PRACTICE AND METHODS OF INTERNATIONAL LAW

by
SHABTAI ROSENNE

PRACTICE AND METHODS OF INTERNATIONAL LAW

by

SHABTAI ROSENNE

OCEANA PUBLICATIONS, INC.
London • Rome • New York

Library of Congress Cataloging in Publication Data

Rosenne, Shabtai.
Practice and methods of international law.

1. International law. 2. International law—Legal research. I. Title.
JX3695.I8R67 1984 341 83-43170
ISBN 0-379-20140-2

Manufactured in the United States of America

PREFACE

This is a *Where-to-find-your-law-and-how-to-read-it* book, devoted to methodological, documentation and bibliographical problems of public international law, that term having the same meaning as in Article 38 of the Statute of the International Court of Justice and the Statute of the International Law Commission. It is written in response to many requests, from practising attorneys in several countries, from friends and colleagues in the United Nations General Assembly and in different international legal conferences, from fellow diplomat-lawyers and from students of international law and relations. The persistence of such questions as where is the law to be found, and when the documentation has been assembled how do you put it to use, caught my attention and seemed to indicate a lacuna in the ever growing literature of international law. At the same time I have to stress that public international law is not an esoteric business with a discipline and a methodology of its own. It is part and parcel of the legal science, and it demands the same kinds of skills and techniques and intellectual approach that all branches of legal science demand. The peculiarity lies in the widely scattered source-material and in the very nature of public international law itself, as is explained in the following pages.

Throughout this book the expression *public international law* is used in its generally accepted sense as reflecting "the body of laws between and among sovereign states that govern their relations with each other" in the words of Professor Julius J. Marke in his Foreword to the *International Legal Bibliography* now being published by the publisher of this book. At the same time, and very much for the reasons he has given, blinders must not be worn, and I have found it necessary to broaden the horizons of this book here and there, at least so as to indicate points of contact with other, not easily classified, branches of law today sometimes regarded as international law.

In writing this book I have drawn upon two useful publications: John W. Williams, "Research Tips in International Law" in 15 *The Journal of International Law and Economics* 1 (1981), of the National Law Center of the George Washington University; and *A Uniform System of Citation* (13th edition), published by the Harvard Law Review Association on behalf of several leading American Law Reviews. Both these are keyed to United States practices. This book is intended for a wider audience.

Footnotes have deliberately been avoided, adequate references being inserted in the text. Many United Nations documents are mentioned and here the official document number (symbol) is given, even where the document is reproduced in a cited publication. As many United Nations documents and publications are issued in more than one language, this system will make it easier for readers who have to refer to some other edition than the English one.

I wish to express my thanks to the Harvard Law Review Association for permission to use copyrighted material in Appendix VI.

It gives me pleasure to thank Mr. Philip Cohen, President of Oceana Publications, Inc. and Mr. Edward Reiter, in-house editor, and their colleagues for the care with which they saw this book through the press.

Beth ha Kerem
Jerusalem December 1983

Shabtai Rosenne

ABBREVIATIONS

A.D.	Annual Digest and Reports of International Law Cases, volumes 1-16, succeeded by ILR, volumes 17-continuing.
AJIL	American Journal of International Law.
BFSP	British and Foreign State Papers.
CTS	Consolidated Treaty Series
doc.	document.
GAOR	General Assembly Official Records.
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.
IDI	Institute of International Law (Institut de Droit international).
ILC	International Law Commission.
ILM	International Legal Materials.
ILR	International Law Reports (see A.D.).
LNTS	League of Nations Treaty Series.
O.R.	Official Records.
PCIJ	Permanent Court of International Justice.
RIAA	Reports of International Arbitral Awards.
UNCITRAL	United Nations Commission on International Trade Laws.
UNTS	United Nations Treaty Series.
YBILC	Yearbook of the International Law Commission.

