movements and groups whose objectives and operations are primarily directed toward producing terror, and whose targets are often unrelated to their putative 'liberation* goals.*' Oakley, *International Terrorism,* 65 FOREIGN AFF. 628 (1987).

of terrorism that would exacerbate, rather than ameliorate, the problem. The loopholes would be so large as to permit unimpeded passage for almost any act of violence claimed to be directed against a wicked regime. On the other hand, few governments would be willing to implement a prohibition on all politically motivated violence against every regime, no matter how repressive. Even the United States has put forward the "Reagan Doctrine,"[48] with its sophisticated distinctions that exculpate external support for "good" insurgents against "bad" regimes, while excoriating support for "bad" insurgents against "good" regimes.[49]

The Reagan Doctrine was merely the most recent restatement of the "just war" notion, evolved by Christian thinkers in the time of Emperor Constantine to reconcile their pacifist theology with imperial military needs,[50] and reinterpreted by Augustine,[51] Aquinas[52] and Grotius.[53] Each version has sought to define the circumstances in which war is permissible, against the background of a more general prohibition. These ef Forts appeal to common sense and human decency. As long as there is no Austinian world sovereign and centralized world police force, there will be good (defensive) wars and bad (aggressive) wars. Articles 2(4) and 51 of the United Nations Charter[54] likewise seem to bless this distinction. The problem is to distinguish good violence from bad without the benefit of a papal decision.

This problem—how to tell the sheep from the goats—operates whenever a rule tolerates exculpatory distinctions. While simple rules inherently suffer from lack of humanity, reason and texture, more complex ones tend to be hard to apply or to make exculpation too easy. Thus we have a literary conundrum. In consequence of making a simple, but irrational, rule more complex, sensible and humane, the text may become too elastic to secure compliance. For example, applying the proposed international norms known as the Reagan Doctrine, Ambassador Jeane Kirkpatrick has argued that U.S. support for the Nicaraguan contras is permissible, but Soviet and Cuban support for the Sandinistas is not, because the contras are democrats fighting a totalitarian regime while the Sandinistas are totalitarian used by

[48] See Address by Ambassador Kirkpatrick, National Press Club (May 30, 1985), which in effect gave new life to the "just war" doctrine.

[49] On this policy, see Franck, *Porfiry's Proposition: Legitimacy and Terrorism,* 20 VAND. J. TRANSNAT'L L. 195, 218 (1987). *See infra* text accompanying note 55.

[50] F. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 12 (1975).

[51] *Id.* at 18-20.

[52] T. AQUINAS, SUMMA THEOLOGIAE, Question 40, Art. 1 (T. Heath trans. 1972).

[53] *See* H. GROTIUS, ON THE LAW OF WAR AND PEACE (L. Loomis trans. 1949); Edwards, *The Law of War in the Thought of Hugo Grotius,* 19 J. PUB. L. 371 (1970). Grotius expressly contemplated intervention by a third state to protect the natural law rights of the citizens of another state. *See* bk. II, ch. XXV of H. GROTIUS, *supra* (entitled "On the Causes of Undertaking War on Behalf of Others").

[54] UN CHARTER. Article 2(4) seeks to curb aggressive wars by imposing the obligation on states to refrain from the threat' or use of force against the territorial integrity or political independence of any state, while Article 51 provides support for the inherent right of individual or collective self-defense in case of armed attack.

Russians and Cubans to colonize Nicaragua.[55] A rule that lends itself to that interpretation, however humane and rational its intent, is unlikely to inhibit any state from pursuing every opportunity for short-term interest gratification, It will be dismissed from serious consideration by states as they weigh their options.

Determinacy thus poses a dilemma. As defined, the term "determinacy" has been used to indicate the clarity of the message transmitted by a rule to those at whom it is directed as a command. We have argued that greater clarity conduces to compliance. Now, however, it has become apparent that "clarity" is far from identical with simplicity. For example, the UN Charter, in Articles 2(4) and 51, sets out a simple rule pertaining to the use of force. It says, in substance, that a state may not use force against another except to respond to an *actual armed attack.* This rule, on its face, seems to enjoy a high level of determinacy. And in most instances of conflict, the rule also makes sense. It is usually possible, in these days of outer space sensing devices, to provide persuasive proof of which state initiated hostilities. Even without such evidence, the answer can usually be determined by looking to see which party is winning after the first day of fighting. Nevertheless, despite its superficial clarity, the rule—under certain circumstances—does not satisfy the test of genuine determinacy: it does not send a clear message as to its meaning in such a way as to promote compliance. This is because a literal reading of the law will produce absurd obligations at the margins of its application. Thus, the rule would seem to compel a state threatened by a nuclear attack to wait until it had actually been hit ("armed attack") before being permitted to use force in self-defense.[56] The rule would also require a tiny state like Israel or Singapore to wait until after an armed attack before striking back, even though it might well have been overrun in that first offensive. In Mr. Bumble's words, "If the law supposes that, the law is a ass—a idiot." Such a rule lacks essential legitimacy, because it is easy to

[55] Address by Ambassador Kirkpatrick, *supra* note 48. The Reagan doctrine is not the only 20th<entury attempt to revive the just war doctrine. The Soviet Union has long maintained that "[j]ust wars . . . are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or to liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism." COMMISSION OF THE CENTRAL COMMITTEE OF THE C.P.S.U., HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (BOLSHEVIKS) 167-68 (1939). The modern non-aligned movement has also upheld the just war doctrine, one result being the provisions of Protocol I to the Geneva Conventions. *See, e.g.,* Art. 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12,1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 3 (1977), *reprinted in* 16 ILM 1391 (1977). This position was dramatically put forth in a 1973 General Assembly resolution: "colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination." GA Res. 3103, 28 UN GAOR Supp. (No. 30) at 142, UN Doc. A/9030 (1973). *See also* GA Res. 2105, 20 UN GAOR Supp. (No. 14) at 3, UN Doc. A/6104(1965). For a case study, see Dugard, *SWAPO: The Jus ad Bellum and the Jus in Bello,* 93 S. AFR. L.J. 144(1976).

[56] *See* Franck, *Who Killed Article 2(4)?,* 64 AJIL 809, 820-22 (1970).

predict that in at least some situations no state would abide by its strictures. If a patently absurd result—a *reductio ad absurdum*—accrues from the only possible application of the evident meaning of a simple rule in circumstances requiring a more calibrated response, then it becomes evident that the rule will not be taken seriously in those circumstances, and perhaps also not in others.

If simplicity of text is an invitation to *reductio ad absurdum,* which undermines the determinacy of a rule, and if complexity imposes an elasticity that deprives it of determinate meaning, what can be said about determinacy that is not self-contradicting? There is an answer to this riddle, but it requires attention to detail and, in particular, to content. A simple, straightforward rule—"red light to port, green light to starboard"—will have a high level of determinacy if the problem to which it is addressed is widely recognized as essentially binary: that is, capable of being resolved by an objective test of compliance involving a choice between only two options. A true-false test is binary in this sense. Most traffic regulations also are of this kind. So are prohibitions on specific acts as to which there is general agreement that no exculpatory exceptions are ever admissible. One example is aerial hijacking.[57] The United States, however ruefully, has prosecuted a gunman who seized an aircraft to escape from Eastern bloc oppression,[58] because it felt obliged to discharge its obligation under the Hague Convention either to prosecute or to extradite hijackers.[59] The binary view of hijacking—it either *is* or *is not,* but no excuse will avail—is also manifest in the accord signed by the United States and Cuba in 1973,[60] and in the 1978

[57] [Tokyo] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, TIAS No. 6768, 704 UNTS 219; [Hague] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 UST 1641, TtAS No. 7192 [hereinafter Hague Convention]; [Montreal] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, TIAS No. 71570.

[58] This scenario most notably occurred when an East German hijacked a Polish airliner to West Berlin. As an outgrowth of the historical and jurisdictional freak that is Berlin, the hijacker was charged with crimes under West German law but prosecuted by the United States and tried in an American court. The U.S. ambassador to West Germany appointed a New Jersey federal district judge, Herbert Stern, to preside over the trial. *See* H. STERN, JUDGMENT IN BERLIN (1984). Judge Stern, applying U.S. constitutional law, determined that the defendant was entitled to a jury trial (despite the anomaly that juries generally do not exist under German law). United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). Impaneling a jury of West Berliners to judge an East German "refugee" raised the specter that the jury would refuse to convict the defendant in the American tradition of jury nullification. *See* Lowenfeld, *Hijacking, Freedom, and the "American Way,"* 83 MICH. L. REV. 1000, 1005 (1985). In other words, the jury would in effect graft a complex clause upon the linear law of the Hague Convention. In the end, the jury did acquit the defendant of hijacking but convicted him of hostage taking. H. STERN, *supra,* at 350. Judge Stern, affronted throughout the trial by the American prosecutor's stance that the Constitution was inapplicable to West Ber in and skeptical that parole (which he thought appropriate) would be granted, sentenced the hostage taker to time served (9 months) and released him from custody. *Id.* at 369-70.

[59] Hague Convention, *supra* note 57, Arts. 7, 8.

[60] Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, United States-Cuba, 24 UST 737, TIAS No. 7579.

Bonn Declaration adhered to by Canada, France, Italy, Japan, the United Kingdom, the United States and the Federal Republic of Germany,[61] which imposes collective measures against states that refuse to extradite or prosecute hijackers.[62] Similarly, there appears to be near-universal belief that an objective binary test should apply to hostage taking[63] and violence against diplomats.[64] Even Islamic and Soviet authorities joined in the UN Security Council[65] to condemn the Iranian violations of U.S. diplomatic immunity in Tehran in 1979, a decision that was reaffirmed by a nearly unanimous International Court of Justice.[66] It is not difficult to visualize other narrow

[61] *International Terrorism,* DEP'T ST. BULL., NO. 2018, September 1978, at 5 [hereinafter Bonn Declaration).

[62] *Id.* This language tracks Articles 7 and 9(2) of the Hague Convention, *supra* note 57. The Bonn Declaration in effect grafts an enforcement mechanism upon the norms embodied in the Hague Convention. However, imposition of sanctions under the Bonn Declaration is not premised on violation of the Hague Convention. Accordingly, sanctions might be taken against a state that had refused to sign the Hague Convention, not on the basis of the duty to prosecute or extradite (assuming, as is likely, that that is not a duty under customary international law), but on the basis that the support of international terrorism violates international law. *See* Levitt, *International Counterterrorism Cooperation: The Summit Seven and Air Terrorism,* 20 VAND. J. TRANSNAT'L L. 37 (1987). *See also* Chamberlain, *Collective Suspension of Air Services with States Which Harbour Hijackers,* 32 INT'L & COMP. L.Q. 616, 628-32 (1983); Busuttil, *The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking,* 31 INT'L & COMP. L.Q. 474 (1982). Specifically, the Seven would (1) "take immediate action to cease all flights to that country," and (2) "initiate action to halt all incoming flights from that country or" (3) "from any country by the airlines of the country concerned." Bonn Declaration, *supra* note 61.

[65] International Convention Against the Taking of Hostages, Dec. 17, 1979, GA Res. 34/146, 34 UN GAOR Supp. (No. 46) at 245, UN Doc. A/34/46 (1979). The negotiations for the Hostages Convention reveal the opposition that a straightforward rule, even one for a compartmentalized activity, faces. Attempts at a reformulation of the Convention ranged in sophistication. Several delegations suggested the Convention should only protect "innocent" hostages. *See, e.g.,* UN Doc. A/32/39, at 38 (1977) (statement of Egypt); *id.* at 40 (statement of Guinea, using Ian Smith as an illustrative guilty hostage). The Tanzanian delegate proposed an exculpatory clause and provided an umpire: "For the purposes of the Convention, the term "taking of hostages* shall not include any act or acts carried out in the process of national liberation against colonial rule, racist and foreign regimes, by liberation movements recognized by the United Nations or regional organizations." UN Doc. A/AC.188/L.5 (1977). The Pakistani delegate wished to condition invocation of the Hostages Convention against national liberation movements on the target state's acceptance of both the Geneva Conventions and the 1977 Protocols. UN Doc. A/C.6/34/SR.62, at 2 (1979).

[64] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons^including Diplomatic Agents, *supra* note 40. *See also* Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 UST 3949, TIAS No. 8413. The latter, an OAS version of the Internationally Protected Persons Convention, specifically condemns ail physical attacks on diplomats, "regardless of motive" (Art. 2). This protection afforded diplomats can be analogized to the 1 lth-century Peace of God doctrine, which declared certain classes, especially the clergy, exempt from all violence. F. RUSSELL, *supra* note 50, at 34.

[65] SC Res. 461, 34 UN SCOR (Res. & Dec.) at 24, UN Doc. S/INF/35 (1979).

