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THE CONCEPT OF CUSTOMARY INTERNATIONAL LAW

KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW*. Dordrecht: Martinus Nijhoff Publishers, 1993, 2nd rev. ed. xxi + 192 pp.

*Reviewed by Daniel M. Bodansky**

The concept of customary international law has long perplexed legal scholars. According to Manley O. Hudson, even the drafters of the International Court of Justice and International Law Commission statutes "had no very clear idea as to what constituted international custom."¹ In his recently revised book, *Custom in Present International Law*, Karol Wolfke sets out to "clarify the reigning confusion in the theory and practice of [customary international] law."² Wolfke's work, first published in 1964 and recently revised, has received justifiable praise for its clarity, rigor, and concision. That he fails in his ultimate task reflects not so much a personal failure as a failure of the international law tradition within which the book is embedded.

Part I of this review surveys the range of possible approaches to customary international law, in order to locate Wolfke's work intellectually. What questions does Wolfke address, and in what manner? Part II outlines Wolfke's particular account of customary international law. Part III critiques Wolfke's approach, and Part IV concludes by evaluating the style of international law scholarship of which Wolfke's work is representative.

I.

Although the concept of customary international law is elusive, some norms have clearly emerged internationally through a customary lawmaking process. The law of diplomatic immunities is one of the best examples. Until the entry into force of the Vienna Convention on Diplomatic Relations³ thirty years ago, diplomatic immunities rested

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1. *Summary Records of the Second Session*, [1950] 1 Y.B. INT'L L. COMM'N 6, U.N. Doc. A/CN.4/SER.A/1950.

2. KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* xiv (2d rev. ed. 1993).

3. Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (*entry into force* Apr. 24, 1964).

almost entirely on custom. Nevertheless, states recognized diplomatic immunities as binding norms — as rules stating what they “ought” to do, even when inconvenient or unpopular. Indeed, over the years, quite elaborate rules of immunity developed, defining the persons or things covered, the extent of their immunities, and the permissible actions of the receiving state.⁴

How should we approach the study of customary international norms such as diplomatic immunity? One possibility is to focus on the causal question: what economic, social, psychological, and political processes explain the emergence of customary norms? To what extent, for example, do customary norms emerge as a result of calculations by states of rational self-interest? To what extent are they imposed by powerful states (what international relations scholars refer to as “hegemons”)? To what extent do they reflect the psychological need for pattern and regularity? Recently, political scientists — and, in particular, rational choice theorists — have devoted a good deal of attention to the problem of how and why social norms emerge in the absence of central governmental authority. Robert Axelrod, for example, has used game theory to explain the development of informal rules of behavior in trench warfare during World War I.⁵ Similarly, Edna Ullmann-Margalit⁶ and Jon Elster⁷ have attempted to rationally reconstruct how norms might emerge through processes of social interaction. Legal historians and legal anthropologists also have much to teach international lawyers about customary law.⁸ Ultimately, the development of more convincing causal explanations for the emergence of customary norms may help us determine those areas of international relations where customary law can play a useful role and those areas where it is unlikely to do so. Game theory suggests, for example, that customary rules are likely to emerge in situations where cooperative behavior can be reciprocated.

A second approach to customary law is to ask, why *should* states comply with customary norms? In contrast to the explanatory question of why norms emerge, this question is normative rather than empirical;

4. *E.g.*, ERNEST SATOW, A GUIDE TO DIPLOMATIC PRACTICE chs. XVI, XVII (Neville Bland ed., 4th ed. 1957).

5. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 73–87 (1984).

6. EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977).

7. JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER (1989).

8. *See, e.g.*, MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985); SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (1978).

it demands an inquiry into the basis of legal obligation.⁹ With respect to international law, this inquiry is of more than philosophical interest. In contrast to Western domestic legal systems, where compliance typically depends on habit or fear of sanctions and the authority of the law generally goes unquestioned, compliance with international law depends far more on what Thomas Franck calls its "legitimacy" — that is, on the recognition by states that they *should* comply.¹⁰

These two approaches to customary international law exemplify what Max Weber characterized as the sociological and ethical perspectives on law.¹¹ Both require us to step outside the legal system — the sociological approach in order to determine the causes of legal norms, the ethical approach to evaluate these norms on the basis of extra-legal standards.

