

## The Inner Logic of International Law

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How does international law change? Must international law await change by external political intervention from outside the legal system? Or does international law provide reasons for its own development to those empowered to develop it? To address these questions, I will draw on an unlikely source. Joseph Raz was one of the greatest legal philosophers of all time. But he wrote relatively little about international law until the last decade of his life. Nevertheless, I will draw on Raz's ideas to illuminate three pathways of international legal change: in the law of treaties, in customary international law, and in international adjudication.

Change in international law is a longstanding problem and an enduring puzzle. Multilateral treaties are difficult to amend, and the formation and evolution of customary international law remains mysterious. International courts appear more influential than their formal authority can explain. International legal change is attributed to political intervention—at one time including war—or to informal processes and social networks.<sup>1</sup> The possibility that international law guides its own development is seldom explored, and it is this possibility that I wish to explore here, inspired by Raz's reflections on related themes.

Why did Raz neglect international law for so long? In his early writings, Raz acknowledged that international law claims comprehensive authority over states and supremacy over national legal systems, as well as openness to selectively giving legal effect to national law on the international plane. Yet Raz considered international law a “borderline case” of a legal system because “there are doubts whether it can be regarded as an institutionalized system.”<sup>2</sup> Late in his life, Raz witnessed “the transformative effect of the growth of institutions difficult for members to leave, and which initiate legal developments, independent of assent of member states.”<sup>3</sup> The growth of such institutions, with their promise and their

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<sup>1</sup> Josef L. Kunz, *The Problem of Revision in International Law*, 33 *AJIL* 33, 33 (1939) (“Perhaps no other problem of international law plays at the present time such an important role as the problem of revision, or, as it is now called with a new and rather ambiguous term, ‘peaceful change’”); *id.* at 42 (“The problem of revision is here again a political, legislative problem”); Nico Krisch, *The Dynamics of International Law Redux*, 74 *Current Legal Problems*, 269, 279 (2021) (“If we want to reconstruct the dynamics of international law, we need to ... trace how international law is treated, in practice and discourse, by societal actors of all kinds. These actors may be government officials, judges, activists or individuals; they may form tight communities of practice or loose assemblages; and in some contexts more (and more varied) actors will be involved, in others less”).

<sup>2</sup> Raz, *Practical Reason and Norms* 150 (2<sup>nd</sup> ed. 1999).

<sup>3</sup> Raz, *Why the State?*, in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* 152 (2017).

limits, convinced Raz that “exclusive concentration on state law was, it now turns out, never justified, and is even less justified today.”

Institutions are central to Raz’s theory of law because they perform three essential functions: they recognize the rules of the legal system, they apply the rules to adjudicate disputes, and they change the rules. Indeed, Raz thought institutions change legal rules in the process of recognizing and applying them. That is why Raz thought courts are the most important legal institution. Only courts perform all three functions, since “even without institutions specifically entrusted to make and change rules [that is, legislatures] ... the rules applied and enforced by the institutions change through their activities ....”<sup>4</sup>

Raz rejected a “a static view of the law” according to which “The rules may be changed from time to time. But they are changed by external political intervention ‘from outside’ the law.” Instead, Raz examined “another view often expressed by talk of the inner logic of the law, a belief in the inner dynamism of the law.” Raz searched for “a sense in which the law can provide reasons for its own development.”<sup>5</sup>

In this paper, I will not discuss the international institutions whose rise attracted Raz’s attention in the last decade of his life, such as the United Nations, the World Trade Organization, and the European Union. Instead, I will focus on three processes of international legal change that occur without institutions authorized to change the law. I hope to show that Raz’s ideas shed new light on these processes, while reflection on these processes push Raz’s ideas in new directions. International institutions are created by treaty and bound by custom. Their legal rights and duties are amenable in principle to international adjudication. This paper examines the dynamics of international law at its most basic level, where it persists as a decentralized and horizontal system of rules without rulers.

Part I shows how the law of treaties distributes the task of developing law by way of interpreting texts. In national legal systems, this task primarily falls to courts exercising directed powers. Domestic courts have the legal power to clarify and develop the law, and are directed to do so through legal interpretation. In the international legal system, this task primarily falls to states themselves. States are directed to apply the general rule of treaty interpretation. This rule requires interpreting a treaty in light of its object and purpose, which may include

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<sup>4</sup> Raz, *Why the State?*, 143-44 (“The rule is now part of the system due to the fact that the institutions are entrusted with its application and enforcement”).

<sup>5</sup> Raz, *The Inner Logic of the Law*, in *Ethics in the Public Domain* 238 (1994).

promoting moral aims or respecting moral principles. As states converge on a sound purposive or teleological interpretation, that interpretation becomes legally conclusive through subsequent agreement and subsequent practice. Since international law, by design, gives States the ability to develop the law in this way, States enjoy a directed legal power to do so.

Part II shows how customary international law invites moral considerations into its formation and evolution. It does so not by actively incorporating morality, but simply by failing to exclude morality. Since moral considerations apply to states independently of the law, States are directed to develop customary law in light of moral considerations. This is by design. It is only by reflecting the group's shared view of how its members should act that customary law can credibly claim the legitimate authority that all law necessarily claims. Once states arrive at a social rule reflecting a shared moral view, states enjoy a legal power to accept that social rule as law, conditional on the acceptance of a representative majority of states. As law, the rule is integrated into the international legal order and interlocked with its secondary rules.

Part III shows how legal reasoning by international courts can establish legal truth or legal justification. Valid reasoning from true legal and factual premises establishes legal truth—what the law is. Valid reasoning from true legal and moral premises establishes legal justification—what the law should be given the moral commitments already endorsed by the law. International courts reason to legal truth to apply existing law to existing facts in contentious cases or advisory proceedings. International courts reason to legal justification for two reasons. When one existing legal rule justifies another, the former illuminates the point or purpose of the latter, guides its interpretation, and assigns its normative weight in the event of conflict with other rules. When an existing legal rule justifies a rule that does not yet exist as law, the former provides a legal reason to create and apply the rule as law. International courts seldom openly engage in this last form of legal reasoning, and occasionally disavow it. But it is plausible that international courts in fact engage in this form of legal reasoning to avoid a *non liquet* in contentious cases, and that parties consent to have their disputes decided in this way. States are rationally committed to the moral implications of their legal positions, and this explains why states so often adopt the conclusions of a court's legal reasoning and make them law.

## **I. Treaties and Directed Powers**

Raz found the key to law's inner dynamism in the concept of a directed power. Raz understood law-making powers as normative powers: abilities or capacities to change normative conditions such as rights and duties. Directed powers are normative powers combined with duties to exercise those powers in specified ways or for specified purposes. For example, in international law, states enjoy a legal power to delimit their continental shelf by agreement, and a legal obligation to enter into negotiations aimed at an agreement that satisfies equitable principles.<sup>6</sup> In this way, international law empowers and requires states to change the law on the basis of moral considerations.

According to Raz, courts in state legal systems exercise directed judicial law-making powers. These powers enable courts to change the legal rights and duties of the parties before them by deciding the cases before them on the basis of a general rule that justifies the decision. Doctrines of precedent may then require the application of the same general rule in future cases. Domestic courts are also directed to exercise their law-making powers through legal interpretation and legal reasoning. In these ways, courts differ from legislatures, who are empowered to make law on their own initiative and through fresh moral judgment. These directed legal powers explain the "ability of the courts to change the law by following guidelines set by the law itself."<sup>7</sup>

International courts have more direction but less power. They are directed to apply the general rule of treaty interpretation, which provides that

A treaty *shall* be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

In addition,

There *shall* be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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<sup>6</sup> North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports (1969) 3, 46–47, para. 85.

<sup>7</sup> Raz, Inner Logic 244. Even in state legal systems with no binding rules of interpretation, courts may be directed by judicial custom to choose among a set of permissible interpretive methods.