[66] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24).

categories of international offenses that could be defined without exculpatory caveats: offenses against children,[67] the use of biological[68] and chemical weapons,[69] and offenses against nonbelligerent civilians.[70]

Issues that cannot be reduced to simple binary categories invite regulation by more complex rule texts which, while avoiding the problem *ofreductio ad absurdum,* suffer the costs of elasticity. A rule finely calibrated to reflect complex considerations, embodying a textured system of regulatory and exculpatory principles, may suffer legitimacy costs because it invites disputes as to its applicability in any particular case. These costs, however, can be reduced by introducing a forum in which ambiguity can be resolved case by case. Such a legitimate forum mitigates the textual elasticity of the rule by introducing process determinacy. One example is a provision in the 1982 Law of the Sea Convention that deals with the allocation of continental shelf shared by two or more riparian states. The shelf should be apportioned, the rule says, "on the basis of international law . . . in order to achieve an equitable solution."[71] The evidently nonbinary quality of this rule, the vagueness of the notion of an "equitable solution," has been redressed effectively in a series of interpretations by the International Court of Justice. The judges have noted that the treaty sets "a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content."[72] This the Court has set out to do. In a 1969 opinion, the judges had ruled that there should be some relation "between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline."[73] In a 1982 case between Tunisia and Libya[74] and a 1985 dispute between Libya and Malta,[75] they gave quite specific content to an "equitable solution." In this

[67] The rights of children were recently codified in the Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1986/39. In addition, these rights are treated in the Declaration of the Rights of the Child, GA Res. 1386, 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959); the Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948), Arts. 25, 26; the International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), Arts. 6,14, 23, 24; and the International Covenant on Economic, Social and Cultural Rights, GA Res. 2200, *id.* at 49, Arts. 10, 12. *See* Bennett, *A Critique of the Emerging Convention on the Rights of the Child,* 20 CORNELL INT'L L.J. 1 (1987).

[68] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 12, 1972, 26 UST 583, TIAS No. 8062.

[69] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 UST 571, TIAS No. 8061, 94 LNTS 65.

[70] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

[71] United Nations Convention on the Law of the Sea, *supra* note 19, Art. 83(1).

[72] Continental Shelf (Libyan Arabjamahiriya/Malta), 1985 ICJ REP. 13, 30-31 (Judgment of June 3).

[73] North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 54 (Judgment of Feb. 20).

[74] *See* Continental Shelf (Tunisia/Libyan Arabjamahiriya), 1982 ICJ REP. 18, 35 (Judgment of Feb. 24).

[75] 1985 ICJ REP. at 44.

way, the elastic rule text has gained determinacy, just as the papacy once gave content to the vague notion of "just" wars.

Process determinacy is not solely the prerogative of courts. Any institution that is seen to be acting legitimately may be used for the purpose. "Acting legitimately" means here that those it addresses perceive the forum itself as having come into being in accordance with right process. In practice, the legitimacy of a forum can be tested in the same way as that of a rule: by reference to the determinacy of its charter, its pedigree, the coherence of its mandate and its adherence to the normative institutional hierarchy of international organization. Nowadays, the UN General Assembly and Security Council, as well as organs of regional organizations, sometimes play this clarifying role. They will only succeed, however, if they are seen to be acting in accordance with their specific mandate and the general principles of fairness; that is, in a disinterested, principled fashion and not simply to gratify some short-term self-interest of a faction. Moreover, each rule-decision emanating from a legitimate forum is itself subject to the test of its perceived legitimacy: its determinacy, coherence, and so forth.

To summarize: the legitimacy of a rule is affected by its degree of determinacy. Its determinacy depends upon the clarity with which it is able to communicate its intent and to shape that intent into a specific situational command. This, in turn, can depend upon the literary structure of the rule, its ability to avoid *reductio ad absurdum* and the availability of a process for resolving ambiguities in its application.

III. SYMBOLIC VALIDATION AND LEGITIMACY

As determinacy is the linguistic or literary-structural component of legitimacy, so *symbolic validation, ritual* and *pedigree* provide its cultural and anthropological dimension. As with determinacy, so here, the legitimacy of the rule—Its ability to exert pull to compliance and to command voluntary obedience—is to be examined in the light of its ability to communicate. In this instance, however, what is to be communicated is not so much content as *authority:*[76] the authority of a rule, the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication. The communication of authority, moreover, is symbolic rather than literal. We shall refer to these symbolically validating communications as cues.

These three concepts—symbolic validation, ritual and pedigree—are related, but not identical. The *symbolic validation* of a rule, or of a rule-making process or institution, occurs when a signal is used as a cue to elicit compliance with a command. The cue serves as a surrogate for enunciated reasons for such obedience. The singing of the national anthem, for example, is a vocal and (on public occasions) a visual signal symbolically reinforcing the citizen's relationship to the state, a relationship of rights and duties. This

[7]" Schachter, *supra* note 1, at 309-11. Schachter uses the terms "competence and authority" to cover some of the same matters. In his formulation, "whether a designated requirement is to be regarded as obligatory will depend in part on whether those who have made that designation are regarded by those to whom the requirement is addressed (the target audience) as endowed with the requisite competence or authority for that role." *Id.* at 309.

compliance reinforcement need not be spelled out in the actual words of the anthem (as it is not in the commonly used stanza of the American one). The act of corporate singing itself is a sufficient cue to validate the fabric of regularized relationships that are implicated in good citizenship. We are not really singing about bombs bursting in the night air, but about free and secret elections, the marketplace of ideas, the rule of valid laws and impartial judges.

Ritual is a specialized form of symbolic validation marked by ceremonies, often—but not necessarily—mystical, that provide unenunciated reasons or cues for eliciting compliance with the commands of persons or institutions. The entry of the mace into the British House of Commons is intended to call to mind the Commons's long and successful struggle to capture control of lawmaking power from the Crown. It functions as a much more direct, literal kind of symbolic validation than the "Star-Spangled Banner." Ritual is often presented as drama, to communicate to a community its unity, its values, its uniqueness in both the exclusive and the inclusive sense.

All ritual is a form of symbolic validation, but the converse is not necessarily true. *Pedigree* is a different subset of cues that seek to enhance the compliance pull of rules or rule-making institutions by emphasizing their historical origins, their cultural or anthropological deep-roctedness. An example is the practice of "recognition." When a government recognizes a new regime, or when the United Nations admits a new state to membership, this partly symbolic act has broad significance. It endows the new entity with a range of entitlements and duties, the concomitants of sovereignty. The capacity of states, and, nowadays, perhaps also of the United Nations, to confer sovereignty and its incidents in this fashion derives not from some treaty or other specific agreement but from the ancient practice of states and groupings of states, which legitimizes the exercise of this power.[77] The time-honored recognition practices by which status is conferred symbolically include such subsets as recognition "de facto" and "de jure," recognition of states and governments, the opening of diplomatic relations, and, in the United Nations, admittance to membership and acceptance of delegates' credentials. Along similar lines, Professor Schachter has observed that a body of rules produced by the UN legislative drafting body, the International Law Commission, will be more readily accepted by the nations "after [the Commission] has devoted a long period in careful study and consideration of precedent and practice." Moreover, the authority will be greater if the product is labeled *codification*—that is, the interpolation of rules from deep-rooted evidence of state practice—"than if it were presented as a 'development' (that is, as new law),"[78] even though the Commission (as a subsidiary of the General Assembly) is equally empowered by the UN Charter to promote "the progressive development of international law and its codification."[79] The compliance pull of a rule is enhanced by a demonstrable lineage. A new rule will have greater difficulty finding compliance, and even evidence of its good sense may not fully compensate for its lack of

[77] For a discussion of the origins of recognition policy and procedure, see 1 L. OPPENHEIM, INTERNATIONAL LAW 124-52 (H. Lauterpacht 8th ed. 1955).

[78] Schachter, *supra* note 1, at 310. [79] UN CHARTER art. 13(l)(a).

breeding. Nevertheless, a new rule may be taken more seriously if it arrives on the scene under the aegis of a particularly venerable sponsor such as a widely ratified multilateral convention, or a virtually unanimous decision of the International Court of Justice.

Symbolic validation, ritual and pedigree are part of the legitimation strategy of all communities, all compliance-inducing rule systems. A study of the legitimacy of imperial authority in ancient China observes that rituals and symbols, "by endowing authority with mystical values and legitimacy, serve not merely to reflect authority but also to recreate and reinforce it. By such means the extent to which people are persuaded to accept a given authority goes far beyond the obedience normally elicited by force."[80] Similar observations have derived from the study of Aztec legitimation strategy, which was found to employ a social tactic making extensive symbolic resources available to achieve "political socialization."[81] For example, the government made a point of distributing food to the citizenry at certain state ceremonies. Feeding as Christian sacrament is also a symbolic validation of status as members of the mystical body of Christ, of hierarchic authority structure within that community, and serves as a renewal of commitment and obligation.

"Political legitimacy," a study of ancient China notes, "can be said to adhere to a regime and its authorities when the governed are convinced that it is right and proper to obey them and to abide by their decisions."[82] This conviction was cued symbolically in Aztec society by priests who provided "supernatural sanction for legitimate state authority,"[83] rather as did the Roman Pontifex Maximus.[84] But, in many societies, ritual and pedigree will have their symbolic roots in the cultural and political, rather than the religious, experience. In a posttheistic society, ritual is not discarded; rather, politics and history are substituted for magic and myth as the compliance-inducing or status-securing cue.

For example, in Britain the rule that a parliamentary bill becomes law only after receiving the assent of the Crown[85] certainly no longer relates to the divine right of monarchs. Although the Queen's title still claims that she rules "by the grace of God," it is not widely believed either that the Queen rules or, for that matter, that there is a God, particularly one involved in

[BM] H. WECHSLER, OFFERINGS OF JADE AND SILK 21 (1985).

[HI] Kurtz, *Strategies of Legitimation and the Aztec State,* 23 ETHNOLOGY 301, 309 (1984).

[82] H. WECHSLER, *supra* note 80, at 10. [8S] Kurtz, *supra* note 81, at 306.

[84] The Pontifex's task, originally, was to legitimate political authority by appeasing the river god Tiber over whose banks the civil authorities had built a useful, but undeniably intrusive, bridge.

** When presenting bills for royal assent, the Speaker of the House of Commons pays homage to the Crown with the formula: "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows. . . ." O. PHILLIPS, A FIRST BOOK, OF ENGLISH LAW 118-19 (7th ed. 1977). The Crown's right to refuse assent to bills that have properly passed through both Houses of Parliament is "practically obsolete.'* A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (9th ed. 1939). In fact, when the Unionists posited in 1913 that the reference to assent restored a real right of veto, the theory was criticized as "obviously absurd" and was said to have troubled the king. E. RIDGES, CONSTITUTIONAL LAW 106 (8th ed. 1950).

British government. A utilitarian explanation for the survival of the historic ritual of royal assent would have to look elsewhere.

Oddly, the very obsolescence of the practice of royal assent helps keep it alive. The act of seeking the Queen's signature on legislation, even when it is clear that she has no choice but to grant it, is not meaningless. It signifies the Government's acceptance of all the accumulated encrustation of customs that define and restrict British governmental powers and practices. The Speaker of the House, for example, assures the Queen that the bill has had its customary three readings in Parliament and has passed both Houses.[86] While meaning little in itself, since the governing party usually can command the parliamentary majority necessary to do what it wants, the ritual of three readings[87] symbolizes the governing party's subordination to orderly, unhurried parliamentary procedure. In an era of relentless bureaucratic momentum, these quaint historical-political rituals provide a delay for reflection and debate between the drafting of a bill and its implementation. The result is that the rituals of three readings and monarchial assent symbolically validate, cuing public compliance and serving to certify the legitimacy of the new law.

Of course, a bad law does not become a good one for having been anointed by parliamentary ritual and having received the blessing of pedigreed authority. A citizen who believes a law to be evil probably will not be induced to think otherwise by symbolic cues. Nevertheless, when decisions to comply or defy are made by those to whom a command is addressed, such cues, with their symbolic validation of its legitimacy, may tip the scales on the side of obedience.

The three-readings ritual is the secular analogue of the church's practice of "publishing the banns" of a proposed marriage on three successive Sundays before the actual nuptials are consecrated.[88] Even in this rational era, the publication of banns also has its residual validating force, which derives not from belief in the divine, but from faith in the evolutionary history that the ritual symbolizes. Just as the House of Commons's three readings celebrate the continuity of parliamentary democracy, the publication of banns symbolizes commitment to the social status of matrimony conferred by both the church and the acquiescent congregation. Both rituals constitute a recommitment to the society's procedural rules of recognition, the "rules of

[86] When a bill is presented to the Crown for assent, it bears an endorsement signed by the Speaker of the House certifying that the provisions of the Parliament Act have been complied with. Parliament Act, 1911,1 *&c* 2 Geo. 5, ch. 13, §2(2), *reprinted in* SELECT STATUTES, CASES AND DOCUMENTS 350, 352 (C. Robertson ed. 1935).

[87] For a full discussion of this ritual as it applies to the enactment of both public and private bills by the House of Commons and the House of Lords, see S. A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 265-71 (3d ed. 1977).

[88] The calling of banns is the public and official announcement of persons who intend to marry and is meant to discover whether the parties are free to marry and whether any impediment to their lawful and valid marriage may exist. The tradition that no marriage was to be celebrated until after a triple publication of the church's banns originated in the 8th century and was extended over all Christendom by Pope Innocent III in 1215. ENCYCLOPEDIC DICTIONARYOF RELIGION 357 (1979).

the game," about which more will be said below. These *secondary* rules about rules are particularly important because they are the yardstick by which all *primary* or substantive rules and commands can be tested. The legitimacy of secondary rules is particularly dependent on the length of their pedigree. They must be difficult to change if they are to be perceived as valid and able to validate. Thus, the secondary rules, as well as the primary rules made in accordance with them, derive their legitimacy in part from the rootedness of the former deep in the history and culture of the community. For this reason, a bill that did not undergo three readings and was not presented for the assent of the Crown would undoubtedly be perceived by Britons as lacking legitimacy, not because those rituals are believed to be powerful in themselves, but because the Government's failure to perform them would be seen as a repudiation of the ancient democratic essence of the British parliamentary system, of which the rites and pedigree are still potent cues.

