

Foreword

The tradition of thought associated with international law is not held in public esteem, despite a literature that extends back several centuries. Somehow the popular imagination regards the failure to achieve a just and stable system of world order as proof of the impotence of international law. And to some extent the rhetoric and moralizing pretensions of many international lawyers have reinforced unrealistic expectations and heightened inevitable disappointments that result from the outbreak of war, the evidence of mass privation, and the reports of brutal repression. Severe limits are placed upon the capacities of international law by the organizational and political setting within which it operates. Power and authority remain fragmented--dispersed among sovereign states and concentrated in a few rich and powerful national societies. Individual states compete for space, resources, and influence, and rely upon threats and the use of force to achieve objectives or protect gains. In such circumstances, law can operate only at the margins, in those situations where the perceived interests of national governments converge to a reasonable degree. The most important legal consequence of the state system is to restrict the scope of effective law to voluntary undertakings of the community and, more controversially, to precedents established by unilateral action of major state governments.

No amount of legal theorizing can overcome the dangerous and destructive consequences that flow from the fact that recourse to violence remains a matter of national discretion. The United Nations has not provided a governmental presence that is capable of giving institutional backing to the legal order. The rapidity of political and technological change encourages governments to challenge old legal rules and proclaim new ones, obliterating, or at least blurring, the distinction between violations and legislative revisions of the law.

Yet there is at the same time an awareness that reliable administration of human affairs increasingly calls for forms of legal order extending beyond national frontiers. International business operations and the scale of contemporary technology disclose fundamental globalizing tendencies at work in the organization of international life. Similarly, concern about oceanic and atmospheric pollution and the allocation of competing claims to appropriate and conserve off-shore resources generate strongly felt needs for effective legal regimes of administration and control. Furthermore, the hazards of the arms race, the uncertainties of escalatory conflicts, and the destructiveness and expense of conventional weaponry are among the pressures in the war-peace area for more and better law, although these pressures are rarely interpreted by statesmen as generating legal-type claims. It is clear that, in a system of sovereign states, these demands for organized control call for *agreements among governments* crystallized in terms of norms, standards, procedures, and institutions--the stuff of international law.

It is with this kind of general concern that Professor Anthony D'Amato approaches the particularly elusive subject matter of customary international law. He is devoted to strengthening the capacities of international law to serve the needs of men, and has chosen to contribute to this goal by deepening our understanding of one of the basic ways by which some measure of legal order develops out of the multitude of interactions that comprise world affairs. The character of customary international law has long fascinated international lawyers. The explanation of this fascination has to do with the impossibility of providing a satisfactory account of the growth and character of customary rules so long as the inquirer maintains a *static* conception of international

law as a corpus of rules and adheres to a sovereignty-oriented view of the procedure by which legal obligations are created in international affairs. As actors with distinct histories, ideologies, and cultures mingle more frequently on the world level, the traditional image of customary international law seems less and less applicable to the world as it is and to the postulates of statecraft in our times.

The strength of Professor D'Amato's achievements arises, in part, from his clear and pervasive realization that a satisfactory account of customary international law requires a shift away from the largely deductive orientation toward inquiry of the classical jurisprudence of international law. More specifically, this shift involves the acceptance of law as *process* and an understanding of the basis of obligation as *consensus*, that is, the attribution of law to a particular standard of behavior that has wide but not necessarily universal or long-standing support by governments. As Professor D'Amato makes abundantly evident from his careful analysis of leading cases and expert commentaries, this readjustment in jurisprudential orientation involves an acceptance of behavioral patterns as decisive indicators of law-content and a consequent repudiation of conceptual categories selected for their logical coherence, but ill adapted as guidelines for or summaries of governmental practice. In essence, Professor D'Amato has worked out an inductively conceived (or radically empiricist) view of customary international law to supplant the deductively conceived notions that have for so long dominated, confused, and distorted thought about the character of customary international law. He has looked at the actualities of international life and the specifics of decisions by international courts to assess when an obligation of law is present. From this empirical base he draws significant generalizations that pertain to law-formation in all nontreaty contexts. The processes of law-formation depend heavily on the interaction of claim and response in the relations among national governments. This process of interaction, whether it be the extension of coastal sovereignty over the mineral resources of the continental shelf or the revival of the idea of reprisal to punish a government that lends support to a liberation movement, builds precedents, provokes opposition, and results in a pattern of claim-making that will influence other governments confronted by similar problems in the future. The boundaries separating good law from bad law, or even law from nonlaw, are somewhat indistinct, depending upon the extent to which government officials acknowledge the "oughtness" of a claim as a constraint on policy.

Professor D'Amato in his study exhibits an effective combination of erudition and imagination, allowing him to take seriously earlier efforts to explain the basis of customary international law and to put forward his own reinterpretation. In the end, one comes away convinced that here is the most persuasive account of customary international law ever written. It disposes of the rigid theories that preceded his own analysis and it verifies convincingly his own plea for a conception of customary international law that reflects the ways in which governments act and react in situations where ground rules are not embodied in treaty-like instruments of formal and explicit agreement.

The importance of Professor D'Amato's contribution can hardly be overestimated. In a world of hostile and diverse national governments, the prospects for explicit agreement are exceedingly limited. At the same time, the rapidity of technological change builds pressures against the fundamental ordering of ideas embodied in the Westphalian conception of international order. In such a world system, the claims, indulgences, and counterclaims of national governments contribute to the achievement of minimum order in the indefinite interval

between the emergence of a controversy about state behavior and its definitive resolution by means of formal agreement. Third-party decision-makers, for instance, courts, are influenced by many factors in determining whether or not to validate a claim that an action constitutes a customary norm of international law. These factors include the reasonableness of the claim, the effectiveness of its assertion, past practice, the quantity and quality of protest, the overall attitude of the international community, and the compatibility of the claim with prevailing ideas of justice. Of course, this same kind of judgment should be used by the government that asserts its right to act, if for no other reason than that the assertion of the claim is a powerful, almost irresistible, justification for reciprocal claims by other actors. Professor D'Amato in essence has merely made this process of third-party judgment more explicit and systematic, and hence has assured that the process of inquiry by claimant or assessor in the future is more likely to focus on the correct issues of behavioral reality.

In sum, then, Professor D'Amato has given us an authoritative book on a basic topic of international law. His careful reformulation of the topic seems likely to encourage responsible thought and action by statesmen, scholars, and students. The subject of norm-creation on the international level reveals the workings of a highly decentralized authority system which is not bound together by shared experience and common myth. As such, it is an example of a very distinctive type of social order that can be usefully compared in its basic traits with national and tribal societies. Professor D'Amato's focus on the special role of "custom" in clarifying the norms of the ongoing system is a particularly illuminating way to comprehend the uniqueness of international society as a social order. His research, analysis, and overall approach seem relevant to work on norm-formation going on at different levels of social organization and proceeding from such diverse nondisciplinary perspectives as anthropology, psychology, sociology, and political science.

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