(c) any relevant rules of international law applicable in the relations between the parties.<sup>8</sup>

However, international courts have legal power only to issue binding decisions to consenting parties, or to issue advisory opinions on legal questions submitted to them. There is no formal doctrine of precedent that makes the rules announced in one case binding on the same court, or other international courts, in future cases. And there is no agreement that courts can make or modify general rules or conclusively settle their precise content going forward.

Who, then, enjoys directed powers to develop international law? States. States are directed to interpret treaties according to the general rule of interpretation, which binds states as well as courts. Their directed interpretations develop the law through subsequent agreements regarding a treaty's interpretation or application, or through subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation. Through such agreements and practice, states exercise a legal power to develop the law. This legal power is conferred on states because it is valuable to give states collective control over the precise content of their treaty obligations.

On this view, states are directed and limited by the general rule of interpretation as they conclude subsequent agreements and engage in subsequent practice. But within the range of meanings permitted by the general rule, their subsequent agreement and practice settles the meaning of their treaty.

Subsequent agreement and practice play a crucial role in the law of treaties. Famously, the law of the United Nations Charter has changed through the subsequent practice of Security Council members and the acquiescence of member states. In this way, the Security Council's authority to maintain "international peace and security" has expanded beyond interstate war to reach internal armed conflicts, mass atrocities, natural disasters, and disease outbreaks. The Security Council routinely acts despite abstentions by permanent members, which are considered "concurring votes."<sup>9</sup> In a different domain, the third Geneva Convention provides that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Yet subsequent practice in

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<sup>8</sup> Vienna Convention on the Law of Treaties, art. 31. The law of treaties also includes a permissive rule providing that recourse *may* be had to supplementary means of interpretation, including preparatory work, to confirm or determine the meaning of a treaty. VCLT, art. 32. This paper will focus on the direction provided by the duty-imposing general rule.

<sup>9</sup> International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), U.N. Doc. A/73/10, p.100.

the application of the treaty seems to have established the agreement of the parties to interpret the provision not to require repatriation against a prisoner's will.<sup>10</sup>

Does subsequent agreement and practice decisively or conclusively settle the meaning or application of a treaty rule? According to the International Law Commission, subsequent agreement and practice is “authoritative” but “not necessarily conclusive” and “not necessarily legally binding.” While they “shall be taken into account,” they do not “override[] all other means of interpretation.”<sup>11</sup>

At a minimum, subsequent agreement and practice settles the meaning or application of a treaty when the parties themselves otherwise comply with the general rule of interpretation, that is, when they interpret the treaty in good faith, in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose, taking into account other relevant rules of international law. Such agreement and practice is conclusive because it is consistent with all other means of interpretation and does not seek to override them.

Put another way, an international court might reject an interpretation to which the parties agree if it undermines the object and purpose of the treaty, or cannot be reconciled with the ordinary meaning of its terms in their context. In such cases, the raw or brute agreement of the parties might be seen as an attempt to modify the treaty rather than interpret it.

In this respect, any power exercised by states through subsequent agreement and practice is doubly constrained. The general rule of interpretation imposes both “a limitation on their power and a duty concerning its exercise.”<sup>12</sup> States that flout the general rule both breach this duty and exceed this limitation. Their agreement or practice is legally invalid and does not change the legal rules arising from the treaty. In this respect, the limited directed power of states recalls a municipal system in which the fact that “a judicial decision misinterpreted or misapplied a statute, or even a common-law doctrine, may deny it its binding force.”<sup>13</sup>

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<sup>10</sup> International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), U.N. Doc. A/73/10, p.48.

<sup>11</sup> International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), U.N. Doc. A/73/10, p.25.

<sup>12</sup> Raz, *Inner Logic*, 242. Raz describes the limited directed power of a legislature with “a duty to legislate, and to legislate rules which promote or protect certain ends and none other. We have already seen that there could be a limitation on a legislative (or any other) power which has an analogous form. The legislation may be valid only if it does, or if it is undertaken in order to, promote some specified aims.”

<sup>13</sup> Raz, *Inner Logic*, 251.

Do subsequent agreement and practice involve the exercise of a legal power? In a late essay, Raz wrote that “a normative power is exercised by a single act (as is typical of promising) or a relatively short series of actions (e.g. legislation).”<sup>14</sup> This passage should give us pause, particularly with respect to subsequent practice, which may involve a long series of actions by many states over many years. Raz did not elaborate further, but noted that

Among many other matters requiring further clarification, one problem is whether the exercise of the normative power effects normative change on its own, or whether it does so only in combination with other factors, i.e. only if other conditions are met. An example would be a case in which an act creates an obligation but only if another person exercises a power of his in an appropriate way. I tend to favour a wide definition including combinations of an exercise of power with other conditions.

If we adopt this wide definition, it is hard to see why normative powers must be exercised by single acts or short series of actions. The exercise of a normative power might effect normative change only if and when other conditions are met in the future. An act might create an obligation only if many other people exercise a power of theirs in an appropriate way. More precisely, one person's attempted exercise of a normative power may succeed only if many others attempt to exercise their normative powers as well. Each person's attempted exercise of their normative power is a condition on each other person's successful exercise of their normative power. For example, voters in a referendum plausibly enjoy a legal power to change the law on the condition that a majority of participants vote for the same change. Yet the series of actions required to exercise this power does not need to be short in time or small in number.

States exercise their directed power to settle the meaning of a treaty collectively rather than individually. As a result, no single State can intentionally develop the law by itself. States also differ from members of a legislative assembly, or judges on a multimember state court. In those cases, legal power is arguably held by the institution rather than by its individual members acting in concert. Subsequent agreement and practice are performed by States themselves, not by an institution of which they are members.<sup>15</sup> But there is no obvious reason why a legal power cannot be distributed among equal parties, which they must exercise concurrently

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<sup>14</sup> Raz, Normative Powers, in *The Roots of Normativity* 162 (Ulrike Heuer ed. 2022).

<sup>15</sup> It is possible that international organizations exercise similar directed legal powers with respect to treaties to which they (apart from their members States) are parties. But these powers would be shared with the other parties to the same treaty, raising parallel questions.

(in the case of agreement) or consecutively (in the case of practice) to create legal effects. Put another way, there is no obvious reason to deny that each state enjoys a legal power to develop the law through interpretation on the condition that other states agree to that interpretation.

Here is a more subtle question. When states adopt a subsequent agreement regarding a treaty's interpretation or application, that looks like the exercise of a legal power since each state acts with the intent to settle the law in an intended way. But when states engage in subsequent practice in the application of a treaty, things may look different. Here, 'agreement' regarding a treaty's interpretation refers to a common understanding, not to a collective action. It may appear that the law changes because the facts change, not because anyone exercises a legal power. Subsequent practice that establishes the agreement of the parties regarding the treaty's interpretation might be simply a fact, to which the general rule of interpretation applies, yielding a legal conclusion. Subsequent practice may be relevant to interpretation because it constitutes evidence of the original intention of the parties, or creates legitimate expectations.

How can we distinguish the exercise of a legal power from other acts that trigger legal consequences? How do we know that contracts involve legal powers, while torts and crimes do not, though all three change legal rights, duties, and liabilities? According to Raz,

A legal power can only be identified by the reasons which led the law (i.e. the institutions which make and sustain it) to attach those legal consequences to the act. The act is an exercise of a legal power only if the reason for attributing to it the legal consequences it has is that it is held desirable to enable people to perform that act as a means to achieve those consequences, if they so wish.<sup>16</sup>

That appears to be the case here. According to the International Law Commission, subsequent agreement and practice is "authoritative" because "the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty."<sup>17</sup> International law attaches legal consequences to subsequent agreement and practice because it is thought valuable to give states substantial control over the meaning of their treaties, particularly in a legal order without courts endowed with directed judicial law-making powers.