As we have noted, validating cues are not a modern, or a western, invention. Pedigree is a particularly universal form of symbolic validation. Most societies make some form of linguistic connection between the concepts "old" and "venerable." In the ancient Aztec state, the rulers' hereditary relation to the Toltec dynasty "was the sacred source of legitimate power and authority,"[89] supplemented by a host of "pedigree nobles."[90] So, too, in the China of 1000 B.C., where the Mandate of Heaven doctrine endowed an ancient imperial series of rulers with historically pedigreed and ritually validated power that rested on an orderly system, or line, of succession.[91]

Ritual, too, is a pandemic validator of authority. The fundamental purpose of ritual in ancient China was to create a form of procedural legitimacy that Max Weber would have understood.[92] The point is illustrated by the story of Kao-tsu (206-195 B.C.). When Kao-tsu founded the Han dynasty, he and his followers were "rough and ready fellows" and, to put them at ease, the emperor abolished the "elaborate and bothersome" *Ck'in* ritual code. Unfortunately, this made a "shambles of court audiences" as the members of his court went about "getting drunk, hurling insults at one another, and hacking up the wooden pillars of the palace with their swords. To introduce some decorum . . . , Kao-tsu was moved to appoint an erudite named Shu-sun T'ung to provide him with a court ritual consonant with his modest personal capacity for performing ceremonial." The experiment proved a great success. The ritual "served as a powerful tool for dignifying and strengthening the ruler's position and for controlling the behavior of subordinates. It emphasized the large gap between the position of emperor and that of mere bureaucrat, prevented former associates from presuming upon past friendships, and helped keep subordinates agreeably subservient."[93]

In the modern state system, ritual and other kinds of symbolic validation play much the same role as in ancient and medieval national societies, inte-

[89] Kurtz, *supra* note 81, at 306. *° *Id.* at 308.
[91] H. WECHSLER, *supra* note 80, at 12-15.
[92] *See supra* note 10 (for Weber's perception that legitimacy in part stems from the authority issuing an order, rather than from the order itself).
[95] H. WECHSLER, *supra* note 80, at 25.

grating by inclusion and exclusion, seducing subjects into obeying rules and rulers, validating the exercise of power and generally contributing to the legitimization of the institutions and rules of the society. As a less-developed system, international society is underendowed with such symbolic validation, but what there is serves approximately the same legitimizing function as in ancient China, in the Aztec nation[94] and in modern parliamentary democracies.[95]

Despite their paucity, there are significant examples of attempts by the international system to legitimize itself through ritual and pedigree. One of the oldest and most universal was by using marriage between children of heads of state as symbolic emphasis for a practical political and social compact between nations, sometimes merely reifying the concept of a "family*' of allied nations, at other times leading to—legitimizing—actual political union or federation. The practice was common not only among medieval European royal houses, but also in Asia, Africa and the precolonial Americas. For example, in Aztec Mexico, the "head of state established alliances with neighboring states through marriage. . . . Acamapichtli is reputed to have married twenty daughters of the chiefs of the clans that comprised Aztec society."[96]

One of the newest examples of symbolic international system legitimation is the creation of supranational agencies such as the United Nations Development Programme,[97] the International Bank for Reconstruction and Development[98] (the "World Bank"), the World Health Organization,[99] the Food and Agriculture Organization[100] and the United Nations International Children's Emergency Fund.[101] Their role is to distribute benefits to the deserving and the needy, either in tandem, or in competition, with the unilateral donations still given by one country to another.

The purpose of these agencies is largely and usefully instrumental. Nevertheless, the form of the organization is heavily symbolic. The World Bank, for example, could as well have been set up with only the 12 to 16 chief industrial nations as members, since they contribute almost all its working capital. Instead, the symbolic mingling of donors and recipients in the bank's governing organs and bureaucracy is intended to purge the assistance given of the aura of direct dependence between recipient and donor, a relationship in which gratitude has often been superseded by bitterness. By symbolic multilateralization, gratitude is directed to the agency, all of whose

[94] *See supra* text accompanying note 81.

[95] *See supra* text accompanying notes 86-87.

[96] Kurtz, *supra* note 81, at 308.

[97] *See* GA Res. 2029, 20 UN GAOR Supp. (No. 14) at 20, UN Doc. A/6014 (1965).

[98] Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, TIAS No. 1502, 2 UNTS 134.

[99] WORLD HEALTH ORGANIZATION CONST., July 22,1946,62 Stat. 2679, TIAS No. 1808, 14 UNTS 186.

ioo UN FOOD AND AGRICULTURE ORGANIZATION CONST., Oct. 16, 1945, 12 UST 980, TIAS No. 4803.

[101] The United Nations International Children's Emergency Fund was founded by GA Res. 57, 1 UN GAOR (Res. pt.2) at 90, UN Doc. A/64/Add.l (1946).

members participate, in most cases, as theoretical equals. This equality of participation is itself the symbolic representation of a confluence between sovereignty and interdependence that holds together the "community" of states.

The distribution of benefits by a global agency, with its own officials and symbols, also helps to create a sense of social solidarity—a primitive version of loyalty—between recipients (both persons and governments) and the international system (the "United Nations Family") of which the donor agency is a part, rather in the same way as did the Aztec rulers' ritual distribution of foodstuffs to subjects. This symbolic, as well as utilitarian, function of multilateral, institutionalized benevolence is familiar to anthropologists and sociologists who study the formation of national societies. In Aztec society, the "[construction and maintenance of temples and other public buildings appeased the gods, organized people's labor according to state directives and supported priests and other state functionaries."[102] The Pharaohs similarly sought to serve both personal and socializing objectives in the construction of the pyramids.[103] This concept of legitimization through the symbolism of public works has not been unknown, either, to American politicians from "Boss" Curley of Boston[104] to Nelson D. Rockefeller of New York.[105] It is also understood by the fledgling bureaucracy of the international system.

There are many other examples of ritual and other symbolic reinforcement of legitimacy in the international system. Thus, the United Nations Organization is authorized to fly its own flag, not only at headquarters, but also over regional and local offices around the world.[106] The flag has been used at the instigation of the Secretary-General to immunize such UN battle-front operations as clearing sunken ships from the Suez Canal in 1956

[102] Kurtz, *supra* note 81, at 310.

[105] Although many consider the pyramids to be solely the product of slave labor, evidence has been advanced indicating that the labor was in fact compensated. Thus, it is "probably nearer the truth [to] regard these monuments as vast public works providing economic security for a good part of the population." H. JANSON, THE HISTORY OF ART 40 (rev. ed. 1969). Erected as part of vast funerary districts, the pyramids were the scene of great religious festivities, both during and after the Pharaoh's lifetime. *Id.* at 38. At least as far as Old Kingdom pyramids are concerned, Pharaohs equipped their tombs as a "kind of shadowy replica of [their] daily environment for [their] spirit[s].... [T]he Egyptian tomb was a kind of life insurance, an investment in peace of mind." *Id.* at 35.

[104] *See J*, DINNEEN, THE PURPLE SHAMROCK (1949) (which details the life of James Michael Curley, four-time mayor of Boston). *See also* E. O'CONNOR, THE LAST HURRAH (1956) (which, although fictional, is said to be based on Curley's life and career).

[105] In formulating the project for the Albany Mall, Governor Nelson Rockefeller suggested modeling New York's capitol on the palace of the Dalai Lama at Lhasa, Tibet. The revised version of the mall's plan incorporated architectural and symbolic elements from Lhasa, Washington, D.C., Brasilia, Versailles, Rockefeller Center and St. Petersburg, and was meant to be "the most spectacularly beautiful seat of government anywhere in the world." Krinsky, *St. Petersburg-on-the-Hudson: The Albany Mall* (citing FORTUNE, June 1971, at 92), in M. BARASCH & L. SANDLER, ART THE APE OF NATURE 771, 778 (1981).

[106] The General Assembly adopted and authorized the use of the United Nations flag on Oct. 20, 1947. *See* GA Res. 167,2 UN GAOR (96th plen. mtg.) at 338-39, UN Doc. A/414 (1947).

and protecting members of the Palestine Liberation Organization being evacuated from Lebanon in 1983.[107] The United Nations also issues stamps,[108] which not only are accepted for mail delivery by member states, but also generate a tidy independent income—some $8.6 million in 1986-1987.[109] Peacekeeping forces and truce observers under UN command and wearing UN symbols are stationed between hostile forces in Kashmir,[110] the Golan Heights,[111] Cyprus,[112] Lebanon[113] and Iran-Iraq.[113a] They are lightly armed, if at all, and palpably unable to defend themselves in the event of renewed hostilities; but, with their distinctive emblems, they have come to symbolize the world's interest in the continuance of an agreed truce or armistice. The blue and white helmets and arm bands also symbolize a growing body of rules applicable to peacekeeping operations, manifesting and reinforcing the authority of forces that usually are neither as numerous, nor as well armed, as those they must keep pacified. Their role is purely, but effectively, symbolic of the desire of bitter enemies—and the international community—to have respite from combat. Yet their token presence has a far more inhibitory effect on the behavior of states than can be explained by their minimal coercive power.[114] It is their perceived legitimacy, symbolically validated, that serves as their shield and usually induces more powerful forces to defer to their intangible authority.

The United Nations and its agencies also maintain headquarters and regional facilities that are accorded limited extraterritoriality and immuni-

[107] For the Secretary-General's operation to remove ships sunk in the Suez Canal during the 1956 war, see 1956 UN Y.B. 53-55; and GA Res. 1121,11 UN GAOR Supp. (No. 17) at 61, UN Doc. A/3386 (1956). The Secretary-General also authorized, with the "support" of the Security Council, the flying of the UN flag on ships that would evacuate armed elements of the PLO from Tripoli. *See* UN Docs. S/16194, S/16195, 38 UN SCOR (Res. *8c* Dec.) at 5-6, UN Doc. S/INF/39 (1983).

[108] The United Nations Postal Administration was established on Jan. 1, 1951. *See* GA Res. 454, 5 UN GAOR Supp. (No. 20) at 57-58, UN Doc. A/1775 (1950).

[109] The estimated 1986-1987 net revenue from the sale of postage stamps was $8,667,700. *See* Advisory Committee on Administrative and Budgetary Questions, First Report on Proposed Programme Budget for the Biennium 1986-1987, 40 UN GAOR Supp. (No. 7) at 209, UN Doc. A/40/7 (1985).

[110] The origin of the United Nations Military Observer Group in India and Pakistan (UNMOGIP) is found in a resolution of the UN Commission for India and Pakistan. *See* 3 UN SCOR Supp. (Nov. 1948) at 32, UN Doc. S/1100, para. 75 (1948). The Security Council subsequently authorized its operation. *See* SC Res. 91, para. 7, 6 UN SCOR (Res. *8c* Dec.) at 1, 3, UN Doc. S/INF/6/Rev.l (1951).

[111] The Security Council established the UN Disengagement Observer Force (UNDOF) for the Golan Heights on May 31, 1974. *See* SC Res. 350, 29 UN SCOR (Res. *8c* Dec.) at 4, UN Doc. S/INF/30 (1974).

[112] The United Nations Force in Cyprus (UNFICYP) was formed by the Security Council on Mar. 4,1964.*SeeSC* Res. 186,19 UN SCOR(Res. &Dec.)at 2-4, UN Doc. S/JNF/19/Rev.l (1964).

[113] The United Nations Interim Force in Lebanon (UNIFIL) was created by the Security Council on Mar. 19, 1978. *See* SC Res. 425, 33 UN SCOR (Res. *8c* Dec.) at 5, UN Doc. S/INF/34(1978).

115:1 *See* Report of the Secretary-General, UN Doc. S/20093 (Aug. 7, 1988); SC Res. 619 (Aug. 9, 1988) (creating the force); GA Res. 42/233 (Aug. 17, 1988) (funding the force).

[114] For a discussion of the noncoercive role of UN peacekeeping forces, see B. URQUHART, A LIFE IN PEACE AND WAR 287-88, 342-43 (1987).

ties.[115] These have symbolic as well as practical significance. The extension of diplomatic immunity to top UN officials, privileges usually reserved for representatives of states, symbolizes the emergence of the Organization as an autonomous international actor, pedigreed in its own right. The functions and privileges of the agencies' resident representatives in various countries do not differ greatly, in practice, from those of ambassadors. Although it is not widely known, the Organization also levies an income tax[116] (staff assessment) on its employees who, with the exception of Americans, are immune from national taxation in recognition of the fact (noted by the U.S. Supreme Court in the domestic federal context[117]) that the right of states to tax federal instrumentalities must be limited because it necessarily encompasses the right to destroy.

A few more examples. Symbols of pedigree and rituals are firmly imbedded in state diplomatic practice. The titles ("ambassador extraordinary and plenipotentiary"), prerogatives and immunities of ambassadors, consuls and others functioning in a representative capacity are among the oldest of symbols and rites associated with the conduct of international relations. The sending state, by the rituals of accreditation, endows its diplomats with pedigree. They become, in time-honored tradition, a symbolic reification of the nation ("full powers" or *plenipotentiary),* a role that is ritually endorsed by the receiving state's ceremony accepting the envoy's credentials. These ceremonies, incidentally, are as old as they are elaborate and are performed with as remarkably faithful uniformity in Communist citadels as in royal palaces.[118] Once accredited and received, an ambassador *is* the embodiment of the nation. The status of ambassador, once conferred, carries with it inherent rights and duties that do not depend on the qualities of the person, or on the condition of relations between the sending and receiving states, or on the relative might of the sending state. To insult or harm this envoy, no matter how grievous the provocation, is to attack the sending state. Moreover, when an envoy, acting officially, agrees to something, the envoy's state is bound, usually even if the envoy acted without proper authorization.[119] The host state normally is entitled to rely on the word of an ambassador as if his or her state were speaking.

