

ANTONIO CASSESE

INTERNATIONAL LAW
IN A
DIVIDED WORLD



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Preface

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A.C.

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Principal Abbreviations

<i>AFDI</i> :	Annuaire français de droit international
<i>AJIL</i> :	American Journal of International Law
Anzilotti, <i>Corso</i> i:	D. Anzilotti, <i>Corso di diritto internazionale</i> (1928), i (4th edn. Milan, 1955)
Anzilotti, <i>Corso</i> iii:	D. Anzilotti, <i>Corso di diritto internazionale</i> , iii. Part 1 (Rome, 1915)
<i>BYIL</i> :	British Yearbook of International Law
<i>ChYIL</i> :	Selected Articles from Chinese Yearbook of International Law (Peking, 1983)
<i>CYIL</i> :	Canadian Yearbook of International Law
DDR- <i>Völkerrecht</i> 1982:	<i>Völkerrecht, Lehrbuch</i> (ed. H. Kröger) (2 vols, Berlin, 1982)
GAOR:	General Assembly Official Records
Hague <i>Recueil</i> :	Recueil des cours de l'Académie de droit international
ICJ:	International Court of Justice
ICJ <i>Reports</i> :	Reports of the International Court of Justice
ILM:	International Legal Materials
ILO:	International Labour Organization
<i>IYIL</i> :	Italian Yearbook of International Law
<i>JYIL</i> :	Japanese Yearbook of International Law
<i>NYIL</i> :	Netherlands Yearbook of International Law
PCIJ:	Permanent Court of International Justice
<i>Schriften</i> :	G. Jellinek, <i>Schriften und Reden</i> , ii. (Berlin, 1911)
SCOR:	Security Council Official Records
Tunkin 1974:	G.I. Tunkin, <i>Theory of International Law</i> , trans. W.E. Butler (London, 1974)
UNCIO:	United Nations Conference on International Organization
USFR:	United States Foreign Relations
<i>ZaöRuV</i> :	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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Introduction

Zu fragmentarisch ist Welt und Leben!
Ich will mich zum deutschen Professor begeben
Der weiss das Leben zusammenzusetzen
Und er macht ein verständlich System daraus
Mit seinem Nachtmützen und Schlafrockfetzen
Stopft er die Lücken des Weltenbaus.¹

Heinrich Heine (*Die Heimkehr*, 1823–4)

THE idea of writing this book first occurred to me in 1980, when a Chinese student from the Florence Postgraduate School of International Affairs, where I then taught, asked me for a book on international law with the advantages of being relatively short and ‘not too legal’; in other words, both accessible and appealing to somebody with no legal background yet keen to acquire an understanding of international legal affairs. To my embarrassment, I was unable to suggest a suitable book. A number of excellent manuals which I indicated to my Chinese student disappointed him, for he found them too ‘technical’. This set me thinking about the need for a short guide to the intricacies of international law viewed from a historical and political perspective. Much hesitation ensued—after all, I knew all too well that in 1910 the prominent British jurist T. E. Holland, in his valedictory lecture at All Souls College, Oxford, prided himself on not having ‘inflicted on the world a new textbook upon International Law’.² In the event, I nevertheless decided to try. The reader will decide whether the Peking student should be blamed for involuntarily setting off a process that culminated in the writing of this book.

Perhaps it would be useful briefly to describe the goal I pursued when I embarked upon this undertaking.

First of all, the aim of the book is practical: it chiefly addresses itself to the student of law, history, and social sciences as well as to the layman, and endeavours to provide a guide to the maze of current international realities. It is not intended as a substitute for legal textbooks, rather it seeks to provide a general perspective and some basic points of reference for a better understanding of the role of law in the world community.

¹ ‘Too fragmentary are world and life! / I shall betake myself to the German Professor. / He knows how to recompose life / And makes an intelligible system therefrom; / With his night-cap and dressing-gown’s rags / He then plugs the gaps in the world’s structure.’

² T. E. Holland, *A Valedictory Retrospect (1874–1910)* (Oxford, 1910), p. 17.

