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978-0-521-10949-9 - International Law: Being the Collected Papers of Hersch Lauterpacht,
Volume I - The General Works

Edited by E. Lauterpacht

Excerpt

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I

INTERNATIONAL LAW—
THE GENERAL PART

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EDITOR'S NOTE

In 1933 Lauterpacht became the fourth editor of Oppenheim's treatise on *International Law*. This two-volume work, which for over half a century has been accepted as a standard English work of reference on international law, first appeared in 1905. Oppenheim, who was then Whewell Professor of International Law at Cambridge, produced the first and second editions. In them he established the division of the subject into two parts, 'Peace' and 'Disputes, War and Neutrality', each represented by a separate volume; and within each volume he established a system of classification which has since had considerable influence upon many students of international law. The third edition of the work was produced by R. F. Roxburgh, who subsequently became a judge of the High Court of Chancery. The fourth edition was edited by Dr Arnold (later Lord) McNair. The fifth and subsequent editions were prepared by Lauterpacht.

In his Preface to the eighth edition of Volume One, written in October 1954, he observed '... that there may be objection to the continued publication of a treatise in which the Sections written by its original author comprise only one-third—or less—of the total contents of the work'. He continued:

Even those Sections—or what is left of them—have undergone changes both of substance and of form. I am conscious of the doubts voiced, on that account, by friendly critics and of their exhortations that I should assume full responsibility, under my own name, for a treatise on International Law. I hope in due course and subject to other calls, to comply with those wishes. In the meantime, so long as the demand for 'Oppenheim' continues, I have not felt justified in abandoning a treatise whose usefulness is widely acknowledged.

Thus by 1954, at the latest, he had begun to feel that 'Oppenheim' as such had absorbed too much of his creative effort and that it was time that he should produce a comprehensive text-book of his own. In the period after the publication of the eighth edition he considered a number of ways of going about this. Sometimes he spoke of converting 'Oppenheim' into an up-to-date treatise, which would henceforth be known as 'Lauterpacht–Oppenheim'. He also contemplated the possibility of abandoning Oppenheim's work completely and, instead, of assuming over-all responsibility for the production of an entirely new treatise which he would prepare in

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association with a number of other authors possessing recognized specialist qualifications. Thirdly, he considered the alternative of producing a new treatise of his own without the aid of others, but in which he would incorporate much that he had already written in 'Oppenheim'.

Eventually, as an interim measure, he decided to prepare a ninth edition of 'Oppenheim', into which he proposed to introduce a considerable amount of new writing with the intention of using it ultimately for his own work. The material which is here printed for the first time represents the first stage in the implementation of this idea. It consists of 364 typewritten pages, of which he revised some 186 before he died. Although the material taken as a whole is entitled 'International Law—The General Part'—a title which he gave to it intending it to replace the Introduction and some of Part I of 'Oppenheim'—he did not in fact complete all the sections which he had originally intended to incorporate therein. In particular, the original Table of Contents of Chapter IV on 'International Law and the Law of the State' lists two additional sections entitled 'Municipal Law in the International Sphere' and 'The So-Called Monistic and Dualistic Doctrine', of which there exists no manuscript or typescript copy.

I have adopted a somewhat restricted view of my task as Editor, and have felt it better to maintain as far as possible the integrity of the original text. This has meant that I have not brought the references up to date; have not mentioned new materials bearing on the topics here discussed; and have not revised those few sections where, in the light of subsequent developments, the views expressed by Lauterpacht may no longer be fully accurate. My approach has been based on the view that the value of these papers lies as much in their record of what he thought and produced at a given time as in their substantive content.

Because the material was intended for use in a new edition of 'Oppenheim', he made liberal use of the existing footnotes and bibliographies in 'Oppenheim' (most of which he had himself introduced into earlier editions). I have retained these footnotes just as they appear in the typescript, as well as the abbreviations in the 'Oppenheim' manner. The full titles of the works thus referred to can be found in the Table of Abbreviations. He himself marked the typescript in such a way as to indicate that he intended that the bibliographies should, in contrast with the prevailing 'Oppenheim' technique, be placed at the end of the relevant chapter.

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So far as style is concerned, I have not attempted to revise Lauterpacht's writing in any significant respect. It is a distinctive and dignified, if solid and sometimes complex, style. Only occasionally, where sentences were unusually involved, have I ventured some minor transpositions or simplifications. I have felt freer about doing this in the later part of the text which Lauterpacht himself did not have time to revise thoroughly. Those footnotes and bibliographies which appear in 'Oppenheim' are reprinted here with the permission of Messrs Longmans, Green & Co. Ltd and of Mr Geoffrey Hudson, in whom the 'Oppenheim' copyright is vested.