[115] *See* Convention on the Privileges and Immunities of the United Nations, *adopted* by the General Assembly Feb. 13, 1946, 21 UST 1418, TIAS No. 6900, 1 UNTS 1 (entered into force for the United States Apr. 29, 1970). *See also* Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, TIAS No. 1676,11 UNTS 11 (entered into force Nov. 21,1947). *Seefurther* Convention on the Privileges and Immunities of the Specialized Agencies, *approved* by the General Assembly Nov. 21, 1947, 33 UNTS 261.

[116] To rectify the inequalities it perceived in its original system of compensation, the United Nations subjected UN salaries to a tax assessed at a rate comparable to the employee's national income tax liability. GA Res. 239 (III), UN Doc. A/703, at 3 (1948), *as amended* by GA Res. 359 (IV), UN Doc. A/1949, at 1 (1949).

[117] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 347 (1819).

[118] $«r M. MCCAFFREE & P. INNIS, PROTOCOL, THE COMPLETE BOOK OF DIPLOMATIC, OFFICIAL AND SOCIAL USAGE 87-104 (1985).

[IW] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 PCIJ (ser. A/B) No. 53 (Judgment of Apr. 5).

The venerable ritual practices of diplomacy are almost universally observed, and the rules that govern diplomacy are widely recognized as imbued with a high degree of legitimacy, being both descriptive and predictive of nearly invariable state conduct and reflecting a strong sense of historically endowed obligation. When the rules are violated—as they have been by Iran and Libya in recent years[120]—the international community tends to respond by rallying around the rule, as the Security Council[121] and the International Court of Justice[122] demonstrated when the Iranian regime encouraged the occupation of the U.S. Embassy in Tehran. Violations of the elaborate rules pertaining to embassies and immunities usually lead the victim state to terminate its diplomatic relations with the offender.[123] The offended state—as Britain demonstrated after the St. James Square shooting—usually takes care not to retaliate by means that the rules do not permit.[124]

Related to the pedigreeing process of diplomatic accreditation, with its symbolic status of privileges and immunities, is the prevalent idea of sovereign immunity. That set of rules and practices has its roots in the medieval notion that the "king can do no wrong" and the monarch's claim that "I am the state." Nowadays, most governments can be sued in their own courts. Until at least the 1920s, however, nations, among themselves, generally continued to treat as sacrosanct not only foreign governments, but also all property of recognized foreign states and those activities and enterprises carried on in the foreign government's name.[125] Only in the last three

[120] For a discussion of the Iranian hostages incident, see Gross, *The Case of United States Diplomatic and Consular Staffin Tehran: Phase of Provisional Measures,* 74 AJIL 395 (1980). For an analysis of the Libyan violations, see Higgins, *supra* note 30.

[121] SC Res. 457, 34 UN SCOR (Res. & Dec.) at 24, UN Doc. S/INF/35 (11979) (adopted unanimously).

[122] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979ICJ REP. 7 (Order of Dec. 15); United States Diplomatic and Consular Staffin Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24); United States Diplomatic and Consular Staffin Tehran (U.S. v. Iran), 1981 ICJ REP. 45 (Order of May 12).

[123] See, e.g., *France Breaks Iran Ties and Isolates Embassy,* N.Y. Times,July 18, 1987, at 1, col. 3, which followed the grant of sanctuary by the Iranian Embassy in Paris to a nondiplomat wanted for questioning in connection with terrorist activities.

[124] The British limited their reaction to the shooting of a policewoman from the premises of the Libyan People's Bureau to expulsion of the perpetrators and closing of the Bureau. *See* Higgins, *UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report,* 80 AJIL 135 (1986).

[125] In the *Steamship Pesaro* case, the U.S. Supreme Court refused to recognize the difference between ships held and used by a government for a public purpose and ships used by a government in trade. The latter "are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force." Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 574 (1926). The Court expounded upon this doctrine in *The Navemar,* holding that, [4]*[a]dmitteclly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire . . .." Compania Espanola de Navigacion Maritima, S.A. v. Navemar, 303 U.S. 68, 74-76 (1938). For similar holdings in British cases, see Thejassy, 1906 P. 270; and The Gagara, 1919 P. 95.

decades have most nations begun to limit the immunity from suit of foreign governments and state commercial entities. While many nations now have restricted this status-based right of immunity by withdrawing it from purely *commercial* property and activities of foreign governments,[126] immunity continues to be granted to all officials and property engaged in *governmental* (public, or noncommercial) undertakings.[127] In practice, this means that immunity protects such officials, state property and governmental activity from legal action or, at a minimum, from the execution of a judgment against them.

Symbolically validated rules like these, precisely because they are old, or have been encrusted with quaint forms and rituals, seem easy prey to functionalist critique. They sometimes work an injustice, and they often appear anachronistic. On the other hand, a new rule, even if agreed upon, might not have the same capacity to obligate. To the extent that the legitimacy of a rule is dependent on symbolic validation, there is reason—albeit not invariably a decisive one—to leave the rule alone.

Symbols, ritual and pedigree are factors that cannot be made to order and rules endowed with them need to be husbanded. "No one makes up ritual or symbol any more than anyone makes up language," a study of ancient Chinese ritual has shown.

> Ritual and symbol arise without intention or adaptation to conscious purpose; they seem to be collective products worked out . . . over long periods of time.. . . Ironically, it appears that rituals and symbols must in some way already be regarded as "legitimate" in order for them to confer legitimacy on those who employ them.[128]

IV. COHERENCE AND LEGITIMACY

Symbolic validation, like determinacy, serves to legitimize rules. But like determinacy, symbolic validation is not quite as simple a notion as it may initially appear. For example, as traditional Chinese practice makes clear, ritual invoked to enhance the capacity of a rule to compel compliance will

[126] The United States officially promulgated this policy in 1952, when the Department of State, by means of the "Tate letter/' declared its adherence to the "restrictive theory'* of sovereign immunity. Under this theory, immunity would be recognized with regard to sovereign or public acts *{jure imperii)* but not with respect to private acts *(jure gestionis).* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952, *reprinted in* 26 DEPT. ST. BULL. 984(1952). For current European treatment of immunity, see the European Convention on State Immunity and Additional Protocol, 1972 ETS 74, *reprinted in* 11 ILM 470 (1972).

[127] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611 (1982). *See also* Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom,* 71 AJIL 423 (1977). For judicial discussion of current U.S. practice and its history, see Broadbent v. Organization of Am. States, 628 F.2d 27 (D.D.C. 1980). U.S. application of the "commercial" activity concept under the doctrine of restrictive immunity is discussed in *id.* at 33-35; and the immunity accorded international organizations under the rubrics of restrictive and absolute immunity is treated in *id.* at 30-33.

[128] H. WECHSLER, *supra* note 80, at 35.

only succeed if the rituals are themselves legitimate and are strictly observed. Similarly, a pedigree only confers actual rights and dudes when the standards for pedigreeing are applied *coherently.* When, on the contrary, symbols, ritual and pedigree are dispensed capriciously, the desired effect of legitimization may not accrue.

Both determinacy and symbolic validation are connected to a further variable: coherence. The effect of incoherence on symbolic validation can be illustrated by reference to diplomatic practices pertaining to the ritual validation of governments and states. The most important act of pedigreeing in the international system is the deep-rooted, traditional act that endows a new government, or a new state, with symbolic status. When the endowing is done by individual governments, it is known as *recognition*™ The symbolic conferral of status is also performed collectively through a global organization like the United Nations when the members vote to admit a new nation to membership,[130] or when the General Assembly votes to accept the credentials of the delegates representing a new government.[131]

These two forms of validation are important because they enhance the status of the validated entity; that is, the new state or government acquires legitimacy, which, in turn, carries entitlements and obligations equal to those of other such entities. Such symbolic validation cannot alter the empirically observable reality of power disparity among states and governments, nor, properly understood, does it give off that cue. It does, however, purport to restrict what powerful states legitimately may do with nheir advantage over the weak. It is a cue that prompts the Soviets, however reluctantly, to do a lot of explaining when they invade Afghanistan. The pedigreed statehood of Afghanistan, together with the determinacy of the rules against intervention by one state in the internal affairs of another, then combine to render those Soviet explanations essentially unacceptable, global scorn evidencing the inelastic determinacy of the applicable rules. The practices of symbolic equality conferred by recognition also stipulate that the leader of tiny Bhutan must receive exactly the same number of volleys fired in salute as does the head of state of its huge neighbor, China. Recognition, as validation, has the effect of cuing the equal capacity of rich and poor, strong and weak, for acquiring rights and duties. It creates a presumption against all purported interpretations of existing rules—and against proposed new rules—that would make arbitrary distinctions between the rights and duties of different states or governments. Symbolic equality thus both affirms and reinforces real equality. Weaker nations, in particular, believe that ritual incantation of their symbolically validated status, at a minimum, has reduced somewhat the option of the powerful to treat the weak as tributary or

[129] For U.S. practices, see L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES (1978). An excellent treatment of recognition in general can be found in H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947).

[130] J. DUGARD, RECOGNITION AND THE UNITED NATIONS (1987).

[131] See *infra* note 140 for illustrations of the converse, attempts to deny or rescind recognition by opposing delegates' credentials.

vassal states in contravention of the rights inherent in their status as states.[132]

These important benefits only accrue if the validation is effective; and it is only effective if the forms and standards have been followed.

Each kind of pedigreeing has its own rules and standards. No cue, no amount of ritual behavior, can achieve symbolic validation if its prescribed procedures are not followed or its public standards are violated. Graham Greene's "whisky priest" may have lost his faith,[135] but as long as he follows the rites, he remains an effective validator. Prescribed standards are the essential element in symbolic validation. For example, in 1948, the International Court of Justice was asked by the General Assembly to designate the test for admitting candidate states to UN membership.[134] The Court replied, essentially, by reciting the rules established by Article 4 of the UN Charter: that an applicant must be a state, peace loving, willing to accept the obligations of the Charter, able to carry them out, and willing to do so. The Court further explained that these were "not merely . . . the necessary conditions, but also . . . the conditions which suffice."[135] In other words, nations that objectively satisfy that standard are entitled to have their status validated. The standard is itself pedigreed by its inclusion in the UN Charter, the world's most inclusive multilateral treaty, and by its deep historical rootedness in analogous national recognition practices.[136]

Similarly, the legal adviser to the Secretary-General prepared a memorandum explaining the rules applicable to accepting or rejecting the credentials of a delegation when there is doubt about their validity, for example, during a civil war when there may be two adversary claimants. In such situations, too, UN members should be guided by Charter Article 4, the legal adviser said. Moreover,

> [wjhere a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfilment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.

[152] For example, a pledged word commits powerful as well as weak governments. There is widespread recognition by states, antedating the UN Charter, that a commitment equally obligates powerful, as weaker nations. *See* Legal Status of Eastern Greenland (Den. v. Nor.), 1933 PCIJ (ser. A/B) No. 53, at 22 (Judgment of Apr. 5).

[ISS] Greene shows that even though a priest may fall into a secularized life style, he retains his spiritual powers. A "whisky priest" is "a damned man putting God into the mouths of men," owing to his authority to perform communion. *See* G. GREENE, THE POWER AND THE GLORY 83(1940).

[184] Admission of a State to the United Nations (Charter, Art. 4), 1948ICJ REP. 57 (Advisory Opinion of May 28).

[155] *Id.* at 62, 63.

[136] *See* 1 L. OPPENHEIM, *supra* note 77, at 124-52.

[157] Letter to Trygve Lie, Mar. 8, 1950, Legal Aspects of the Problems of Representation in the United Nations, 5 UN SCOR Supp. (fan.-May 1950) at 18, 22-23, UN Doc. S/1466 (1950).

Governments that do are eligible; those that do not are not. These standards are also rooted in venerable national recognition practices.

These standards for symbolic validation at the United Nations, like any rules, leave room for differences of interpretation in borderline cases where "willingness to carry out obligations" and "control over territory and population" are not wholly self-evident. Nevertheless, the standards have a fairly high degree of formal determinacy and are not difficult to understand, making it possible to dismiss bogus, self-serving interpretations. For example, it is surely not permissible to vote to deny membership to a new state on the ground that its president is black or that its inhabitants are poor. The standards also explain why even ardent Palestinian and Sahrawian representatives have not yet sought membership in the United Nations.

When the symbolic validation proceeds legitimately in accordance with its own prescription—when these rules are followed—it succeeds in its purpose. If validation is withheld in conformity with the same standards, the rejected candidate will be denied the hallmark of effective statehood. The legitimate refusal of governments, individually, and collectively in the United Nations, to validate the Bantustan "homelands"—which clearly do not meet the standard—has undoubtedly contributed to those pseudo-nations' failure to achieve the status of membership and equality in the international community.[138] Problems arise, however, when the standards are not applied coherently; that is, when they are applied to some but not to others equally entitled, or when the standards cease to be connected to principles of general applicability. For example, the United States Government led the fight that, for years, allowed the Nationalist regime on Taiwan, and not the Communist regime in Beijing, to occupy the Chinese seat in UN organs, on the ground that this "is a privilege and not a right."[139] The United States meant that symbolic validation could be withheld from the Beijing Government, even though it obviously met the traditional criteria, because those could be overridden by political considerations. More recently, African and Arab members of the General Assembly have led efforts to reject the credentials of the delegations from South Africa and Israel[140]

[138] The Genera! Assembly condemned the establishment by South Africa of Bantu homelands (Bantustans) as an attempt artificially to divide the African people into "rations" according to their tribal origins, with the aim of weakening the African front in its struggle for its inalienable and just rights. GA Res. 2775E, 26 UN GAOR Supp. (No. 29) at 42, UN Doc. A/8429 (1971). The resolution passed by the resounding vote of 110 in favor, 2 opposed, with 2 abstentions. *See also* Report of the Secretary-General, UN Doc. A/8388 (1971) (transmitting consensus adopted on Sept. 13,1971, by joint meeting of the Special Committee on *Apartheid*, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the United Nations Council for Namibia); Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INT'L L. & POL'Y 11 (1980) (for the development of the Bantustan policy).