Wolfke, in contrast, is firmly planted *within* the universe of international law. While he recognizes that "multifarious social or physical phenomena, like expectations, fears, interests and so on" may play a causal role in to the "custom-creating process" and hence should be "of interest to legal science and practitioners,"¹² he considers them outside the scope of his inquiry because of their extra-legal character. Similarly, he addresses only briefly the "basis of the binding force of customary rules,"¹³ which he concludes "boils down to at least presumed acceptance of a practice as an expression of law."¹⁴ Apparently, he regards it as self-evident that states should comply with customary norms that they have (at least presumably) accepted. This, however, glides over a host of troubling questions: even if *express* consent can be a basis of obligation, why should the same be true of *presumed* consent?¹⁵ For example, why should a newly-independent state adhere to a putative customary norm regarding expropriation of alien property that the state in question had no part in creating and has never expressly accepted? Consent as a basis of obligation is particularly problematic in the area of international relations, given the lack of a clearly identifiable, continuing "self" that is able to give its consent; why should the people or govern-

9. See, e.g., JAMES LESLIE BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS* (Hersch Lauterpacht & C.H.M. Waldock eds. 1958); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986).

10. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

11. See, e.g., ANTHONY T. KRONMAN, *MAX WEBER* 7-14 (1983).

12. WOLFKE, *supra* note 2, at 48-49; see also *id.* at 58.

13. *Id.* at 160-68.

14. *Id.* at 161.

15. See, e.g., LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1988); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979).

ment of a state be bound by what their predecessors acquiesced in several centuries ago? These are difficult questions, about which much could be said. But Wolfke sidesteps them on the grounds that they “do not belong to the doctrine of international law *sensu stricto*, but to what is called its philosophy.”

Wolfke’s approach to customary international law instead exemplifies what Weber refers to as “dogmatic jurisprudence” — that is, taking law as a given (a “dogma”) and seeking to clarify its meaning and to employ it as an evaluative standard.¹⁶ The object of Wolfke’s inquiry is not the content of customary rules — the primary rules relating to diplomatic immunities, recognition, the use of force, and so on — but the meta-rules regarding the elements, formation, and ascertainment of custom — what H.L.A. Hart called the “secondary rules” governing how law is formed, changed, and applied (and which Hart did not believe existed for “primitive” legal systems like international law).¹⁷

II.

Wolfke generally accepts the mainstream account of customary international law. He rejects the “single element” theories,¹⁸ which attempt to reduce custom solely to state practice¹⁹ or *opinio juris*.²⁰ In his view, customary rules have both a material and a subjective element; both state practice and *opinio juris* are needed to create a customary norm.²¹ Wolfke also rejects proposals to take a more expansive view of how customary law can be created — for example, through the activities of inter-governmental and non-governmental organizations. Wolfke shares the “sober opinion” that U.N. General Assembly resolutions do not directly create customary law (because they constitute neither state practice nor *opinio juris*), but instead have only an indirect effect on the customary lawmaking process.²²

For Wolfke, “the essence of customary law lies in the legalization, mainly by means of acquiescence, of certain factual uniformity in inter-

16. KRONMAN, *supra* note 11, at 10–11.

17. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

18. G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983).

19. See, e.g., Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 *BRIT. Y.B. INT’L L.* 127 (1937).

20. See, e.g., Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?* 5 *INDIAN J. INT’L L.* 23, 36 (1965) (“international customary law has in reality only one constitutive element, the *opinio juris*”).

21. WOLFKE, *supra* note 2, at 40–51.

22. *Id.* at 83–84.

national relations."²³ The factual uniformities relate to state practice; the transformation of these uniformities into legal norms depends on their acceptance by states as law.

