Michael Akehurst

A Modern Introduction to International Law

Fifth Edition

A MODERN INTRODUCTION TO INTERNATIONAL LAW

MICHAEL AKEHURST

M.A., LL.B.(Cantab.),
Docteur de l'Université de Paris,
of the Inner Temple, Barrister-at-Law,
Reader in Law at the University of Keele

FIFTH EDITION

London
GEORGE ALLEN AND UNWIN
Boston Sydney

George Allen & Unwin (Publishers) Ltd,
40 Museum Street, London WC1A 1LU, UK

George Allen & Unwin (Publishers) Ltd,
Park Lane, Hemel Hempstead, Herts HP2 4TE, UK

Allen & Unwin, Inc.,
9 Winchester Terrace, Winchester, Mass. 01890, USA

George Allen & Unwin Australia Pty Ltd,
8 Napier Street, North Sydney, NSW 2060, Australia

A Modern Introduction to International Law was first published as No. 25 in the Minerva Series of Student's Handbooks.

First published in 1970
Second edition 1971
Third edition 1977
Fourth impression 1980
Fourth edition 1982
Second impression 1983
Fifth edition 1984
Second impression 1985

British Library Cataloguing in Publication Data

Akehurst, Michael, 1940–
A modern introduction to international law – 5th ed.
1. International law
I. Title
341 JX3091
ISBN 0–04–341025–1
ISBN 0–04–341026–X Pbk

Library of Congress Cataloging in Publication Data

Akehurst, Michael Barton.
A modern introduction to international law.
Includes bibliographical references and index.
1. International law. I. Title.
JX1308.A43 1984 341 84–9195
ISBN 0–04–341025–1 (alk. paper)
ISBN 0–04–341026–X (pbk. : alk. paper)

Set in 11 on 12 point Times
and printed in Great Britain
by Mackays of Chatham

Contents

Chapter 1

Is International Law Really Law?

International law (otherwise known as public international law or the law of nations) is the system of law which governs relations between states. At one time states were the only bodies which had rights and duties under international law, but nowadays international organisations, companies and individuals also sometimes have rights and duties under international law; however, it is still true to say that international law is *primarily* concerned with states.

English textbooks on international law usually discuss not only international law, but also certain rules of English law, such as the British Nationality Act, which are relevant to international relations; and this is a practice which the present book will also follow.

Popular Scepticism about International Law

The initial reaction of law students and laymen alike, when they are first told about international law, is usually highly sceptical. They believe that states have little respect for international law, and have no incentive to obey it in the absence of a supranational system of sanctions capable of being enforced against the law-breaker. In short, the popular belief is that international law is not really law.

The question whether international law is really law cannot be dismissed as a purely verbal question. If cabinet ministers and diplomats shared the popular scepticism about international law, then international law would be broken far more often than it is. Even if they regarded international law as a form of morality rather than law, respect for it would still be weakened; it is significant that those who regard international law as a form of morality usually speak of it as '*mere* morality'. Although experienced diplomats do not often share the popular scepticism about international law, there is a danger that the popular attitude may affect inexperienced officials and pressure groups within a state, and that the state may, as a result, be pushed into breaking international law.

In fact, however, states do accept that international law is law; and, what is more, they usually obey it. It is true that international law is sometimes broken with impunity; but the same could be said of any legal system. In English law, for instance, the cost of bringing a civil action is often greater than the amount of damages which can be recovered; and many people never even think of going to court, because they are ignorant of their rights. Even in English criminal law, where prosecutions are normally brought by the police, about 59 per cent of the serious crimes known to the police are never solved. In some other countries the position is even worse. If war is taken as the supreme example of a breakdown of law and order, it is significant that in many states civil wars and rebellions have been far more frequent (and often more devastating) than international wars.

International law is not broken more often than any other system of law. But people imagine that it is constantly broken. Why has this impression arisen? There are, I think, two explanations.