[139] State Department Memorandum, *U.S. Policy on Nonrecognition of Communist China*, 39 DEP'TST. BULL. 385 (1958).

[140] GA Res. 3207, 29 UN GAOR Supp. (No. 31) at 2, UN Doc. A/9631 (1974) (resolution on South Africa). When, in 1982, the Arab bloc decided to challenge the credentials of the

even though there is no question that these do meet the criteria for representing their respective countries. The General Assembly, with the support of the United States and a majority of Western and Third World nations, has also continued to seat the delegation of the Kampuchean regime headed by Prince Sihanouk even though it fails to control any significant part of the territory of the country it claims to represent. At least those who are responsible for the Kampuchean result have sought to justify themselves by proposing a new general rule: that a regime, even if it is in effective control, should not be rewarded for having been installed by foreign aggression.[141] That new rule may eventually acquire pedigreed legitimacy, but it has not done so as yet.

When the process of symbolic validation is abused by failure to follow its own procedural rules and standards, a divergence is likely to occur between the real world and the symbolic world, to the detriment of the status-validating processes and symbols. They may cease to be taken seriously. For example, at a time when the Chinese Communist regime was still being excluded from the United Nations, Secretary-General Dag Hammarskjold nevertheless engaged in numerous important negotiations with Chou En-lai, Beijing's foreign minister.[142] The head of the UN Secretariat, it seems, did not feel constrained by the members' decision denying validation to the Communist authorities. Similarly, Hammarskjold's successor, U Thant, vigorously pressed his negotiations with Hanoi during the Vietnam War,[143]

Israeli delegation, the United States announced it would boycott any UN body that excluded the Israelis and would also withhold its contribution amounting to 25,% of the UN budget. T. FRANCK, NATION AGAINST NATION 217 (1985). Most recently, Oman, acting on behalf of 20 Arab states, proposed an amendment to exclude the credentials of Israel from General Assembly approval. The General Assembly voted not to act on this amendment. *Credentials Committee Reports Adopted,* UN CHRON., No. 1, February 1987, at 16. *See also* Halberstam, *Excluding Israel from the General Assembly by a Rejection of its Credentials,* 78 AJIL 179 (1984).

[141] Credentials of Representatives to the Forty-first Session of the General Assembly: First Report of the Credentials Committee, UN Doc. A/41/727, para. 12 (prov. ed. 1986).

> The representative of the United States of America stated that the credentials of the representatives of Democratic Kampuchea were in order, fulfilled the requirements of rule 27 of the rules of procedure, had already been accepted by the General Assembly in the past and should be accepted at the current session. The suggested alternative was a regime brought to power by a foreign military invasion and that was clearly not representative in any way, shape or form of the Kampuchean people.

Id.

[142] The Secretary-General conducted a series of talks with Chou En-lai "in the name of the United Nations" *(see* GA Res. 906, 9 UN GAOR Supp. (No. 21) at 56, UN Doc. A/2890 (1954)) in order to discuss the release of four U.S. fighter pilots shot down near the Yalu River between October 1952 and January 1953, while they were flying missions for the UN Command during the Korean War. See 2 PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS: DAG HAMMARSKJOLD (1953-1956), at 415-59 (1972), for details of the Secretary-Generars mission. *See also* T. FRANCK, *supra* note 140, at 136-37.

[145] In 1964 U Thant secretly informed President Johnson that he could arrange a meeting between the United States and North Vietnam. Believing he had secured the President's blessing, he proceeded to use his good offices to arrange a meeting in Rangoon. But when the United States failed to respond once the meeting had been agreed to by the North Vietnamese,

even though the UN political organs had never validated the nation of North Vietnam, let alone its governmental representatives.[144] The refusal to seat the South African delegates to the General Assembly likewise has not prevented Secretary-General Perez de Cuellar from negotiating with Pretoria over such matters as the future of illegally occupied Namibia.[145] With whom else, after all, *could* he negotiate that question?

To recapitulate: an act of recognition, the symbolic validation of a state or regime, has the capacity to bestow, symbolically, rights and duties on the recognized entity when, *but only if*, it is done in accordance with the applicable principled rules and procedures. Such pedigreed recognition, and its corporate UN equivalent, is everywhere accorded great weight. On the other hand, when the rules and standards for validation are violated, or are themselves unprincipled and capricious, then symbolic validation fails in its objective of bestowing status. Moreover, when validation is seen to be capricious, a failure to validate will do more to undermine the legitimacy of the validating process than of the state or government thus deprived of symbolic validation.

The failure of mystical ritual to do what it is invoked for is usually explained metaphysically. The excommunicate priest who elevates the host before the altar in a fraudulent Eucharist is left holding only bread and wine because his invalid orders cannot effect the miracle of transubstantiation. But failed validation can often be explained rationally. For example, the Ukraine has not been transformed into a sovereign and equal state by its membership in the United Nations. Membership held at variance with the Organization's own standards does not validate the Ukraine's statehood.[146] Similarly, when the United Nations wishes to engage in relief activities in Kampuchea, its officials do not deal with the symbolically validated government of Prince Sihanouk but, rather, with the "unrecognized" regime actually in control. The perverse use of validation, in both instances, fails to give or withhold status for reasons that are practical, rational and not; in the least

Thant felt humiliated by the U.S. Government and leaked his story to the world. T. FRANCK, *supra* note 140, at 154-58.

[144] The People's Republic of China was admitted to the United Nations on Oct. 25, 1971, and Vietnam acquired membership only in 1977.

[145] For an account of how the Security Council directed Secretary-General Waldheim " 'to initiate as soon as possible contacts with all parties concerned' " so that the people of Namibia might exercise their right to self-determination and independence, see D. SOGCOT, NAMIBIA: THE VIOLENT HERITAGE 53-54 (1986).

[146] Despite the fact that the Soviet Constitution guarantees individual republ cs the right to secede from the Soviet Union, it was widely known that the Ukraine, like each of its sister republics, was considerably less independent than any American state and thus was otherwise ineligible for UN membership. Nonetheless, the West ultimately acceded to the Soviet request to admit two republics as UN members because it was viewed as a reasonable price to pay for Soviet participation in the United Nations. T. FRANCK, *supra* note 140, at 21. For a detailed history of the negotiations leading to the West's disposition of Stalin's initial request for membership for all 16 Soviet republics, see R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 435, 533, 536-37, 539 n.49, 584, 597-98, 636 (1958).

metaphysical. If the valid procedural rules or standards are not applied, it is to be expected that no legitimacy will be conferred.

The costs to its legitimacy of applying a rule incoherently arise in three related, but different, senses. First, incoherence nullifies the flawed act of validating or withholding validation. Second, it undermines the standards, rules and processes for bestowing status or validity. Third, it derogates from the legitimacy of the institution that is charged with validating. Thus, in the UN context, when the General Assembly fails to follow the Organization's own rules, standards or procedures for accrediting delegates, it damages the claim of the whole UN system to be taken seriously as the symbolic bestower of status.

Dworkin has pointed out that coherence (he uses the term "integrity")[147] is a key factor in explaining why rules compel.[148] He observes that a rule is coherent when like cases are treated alike in application of the rule and when the rule relates in a principled fashion to other rules of the same system. Consistency requires that a rule (or, as we have noted, a ritual or standard), whatever its content, be applied uniformly in every "similar" or "applicable" instance. The opposite is what Dworkin calls "checkerboarding."[149]

There is another aspect of coherence. It encompasses the further notion that a rule, standard or validating ritual gathers force if it is seen to be connected to a network of other rules by an underlying general principle. This latter aspect of coherence merits closer examination.

Let us imagine that it has been generally agreed that the $1,010 billion debt of Third World states[150] should be retired by the borrowers' paying the lenders half the total amount owed. Both sides regard this compromise as the best deal they can get in present circumstances. The problem is one of coverage. How is the 50 percent repayment formula going to be implemented in practice? Who will repay what? Suppose it were suggested that states whose names begin with the letters *A-M* should repay their entire debt, while those whose names start with *N-Z* pay nothing. Such a rule has determinacy. Although some will fare better than others, no borrower state will be worse off with the compromise than without it. The compromise is also better for the lenders than being repaid nothing, and better for the borrowers than having to repay everything. Yet any such "checkerboard" compromise is likely to be rejected by both borrowers and lenders because of its manifest incoherence. Its incoherence makes it facially illegitimate.

To be legitimate, Dworkin points out, such a compromise must "aim to settle on some coherent principle whose influence then extends to the natural limits of its authority."[151] That means the compromise must connect what it does with some *rational principle of broader application.* The alphabetic

[147] R. DWORKIN, *supra* note 7.

[148] W. at 190-92. U9/<f.atl79.

[150] INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, WORLD DEBT TABLES, EXTERNAL DEBT OF DEVELOPING COUNTRIES, 1985-86, at xi (1986).

[151] R. DWORKIN, *supra* note 7, at 179.

compromise asserts a principle that distinguishes between countries—those which must repay and those to be forgiven—by means of a general principle that cannot be defended on any rational basis. The alphabetic compromise, like the flipping of a coin, is an admission that no rational principle can be found that will produce the desired result. Thus, the decision is left to chance: the "draw" of the alphabet. This establishes no generalizable rule, no principle to justify the basis for making a decision. It lacks coherence because it lacks nexus: both in logic and, more important, in practice. It fails to connect to a rational principle in general use. It establishes no basis for a continuing pattern of systemic interaction; it connects the particular decision to no sense of ongoing community. Even if there were other debt crises in the future, the alphabetic approach would merely become more indefensible as it lost its one vestigial merit: its randomness. Nothing in international life is ever resolved, or likely to be solved, by recourse to the alphabetic principle except seating arrangements at multinational conferences.

A coherent half-loaf compromise could be achieved by applying any one of various coherent, principled approaches. For example, debt forgiveness could be distributed on a sliding scale based on national income or on per capita productivity, the inverse of the scale of assessment used to tax UN members. Or each debtor's indebtedness could be reduced by a fixed percentage, as in a bankruptcy reorganization. Or all repayments could be stretched out in accordance with a schedule based on rise in productivity. Any of these methods of implementing the half-loaf compromise connects with a principle of distribution that commends itself rationally and has been, and will be, applied elsewhere. Coherence requires that the rule applied to a dispute about the distribution of debt relief should employ distinctions that are acceptable (or, at least, not unacceptable) in solving not only future instances of the same problem but also quite different distributive problems.

Dworkin illustrates the potency of coherence as a factor in legitimacy by asserting that a half-loaf regulation is even less acceptable than no loaf at all when it produces a checkerboard result. "Even if I thought strict liability for accidents wrong in principle," he has written, "I would prefer that manufacturers of both washing machines and automobiles be held to that standard rather than that only one of them be. I would rank the checkerboard solution not intermediate between the other two [no strict liability and universal strict liability] but third, below both, and so would many other people." Such "compromises are wrong, not merely impractical."[152] They are lacking in legitimacy.

A rule taxing only property with even-numbered addresses would be incoherent and lack legitimacy. The same rule would be perfectly coherent if odd-numbered properties, all being on the same side of each street, had received a 20-year tax abatement in return for yielding several feet of their frontal property to the city for the widening of roadways. A "selective service" lottery for induction into the armed services employs a purely random military draft, which may be justified as the fairest way to allocate a

[152]/rf.atl82.

social burden in some circumstances. In other words, before a rule that is facially inconsistent in its application can be adjudged incoherent, it is necessary to determine not only that it applies unequally but also that no reasonable principle of general application can justify the inequality. If a rule is unequally applied, its legitimacy is placed in question. If the inequality is also unprincipled, the legitimacy of the rule—its capacity to obligate—will be severely depleted.

The idea that coherence is a key indicator of legitimacy may be illustrated further by reference to three recent developments in the international community: the emergence of a "right" to *self-determination;* the development of a notion *of state equality,* as exemplified by the voting system of the United Nations; and the entrenchment of free and nondiscriminatory terms of trade—the *most-favored-nation* system—in the General Agreement on Tariffs and Trade. Each has undergone a crisis of legitimacy occasioned by challenges to its normative coherence. Let us examine how each has attempted to meet that challenge and thus to protect its legitimacy.

The notion that national or ethnic groups are entitled to "self-determination" had its origins in the settlements made at the end of World War I. The U.S. delegation to the Versailles Peace Conference was firmly instructed to apply ethnic criteria to resolve all European territorial disputes and, to that end, President Woodrow Wilson saw to it that his team included historians, geographers and ethnologists.[153] Throughout the negotiations, Wilson insisted that settlements be based on "facts,"[154] by which he meant "racial aspects, historic antecedents, and economic and commercial elements."[155] Note, however, in passing, that this general principle need not be accepted as *just.* The legitimacy of a rule is conditioned by its coherence, but a rule may be quite coherent (in our sense of the term), as well as highly determinate and symbolically validated, and yet be thought unjust. Wilsonian self-determination, for example, may be legitimate yet work an injustice by transferring territories and resources in accordance with a general principle of ethnicity while ignoring considerations of economic well-being and the distributive claims of poor people.[156]

The Wilsonian principle achieved considerable coherence in the immediate period following World War I. Insistence on its application led to a plebiscite in Schleswig, which had been annexed by Prussia in 1864.[157] In 1920, Northern Schleswig voted to revert to Denmark, a verdict accepted by the Peace Conference.[158] The same principle governed the creation of Czechoslovakia, in accordance with the wishes of Wilson's Secretary of State Lansing, "that all branches of the Slav race should be completely freed from German and Austrian rule."[159] Similarly, the principle was used by Wilson

[155] R. S. BAKER, WOODROW WILSON AND WORLD SETTLEMENT 109 (1922).

