



## International Law -- Content and Function

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# International law—content and function: a review

Hans Kelsen, *Principles of International Law*

Second edition, revised and edited by Robert W. Tucker. New York: Holt, Rinehart and Winston, 1966. Pp. 602. \$9.95.

Georg Schwarzenberger, *The Inductive Approach to International Law*

London: Stevens, 1965. Pp. 209.

William D. Coplin, *The Functions of International Law: An Introduction to the Role of International Law in the Contemporary World*

Chicago: Rand McNally, 1966. Pp. 312. \$3.50

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The publication of these three books attests to the sharply accelerating interest at the present time in the role of international law in conflict resolution. Professor Deutsch's recent general definition of politics as the "more or less incomplete control of human behavior through voluntary habits of *compliance* in combination with threats of probable *enforcement*" comes very close to being a description of international law (1967, p. 232). The latter is made up largely of voluntary state habits of compliance, termed "international customary law," in combination with threats of probable forceful action by other states. The result is a loose international legal system made up of rules, legal procedures for doing things, standard legal ways of making international claims and phrasing diplomatic notes, and a rough consensus as to permitted modes of legal persuasion. There are two basic, and superficially un-

related, questions we can ask of international law. First, what role does it play in international politics? And second, what is its content?

Professor Coplin has made an admirable beginning in the study of the functions of international law. Addressing himself to the question of the usefulness of international law, he argues that the law fulfills several important functions in international relations. It helps national decision-makers stake out the claims of their respective jurisdictions, thus avoiding many possible interstate clashes. It also helps to limit international violence by means of direct legal prohibitions on the threat or use of force. Third, there is a considerable amount of social and economic welfare legislation to be found in multilateral conventions creating international agencies to cope directly with international welfare problems. Finally, international law serves the func-

tion of communicating a "climate of opinion" as to the nature of international relations. So far, so good, even though this functionalist approach, like most of those in that category, fails to assign comparative weights to the various functions and in addition fails to prove the mutual exhaustiveness of the functions selected.

The difficulty arises when one raises the objection that perhaps, after all, the content of international law might be so minimal and trivial that, though these functions may apply, nothing significant is changed thereby. For instance, opening Coplin's lengthy appendix at random, we might find article 2 of the Vienna Convention on Diplomatic Relations saying, "The establishment of diplomatic relations between states, and of permanent diplomatic missions, takes place by mutual consent." There is of course a long distance between this innocuous rule and those that might regulate international violence or the apportionment of sharable community resources. Thus, the question of what is the content of international law is inherently related to the question of the role international law plays, or its usefulness, in international relations. This is easily shown by Coplin's book itself, which devotes less space to the analysis of the functions of law than is devoted to the matter of recapitulating the content of international legal norms.

How exactly can one determine what substantive international law really is? Coplin has not undertaken an independent examination of the content of international law; he is content to rely almost exclusively on the books and articles of other writers, borrowing their conclusions as to substantive law. While this is reasonable in light of his purpose, it nevertheless raises in acute form the second-hand nature of similar enterprises and the question of reliability of the

"other writers." Yet the problem of ascertaining whether a given writer on international law has accurately described his subject is itself rather complex. For there is an "uncertainty principle" involved in the description of legal rules. No investigator can fully detach himself from his subject; he invariably inserts his own ideas of what the law should be. The way he structures his arguments, what he includes and excludes, the manner in which he deals with the alleged "sources" of international law, the way he handles conflicting interpretations of substantive rules—all these introduce his own substantive ideas into the law he describes. To an extent, the same would be true of many areas of research, but law, and especially international law, has the additional complication that national decision-makers may, and often do, rely upon the accounts of writers in coming to their own decisions as to what international law requires.

From the writer's point of view, therefore, the possibility of a self-fulfilling prophecy exists. This possibility in turn encourages the writer to incorporate, to a greater or lesser extent, his own ideas of what the law should be into his account of existing international rules. Nor should we be surprised that legal writers invariably do this. For they are, primarily, jurists and not political scientists; they have no particular commitment to scientific detachment, but rather were attracted to their subject for motives such as patriotism, humanitarianism, morality, or merely a passion for "tidying up" the disparate assortment of available international legal rules.