In the first place, it is only the violations of the law that get into the newspapers. When people are robbed or murdered, or when states attack one another, it is news; if the law is obeyed, it is not reported, but taken for granted. A visitor from another planet, picking up one of our newspapers and finding it full of accounts of robberies and murders, might be forgiven for thinking that life was not safe; we, who live on this planet, can tell from our own experience of everyday life that what is reported in the newspapers is the exception, not the rule. But most people have no similar experience of international relations to set against what they read in the newspapers, and so they think that the reported breaches of international law are typical instead of being exceptional.

Secondly, people tend to imagine that the mere existence of an international dispute proves that at least one state has broken the law. But international disputes are not necessarily caused by breaches of international law, just as disputes between individuals are not necessarily caused by breaches of national law. International law does not provide an answer to all international disputes, just as English law does not provide an answer to all quarrels between Englishmen. It is worth listing some of the other factors which can cause international disputes.

(1) There may be a genuine uncertainty about the facts. For instance, before one can decide whether United States participation in the Vietnam fighting was legal or illegal, one has to decide whether the National Liberation Front (Vietcong) in South Vietnam represented spontaneous internal revolt or whether it represented subversion from North Vietnam. In the former case,

American intervention was probably unlawful; in the latter case, it was probably lawful (see below, pp. 242–6). But opinions and evidence about the nature of the NLF differ, and one has to know the facts before one can apply the law.

(2) There may be genuine uncertainty about the law. For instance, some states think it is lawful to nationalise foreign property without compensation; others disagree. When a dispute arises between a state in the first group and a state in the second group, each will be convinced that it is in the right, and it is difficult to predict how an international court would decide the case (see below, pp. 91–6).

(3) An international dispute may be caused by a demand for a change in the law, just as strikes and other types of industrial dispute are often caused by a demand for alterations in the workers' contracts of employment. One cannot solve such a dispute by telling states what the existing law is, any more than one can persuade strikers to go back to work by telling them that Professor X says in his book on industrial law that wages are fixed by the contract of employment and that Professor Y says in his book on the law of contract that contracts can only be altered by mutual agreement.

(4) An international dispute may be caused by an unfriendly but legal act. The duties which international law places on states are often limited, and it may therefore be possible to injure another state severely without breaking the law. For instance, apart from special treaty provisions, international law does not prevent a state increasing its tariffs on goods coming from another state, even though the result may be to cause severe unemployment in the other state.

(5) An international dispute may arise from a violation of a body of rules which does not form part of international law. Just as societies of individuals have rules of morality, good manners, and so on, which are not part of the law, so the international society of states has rules of conduct which do not form part of international law. Some of these rules may be briefly mentioned.

(*a*) There are rules of courtesy, for example, saluting the flags of foreign warships at sea. There is an obvious similarity between such rules and the rules of courtesy which individuals observe in a national society (for example, taking your hat off in church).

(*b*) There are certain ideals which are regarded as desirable but not always practicable, such as human rights, and self-determination of peoples. It is precisely because they are not always practicable that they have often not been treated as rules of law; for law demands 100 per cent com-

pliance.[1] They bear some resemblance to moral ideals like truthfulness, which national law does not seek to enforce, because violations are too common to make enforcement practicable.

(*c*) Under the doctrine of spheres of influence, a major power adopts the policy of defending smaller powers within its sphere of influence against outside attacks (to this extent the doctrine serves to strengthen international law); the major power also claims the right to intervene in the affairs of the smaller powers within its sphere of influence (and here the doctrine runs counter to international law). The world received a grim reminder of the continuing existence of this doctrine at the time of the Soviet invasion of Czechoslovakia in August 1968, which the Soviet Union publicly justified by reference to the concept of spheres of influence. The doctrine mercifully has no exact parallel in national societies, but something like it may be seen in those unspoken patterns of segregation which exist in societies where there are deep racial or religious differences; a Catholic who buys a house in a Protestant area of Belfast will soon be made to feel a trespasser, even though he may have an impeccable legal title to the property.

There is really only one way of distinguishing international law from non-legal rules applicable to international relations, and that is to ask: 'Do states regard this particular rule as a rule of international law, or not?' The question is important and needs to be asked, because two significant consequences depend on the answer.