PRACTICE AND METHODS OF INTERNATIONAL LAW

TABLE OF CONTENTS

Chapter One
SOME FUNDAMENTALS

§ 1. *The Techniques of International Law Research*

Fundamentally, the techniques and methodology of research in international law do not differ from the corresponding techniques and methodologies of research commonplace in internal legal systems. It is the substance of the material, its widely diffused, interdisciplinary and unsystematic presentation, the broad variety of primary source-materials to be examined, the many languages in which they are written, the relative inaccessability of much of this material, and above all the essential characteristics of public international law itself, that generate the peculiarities and difficulties, and require properly adapted methodological techniques.

Questions such as whether international law "exists," whether it is "law," and the source of its binding character and validity, are all highly controversial and hotly debated in political as well as in legal circles. They are questions of legal philosophy and political science. They are not relevant to the subject here under discussion. Neither are the various "schools" of international law found in the books, particularly the opposing schools of legal positivism and natural law, of dualism and monism (on the question of the interrelationship of international law and the internal law of a State), or the attempts to effect a synthesis among them. While the sophisticated jurist must be alert to these trends and refinements, and be able to take advantage of them when occasion arises, none of them ought to affect the techniques and methodology of international legal research itself, only the results of properly conducted research, only the manner in which what has been researched is read and put to use. For the practising attorney faced with a concrete problem, whether in litigation or whether he is acting in an advisory capacity or involved in negotiating a treaty or an international or transnational contract, such philosophical questions have no relevance at all. Nevertheless, it is necessary to commence with a brief, and it is hoped non-controversial, description of modern international law, its functions, and the elements of which it is composed.

§ 2. *The Nature and Functions of International Law Today*

Essentially, international law is a law of coordination, not, as is

the case of most internal law, a law of subordination. By *law of coordination* we mean to say that it is created and applied by its own subjects, primarily the independent States (directly or indirectly), for their own common purposes. That law thus created is usually called *positive international law.* That law has no superior "sovereign power" and it is difficult to put one's finger on its "basic norm." It has no formalized legislature, no clearly defined separation of executive, legislative and judicial powers (as a matter of fact a similar blurring of powers and functions can be observed in many internal legal systems, political and legal theory notwithstanding and whatever Montesquieu may have written!), no regular and hierarchical court system, no easy mechanism for "correcting" possibly undesirable consequences of a judicial pronouncement, no clear system of "precedents" (whether formal, as found in common law countries or simply intellectually persuasive as in many civil law countries), no clear distinction between political and judicial precedents, no centralization—in fact none of the attributes and trappings usually associated with "law" within a State. On the other hand, it does have some intellectual and conceptual affinities with public law in general and with constitutional law in particular, particularly to the extent that constitutional law issues are often not justiciable and cannot be applied by courts of law, but are left to the interaction of the internal legislative and executive processes, as well as with other specialized branches of law such as labor law, where clashes of group interests looking to the future rather than individual rights and duties established in the past are in issue. International law is the product of the coordinated wills of its own subjects, what might be called the agreed "rules of the game."

The functions of this law are different from the functions of law within a State community. It is not directly concerned with the rights and duties in terms of dispute settlement—civil or criminal—of individual persons, physical or moral, except where the States have agreed that this should be so. It is of considerable importance in the drafting of major diplomatic documents and treaties, as well in appropriate instances in the drafting and application of internal legislation, though less than is the advice of a lawyer advising his client on these matters. It is of considerable significance in the field of international dispute prevention and control. While international law (especially treaties) may seem to give rights to individuals or impose duties upon them (it is here that an individual's legal advisor may find himself confronted with international law questions), that is the

consequence of an agreement between States, and the responsibility for observing the agreement, and conversely any responsibility for breaching it and the concomitant reliefs and remedies, enure to the States, not to the individual. In brief, international law is a comprehensive legal system which, notwithstanding its voluntaristic basis, operates exclusively in the political environment, in which the principal actors are sovereign independent States. It is a formal conduct-regulating system for those actors. It deals above all with the reconciliation of group interests, and of group rights and duties, the group normally in question being the State.

