Law Among Nations

An Introduction to Public International Law

FIFTH EDITION

Gerhard von Glahn

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TO DOROTHY

PREFACE TO FIFTH EDITION

The fifth edition has been revised and brought up to date as far as the publisher's deadlines have permitted. Certain portions of the volume have been altered significantly in the light of developments during the past few years, such as the coverage of Namibia; the settlement of the case involving U.S. diplomatic hostages in Iran; the U.S. operation in Grenada; the Falkland Islands War; the war in the Persian Gulf area; the downing of Korean Airlines Flight 007; Israel's territorial annexations; the covert mining of Nicaraguan ports; the continuing Western Sahara dispute; new arbitration awards and court decisions regarding maritime boundary delimitations; the 1982 Law of the Sea Convention; and selected problems posed by mercenaries and terrorists. Certain topics have been shifted to provide a more orderly presentation of material.

The bulk of material covered by international law is concerned with relations among nations in times of peace. Indeed, when the Charter of the United Nations came into force on October 24, 1945, many people believed that war had at long last been banished from the world. Regrettably, this has not proved to be the case; since 1945, there have been scores of armed conflicts, and hundreds of thousands of military personnel as well as civilians have died as a result. In light of this fact, in Part VI, Armed Conflicts, I have felt obliged to deal in considerable detail with the rules governing warfare. Wherever possible, I have replaced the word "war" with the term "armed conflict," since many of the newer rules relate to hostile actions not generally considered part of "traditional war."

As in the past, I have been greatly assisted in preparing this fifth edition by the helpful criticisms and suggestions of colleagues and students, both here and abroad. Their advice and their factual contributions are gratefully acknowledged.

G.v.G.

PREFACE TO FIRST EDITION

Traditional texts in international law have fallen into one of three basic categories: (1) commentaries, heavily weighted with historical background material, (2) casebooks, and (3) combinations of cases and extensive editorial notes.

The writer has long felt a need for a text adapted specifically for the typical undergraduate course in international law: an upper-level offering commonly limited to one semester or two quarters in length. He believes that the bulk of the students enrolled in such a course do not intend to enter law schools, government service, or the employment of an international agency after the completion of undergraduate training. Such students may be assumed to be taking a course in international law because it forms a part of the required curriculum for majors in political science or because of their personal interest in a rather fascinating and timely subject.

If the foregoing assumptions are correct, then available texts, regardless of excellence, do not really satisfy the needs of the student clientele, for those texts are, on the whole, too extensive in their treatment of the subject considering the time available in the typical course. They also require, in the instance of commentaries, a casebook to accompany the text. Such collections are, again, extremely comprehensive in scope and expensive, and they appear to be designed primarily for use in law schools or on the graduate level of instruction.

These considerations led to the writing of a relatively brief text on international law, using the traditional approach to the subject but incorporating in the actual text, whenever called for as illustrative materials, abstracts of classic and modern cases. The volume thus obviates the use of a casebook and stands as a self-contained unit. Admittedly, an obvious disadvantage of this unique feature is that students miss the complete wording of the judges in some of the great classic cases. Nothing would prevent the instructor, on the other hand, from assigning selected cases as outside reading and for practice in briefing. Most of the chapters are followed by lists of suggested readings make possible the adaptation of the text to a course running for a full academic year.

In view of the notorious inability of undergraduates to read foreign languages with any degree of fluency, the references in both footnotes and suggested readings have been deliberately restricted to sources in the English language. This has meant the sacrifice of a very large number of valuable contributions to international law by foreign scholars but has resulted in references usable by students. The omission of this portion of the scholarly "apparatus" has also kept the volume within manageable limits. Most references have been restricted intentionally to sources likely to be found in the

library of a college offering courses in international law; if lacking, they could be added at modest cost. The inclusion of numerous references to legal journals was prompted by the fact that the legal profession has created central reference libraries in many urban centers; such facilities may be available to students by special arrangement.

