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Brierly's LAW OF NATIONS

Seventh Edition

ANDREW CLAPHAM

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An Introduction to the Role of International Law in International Relations

SEVENTH EDITION

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PREFACE TO THE FIRST EDITION

ANY intelligent study of the problems of international relations must raise the question of the role, if any, to be assigned in them to law. Unfortunately current discussions of the matter too often assume that this question can be determined by *a priori* methods, to the neglect of any serious examination either of the part that law is actually playing in the relations of states to-day, or of the conditions upon which an effective legal order in any society depends. This method of approach to the law of nations has made possible two popular misconceptions about its character: one that it exists solely or mainly in order to make war a humane and gentlemanly occupation, from which some critics deduce the futility of the whole science, and others the supreme need for devising a system of overwhelmingly powerful 'sanctions'; the other that, inasmuch as law within a state is normally an instrument of peace, nothing but the wickedness of governments prevents us from recognizing the law of nations as a mighty force by which war might be 'outlawed' immediately from international relations.

In this small book I have tried to give reasons for my belief that the law of nations is neither a chimera nor a panacea, but just one institution among others which we have at our disposal for the building up of a saner international order. It is foolish to underes-

timate either the services that it is rendering to-day, or the need for its improvement and extension.

J. L. B.

OXFORD,
February, 1928.

PREFACE TO THE SEVENTH EDITION

'Whether fairly or not, the world regards international law today as in need of rehabilitation; and even those who have a confident belief in its future will probably concede that the comparatively small part that it plays in the sphere of international relations as a whole is disappointing.'[1] Brierly's critical voice, present in the opening paragraph of his Inaugural Lecture at Oxford University in 1924, seems to speak to us in a very direct way. My aim in this new edition of *The Law of Nations* is to help Brierly explain again the role of international law in international relations, and, with him, to demystify the operation of international law today. The new subtitle reflects Brierly's preoccupation with the role played by international law, as well as the idea that international law is 'just one institution among others which we can use for the building of a better international order'.[2]

Brierly was comfortable writing that law exists for certain ends, and he saw that there exists a 'purpose in law'. This purpose can be

1. 'The Shortcomings of International Law' (first published in the *British Year Book of International* Law, 1924) reprinted in J.L. Brierly *The Basis of Obligation in International Law and Other Papers*, H. Lauterpacht and C.H.M. Waldock (eds), (Oxford: Clarendon Press, 1958) 68–80 at 68.

2. J.L. Brierly (ed.), *The Law of Nations: An Introduction to the International Law of Peace*, 5th edn (Oxford: Clarendon Press, 1955) preface at v. See also the opening line of the preface to the 1st edn (above).

seen as simultaneously, to provide a stable, reasonable and ordered framework for interaction, and 'to embody social justice in law (giving to that term whatever interpretation is current in the thought of our time)'.[3] The obvious tension between stability and change is the theme that runs through this approach to international law. Brierly suggested in 1924 that international law 'has attempted to maintain existing values, but rarely to create new ones'.[4] For international law to play a role in international relations the concepts used need to relate to, and reflect, the changes taking place in the world. Brierly saw an 'urgent need' to consider what words such as 'sovereignty' or 'independence' mean in 'modern conditions'.[5] He wanted us to recognize that 'as the bonds of international society have become closer, the words have changed, and are continually changing, their content.'[6]

It is hoped, therefore, that Brierly would approve of this attempt to update his book to provide the general reader with some idea of the role we expect international law might play in international relations today. Providing the reader with an accessible text means, not only examining the changing content of the relevant concepts, but also finding examples and phrases that resonate. I have tried to use a prose style which reflects what Brierly and I might have agreed on had we gone through the text together. This means I have rewritten and supplemented, imagining a co-author with opinions developed over a lifetime's writing. Consequently I have

3. Ibid 23.

4. 'The Shortcomings of International Law' (above) at 72.

5. Ibid 75.

6. Ibid 76.

sometimes inserted passages from Brierly's other works, where I feel these help to develop the argument. More generally, the other writings have helped me to try to imagine what Brierly would say during our virtual negotiations over certain new passages (and deletions).

In order to keep this a two-way conversation I decided to work from Brierly's fifth edition, rather than Sir Humphrey Waldock's sixth edition, published in 1963. I have, however, taken into consideration some of Waldock's alterations, and on occasion, where the phrasing and ideas built on Brierly's approach, I have incorporated Waldock's passages verbatim or referenced his General Course delivered at the Hague Academy of International Law around the time of the publication of the sixth edition of *The Law of Nations.*

The footnotes retain and expand some of Brierly's original references, but I felt the reader now expects indications for further reading. Moreover it was sometimes necessary to reference significant treaties and judgments that have appeared since 1963. In the last fifty years international law scholarship has burgeoned. The references are mostly aimed at students looking for a clear explanation of the law going beyond the outline presented in this introduction. In several cases I have deliberately emphasized the contribution of those writing in what I consider to be a similar tradition to Brierly's. I have felt comfortable liberally referring to Vaughan Lowe's *International Law*, bearing in mind that Lowe himself has self-consciously described Brierly's book as 'the ancestor' to his own.[7]

7. (Oxford: OUP, 2007) at 4.