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<sup>16</sup> Raz, *Legal Rights*, in *Ethics in the Public Domain* 267-68 (1994).

<sup>17</sup> ILC, *Draft conclusions on subsequent agreements and subsequent practice*, p.24.



According to Raz, “The general function of laws creating directed powers is to effect a certain division of power and of labour.”<sup>18</sup> In state legal systems, this division is often effected “between various authorities,” notably legislatures, courts, and agencies. In the law of treaties, this division is effected between the same States parties at different times or, on an individualist account, between different State officials at different times (those involved in drafting, negotiating, signing, and implementing the treaty).

It is a mark of a legal power that its exercise has legal effects independently of its merits. But how independently? Raz thought the exercise of legal powers binds even if it is *mistaken*, that is, contrary to the balance of reasons. We are considering the view that subsequent agreement and practice bind even if they are underdetermined by the balance of other interpretive considerations. This still looks like the exercise of a legal power, because it makes a difference to the law's content rather than reproducing or reaffirming its content.

Finally, there is the question of the permissible scope of legal change through subsequent practice. According to the ILC, “The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.” At the same time, “the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes ‘difficult, if not impossible, to fix’.”<sup>19</sup> The simplest view would be that subsequent agreement and practice can only give a treaty a meaning, and its rules a content, permitted by the other elements of the general rule: ordinary meaning, purpose, and systemic fit. Any meaning outside that frame amounts to modification, rather than interpretation.

In this respect, it may be misleading to say that states have a legal power to change the law. According to Raz, “‘a change’ is often used to convey a change of direction, or an alteration to the existing situation which is significant enough to make the changed object substantially or significantly different from before.” Such ‘change’ does not occur when “The law was modified in a matter of detail which merely develops it in the same direction and in the same spirit it had before.”<sup>20</sup>

The ILC does not rule out the possibility of modification through subsequent practice. It notes that states and courts sometimes accept subsequent practice that

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<sup>18</sup> Raz, *Inner Logic*, 243.

<sup>19</sup> ILC, *Draft conclusions on subsequent agreements and subsequent practice*, p.60.

<sup>20</sup> Raz, *Inner Logic* 247.

appears to “go beyond” or seems “difficult to reconcile” with ordinary meaning.<sup>21</sup> Be that as it may, any legal power to modify treaties through subsequent practice would exist alongside a legal power to settle the meaning of treaties through subsequent practice. According to the ILC,

A subsequent agreement ... is an agreement “regarding” the interpretation of the treaty or the application of its provisions. The parties must therefore intend, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.<sup>22</sup>

States have a directed power to intentionally change the law through interpretation. To exercise this power, they must intend to interpret the treaty, in conformity with the general rule, and not intend simply to modify the treaty.

According to Raz, “The definition of normative powers does not require them to be exercised with the intention to exercise a normative power, though often this is how they are exercised. The mental state required for their use is determined by the value that establishes their existence.”<sup>23</sup> In this case, the legal power gives the common will of the parties specific authority in identifying the meaning of their treaty. That specific authority is only implicated when states intend to interpret their treaty rather than modify it.

## **Purposive Interpretation and Moral Reasoning**

So far, we have seen that international law gives states a legal power to change treaty rules through subsequent agreement and practice, a legal power directed and limited by the general rule of interpretation. The general rule, in turn, requires states to interpret treaties in light of their object and purpose. That object and purpose may have a descriptive content or, perhaps, a moral content. Either way, interpreting a treaty in light of its object and purpose requires states to engage in

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<sup>21</sup> According to the ILC, “States and international courts are generally prepared to accord parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty.” According to the International Court of Justice, “subsequent practice of the parties ... can result in a departure from the original intent on the basis of a tacit agreement between the parties.” ILC, Draft conclusions on subsequent agreements and subsequent practice, at 59. The ILC concludes that, “while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. Rather, the Court has reached interpretations that were difficult to reconcile with the ordinary meaning of the text of the treaty, but which were in line with the identified practice of the parties.” *Id.* at 61.

<sup>22</sup> ILC, Draft conclusions on subsequent agreements and subsequent practice, at 24. See also *id.* at 45 (“only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation.”)

<sup>23</sup> Raz, *Normative Powers*, 176.

moral reasoning. Moral reasoning may be required to identify the content of a treaty's purpose, or to resolve conflicts between a treaty's multiple purposes, or to balance a treaty's purpose with other values the parties presumably endorse.

For example, the object and purpose of the Genocide Convention is "to safeguard the very existence of certain human groups and ... to confirm and endorse the most elementary principles of morality."<sup>24</sup> The first purpose has a core descriptive content that can be identified without moral judgment: to prevent the intentional destruction of a protected group "in whole." Moral judgment may be required to determine what would constitute the destruction of a group "in part." The second purpose evidently has a moral content. Moral judgment is therefore required not only to interpret the substantive provisions, but also to determine the permissible scope of reservations to the treaty.

Raz considered the possibility that "some moral consequences of a legal rule can be attributed to the author of that legal rule as representing its intention or meaning and thus being part of the law," though he seemed skeptical.<sup>25</sup>

My suggestion is different anyway. It is not that the purpose of a treaty, or its moral consequences, are part of the law. It is that states are directed to interpret a treaty in light of its object and purpose, reasoning through their moral consequences. If states reach the same interpretation, then their shared understanding becomes part of the law. The moral consequences of a treaty rule are not attributed to its authors. Rather, the authors of the treaty rule accept its moral consequences as representing their current intention regarding the rule's meaning.

Purposive interpretation enables interpretive convergence for the right reasons. If states can agree on the moral content of the treaty's purpose, how to reconcile its conflicting purposes, and when to limit the pursuit of its purposes for the sake of other values, then they can settle the meaning of the treaty through subsequent agreement or practice. If not, then not. Similarly, states cannot converge on just any shared understanding that reflects their current interests. They can only converge on a shared understanding that reflects the object and purpose of the treaty, to which they are precommitted. If they insist on making the law crooked rather than straight, they must amend the treaty and not simply reinterpret it.

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<sup>24</sup> Reservations to the Convention of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15, 23.

<sup>25</sup> Raz, Authority, Law, and Morality, in *Ethics in the Public Domain* 230 (1994) ("I will not present a refutation of this possibility").

Since purposive interpretation requires moral reasoning, the law of treaties directs states to give legal effect to their moral judgments. When these moral judgments are both correct and shared, moral facts determine legal facts, albeit indirectly. To this extent, the inner logic of international law is a moral logic, and moral reasoning drives its internal dynamics. This does not entail that morality is part of international law, or that morality is a ‘material source’ of international law that remains outside it. It means that international law requires states “to use extralegal considerations in developing the law” and refers them “to moral considerations and thus open them to the influence of social and political considerations.”<sup>26</sup>

Raz wrote the preceding words in relation to domestic courts. He continued:

The degree to which this is so depends on the extent to which the courts have power to develop the law at all, and the degree of discretion they are given and the kind of direction in its use they are provided with. These are empirical matters which vary between different legal systems. But as it is a necessary fact that courts have law-making powers, it is also a universal fact that in exercising them they base their actions on moral and political tendencies, and that they are directed by law to do so.

So too, the extent to which states have power to develop international law at all, and the degree of discretion they are given and the kind of direction in its use they are provided with it are empirical (or doctrinal) matters. But as it is a necessary fact that states have international law-making powers, it is also a universal fact that in exercising them they base their actions on moral and political tendencies, and that they are directed by law to do so.

We earlier saw that the legal power of states to develop treaty law is both directed and limited by the general rule of interpretation. We now see that purposive interpretation requires sound moral reasoning. But if interpretation that flouts the general rule is invalid, and the general rule requires sound moral reasoning, then it seems to follow that the legal validity of subsequent agreement and practice may depend in part on moral facts, rather than on social facts alone. If so, then the inner logic of international law is a doubly moral logic.<sup>27</sup>

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<sup>26</sup> Raz, *Inner Logic*, 253.

