

Preface

We are on the threshold of a renaissance of theory in international law. The nuclear age has made it imperative that nations settle their differences and claim-conflicts in the earliest stages, for escalation that may lead to all-out war is no longer a rational policy. (The United States and the Soviet Union today have stockpiled nuclear megatonnage in the firepower equivalent of over a hundred tons of TNT for every man, woman, and child alive in the world.) Yet nuclear weaponry does not itself guarantee that nations, in a burst of enlightenment, will set up a world government having central legislative, executive, and judicial functions. Rather we may expect recurring crises in the foreseeable future in a world where nationalism and parochialism flourish at the expense of global sanity. As a practical matter, we are forced to deal with the nation-state system. Fortunately within that system there is a common element, though it may often appear feeble-international law. This element, as a common language transcending national frontiers, may help nations reduce their disputes to conceptually manageable legal problems. The blunderbuss approach of the old power politics hopefully will give way to legal battles and the clash of persuasive argumentation. Even though military power may remain in the background and from time to time become visible in "trouble spots" in the world, diplomatic bargaining couched in legal terms and legal claim-conflict settlements arranged by foreign office advisers and their legal counsel are increasing daily and are gaining in importance.

As the language of law and legal settlement becomes increasingly significant in inter-nation affairs, scholars will naturally look to the language itself and thus subject the very stuff of which international law is made to microscopic theoretical analysis. Much of the theoretical understructure of international law, as we have inherited it from preceding centuries and from the first half of the twentieth century, is rough and ambiguous, for international law has occupied a limited place in the realm of international power politics. As the situation changes in light of the nuclear threat of global suicide, greater attention will be paid to the internal consistency and the theoretical soundness of international law. The underlying theory and structure of international law have been given unprecedented attention in the leading journals during the last three or four years. If the journals are an indicator, the approaching theoretical explosion in the discipline will rival that of Grotius, Pufendorf, and their contemporaries in the sixteenth and seventeenth centuries.

The present study is an attempt to contribute to the intensifying dialogue on the theory of custom in international law. Since custom is at the heart of what we mean by international law, the immodesty of the present enterprise is immediately apparent. I can only say, by way of defense, that I was attracted to the most important problem in the field because it was the most important-better to aim at the stars than to aim at a rooftop.

Part One of this book attempts to set forth the requirements of a consistent theory of custom and to locate the concept of custom in the larger meaning of the term "international law." If international law refers to a process and language by which many conflicting international claims are defined and argued, "custom" then becomes a method of legal argumentation. I shall argue that custom is a secondary rule for discovering the content of primary or substantive rules of international law.

Part Two examines in detail theories about customary law and then suggests a reformulation. A separate chapter is devoted to the impact upon customary law of provisions in treaties—a consideration which has usually been ignored because it does not easily fit into traditional theories of custom. My suggested reformulation is offered as a way of taking fully into account the increasingly fine-meshed web of international treaty law. More important, it recognizes the central role now accorded to provisions in treaties—a role accorded even by the nonparties. For custom itself, I shall argue, is a style of argumentation basic to the functioning of the international legal process. In this view, it is essential that a theory of custom reflect the kinds of arguments that states actually use in their attempt to define and legitimize their claims.

Part Three places the reformulated theory in a larger context, taking up the authoritativeness of resorting to the claim of custom. Examined are factors providing for the legal strength and durability of custom, as well as factors—such as consent, estoppel, and reasonableness—that reinforce its persuasiveness.

Finally, Part Four deals with issues that have been closely associated with the concept of custom. One of these is special, or local, custom, a distinctive variant that operates on rules of its own which in the past have been confused with the theory of general customary law. Another question concerns the meaning of "sources of law." The ambiguities of this term suggest that it should be rejected as a method of approach, even though traditional studies begin, rather than end, with the notion of "sources of law" in discussing the concept of custom.

This brief outline suggests that the ground I propose to traverse has been explored by many scholars in the past. The numerous footnotes in the text acknowledge the footprints of others. But if my topic clearly is not new, I hope I have charted a new approach. In addition, I want to make clear that, although I have at times attempted to make a very strong "case" for a proposition that has not commanded general acceptance, I have done so with the hope of provoking others to join in the dialogue.

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