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CHAPTER I

THE DEFINITION AND NATURE
OF INTERNATIONAL LAW AND ITS
PLACE IN JURISPRUDENCE1. *Definition of international law*

International law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not exclusively, upon sovereign States and which owe their validity both to the consent of States as expressed in custom and treaties and to the fact of the existence of an international community of States and individuals. In that sense international law may be defined, more briefly (though perhaps less usefully), as the law of the international community.¹

All these elements of the definition of international law are controversial. It is a matter of dispute whether it may properly be described as law in the sense generally accepted in jurisprudence; whether its rules extend to bodies and persons other than States; whether there exists an international community; and whether there is a source of international law other than the consent of sovereign States. Although it is generally agreed that international law is enforceable by physical compulsion, the precariousness and uncertainty of its enforcement have caused many to question, on that account, its claim to be considered as law in the proper sense of that term. There is substance in the doubts thus expressed as to the legal nature of the body of rules and principles currently described as international law. While, as will be shown, these doubts do not, upon examination, prove to be decisive, no useful purpose can be served by claiming for international law as now

¹ The above simplified definition of international law approaches closely that given by Westlake: 'International Law, otherwise called the Law of Nations, is the law of the society of states or nations' (*International Law*, Part I (1st ed. 1904), p. 1). With this there may be usefully compared that given by Hall: 'International Law consists in certain rules of conduct which modern civilised 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 laws of the country, and which they also regard as being enforceable by appropriate means in case of infringement' (*International Law* (3rd ed. 1890), p. 1). There may be an advantage in indicating in the definition of a subject such as international law the complexities inherent in it as distinguished from what is no more than a tautological description.

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existing a degree of legal reality which it does not possess. It is more accurate to admit its imperfections when gauged by the notion of law as it is known in civilized societies than, as is often done, to assert its legal nature by reference to a tenuous conception of law derived from a contemplation of conditions said to prevail, or to have prevailed, in primitive communities.¹

¹ Already after the First World War one of the effects of the cataclysm was to produce among international lawyers widespread dissatisfaction with the inadequacies of existing law and its philosophy and a conviction of the necessity of restating much of the law and finding a new basis for it. Amongst a mass of literature the following may be mentioned: Fauchille, §§ 1711–21; Niemeyer, *Aufgaben künftiger Völkerrechtswissenschaft* (1917); Nippold, *The Development of International Law after the World War* (1917) (trans. by Hershey, 1923); Lammasch, *Das Völkerrecht nach dem Kriege* (1917); Schücking, *Die völkerrechtliche Lehre des Weltkrieges* (1917); Nelson, *Rechtswissenschaft ohne Recht* (1917); Jitta, *The Renovation of International Law* (1919); Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1918); Zitelmann, *Die Unvollkommenheiten des Völkerrechts* (1919); Woltzendorf, *Die Lüge des Völkerrechts* (1919); Garner, *Developments*, pp. 1–42, 775–818, and in *R.G.* 28 (1921), 413–40; Feilchenfeld, *Völkerrechtspolitik als Wissenschaft* (1922); Burckhardt, *Die Unvollkommenheit des Völkerrechts* (1923); Politis, *Les nouvelles tendances du droit international* (1927), and in *R.I. (Paris)*, 1 (1927), 57–75; Fischer Williams, *Chapters*, pp. 68–85; Cavaglieri, *La rinnoiazione del diritto internazionale ed i suoi limiti* (1931); Kraus, *Die Krise des zwischenstaatlichen Denkens* (1933); Laun, *Der Wandel der Ideen Staat und Volk* (1933); Scott, *Le progrès du droit des gens* (1934); Van Vollenhoven, *The Law of Peace* (trans. from the Dutch, 1936), pp. 113–261; Griziotti, *Riflessioni di diritto internazionale* (1936); Alvarez, *Le nouveau droit international* (1924), and *La psychologie des peuples et la reconstruction du droit international* (1936); Rolin in *R.G.* 26 (1919), 129–41; De Louter, *ibid.* pp. 76–110; Pound in *Bibliotheca Visseriana*, 1923, i, 73–90; Kunz in *Grotius Society*, 10 (1925), 115–42, and in *Strupp, Wört*, iii, 294–302; Hudson in *A.J.* 22 (1928), 330–50; Dickinson in *West Virginia Law Quarterly*, 32 (1925), 4–32, and in *Michigan Law Review*, 25 (1927), 622–44; Garner in *R.G.* 37 (1930), 225–40, and in *Hague Recueil*, 35 (1931) (i), 609–720; Del Vecchio, *ibid.* 38 (1931) (iv), 545–649; Le Fur, *ibid.* 41 (1932) (iii), 548–98; Scelle in *R.I. (Paris)*, 15 (1935), 7–35; Brierly in *Nordisk T.A.* 7 (1936), 3–17. See also the literature in regard to the recent criticism of the conceptions of sovereignty at pp. 35n. and 36n. and in regard to the bases of the Law of Nations at p. 90.

