INTERNATIONAL LAW IN THEORY AND PRACTICE

by

OSCAR SCHACHTER

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PREFACE

Law is eminently a practical subject and its practitioners generally have little interest in theory. Those whom Montesquieu called "les grands décisionaires" are content to make and apply rules and leave it to others to worry about the system as a whole or its basic premises. However, a purely technocratic approach to international law has its perils, even for the practitioner. In a non-hierarchical system, lacking a supreme authority, a claim of legal force ultimately rests on the underlying postulates of the system. Disputes as to the applicable principle of law are more likely than not to implicate such premises. In many cases, the "rules of recognition" (in international law, the "sources") cannot be applied without understanding the broader theory and function of the system as a whole.

This book considers how that system operates in its unity and diversity. It recognizes that international law is not an ideal construct but part of a broader political process, shaped and applied in response to perceived needs, societal forces and disparities in power. However, the law is not reducible to politics; it has its distinctive character and relative autonomy. To show this in a realistic and coherent manner calls for both a broad perspective and concrete examples.

My attempt to do this in a single volume is a response to the challenge presented initially by the invitation of the Hague Academy of International Law to give its General Course in 1982. The lectures given subsequently appeared as volume 178 of the Academy's Recueil des Cours. The present book has substantially revised and supplemented those lectures. It has done so especially in the chapters on the use of force and self-defense (chapters VII and VIII), and on human rights (chapter XV). It also has added new chapters on International Environmental Law (chapter XVI) and on Collective Security (chapter XVII).

This book appears at a time when international law has undergone a vast expansion into virtually every area of human activity extending across national lines. It is invoked and applied in countless decisions, accessible in many cases only to specialists. At the same time, some of its basic postulates seem to be challenged by calls for a "new world order", and for a strengthened system of global governance. Moreover, new structures of authority are emerging as economic interdependence renders national boundaries of minor significance and demands for human rights and ethnic autonomy erode the exclusive domain of nation States. Even powerful States can no longer insulate themselves from external conflicts, or transboundary environmental damage or migrants driven by poverty and oppression.

International law will surely change in response to these factors and become more complex and pervasive. However, its principal features are likely to remain as long as a pluralist society of self-ruling territorial entities has the support of most peoples.

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I was also assisted in the final stages of this work by Ayesha Dias, LL.M., Columbia Law School. Her diligent assistance in the revision of chapters VII and VIII is greatly appreciated.

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CHAPTER I

THE NATURE AND REALITY OF INTERNATIONAL LAW

International law today is a dense, intricate body of rules and practices. It has spread far and wide into virtually all human activities that extend beyond national boundaries. Business and finance, air and sea transport, resource exploitation, television and radio, health, the rights of women and children, the conduct of war, the movement of artistic treasures – the list could go on – are all governed in one way or another by international law. Multilateral law-making treaties have proliferated as have international institutions. It is no longer possible for a "generalist" to cope with the volume and complexity of the various branches of international law. Increasingly, the professional international lawyer, whether practitioner or scholar, is a specialist in a particular branch of the law and each branch develops its own complicated and often arcane doctrine.

It may be illuminating to apply a metaphor once suggested by the atomic physicist Robert Oppenheimer for his discipline[1]. We may envisage international law as a large terrain made up of towns and villages with interconnecting paths and highways. The specialized branches of the law form the separate towns and villages, each centred on its own affairs. Narrow paths run from one to another, used occasionally. Across the entire terrain are the superhighways, the connecting links, which in the metaphor convey the general principles and concepts. Those who travel on the highways are generally only dimly aware of the lively activities in the towns and villages. Those who remain only in the local communities immersed in their specialities tend to lose sight of the interconnections and coherence of the larger whole. It may well be in the present complicated world of international relations that the real work of international law must fall to the specialists and that the generalists cannot fully understand the intricacies of the specialized areas. (This seems to be the case generally in the natural sciences.) Even if this is the case, it is still important to have the superhighways. International law seen as a unified system, with a core of basic concepts and processes, is much more than a congery of separate legal régimes in particular fields. Just as facts become meaningful when they are linked to ideas and norms, so do ideas and norms gather strength as they become part of a coherent interrelated system. One of the principal functions of this book is to delineate the overall system and to clarify the general ideas, concepts and principles that give that system its unity. At the same time we must not lose sight of the specifics, and of the specialized régimes that flourish away from the superhighways, yet are influenced and strengthened by the general system.

In sum, the immense expansion of international law and its specialization do not mean that it no longer has an operative doctrinal core of basic concepts and general principles. But it has become even more important because of the expansion to understand the relation of the core doctrine to the concrete body of rules and practices in each area. An aphorism of Kant is in point: "concepts without percepts are empty; percepts without concepts blind". We need to relate concepts to practice and thus give them content. We need to relate practices to concepts in order to give practice meaning and direction.

If we are to relate doctrine and practice, we need also to widen the boundaries of our subject. This is not a simple task. Can we understand the relation of doctrine and practice, the connections between principles and specific decisions, without broadening our conception of international law to embrace the aims, interests and values of those engaged in making and applying the law? Do we not have to consider the effect of the law on those aims, interests and purposes? And is it not essential to our analysis to take into account the concrete problems and conflicts that give rise to legal rules and legal solutions? And finally, ought we not also to consider the socio-historical dimension, especially those major transformations in society that profoundly affect the structure and process of international law?

These questions virtually answer themselves. They remind us, if we need reminding, that international law is not "a brooding omnipresence in the sky". It is more than a given body of rules and obligations. It involves purposive activities undertaken by governments, directed to a variety of social ends. These activities are conditioned and limited by constraints on the voluntary choices of the government – constraints related to factors of power, resources, ideology, felt needs. Underlying these factors are the less perceptible societal conditions, especially those that mark historical transformations such as the spread of industrialism and capitalism, the movements for democracy and socialism, the break-up of the great empires, the nuclear weapon and the other new military technologies. Government decisions that bear on law are also affected by their assessments of the means and strategies to achieve their ends. In many cases internal politics and struggles for power can be decisive. All these factors are extra-legal, outside of the body of law. They could in fact include any event or condition that has an impact on the perception of a State's interests or its capabilities. Not only are such factors endlessly diverse for any particular State but the international environment is itself so variable as to multiply the circumstances that affect the development and application of law. For example, the disparity in power among States is a pervasive and ever-changing set of circumstances of particular importance to law (as we will discuss later). So, of course, are material conditions: technology, population, usable resources; these too are always in movement, bringing new pressures and conflicts to bear on law. Nor can we overlook the less tangible realm of ideas and ideals that both reflect and influence the demands of people and the conduct of governments. No account of the role