Take, for example, Oppenheim, a famous name in international law and a writer cited frequently by Coplin. The first edition of Oppenheim's treatise on international law was published in 1905, and the text has

gone through eight famous editions. Professor Schwarzenberger, in the second book under review, uncovers a neat example of manipulation in Oppenheim's treatise. In the first through fifth editions, Oppenheim pontificated that in trials of war criminals the defense of superior orders is valid. As Schwarzenberger demonstrates, this was contrary to the actual practice of Great Britain and the United States in the nineteenth century, and certainly was the direct opposite of the rule applied, after great research, at Nuremberg. Oppenheim supported it by a lone citation to the United States Rules of Land Warfare of 1914. But it turns out that the relevant paragraph in these Rules was copied from the corresponding paragraph in the 1914 British Manual of Military Law, the author of which was none other than Oppenheim. However, in this instance, Oppenheim did not manage to change international law; in the sixth edition of 1940, edited by Lauterpacht, the correct rule was inserted without any explanation that it was an about-face from the prior editions.

Perhaps Oppenheim really thought that he was providing international law with a decent rule (how could a soldier be punished simply for obeying orders?). He probably figured in addition that the general authoritativeness of his text would "carry" this particular insertion over into real law. So long as he did not attempt to pass off too many of his pet views as descriptive of existing law, he probably stood a good chance of changing the law in some areas. And if, when the issue came up, states followed his text, then he would be vindicated; for whatever the original reason for the rule, it would have become adopted by the actual practice of states into existing international law. Surely we have no right to blame Oppenheim for doing

this; he may have decided to go into the field of legal writing so that he might personally affect the course of international law by changing some of its rules in the right direction. Yet we ought to be wary of simply citing Oppenheim, or any other writer, to "prove" the existence of certain rules of substantive international law. Nor can we simply take refuge in citing the consensus of a number of writers; the consensus might simply reflect a follow-the-leader approach of writers who do not want to cross swords with their elder colleagues.

If we start with the simple, yet often overlooked, premiss that there is no *purely* objective way of discovering the content of international law, we might at least be taking a fruitful tack if we look at the problem from the national decision-maker's point of view. For he will often want to know what international law has to say with respect to a given situation.<sup>1</sup> He will consult legal counsel, who in turn will no doubt consult what the various writers on international law have to say about the subject. But the legal counsel will also know that the other side will be engaging in roughly the same procedure, and thus the lawyer will want to consult writers who will probably be viewed as impartial by the other side. The problem is to determine

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<sup>1</sup> Knowledge of the content of international law will be important to him in international bargaining and claim-conflict situations as long as matters are in the argumentative stage. He will be better off if he can rely on existing rules for his policy and make it appear that the opponent state is the innovator. Even if matters reach a point of reprisals or the threat or use of force, the side with greater legal "equity" can usually make it appear that the enemy is the innovator who is subject to retaliation without the retaliation being viewed as escalatory.

which text the other side will consider the most authoritative.

But what exactly is it that makes a text seem authoritative? To approach an answer to this question, let us now take a look at the strategies from the writer's point of view. One way for a legal writer to make himself appear unbiased and authoritative might be to criticize his own country's position on international legal questions. Imagine if a Soviet jurist were to do this; he would immediately become very famous outside of Russia and cited by everyone. But within Russia he would run the risk of never getting anything else published, and if he left the country he would be just another of many outside critics. In any event, most non-Soviet jurists today occasionally take unpatriotic positions, and thus this strategy is not a distinctive one.