The international crisis which preceded and followed the Second World War, and the fact that organized international society once more proved unable to check frequent and flagrant breaches of the Law of Nations, gave rise both to further criticisms of international law and to attempts to answer them. See, for instance, Fischer Williams, *Aspects of Modern International Law. An Essay* (1939); Niemeyer, *Law Without Force* (1941); Kelsen, *Law and Peace in International Relations* (1942); Brierly, *The Outlook for International Law* (1944), and in *International Affairs*, 22 (1946), 352–60; Dickinson, *Law and Peace* (1951); Corbett, *Law and Society in the Relations of States* (1951), and the same, *Law in Diplomacy* (1959); Ch. de Visscher, *Théories et réalités en droit international public* (1st ed. 1953, trans. by Corbett in 1957); Vedel in *R.G.* 46 (1939), 9–36; Jessup in *Foreign Affairs* (U.S.A.), 18 (1939–1940), 244–53; Keeton in *Grotius Society*, 27 (1941), 31–58; Schwarzenberger in *A.J.* 37 (1943), 460–79; Kunz in *American Political Science Review*, 38 (1944), 354–69; Dickinson in *California Law Review*, 33 (1945), 506–42; Friedmann in *A.J.* 50 (1956), 474–514; Kunz, *ibid.* 51 (1957), 77–83.

It is important to distinguish between criticism of international law and criticism of the science of international law. The latter cannot be held responsible, to any appreciable degree, for the shortcomings of international law, whose growth and authority must depend upon the willingness of States to accept, through progressive limitations of their sovereignty, the normal restraints of law. The science of international law can assist in that development by disclosing the shortcomings of existing law, by examining the possibilities of its improvement, by refraining from generalizing the effects of phenomena

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DEFINITION AND NATURE

2. *International law as 'law'*

The question whether international law is law presupposes a definition, commanding general agreement, of what is law. It may be an undue simplification of the issue to expect that that generally agreed definition can differ in every respect from what is usually described as the Austinian conception of law conceived as a body of external rules partaking of the nature of a command set and enforced by a sovereign authority and habitually obeyed by those subject to it. In particular, caution must be exercised in resorting to the argument that the Austinian conception of law is based upon an unjustifiable generalization of the experience of modern States. According to that argument, we are not entitled to restrict ourselves to that limited orbit of legal experience and to disregard the law of primitive communities which know no law-giver, no regular tribunals, and no superior agencies of enforcement. The answer to that view is that a workable conception of law cannot, except for the purposes of abstract speculation, be properly formulated by way of a most comprehensive generalization which takes decisively into account the so-called law of primitive communities. A conception of law which aims at embracing the experience of human society from the very inception of its political existence may result in a notion of law so diluted and so elastic as to render it of little value except for the purposes of anthropological or sociological study.¹ In particular, care must be taken not to exaggerate the so-called specific character of international law as a reason for acquiescing in or justifying solutions departing radically from general principles of law as adopted within the State and from rules of morality as embodied in those principles.² We must not, in any case, lose sight of the fact that modern States are not primitive

which may be purely temporary, and by exercising restraint in rationalizing its defects as being inherent in the nature of States and in the impossibility of subjecting their vital interests to the rule of law. See also Briggs, *The Progressive Development of International Law*, and Smith, *The Crisis of the Law of Nations* (both in the form of publications of the Turkish Institute of International Law, 1947); Jessup, *A Modern Law of Nations* (1948), an important work of a general character. And see McDougall in *Hague Recueil*, 82 (1953) (i), 143–226; Corbett, *ibid.* 85 (1954) (ii), 471–540; Kunz, *ibid.* 88 (1955) (ii), 9–100.

¹ For the literature on the so-called sociological approach to international law see Oppenheim, I, 15, n. 1.

² See Lauterpacht, *The Function of Law*, p. 406. And see Westlake, *Papers*, p. xxii: 'If we give the name of law to anything which we so discover in a remote state of society before we have fixed in our minds what we mean by that name, we beg the question, and we have no security that our language has any consistent, or therefore useful, meaning.'