Over the last fifty years there have been several attempts to bridge the gap between the fields of international law and international relations. Influential international relations scholars have sought to challenge the notion that international law has any meaningful role or effect in international relations. Brierly had little patience for those who doubted whether international law operated in the real world as a set of real obligations, and he asserted that: 'Those who act in international affairs (in contrast to those who speculate about them), statesmen, diplomatists, judges, advocates, regularly and unhesitatingly assume the existence of a juridical obligation in international law.'[8] Today there is an increasing awareness not only of the existence of international law as law, but also of international lawyers as lawyers.[9]

Brierly's empirical approach was grounded in his exposure to the day-to-day application of international law as legal advice to governments. This knowledge that international law is discussed and applied every day was matched with a rejection of abstract

8. 'The Basis of Obligation in International Law' in Lauterpacht and Waldock (eds) (above) at 19.

9. P. Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (London: Penguin, 2009). In 2010, the Legal Adviser to the US State Department, Harold Hongju Koh, addressed the American Society of International Law in the following terms: 'But in addition to being counselors, we also serve as a conscience for the U.S. Government with regard to international law... That means that one of the most important roles of the Legal Adviser is to advise the Secretary when a policy option being proposed is "lawful but awful." As Herman Pfleger, one former Legal Adviser, put it: "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no."' 'The Obama Administration and International Law', 25 March 2010.

political science interpretations of notions such as 'sovereignty' and 'independence', which he saw as misleading and counterproductive. In the past half-century there have been considerable attempts at rapprochement between the fields of international law and international relations,[10] and the present volume seeks to reinforce Brierly's arguments about the real role played by international law in international affairs.

Much of the most recent interdisciplinary scholarship refers to the importance of analysing discourse, finding common meanings in vocabulary, and developing a grammar, which enables, not just scholars to understand better the developing international order, but also international law to play a greater role in international relations. The linguistic approach can be seen to build on Brierly's assertion that actors unhesitatingly assume that international law exists, and suggests that understanding international law is essential to the conduct of international relations due to the means of communication used. International law can be seen today as having been internalized by the main actors, who increasingly meet in institutionalized settings such as the United Nations and other international organizations. This socialization through the language of international law is a real phenomenon (witnessed by the

10. See further A.-M. Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205–39; A.M. Slaughter, A.S. Tulumello, and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *AJIL* (1998) 367–97 R.O. Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard International Law Journal* (1997) 487–502; M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: OUP, 2000).

present editor) and explains in part much of the impact of international law.

Legal methods have been described as 'styles of argument, of linguistic expression' which are adapted by the actor to the circumstances.[11] Although legal methods may indeed vary, understanding the deeper structures and the legal labels used to explain them is essential to seeing how international law works.[12] Moreover understanding the legal lexicon helps disentangle what is happening in international relations. A recent interdisciplinary study explains that: '[i]n the international context, the "official language" of interstate relations is frequently the language of international law. This means not only that legal norms increasingly become part of international discourse but that standard forms of legal reasoning creep into international "conversation".'[13]

Although Brierly has been portrayed as presupposing that states were the sole concern of international law, and overly focusing on the enforcement of law by states,[14] I would suggest that we can find evidence that he was concerned, not only with the role of the

11. M. Koskenniemi, 'Letter to the Editors of the Symposium', 93 *AJIL* (1999) 351–61 at 359.

12. M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP, 2005).

13. D. Armstrong, T. Farrell, and H. Lambert, *International Law and International Relations* (Cambridge: CUP, 2007) at 30.

14. A. Carty, 'Why Theory?—The Implications for International Law Teaching', in British Institute of International and Comparative Law, *Theory and International Law: An Introduction* (London: BIICL, 1991) 75–99, at 80. In fact Carty himself says: 'Brierly objected, against his predecessors in the discipline, that the State is not a moral entity. It is merely an institution, "a relationship which men establish as a means of securing certain objects".'

individual and certain organizations, but also with the apparent failure of the dominant doctrine to recognize such non-state actors as subjects of international law. In 1928 he wrote:

> The law of any state has for its subjects both individuals and institutions, and there is no reason why international law should not become, if it is not already, a law of which the subjects are indifferently either states, or other institutions such as the League of Nations, the Bureau International de Travail, the Union Postale Universelle, &c., or finally, individuals. Such a conception of the international juridical community would in a sense be merely a return to that of Grotius; it would be a community of *Civitates*, but it would also be a community of *genus humanum*.[15]

There is a good argument for retaining the title *The Law of Nations* rather than 'updating' this to international law. Although highlighting the nation might be seen as opening the gates to reinforcing unsavoury forms of nationalism, there is an attraction in reverting to the original sense of this legal order as encompassing some universal norms that apply to a multiplicity of actors. The question lies on the fault lines of the debate about the scope of the discipline. Ironically the old-fashioned historical term (law of nations) may open up the possibility of comprehending this legal order in a way that reflects the contemporary reality and more easily allows for a progressive development of the law. Mark Janis has appealed for such a shift in the following terms:

15. 'Basis of Obligation' (above) at 52.

