CUSTOMARY INTERNATIONAL LAW

Customary international law, although long recognized as a primary source of international law, remains replete with enigmas, both conceptual and practical. These include how to determine the existence of opinio juris, the function of the state practice requirement, the definition of jus cogens customary norms, and the relationship between customary international law and ethics. In part because of these enigmas, the subject has generated a wide-ranging literature. However, no recent book-length work has attempted to articulate a comprehensive theory of customary international law that can effectively resolve these questions.

This book sets out to accomplish this goal. Its approach is unique in a number of ways. For example, it is multidisciplinary and draws insights from fields such as legal theory, philosophy, political science, and game theory. In addition, it is anchored in a sophisticated ethical framework and explores at length the interconnections between customary international law and ethics.

Brian D. Lepard is Law Alumni Professor of Law at the University of Nebraska College of Law and codirector of the university’s Human Rights and Human Diversity Initiative. Professor Lepard has served as Chair of the International Legal Theory Interest Group of the American Society of International Law. His books include Hope for a Global Ethic: Shared Principles in Religious Scriptures (2005) and Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions (2002). His articles have appeared in such journals as the Duke Journal of Comparative & International Law and the Journal of Human Rights.
The purpose of the ASIL Studies in International Legal Theory is to clarify and improve the theoretical foundations of international law. Too often the progressive development and implementation of international law has foundered on confusion about first principles. This series will raise the level of public and scholarly discussion about the structure and purposes of the world legal order and how best to achieve global justice through law.

The idea for this series grows out of the International Legal Theory project of the American Society of International Law. The book series ASIL Studies in International Legal Theory will deepen this exchange by publishing scholarly monographs and edited volumes of essays considering subjects in international legal theory.

Editorial Board
Samantha Besson, University of Fribourg
Allen Buchanan, Duke University
David Kennedy, Harvard University
Jan Klabbers, University of Helsinki
Larry May, Vanderbilt University
Helen Stacy, Stanford University
John Tasioulas, Oxford University
Fernando Teson, Florida State University
Onuma Yasuak, University of Tokyo
Customary International Law

A NEW THEORY WITH PRACTICAL APPLICATIONS

BRIAN D. LEPARD

University of Nebraska
For Jenina
## Contents

*Figures*  
*Acknowledgments*  
*Cases*

### PART ONE: THE ENIGMAS OF CUSTOMARY INTERNATIONAL LAW
1. The Need for a New Theory  
2. Some Conceptual Enigmas  
3. Some Practical Enigmas

### PART TWO: FOUNDATIONS OF A NEW THEORY OF CUSTOMARY INTERNATIONAL LAW
4. Clarifying the Concept of Authoritative International Legal Norms  
5. Fundamental Ethical Principles and Customary International Law

### PART THREE: RESOLVING THE CONCEPTUAL ENIGMAS OF CUSTOMARY INTERNATIONAL LAW
6. Toward a New Normative Theory of Customary International Law  
7. A New Understanding of *Opinio Juris*  
8. The Function of the State Practice Requirement  
9. Ethics and Customary International Law  
10. Democratic Principles and Customary International Law  
11. The Relationship Between Customary International Law and General Principles of Law
## Contents

### Part Four: Resolving the Practical Enigmas of Customary International Law

12. General Sources of Evidence of *Opinio Juris* .................................................. 171
13. The Role of Treaties as Evidence of *Opinio Juris* .............................................. 191
14. The Role of United Nations General Assembly Resolutions as Evidence of *Opinio Juris* ................................................................. 208
15. The Role of Consistent State Practice ................................................................. 218
16. The Persistent Objector Exception .................................................................... 229
17. Defining *Jus Cogens* Customary Norms .......................................................... 243
18. Defining *Erga Omnes* Customary Norms ......................................................... 261
19. Resolving Conflicts with Treaties ...................................................................... 270
20. Changing Customary International Law and the Role of International Organizations ................................................................. 277

### Part Five: Some Applications of the Theory

22. International Human Rights Law in General .................................................... 306
23. Determining the Customary Law Status of Specific Human Rights ............... 331
24. The Right to Change One’s Religion or Belief ................................................... 346