<sup>27</sup> Presumably, Raz would not accept this implication, as it seems to contradict his sources thesis. At one point, Raz says that legislation enacted pursuant to a limited directed power “may be valid only if it does, or if it is undertaken in order to, promote some specified aims.” Raz, *Inner Logic*, 242. If the aims are moral aims, and validity depends on their promotion, then validity depends on moral facts. In contrast, if validity depends only on attempting the promotion of moral aims, then validity may depend on moral beliefs but not moral facts. Raz also says that, in common-law systems,

## II. Custom as a Shared Moral View

Raz wrote that “a customary rule ... is constantly in a process of change.”<sup>28</sup> But how do customary rules change? How do they emerge in the first place? And how do customary rules become rules of law, integrated into a larger legal order?

Do states enjoy a directed legal power to develop customary international law? The answer is doubly unclear. It is unclear that international law directs states to develop customary international law in any specific way. And it is unclear whether states develop customary international law through the exercise of a legal power.

No doubt, states often identify, interpret, and develop rules of customary international law in light of their object and purpose, taking account of other relevant rules.<sup>29</sup> It is less clear that international law requires states to do so. The ILC's draft conclusions on the identification of customary international law do not set out primary or secondary legal rules that states are required to follow. They simply set out a methodology for evaluating the constituent elements of general state practice accepted as law. Put another way, states are required to follow customary international law, so they would be wise to correctly identify its content. But there appears to be no separate legal rule directing states to identify the content of customary international law or interpret its constituent elements purposively, systemically, or otherwise.

Notably, in its conclusions on peremptory norms, the ILC took the view that “Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the

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The fact that a judicial decision misinterpreted or misapplied a statute, or even a common-law doctrine, may deny it its binding force, or at any rate weaken it (in a case in which the judicial mistake may not have been decisive in determining the rule adopted in the case. ... No such restrictions on the force of a decision as a binding precedent apply when its misapplication of the existing law consists in faulty moral reasoning, or in accepting the wrong moral premis[es].

Raz, Inner Logic 251-52. The passage refers to the rules of common-law systems. Raz may have thought that legal powers can never be legally limited in such a way that the validity of their exercise depends on moral facts, since this would contradict the sources thesis.

<sup>28</sup> Raz, Identity of Legal Systems, in *The Authority of Law* 98 (2<sup>nd</sup> ed. 2009).

<sup>29</sup> I will remain neutral on whether, strictly speaking, the relevant object of interpretation is the rule of customary law or the social facts (state behavior and attitude) underlying it. See Odile Ammann, Domestic Courts and the Interpretation of International Law 45 (2020) and Orfeas Chasapis Tassinis, Customary International Law: Interpretation from Beginning to End, 31 EJIL 235 (2020).

former.”<sup>30</sup> However, it is not clear that this interpretive rule is, or is put forward as, a binding legal rule. Finally, “no derogation is permitted” from a peremptory norm. This rule limits the formation and development of customary law. However, this rule involves a legal disability—the opposite of a legal power to change, and the correlative of a legal immunity from change—rather than a legal prohibition. This rule limits but does not direct state law-making.

It is also unclear whether states have a legal power to make or develop customary international law, or whether state practice is simply behavior with legal effects. The view that custom makes law through express or tacit consent—a paradigmatic legal power—reflects the value of state autonomy but seems unsustainable today.<sup>31</sup> Customary international law binds newly independent states that did not participate in its formation or consent to be bound by it, as well as states that merely acquiesced in its formation and evolution without persistent objection. A legal power to make or develop customary international law must be found elsewhere, in its collective production rather than its individual reception.

Raz indicated that social customs do not involve normative powers.

Normative conditions can change in ways other than by the use of normative powers. For example, social customs change them. Interestingly, normative conditions that come about through custom or through the use of normative powers share an important feature. They may be normatively binding, valid, and yet it might have been better had they not come about, and/or better that they be repealed.<sup>32</sup>

In a fascinating and complex passage, Raz continued

A natural suggestion is that this dual aspect of chained normative powers and of other normative phenomena like customs has to do with the fact that they are exercised by acts intended to exercise them. That is, however, a mistake. The definition of normative powers does not require them to be exercised with the intention to exercise a normative power, though often this is how they are exercised. The mental state required for their use is determined by the value that establishes their existence. Often it does not

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<sup>30</sup> ILC, Conclusions on Peremptory Norms, A/77/10, at 79. This conclusion applies to all “obligations under international law,” including those “arising under ... customary international law”. Id. at 81

<sup>31</sup> For a recent expression of this view, see Massimo Lando, Identification as the Process to Determine the Content of Customary International Law, *Oxford Journal of Legal Studies* (forthcoming).

<sup>32</sup> Raz, Normative Powers 166.

require such an intention. That is obvious in the case of the activities and practices that establish customary rules, as well as in the evolution of the common law through judicial decisions that often are not intended to develop the common law. The same is true of some other normative powers. Yet there the suggestion may be close to the truth. Normative powers are almost always exercised by acts that are related to intention to perform some actions, even if they end up being accidental, or if they are motivated by false beliefs in reasons that do not exist, etc. Given that in all these cases they are a successful exercise of power because they meet the value condition that applies to them, that condition recognizes the value of possessing power even when its exercise involves mistakes, misjudgements, etc. That is why chained powers, and related normative phenomena like customs, have that apparently paradoxical dual aspect.<sup>33</sup>

While not entirely clear, these passages, on balance, suggest that social customs do not involve the exercise of normative powers. Nevertheless, it is valuable that social customs are normatively binding even when they arise from mistakes and misjudgments and it would be better had they never arisen at all. It is valuable because, as Raz writes elsewhere, social custom “is not normally generated by people intending to make law. But it can hardly avoid reflecting the judgment of the bulk of the population on how people in the relevant circumstances should act.”<sup>34</sup>

The reflection of a shared moral judgment explains why social custom generates content-independent reasons for action even in the absence of legitimate institutional authority. According to Raz, we have reasons to obey the directives of legitimate authorities, whether or not we agree with their content. Legitimate authorities may have knowledge or expertise that we lack, or they may be able to coordinate social behavior in ways we cannot. Legitimate authorities also base their directives on the reasons that already apply to us, while leaving us free to make important decisions for ourselves. Normally, we will better conform to the reasons that already apply to us by obeying legitimate authorities than by relying on our own moral judgment.

Social customs are not directly created through the exercise of authority. However, we have reasons to follow social customs, whether or not we agree with their content. Social customs reflect the views of many minds, considering a social problem from many perspectives. Social customs also form in advance of our own

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<sup>33</sup> Id. at 176.

<sup>34</sup> Raz, *Authority, Law and Morality*, 221.

predicaments, so they are not distorted by our own biases. When social coordination requires selecting among equally good rules, custom can select the rule of the group going forward.<sup>35</sup>

Raz's account of social custom plausibly extends to general state practice, understood as a social custom of states. It is less clear how it bears on acceptance as law, the other constitutive element of customary international law. The ILC regards acceptance as law as belief that conduct is legally required, permitted, or prohibited.<sup>36</sup> This view famously entails that customary law only arises when states mistakenly believe that customary law already exists. Belief that a social rule is legally binding is a nonvoluntary cognitive state. You cannot choose what to believe. This is why, on the ILC's view, states must mistakenly believe that a social rule is already a legal rule for it to become a legal rule.