In the first place, when a non-legal rule is turned into a legal rule, it acquires a vigour which it never had before. An immoral or discourteous act is regarded as worse if it is illegal as well. For instance, Argentina reacted sharply to the Israeli abduction of the Nazi war criminal Eichmann from Argentina in 1960, not because they had any interest in protecting Eichmann from punishment, but because the abduction constituted an infringement of Argentina's rights under international law; if Argentina had merely regarded the abduction as discourteous or immoral, her reaction would probably not have been as sharp. Similarly, a sphere of influence is strengthened if it is placed on a legal basis. Thus, the fact that America has promised *by treaty* to defend the

[1] Such ideals are gradually becoming rules of law; see below, pp. 74–81 and 248–55. But the process is gradual, because states require time to get used to such stringent ideals.

European members of NATO against Soviet attack means that America is more likely to honour her promise than she would have been in the absence of a *legally* binding promise; as a result NATO's effectiveness as a deterrent is greatly increased.

Second, when a non-legal rule is turned into a legal rule, arguments about the scope of that rule take on a new character. Lawyers are trained not only to know (or to know where to find) the law when the law is clear, but also how to argue a case when the law is not clear – how to interpret or distinguish previous authorities, how to make use of analogies, how to deduce general principles from more detailed rules, and vice versa. Legal argument is a distinctive form of argument, just as literary criticism is a distinctive form of argument. The applicability of legal argument to particular rules is both a consequence and a proof of the legal character of those rules; to argue about rules of morality or of courtesy in the same way that one argues about rules of law would clearly be grotesque:

> What predominate in the arguments, often technical, which states address to each other over disputed matters of international law, are references to precedents, treaties and juristic writings; often no mention is made of moral right or wrong . . . Hence the claim that the Peking Government has or has not a right under international law to expel the Nationalist forces from Formosa, is very different from the question whether this is fair, just, or a morally good or bad thing to do, and is backed by characteristically different arguments. (H. L. A. Hart, *The Concept of Law*, 1961, p. 223)

The Problem of Sanctions

In a modern state we are accustomed to find a legislature which enacts the law; a judiciary which tries violations of the law; and an executive body which, among other things, enforces the decisions of the legislature and the judiciary. In international law, these features are almost wholly lacking. To a large extent, states create international law for themselves and need not accept a new rule unless they agree to it; they need not appear before an international tribunal unless they agree to do so; and there is no centralised executive body with the task of enforcing the law.

The absence of a legislature in international law led some nineteenth-century philosophers to deny that international law was law, but this defect is not regarded as crucial nowadays. What contemporary sceptics seize on is the absence of sanctions – that is to say, the absence of obligatory judicial settlement, and the absence of a centralised executive authority to enforce judgments.

If one state commits an illegal act against another state, and refuses to make reparation or to appear before an international tribunal, there is (or was until recently) only one sanction in the hands of the injured state: self-help. Self-help exists as a sanction in all legal systems. In primitive law (for example, English law before the Norman Conquest) most sanctions involved the use of self-help in one form or another. Even in modern English law an individual may defend himself against assaults, retake property which has been stolen from him, evict trespassers from his land and terminate a contract if the other party has broken a major term of the contract. But in modern societies self-help has become the exception rather than the rule, whereas in international law it has remained the rule.

At one time states could even go to war to enforce their legal rights. However, this is no longer lawful, with certain exceptions such as self-defence against armed attack. The remaining forms of self-help are retorsion and reprisals.

Retorsion is a lawful act which is designed to injure the wrong-doing state, for example, cutting off economic aid (this is lawful because there is no legal obligation to give economic aid, apart from special treaty provisions).

Reprisals are acts which would normally be illegal but which are rendered legal by a prior illegal act committed by the other state. For instance, if state A expropriates property belonging to state B's citizens without compensation, state B can retaliate by doing the same to property of state A's citizens. Reprisals need not take exactly the same form as the original illegal act; for instance, in the example just given, state B could, instead of expropriating the property of state A's citizens, repudiate a loan which it had borrowed from state A's citizens. But reprisals must be proportionate to the original wrong; for instance, state B could not expropriate property worth several times the value of the property which its citizens had lost; still less would it be entitled to kill or imprison state A's citizens.