Secondly, it adopts a general approach to legal institutions which is different from that prevailing in juridical writings. To explain what I mean by the term 'different' I need to make a short digression. It is almost a truism that positivism, which had its heyday in the second half of the nineteenth century, and the 'normativist' school, which evolved in the early twentieth century in Austria, Germany, and Italy, have two chief merits, especially in the fields of public law and international law. First, they disentangled legal science from other disciplines such as history, philosophy, political science (*lato sensu*), and sociology, with which it was previously associated. Second, they insisted on the need for investigating public law (as well as international law) by a method of enquiry distinct from that which, in the wake of the Roman law tradition, prevailed in the field of private law. However, the first of these undisputed virtues, though it certainly 'purified' legal science, and permitted it to attain very high levels of scholarly elaboration, gradually led to an impoverishment of legal knowledge, despite the fact that the early positivists and such 'normativists' as Kelsen had proclaimed that they did not intend 'to erect a Chinese wall' around the fledgling discipline.³ As a consequence, legal enquiry was cut off and isolated from other cognate methods of investigation and, in addition, the various branches of legal science were compartmentalized—with the obvious result that today, if one opens a good legal book, one seldom gains any insight into the social, political, and ideological conditions behind the rules, or into the multifarious factors shaping their evolution, or into the impact of legal institutions upon present-day reality. 'Purity' has led to sterility.

In this book an attempt is made to *combine*, rather than merge, the rigorous method of the positivist and 'normativist' schools in their more modern versions, with an enquiry into the historical dimension of international law and the political and ideological motivations behind it. One of the basic, perhaps somewhat naïve, assumptions of the book is that one can draw, with profit, upon various methods of investigation without necessarily betraying the distinct character of each. Let me emphasize that this approach—which one could describe as 'multi-disciplinary'—is intended not simply to render accessible a subject-matter usually considered dry or too technical but principally to examine an area of international relations as part of the complex and multi-faceted reality, with which it is closely connected: to view international legal institutions not as abstract entities 'frozen' in time, but rather as dynamic and continuously changing elements of a whole.

It would, of course, be a mistake to believe that until now no inter-

³ Mention of the 'Chinese wall' was made by V.E. Orlando, 'I criteri tecnici per la ricostruzione giuridica del diritto pubblico' (1889), *Diritto pubblico generale, Scritti vari* (Milan, 1954), p. 19.

national lawyer has drawn upon other disciplines: in some European countries especially, and in the US (where the influence of the two legal schools of thought referred to above has been less marked) many authors have trodden the path before me. In the field of international law a number of seminal works stand out.⁴ While deeply appreciating the invaluable contribution offered by them, I feel, however, that there is still a need for an approach which is both radically 'holistic' (to use a fashionable term) and which puts all legal phenomena into historical perspective. I also feel that there is a need for an elementary book to trace the broad outlines and the main issues of international legal relations, viewed from this new angle.

A further general remark seems appropriate. Since the development of the sociology of knowledge, no scholar should claim to be free from 'prejudices' and ideological assumptions: they creep into scientific argumentation often without the writer being aware of them. In a way, scholars are like the character in one of Chekhov's plays,⁵ who was meant to lecture on the evils of tobacco but could not help intermingling his cogitations on the drawbacks of smoking with lamentations about his wretched existence and his bullying wife. No student of the social sciences can refrain from interjecting—often unwittingly—his own personal feelings into his work. However, what is universally demanded from any person of learning is that his values should not lead him to manipulate scientific methods to make them suit a particular political philosophy. The reader will no doubt perceive the ideological 'leanings' of this book.⁶ They have, of course, conditioned the

⁴ Suffice it to mention those by the Greek jurist, N. Politis, *Les Nouvelles Tendances du droit international* (Paris, 1927), and the Belgians, M. Bourquin, *L'État souverain et l'organisation internationale* (New York, 1959) and C. de Visscher, *Théories et réalités en droit international public*, 4th edn. (Paris, 1970). Twenty-five years ago B. V. A. Röling, a Dutchman, published his fundamental work which must also be credited with opening the way to a 'progressive' approach to current international law: *International Law in an Expanded World* (Amsterdam, 1960). Other works include those by the French lawyer, M. Virally, *L'ONU d'hier à demain* (Paris, 1961), the Americans, W. Friedmann, *The Changing Structure of International Law* (London, 1964), O. J. Lissitzyn, *International Law Today and Tomorrow* (Dobbs Ferry, 1965), L. Henkin, *How Nations Behave*, 2nd edn. (New York, 1979), as well as (with a different outlook): R. Falk, *The Status of Law in International Society* (Princeton, NJ, 1970), and, most recently, the Frenchman, G. de Lacharrière, *La Politique juridique extérieure* (Paris, 1983), and the Spaniard J. A. Carrillo Salcedo, *El derecho internacional en un mundo en cambio* (Madrid, 1984). I should like to emphasize that the expression 'International law in a divided world' was first used by O. Lissitzyn in the first version of his monograph mentioned above (published in *International Conciliation*, 1963, March issue). It was subsequently taken up by R. Higgins in her book *Conflict of Interests: International Law in a Divided World, A Background Book* (London, 1965).

