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# THE STUDY OF INTERNATIONAL LAW

GIDON GOTTLIEB\*

The proliferation of approaches to public international law is matched only by rising doubts about international law itself: Political scientists as eminent as Raymond Aron question the relevance of international law to state behavior—indicating that power relationships, strategic considerations and other factors minimize the role law can be expected to play in all but trivial respects.<sup>1</sup> Historians and diplomats, among them George Kennan, scoff at legalistic attitudes to international relations while legal theorists debate the very status of international law as law.<sup>2</sup> Professional lawyers, moreover, have traditionally had deep doubts about a legal field in which adjudication is a rare event and law enforcement well-nigh unattainable. The confusion is compounded by doctrinal schisms among international lawyers themselves. Advocates of the policy-science approach and the traditional rule or text-oriented method, are involved in a running controversy inaccurately associated with the so-called Yale and Harvard approaches.<sup>3</sup>

Other, newer methodological orientations are also burgeoning in the fertile soil of uncertainty—each approach being accompanied by correspondingly partisan commitments to particular teaching methods.<sup>4</sup> These methodological schisms are themselves dwarfed against the background of the doctrinal rivalries mirroring the East-West conflict and the emergence of the new states.

World tensions and armed conflicts heighten the discrepancy between law and practice, between principle and behavior—while a

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1. R. ARON, *PEACE & WAR AMONG NATIONS* (1966).
2. H. HART, *THE CONCEPT OF LAW* (1961); G. KENNAN, *AMERICAN DIPLOMACY 1900-1950* (1952); Williams, *International Law and the Controversy Concerning the Word Law*, 22 BRIT. Y.B. INT'L L. 146 (1945).
3. For the policy-science approach, see e.g., M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* (1967); M. McDUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1963); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960).
4. Falk, *New Approach to the Study of International Law*, 61 AM. J. INT'L L. 477 (1967).

handful of dedicated scholars have assumed the awesome task of designing a legal framework for world order.<sup>5</sup> Most blueprints for total disarmament, for world government, for international police forces, deepen the discouragement of the cynic while having but a faint impact on national policy. The cumulative effect of such considerations on casual observers of the field must be one of unredeemable unreality and labyrinthine complexity. Indeed, if there is any legal field which absolutely resists simplification and orderly organization, it is the field of international law—a field bordering on the treacherous domains of propaganda, politics and morality. It is nonetheless a field which forms an essential component of the international system.

Modern studies of international law must recognize the variety and complexity of contemporary approaches, must shy away from methodological messianism, and from the quest for the simple, easy answer. The documents section of this Journal is designed to reflect such variety and complexity by drawing on legal materials emanating from a multiplicity of sources echoing conflicting national approaches and claims.

The traditional law school emphasis on decided court cases is pedagogically inept in a field in which adjudication is an exceptional occurrence and the guiding hand of precedent is particularly shaky. The skills demanded of public international lawyers are markedly different from those expected of lawyers operating within a fixed and predictable legal framework such as the statutory law of bills and notes: Ease in the face of uncertainty, assurance in the face of ambiguity, a broad understanding of what is "relevant," a sharp eye for the interplay of legal and political factors, and a good sense of political realities are all demanded of the international lawyer in equal measure together with the conceptual sophistication necessary for harnessing a field so vast and so diverse. These are frequently dangerous qualities—ambiguity can degenerate into vagueness and imprecision, the sense for political realities into propaganda and partisanship, and conceptual sophistication into a bent for theoretical disputations. Thus, while the decided case approach cannot do full justice to international law, a purely academic, descriptive or analytic treatment of the subject is pedagogically equally unsatisfactory—this is a difficulty common to the study of labor law and international law and not entirely absent from the study of constitutional law.

While international instruments are not frequently applied by

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5. G. CLARK & L. SOHN, *WORLD PEACE THROUGH LAW* (3d ed. 1966).

judicial organs, they are commonly interpreted and invoked in international bodies such as the Organization of African Unity and the United Nations no less than in the practice of states. The development of international law in the post-war era has thus been greatly enhanced by the proliferation of such international organizations. In like manner, the interpretation and development of the Constitution has taken place not only through judicial determinations but also through Congressional, executive and administrative applications. Indeed, no modern study of international law can afford to neglect the distinctive processes whereby international law is made, interpreted and acted upon. Nor can it ignore the pluralistic character of the international community and the competing attitudes towards the nature, function, making and interpretation of such law.