One disadvantage of retorsion and reprisals is that the state imposing them may injure itself as much as the state against which they are directed; this is particularly true when one state cuts off trade with another state. But other types of sanctions share the same defect; for instance, in English law, a businessman who sues a customer to recover a debt may face a bill from his lawyers which is greater than the value of the original debt. A more serious disadvantage of self-help is that it only works effectively if the injured state is in some way more powerful or more determined than the wrong-doing state.

Not surprisingly, therefore, there has been a recent tendency for

sanctions to be imposed by large groups of states, working through international organisations such as the United Nations. But the United Nations Security Council can impose sanctions only in limited circumstances, and is often paralysed by the power of veto possessed by each of its five permanent members. The United Nations General Assembly is not subject to the veto, but its resolutions are usually not legally binding (although they are an institutionalised form of public opinion and can exercise great political pressure). Both the Security Council and the General Assembly, being political and not judicial bodies, base their decisions on political considerations and sometimes pay little attention to the legal rights and wrongs of a dispute.

International organisations with more specialised functions may exercise a more effective control over their members, especially if they provide essential services, like the International Monetary Fund: a state which was excluded from membership of the Fund would be unable to borrow gold and foreign currency from the Fund to meet a balance of payments crisis. And regional organisations may exercise an even stricter discipline over their members; for instance, the Court of Justice of the European Communities has compulsory jurisdiction over member-states which are accused of breaking the rules of the EEC.

However, it must be confessed that sanctions work less effectively in international law than in national law. States are few in number and unequal in strength, and there are always one or two states which are so strong that other states are usually too weak or too timid or too disunited to impose sanctions against them. But this does not mean that international law as a whole works less effectively than national law – only that it works in a different way. The importance of sanctions must not be exaggerated. They are not the main reason why the law is obeyed in any legal system. People do not refrain from committing murder because they are afraid of being punished, but because they have been brought up to regard murder as unthinkable – habit, conscience, morality, affection and tolerance play a far more important part than sanctions. Sanctions are only effective if the law-breaker is in a small minority; if he is not, sanctions are powerless to secure compliance with the law, as is shown by widespread violation of speed limits on English roads. It is unsound to study any legal system in terms of sanctions. It is better to study law as a body of rules which are usually obeyed, not to concentrate exclusively on what happens when the rules are broken. We must not confuse the pathology of law with law itself.

Reasons Why States Obey International Law

States obey international law far more often than most people suppose. Fear of sanctions has very little to do with this obedience. There are other factors inherent in the very nature of international law and of international society which induce states to obey international law. These factors more than compensate for the weakness of sanctions, but few people are aware of them, because they have no counterpart in national systems of law. Not all of these factors may operate at the same time, but compliance with international law will usually be secured even if only one of them operates in a particular case.

(1) *The absence of a legislature* is paradoxically a source of strength for international law. All legal systems correspond to some extent to the prevailing climate of opinion in the society in which they operate, but in national legal systems the concentration of legislative power in the hands of a small number of individuals may result in the enactment of rules which most people do not want and are reluctant to obey. In international law the absence of a legislature means that states very largely create law for themselves, and it is unlikely that they will create law which is not in their interests or which they will be tempted to break. Of course, it is possible that a state may be forced to agree to a rule under duress, or that the interests of states may change, or that a change of circumstances may render a rule burdensome; but international law provides at least a partial solution to these problems (see below, pp. 132–9).

It is not difficult to see why it is in the interests of states to agree to rules of international law. States are naturally interdependent in many ways (for example, international trade), and international law facilitates international co-operation; states have a common interest in preventing pollution of the sea, for instance, but prevention of pollution requires detailed rules about such things as the discharge of oil from ships, and a treaty or some other legal instrument is the obvious way of laying down the necessary rules. Similarly, when a particular problem is constantly arising (for example, do aircraft from one state have a right to fly through the air space above another state?), it is in everyone's interests to have an agreed rule to deal with all such cases, instead of leaving every individual case to be decided by a trial of strength between the particular states concerned. Even when the relevant rule of international law is imprecise, it still performs a useful function; it may not eliminate the area of disagreement between states, but at least it reduces that area, and thus makes it easier for disputes to be settled without friction.