⁵ A. Chekhov, 'Smoking is bad for you', in *Short Plays* (Oxford, 1979), pp. 155–8.

⁶ For the 'values' shared in this book, see J. Galtung, 'On the Responsibility of Scientists', *Bulletin of Peace Proposals*, 7 (1976), 186–9, who lists a set of 'positive' values to which the 'negative' values of violence (including war), poverty, and repression can be opposed. See also R. A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in C. A. Black and R. A. Falk (ed.), *The Future of the International Legal Order*, i (Princeton, NJ, 1969), pp. 33 ff. Falk lists five main 'values': 'the minimization of violence; the promotion

choice of topics, the emphases and omissions, the method of enquiry, the interpretation of legal rules. I have, however, made every effort to avoid disfiguring international reality in a way contrary to scientific rigour.

I have also been induced to neglect certain topics, and to concentrate on others which I felt to be of greater interest within the context of the contemporary development of the international community, both in view of the general approach of this book and the 'values' which lie at its roots. Four general themes underlie the whole. First, the deep crevasses which split the international community along both ideological, political, and economic lines and their prismatic effect on law: in a nutshell, the unhomogeneous character of both the international community and its law today. Second, the coexistence within the community of two distinct patterns of legal order. The former we may call the 'Westphalian model', which grew out of the origins of the international community and lasted until the First, or rather, the Second World War; the latter, which has evolved in our own time, may be called the 'UN Charter model'.⁷ Thus international law possesses 'two souls', and the second seems incapable of supplanting the first. Third, the role which international law can play within the international community: what weight legal precepts carry in the decisions of States and to what extent international subjects are guided in their conduct by the rich panoply of present-day legal rules and institutions. Fourth, the diversity and occasional clashes between the old and new 'actors' playing on the international scene: since sovereign States are still the protagonists, how far can we say that individuals, peoples, and non-governmental organizations are allowed to play an active role or that theirs are mere walk-on parts? Is the international community still composed of the 'governors' only or are the 'governed' allowed to have a say?

The choice of these four themes has led me to disregard, as I have already stated, certain classic topics (for example, the relations between domestic

of human rights of individuals and groups, especially autonomy and racial equality; the transfer of wealth and income from rich States to poor States; the equitable participation of diverse cultures, regions, and ideologies in a composite system of global order; the growth of supranational and international institutions'.

⁷ For these concepts see R. A. Falk, *op. cit.* (and, before him, L. Gross, 'The Peace of Westphalia: 1648-1948', *AJIL* 42 (1948), 20 ff.). I should immediately point out that although in the Introduction and in the whole book I have taken up the terminology propounded by R. Falk, I am aware of its flaws. As I shall try to explain in Chapter 3, a main turning-point in the world community occurred in 1917, as a result of the emergence of the USSR and its challenge to traditional international law. (The First World War and the League of Nations were also instrumental in bringing about a gradual change in the international community.) If, by contrast, a main distinction is drawn between two periods (from the Peace of Westphalia to 1945, and from then to the present), those fundamental elements in the history of the world community are passed over in silence; one consequently fails to understand when and how the 'family of nations' split for the first time and profound conflicts (ideological, political, and economic) emerged. Whenever Falk's terminology is used in this book, one should always bear in mind these qualifications.

and international law, the treatment of foreigners, the legal regulation of territory and the high seas, international responsibility, etc.) which, however, I have touched upon tangentially. Should the reader wish for a complete picture of international law, describing each and every aspect of State activity, then he should turn to the textbooks on the subject.

Finally, let me point out, lest the motto quoted on the first page of this introduction be misinterpreted, that of course this book does not intend to ridicule German academics. Far from it, I have relied heavily on their past and present contributions, and hold them in high esteem. In his poem Heine wishes, I believe, to make fun of any man of learning's tendency to manipulate and ossify reality. However critical and vigilant a student of social institutions may be, sooner or later he falls into the trap of believing that his own reconstruction of reality actually reflects it as a coherent and flawless whole and that indeed the object itself is as smooth as the mirror. Reality intrudes continuously, but he glosses over the cracks or simply hides them by theoretical contrivances. The present book is of course not immune from this propensity, nor from other flaws. This I say without any undue trepidation: I remember all too well Hegel's warning⁸ that the words of the Apostle Peter to Ananias' wife ('Behold, the feet of them which have buried thy husband are at the door, and shall carry thee out') also apply to all scientific works—which are ineluctably destined to be eroded by subsequent scholarship.

⁸ G. F. W. Hegel, *Lectures on the History of Philosophy*, trans. E. S. Haldane (London, 1892), i. 17.