In Wolfke's view, "a true custom is not intentionally created by anybody."²⁴ For him, this is one of the main features that distinguishes customary norms from treaties. The process of customary law formation is "continuous." "It arises in the course of a more or less complex process in the sphere of international social phenomena."²⁵ He notes:

An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.²⁶

Although many mechanisms may produce customary norms, Wolfke seems to find particularly convincing the McDougalite characterization of customary law formation as "a continuous process of raising mutual claims and the adoption of an attitude to such claims by competent state organs."²⁷

Analyses of customary international law have tended to fall along a spectrum, with natural law at one pole and positivism at the other. The natural law approach views customary rules as a reflection of preexisting duties or rights; customary rules are binding on all states, in contrast to treaties, which are specific obligations between contracting states. Positivism, on the other hand, views both custom and treaties as based on will; the only difference is that treaties reflect the active and express will of states, whereas with customary law the "will is most often reduced to a mere tacit acquiescence."²⁸

Although Wolfke disclaims a desire to "deal in detail with . . . the old dispute between positivists and naturalists of various schools and shades,"²⁹ his work reflects a decidedly positivist approach. In his view, the "core" of "the whole international reality of today" is that states are "bound exclusively by their own sovereign will."³⁰ Consequently, all of international law, including customary law, "depends formally and

23. *Id.* at 164.

24. *Id.* at 52.

25. *Id.*

26. *Id.* at 53.

27. *Id.* at 56.

28. *Id.* at 97.

29. *Id.* at 160.

30. *Id.* at 162.

factually on the consent of states."³¹ In this regard, he quotes Waldock approvingly: "[T]he ultimate test [of customary international law] must always be: is the practice accepted [by states] as law. . . . Their recognition of the practice as law is in a very direct way the essential basis of customary law."³²

Wolfke's positivist approach has clear implications for many of the standard topics relating to customary law, such as *opinio juris*, "particular" customary law, persistent objection, and *jus cogens*. *Opinio juris*, in Wolfke's view, boils down to passive consent — that is, acceptance or acquiescence. Wolfke strongly criticizes interpretations of *opinio juris* as a feeling of duty or right, which reflect a naturalist view that "practice is only a manifestation or evidence of a certain already existing duty or right."³³

Wolfke's voluntarist approach also leads him to accept the possibility of "particular" customary international law, the customary norms that apply only to a limited group of states.³⁴ Wolfke regards the existence of such norms as "no longer controversial."³⁵ In his view, a customary rule binds only those states that have accepted it. While some rules have been accepted by all states and represent general international law, many customary rules have been accepted by only a limited number of states. Moreover, contrary to writers who draw a sharp distinction between particular and general customary law,³⁶ Wolfke argues that there is no "essential" difference between the two, because both depend on consent.³⁷

Wolfke accepts almost as a matter of course the persistent objector doctrine. While acceptance by states of a customary norm is generally presumed, that presumption can be overcome if a state "has consistently refused to join a practice or to accept it as law."³⁸ In such cases, the persistently objecting state is not bound.

Finally, even norms of *jus cogens* depend on consent and recognition. As a result, Wolfke questions whether, in the context of customary

31. *Id.* at 167.

32. *Id.* at 50 (quoting Sir Humphrey Waldock, *General Course on International Law*, 106 RECEUIL DE COURS 1, 49 (1962)).

33. *Id.* at 46.

34. Some writers use the alternative term "special" customary international law. See, e.g., Anthony A. D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969).

35. WOLFKE, *supra* note 2, at 88.

36. D'AMATO, *supra* note 34, at 223.

37. WOLFKE, *supra* note 2, at 90.

38. *Id.* at 66.

law (as opposed to treaty law), the concept of *jus cogens* has any clear meaning.³⁹ Given the requirement of consent, *jus cogens* need not bind states universally; norms of *jus cogens* may be accepted by only a particular community of states.

Given Wolfke's positivist orientation, one might expect him to equate custom with tacit agreement. In his view, however, customary law "differs essentially" from an agreement.⁴⁰ As he argues:

[T]he formation of international custom . . . requires the existence of an already factually arranged area of co-operation between states in the form of qualified practice [In contrast], the international conventional rule is created by an express active will to regulate a certain area of reality not yet arranged according to the needs and intentions of the parties. . . .

