GERMAN YEARBOOK OF INTERNATIONAL LAW

VOLUME 31 · 1988

DUNCKER & HUMBLOT · BERLIN

GERMAN YEARBOOK OF INTERNATIONAL LAW

Volume 31 · 1988

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This Yearbook may be cited:

GYIL 31 (1988)

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GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 31 · 1988

DUNCKER & HUMBLOT / BERLIN

Printed by Berliner Buchdruckerei Union GmbH, Berlin 61

ISBN 3-428-06718-5

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ARTICLES

The Theory of International Customary Law*

By Gennady M. Danilenko

I. Custom as a Source of International Law

1. The Concept of International Custom

The formation of international law is the result of a complex political-legal process which is determined by a number of economic, political and ideological factors. The rules of international law do not directly emanate, however, from social relations. In international law, as in any other legal system, the creation of law, being a specific activity of States and other subjects of law, can take place only within the framework of certain legal procedures which serve as generally recognized modes of manifestation of agreement of its subjects aiming at establishing legally binding rules of conduct. As normative products of law-creating processes recognised within the international community, the rules of international law exist in forms consistent with these processes. The internationally recognized processes of creating law along with the forms of its subsequent existence constitute the characteristic element of international law as an institutional entity. From the theoretical point of view, it may be asserted that without official recognition of certain law-creating procedures and relevant forms of expression, law in general and international law in particular cannot exist as a specific normative phenomenon. From the practical point of view, it is of decisive significance that the existence of law-creating procedures and relevant forms recognized by all States is an indispensable pre-requisite for determining what specific rules have to be considered as law and therefore implemented as such in international relations.

Custom is one of these law-creating procedures. It also serves as one of the forms of existence of international legal norms. In other words, it is one of the sources of international law in a legal sense.

The peculiarity of custom as a source of international law is that, in contrast to international treaty, it is difficult to differentiate here between the law-creating procedure and the normative result. Whereas the material source of a treaty

* The author would like to acknowledge his appreciation to Professor *William Butler* of University College London, who made many helpful editorial suggestions on an English version of the article.

resulting from formal negotiations is a concrete normative act, custom is created by the practice of States and continues to exist and operate as a norm based on the practice. For this reason, the ascertainment of the existence and content of customary rules in most cases is closely connected with the analysis of the process of their origin. Consequently, rules governing the process of custom formation serve, at the same time, as criteria by which the existence of customary norms is established in a given situation.

Nevertheless, both from the theoretical and practical point of view, it is necessary to distinguish between custom as the process of creation of international legal rules and custom as the result of this process, *i.e.*, custom as a legally binding rule of conduct established by inter-state practice. As *Hans Kelsen*[1] has shown, the notion of "custom" can therefore be used to designate, on the one hand, the process of creating a norm and, on the other, a customary rule established as the result of a law-creating process.

The generally recognized normative definition of the notion of custom is provided by Art. 38 (1) (b) of the Statute of the International Court of Justice. According to Art. 38, the Court applies "international custom, as evidence of a general practice accepted as law". It is obvious that this definition, which usually serves as a starting point of any study of international custom, refers to custom as the result of a law-creating process, *i.e.*, rule of international law. If custom is to be interpreted as a usual or habitual course of action taken by States, their actual practice leading to the recognition of the binding rule of conduct, then the Court cannot apply it to a specific case. The Court can only apply a legal norm created by custom.

The wording of Art. 38 of the Statute of the International Court of Justice has been widely criticized in international legal literature. The principal deficiency of the definition of custom, as given in Art. 38, ist that it describes custom as evidence of general practice, whereas, in reality, it is the reverse. As the International Court of Justice observed "the actual practice of states is expressive, or creative, of customary rules".[2] For this reason, general practice accepted as law should be considered as evidence of the existence of custom. It ought to be kept in mind in this context that, in principle, the rules of conduct constituted by practice and not practice as such are accepted as law.

Despite the indicated deficiency, largely caused by natural law theories, the definition of custom provided by Art. 38 of the Statute is extremely important for the theory and practice of international customary law. In the first place, Art. 38 reaffirms the recognition by all States of international custom as one of the main

[1] *See Hans Kelsen*, Théorie du droit international coutumier, in: Revue internationale de la théorie du droit 1 (1939), 253-274 (262). For details on these and other problems *see Gennady M. Danilenko*, Custom in Modern International Law (in Russian), Moscow 1988.

[2] International Court of Justice (I. C. J.) Reports 1982, 46.

sources of international law. This recognition is an indispensable pre-condition for the continued operation of custom as a source of international law because, as indicated earlier, legal rights and obligations of States can be established only if these States accept certain procedures as authoritative sources. Secondly, Art. 38 reflects the agreement of all members of the international community on basic constituent elements required for the formation and operation of customary rules of international law, namely, *practice*, on the one hand, and *acceptance* of this practice as law, on the other.

It is generally recognized that while the element of practice leads to the crystallization of the content of the rules of conduct, it is the requirement of acceptance as law, usually described as *opinio iuris*, which transforms the resultant common rules of conduct into the legally binding norms of international customary law.

2. *International Custom as a Law-making Process: The Significance of Agreement (Consensus)*

The examination of international custom as a law-making process requires, in the first place, the clarification of the peculiarities of co-ordination of wills of States in the process of custom formation. The structure of the international community based on the co-existence of sovereign States determines the content of the basic principle of international law-making according to which international law can only result from a consensus or agreement between States. Within the international community, the creation of a legal rule requires agreement both as to the content of a rule of conduct and to the recognition of this rule as a legally binding norm of international law.[3]

The process of co-ordination of the wills of States in the process of customary law formation is unique. Its specific nature is determined by the fact that international custom results not from formal negotiations, but from continuous and uniform State practice consisting of individual and seemingly unrelated acts and actions of States.

Many Western lawyers are inclined to deny that in customary law formation the consent of individual States to an emerging norm is of decisive significance. In support of this proposition various arguments are used, including references to the provisions of Art. 38 of the Statute of the International Court of Justice. Usually, the contention is made that with respect to treaty, Art. 38 (1) (a) requires express recognition of conventional rules on the part of contesting States; whereas with respect to international custom it requires only general acceptance saying nothing of the recognition of customary rules on the part of the States which are bound by them. In substantiating this point of view, *Alfred Verdross* and *Bruno Simma* also refer to international judicial practice which, as they claim, confirms that courts

[3] *See Grigory I. Tunkin*, Theory of International Law (in Russian), Moscow 1970, 239.