

## I. PUBLIC INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

### THEORY AND PRACTICE OF INTERNATIONAL LAW

**A METHODOLOGY OF INTERNATIONAL LAW.** By Maarten Bos. North Holland, The Netherlands: Elsevier Science Publishers B.V., 1984, 357 pp., \$66.75.

This ambitious book purports to set out a comprehensive methodology of public international law for the practitioner and secondarily for the legal theorist. The author discusses the sources of international law, their hierarchy, the theory and practice of treaty interpretation, and more specialized matters such as intertemporal questions, gaps in the law, the impact of procedure on substance, and evidentiary questions in international courts. He draws upon wide-ranging familiarity with Continental legal scholarship and a somewhat lesser acquaintance with American sources.

The whole of international law, according to Professor Bos, can be characterized by a kind of X-ray diagram which projects the general concept of law through a sphere called the normative concept of law onto a three-dimensional surface called the recognized manifestations of law. Legal thought, on the other hand, is divided into two concepts: method and law. Method, unlike law, does not "bind," according to the author, but it plays a real and profound role in enabling the international lawyer to understand and work with the rules of law. These rules come into being through a kind of "legislative" process that the author, later in the book, takes great pains to dissociate from the "will" of the state. Professor Bos thus locates his own scholarship within naturalistic theory as it is best conceived — not opposed to positivism but cognizant that state practice is a manifestation of international norms and cannot be dismissed as either irrelevant or contrary to them.

If what I have just said fairly characterizes the author's enterprise, the reader may well wonder about the utility of this book to the international law practitioner. Indeed, the author's purpose, contrary to his avowed statement, seems to be abstract and theoretical — almost what Hegel would have done to international legal theory had he ever turned his attention to it. The "methodology" in the author's title turns out to be a way of organizing theory and not something that is related to practice.

Yet all of that aside, the author has some very interesting observations on a number of difficult problems in international law. He argues powerfully that custom should not be imbued with a voluntarist element, an argument that perhaps would have been improved had the author more

carefully distinguished between consent and consensus.<sup>1</sup> There is a fine chapter on intertemporal questions and interesting historical material (though covering rather familiar territory) about the origin of the phrase "general principles of law" in Article 38 of the Statute of the International Court of Justice. There is much in this book that is of value, although finding it sometimes can be difficult given a rather loose organization. The author deals with the same subject in different places, sometimes redundantly, and sometimes "interpreting" what he has said before in an often curious fashion (*e.g.*, he refers to his earlier "misgivings," or his "inability" to do one thing because of his "limited conception" of something else — always referring to himself in the third person).

The core of any theoretical work on international law is the author's conception of custom, because out of the customary practice of states arises the only international law we know that can truly be called general. Treaties only apply to their parties, although a treaty in a different sense is a resolution of the interaction of two or more states and thus is as much "state practice" as any other form of practice that makes up custom. Hence, the ascertainment of custom is a major enterprise of a book of this sort, and Professor Bos accordingly devotes a great deal of thought to custom.

Yet it is not at all clear what the author *means* by custom. To be sure, in his terms it is a "recognized manifestation of international law," but how is it to be identified? The author disengages the notion of voluntariness from *opinio juris*, but replaces it with the belief on the part of states that "a certain practice should or may be followed by *rights* because it satisfies a conception of legal propriety held by the States concerned. . . ." (p. 223)

But how does the author propose to discover whether states entertain such beliefs? Can he place a state on a psychiatrist's couch and question it as to whether it adheres to a notion of legal propriety such that it expects a given act to be followed by legal rights? If not the state, can officials within the state be subjected to such psychiatric examination? What if they lie? What officials are we talking about? I have purposely suggested these absurd questions, because it has never been apparent to me how one can talk about *opinio juris* in any practical sense if one holds, as does Professor Bos, that it depends on what *states believe*.

I raised all these objections a long time ago in my book *The Concept of Custom in International Law* (1971). Professor Bos kindly cites my book in a number of places and refers to it several times in his text. Nevertheless, the entire discussion of the inability to ground custom on what states "be-

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1. This distinction is fully explained in D'Amato, *On Consensus*, 1970 CAN. Y.B. INT'L L. 104-22.

lieve" seems to have been missed by Professor Bos. He also has failed to see the pervasive distinction I drew between general and special custom, a distinction which I believe would materially help him in sorting out a large number of problems he raises about the impact of practice on non-participating states. (Indeed, Professor Bos admits at one point that he "feels unable to make any distinction, here, between local or regional custom on the one hand, general custom on the other hand." [p. 256]) Most curiously, Professor Bos claims that I have rejected both the material and psychological elements traditionally found in custom. (p. 224) Far from rejecting them, I not only accepted both of them in my book, but insisted that they were necessary components of custom. The entire book is an attempt to make objective sense out of those two necessary elements. There could not be any notion of custom without the material and psychological, or the quantitative and qualitative, elements. I am astounded to think that anyone could have read my book as rejecting the very pillars that supported my entire theory.

If Professor Bos has misunderstood me, I must accept the possibility that I misunderstand him. Since he has so many insightful observations about so many aspects of international law theory and doctrine, and because he is so comprehensive and cosmopolitan in his sources, readers ought to judge for themselves whether his overall theory is useful and coherent. Perhaps I should be disqualified from attempting to make that ultimate judgment.

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