Instead, acceptance as law should be regarded as a voluntary decision to treat a social rule as a legal rule.<sup>37</sup> To treat a social rule as a rule of international law involves, among other things, to invoke the secondary rules of state responsibility in response to its breach; to follow the secondary rules of *lex specialis* and *lex posterior*, and *lex superior* in its application; and to systemically integrate it with other legal rules through harmonious interpretation. This view avoids the 'chronological paradox' that arises from regarding acceptance as belief. States have a legal power to treat social rules as law and thereby make them law, provided that such treatment is sufficiently widespread, representative, and consistent. This legal power must be exercised collectively, by states themselves rather than institutions of which states are members. The value of this legal power lies in the control it gives to states over which of its social rules will have legal force, and whose breach will trigger legal consequences.

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<sup>35</sup> See Raz, *Sovereignty & Legitimacy: On the Changing Face of Law*, Questions and Speculations, Frederic R. and Molly S. Kellogg Biennial Lecture in Jurisprudence, Library of Congress, Oct. 5, 2011, starting at 39:00, <https://www.youtube.com/watch?v=VMC9u7PZZCo>.

<sup>36</sup> ILC, Draft conclusions on identification of customary international law, with commentaries 2018, U.N. Doc. A/73/10, p.138 ("It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law:")

<sup>37</sup> See David Lefkowitz, (Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach, 21 *Can. J. L. & Jurisprudence* 129 (2008) ("the creation of a new rule of customary international law requires a two-step process; first, the development of a new customary rule, and second, the incorporation of that rule into international law"). On acceptance as a voluntary decision to treat a proposition as true, including the propositional content of a rule, see Adam Perry, *The Internal Aspect of Social Rules*, 35 *Oxford Journal of Legal Studies* 283-300 (2015) ("what you accept in a context is (i) shaped by practical reasons; (ii) context-dependent; and (iii) under your direct, voluntary control").



Raz's account may partly explain 'traditional' custom but not 'modern' custom. As Raz notes, "traditionally, custom was the main source of general international law .... established by the common practice extended over time." In contrast,

In recent times, there has been a marked tendency to recognise emerging customary rules, rules that emerge over a short period of time. The main route to customary standing is through multilateral treaties. A few years after the coming into effect of a multilateral treaty, its existence is taken as evidence for the emergence of a new custom. ... states that ratify treaties impose, you may say, their will on states that do not ratify them, or that enter reservations to some aspects of the treaties."<sup>38</sup>

If states accept collective declarations that a rule is customary law as a valid source of general international law, then states have the legal power to make such law. The value of this legal power would lie in giving states the ability to directly enact their moral values into general international law. This ability is especially important to avoid an absurd result. According to the ILC, "if the practice in question is motivated solely by [extralegal] considerations, no rule of customary international law is to be identified."<sup>39</sup> This entails that states can never make general international law that reflects their moral values precisely because their practice will be motivated by moral rather than legal conviction.

In what follows, I will assume that the development of customary international law is not directed by a legal duty, and that the formation of a customary social rule does not involve the exercise of a normative power. I will take the view that acceptance as law does involve the exercise of a legal power, but little of my argument turns on that assumption. I will argue that states are nevertheless directed to develop customary international law in light of moral considerations. This direction comes from morality itself, not from law, though law does not exclude such moral considerations and indirectly invites them.

The starting point for this approach is Raz's reminder that moral reasons apply to all human beings prior to and independently of the law. The law does not need to incorporate moral reasons to make them applicable to legal officials or legal subjects. On the contrary, moral reasons remain applicable to legal officials and legal subjects except insofar as the law legitimately excludes them from legal interpretation, reasoning, and decision-making. For Raz, law legitimately excludes

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<sup>38</sup> Raz, *Why the State* 154. See also Raz, *The Future of State Sovereignty*, in *Legitimacy: The State and Beyond* 74 (Wojciech Sadurski, Michael Sevel, and Kevin Walton, eds., 2019).

<sup>39</sup> ILC, *Draft conclusions on identification of customary international law*, at 139.

moral reasons only insofar as its addressees will better conform to the moral reasons that apply to them by not acting on their own moral judgment, but instead acting on a legally constrained set of considerations.<sup>40</sup>

For example, the general rule of treaty interpretation plausibly excludes moral considerations other than those implicated by a treaty's object and purpose—and perhaps those similarly implicated by other relevant rules of international law—from the deliberations of states and courts interpreting the treaty with a view toward its application. This partial exclusion may be legitimate if, over time, it facilitates coexistence and cooperation among states with different moral views, which unconstrained moral reasoning by diverse actors would undermine.

In contrast, there appears to be no legal rule excluding moral considerations from the interpretation and development of customary international law. International law does not incorporate moral considerations into the process, but it need not since moral considerations apply to the process by default. States are free to interpret customary law in its morally best light, and to develop it in the morally best way. This is no oversight. On the contrary, customary international law must be open to moral considerations for it (paraphrasing Raz) to reflect the judgment of the bulk of the population of states on how states in the relevant circumstances should act. It is only on this condition that customary international law can generate content-independent reasons for action and claim legitimate but non-institutional legal authority.<sup>41</sup>

Customary rules begin with moral arguments. Community members act on their moral judgment, justifying themselves and criticizing others by reference to moral

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<sup>40</sup> Raz, *Authority, Law, and Morality*, at 214.

<sup>41</sup> See Raz, *The Claims of Law*, 29:

Customary rules can be legally binding. Can they be authoritative despite the fact that they are not issued by authority? It is possible to talk directly of the authority of the law itself. .... The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action; i.e. a law is authoritative if its existence is a reason for conforming action and for excluding conflicting considerations. 'Reason' here means a valid or justifiable reason, for it is the legitimate authority of the law which is thus defined. The law enjoys effective authority, as we saw it, if its subjects or some of them regard its existence as a protected reason for conformity.

See also Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries* 329 ("It is tempting to think that the authority of law, of any law, derives from the authority of its maker. Customary law is allowed to be a puzzling exception.") *Id.* at 330 ("This is a powerful argument for the claim that the authority of constitutions derives from the authority of their makers. The argument is not that there is no other way in which law can have authority. Customary law shows that there are other ways of establishing the authority of law." On a related point, see Raz, *Intention in Interpretation* ("It is a moot point whether the law rests entirely on the authority of the law-maker(s). It seems fairly clear that this is not the case with regard to customary law."))

considerations. As others are persuaded, or go along, a common moral view forms. Soon enough, members act, justify, and criticize by reference to a rule of the group, rather than the moral considerations underlying it. The rule mediates between group members and the moral reasons that apply to them, allowing them to follow the rule wherever it applies rather than engage in fresh moral deliberation in each circumstance. The fact that the rule reflects the judgment of the group (or the bulk of its members) is presented as a reason to follow it, calling for deference to its reliable source rather than independent (re)consideration its content. This is how general practice forms social rules, which may then be accepted as law within a given legal order.<sup>42</sup>

The evolution of customary rules resembles their formation. The precise content of a customary rule is gradually settled by the bulk of the population forming a fine-grained judgment of how members in a relevant situation sub-type should act, then treating their shared judgment as part of a rule of the group that preempts fresh moral reasoning. This new part of the social rule may then be accepted as part of the law.

While social rules typically arise from “common practice extended over time,” they can also “emerge over a short period of time ... through multilateral treaties,” UNGA resolutions, or non-binding instruments. States need only accept a rule expressed in a treaty, resolution, or instrument as a rule of the group—not merely as a rule of the parties to the treaty—reflecting their shared moral view of how all states should act. States may then accept that social rule as law, interlocked with secondary rules of state responsibility, conflict resolution, and so on.<sup>43</sup>

Of course, the shared view of states regarding how they should act may be wrong, their social rules corrupt, and their legal rules illegitimate. States may have a distorted or truncated view of the moral considerations that apply to them, and their moral reasoning may be invalid or unsound. States may think too much of the wealth of their elites and too little of the needs of their people. They may insist on morally trivial rules while resisting morally imperative ones. But states must present their individual and shared views as moral views of how states should act. They

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<sup>42</sup> See Hugh Thirlway, Reflections on *lex ferenda*, 32 Netherlands Yearbook of International Law 3, 10 (2001) (“At the same time, the rule—unless it is one of simple convenience—may be assumed to have recommended itself to states for reasons of justice, for the practice to have developed in the first place”).