That concept of sovereign independent States supplies the key to the understanding of the statement made above, that internationl law is a law of coordination, not of subordination. This is enshrined in the juridical principle of the equality of the States. As the United Nations Charter (Article 2, paragraph 1) puts it: "The Organization is based on the principle of the sovereign equality of all its Members." The sovereign equality of States as a legal principle is not, of course, the same thing as their political or economic equality, and a sensitive approach to international law materials must always keep this in mind. *Quod licet Jovi* . . . .

Sovereignty and independence, whether taken together or separately, are themselves elusive topics, also given to much philosophical and practical controversy. These controversies need not today greatly exercise the practising attorney save in the extremely rare case where he has to handle a question whether a given entity is a sovereign independent State or is entitled to the status of a sovereign independent State. This occasionally occurs on both the international and the internal level—for intance in an English court the question whether during the civil war in Nigeria secessionist Biafra could be regarded as a State, an issue which arose in the course of a private law action for possession. *Aqbor v. Metropolitan Police Commissioner,* [1969] 1 WLR 703; [1969] 2 All E.R. 707; 52 ILR 382. A widely accepted working definition of "state" appears in the Montevideo Convention of 26 December 1933 on the Rights and Duties of States. According to that text, a State as a person of international law should possess the following characteristics: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other States. 165 LNTS 19; U.S. *Treaty Series,* No. 881; Manley O. Hudson, VI *International Legislation* 620. As for the concept of "sovereign equality", General Assembly resolution 2625 (XXV), 24 October 1970, entitled Declaration on

Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, describes the elements of this principle in terms of United Nations law as including the following: (a) all States are juridically equal; (b) each State enjoys the rights inherent in full sovereignty; (c) each State has the duty to respect the personality of other States; (d) the territorial integrity and political independence of a State are inviolable; (e) each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

As for "independence", for practical purposes take as the point of departure the lists of the States members of the major international organizations such as the United Nations, the specialized agencies and others of universal membership, that is organizations membership in which is in principle open to every independent State. Those lists would not be conclusive or exclusive, as some of these organizations permit semi-independent states and other politically distinct territorial units to become members of one kind or another, while in the United Nations itself the political compromise of 1945, which gave the USSR three votes in the organization, led to the inclusion of the Byelorussian SSR and the Ukrainian SSR among the founder members of the United Nations, although their status as *independent* States will not be recognized everywhere, and certainly does not display itself in the United Nations.

While, then, the independent sovereign State is the primary subject of international law, it is not the only one. Its primacy, however, is an essential feature of international law, because international law is made by the independent sovereign States or in accordance with their will, and not by any other entity. The reality of this was well brought out indeed in a recent technically administrative discussion on whether international organizations should be enabled to participate fully in a diplomatic conference to conclude a convention on the law of treaties between States and international organizations or between international organizations, proposed in 1982 by the International Law Commission. There were some representatives of international organizations who thought that as the conclusion of such a treaty was exclusively a matter for States, there was no place for the full participation of international organizations in the proposed conference, and that their status as observers, that is without the right to vote and with limited rights of initiative and of

participation in the debates, would not only be adequate but also more in conformity with the basic structure of contemporary international law. This appears in decision 1982/17 of the Administrative Committee on Co-ordination, circulated to the General Assembly in document A/C.6/37/L.12. Indeed that decision actually refers to the right to vote as belonging to States.

§ 3. *Public International Organizations*

The complexity of modern international relations has led to a proliferation of public or intergovernmental international organizations. While their origin may be found in considerations of administrative convenience which began to emerge in Europe during the nineteenth century, in the twentieth century, and especially since 1945, this phenomenon has taken on an entirely new character, and many of these organizations, now universal in their scope and role, have acquired a degree of what is usually called *international personality* (a term which defies precise definition). The International Court of Justice explained the meaning of this in relation to the United Nations in the following passage:

> ***[T]he Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of possession of a large measure of international personality and the capacity to operate on the international plane. It is at present [1949] the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality.* * * Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a "super-State" whatever that expression may mean. It does not even imply that *all* [italics supplied] its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing rights and duties, and that it has capacity to maintain its rights by bringing international claims. *Reparation for Injuries suffered in the Service of the United Nations,* advisory opinion, ICJ Reports 1949, 174 at p. 179.