The inclusion or omission of subject matter is the responsibility of the writer. Dictated by his own experience in teaching international law courses, the selection of topics and the extent of their coverage also reflect his views as to the importance of each of them. Thus, since the text is intended to present a realistic picture of what the law is and not what it ought to be, relatively extensive treatment has been accorded the law of war.

The use of force has not been eliminated from the world scene, and when states or international agencies have recourse to force, the rules of the law designed for such purposes still find application. Despite the eloquence of the writings of many people of goodwill, methods for the peaceful settlement of international disputes have been, and are likely to be, abandoned in favor of war. Neutrality, pronounced dead on many occasions by learned jurists, has shown a perhaps not-too-surprising ability to survive in the practice of nations. And assertions of the present or rapidly approaching existence of a world law must as yet be regarded as utopian.

It may well be that at some future time humans will utilize their reason more fully and bring into being a peaceful world under the rule of law. For the time being, however, realism dictates the regrettable assumption that the scourge of war is with us and will be so for a long time. Hence the rules governing the use of force must be studied by the generations that will be affected most profoundly by recourse to forcible settlements of disputes. Condensation of the law of war and neutrality into a chapter, or total omission of such disagreeable topics, would be an inexcusable and unrealistic approach to the totality of international law.

The title of this volume has been chosen with care: the principles and rules embodied in what is termed *international law* represent not law above nations or supranational law but law *among* nations, *jus inter gentes*. Jurists may smile at such a concept, since to them law must stand above its subjects. This is not true, however, in the case of general international law, which at present is only a weak and developing form of law. It applies to a relatively unorganized community and lacks specialized agencies dedicated to its enforcement. Nevertheless it represents the best that a chaotic community composed of sovereign states has been able to evolve to date. And whenever the often elaborate particular law of such international agencies as the United Nations fails to be applied to relations among states, recourse is had to the general law based on custom and on general lawmaking treaties in order to regulate such relations.

G. v. G.

ABBREVIATIONS

Certain sources utilized frequently throughout this volume are cited in abbreviated form as follows:

Books

Brierly.	J. L. Brierly. *The Law of Nations* (6th ed., by Sir Humphrey Waldock). London: Oxford University Press, 1963.
Briggs.	Herbert W. Briggs, ed. *The Law of Nations: Cases, Documents, and Notes*, 2nd ed. New York: Appleton-Century-Crofts, 1952.
Bishop.	William W. Bishop, Jr. *International Law: Cases and Materials*, 2nd ed. Boston: Little, Brown, 1962.
Cheng.	Bin Cheng. *General Principles of Law As Applied by International Courts and Tribunals.* London: Stevens & Sons, 1953.
Claude.	Inis L. Claude, Jr. *Swords into Plowshares: The Problems and Progress of International Organizations*, 3rd ed., rev., New York: Random House, 1964.
Corbett.	Percy E. Corbett. *Law and Society in the Relations of States.* New York: Harcourt Brace Jovanovich.
Fenwick.	Charles G. Fenwick, *International Law*, 4th ed. New York: Appleton-Century-Crofts, 1965.
Gould.	Wesley L. Gould. *An Introduction to International Law.* New York: Harper & Row, 1957.
Hackworth.	Green H. Hackworth. *Digest of International Law.* (8 vols.) Washington, D.C.: U.S. Government Printing Office, 1940–1944.
Higgins-Colombos.	C. John Colombos. *The International Law of the Sea*, 3rd rev. ed. of A. Pearce Higgins and C. John Colombos, *The International Law of the Sea.* London and New York: Longmans, Green, 1954.
Hudson.	Manley O. Hudson. *Cases and Other Materials on International Law*, 3rd ed. St. Paul: West Publishing, 1951.