The fact that international law largely reflects the interests of states does not justify the conclusion that states would act in the same way even if there were no law; still less does it justify the cynical view that states only obey international law when it is in their interests to do so. In the first place, as we shall see, the mere fact that a rule is a rule of international law provides states with reasons for obeying it even when there appear to be short-term gains to be derived from breaking it. Second, as I have already tried to show (above, pp. 4–5), a rule acquires a life of its own when it becomes a rule of international law. Out of habit, states obey the rule even when it goes against their interests, and claim their legal rights even when their interests are not involved. And legal arguments as well as political arguments are used in disputes about applications of the rule.

(2) *International law is largely based on custom.* By obeying a customary rule, states strengthen the rule. By breaking it, they weaken it and, so to speak, cast a vote in favour of its repeal. Customary law has a built-in mechanism of change. Thus, a state which breaks a rule of customary law may find that it has created a precedent which can be used against it, not only by the original victim, but also by third states, when the wrong-doing state wants to claim the benefit of that rule in the future. Realisation of this possibility often deters states from breaking international law.

However, the application of this factor is subject to three disadvantages:

(*a*) When states break rules of international law, they often attempt to justify their conduct by suggesting a narrow exception to the original rule, in the hope that a narrow exception will not constitute a dangerous precedent. But sometimes this hope is not fulfilled. For instance, when India invaded Goa in 1961, she argued that the liberation of territories seized in the past by colonial powers constituted an exception to the general prohibition against the use of force. A year later China invaded some areas held by India in the Himalayas, arguing that these areas had originally been seized from China by a colonial power (Britain) and that China was therefore entitled to use force to recover them, just as India had done in Goa.

(*b*) A state may deliberately try to undermine a rule if that rule generally works against the state's interests. However, in some cases it may be difficult to undermine a particular rule without undermining the law as a whole, and a realisation of this may act as a deterrent on the state concerned.

(*c*) Many diplomats may not be sophisticated enough to weigh the long-term disadvantages of violating a rule against the short-term gains of violation. At times of great tension, it may be difficult to look beyond the immediate crisis. The cynical view is that states will always violate international law when their vital (short-term) interests are in danger. This view is only partly true, because violations, when they do occur, are more often unconscious than conscious. It often happens that there is no absolutely right answer to a legal problem; instead, there are answers of varying degrees of legal soundness and unsoundness. In times of crisis, when a state's vital interests are in danger, the state's legal advisers may lose their usual calmness and impartiality and be content with a lower degree of legal soundness than they would normally have required. The danger is that what seems reasonably sound to one side will not seem reasonably sound to the other side, particularly if the other side is equally inflamed. Consequently each side may genuinely believe that *it* is obeying the law and that the other side is the law-breaker.

(3) *States are few in number and are composed of territory.* The fact that states are few in number means that every state comes into frequent contact with every other state. The fact that states are composed of territory means that a state cannot choose its neighbours; it is forced to live with the states near it. Occasionally a state is able to live in virtual isolation from the rest of the world, as Japan did for over two centuries before 1854. But normally a state is driven by economic and other needs to seek benefits from other states. If it tries to take those benefits by force, it will unite other states against it in a defensive alliance. If it tries to obtain benefits by peaceful means, it will have to give something in return. And, in order to induce other states to 'do business' with it, it will have to acquire the reputation of being trustworthy and law-abiding. This applies particularly to its relations with its neighbours, with whom it is likely to have the most frequent dealings. In national societies, an individual who acquires a reputation for lawlessness in his home-town can move to another town where he is unknown and find anonymity in a large crowd. But states cannot move from one continent to another; even if they could, they would find that their reputation was known all over the world, simply because the international society of states is so much smaller than a national society of individuals.

It is frequently supposed that only small states need to worry about acquiring a reputation for being law-abiding. But such a

reputation is an indispensable asset for the foreign policy of even the strongest states. For instance, under the North Atlantic Treaty, which is a cardinal feature of United States foreign policy, the USA undertakes to defend its European allies against Soviet attack. In order to make the alliance an effective deterrent in Soviet eyes, and in order to encourage the European allies to remain in the alliance, the USA has to convince both the Soviet Union and the European members of NATO that it is a state which keeps its promises.