### Part Six: The Future of Customary International Law

25. Customary International Law as a Dynamic Process ......................................... 371

* Bibliography ........................................................................................................ 381
* Index ..................................................................................................................... 397
Figures

4.1. A graphic interpretation of Raz’s model of decision making according to the balance of first-order reasons  page 48
4.2. A graphic interpretation of the preemptive effect of an authoritative norm according to Raz  50
4.3. Persuasion  52
4.4. Persuasive authority  55
4.5. An alternative conceptualization of the effect of a norm with persuasive authority  56
4.6. A harmony game  61
4.7. An assurance (“stag hunt”) game  63
4.8. A prisoner’s dilemma  65
4.9. A pure coordination problem  68
4.10. A nonpure coordination problem  70
4.11. A zero-sum game  72
5.1. A proposed classification of ethical principles  83
5.2. A proposed classification of human rights  85
5.3. Selected essential human rights  86
Acknowledgments

This book could not have been written without the support, first and foremost, of my wife Jenina and sons Justin and Brandon. They gave me constant encouragement and also tolerated many absences as I engaged in my research and writing – unfortunately a very solitary enterprise.

I owe much gratitude, too, to the University of Nebraska College of Law, its administration, and its faculty for helping nurture this project, financially and professionally. I benefited from a number of Ross McCollum grants that assisted me in my research, and I especially appreciate the support of former Dean Steven L. Willborn and Interim Dean Anna Shavers. My colleague Frans van der Dunk provided many detailed comments on portions of the manuscript. The assistance of the staff of the Marvin and Virginia Schmid Law Library at the College of Law was indispensable – and I am particularly indebted to Kris Lauber for her tireless work procuring so many of the resources I used in researching the book. She unfailingly responded with grace and good humor to my frequent requests.

My colleagues within the University of Nebraska’s Human Rights and Human Diversity Initiative also offered advice. I am particularly grateful to David P. Forsythe and Ari Kohen for their extensive comments on particular chapters.

Outside Nebraska, many professional colleagues offered helpful input. I drew much inspiration from my friends and colleagues in the American Society of International Law’s International Legal Theory Interest Group and in the Society generally. I especially appreciate the support of Mortimer Sellers, who encouraged me to include the book in the ASIL Studies in International Legal Theory series, and of Elizabeth Andersen, Executive Director of the Society. I am also indebted to particular colleagues for their detailed comments on parts of the book, including Reuven Avi-Yonah, Mark Janis, and Julie Roin. I appreciate, too, the encouragement of John Noyes and Fernando Tesón during the course of the project.

I am grateful to John Berger, Senior Editor at Cambridge University Press, for suggesting that I submit the manuscript to the Press and for his expert help in seeing the enterprise through to completion. I also thank the anonymous peer
reviewers for the Press. They provided many insightful comments that greatly improved the manuscript. The project manager for the book, Brigitte Coulton, did an excellent job shepherding the project along, and Jim Diggins produced an admirably thorough index.

Finally, I express appreciation to my academic mentors in the international law field at Princeton University and Yale Law School, who inspired me to reflect over the years on the nature of customary international law. They include Richard Falk, Harold H. Koh, W. Michael Reisman, and Ruth Wedgwood. I hope this work will help carry forward their invaluable contributions to the discipline.
Cases
(in chronological order by category)

PERMANENT COURT OF INTERNATIONAL JUSTICE

Contentious Cases

(Cited as S.S. “Wimbledon” Case.), 129–130, 276

(Cited as Mavrommatis Palestine Concessions Case.), 166

(Cited as S.S. “Lotus” Case.), 16, 114–115, 130, 143, 177, 179, 188–189, 202, 219

Factory at Chorzów (Claim for Indemnity), Merits, Judgment of 13 September 1928, P.C.I.J. Series A, No. 17 (1928).
(Cited as Chorzów Factory Case.), 6, 166, 167

(Cited as Oscar Chinn Case.), 256

Advisory Opinions

(Cited as Treaty of Lausanne Advisory Opinion.), 164

(Cited as Jurisdiction of the European Commission Advisory Opinion.), 35

(Cited as Greco-Bulgarian “Communities” Advisory Opinion.), 166

INTERNATIONAL COURT OF JUSTICE

Contentious Cases

Corfu Channel Case, Merits, Judgment of 9 April 1949, 1949 I.C.J. Rep. 4. (Cited as Corfu Channel Case.), 23, 38, 146, 147, 164