<sup>43</sup> See Brian J. Egan, International Law and Stability in Cyberspace, (10 November 2016), <https://www.justsecurity.org/wp-content/uploads/2016/11/Brian-J.-Egan-International-Law-and-Stability-in-Cyberspace-Berkeley-Nov-2016.pdf>, 25 (“it is possible that if States begin to accept the standards set out in such non-binding norms as legally required and act in conformity with them, such norms could, over time, crystallize into binding customary international law”).

must present the rules of the group as categorically binding irrespective of a state's policy goals, as carrying mandatory force that excludes considerations of self-interest, and as legitimate standards for self-justification and for criticism of others.

According to Raz, law necessarily claims legitimate moral authority, and those who make and develop the law necessarily claim such legitimate moral authority for the law. When states accept a social rule as law, they necessarily claim that the rule is morally binding. The rule provides authoritative guidance for state conduct, and an authoritative standard for state responsibility. The law must claim legitimate moral authority, because the potential costs of legal compliance, and the potential stakes of legal responsibility, require moral justification. Indeed, the choice to accept a social rule as law requires additional moral justification, over and above the moral justification of the social rule itself, given these costs and stakes.

To sum up: The development of customary international law is not directed by law, but it is directed according to law. States have no legal duty to develop customary law in any particular way. Instead, states have a moral duty to develop customary law in the morally best way. International law does not exclude the moral considerations that apply to states, so these moral considerations direct the development of customary law. The choice not to exclude is part of the law's design, a strategy to ensure that customary international law can credibly claim legitimate moral authority. Once states arrive at a social rule reflecting a shared moral view, they enjoy the legal power to accept that social rule as law. This legal power is decentralized, and its effective exercise depends on its individual or joint exercise by a representative majority of states.

## **Customary Legal Statements**

How well does this account fit the surface grammar of customary international legal discourse? It is hard to say, because the surface grammar is diverse. Often, States say they believe a rule is (or is not) already law. Sometimes, States say they have decided to treat a rule as law for reasons of morality or self-interest. Occasionally, states candidly say they accept a rule as law in order to help make it law.

In 2011, the United States announced that Article 75 of Additional Protocol I to the 1949 Geneva Conventions, which

sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, ... is consistent with our current policies

and practice and ... also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.<sup>44</sup>

The announcement is somewhat ambiguous, referring to both policy choice and legal obligation. The simplest reading is that accepting a rule as customary law involves a choice to treat the rule as a legal rule applicable to its own conduct as well as the conduct of other states. But a subsequent statement went further:

As a matter of international law, the administration's statement is likely to be received as a statement of the U.S. Government's *opinio juris* as well as a reaffirmation of U.S. practice in this area. The statement is therefore also likely to be received as a significant contribution to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in international armed conflict. ... The U.S. statement, coupled with a sufficient density of State practice and *opinio juris*, would contribute to creation of the principles reflected in Article 75 as rules of customary international law, which all States would be obligated to apply in international armed conflict.<sup>45</sup>

This statement suggests that the U.S. did not believe that the principles reflected in Article 75 were already rules of customary international law. Nevertheless, it chose to treat these principles as law in order to contribute to the crystallization or creation of such rules of customary international law.

At a 2018 event, a Danish official described Denmark as “one of the few countries also adhering to the doctrine of humanitarian interventions.” At the same event, a representative of the United Kingdom said: “We are also in the group with Denmark of states that believe there is a limited right to use force under [a] humanitarian intervention legal basis.” On the ILC's view, these statements refute themselves. If a “group” of a “few countries” believes that such a legal right exists then, necessarily, no such legal right exists and the belief is false. But the Danish official went on to explain that:

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<sup>44</sup> The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy, Mar. 7, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

<sup>45</sup> Harold Koh, Legal Adviser, Department of State, Responses to Questions Submitted by Senator Richard G. Lugar, Libya and War Powers: Hearing Before the Committee on Foreign Relations, U.S. Senate, 112th Congress, First Session, 53, 57 (Jun. 28, 2011).

we have also seen things in the last thirty years—Rwanda, Yugoslavia, Bosnia—where you could say that you need sometimes to develop law in order to face the new threats, the new realities that we have. I mean, that is why UK and Denmark are part of the humanitarian intervention doctrine.<sup>46</sup>

So states sometimes accept rules as law, not because they believe they are already law or already reflect general state practice, but because treating the rule as law and inviting other states to do so as well might make it law. On the ILC's view, this approach is either self-defeating, if carried out openly, or duplicitous, if carried out secretly. But in fact it is neither. It is not self-defeating because a state can choose to treat a rule as law without believing that states generally treat it as law. And it is not duplicitous so long as states understand that statements that a rule *is* law may describe an existing fact or, instead, express endorsement of a rule and invite similar endorsement from others. In this way, the semantics of customary legal discourse may differ from its pragmatics. States may *say* that a rule is law, but what they are *doing* is expressing and inviting endorsement of the rule.

Raz distinguished two types of legal statement. Legal statements assert that “the law is X,” “legally, you ought to Y,” “legally, you have a right to Z,” and so on. Such legal statements typically express belief that the asserted rule, right, or obligation exists and that the truth conditions of the statement are satisfied. According to Raz, *committed* legal statements also express moral endorsement of a rule's content, while *detached* legal statements do not. Committed legal statements are typical of legal officials justifying their conduct by reference to the law, while detached legal statements are typical of lawyers advising clients of legal risks as well as legal scholars describing or evaluating existing law.

Customary legal discourse apparently features a third type of legal statement, which expresses endorsement of a rule's content but does not express belief that the rule currently exists as law. Presumably, the Danish and U.K. officials would not withdraw their statement that, legally, unilateral humanitarian military intervention is permissible, when confronted with evidence that the truth conditions for that statement are not satisfied. At most, they might rephrase their statement to “we take the position that ...” or “it is our view that ....” These formulations cancel the implication that these legal statements are intended to express belief that their truth conditions are satisfied. They let interlocutors know

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<sup>46</sup> Monica Hakimi, Katrina Cooper, Paul McKell, Asif Amin and Patrick Luna, The Use of Force Against Non-State Actors, Proceedings of the Annual Meeting (American Society of International Law), April 4–7, 2018, Vol. 112 (April 4–7, 2018), pp. 45-59.

that the speaker is not ignoring or denying relevant evidence, or attempting to mislead or bluff. Instead, the pragmatic function of such statements is to invite others to endorse the asserted content, thereby arriving at a shared moral view that can be accepted as law.<sup>47</sup>

This is an odd linguistic convention, to put it mildly. But the participants in customary legal discourse seem to accept that legal statements that express endorsement but not belief are ‘in good order’ within their community.

Perhaps the divergence between the semantics and pragmatics of customary legal statements is inevitable. While states seldom make customary law claims they know to be false, they routinely make customary claims they cannot know to be true. The social facts that ground the existence and determine the content of customary legal rules—the practices and attitudes of a representative majority of states—are seldom fully accessible to anyone. When states say ‘customary international law provides X’ they can seldom prove that their assertion’s truth conditions are satisfied. They make such assertions hoping that the response of other states will prove them right. Whether their assertions were true at the time they were made, or were made true by the responses of other states, will never be known.