The most essential difference between customary and conventional rules lies, it seems, precisely in different elements of will and reality, and their proportions in the two kinds of rules. While in the event of the creation of a conventional rule, the will of the subjects is operative — that is, it aims at changing the *status quo*, and is at the same time always clearly manifested, in the event of customary law, such will is most often reduced to a mere tacit acquiescence in the practice. The element of reality to which both kinds of rules refer is also different. Whereas the creation of a conventional rule refers, in general, to an area of reality not yet regulated according to the needs and wishes of the parties, the formation of a customary rule is linked with a reality at least partly arranged in the form of qualified practice.

. . . .

The demarcation zone between customary and conventional rules falls in the [area] where passive toleration of factually regulated reality passes into active will to change the yet unregulated reality.⁴¹

Nonetheless, while Wolfke believes that "factually regulated reality" (*i.e.*, state practice) is what differentiates customary rules from other types of international law, Wolfke denies that there are any "binding, precise, pre-established conditions for custom-creating practice;"⁴² there

39. *Id.* at 91.

40. *Id.* at 96.

41. *Id.* at 96–98 (footnotes omitted).

42. *Id.* at 44.

are no firm requirements of generality, duration, and consistency, as the conventional account holds. "[W]hose behaviour contributes to the practice is not important."⁴³ Nor is the number of states, or the time element, or the amount of practice involved "material,"⁴⁴ nor must the practice be "uninterrupted, consistent and continuous."⁴⁵ Instead, according to Wolfke, the one requirement for state practice is that the "practice must give sufficient foundation for at least a presumption that the states concerned have accepted it as legally binding."⁴⁶ Thus we are brought back to Wolfke's positivist view that consent is the alpha and omega of international law.

III.

In critiquing the standard accounts of customary international law, Martti Koskenniemi has acutely observed that neither the naturalist nor the positivist approach provides an account of custom as a separate type of law. Custom is "constantly in danger of collapsing either into tacit agreement or a naturalistic principle."⁴⁷

Wolfke's positivist approach seems vulnerable to this charge. Although he argues that customary law "differs essentially" from a tacit agreement,⁴⁸ his attempt to distinguish customary from conventional rules is unpersuasive. Treaties and customary rules may arise in different manners, treaties purposively and custom non-purposively, and may thus represent different "material sources" of legal rules. If we ask the question, however, "Why does a rule of international law bind?,"⁴⁹ Wolfke gives the same answer for both treaties and custom. According to Wolfke, the formal source, or the secondary rule, for all of international law, both treaties and custom, is consent.⁵⁰

The standard way of differentiating custom from tacit agreement is to insist that custom has a material as well as a subjective element. Wolfke takes this tack, arguing that custom, unlike agreement, is not a mere assertion of will; it represents "factually regulated reality." In

43. *Id.* at 58.

44. *Id.* at 59-60 ("The conduct of even one state, tacitly accepted as a legal right or duty by another, can lead to the formation of a custom . . .").

45. *Id.* at 60.

46. *Id.* at 44.

47. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 350 (1989).

48. WOLFKE, *supra* note 2, at 96.

49. See KOSKENNIEMI, *supra* note 47, at 351.

50. In his view, states can be "bound exclusively by their own sovereign will." WOLFKE, *supra* note 2, at 162.

Wolfke's account of customary law, however, the material element plays a fundamentally different role than the subjective element. Only the subjective element, tacit consent, has a lawmaking character. In contrast, the material element, state practice, provides merely the historical background, the "raw material," for the emergence of legal rules.⁵¹ In this respect, it is similar to other non-legal factors that may produce law, such as economic and political forces. It is because state practice does not play any essential part in the lawmaking process that Wolfke can conclude that there are no secondary rules establishing the conditions for custom-creating practice.⁵² The only requirement is that state practice must "give sufficient grounds for at least a presumption" of consent.⁵³

Given the centrality of consent to Wolfke's theory and his view that state practice is important only as a means of inferring consent, one would expect him to accept the possibility that international law could be created through verbal acts, U.N. General Assembly resolutions, and the like. In deciding, in a given case, whether these phenomena create legal rules, the only relevant question should be: do they allow a presumption of consent, considering all of the circumstances?⁵⁴

Rather than take this contextual approach, however, Wolfke asserts categorically that verbal acts and U.N. resolutions "do not constitute acts of conduct, nor, even multiplied, any conclusive evidence of any practice."⁵⁵ As he states, "customs arise from acts of conduct and not from promises of such acts."⁵⁶

51. In addition, state practice constitutes the main evidence of customary norms, since, unlike treaties, customary norms are generally unwritten.