A second and more grandiose, but harder, strategy is to wrap one's descriptions of substantive law in a comprehensive theory. Hugo Grotius, the "father of international law," backed up his brief on behalf of the Dutch mercantile interests for freedom of navigation on the high seas with an elaborate appeal to the immutable dictates of the law of nature. This made his description of the rules of law seem compelling and necessary, and was a highly successful strategy for the seventeenth century. Today, scholars dismiss the Grotian natural-law concept all too readily, failing to see that it was the most persuasive vehicle available in the seventeenth century. Indeed, had Grotius been three hundred years ahead of his time by invoking a scientific theory, he probably would have lost the propaganda war for freedom of the seas.

Professors Kelsen and Schwarzenberger have both surrounded their views of substantive law with comprehensive theories, and thereby have achieved considerable

fame in international legal circles. The theoretical infrastructure helps to convince readers that the author is not inserting his own biased ideas but is simply following the dictates of his theory.

Much, then, depends on the kind of theory that is used. A natural-law approach based on "right reason," for instance, would not be persuasive these days. Kelsen has tried the opposite approach to natural law—legal positivism. There are, of course, many kinds of positivists; the distinctive form assumed by Kelsen is based on two subtheories. First, his "monist" position is that international law occupies the top position in the legal hierarchy in that it defines the boundaries of lesser legal systems such as national legal systems. Second, his "sanctions" theory is that law can only be called "law" if it regulates the conditions for the employment of forcible sanctions against transgressors. The first of these, while *prima facie* of great appeal to international jurists in that it reinforces the international lawyer's sense of his own importance, has paradoxically not met with an enthusiastic reception. For international legal scholars seem particularly anxious to win the support of their own governments, and they know that their own governments look askance at theories that would limit their "sovereign" power. Thus Kelsen's monist position has been challenged by the "dualist" doctrine which recognizes international law as valid only insofar as any given country chooses to recognize it by incorporating it into its domestic legislation or constitution. Kelsen's second theory, emphasizing "sanctions," has similarly not been enthusiastically received. Enforcement of international law is one of international law's weakest characteristics; to emphasize it might mean abandoning many rules that exert some legal pressure upon states and

that have typically been obeyed in the past but which no one expects can be enforced in the event of violation.

Professor Robert W. Tucker, editing and adding considerably to Kelsen's text in the present version, gamely and brilliantly follows Kelsen's theories and gets enmeshed in the complex capillaries of rules regulating the use of force. He struggles with the United Nations Charter, which outlaws the resort to the threat or use of force, and attempts to find an enormous exception in the guise of "self-defense." He explains the United States' position in the Cuban missile crisis of 1962 as based on self-defense, apparently unaware that this expanded view of self-defense would similarly condone all preemptive strikes or "anticipatory retaliations" in the nuclear age, thus wiping out the explicit prohibitions in the Charter against the resort to force by individual states. That and similar expansions of the "sanctions" theory tend to make it a catch-all and thus unpersuasive as insurance against the bias of the writer who purports to apply the theory.

Schwarzenberger's self-styled "inductive" approach is at first glance closer to current conceptions of what an unbiased theoretical structure should be than Kelsen's framework. It appears more "scientific." Schwarzenberger adroitly criticizes previous approaches, calling them oversimplified, eclectic, unverifiable, intuitive, capricious, and purportedly based on deductions from God and Reason (pp. 4-7, 13). Yet if we look closely at Schwarzenberger's suggested antidote, we find a peculiar notion of the idea of inductivism. His argument as to the illegality of the US "quarantine" during the Cuban missile crisis of 1962, for instance, is based on deduction, verbal distinctions or their absence ("offensive" vs. "defensive" missiles), and arbitrary use of

legal "source" material; there is nothing in his argument resembling an inductive examination of state practice in analogous instances or an inductive inquiry into the question whether the relevant national decision-makers thought that the United States' actions in 1962 were legal or illegal. Moreover, Schwarzenberger attempts to characterize the entire Cuban missile crisis as either legal or illegal as a whole; his is a curiously rigid or Platonic view of "international law" that refuses to assess whether the pressure of international norms accounted for a portion of the decisions the United States made or played a partial role in shaping the policies of the affected countries. In addition, with respect to all his writings, Schwarzenberger assigns a central and crucial role to a statute of the International Court of Justice that lays down a description of the "sources" of international law. These sources include international treaties, custom, general principles of law, judicial decisions, and the writings of publicists. Not only is this a noninductive approach (for although many states recognize the Court's statute as authoritative, there is nothing to stop them from departing from it)<sup>2</sup> but it also fails to take into account recent important "sources" of international norms such as resolutions of the General Assembly or drafts of the International Law Commission.