On this view, epistemic uncertainty regarding customary rules is not a defect but part of the law’s design. Were the social facts underlying customary rules fully known, the dynamics of customary international law would grind to a halt. Where

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<sup>47</sup> In this respect, customary legal discourse recalls Kevin Toh’s view that legal statements express plural acceptances of norms:

we can think of the speaker and the audience as both interested in and aiming at a joint acceptance of a set of fundamental norms, and interested in initiating and maintaining interactions with each other on the shared normative bases. Each can be seen as finding some range of fundamental norms acceptable, and each can be seen as considering the fact that a particular norm within his range is acceptable to others as counting in favor of accepting that particular norm. When each person’s commitments to norms are suffused with the aim of achieving joint acceptances of norms in this way, then at least in some cases, a speaker should be able to make a pitch for some norms even in the absence of pre-existing joint acceptances of those norms, with an expectation, or at least a hope, that others will take him up on the offer and thereby realize together with him a joint norm-acceptance. And his acceptances of any such norms would be maintained only when there is a sufficient uptake, or at least a genuine prospect of such, on the part of his audience.

Kevin Toh, *Legal Judgments as Plural Acceptances of Norms*, in *Oxford Studies in Philosophy of Law*: Vol. 1, 119 (Leslie Green and Brian Leiter eds, 2011) (“In other words, the norm-acceptances that are suffused with the aim of achieving joint acceptances of norms are commitments to norms that are conditional on the relevant audience having or developing commitments to the same norms”). A state engaged in customary legal discourse resembles “[a] person who proffers a particular normative position and invites his audience to take up the same position, and at the same time displays his willingness to withdraw that proffering should the relevant audience not (sufficiently) take up his position.” Such a state “cannot be characterized as browbeating or otherwise goading his audience,” or deceiving or manipulating them.

these social facts are uncertain, states are free to assert that a rule has a specific content as well as legal force, accept it as a guide to their own conduct and their responses to the conduct of others, and invite other states to so accept it as well. No one can say whether, in these cases, states are mistaken or lucky, finding law or making law. To invite a favorable response, states pair legal claims with moral claims that the asserted rule reflects shared values and community interests. These legal and moral claims say the law is as it should be, but often have the effect of making the law as it should be. In this way, the inner logic of customary international law is also a doubly moral logic.

### **III. Legal Reasoning and International Courts**

Raz understood legal reasoning broadly, as reasoning from legal premises. Legal reasoning can be quite complex, involving defeasible inferences and conflicting doctrines. Broadly speaking, legal reasoning links true legal premises with true factual premises to yield true legal conclusions. To take the simplest example:

Legally, all As have a right to X.  
Factually, F is an A.  
Therefore, legally, F has a right to X.

In contrast, legal reasoning links true legal premises with true moral premises to yield justified legal conclusions. To again take the simplest example:

Legally, all As have a right to X.  
Morally, G is equivalent to an A.  
Therefore, legally, G has a right to X.

Legal justification that relies on moral premises does not establish legal truth. The conclusion of such legal reasoning may not reflect existing law. According to Raz's sources thesis, the existence and content of legal rules depends on social facts, not moral facts. So legal reasoning that relies on moral premises cannot establish what the law is; it can only establish what the law ought to be. As Raz explains, "If the justified statement is not a true statement of law, the justification provides a reason for changing the law so as to make the justified statement true."<sup>48</sup>

Legal reasoning that relies on moral premises establishes what the law ought to be from the law's point of view. The law's point of view is the point of view of

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<sup>48</sup> Raz, *Legal Rights*, 265. Id. ("legal rules constitute legal reasons for developing the law in certain ways").



someone who accepts the law's claim to legitimate moral authority, and therefore accepts that legal rights and obligations are moral rights and obligations. Such a person will accept that true legal premises are morally sound. So true legal premises and true moral premises will yield true moral conclusions. Legal reasoning is a form of moral reasoning, that accepts law's moral claims as true and reasons from them to legal conclusions that are morally justified from the law's point of view. The result of such legal reasoning is *lex ferenda*—the law that ought to be born out of the law that exists, from the moral commitments of the law itself.

States regularly engage in legal reasoning that relies on moral premises when developing customary international law. Since customary rules reflect a shared moral view of how states should act, legal reasoning from true legal and moral premises will establish the moral conclusions to which states are rationally committed. The legally justified conclusion may not yet reflect the shared moral view of states, but it reflects the moral view that states ought to share given their own moral commitments.<sup>49</sup> This form of legal reasoning provides an especially powerful invitation to other states to share the new moral view and accept it as customary law.

What about courts? According to Raz, domestic courts engage in both forms of legal reasoning. When domestic courts reason soundly from legal and factual premises, they identify the legal rule that applies to the case. When domestic courts reason soundly from legal and moral premises, they identify the rule that ought to apply to the case. They then apply that rule to the case, thereby establishing it as a legal rule. The legal rule they make in a given case is binding on the parties before them. Doctrines of precedent may then require the courts to apply the new legal rule to future cases. Domestic courts enjoy a directed legal power to make law that is justified by legal reasoning. This narrow law-making power contrasts with the broad law-making power of a legislature to make law based on non-legal (moral and factual) reasoning.

The International Court of Justice has the legal power “to decide in accordance with international law such disputes as are submitted to it,” as well as the legal duty to “apply” existing conventions, customs, and general principles.<sup>50</sup> In principle, legal reasoning that depends on moral premises could be considered in accordance

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<sup>49</sup> Raz, Legal Rights, 259 (“That the law is a system of practical reasoning means no more than that it follows from this fact that belief in the normative force of some of the legal rules commits one to belief in the normative force of some of the others”).

<sup>50</sup> ICJ Statute, art. 38. The Court also enjoys “the power ... to decide a case *ex aequo et bono*, if the parties agree thereto.” Arguably, this shows that the Court can enjoy a directed legal power to make law (for the parties) on the basis of moral considerations.

with international law, and the application of existing law need not preclude the application of moral considerations. Parties could consent to have their disputes decided by legal reasoning that includes moral premises, at least when necessary to avoid a *non liquet*. After all, states may agree to the court deciding their case *ex aequo et bono*, which is itself a mixture of legal and moral reasoning. The court's decision would bind the parties to the dispute, but the new rule announced by the court would not bind other states (or even the parties apart from the dispute).

In practice, the ICJ does not seem to assert the legal power to make law through legal reasoning that relies on moral premises. Arguably, the Court has disclaimed this power, declining to infer legal rights, interests, or obligations from humanitarian considerations or moral principles.<sup>51</sup> The ICJ purports to reason exclusively from legal and factual premises to legal conclusions. The ICJ “states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.”<sup>52</sup>

We should be skeptical of this self-presentation, for reasons that Raz explains well. The meaning and application of legal rules is always partially underdetermined due to the vagueness and open texture of legal sources as well as unresolved conflicts between legal rules.<sup>53</sup> At the same time, it is “an important and well-established principle that the concept of *non liquet* ... is no part of the Court's jurisprudence.”<sup>54</sup> If the Court is truly committed to reach a legal conclusion in every case that comes before it, then its legal reasoning will have to reach beyond legal and factual premises. Since moral reasons apply to the Court independently of the law, we should expect the Court to engage in moral reasoning where the law is unclear. The alternative would be to resolve disputes in a way that is neither legally nor morally defensible.

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<sup>51</sup> South West Africa (Liberia v. South Africa), Judgment, ICJ Reports (1966) 6, at 34, paras 49–54 (finding that the “sacred trust of civilization” was a moral principle with no residual juridical content beyond the positive rules of the mandate system).

<sup>52</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226, at 237, para 18. See also Fisheries Jurisdiction (Federal Republic of Germany v. Zeeland), Merits, Judgment, Z.C.J. Reports 1974, p. 175, para 45 (“the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down”).

<sup>53</sup> Raz, Legal Reasons, Sources, and Gaps, in The Authority of Law (2<sup>nd</sup> ed. 2009). Raz rejected the possibility of gaps in the law arising from legal silence. For a contrary view, see Eugenio Bulygin, The Silence of the Law, in Essays in Legal Philosophy (2015).

<sup>54</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996) 226, at 591, para 36, Dissenting Opinion of Judge Higgins.

