Chapter One

Customary International Law, Theoretical Conceptions and Evidence of its Formation

I. INTRODUCTION

This chapter will explore the notion of custom and its function as a source of international law. However, the concept of customary international law, i.e. its source function and the question of which individual elements are needed for its formation, are issues which are hopelessly disputed in international scholarship. The different perceptions advanced are almost innumerable since they are in the main closely connected to the individual perceptions of each international scholar of the general nature of international law. The majority of the arguments exchanged in this field are well known.

Nevertheless, as outlined above, this book attempts to relate the conclusions drawn from the development of customary law in a particular field of international law – international criminal law – to the development of customary international law in general. In particular, it will try to identify and assess which concepts underlie the discovery and development of customary norms in international criminal law and in international law in general. In order to carry out such assessment, it is necessary to have some knowledge of the broad ideas underlying custom and general international law. Thus, this chapter will refer to the different theories on the formation of custom and, secondly, to the underlying idea of the nature of general international law.

II. CUSTOMARY INTERNATIONAL LAW

A. Custom as a source of international law

Customary international law is usually defined as international law which has been generated from a “general practice, accepted as law”, as stated in Article 38 (1) (b) of the ICJ Statute. Along with international treaties and conventions, it is considered to be the major source of public international
law. Any discussion of the formation of customary international law must therefore start with its definition set out in Article 38 of the ICJ Statute. Although this Article is binding only with respect to cases before the ICJ, it is widely as having itself attained the status of customary international law. Nevertheless, as Sir Robert Jennings observed in 1981, the definition of custom in Article 38 (1) (b) of the ICJ Statute can merely be the starting point of a discussion on the creation and formation of rules of customary international law. Since it is based on a draft which dates back to 1920, it may not always meet the demands of modern international law. Yet before we delve more deeply into the concept of customary international law represented in Article 38 of the ICJ Statute, some preliminary aspects of custom merit consideration.

1. Custom

In nearly every society, custom serves as a source of rules ordering society’s everyday life. The rules develop almost unconsciously among the members of the group and are maintained by them by means of social pressures. At national level, custom is frequently regarded as a rather cumbersome source of law. It has often been superseded by more sophisticated mechanisms of law-making, such as by the establishment of a formal legislature. At international level, however, custom, together with treaties, is the most or second most important source of legal norms. This is commonly ascribed to the fact that the international legal order lacks a formal legislature and other centralised government organs.

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1 H. Kelsen (Principles) 304, 417; L. Henkin (International Law) 27; G. Van Hoof (Rethinking the Sources) 58; C. Sepúlveda (1990) 33 GYIL, 438: “Custom was, at a time, the queen of sources, and provided part of the rules of the international legal order”; however contrast the Soviet conception of international law: infra on page 29ff.
2 R. Jennings and A. Watts (Oppenheim’s International Law) vol. 1, peace, 21, note 1.
3 R. Jennings in M. Koskenniemi (Sources) 29.
5 M. Shaw (International Law) 68.
6 M. Shaw (n. 5) 69.
7 M. Shaw (n. 5) 68.
8 M. Shaw (n. 5) 69.