[154] *Id.* at 187. [155]/rf.

[156] Franck & Hawkins, *Rawls' Theory of Justice in International Context,* 10 MICH. J. INT'L L. (1988).

[157] S. WAMBAUGH, PLEBISCITES SINCE THE WORLD WAR 14 (1933).

[158] 2 A HISTORY OF THE PEACE CONFERENCE OF PARIS 205 (H. W. V. Temperley ed. 1920).

[lw]4irf.at261 (1921).

to oppose efforts by France to create a buffer Rhenish Republic[160] between itself and Germany. Wilson's chief adviser, Colonel House, was scornful of the French, who "do not seem to know that to establish a Rhenish Republic against the will of the people would be contrary to the principle of self-determination."[161] The compromise accommodated some elements of both French geopolitics and American moralism. A Saar buffer was established. However, it was not to be independent but administered through the League of Nations. Although the inhabitants were not allowed to be represented in the German Reichstag, their schools, language, laws and German nationality were left untouched.[162]

The principle of self-determination was also used in drawing the boundaries of an independent Poland on incontrovertible historical and ethnic grounds.[163] Wilson succeeded in his demand that the new Polish state "should be erected" to "include the territories inhabited by indisputably Polish populations."[164] Finally, Upper Silesia was divided by the League Council in 1921 along strictly ethnic lines.[165]

The coverage, in practice, of the concept of self-determination after World War I should not be exaggerated by dwelling exclusively on these dramatic instances. The rule was extended only—and, at that, imperfectly—to the European territories of the vanquished powers. It was not applied, for example, to the dispute between Sweden and Finland over the Aaland Islands.[166] The commission of inquiry appointed to settle that problem instead declared that "the principle had not yet attained the status of a positive rule of international law."[167] On the other hand, Britain claimed to be motivated by self-determination in the partition of Ireland.[108]

After World War II, however, the self-determination principle came to be applied even more generally. The United Nations Charter for the first time expressed a general obligation of states to help enable inhabitants of all dependent non-self-governing territories to make a meaningful choice of national destiny. By joining the United Nations, its members accepted "a sacred trust" to "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."[169] Some colonial territories that previously belonged to Germany or Japan were placed under a formal

[160] THE INTIMATE PAPERS OF COLONEL HquSE 334 (C. Seymour ed. 1928).
[161] *Id. at 345.*
[162] 2 Temperley (ed.), *supra* note 158, at 182.
[163] R. S. BAKER, *supra* note 153, at 110-11.
[164] *Id.*
[165] D. FLEMING, THE UNITED STATES AND WORLD ORGANIZATION 153 (1938).
[166] L. BUCHHEIT, SECESSION 71 (1978). [167] *Id.*
[168] Linking the issue of Ireland to self-determination, Balfour wrote: "No one can think that Ulster ought to join the South and West who thinks that the Jugo Slavs should be separated from Austria. No one can think that Ulster should be divorced from Britain who believes in self-determination." Balfour, The Irish Question, Nov. 25, 1919, PRO CAB 24/93, *quoted in* T. G. FRASER, PARTITION IN IRELAND, INDIA AND PALESTINE 27 (1984). For Lloyd George's comments, see T. G. FRASER, *id.* at 38.
[169] UN CHARTER art. 73.

trusteeship system supervised by the United Nations, which aimed "to promote . . . progressive development towards self-government or independence as may be appropriate/* in accordance with "the freely expressed wishes of the peoples concerned."[170]

The principle now applied equally to all: to colonies and to Europe, to victors and to vanquished. The first article of the Charter, enumerating the Organization's "Purposes and Principles," specifies an all-embracing obligation of members to develop "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples/'[171] This casts the principle in terms of universal coverage. The term "peoples," moreover, recognizes the importance of the ethnic dimension in determining *who* is entitled to invoke self-determination. No boundary separates "peoples" entitled from "peoples" not entitled. Coherence was achieved and the rule acquired powerful legitimacy.

This is not merely a matter of theory or words. Very few rules of the international system have had as dramatic an impact. Beginning with India, Burma and the Gold Coast, Britain conceded self-determination to nearly one billion persons, with France, the Netherlands, Belgium, Spain and Portugal, albeit at first reluctantly, following suit. With a host of new nations seeking validation, UN membership nearly doubled between 1960 and 1980.[172] This was achieved almost entirely by voluntary compliance in deference to a legitimate rule, rather than by coercion.

The coherence of the rule, however, did not last. Even as these dramatic events were occurring, the same principle of self-determination was being denied all of Eastern Europe. Territories largely inhabited by Latvians, Poles, Germans, Romanians, Hungarians and Slovaks were arbitrarily annexed by neighboring states, and their populations often put to flight. Somewhat later, some of the very nations of a Third World that had just benefited from the application of self-determination refused to join in censuring the Soviet Union and Warsaw Pact nations during the invasion of Hungary in 1956 and of Czechoslovakia in 1968.[173] Nor was the principle disregarded only in Europe. No sooner had India become independent than its armed forces denied self-determination to the princely state of Kashmir, which might well have been entitled to it on ethnic, religious and legal grounds.[174] So, too, neither independent Nigeria nor the Organization of African Unity felt any obligation to permit self-determination to the ethni-

[170] *Id.* art. 76(b).

[171] *Id.* art. 1, para. 2.

[172] UN membership rose from 82 members at the beginning of 1960, 1959 UN Y.B. 539, to 154 by the end of 1980, 1980 UN Y.B. 1347.

[175] Saudi Arabia, Syria, Yemen, Yugoslavia, Afghanistan, Burma, Ceylon, Egypt, India, Indonesia, Iraq, Jordan, Libya and Nepal abstained from voting on a resolution condemning the 1956 Soviet invasion of Hungary. GA Res. 1004, ES-2 UN GAOR (564th plen. mtg.) at 7, 20, UN Doc. A/PV.564 (1956). Algeria, India and Pakistan abstained from voting on a Security Council resolution condemning the 1968 Soviet invasion of Czechoslovakia. 23 UN SCOR (1443d mtg.) at 28-29, UN Doc. S/PV.1443 (1968).

[174] India Independence Act, 1947, 10 & 11 Geo. 6, ch. 30.

cally and religiously distinct Ibo "nation" when it sought statehood for Biafra.[175]

Thus, the principle of self-determination began its descent into incoherence—in the sense of inconsistency of application—almost from the moment of its greatest apparent ascendance. Increasing incoherence became textually evident in 1960 with the General Assembly's adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[176] Drafted by the newly independent former colonies of Africa and Asia, it reiterated, on the one hand, "that all peoples have an inalienable right to complete freedom"[177] and demanded immediate implementation of this right "without any conditions or reservations in accordance with their freely expressed will and desire"[178] and regardless of "political, economic, social or educational preparedness."[179] On the other hand, the right was now to be applicable only to "territories which have not yet attained independence." The right was also offset by a new rule against any "attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country."[180]

The declaration thus revived the notion of the sanctity of existing boundaries and resistance to secession that informed the U.S. Civil War[181] and the decision in the Aaland Island case, but had briefly been disestablished by the notion of self-determination after World War I. In place of a coherent rule, there was now checkerboarding, with self-determination doctrinally sanctioned for some cases and prohibited for others. Not only has the coverage of self-determination shrunk, but also its boundaries—where it is applicable and where not—have become indistinct and incoherent. The standards for granting or withholding the right seem to lack connection to any underlying rational general principles.

This incoherence can be demonstrated by searching for applicable general principles that would justify the inconsistencies in the actual state practice since 1960. For example, Algeria was granted self-determination at the insistence of the world community, while Biafra was not. Is Algeria different from Biafra because the former is separated from France by water, while the latter is a contiguous part of the Nigerian landmass? Surely, this is not a

[175] Biafra declared its independence on May 30, 1967, but only five nations recognized its claim to independence. Neither the United Nations nor the OAU supported Biafran independence and the United Nations never even considered the issue. Nanda, *Self-Determination in International Law,* 66 AJIL 321, 326-27 (1972). *See also* 66 ASIL PROC. 58, 175 (1972).

[176] GA Res. 1514, 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1960).

[177] *Id.,* Preamble.

[178] *Id.,* Art. 5.

[179] *Id., Art.* 3.

[180] *Id., Art.* 5.

[181] See, e.g., comments by President Lincoln:

> My paramount object in this struggle *is* to save the Union. . .. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.

Letter from Abraham Lincoln to Horace Greeley, Aug. 22, 1862, *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 388 (R. Basler ed. 1953).

principled distinction capable of being generalized. Many nations—the United States, the Philippines, Canada, Indonesia, India, China and the Soviet Union—have provinces or regions separated from the rest of their territory by salt water. Thus, the distance from Hawaii to Los Angeles is five times greater than that from Marseilles to Algiers. Understandably, an ultramarine principle has never been accepted in practice to define the boundaries of self-determination. No government is likely to accept a distinction that would allow the Canadian province of Prince Edward Island to enjoy the right of self-determination but not Quebec.

Other principles for making distinctions between those entitled and those not, encounter equal difficulty. A differentiation between oppressed "peoples" (entitled) and others (not entitled) has a certain moral attraction. But it is not generalizable and certainly fails to account for the actual behavior of states during the past 25 years in supporting or ignoring demands for self-determination. For example, even before their independence, the populations of Nigeria, India, Senegal and the Ivory Coast had far more say in their government than is currently enjoyed by the people of Latvia, Eritrea and the southern Sudan. Yet the international community has championed self-determination for the former, but not for the latter.

Likewise, attempts to introduce an economic variable to rationalize the "checkerboard" application of self-determination tends to be unsuccessful. It has been argued that Biafrans and other Nigerians have fared better by remaining united than they would have done had they separated.[182] But a strong case can also be made that Algeria and France would have prospered more had they remained together. And Katanga has surely suffered economically as a result of its continued union with Zaire, a denial of self-determination that was actually enforced by the United Nations.[183] The economic factor not only does not rationalize actual state practice, it is also probably bad theory. That economic considerations should or ever *will* trump political, cultural and ethnic ones is a very questionable basis for any agreed general principle.

A more defensible distinction makes self-determination applicable only to "peoples" who are treated *unequally* by government. This principle would

[182] An independent and united Nigeria was perceived to be a "model for Africa," a "key" to that continent's future stability and prosperity, because of its material wealth and rich culture. The "progressive Balkanization" of Nigeria, with its concomitant vast waste of human and social resources, was viewed with great anxiety as a tragedy for all Africa. 283 PARL. DEB. (5th ser.) 1367-76 (1967).

[185] The United Nations completely rejected the claim that Katanga was a sovereign independent nation. *See, e.g.,* SC Res. S/5002, 16 UN SCOR (Res. & Dec.) at 3, UN Doc. S/INF/I6/Rev.l (1961). The United Nations found itself at odds with Katanga. On Apr. 3, 1961, Katanga adopted a Decree on the State of Enmity with the United Nations, *reproduced in* J. GERARD-LIBOIS, KATANGA SECESSION 335-37 (R. Young trans. 1966), which, inter alia, forbade Katangans to enter into relations of any nature whatsoever with the United Nations or its agents. See also C. C. O'BRIEN, TO KATANGA AND BACK (1962), in which the author, a former representative of the United Nations in Katanga and former member of the Secretary-General's executive staff, offers a case history of UN experiences with Katanga.

explain why the inhabitants of a colony ruled by Britain or France might be entitled to self-determination, while Latvians or Biafrans were not. Even though preindependence Algeria did elect members to the French Assembly and Senate, the system of communal "colleges" then in operation gave a European vote ten times more weight than an Arab one.[184] Biafrans, by contrast, enjoyed the same rights as other Nigerians. Paradoxically, this basis for distinction may deny the right of self-determination to groups that are more oppressed than some to whom the right would accrue. Latvians, deprived of many basic freedoms, would have no right because they are treated no differently than other disempowered Soviet citizens. Thus, "peoples" of nations that treat everyone equally badly would have no right, while "peoples" treated quite well would be entitled to secede if they were not accorded quite as many rights as the most privileged of that populace.

Moreover, this theoretical basis for determining entitlement to self-determination, while coherent, and also rather congruent with prevailing state conduct, is hard to apply in practice. Once a secessionist movement is in full operation, its ethnic group is almost certain to encounter discriminatory treatment, as is demonstrated by the rise of anti-Tamil sentiment in Sri Lanka in tandem with the spread of Tamil insurrection. Secessionism and discrimination mutually reinforce one another, and it is difficult in particular instances to determine whether secessionism *caused* or *was caused by* unequal treatment.

Difficult or not, the search for a coherent general principle of coverage, or boundary, is important. If it fails, the once-dynamic right of self-determination will fall into incoherence and desuetude. As a rule of state conduct, it began to lose its power to obligate when it became a checkerboard of incoherent practice.

