

PREFACE

I was introduced to International Law as an undergraduate student in Herbert W. Briggs's class on that subject at Cornell University in the 1950s. As I sat there astounded by how much subject matter there was in that course, I kept wondering where it all came from. Professor Briggs seemed uninterested in that question. When I asked him, he said, "international law is simply the practice of states." But on my way home from class, walking down the steep incline from the quad to my dormitory room, troublesome thoughts went through my mind, such as "Does all state practice become law?" and "If states started committing genocide, would genocide become legally required?" and "If I walk down the hill in this direction, does this mean that others who follow me are legally required to trace my steps?"

My next stop was Harvard Law School where I discovered that the professors who taught international law were almost as uninterested in where the law came from as Professor Briggs had been. Roger Fisher was a pragmatist—a very refreshing one—who was interested in how international law works; where the law came from was, to him, a metaphysical question. Louis Sohn was a vast storehouse of details about international law, and perhaps the details were like the trees that one sees instead of the forest; one did not even reach the question of how the forest got there. Richard Baxter gave me room to pursue my interest in sources (I wrote the paper reprinted herein as Chapter 11 for his seminar), but he advised me that the issue I was interested in was well outside the mainstream of international law scholarship.

In the short run, Professor Baxter turned out to be right. In the decade after law school, I continued to write about sources, and my writings were met with reactions that ran the gamut from disinterest to disdain. I wrote *The Concept of Custom in International Law* as a Ph.D. thesis at Columbia University under Louis Henkin and Oliver Lissitzyn. Their enthusiasm was not what one might call contagious. Although I was looking for a teaching job at the time, they politely declined my request for a letter of recommendation to any school whatsoever. I tried to interest publishers in the book; the publishers asked me to get a recommendation from Professor Henkin. I asked Professor Henkin if he could kindly write for me a one-sentence letter recommending publication of the book. He courteously replied that he did not think it was worthy of being published.

Fortunately, Cornell University Press published my book anyway in 1971. I anxiously awaited the reviews. The book was universally panned. The *British Year Book of International Law* took several pages to trample all over it; the *American Journal of International Law* dismissed it out of hand in just a few

paragraphs. In the latter, it was manifestly clear that the reviewer had not read past page 4 of the book. Thus Professor Baxter's prediction was still operative. The publication of the book did nothing to help my academic career at a time when I was desperately in need of help.

One might say that the lesson I should have learned from all of this is that it doesn't pay to buck the establishment. The international law establishment, as interpreted by some of its leading practitioners under whom I had the privilege of studying and whose names I have already mentioned, was telling me to write about small, safe topics in the application of international law. It was telling me that a young person who dares to write about the foundations of the discipline will be unceremoniously shot down by the keepers of the gate.

That lesson wore heavily upon me in those years. I felt that I had made a disastrous mistake in pursuing the question of the foundations of international law. But with a certain obstinacy, I continued to research the question, delving into all the classic books on the subject that had not been checked out of the library since they had been acquired. I do not think that my continued writing on the sources of international law betrayed the way I felt. Richard Falk, in his Foreword to the present volume, sees in my writing an enthusiasm and optimism for international law. I hope that the reader sees it the same way. My explanation is that it was not a psychological problem for me to separate my pessimistic feelings about my personal circumstances from my optimistic view of the future of international law. My writings were simply a refuge from the real world around me, the world that was rebuking me for those very writings. In fact, writing for me was at the time perhaps more of a vacation than a vocation.

Whether or not *The Concept of Custom in International Law* or the papers collected in this volume have or have not succeeded in settling any of the foundational questions of our discipline that are addressed therein, there is one line I hope will be imaginarily engraved on my academic tombstone: that I opened up a space for the serious consideration of the foundational questions of international law. From 1964 when my paper for Professor Baxter's seminar was published, to about the mid-1980s, there was virtually no serious or sustained work on the sources of international law. To be sure, I had engaged during that time in some dialogues with others about these questions, and my input into this dialogue is contained in various chapters of the present volume. But starting in the mid-1980s, spontaneous combustion occurred. I was immensely gratified to see writers abroad and in the United States suddenly taking very seriously the question of the sources of international law. Curiously, I discovered that my writings on the subject may have been published a bit too soon. Publicists who were new to the area, although they had studied my work, wanted to be the ground breakers. They focused on the questions I had asked in my books and articles, but preferred to state those questions as if they had just occurred to them. One scholar in particular recently wrote a mini-review of my 1971 book in a long

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footnote gratuitously attached to his article in the *British Year Book of International Law*. His review was even more dismissive and disdainful of my book than the reviews that came out when it was published. Since his own writings on custom and treaty have raised the same questions, used the same sources, investigated the same mid-level generalizations, assumed implicitly the same methodology, and occupied the same space that I had charted starting in 1964, I experienced in reading his review an *Unbearable Lightness of Being* moment. In that novel, Milan Kundera recounts the untimeliness of an academic's warning; it had come before his colleagues were ready to absorb it. When they finally realized he had been right, it was too late; his prediction had, sadly, come to pass. Yet they ostracized the person because his very presence reminded them that he had been courageous and realistic at a time when they had remained passive and close-minded. It didn't matter to them that he had been prescient; what mattered is that they now felt uncomfortable in his presence. (I name the scholar who wrote the mini-review of my book later in this volume.)

Again I thank my assistant Mary Finn for her exceptional work in assembling this volume. My research is in part funded by Judd and Mary Morris Leighton, donors of the Leighton Chair. I appreciate the support that Dean David Van Zandt has given to this project. I thank Richard Falk for his generous Foreword. Of all the people I have met in the world of academia, he has always been my role model.

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