Hyde.	Charles Cheney Hyde. *International Law Chiefly As Interpreted and Applied by the United States,* 2nd ed. (3 vols.) Boston: Little, Brown, 1945.
Jacobini.	H. B. Jacobini. *International Law—A Text,* rev. ed. Homewood, Ill.: Dorsey Press, 1968.
Jessup.	Philip C. Jessup. *A Modern Law of Nations: An Introduction.* New York: Macmillan, 1949.
Kaplan-Katzenbach.	Morton A. Kaplan and Nicholas deB. Katzenbach. *The Political Foundations of International Law.* New York: John Wiley, 1961.
Land Warfare.	Department of the Army. *The Law of Land Warfare* (FM. 27–10). Washington, D.C.: U.S. Government Printing Office, July 1956.
Lauterpacht's *Oppenheim.*	L. F. L. Oppenheim. *International Law: A Treatise.* Vol. 1, *Peace* (8th ed., by Hersch Lauterpacht). London and New York: Longmans, Green, 1955; Vol. 2, *Disputes, War and Neutrality* (7th ed., by Hersch Lauterpacht). London and New York: Longmans, Green, 1952.
Lipsky.	George A. Lipsky, ed. *Law and Politics in the World Community.* Berkeley and Los Angeles: University of California Press, 1953.
Manual.	Max Sorensen, ed. *Manual of Public International Law.* New York: St. Martin's Press, 1968.
Moffitt.	Robert E. Moffitt, *Modern War and the Laws of War.* Tucson: Institute of Government Research, University of Arizona, 1973.
Moore.	John Bassett Moore. *A Digest of International Law.* (8 vols.) Washington, D.C.: U.S. Government Printing Office, 1906.
Nussbaum.	Arthur Nussbaum. *A Concise History of the Law of Nations,* rev. ed. New York: Macmillan, 1954.
Plischke.	Elmer Plischke, ed. *Systems of Integrating the International Community.* Princeton, N.J.: Van Nostrand Reinhold, 1964.
Reiff.	Henry Reiff. *The United States and the Treaty Law of the Sea.* Minneapolis: University of Minnesota Press, 1959.
Stone.	Julius Stone. *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law,* 2nd impr., rev. with Supplement, 1953–1958. London: Stevens & Sons, 1959.

Svarlien.	Oscar Svarlien. *An Introduction to the Law of Nations.* New York: McGraw-Hill, 1955.
Tung.	William M. Tung. *International Law in an Organizing World.* New York: Thomas Y. Crowell, 1968.
von Glahn.	Gerhard von Glahn. *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation.* Minneapolis: University of Minnesota Press, 1957.
Whiteman.	Marjorie M. Whiteman. *Digest of International Law* (15 vols.) Washington, D.C.: U.S. Government Printing Office, 1963–1973.

Periodicals, Etc.

AJIL	*American Journal of International Law*
APSR	*American Political Science Review*
BYIL	*British Year Book of International Law*
CSM	*Christian Science Monitor*
I.C.J. Reports	International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (1947–)
ILM	*International Legal Materials*
NYT	*New York Times*
P.C.I.J.	Permanent Court of International Justice:
Ser. A.	*Judgments and Orders* (1922–1930)
Ser. B.	*Advisory Opinions* (1922–1930)
Ser. A/B.	*Judgments, Orders, and Advisory Opinions* (1931–1940)
Proceedings	*Proceedings of the American Society of International Law*
TGS	*Transactions of the Grotius Society* [London]
Tijdschrift	*Nederlands Tijdschrift voor International Recht*
U.S.	*United States Reports* (Supreme Court of the United States). Cases before 1875 are cited by the name of the reporter:

Dallas (1787–1800)
Cranch (1801–1815)
Wheaton (1816–1827)
Peters (1828–1842)
Howard (1843–1860)
Black (1861–1862)
Wallace (1863–1874)