Informal procedures for the development of international law, its application in non-judicial organs, its rather haphazard enforcement, and glaring contrasts between law and state practice, have blurred the status of international law as law. We have, however, argued elsewhere that the identification of particular rules, principles and other textual provisions as "legal," is normally required *only* when a doubt arises about their applicability in a given forum.<sup>6</sup> Where the forum is political, such identification is generally less strict and less significant. It is the "law of the forum" that governs rather than a general concept of what "law" is. This point requires some elaboration.

International lawyers are familiar with the authoritative definition of international law adopted in the Statute of the International Court of Justice. Article 38 of that Statute provides,

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

6. G. GOTTIEB, *THE LOGIC OF CHOICE: AN INVESTIGATION OF THE CONCEPTS OF RULE AND RATIONALITY* (1968).

This treaty definition of the law of the International Court of Justice must not be understood to reflect on other ingredients habitually associated with the concept of law: i. the binding force of law; ii. the effectiveness of law; iii. the enforcement of law. Not all "law" under Article 38 is effective or enforceable. All law is "binding" but not all "binding" texts are law in the sense of Article 38. Not all "effective" provisions are laws or "binding" or enforceable. Not all enforced provisions are law or "binding" or effective. Let me give examples:

- a) Some states claim that the 1965 United Nations General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States is binding as law though others deny the legal character of this resolution;
- b) Domestically, industries may accept a code of conduct as "binding" without giving it contractual force;
- c) All law is binding in the sense that states recognize the authoritative force of all "legal" instruments—this is not unlike the recognition by the President of the United States that decisions of the Supreme Court are binding upon him;
- d) Rules of international protocol and courtesy, i.e., the 21-gun salute for visiting heads of state, are generally adhered to, although states do not recognize them as binding;
- e) Texts and policies such as the Monroe Doctrine have been "enforced" by the United States even though the "legal" status of such doctrine is in doubt;
- f) Violations of the Taylor Law and court orders under that law prohibiting strikes by public employees is a phenomenon similar to that involving the breach of treaties whose legal status is not in doubt but for whose violation no effective remedy is provided;
- g) A domestic parallel to the enforcement of the Monroe Doctrine would be a lawful corporate decision to drive competitors out of business backed by corresponding economic measures.

The documents section of this Journal attempts to give a clear indication of the different legal texture of international texts and instruments. It includes in this issue a portion of the 1967 Report to the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States. The Report on Friendly Relations contains a chapter dealing with state claims concerning the codification of the U.N. Charter principle that states shall refrain in their international relations from the threat or use of force. These claims are formulated in the legal form of a draft declaration

of legal principles and rules representing a codification and progressive development of international law. They offer a synoptic index to the legal attitudes of states to the uses of force in international relations. As such, they are probably more relevant to state behavior than the general principles embodied in the Kellogg Briand Pact, the United Nations Charter and the 1949 Declaration on the Nuremberg Principles. Though the "legal" status of these draft declarations is debatable in terms of Article 38 of the Statute of the International Court of Justice, they are nevertheless advanced as authoritative re-statements of what the law is understood to mean according to important groups of states.

The significance of legal instruments such as treaties, declarations and claims must not be obscured by the tropical-like growth of new approaches to the study of international law. A systematic exposition of such instruments serves a sound educational purpose particularly when linked to a study of conflicting sets of state practice.

In most "moves" which states make in their international relations they invoke the authority of relevant instruments. It is, of course, utterly naive to assume that these instruments dictate and control state actions, especially those involving their vital concerns. But it is equally naive to ignore them altogether, for they outline available options and responses to desired courses of action.

The documents section of this Journal will include selected instruments which are "law" in the meaning of Article 38 of the Statute of the International Court of Justice as well as other documents and reports which are recognized as binding, effective, enforceable or merely declaratory. It should reflect both western and non-western approaches to international law, as well as the practice of states of all shades of alignment. The documents section has no aspiration to be comprehensive—it seeks rather to supplement other existing compilations such as *International Legal Materials* and to include significant texts not generally included in such collections.

Much vital documentation is available only in a few major libraries. This collection should therefore assist teachers, practitioners and scholars with limited access to such libraries and provide students with a handy documentary source on selected aspects of international law and relations. As some learned periodicals clearly demonstrate, the structure of an international law journal should reflect the distinctive characteristics of international law rather than be modeled on traditional law review lines. It should be a tool for the study of international law. The document section of this Journal is a step in this direction.