52. *Id.* at 44.

53. *Id.* at 51. By emphasizing the centrality of consent, but denying that custom represents simply tacit consent, Wolfke falls into exactly the contradictions described by Martti Koskenniemi:

[Once] we include an internal aspect — *opinio juris* — within custom . . . why do we need *anything more*? Does it not involve inadmissible formalism or utopianism to deny the status of law from a norm which all States consider as valid? But if it is law, what category of law does it come under? If there is no formal treaty, then the only possibility seems to be to regard it as custom. But this destroys the normative distinction between custom and treaties: both arise now from consent. The sole distinction would seem to be the descriptive one: treaties describe consent in written while custom is consent in non-written form. But as non-formal agreements, too, tend to be written down in recommendations, resolutions, "Final Acts" etc., even this ultimate basis for difference seems lost.

KOSKENNIEMI, *supra* note 47, at 361.

54. On virtually every question relating to customary law, Wolfke concludes with the refrain that we must look at all of the circumstances. *See, e.g.,* WOLFKE, *supra* note 2, at 72, 77, 84, 134, 154.

55. *Id.* at 84.

56. *Id.* at 42.

In drawing this sharp distinction between verbal and physical acts, Wolfke could conceivably be making two alternative claims. First, he could be making a definitional claim about what the term "custom" means, similar to the criticism sometimes made of "instant custom,"⁵⁷ namely that it is a contradiction in terms. Even if we accept Wolfke's terminological point, however, it would not address the substantive question of whether an international legal rule can emerge through verbal rather than physical acts. If the term "customary law" does not encompass such rules, then we simply need to define another category of law that does. One writer, for example, has suggested the category, "declarative international law."⁵⁸

Alternatively, Wolfke could be making the empirical claim that international legal rules have not, in fact, emerged from verbal practice or that verbal acts are a less reliable indicator of future action than physical acts. His assertion that "the very essence of every kind of custom . . . for centuries has been based upon material deeds and not words"⁵⁹ suggests such an interpretation. If this is Wolfke's argument, however, he provides no supporting evidence. Moreover, even if the argument were historically true, it would not preclude the emergence of a new method of international lawmaking based on verbal acts. Some would argue that the development of human rights law in the period since World War II represents exactly such a development.

Wolfke's consensual view is open to other criticisms as well. While for treaty law consent has a tangible quality by virtue of the elaborate rules about who may give consent and in what manner,⁶⁰ the meaning of consent is much less clear in the context of customary lawmaking. When the United States consents to a treaty, a specific person must establish that she has "full power" to sign the treaty on behalf of the United States. But when a mid-level State Department official decides not to protest a foreign action, in what sense has the "United States" accepted a customary international rule? Wolfke writes that "the will of state," though a "metaphor," is "something very real in international relations," and that the application of this notion "does not present particular difficulties."⁶¹ But he does not explain where we should look

57. See Cheng, *supra* note 20.

58. Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991). Wolfke himself recognizes the possibility of intermediary rules, between treaty and custom. WOLFKE, *supra* note 2, at 100-04.

59. WOLFKE, *supra* note 2, at 42.

60. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 7, 11-15, 8 I.L.M. 679, 683-85.

61. WOLFKE, *supra* note 2, at 47.

to find this "metaphoric" entity, or the ontological basis for characterizing it as "real."

Wolfke also makes no attempt to address the "problem cases" for the positivist approach — that is, cases where international norms are applied even in the apparent absence of consent. For example, how does the consensual approach account for the Nuremberg Principles, or the application of anti-apartheid norms to South Africa? On what basis can we apply customary norms of humanitarian law to the Bosnian Serbs? Wolfke's abstract discussion does not provide the answers to concrete questions such as these.

IV.

Notwithstanding these shortcomings, *Custom in Present International Law*, now in its second edition, has become one of the leading works on customary international law, and not without reason. It is concise and clearly argued and surveys the legal literature on customary international law in a careful, methodical manner. It is a good example of a traditional style of scholarship, which treats international law as an autonomous phenomenon and engages in legalistic interpretations of its meaning and implications. So familiar is this style of scholarship that we tend not to question it. Its value as a means of understanding international relations, however, is open to question.