Schwarzenberger's reliability as a describer of substantive international law, as assessed in international legal circles, is somewhat higher than Kelsen's, reflecting perhaps the promise, though not the delivery, of an impartial scientific "inductive" theory. Professor McDougal, for instance, has a higher position than either, since he

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<sup>2</sup> I have criticized Schwarzenberger's "inductive" approach at greater length elsewhere (D'Amato, 1966).

has systematically adapted Lasswell's "psychological" terminology to the delineation of "values" in international law. Even though the approach is quite old-fashioned from a psychological point of view, it is relatively new and apparently "scientific" from the perspective of international lawyers and national decision-makers, many of whom complain, with an implicit touch of admiration, that they cannot understand the jargon McDougal uses. It is safe to say that McDougal's approach seems more scientific than Schwarzenberger's, and Schwarzenberger's seems more scientific than Kelsen's. Up to now, the Soviet Union has not produced a theorist who can rival any of these men, with the result that it has not had as important an influence as the United States or Great Britain in getting its own views of substantive international law across to young lawyers and statesmen in the "third world."

It may very well be that, in this final third of the twentieth century, writers on international law will stand a better chance of having their works accepted by national decision-makers if they seem increasingly rational, scientific, detached, unambiguous, and impartial.<sup>3</sup> Yet this fact raises a difficulty in our ascertainment of the authoritativeness of various writers, for the premium placed on apparent objectivity makes it likely that jurists will become increasingly proficient in masking their own biases.

Nevertheless, even as it becomes more difficult for us to detect individual biases in writers, there is considerable hope that

scientifically detached observers will enter the ranks of those attempting to describe international substantive law. If they do, the scientific tests they are likely to apply to determine substantive law may be entirely different from any research that is now going on in the field. They may indeed be utterly unlike any of the methods in the three books under review. If a prediction can be risked, the new methods will be concerned with the psychological determination of international legal constructs as they appear in the minds of the relevant national decision-makers and their legal counsel, and as they have been employed in international bargaining and claim-conflict situations. The methods will involve interview data, content analyses of memoirs, biographical data, and state papers, and the use of multiple regression analysis to determine the various "weights" to be assigned to various kinds and forms of legal argumentation that have been relatively persuasive in cases of international bargaining. Of course, this does not mean that much of the "traditional" learning will become irrelevant; rather it will become incorporated as components of the psychological constructs of the decision-makers. This should serve to put the "traditional" learning in its proper setting as part of the psychological mechanism that goes into influencing the behavior of others by invoking the terminology of "law." Standing alone, the traditional methods are trans-empirical and noninductive in that they assume that treaties, customs, judicial decisions, books, articles, and diplomatic correspondence each necessarily influence national decision-makers to alter their behavior to conform to the norms that any given writer extracts from the said treaties and books. Traditional research fails to take into account misperceptions and

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<sup>3</sup> Today's fashions need not be with us forever, and there is no guarantee that legal methods will become increasingly scientific. It is conceivable, for example, that in the future there might be a resurgence of interest in teleology and in a modified form of natural-law theory.

distortions of these data by the relevant actors. Yet it is precisely the individual perceptions or constructs of international law in the minds of national decision-makers and their legal counsel that constitute the ultimately authoritative reference for international norms. International law, in short, is phenomenological at the national-perception level. Only when we begin to get at the subject from such an approach can

the claims of scientific accuracy, which at present are used for propagandistic purposes, become truly persuasive.

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