

HERSCH LAUTERPACHT
MEMORIAL LECTURES

INTERNATIONAL LAW
AND THE
ANTARCTIC TREATY SYSTEM

Sir Arthur Watts

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AND THE ANTARCTIC TREATY SYSTEM

by

SIR ARTHUR WATTS, KCMG, QC



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INTERNATIONAL LAW
AND THE ANTARCTIC TREATY SYSTEM

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PREFACE

It was a great honour to have been invited to give the Hersch Lauterpacht Memorial Lectures for 1992, and it was with considerable trepidation that I accepted the invitation.

For all international lawyers Hersch Lauterpacht occupies a very special and eminent place. For me, however, Hersch Lauterpacht's memory holds a special significance. He was my first Professor of International Law, both as an undergraduate and as a post-graduate student at Cambridge University: indeed, I must be among the last of his post-graduate students, for my first post-graduate year was that in which he was elected to the International Court of Justice. Although, therefore, he had effectively stopped teaching at that time, his presence in Cambridge, and his continuing active interest in all the international law students, was enough to fill me with enthusiasm for the subject and thus to lead me, directly, to the career in the practice of international law which it has been my good fortune to enjoy. To have the opportunity of these Memorial Lectures to pay my tribute to Hersch Lauterpacht's influence upon me personally is therefore particularly welcome.

Selecting a topic for these Lectures was not easy. In the event I decided that there might be merit in exploring a little some of the ways in which Antarctica both illustrates and contributes to certain aspects of international law. This combination of new developments and traditional international law might be illuminating. The emergence of Antarctica as a significant subject in international relations and international law almost entirely post-dates Hersch Lauterpacht's time (his untimely death in 1960 came only the year after the conclusion of the Antarctic Treaty, and before its entry into force in 1961); yet for all Antarctica's novelty, and its unique characteristics, it still falls to be considered within the framework of the rules which form the main body of

international law to which Hersch Lauterpacht made such an outstanding contribution.

This book is a somewhat expanded version of the Lectures which were delivered in Cambridge in February 1992, at the Research Centre for International Law. To the Director of the Centre, Mr Eli Lauterpacht CBE QC, I must express my very warmest thanks, both for having invited me to give the Lectures in the first place, and then for having made all the arrangements for their delivery and, after that, for their publication in this present form.

Finally, I should just record that, although my active involvement in Antarctic affairs – as a member of the United Kingdom delegation to the first Antarctic Treaty Consultative Meeting in 1961, and later primarily as the leader of the United Kingdom delegation during the 1982-88 negotiations for the Convention on the Regulation of Antarctic Mineral Resource Activities 1988 – was as a member of the Foreign and Commonwealth Office, London, to which I was from July 1987 until November 1991. The Legal Adviser, the views expressed in these Lectures are my own personal views and do not necessarily reflect the views of that Office.

Arthur Watts

London
July 1992

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- Convention for the Conservation of Antarctic Marine Living Resources, 1980: *UKTS* No. 48 (1982); *ILM*, 19 (1980), p. 837; and see the Appendix to this volume
- Convention on the Law of the Sea, 1982: *ILM*, 21 (1982), p. 1261
- Convention for the Regulation of Antarctic Mineral Resource Activities, 1988: *UK Misc.* No. 6 (1989); *ILM*, 30 (1991), p. 190; and see the Appendix to this volume
- Charter of Paris for a New Europe, 1990 *ILM*, 30 (1991), p. 190
- Protocol on Environmental Protection to the Antarctic Treaty, 1991: *ILM*, 30 (1991), p. 1455; and see the Appendix to this volume

ABBREVIATIONS

<i>AJIL</i>	American Journal of International Law
<i>BFSP</i>	British and Foreign State Papers
<i>BYIL</i>	British Year Book of International Law
<i>Cmnd</i>	United Kingdom Command Papers
<i>Handbook</i>	Handbook of the Antarctic Treaty System (7th ed., 1990; ed. Heap)
<i>ICJ</i>	International Court of Justice
<i>ICLQ</i>	International and Comparative Law Quarterly
<i>ILC</i>	International Law Commission
<i>ILM</i>	International Legal Materials
<i>LNTS</i>	League of Nations Treaty Series
<i>PCIJ</i>	Permanent Court of International Justice
<i>Recueil des Cours</i>	Recueil des Cours de l'Académie de Droit International de la Haye
<i>RIAA</i>	Reports of International Arbitral Awards
<i>UKTS</i>	United Kingdom Treaty Series
<i>UK Misc</i>	United Kingdom Miscellaneous Series
<i>UNGA</i>	United Nations General Assembly
<i>UNTS</i>	United Nations Treaty Series
<i>YBILC</i>	Year Book of the International Law Commission
<i>ZaöRV</i>	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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CHAPTER 1

INTRODUCTION

Nowadays Antarctica is firmly on the international agenda. So much is this the case that it is sometimes difficult to recall that until about 35 years ago the outside world's involvement with Antarctica was essentially episodic, whether in the form of early voyages by boat to the waters surrounding the continent, or small parties engaging primarily in hunting seals or whales in Antarctic waters, or very occasional expeditions of exploration and discovery in the interior. Most of such human activity as there had been was concentrated on certain of the more accessible coastal islands and fringes, particularly during the summer months, usually taking the form of short visits to small settlements, very seldom involving planned over-wintering. All this activity resulted, for the whole continent of Antarctica, in an ephemeral 'population' to be numbered at most in tens rather than hundreds, let alone thousands. Even with the discovery of the South Pole in that heroic southern summer of 1911-12, it was not until the International Geophysical Year of 1957-58 – only 35 years ago – that the Pole was again visited on land.