That remark about "super-state" was reiterated and applied to the law of treaties in the advisory opinion of the same Court concerning the *Interpretation of the World Health Organization/Egypt Agreement,* ICJ Reports 1980, 73 at p.89.

The Court gave the following rationale:

> ***[T]he Court's opinion is that fifty States, representing the vast majority of the members of the international community [in 1945], had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims. ICJ Reports 1949, at p. 185.

In dealing with public international organizations, one should distinguish between those of a universal character, regional organizations, and organizations of integration. The first category has been defined specifically and generically as "the United Nations, its specialized agencies [cf. Articles 57 and 63 of the Charter], the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale" (Vienna Convention of 14 March 1975 on the Representation of States in their Relations with International Organizations of a Universal Character, article 1, paragraph 1 (2) [not yet in force], United Nations Conference on the Representation of States in their Relations with International Organizations, O.R., II (A/CONF.67/16)). There is no formal definition of a regional organization, but *a contrario* they are obviously organizations whose membership and responsibilities are on a geographically regional scale. Examples include the Organization of American States, the Organization of African Unity and the League of Arab States, and various smaller organized groupings or sub-groupings. None of these definitions are intended to include military and defense organizations such as the North Atlantic Treaty Organization (NATO) or the Warsaw Assistance Treaty of 14 May 1955 (the Warsaw Pact).

Organizations of integration are a new phenomenon. Indeed, for the present only one exists (although there are signs of others coming into being), and that is the European Economic Community (the Common Market). Organizations of universal character and the regional organizations are essentially organizations of coordination in the same sense that international law itself is a law of coordination. The new organizations of integration, however, contain the seeds of supranationalism, since the member States have transferred some of their own legislative and administrative competences, and with them some part of their international competences, to the organs of the Community. The Community also has its own Court of Justice (the Luxembourg Court) standing in a certain hierarchical relationship with the internal court system of the member States. Community legislation and community jurisprudence can therefore for some

purposes be regarded as an extension of national legislation and national jurisprudence of the member States.

All international organizations have their own internal law. Their constituent intrument determines what it is and how it is made and applied, and the nature and extent of its binding character, including the possibility that some of its decisions could be binding upon, or at least persuasive for, non-member States (cf. United Nations Charter, Article 2, paragraph 6). For international organizations of the first two types, this internal organizational law, sometimes called (inaccurately, it is believed) international constitutional law or international administrative law (for the international civil service) must be regarded as forming a particular branch of international law, and often a highly specialized one at that. But for an organization of integration this is not so, at least as regards its own members and also to some extent for third parties involved in transactions governed by the Community law. On the other hand, the relations of the Community with third States and with other international organizations are governed by international law, whether customary or conventional (terms to be explained later).

International intergovernmental organizations all perform their work through organs. A plenary organ consists of the whole membership of the organization. Adopting United Nations terminology which is widely followed (with perhaps differences of nomenclature), organs are principal when they are established by the constituent instrument of the organization itself, and subsidiary when they are established by a principal organ (empowered to set up subsidiary organs) in the course of or to facilitate its work. Organs of either kind may be composed of the representatives of States (whether or not members of the organization), or of individuals elected or appointed in their personal capacity and not, as such, representatives of States. The Secretary-General of the United Nations and the corresponding chief administrative officers of other international organizations are usually part of a principal organ—the Secretariat—consisting of a named individual and the necessary staff. The International Court of Justice is a collegial organ, a principal organ and the principal judicial organ of the United Nations. It consists of fifteen named individuals elected in their personal capacity. The International Law Commission is a subsidiary collegial organ composed of thirty-four individuals also elected in their personal capacity, while the United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary collegial organ composed of the representatives of thirty-six States.