According to Stephen Talmon, “the Court resorts to deductive reasoning in order to avoid a non liquet” when inductive reasoning from evidence of state practice fails to provide a complete legal answer to a question before the Court.<sup>55</sup> Talmon distinguishes between normative, functional, and analogical deduction. Each type of deduction leaves room for moral considerations to enter legal reasoning. It is hard to conclusively show that the ICJ relies on moral premises, in part because its reasoning is often quick and conclusory. But a brief survey suggests that it may.

The ICJ engages in normative deduction when it infers new rules from existing rules. In the *Corfu Channel* case, the Court found that coastal states have a peacetime legal obligation to warn ships approaching minefields in their territorial sea, inferring this obligation from:

certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.<sup>56</sup>

Plausibly, the Court relied on moral premises (“elementary considerations of humanity”) to reason that the peacetime rule would be legally justified.

The ICJ engages in functional deduction when it infers the existence or content of customary rules from the function of an official or an organization.<sup>57</sup> But the effective performance of an official or organizational function may conflict with other values. As Raz explained, settling conflicts between values “cannot be done other than by the exercise of moral judgment.”<sup>58</sup> In the *Arrest Warrant* case, the

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<sup>55</sup> Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion* 26 EJIL 417, 423 (2015). Talmon draws a related distinction between deduction from “existing legal rules or principles” and deduction that relies on “postulated values.” *Id.* at 441:

Indeed, it could be argued that rules arrived at by deduction are not ‘created’ by the Court at all. Like implied powers or implied (contract) terms, there are ‘implied rules’ – that is, rules that are already contained in existing rules or principles and that may be arrived at by deductive reasoning. These implied rules may be regarded as ‘direct and inevitable consequences’ of existing rules. Thus, the deductive method is also compatible with the consent principle in international law. The implied rules are covered by states’ consent to the existing rules or principles from which they are deduced. In this sense, deduction is the logically consistent extrapolation of the established body of customary international law. It is, however, important that new rules of customary international law are deduced only from existing legal rules or principles and not from postulated values. Otherwise, the Court would simply emulate the classical theorists with their naturalistic and self-assured deductions.

<sup>56</sup> *Corfu Channel* (United Kingdom v. Albania), Merits, ICJ Reports (1949) 4, 22.

<sup>57</sup> Talmon, 425.

<sup>58</sup> Raz, *Inner Logic* 243.

Court concluded that the mere issuance and circulation of an arrest warrant against a foreign minister was likely to hinder the effective performance of their functions, and therefore violated their immunity and inviolability.<sup>59</sup> At the same time, in *United States Diplomatic and Consular Staff in Tehran*, the Court observed that “the inviolability of the members of a diplomatic mission ... does not mean ... that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.”<sup>60</sup> Plausibly, the Court found that the rules governing immunity and inviolability defeated the values underlying criminal prosecution, but did not defeat the values underlying crime prevention.

The ICJ engages in analogical deduction when it infers the existence and content of one legal rule from the existence and content of a similar or related rule.<sup>61</sup> For example, in the *Bosnian Genocide* case, the Court saw “no reason to make any distinction of substance” between ‘complicity in genocide’ under the Genocide Convention and ‘aid or assistance’ under the law of state responsibility, concluding that a state is complicit in genocide if its agents furnish aid or assistance to its commission.<sup>62</sup> Plausibly, the Court reasoned that the two rules reflect the same standard of moral responsibility, and should therefore be assigned the same content.

As Raz observed, “questions of how much evidence is required to establish a point of fact may well be a moral question, a point familiar to anyone who reflects on the difference in the level of proof required by law in criminal and civil cases.”<sup>63</sup> Frederic Kirgis famously argued that the ICJ varies its standard of proof for the existence and content of customary rules along a sliding scale. The morally better the rule, the less inductive evidence the Court requires, and vice versa.<sup>64</sup> Plausibly,

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<sup>59</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Reports (2002) 3, para 53 (“to determine the extent of [the] immunities [enjoyed by a foreign minister], the Court must ... first consider the nature of the functions exercised by a Minister for Foreign Affairs”).

<sup>60</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports (1980), 3, para 86. See also ILC, Draft Articles on Diplomatic Intercourse and Immunities with commentaries, Yearbook of the International Law Commission, 1958, vol. II, at 97 (“This principle [of the inviolability of the diplomatic agent] does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.”)

<sup>61</sup> Talmon, 426.

<sup>62</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Rep 43, paras. 419–20.

<sup>63</sup> Raz, Inner Logic 244.

<sup>64</sup> Frederic L. Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146, 149 (1987).

Exactly how much state practice will substitute for an affirmative showing of an *opinio juris*, and how clear a showing will substitute for consistent behavior, depends on the activity in question and on the reasonableness of the asserted customary rule. It is instructive here to focus on rules that restrict

the Court relies on moral premises when it reasons its way through questions of legal proof.

Finally, legal reasoning that depends on moral premises plays another important role in international adjudication. Legal reasoning can show that existing legal rules, independently established by the social sources of law in a legal system, also justify one another. The content of one rule justifies the content of the other, together with factual premises and, perhaps, moral premises as well. In *Jurisdictional Immunities of the State*, the Court emphasized that “the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States.”<sup>65</sup> The point was not to establish the existence of the rule of State immunity, but to show that it is legally justified by its a logical relationship with “one of the fundamental principles of the international legal order.” Since committed participants in international legal practice presuppose the moral merits of sovereign equality, they are rationally committed to accept the moral merits of state immunity.

This survey may tell us something about why the Court's influence exceeds its formal legal authority, developing international law without compulsory jurisdiction or a doctrine of precedent. When the Court reasons from legal premises that reflect the shared moral view of states, we should expect states to endorse what their own moral commitments entail. We should expect states to take up the Court's legally justified conclusions and make them legally valid. They may adopt the Court's formulation of a customary rule as their shared moral view and accept it as law. Or they may establish their agreement with the Court's interpretation of a treaty through subsequent agreement or practice. The Court cannot make law, but it can show states the law they ought to make. In this way, the Court participates in the process of legal change within a horizontal and decentralized yet dynamic legal order.

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governmental action. The more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable. The converse, of course, will be true as well. If the activity is not so destructive of widely accepted human values, or if the asserted rule seems unreasonable under the circumstances, the decision maker is likely to be more exacting in finding the necessary elements for the rule. A reasonable rule is always more likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.

See also Talmon, 427 (“Where a rule of customary international law is logical, because it can be deduced from an existing underlying principle, the burden of proving the rule by way of inductive reasoning is proportionally diminished. In essence, a logical rule requires a smaller pool of state practice and *opinio juris*.”)

<sup>65</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Reports (2012) 99, para. 57.

## Conclusion

In this paper, I have argued that states exercise a legal power to develop treaty law through subsequent agreement and practice directed by the general rule of interpretation. I have argued that customary international law develops under the direction of moral considerations, which international law does not exclude so that customary law can claim the legitimate moral authority that all law necessarily claims. And I have argued that international courts plausibly engage in legal reasoning that relies on moral premises in order to formulate legally justified rules that states make legally valid through their uptake of court decisions. In all these ways, international law provides for its own development, changing not through external political interventions but through its own inner logic.

Raz thought that “at the end of the day” talk of the inner logic of the law “has to be rejected as a distorting exaggeration.”<sup>66</sup> Directed powers to develop the law “require the courts to use extralegal considerations in developing the law. They refer them to moral considerations and thus open them to the influence of social and political considerations.” So the inner logic of the law is not an insular logic. Legal reasoning is not autonomous or *sui generis*, but part of practical reasoning more generally. This is not surprising. Raz always said that legal systems are open systems, which give legal effect to non-legal norms. It is law’s openness to moral considerations that enables legal systems to provide for their own development. The inner logic of the law is a moral logic, and this explains the dynamism at the foundation of international law.

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<sup>66</sup> Raz, *Inner Logic*, 253.