

Handbook of International Law, second edition

To the new student of international law, the subject can appear extremely complex: a system of laws created by States, courts and tribunals operating at the global and national level. A clear guide to the subject is essential to ensure understanding. This handbook provides exactly that: written by an expert who both teaches and practises in the field, it focuses on what the law is, how it is created, and how it is applied to solve day-to-day problems. It offers a uniquely practical approach to the subject, giving it relevance and immediacy. The new edition retains a concise, user-friendly format allowing central principles such as jurisdiction and the law of treaties to be understood. In addition, it explores more specialised topics such as human rights, terrorism and the environment. This handbook is the ideal introduction for students new to international law.

Anthony Aust is a solicitor and former Deputy Legal Adviser of the Foreign and Commonwealth Office, London. He now practises as a consultant on international law and constitutional law to governments, law firms and international organisations. He is a visiting professor at various universities. His publications include *Modern Treaty Law and Practice* (Cambridge, 2nd edn 2007).

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Handbook of International Law

Second Edition

ANTHONY AUST



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Foreword to the First Edition

Tony Aust has already produced *Modern Treaty Law and Practice* (Cambridge University Press, 2000; Chinese edn, 2005; 2nd English edn, 2007). This was an exercise in the handbook mode which some scholars profess to dislike, and which most of them certainly neglect. In my own case, I confess that that book is often to hand, because it is a place to start looking at problems in the law of treaties on an everyday basis. It does not claim to be definitive, but it succeeds in its task of introducing and of providing initial guidance in a clear and well-informed way. Take for example the short discussion on provisional application (*ibid.*, pp. 172–6), an issue of great practical significance as to which there is little or nothing in the older treatises. What he says is clear, well illustrated – one is pointed to difficulties and prominent instances (e.g. the Energy Charter Treaty) – and one is told that the case of provisional application which everyone knows – GATT 1947 – is ‘hugely atypical’.

The clear guidance and practical sense of *Modern Treaty Law and Practice* is here repeated on the broader canvas of general international law, an area of equal significance but much less accessible than the law of treaties. These days everyone including taxi drivers talks about customary international law, although they probably (and wisely) do not use the term. But there is an awareness that an imminent threat is a condition for action in self-defence; that the Security Council can authorise individual States to use force but may be expected to do so in clear language; that crimes against humanity are punishable and might be punished; and that human rights confront State responsibility with consequences for both. Providing guidance in this much broader frame is a challenge. But non-specialists have to start somewhere and this is a good place to start.

Tony Aust brings to the work a sense of humour, of balance and of British practice – but the work is not parochial. Her Majesty’s Government has a long tradition (back to the 1880s) of a legal adviser in the Foreign Office, and there has been a consistent pattern of consultation on issues perceived as legal. It can be traced in the United Kingdom Materials on International Law (UKMIL), published in the *British Yearbook of International Law* since 1978 and running now to thousands of pages – but it goes back much further than that. Senior

decision makers tend to say that they like their lawyers ‘on tap and not on top’ (as one British ambassador to the UN put it). But if one is ever involved in a long-running international dispute it is a fair bet that the government which has had a consistent, legally informed approach is the more likely to prevail, whatever the initial merits may have been. Aust has been a participant in this process from the British side for as long as thirty-five years – a process sometimes affected by forays from Lord Chancellors (as in Suez in 1956) or Attorneys-General (as with Iraq in 2003) but constant and generally consistent. In turn, good international law has reinforced sustainable international policy – witness those two occasions where the costs of the alternatives were considerable.

The treatment of the subject is light and sometimes schematic – more detailed issues will require more research. But he covers the ground and gives a good idea of its shape and contours, and this is a valuable service at a time of overspecialisation.

James Crawford

Whewell Professor of International Law
University of Cambridge
28 April 2005

Preface to Second Edition

[Q]uotation is a national vice.¹

The *Oxford English Dictionary* defines a handbook as a short manual or guide; and this book is intended to be a helpful means of finding out about international law. As James Crawford said in his foreword, a handbook is meant to be kept often to hand. So, when one comes across a problem (perhaps a new area of the international law or a new concept or term of that law) one can turn first to the handbook and get a quick answer to questions such as: What is a State? What is the exclusive economic zone? Who is a refugee? What is the legal regime of Antarctica? How are diplomatic and State immunity confused? What is Palestine? Should one prefer an arbitral tribunal to an international court? What is a Chapter VII resolution? My purpose is to explain international law principles and rules in a clear and concise way. I avoid as far as possible theory and speculation.

Although the book can be read as an introduction to the subject, it is also designed to meet the need for a practical guide for those concerned with international law, whether on a regular or an occasional basis. In the twentieth century, a tremendous amount was written about international law. General works may be intended rather more for the student. Dealing as they do with the history of international law, its doctrines and intellectual problems, such works do not always have enough space to set out the law in detail. That is right. Most students of international law, whether undergraduate or postgraduate, will not practise it.

However, today, many people need to know about international law, not only legal advisers to foreign ministries. Therefore, an object of this book is to make more people aware of the international law that lies behind so many ordinary activities. Today international law affects almost every sort of human activity. To take one simple example: foreign flights by air are only possible because of an elaborate network of bilateral treaties; and they have been concluded pursuant to a multilateral treaty (the Chicago Convention of 1944) which provides the basic legal structure for the regulation of international civil aviation. And

¹ Evelyn Waugh, *The Loved One*, 1948, Ch. 9.

when your aircraft crashes, treaties going back to 1929 may limit the compensation received by your family (see pp. 324–5 below).