From being an uninhabited and virtually unvisited continent until about 35 years ago, there is now a year-round 'population', with several hundred people occupying permanent stations during the winter months, rising to several thousand at those and other stations during the summer months; even tourists – although still in modest numbers – are now regular visitors to certain parts of Antarctica. The gradual but steady growth of human activity in Antarctica has brought with it a growing interest on the part of States, ever-conscious of their rights and responsibilities in relation to the activities of their nationals, and of the opportunities traditionally afforded by "empty" areas,

especially in a world where such areas have been fast disappearing. The expansion in human activities in the continent has accordingly found a parallel in the development of a legal framework to govern them.

It is that legal framework – or at least certain aspects of it – which calls for further examination, from the standpoint of its relationship to certain established principles and rules of international law. For all the public interest which has been aroused by the prospect of the vast resources to be found in the continent of Antarctica, it should be recalled that those resources are still speculative, and that so far the only substantial product of human activity in Antarctica has been an increase in scientific knowledge; knowledge is, as yet, the only valuable export from that continent. Its predominant value has been as a unique, and vast, scientific laboratory.

It is as a laboratory that Antarctica is also of value to the science of international law. Nothing in Antarctica is as it is anywhere else in the world. Its geographical uniqueness is obvious; less obvious, but just as true, is its distinctive international political and diplomatic complex of relationships; and its legal aspects stand out for their novelty and singularity. Many propositions of international law stand exposed with particular clarity in the context of Antarctica, many views can be tested (perhaps to destruction) by reference to its special characteristics, the meaning of many rules of international law can be clarified by having to be applied there in unusual circumstances, and many emerging trends in the development of international law can be illustrated, and perhaps reinforced, by what has been happening there. There does, accordingly, seem to be some value in a comparative and cumulative account of the contribution of the principal international elements of the Antarctic regime not only to the governance of Antarctica but also to the development of certain well-known areas of international law.

With that kind of agenda in mind, it is convenient to set out, in very summary form, the main elements in the legal architecture of Antarctica, as it has evolved in the past 35 years. Although these will be the subject of closer examination in later Chapters, an

overall view at this stage will help to provide some sort of general perspective.

Physical Characteristics of Antarctica

Any consideration of the legal aspects of Antarctica must take into account its severe and singular physical characteristics. They not only establish the context in which the relevant legal rules have to be applied but also in many cases are the determining factor in their application. Even a necessarily brief resumé of some of the most important elements will demonstrate the peculiar physical realities with which any regime for Antarctica must come to terms.

Antarctica is *sui generis*. Like the other major portions of the world's land surface, it is of continental size, approximately equivalent to the United States of America and Mexico combined, or Western Europe. But it can be distinguished from them in important respects. Its climate is extremely cold and inhospitable; its pristine condition makes it scientifically and environmentally precious; its continental land mass is almost totally (to the extent of about 98%) covered by an immense ice sheet, which averages about 1¼ miles in thickness and is moving all the time outwards towards the sea, in places extending beyond the seaward extent of the underlying land mass for distances up to 200-300 miles in the form of massive ice shelves; Antarctica's low temperature and other characteristics of its adjacent waters have made of its animal, bird, marine and plant life a distinctive ecosystem; it has no indigenous human population; and despite its large surface area, it is not the subject of any generally accepted State sovereignty. It is, in short, for the most part a vast and icy emptiness.

The Antarctic Treaty 1959

While interest and activity in Antarctica had for centuries been minimal and episodic, the late 1940s and the 1950s saw an increase in tension in the South Atlantic and neighbouring parts of Antarctica, which brought with it an increased awareness of

Antarctica as a whole. The tension had a variety of causes, but was perhaps principally due to disputed territorial claims in the area, super-power rivalry between the Soviet Union and the United States of America, and rapid advances in technology, especially in weapons-related areas.

Despite this unpromising background, the arrangements for a world-wide International Geophysical Year (IGY) in 1957 included a programme of scientific research in Antarctica, and this Antarctic component of the IGY was successfully undertaken in 1957 and 1958. The programme of scientific activities was governmentally funded, and might therefore have had political and legal implications. These, however, were neutralised by a "gentleman's agreement" which effectively deprived the scientific activities of their potential political implications. This example, in an area otherwise marked by international tension, was too promising to ignore, and in 1958 negotiations began in Washington which led to the conclusion of the Antarctic Treaty which was signed on 1 December 1959 (and eventually entered into force on 23 June 1961).

The Treaty was concluded between the twelve States which were at the time active in Antarctica and which had participated in the Antarctic programme of the IGY. By the Treaty the parties achieved the establishment of Antarctica as an area free for scientific research. The main provisions of the treaty involved the dedication of Antarctica to peaceful purposes only (Article I); the non-militarisation and non-nuclearisation of Antarctica (Articles I and V); agreement by the parties not to press (but, equally, not to surrender) their divergent views about territorial sovereignty in Antarctica (Article IV); and the opening of the way for freedom of scientific cooperation and research in Antarctica on a long-term basis (Articles II and III).

Convention for the Conservation of Antarctic Seals 1972¹

The Antarctic Treaty did not deal directly with the resources of Antarctica, either on-shore or in the surrounding waters. Sealing

¹ See principally pp. 211-215 below.