Suggestions for Further Reading

M. A. Kaplan and N. de B. Katzenbach, *The Political Foundations of International Law*, 1961, especially chs 1, 2 and 13.

L. Henkin, 'International law and the behaviour of nations', *Recueil des cours de l'Académie de droit international de La Haye*, vol. 114, 1965, pp. 171–276.

L. Henkin, *How Nations Behave*, 2nd ed., 1979.

A. James, *The Bases of International Order*, 1973, pp. 60–84.

J. G. Merrills, *Anatomy of International Law*, 2nd ed., 1981.

Roger Fisher, *Points of Choice*, 1978.

John A. Perkins, *The Prudent Peace: Law as Foreign Policy*, 1981.

Chapter 2

Historical and Political Factors

Whenever independent political communities have come into peaceful contact with one another, they have felt the need for some sort of international law to govern their relations, even though the rules may have been very rudimentary, for example, that treaties should be obeyed and that envoys should not be harmed. Thus, there were systems of international law in force between the city-states of classical Greece and between the Hindu kingdoms of ancient India. Even during the Middle Ages in Western Europe international law existed. But medieval Europe was not very suitable for the development of international law, because it was not divided into states in the modern sense. Nowadays we think of states as having undisputed political control over their own territory, and as being independent of external political control. Medieval kings were not in this position; internally, they shared power with their barons, each of whom had a private army; externally, they acknowledged some sort of allegiance to the pope and to the Holy Roman emperor.

Modern international law began to develop at the same time as the modern system of states, in the sixteenth and seventeenth centuries. It originated in Western Europe, but at first Europeans were prepared to admit that non-European states had at least limited rights under the European system of international law. Non-European states were also often prepared to admit that European states had at least limited rights under their various non-European systems of international law, and so legal relations between European and non-European states became possible. By about 1880, however, Europeans had conquered most of the non-European states, which was interpreted in Europe as conclusive proof of the inherent superiority of the white man, and the international legal system became a white man's club, to which non-European states would be elected only if they produced evidence that they were 'civilised'.

It was not until after the First World War that international law rid itself of this racialist bias and became truly universal. Since 1945 so many colonies have become independent that the majority

of states are now non-European. But the separate systems of international law which had once existed between non-European states had been destroyed during the period of European domination, and non-European peoples had been subjected to a long period of European cultural and technological influence. Consequently, instead of seeking the re-establishment of traditional non-European systems of international law, non-European states have accepted the system which had originally been developed by Europeans, and have merely tried to obtain revision of individual rules which are contrary to their interests (see below, pp. 19–22).

Naturalists and Positivists

During the formative period of international law, academic writers exercised a much greater influence than they do nowadays. Since they have, to some extent, left a mark on the modern law, it is necessary to say something about them, and in particular to describe the two main schools of thought – naturalists and positivists.

The leading naturalist writer was the Dutchman Hugo Grotius (1583–1645), who is often regarded as the founder of modern international law; other important naturalist writers were the Spaniards Vitoria (1480–1546) and Suárez (1548–1617), Gentili, an Italian protestant who fled to England (1552–1608), and the Englishman Zouche (1590–1660). Although disagreeing about many things, all these writers agreed that the basic principles of all law (national as well as international) were derived, not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason; law was to be found, not made.

These basic principles of law were called natural law. Natural law was originally regarded as having a divine origin, but Grotius wrote that natural law would still have existed even if God had not existed; instead, Grotius considered that the existence of natural law was the automatic consequence of the fact that men lived together in society and were capable of understanding that certain rules were necessary for the preservation of society. According to this line of argument, the prohibition of murder, for instance, was a rule of natural law, independently of any legislation forbidding murder, because every intelligent man would realise that such a rule was just and necessary for the preservation of human society.

The theory of natural law has a long tradition, going back to Roman times, and is still the official philosophy of law accepted by the Roman Catholic Church. But nowadays it is not accepted by