In recent years, treaties providing for the protection of human rights and the environment have become widely known. But there are many other important areas regulated by treaties – some of which date back to the nineteenth century – yet they are largely unknown, except to the specialist. That the Table of Treaties is much longer than the Table of Cases merely reflects the fact that treaties now play a much more important role in the day-to-day work of the international lawyer. Today, decisions of international courts and tribunals have a less central role. Similarly, common law practitioners will be familiar with the way legislation, primary and secondary, has increased so much in volume and complexity in the last sixty years that it is now the principal element of their work.

The vital role played by international law is often not obvious even to lawyers, unless they specialise in the subject. Fortunately, in recent years George W. Bush, Saddam Hussein and Slobodan Milošević have done much to heighten awareness of the law on the use of force, UN sanctions, war crimes and crimes against humanity. Yet specialists – whether lawyers or not – in areas such as human rights, the environment or the European Union, often do not have a good grounding in international law, even though their fields have been created wholly or largely by treaties. A physicist needs to have advanced mathematics, and no doctor could qualify without a good knowledge of chemistry and biology. Similarly, international civil servants, government officials, NGO staff and other specialists all need to be more familiar with the international law underlying their subject, and not just the particular texts that may seem relevant.

It is a mistake to think that only international courts and tribunals decide disputes about international law. National courts and tribunals still decide most of them. And international law can reach far down into the internal legal order of States, sometimes with unexpected effects. In 1994, a merchant ship belonging to a former communist State was arrested in Scotland on the initiative of the crew who had not been paid for months. Normally the arrest would have been perfectly proper, but, unknown at first to the local court, there was a bilateral treaty, between that State (when it was communist) and the United Kingdom, which prohibited the arrest of merchant vessels for such a purpose. The treaty had been made part of UK law and had not been revoked or amended.

Although law is always developing, it is a mistake to think that all of it is uncertain. International law develops continually. It has its share of grey areas, but that does not mean that it is always a matter of opinion. Most of the basic principles and rules are well established. As with the law of each State, the problems faced daily are concerned more with how to apply a well-established rule to the facts. This goes also for most cases before national courts and tribunals. Cases such as *Pinochet* (see pp. 5 and 162 below) are the exception, not the rule.

All practising lawyers know how different the practice of law is from what they learned as a student. It is the same for international law. I have therefore included as much as possible of its practical aspects. This book explains how the law is actually developed and applied by States and international organisations. I was very fortunate to have been a foreign ministry legal adviser for thirty-five years. It gave me an insight into how things are done, and I have put much of my experience into this book. When I have not been able to draw on that experience, or that of former colleagues, I have been able to use my understanding of what international law can really do, and what it is important. This understanding has been developed during a lifetime of practice, which inevitably gives one a feel for what is really important. I have aimed to convey this throughout the book.

I hope that teachers and students of international law will find the book of value. There is an increasing awareness of the need to teach international law (and not just EU law), and especially how it is developed, within its proper context, and this book has certainly benefited from teaching students over the years. The proper context is largely that of diplomacy. One cannot properly appreciate why a treaty or a UN Security Council resolution was drafted in a particular way unless one understands something of the political or diplomatic process that produced it and how problems are eventually solved. That knowledge helps to explain what diplomats and other international negotiators actually do. Yet, in any country, diplomats are a small minority. I have therefore tried to set international law in the context in which it is made.

This book is not just of interest to diplomats, as is largely the case with *Satow* and similar books. My aim is to cover most areas of international law, not just those that are of particular interest to a diplomat (Denza's excellent and authoritative *Diplomatic Law* is limited to the Vienna Convention on Diplomatic Relations). Nevertheless, I hope this book will be useful to diplomats who may well be concerned with many more aspects of international law than they think. Even those who work in foreign ministries or embassies with easier access to expert legal advice have a need to understand that advice so that they can act upon it properly and effectively. There are all too many diplomats with no or little legal knowledge of the international law which underlies their work or who work largely without legal advice, having to deal with international legal problems as best they can.

The chapters vary much in length. The longer ones, such as those on the law of treaties, of diplomatic relations and of the sea, give a fairly detailed treatment of those topics, since they are central to any study of international law. Other, more specialised topics, like human rights and environmental law, are dealt with more summarily since they cannot be described in detail in a book of this length: the leading British work on international environmental law has over 800 pages which is much longer than this book. So, many chapters are more in the nature of introductions to the subject; the background and concepts being concisely described, and longer and learned sources of information mentioned.

Whenever possible, I have tried to use *primary* sources: treaties, judgments and authoritative commentaries. It is always desirable to consult the original text, be it a Security Council resolution, a treaty or whatever. Reading what you want to know often clears the mind of ‘spin’, which may have been put on the text. Like many others, inevitably I have had to rely also on leading general works like *Oppenheim’s International Law* (vol. 1, 9th edn, London, 1992) and Shaw’s *International Law* (6th edn, Cambridge, 2008), as well as many other books and articles.

All the chapters have references to books and articles, cases and other materials, which the reader is encouraged to consult. Websites are indispensable today. Shaw’s *International Law* has a useful list of websites. This book does not have such a list, but wherever possible the text will mention the relevant sites, including some of the more obscure. But one must always remember that website addresses do sometimes change. When this happens – or at other times – resort to a Google search may be necessary.

As far as possible, the facts and law are stated as at 31 July 2009, although inevitably some later developments have been added at the proof stage.

All material, comments and corrections should be sent to me at: aiaust@aol.com.