(Cited as Asylum Case (Colombia v. Peru).), 37, 115, 130–131, 195, 236, 238
Interhandel Case (Switzerland v. United States of America), Preliminary Objections, Judgment of 21 March 1959, 1959 I.C.J. Rep. 6. (Cited as Interhandel Case.), 6
Right of Passage Over Indian Territory (Portugal v. India), Merits, Judgment of 12 April 1960, 1960 I.C.J. Rep. 6. (Cited as Right of Passage Case.), 12, 109, 134, 226–227, 300
Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, 1963 I.C.J. Rep. 15. (Cited as Northern Cameroons Case.), 185
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984 Given by the Chamber Constituted by the Order Made by the Court on 20 January 1982, 1984 I.C.J. Rep. 246. (Cited as Gulf of Maine Case.), 18, 107, 131–132, 137, 149, 152, 167, 185


Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, 2001 I.C.J. Rep. 40. (Cited as Maritime Delimitation Case (Qatar v. Bahrain).), 5, 27, 204


Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007. (Cited as 2007 Territorial and Maritime Dispute Between Nicaragua and Honduras.), 5


xviii  Cases

Advisory Opinions


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 I.C.J. Rep. 136. (Cited as Wall Advisory Opinion.), 4, 5, 6, 147, 204–205, 261, 262, 343

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), 182–183

Prosecutor v. Furundžija, Case No. IT-95–17/1-T, Trial Chamber, Judgment (10 December 1998), 338

REGIONAL COURTS

European Court of Human Rights


European Union Courts

A. Racke GmbH & Co. v. Hauptzollamt Mainz, Judgment of the Court of Justice of the European Communities, Case C-162/96 (16 June 1998), 281

Kadi v. Council of the European Union, Judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition), Case T-315/01 (21 September 2005), 42, 336

*Inter-American Commission on Human Rights*


*Inter-American Court of Human Rights*


Advisory Opinion OC-18/03 of 17 September 2003 Requested by the United Mexican States, “Juridical Condition and Rights of the Undocumented Migrants” (17 September 2003), 257

**NATIONAL COURTS**

**Australia**


*Nulyarimma v. Thompson*, [1999] FCA 1192 (1 September 1999), 177

*Dow Jones and Co. v. Gutnick*, [2002] HCA 56 (16 December 2002), 328

*Behrooz v. Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*, [2004] HCA 36 (6 August 2004), 177

**Canada**


**India**

*People’s Union for Civil Liberties (PUCL) v. Union of India*, [1997] 1 SCC 301 (18 December 1996), 177–178

**Israel**

*Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 (13 December 2006), 178

*A v. State of Israel*, Supreme Court of Israel (11 June 2008), 178

1Many of these national court decisions are available on databases collected at www.globalcourts.com.
Cases


Namibia


New Zealand

Attorney-General v. Tāunoa, [2005] NZCA 312 (8 December 2005), 114

South Africa

Competition Commission v. American Natural Soda Ash Corp., Competition Tribunal of the Republic of South Africa, Case Nos. 49/CR/Apr00 and 87/CR/Sep00 (30 November 2001), 24

American Soda Ash Corp. v. Competition Commission of South Africa, Competition Appeal Court of South Africa, Case No. 12/CAC/DEC01, [2003] ZACAC 6 (30 October 2003), 178

Kaunda v. President of the Republic of South Africa, Case CCT 23/04 (4 August 2004), 178

Tonga


United Kingdom

A (FC) v. Secretary of State for the Home Department, [2005] UKHL 71 (8 December 2005), 332
Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), [2006] UKHL 26 (14 June 2006), 250, 332
R. (on the application of Al-Jedda) (FC) v. Secretary of State for Defence, [2007] UKHL 58 (12 December 2007), 42

United States

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), 16
Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804), 178
The Scotia, 81 U.S. 170 (1871), 18, 154–155, 176, 225, 228, 233
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), 325
Zemel v. Rusk, 381 U.S. 1 (1965), 325
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), 20, 325, 330, 332, 333