Contemporary International Law

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THE PLAN OF THIS BOOK

The major sections of this book end with lists of relevant references and readings. In general, the literature is limited to the period of the last fifteen or twenty years.

All cases mentioned in the text are identified by the year of the decision or award. When a case is cited, the year is followed by the number of the page in the source in which the case can be found. The text is followed by Appendix A, in which a few cases are abstracted; Appendix B, a complete list of cases cited in the text; and a selected bibliography of literature dealing with international law. This last section is subdivided into books of texts of cases, digests of cases, and surveys of international law. An index will be found at the end of the book.

A list of abbreviations used (mostly in the "References and Readings" sections and in Appendix B) appears on page xviii.

ABBREVIATIONS

ADIRC	Académie de Droit International, *Recueil des Cours*. The Hague.
AJIL	*American Journal of International Law*
Ann. Dig.	*Annual Digest of Public International Law Cases* (covering cases to 1945; continued thereafter as *ILR*)
AV	*Archiv des Völkerrechts*
BYIL	*British Yearbook of International Law*
F. Supp.	*Federal Supplement* (decisions of the U.S. District Courts)
F. 2d.	Federal Reporter 2nd series (decisions of U.S. District Courts)
ICJ	*Reports of Judgments, Advisory Opinions and Orders* of the International Court of Justice
ILR	*International Law Reports* (continuation of *Ann. Dig.*, covering cases after 1945)
Int. & Comp. L. Q.	*International and Comparative Law Quarterly*
JDI (Clunet)	*Journal du Droit International* (from 1915; founded by Edouard Clunet 1874)
PCIJ	*Judgment, Orders and Advisory Opinions* of the Permanent Court of International Justice
RGDIP	*Revue Générale de Droit International Public*, 3rd series
UN Reports	United Nations *Reports of International Arbitral Awards*
US Reports	*United States Supreme Court Reports* (including reports by reporters Dallas, Cranch, Wheaton, Peters, Howard, Black, Wallace)
Z	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

CONTENTS

PART ONE

THE NATURE AND FUNCTION OF INTERNATIONAL LAW

Law is one of the regulators of social action. It prescribes the behavior of a society's members, thereby helping in making their coexistence and the society's survival possible. It addresses itself to natural and juridic persons (corporations and associations, for instance) in national societies; and, mainly, to states in the international society. What the prescribed behavior is to be, hence what the content of the law must be to produce it, is neither predetermined nor can it be stated in the abstract. The law is an integral part of its society. The members can, to a large extent, choose the character of their own society, and then formulate their laws accordingly. Law, in other words, is man-made. For this reason, no two legal systems are alike. The totality of a society's social goals, policies, and attitudes determines both the character of the society and the content of its laws.

Only a very few fundamental and indispensable elements must be present for there to be a society (e.g., the life of some members must be preserved) or a legal system (e.g., agreements must be kept). Beyond those few elements, the content of the law, the manner of its functioning, and its efficacy result from the human choices. The quality of the law depends therefore upon how well people have formulated their laws in the light of the goals they pursue with its help. Most of the time, when a law is found to be "inadequate" the reason is that its goal is valued less than some other goal. The remedy then is not to manipulate laws but to change evaluation of goals. (For example, if the veto right of the five permanent member states in the Security Council of the United Nations is found to hamper the peace-enforcing activity of the council, the "inadequacy" does not lie in the veto right because no state is obliged to

make use of it.) Most particulars of a legal system are neither ordained nor immutable. Many great differences between national and the international legal systems exist not because they have to, but because of the values and corresponding choices of people regarding their national and international societies.

The crucial importance of people for the creation and maintenance of a legal system raises the question of which members of the society make the law. Of particular significance to the answer is the structure of power and the mode of its exercise in a given society—not just at a particular moment, but over a period of time; for no one generation is ever responsible for the entire legal system. Two reasons explain this significance. The first is that every law is preceded by a political process in which social issues are evaluated and decided, with the decision then embedded and firmed in law. The second is that political decisions are made by those in the society who possess, organize, and exercise the power and who embody their interests in the political system, hence in the laws of the society (in national societies the aristocracy, the capitalists, the proletariat, or leaders of a majority party; in the international society the states sufficiently influential to make and enforce individual decisions).

Differences in how power is structured and exercised in societies can largely account for differences between their legal systems. The unique organization of power in the modern international society makes the international legal system unique.

Within states, power is organized vertically, from top to bottom. The decisive power potential is located at the top, usually in the central government. In the international society, power is organized horizontally among states. Each state is an independent power center, with no state having a monopoly of power, or even only a sufficient concentration of a power potential to control the entire society. Such diffusion of power affects the quality of international law. It intensifies the difficulty of creating, interpreting, and enforcing law. Each state is eager to use its own power to do all these things itself. There is no authoritative backing such as a central government can give to law within the state (to the so-called municipal law).

Possession of a power potential by each state enables it sometimes to impose, reject, or escape the law. The unequal magnitude of the power potential of the states of the world and its changing dimension over time makes any prediction of whose power will prevail and who the lawmaker will be in any given case very difficult. Agreement upon a legal norm and its efficacy will depend upon how it affects each

state's separate national interest and therefore its readiness to compromise on the creation of and obedience to legal norms. In the absence of such readiness, the very existence of the international society might be endangered. The situation is qualitatively different from that within states when individual citizens disobey or oppose legal norms, except perhaps during revolutionary times. The most extreme such case is war, when the sweeping resistance (if not outright disobedience) to legal norms in order to preserve alleged vital national interests has at times destroyed the international society.

Because interests determine what the law is going to be and how effective it is, the proper evaluation of the quality of law requires a constant awareness that states are using international law as an instrument to further their own ends. This is more important for international law even than municipal law because the so-called individual national interest (as against a common, collective international interest) is the most powerful motor behind a state's behavior.

At the same time, however, recognizing the national interest basis of international law may not be easy. Like all lawgivers, states attempt to endow the laws they sponsor with a quality of universality and justice. If they are successful in this enterprise, they could bind a large number of states to the norms, enhance the norms' legitimacy, and lift the onus of selfishness from the law. Lawgivers like to invoke a higher authority than themselves as the source of their law to achieve these ends: God, will of the people, nature. In case of success, what started as a utilitarian principle serving some state's interest is then metamorphosed into a moral principle, and the universality of the norm obliterates its lowly origin. The higher source invoked by the lawgiver obscures the norms' mundane function of protecting the lawgiver's interests. When Moses descended from Mount Sinai he too claimed that he had received the Ten Commandments from God!

This practice is pronounced in the international society. In an age of propaganda and psychological warfare, states do not readily admit the selfish interests motivating their advocacy of particular laws. Yet with no formal legislature or complete judiciary to turn to for information, the genesis of laws and their modifications must be found in the interests and actions of states. In national societies the common interest of citizens in the maintenance of their states (nationalism) serves as a basis and a partial explanation for municipal legal systems. In the international society no one overwhelming interest common to all states could serve as a basis for international law and explain its norms. In fact, the lack of such a common comprehensive interest is one of the