Coherence, in this sense, is fundamental to understanding why a rule text has sufficient legitimacy to affect the conduct of states. The power of coherence to validate derives from the phenomenon we have already identified: that the status of states is symbolically validated by admission into the community of states. It is by symbolic recognition of their membership in that community that states are confirmed in their equal capacity for rights and obligations. Coherence derives from—is the operational manifestation of—that community of rules. Dworkin, although focusing on a community of persons rather than of nations, explains *why* legitimacy is "grounded in" coherence.[185] Coherence demonstrates that states relate through more than random interactions; that they consciously accept responsibilities derived "from a more general responsibility" that is based on membership in a community. Thus, in the community of nations, each state must "treat discrete obligations that arise only under special circumstances, like the obligation to help a friend who is in great financial need, as derivative from and expressing a more general responsibility active throughout the association in different ways."[186] This concern, in principle, must be "an *equal*

[184] E. BEHR, THE ALGERIAN PROBLEM 38 (1961).
[185] R. DWORKIN, *supra* note 7, at 194. [186] *Id.* at 200.

concern for all members."[187] However, the concern is not incompatible with distinctions, so long as each distinction "fits a plausible conception of equal concern."[188] A plausible conception of equal concern is another way of describing a generalizable principle for determining the coverage of a rule-based obligation.

To take another example of such a search: the UN Charter, in Article 2, sets forth "the principle of the sovereign equality of all . . . Members." Article 27, however, provides that the five permanent members of the Security Council—Britain, China, France, the United States and the USSR—shall have a veto over substantive decisions. If states did not regard the United Nations as an aspect of a global community, this seeming contradiction would not matter. Life is full of contradiction. It only matters when a contradiction rises to the level of an incoherence that invalidates and illegitimatizes an aspect of the system of rules of a community to which the state belongs and by reference to which the state defines *its own legitimacy.* Does the contradiction between the voting procedure of the Charter and its rule of state equality invalidate the rules, the UN-based community and, thus, even the individual legitimacy of the members? To ask the question is to understand why states are reluctant to let the Charter fall into incoherence. Instead, they strive to find a reconciling "neutral principle,"[189] a rational distinction that could restore coherence and validate the "checkerboarding." The best one available is this: while all states are equal, some states, because of their special wealth and power, have greater obligations and responsibilities. Consequently, they may also be entitled to an enhanced vote in certain matters.

Unfortunately, this coherent conceptual justification for the privileges granted the "Big Five" in 1945 is not rationally defensible in 1988. In 1945, they really were the world's major powers, having vanquished the Axis and inherited the postwar leadership. Their special status had a certain plausibility, since the success of any important Security Council action would depend on their cooperation. Today, however, Britain, France and China are middle powers, and their role in the world and in the Organization has become no more important than that of some important states without the veto such as the Federal Republic of Germany, Brazil, Nigeria, India and Japan. The privilege bestowed by the rules has thus lost its rational persuasiveness as a boundary, a standard for making distinctions that connects with a rational general principle.

Apparently, this problem of incoherence, with its concomitant dangers, is recognized. While it has not been possible to amend the Charter, Britain, France and China, although casting occasional negative votes in the Council, have made it a practice not to do so except in the company of a majority, or of either the United States or the USSR.[190] In this way, they have contributed to the de facto remission of their veto power.

[w] *Id.* ™ *Id. at 201.*

[189] For a noteworthy attempt to establish a theoretical basis for such a quest in another area of law, see Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

[190] U.S. Mission to the United Nations, List of Vetoes Cast in Public Meetings of the Security Council (Apr. 14, 1988). Only once did the People's Republic of China stand alone in its veto in

This example illustrated that coherence mandates a connectedness between various component parts of a rule or code; between several applications of a rule in various instances; and between the general principles underlying a rule's application and those implicated in other rules. The General Agreement on Tariffs and Trade of 1947[191] further illustrates these aspects of coherence. Its most basic provision is the most-favored-nation clause, which prohibits members from giving benefits to some trading partners not given to all.[192] As long as this rule is applied consistently in practice, it appears to be coherent and, thus, legitimate. In recent years, however, it has become evident that the MFN provision, if applied consistently to all nations, would undermine rather than advance GATT's underlying purpose by diminishing the trade prospects of some 50 less-developed member countries. GATT therefore adopted a Generalized System of Preferences for these special cases.[193] It allows developed states temporarily to permit preferential access to products of only some states, particularly the "least developed."[194] While GSP is inconsistent with MFN, it coheres with the underlying purpose of GATT, which is to increase trade for all nations. It thus advances the real objectives of GATT. Also, it establishes a standard for distinction between the members to whom MFN is applicable and those temporarily benefited by GSP. That standard connects coherently with boundaries commonly used in other sets of regulations to demarcate coverage. Redistributive principles such as those which underlie GSP are commonplace in the international rule system and justify distinctions that, although creating superficial inconsistencies within rules and the application of rule systems, nonetheless leave the rules coherent and legitimate. The checkerboarding, in other words, is redeemed by being seen as based on a principle that both is consistent with the real intent of the specific rule and connects with that skein of principles integrating various other rules of the international system.

To summarize: coherence, and thus legitimacy, must be understood in part as defined by factors derived from a notion of community. Rules become coherent when they are applied so as to preclude capricious checkerboarding. They preclude caprice when they are applied consistently or, if inconsistently applied, when they make distinctions based on underlying general principles that connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system. The result-

the Security Council. *Id.* at 9. France has vetoed alone only twice since 1946. *Id.* at 10-11. All United Kingdom vetoes during the last 15 years have been cast with the United States. *Id,* at 12-13.

[191] General Agreement on Tariffs and Trade [hereinafter GATT], Oct. 30, 1947, 61 Stat. (5), (6), TIAS No. 1700, 55-61 UNTS.

[192]/</.,Art. 1(1).

[195] GATT Contracting Parties, Decision of Nov. 28,1979, Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, GAirT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. 203 (1980). *See also* J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1149 (2d ed. 1986).

[194] Decision of Nov. 28, 1979, *supra* note 193, paras. 1 and 6.

ant skein of underlying principles is an aspect of community, which, in turn, confirms the status of the states that constitute the community. Validated membership in the community accords equal capacity for rights and obligations derived from its legitimate rule system.

By focusing on the connections between specific rules and general underlying principles, we have emphasized the horizontal aspect of our central notion of a community of legitimate rules. However, there are vertical aspects of this community that have even more significant impact on the legitimacy of rules.

V. ADHERENCE (TO A NORMATIVE HIERARCHY) AND COMMUNITY

Professor Hart's observation, noted above, that the international arena lacks a "legislature, courts with compulsory jurisdiction, and centrally organized sanctions" leads him to deduce "that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system."[195] Although he acknowledges that international law does have many substantive "primary" rules, such as those specific rights and duties typically enumerated in treaties or developed through customary usage, he nevertheless concludes that the system is primitive, if not illusory, because it lacks those crucial procedural "secondary" rules which permit a rule to change and adapt through legislation and the decision of courts. An even more serious disqualification of the international system, Hart alleges, is its lack of "a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."[196] By a "unifying rule of recognition," Hart means an international equivalent of the U.S. Constitution, or the British rule of parliamentary supremacy, both of which are "ultimate" in that they test the validity of all other rules by standards that are not themselves subject to being tested by reference to any superior rule.

Hart identifies the essential elements of a developed system of rules and then concludes that they are missing at the international level. He thus finds the international community to be the approximate equivalent of a small primitive tribe that has primary rules of obligation about such matters as land and kinship, but no system of governance that allocates and regulates social roles or facilitates, by an established process, the making, changing, application and reinterpreting of these random substantive primary rules.

In effect, Hart considers the international system to be primitive because individual rules lack *adherence* to a rule hierarchy. This is a much more sophisticated critique of the international rule system than the simple Austinian one, which focuses on the absence of a system of coercion. Hart does note the lack of institutionalized coercion but puts greater critical emphasis on the failure of international rules to adhere to a hierarchic rule structure.

[195] H. L. A. HART, *supra* note 3, at 209. [19G] *Id.*

Adherence—a term Hart does not use—is used here to mean the vertical nexus between a single *primary rule of obligation* ("cross on the green; stop on the red") and a pyramid of secondary rules about how rules are made, interpreted and applied: rules, in other words, about rules. These may be labeled *secondary rules of process.* Primary rules of obligation that lack adherence to a system of secondary rules of process are mere ad hoc reciprocal arrangements. They are not necessarily incapable of obligating parties that have agreed to them. They may even connect coherently with the underlying principles of distinction found in other rules to create a horizontal skein that is an aspect of community. But the degree of legitimacy of primary rules that only cohere is less than if the same rule were also connected to a pyramid of secondary rules of process, culminating in an ultimate rule of recognition. A rule, in summary, is more likely to obligate if it is made within the procedural and institutional framework of an organized community than if it is strictly an ad hoc agreement between parties in the state of nature. The same rule is still more likely to obligate if it is made within the hierarchically structured procedural and constitutional framework of a sophisticated community rather than in a primitive community lacking such secondary rules about rules.

Hart's critique of the community of states as small and primitive is still widely accepted. Even those who think that the system is at a more sophisticated stage of development might well concede that Hart's misgivings are not wholly unjustified. The recurrence of wars, other conflicts and unremedied injustices invites the appellation "primitive."

The misgivings, however, need to be kept in perspective. Of course, there *are* lawmaking institutions in the system. One has but to visit a highly structured multinational negotiation such as the decade-long Law of the Sea Conference of the 1970s to see a kind of incipient legislature at work. The Security Council, the decision-making bodies of the World Bank and, perhaps, the UN General Assembly also somewhat resemble the cabinets and legislatures of national governments, even if they are not so highly disciplined and empowered as the British Parliament, the French National Assembly or even the U.S. Congress. Moreover, there *are* courts in the international system: not only the International Court of Justice, the European Community Court and the regional human rights tribunals, but also a very active network of quasi-judicial committees and commissions, as well as arbitral tribunals established under such auspices as the Algiers agreement ending the Iran hostage crisis.[197] Arbitrators regularly settle investment disputes under the auspices and procedures of the World Bank and the International Chamber of Commerce. Treaties and contracts create jurisdiction for these tribunals and establish rules of evidence and procedure.[198]

[197] *See* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States oF America and the Government of the Islamic Republic of Iran, DEP'T ST. BULL., NO. 2047, February 1981, at 3, *reprinted in* 75 AJIL 422 (1981), 20 ILM 230 (1981).

[198] The World Bank approved the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18,1965,17 UST 1270, TIAS No. 6090,

The international system thus appears on close examination to be a more developed community than critics sometimes allege. It has an extensive network of horizontally coherent rules, rule-making institutions, and judicial and quasi-judicial bodies to apply the rules impartially. Many of the rules are sufficiently determinate for states to know what is required for compliance and most states obey them most of the time. Those that do not, tend to feel guilty and to lie about their conduct rather than defy the rules openly. The system also has means for changing, adapting and repealing rules.

Most nations, most of the time, are both rule conscious and rule abiding. Why this is so, rather than that it is so, is also relevant to an understanding of the degree to which an international community has developed in practice. This silent majority's sense of obligation derives primarily not from explicit consent to specific treaties or custom, but from *status.* Obligation is perceived to be owed *to a community of states as a necessary reciprocal incident of membership in the community.* Moreover, that community is defined by secondary rules of process as well as by primary rules of obligation: states perceive themselves to be participants in a structured process of continual interaction that is governed by secondary rules of process (sometimes called rules of recognition), of which the UN Charter is but the most obvious example. The Charter is a set of rules, but it is also about how rules are to be made by the various institutions established by the Charter and by the subsidiaries those institutions have created, such as the International Law and Human Rights Commissions.

In addition, obligation is owed not only to the rules of the game, but also *to the game itself* This is symptomatic of a community organized by a pyramid of secondary rules at whose apex is an ultimate rule or set of rules of recognition. The ultimate rule defines the community. If the game were football, the ultimate rule of recognition would be the one justifying the statement that what is being played is not baseball or tennis, but football. Thus, when the uVnpire calls a "foul," the legitimacy of that judgment derives ultimately from those rules which define the activity as football rather than some other sport. In the international system, the game of nations does have its own ultimate, defining set of rules by which the validity of all subsidiary rules—secondary procedural as well as primary substantive —may be tested.

A community is sophisticated when it has such an *ultimate rule of recognition.* In the United States, France, Germany and many other countries this is in the form of a written constitution. In the United Kingdom, however, the existence of an ultimate rule of recognition must be established deductively, since there is no written law defining the community. Nevertheless, it is

575 UNTS 159, which established the Internationa! Centre for Settlement of Investment Disputes. *See* Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction,* 5 COLUM. J. TRANSNAT'L L. 263 (1966). For U.S. implementing legislation, see Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, §2, 80 Stat. 344 (codified at 22 U.S.C. §§1650, 1650a (1982)). Under certain circumstances, parties to a dispute may arbitrate in the International Chamber of Commerce Court of Arbitration.

demonstrable that parliamentary supremacy qualifies as an ultimate rule of recognition because it owes its legitimacy only to public acquiescence, or to the corporate act of social commitment sometimes metaphorically described as a social contract. Its validity, unlike all the community's other secondary and primary rules, cannot be tested by reference to any other law. No statute makes Parliament supreme, nor can any law curb that supremacy. Indeed, if an act stipulated that it could only be repealed by a two-thirds majority, Parliament could delete that two-thirds requirement by a simple majority vote.[199] The rule of parliamentary supremacy defines the legitimacy of all other laws, but its own legitimacy is undefined, and thus *ultimate,* The rule is autochthonous: one "sprung from the earth itself."

Both the British Parliament and the U.S. Constitution are repositories of ultimate power unfettered by superior authority. Both the rule of parliamentary supremacy in Britain and the rules embodied in the Constitution of the United States are ultimate secondary rules of process by which the legitimacy of all primary rules of obligation may be tested and established. A rule of ultimate recognition operates with such extraordinary power to validate a subsidiary pyramid of rules—both other secondary rules of a procedural nature and primary rules of obligation—because the ultimate rule is accepted by a community that is defined by that rule. The ultimate set of rules also defines the status of each member of the community; that is to say, each member's status derives from the recognition of membership. Rejection of the ultimate rule by the members constitutes revolution and is the only option for discarding the ultimate rule (which, in some states but not in others, may be changed—as distinct from being overthrown—but only in strict accordance with its own terms). Acquiescence, *on* the other hand, is demonstrated tautologically, by compliance. Ultimate rules of recognition cannot be validated by reference to any other rule. All other secondary rules of the community are inferior to, and validated by, the ultimate rule or set of rules.