> I would like to ask whether the denomination of our subject, 'international law,' still makes sense. Positivist international law is rooted in the concept that relevant rules are those that address the interests of competing sovereign states. However, non-state actors now help to shape the global legal system. Arguably, it would be more appropriate and useful to re-adopt the term 'law of nations.' 'Law of nations' was used in legal discourse until Bentham's criticism of the term replaced it with 'international law.' Bentham felt that 'law of nations' did not clearly indicate that the subject had only to do with relations among sovereign states. Since 'international law' does not now solely concern 'sovereign states'—and indeed may never have—it is time to put Bentham's term to rest. Now that the practical and intellectual mould of international law is broken, why not announce a new paradigm for the discipline using older terms, 'law of nations' or 'droit des gens,' which more readily signal the diversity and complexities of the subject?[16]

Sir Hersch Lauterpacht reflected that some of the doctrine Brierly was exploring in 1924 could have been seen as 'iconoclastic', even if by 1958 aspects had become 'almost orthodox'.[17] Paradoxically the book today is considered an icon among textbooks. How then can the text retain the mould breaking approach yet remain

16. Footnote omitted. M.W. Janis, 'International Law?' 32 *Harvard Journal of International Law* (1991) 363–72, at 371–2.

17. H. Lauterpacht, 'Brierly's Contribution to International Law', in J.L. Brierly, *The Basis of Obligations in International Law and other Papers* (1958) xv–xxxvi at xvi.

revered? This is the conundrum at the heart of this project. Lauterpacht distilled Brierly's themes down to the following:

- The moral foundation of international law
- The individual as subject of international law
- The unity of international and municipal law
- The independence and sovereignty of states.

We can nuance this list of themes by emphasizing that Brierly often downplayed the role of states. In his quest to reduce the focus on the state, and emphasize the rights and obligations of individuals that make up the state, he attacked the doctrine which sought to exclude other actors as subjects of international law and played with the concept of personality:

> Even the state, great and powerful institution as it is, can never express more than a part of our personalities, only that part which finds expression in the purpose or purposes for which the state exists; and however important these purposes may be, however true it may be that they are in a sense the prerequisite condition of other human activities in a society, they never embrace the whole of our lives.[18]

Brierly foresaw other entities becoming subjects of international law, just as 'the law of any state has for its subjects both individuals and institutions'.[19] And Brierly's sense of community was not a

18. 'The Basis of Obligation' (above) at 51.
19. Ibid 52.

community of sovereign states but rather a community which drew on a sense of solidarity across traditional borders. Writing at a time when the League of Nations system seemed incapable of stemming the resort to force and aggression by Italy in Abyssinia, Brierly contrasted material links across borders with the need to find a 'spiritual as well as a material basis' for society: a Rousseauian *volonté générale*.[20] And he suggested that individuals from different nations are not strangers in the sphere of the 'deeper essentials of morality'.[21] He wrote in 1936:

> These common standards, too, do sometimes issue in common action, and though the action may be half-hearted and its results meagre, it is evidence of the general acceptance of at least some degree of common responsibility for the common welfare. The Mandates system, the Minorities treaties, the Nansen office for refugees, the international Red Cross organization, the manifold social and humanitarian work of the League of Nations—these things are not enough, but they are not negligible. Moreover, the acid test of the reality of a community is that common standards of conduct should be held with a conviction strong enough to induce its members to take common action, even at the cost of sacrifices to themselves, in defence of the law.[22]

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20. 'The Rule of Law in International Society', reprinted in *The Basis of Obligations in International Law and other Papers* (above) at 250, 251. Cf P. Allott, *Eunomia: New Order for a New World* (Oxford: OUP, 2001) at xx, who asks us to look for an 'emerging *public mind of international society*' and highlights the emergence of the '*infrastructure* of international social consciousness'; see also Carty (above) esp. at 79ff.

21. Ibid 252.

22. Ibidem.

Perhaps by putting these topics in relief there is the possibility of taking Brierly's original approach forward. Key to reconsidering Brierly's style is an understanding that he was not really seeking to state the law; rather he sought to highlight how to explore the development of international law. To demonstrate the point let us return to Lauterpacht's appreciation:

> [Brierly's] distinct contribution to the science of international law…lay not so much in the solutions which he propounded—for he often admitted, or implied, that there was no solution or no easy solution—as in the way in which he pointed to the difficulties involved and, after apparently propounding an answer to them, proceeded to develop the theme of the deceptiveness and the insufficiency of the answer thus given. It would almost appear that what weighed with him was not the result of the search, but the search itself; that he was content to be an exponent of difficulties and not a provider of solutions; and that it did not matter to him that in fact he left the problem unresolved.[23]

This new edition seeks to preserve this aspect of Brierly's approach, as well as his emphasis on the natural law origins of international law, the need to recognize that international law touched entities beyond the state, and the sense that international law provides the vocabulary for international relations.

23. 'Brierly's Contribution' (above) at xxx–xxxi.