LAW AMONG NATIONS

CONTENTS

V. INTERNATIONAL TRANSACTIONS

VI. ARMED CONFLICTS

PART I

The Law of Nations

1

The Nature of International Law

DEFINITION OF INTERNATIONAL LAW International law is a body of principles, customs, and rules recognized as effectively binding obligations by sovereign states and such other entities as have been granted international personality; the law is also increasingly applicable to individuals in their relations with states. This definition of the subject corresponds closely to the current opinion of most writers on international law but represents by no means the only acceptable definition. Few areas of knowledge have been defined as often and in as many different ways as has international law. As Jessup pointed out, an old and possibly apocryphal Chinese proverb is said to counsel, "One should always have in the background of one's mind a multiplicity of definitions covering the subject at hand in order to prevent oneself from accepting the most obvious."[1] In the spirit of that advice, the following additional definitions are offered:

> The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.[2]

> International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of his country, and which they also regard as being enforceable by appropriate means in case of infringement.[3]

> The Law of Nations is the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights.[4]

> International law consists of a body of rules governing the relations between states.[5]

[1] Jessup, p. 4. (Full references to this and other works cited subsequently by author only may be found in the list of abbreviations, p. xiii.)

[2] Brierly, p. 1.

[3] W. E. Hall, *A Treatise on International Law*, 8th ed., A. Pearce Higgins, ed. (New York: Oxford University Press, 1924), p. 1.

[4] E. de Vattel, *Le Droit des Gens*, Charles G. Fenwick, trans. (Washington, D.C.: U.S. Government Printing Office, 1916 [1758]).

[5] Hackworth, vol. 1, p. 1. See also the extensive documented coverage in Whiteman, vol. 2, pp. 35–50.

On the other hand, the definition given by Abba Eban, then the Israeli ambassador to the United States, on Edward Murrow's television program "Person to Person" on September 20, 1957, corresponds to a widespread popular belief concerning the nature of the law: "International law is the law which the wicked do not obey and which the righteous do not enforce."

In part this difference of opinion about the very nature of the law has been caused by events or philosophies in the century in which a given definition was composed; in part it was the theory of law cherished by a given writer that dictated the nature of his definition; and, again, it may have been the relative importance placed by an author on the sources of the law that influenced the wording of his definition.

It should be realized even at this early point that the scope and, hence, the subjects, of international law are created by states and are determined by those same states. The definition given in the opening paragraph may therefore be changed in the future to accommodate additional categories of subjects. Many modern writers do, in fact, include individuals among the subjects of the law, although they usually are forced to admit that generally, the practice does not yet support their theoretical contention. The variations found currently among definitions of international law can also be explained logically by the fact that the law itself is in a state of transition.

It is generally agreed that international law is derived from domestic law through the openly or tacitly expressed will of the states, which recognize the obligatory character of a rule of international law.

If this theory is true, is international law really law? An answer to that question depends on one's definition. If one contends, as did the English writer John Austin in the nineteenth century, that there must exist not only adequate and well-defined rules but also fully developed institutions and, above all, an "enforcer" of sanctions or punishments, then international law is not "law proper." The correct view, however, is that international law should be regarded as true but imperfect law. The institutional apparatus for both its development and its enforcement are inadequate and incomplete as yet. But inasmuch as the rules recognized by the states of the world as binding obligations are enforced in the courts of those states or have been approved officially and formally by the governments of those states, the rules must be considered rules of true law. The fact that this law is, indeed, a form of primitive law is somewhat irrelevant in the light of the general obedience accorded the law. (See below "Problems of Obedience to International Law.")

The validity of the accepted rules of international law is not affected, of course, by the absence of universally shared standards and values in a heterogeneous congeries of sovereign states or by the limited scope of that law imposed by the unwillingness of those same states to subordinate their "vital" interests to an international legal order. The obvious danger is that a tendency toward the creation of regional (or particular) law may continue until all legal rules governing the actions of states across the borders of the various systems have disappeared. Such an atomistic division of the law, however, is not anticipated by even the most critical analysts. Within the preceding limits,