It is the nature of community, therefore, both to empower authority and to circumscribe it by an ultimate rule or set of rules of recognition that exists above, and itself is not circumscribed by, the system of normative authority. Does such a notion of community exist internationally, among states? Do nations recognize an ultimate rule or set of rules of recognition or process by which the legitimacy of all other international rules and procedures can be tested, a rule not itself subject to a higher normative test of its legitimacy, a rule that simply *is,* because it is accepted as font of the community's collective self-definition?

If the international community were merely a playing field on which states engaged in various random, or opportunistic, exchanges or interac-

[199] In perhaps the most eloquent statement of Parliament's unlimited legislative authority, Sir Edward Coke has declared that its "power and jurisdiction . . . is so transcendent and absolute, that it. . . hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws." E. COKE, FOURTH INSTITUTE 36, *quoted in* A. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 41 (9th ed. 1939).

tions, it would be easy to conclude that this was a truly primitive aggregation, a rabble, lacking the organizing structure of secondary rules of process and, of course, an ultimate secondary rule. This, rather than any absence of coercive force, would indeed justify the appellation "primitive." The international community, however, demonstrably is not like that. States—whatever their occasional rhetorical excesses—recognize that they are not sovereign. They accept that they are members of a sophisticated community with secondary rules and with what amounts to a constitution or ultimate rules of recognition. States also recognize that they derive validation from membership in this community.

The nonsovereignty of states and the existence of a set of ultimate community rules can be demonstrated by examining the way treaties operate from the perspective of those that become parties to them. It is quite wrong to think that treaties bind states *because* they have consented to them. If states were sovereign, the mere act of entering into a treaty could not "bind" them in any accurate sense. States are not bound only because they agree to be bound, in the sense in which neighbors in an apartment building might informally agree, for their mutual convenience, to turn off their television sets by 10 o'clock every evening. Those neighbors are at liberty to disregard their obligation whenever it does not suit their purpose. Nor are states obligated by treaties the way individuals are bound by a contract. In municipal law, contracts are binding because their sanctity is prescribed and enforced by the state.[200] True, most contracts operate without recourse to state sanctions, but the sanctions remain in reserve.

Treaties thus do not exactly fit either model. They are not like the free-will agreement among neighbors, which is valid only as long as it continues to suit everyone's purpose; and they are not contracts made under the authority of a sovereign and enforceable by the full authority of the state, through either compelled specific performance or an award of damages. Treaties obviously cannot be binding in the sense of being sanctioned by an Austinian sovereign; but a treaty also cannot be said to be binding only because two or more sovereign states voluntarily agree to carry it out. "Sovereign" means *unbindable.* A treaty ratified by a truly sovereign state could only *declare,* never *bind,* that state's free will. If the state were indeed sovereign, then, no matter what it had signed, it would nevertheless remain free to terminate its consent at any time, just as the sovereign British Parliament cannot legislate a law that can only be amended by a two-thirds major-

2oo while the term "contract** is susceptible of many definitions, whatever else a contract may entail, it is agreed that it is "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.** 1 WILLISTON ON CONTRACTS §1 (3d ed. 1957); RESTATEMENT (SECOND) OF CONTRACTS §1 (1981). *See also* 1 A. CORBIN, CONTRACTS §3 (1963) (which defines a contract to include "a promise enforceable at law directly or indirectly*'). In some jurisdictions, courts will routinely mandate specific performance of the promise. *See, e.g.,* Dawson, *Specific Performance in France and Germany,* 57 MICH. L. REV. 495 (1959). The Anglo-American legal system, however, prefers to impose damages at least equal to the value of the breached promise. *See, e.g., J.* CALAMARI &J. PERILLO, THE LAW OF CONTRACTS 580-604 (1977).

ity. If states were sovereign, entering into a treaty would be nothing more than evidence of their state of mind for the time being.

Notably, states never claim this. They act, instead, as if they were bound. They believe themselves to be bound—which can only be understood as evidence of their acquiescence in something demonstrable only circumstantially: an ultimate rule of recognition. In the international community "sovereignty"—however fragile—resides in the rule, and not in the individual states of the community. States seem to be aware of this rule's autochthony. They act in professed compliance with, and reliance on, the notion that when a state signs and ratifies an accord with one or more other states, then it has an obligation, superior to its sovereign will. The obligation derives not from consent to the treaty, or its text, but from membership in a community that endows the parties to the agreement with status, including the capacity to enter into treaties.

The most recent instance of this perception of an international rule superior to the specific acquiescence of any particular state is to be found in the advisory opinion rendered by the International Court of Justice on April 26, 1988, at the request of the United Nations General Assembly.[201] At issue was a conflict between provisions of a U.S. law that required the closing of the Observer Mission of the Palestine Liberation Organization,[202] and the obligation assumed under the UN Headquarters Agreement.[203] The Court stated unequivocally that it was "the fundamental principle of international law that it prevails over domestic law,"[204] that "the provisions of municipal law cannot prevail over those of a treaty.*'[205] The U.S. judge (Stephen M. Schwebel) added that "a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations" under a treaty.[206] Unanimously, the Court accepted that clear limitation on the sovereignty of states imposed by membership in the international community.

In Hart's words, the "view that a state may impose obligations on itself by promise, agreement, or treaty is not . . . consistent with the theory that states are subject only to rules which they have thus imposed on them-

[201] GA Res. 42/229B (Mar. 2, 1988).

[202] The Observer Mission status was created by GA Res. 3237,29 UN GAOR Supp. (No. 31) at 4, UN Doc. A/9631 (1974). The closure of the mission is required by the Anti-Terrorism Act of 1987, title X of the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, tit. X, §1001, 101 Stat. 1331, 1406 (codified at 22 U.S.C.A. §§5201-5203 (West Supp. 1988)).

[203] *See* Agreement Regarding the Headquarters of the United Nations, June 26, 1947, *supra* note 115.

[204] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947,1988 ICJ REP. 12, 34, para. 57 (Advisory Opinion of Apr. 26).

[205] Greco-Bulgarian "Communities," 1930 PCIJ (ser. B) No. 17, at 32 (Advisory Opinion of July 31).

[206] 1988 ICJ REP. at 42 (Schwebel, J., sep. op.).

selves."[207] Rather, *"rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do."[208] This hypothetical notion itself is actually set out in the text of a global treaty defining the law of treaties,[209] a document establishing a body of secondary rules of process. Even so, the binding force of the treaty codifying the law of treaties cannot emanate from the agreement of the large majority of states that have ratified it. It must come from some ultimate, generally accepted unwritten rule of recognition that is fundamental to any real understanding of the nature of international obligation.

If there is an ultimate set of secondary rules of process that embodies an abstract sovereignty and confers legitimacy in the international community, what are its other provisions? As with the foregoing rule, *pacta sunt servanda,* the other components of an ultimate rule of recognition can only be hypothesized and demonstrated circumstantially by habitual state deference. Thus, the rule that treaties are binding is itself modified by the rule that treaties are *void ab initio* if they are against the community's basic public policy, that is, if they violate the community's ultimate (peremptory) norms.[210] A treaty to commit genocide, for example, would be invalid for this reason. A related notion that appears to qualify as part of the ultimate rule of recognition pertains to the binding obligation imposed on state conduct by global custom. There is widespread acknowledgment by states that they are obligated by international customary rules, whether or not they agree in any specific instance with the import of a rule. This was recently reiterated by the International Court of Justice in the case brought by Nicaragua against the United States, where the latter was held to be obligated by an extensive array of customary norms despite an evident desire to pursue its self-interest in a manner incongruent with those rules.[211]

There are other parts of the ultimate rule that can be deduced from the practice of states in adhering to it *as an incident of statehood* rather than as a consequence of their specific consent. For example, new states are deemed to acquire the universal rights and duties of statehood not because they have agreed but because they have joined the community.[212] Similarly, new states may "inherit" rights and duties from a "parent" state[213] not by virtue of

[207] H. L. A. HART, *supra* note 3, at 219. [208] *Id.*

[209] Vienna Convention on the Law of Treaties, *supra* note 33, Art. 26.

[410] W., Art. 53.

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

[2.2] It is a well-established principle that a new state to the international community is automatically bound by the rules of international conduct existing at the time of admittance. *See* 1 L. OPPENHEIM, *supra* note 77, at 17-18. Even Tunkin concedes that if it enters "without reservations into official relations with other states," a new state is bound by "principles and norms of existing international law.** *See* Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law,* 49 CAL. L. REV. 419, 428 (1961).

[215] There has been wide debate over the rights and obligations a successor state can inherit from its parent. The 19th-century doctrine of universal succession maintains that all the rights and duties of the parent pass to the successor. *See* O. UDOKANG, SUCCESSION OF NEW STATES

their consent but as a concomitant of status. Successor governments, too,' automatically inherit rights and obligations.[214]

One more example of a part of the ultimate rule of recognition is the previously noted notion of state equality. UN Charter Article 2(1) specifically restates this rule, and no state since Hitler's Germany has claimed anything to the contrary. All states are bound by a rule of state equality as a concomitant of their membership in the community of nations. In the words of U.S. Chief Justice John Marshall in an 1825 decision, *The Antelope*, "No principle of general law is more universally acknowledged than the perfect equality of nations."[215]

It is therefore circumstantially demonstrable that there are obligations that states acknowledge to be necessary incidents of community membership. These are not perceived to obligate because they have been accepted by the individual state but, rather, are rules in which states acquiesce as part of their own validation; that is, as an inseparable aspect of "joining" a community of states that is defined by its ultimate secondary rules of process. It is even possible to conclude that the members of the global community acknowledge—for example, each time they sign a treaty or recognize a new government—*that statehood is incompatible with sovereignty.* They acknowledge this because they must, so as to obtain and retain the advantages of belonging to an organized, sophisticated community, advantages only available if ultimate sovereignty resides in a set of rules of universal application. That is why states behave as if such rules existed and obligated.

To put the matter another way, a "community" of states exists. It has at least some important secondary rules of recognition. These rules are "associative obligations," to use Dworkin's term,[216] which fasten onto all states because of their status as validated members of the international community. Only by stretching the notion of "consent" beyond its natural limits can these specific associative obligations be said to have been assumed consensually, even though they may sometimes be restated in a treaty. Dworkin rightly points out that "associative" rules of obligation are interpretive,[217] defining what a member owes others in the community in general. Thus, the obligation to honor treaties is acquired associatively, rather than by specific consent; and it is owed generally towards all members of the community. This is universally acknowledged. It is inconceivable, for example,

TO INTERNATIONAL TREATIES 122-24 (1972). At the other extreme is negativist theory, which holds that a successor inherits no rights and obligations, but begins with a tabula rasa. *See* D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 14-17 (1967). The truth lies somewhere in between, with certain rights and duties, of the parent devolving upon the successor. *See* 1 L. OPPENHEIM, *supra* note 77, at 120. Harl further points to evidence that changes in a state's circumstance may automatically accord it new rights and duties, for example, when it acquires new territory giving it a coastline. H. L. A. HART, *supra* note 3, at 221.

[214] Tinoco Case (Gr. Brit. v. Costa Rica), 1 R. Int'I Arb. Awards 369 (1923), *reprinted in* 18 AJIL 147 (1924).

[215] The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825).

[216] R. DWORKIN, *supra* note 7, at 196. [217] *Id.* at 197.

that a state would announce that it would no longer be bound by treaties or custom. The obligation, moreover, cannot be extinguished by renouncing a consent that was never given, but only by extinguishing the status that is the real basis of the obligation.

According to Dworkin, a true community, as distinguished from a mere rabble, or even a system of random primary rules of obligation, is one in which the members

> accept that they are governed by common principles, not just by rules hammered out in political compromise. . . . Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. So each member accepts that others have rights and that he has duties flowing from that scheme . . . .

Nor are these rights and duties "conditional on his wholehearted approval of that scheme; these obligations arise from the historical fact that his community has adopted that scheme, . . . not the assumption that he would have chosen it were the choice entirely his."[218]

Moreover, the community "commands that no one be left out, that we are all in politics together for better or worse."[219] And its legitimizing requirement of rule integrity "assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."[220]

Does that accurately describe the social condition of the nations of the world in their interactive mode? The description does not assume harmony or an absence of strife. According to Dworkin, an "association of principle is not automatically a just community; its conception of equal concern may be defective."[221] What a rule community, a community of principle, does is to validate behavior in accordance with rules and applications of rules that confirm principled coherence and adherence, rather than acknowledging only the power of power. A rule community operates in conformity not only with primary rules but also with secondary ones—rules about rules—which are generated by valid legislative and adjudicative institutions. Finally, a community accepts its ultimate secondary rules of recognition not consensually, but as an inherent concomitant of membership status.

In the world of nations, each of these described conditions of a sophisticated community is observable today, even though imperfectly. This does not mean that its rules will never be disobeyed. It does mean, however, that it is usually possible to distinguish rule compliance from rule violation, and a valid rule or ruling from an invalid one. It also means that it is not necessary to await the millennium of Austinian-type world government to proceed with constructing—perfecting—a system of rules and institutions that will exhibit a powerful pull to compliance and a self-enforcing degree of legitimacy.

[218] /rf. at 211.
[219] /rf. at 213.
[220] W. at 214.
[221] /<*.