In large part, Wolfke considers his assertions as empirically based — "this is the way it is," he seems to be saying. He states, in responding to critics of his voluntarist approach:

It is obvious that it is not this or that conception of law which is to blame for unsatisfactory progress in international relations. And changing such a conception cannot of itself improve these relations. . . .

International law, if it is to be a factor of true progress in interstate relations, must be primarily based upon better and better learning and universal understanding of the mechanism of international life⁶²

If Wolfke's aim, however, is to describe the realities of international life — the ways in which legal norms *in fact* emerge, develop, and are applied — then his methodology seems singularly ill-chosen. Wolfke has no interest in empirical data about the actual role that norms play in

62. *Id.* at 168.

international relations. He makes no attempt, for example, to trace the history of how various customary norms have formed, to see what role, if any, consent played. Indeed, he practically never makes reference to any specific customary rules to illustrate or prove his points.

If Wolfke's claims are empirically based, then they should be subject to disproof on empirical grounds, for example, by finding cases where customary human rights norms formed as a result of verbal rather than physical acts or where norms were applied against non-consenting states (for example, the application by the United States of the moratorium on commercial whaling, even against states such as Norway that have expressly opted out). But it seems doubtful that Wolfke would consider his claims to be subject to this type of empirical testing.

Instead of studying the realities of interstate relations, Wolfke engages in exegesis of legal texts — in particular, decisions of the International Court of Justice, reports of the International Law Commission, and writings of international law scholars. His arguments about custom are best understood not as empirically based claims, but as interpretations of what judges, arbitrators, and other legal scholars have said. This perhaps explains the abstractness of his style, which in an empirical study would be curious.

Wolfke's audience is other international lawyers, for whom the texts that he cites have an "authoritative" character. His work is part of the ongoing debate within the legal community about the sources of international law,⁶³ for example, whether the traditional sources should be expanded to include U.N. General Assembly resolutions, a debate that has generally taken place within the closed world of international law where legal texts serve as the main source of authority.

Is this debate of interest to outsiders such as international policymakers? Why should they care what Wolfke says about the proper interpretation of international custom? In the domestic arena, exegeses of legal materials are of far more than academic interest, given the enormous influence wielded by the legal community. If the interpretive community of international lawyers to whom Wolfke's arguments are addressed — judges, arbitrators, legal advisers, and scholars — had similar influence (if they decided, for example, a significant number of disputes), then what they think about international custom would be of practical interest, even to outsiders with no interest in legal exegesis *per se*.

63. See, e.g., CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* (1965); VAN HOOF, *supra* note 18; Jose E. Alvarez, *Positivism Regained, Nihilism Postponed*, 15 MICH. J. INT'L L. 747 (1994) (book review).

At present, however, comparatively few international cases are referred to adjudication or arbitration or are otherwise decided directly by members of the international law community. There are, of course, a few niches where the role of legal decision-makers is substantial, such as in the resolution of investment disputes through arbitration. Over time, these niches may grow, and, consequently, the importance of traditional legal exegesis. Currently, however, to confuse these rare cases with the more general patterns of international relations would be a serious distortion. And, as a result, the "dogmatic" style of scholarship, based on the exegesis of authoritative legal texts, often seems beside the point. This style of scholarship is second nature to international lawyers, as a result of their training in national legal systems. But international society differs fundamentally from national society, and the same style of legal scholarship is not necessarily appropriate for both. More than any other factor, the focus on legal exegesis, in a setting where legal institutions play a comparatively small role, has led many to view international law as irrelevant and sterile.

Wolfke's lawyerly study of custom is a good example of its kind. In addition, however, we need much broader studies of the role of customary norms in international relations. Wolfke says in his preface that his object is "to ascertain what conception of customary international law might be recognized as generally accepted in contemporary international society."⁶⁴ But he examines only the conception of customary international law recognized by international courts and legal scholars. What we need to ascertain is not merely what international lawyers think about the concept of custom, but how custom actually operates. That, however, would require a different sort of study.

64. WOLFKE, *supra* note 2, at xiv.