

INTERNATIONAL LAW OPINIONS

SELECTED AND ANNOTATED

BY

LORD MCNAIR

Q.C., C.B.E., LL.D., F.B.A.

*Fellow of Gonville and Caius College
Bencher of Gray's Inn
formerly President of the
International Court of Justice*

VOLUME I

PEACE



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PREFACE

These three volumes represent an attempt to trace the development of public international law in Great Britain as evidenced by the opinions given to the Crown by its Law Officers and certain other occasional legal advisers during the past three to four centuries, and more particularly between 1782 and the end of 1902.

For the historian of the common law or equity, the law reports are the primary source. The historian of international law is not so fortunate, because his sources are not so readily available. Apart from prize, spoil, piracy, and an occasional case on diplomatic immunity, the law reports yield him practically nothing until the nineteenth century; in that century they yield a little, and the present century, as the result of three considerable wars, has already produced a good deal. But in the nature of things there is a vast field of international law which municipal courts of law are never likely to touch; more and more we find international tribunals working in parts of this field, but the main source of law, apart from multipartite treaties, is to be found in the practice of governments. It is a delusion affecting the minds of many laymen and not a few lawyers that governments in the conduct of foreign affairs act independently and capriciously and without reference to legal principle. Those who have worked in, or in the archives of, the Foreign Offices of well-established States, realize that the ordinary, routine, non-political business of the world is carried on by Ministers of Foreign Affairs and their diplomatic agents against a background of law, slowly built up in Western Europe during the past three or four centuries and in the United States of America since they became independent, and gradually spreading throughout the civilized world.

As appears from a paper read by me to the Grotius Society at its Edinburgh Conference in 1953,¹ in the sixteenth century the Crown developed the practice of consulting groups of civilians, members of Doctors' Commons, upon questions of international law which arose in the conduct of foreign affairs, and we find these groups of civilians being consulted throughout the seventeenth century. From about 1600 until the retirement of the last holder of the office, Sir Travers Twiss, Q.C., in 1872, the Crown's standing adviser on these questions was the Queen's (or King's) Advocate,² who was always (or with rare exceptions)

¹ Printed in the Appendix to Vol. III of this work.

² In *British Year Book*, VIII (1927), Malkin, then Second Legal Adviser in the Foreign Office, quotes at p. 7 from the *Encyclopaedia of the Laws of England*, I, 225-6, the following description of the Queen's Advocate, or more correctly, Her Majesty's Advocate General: 'the principal law

a civilian and a member of Doctors' Commons. He was consulted alone or with other civilians, and from the seventeenth century onwards the Attorney- and Solicitor-General were associated with him when the question was one of great importance or, frequently, upon his own request;¹ these three officers are comprised in the term 'the Law Officers'. (In some matters having a special application to Scotland or Ireland the Law Officers of those countries have also been consulted.) In this way for at least four centuries the Crown has been obtaining from its advisers opinions upon questions of international law. For the reasons indicated in the Note attached to this preface my examination of the opinions given before 1782 has not been systematic and comprehensive.

In the Preface to the first volume of the *Annual Digest of Public International Law Cases*, 1925-6, published in 1929, Judge Lauterpacht and I wrote as follows:

The work of which this book is the first-fruits was prompted by the suspicion that there is more international law already in existence and daily accumulating 'than this world dreams of' and by the conviction that it is more international law that this world wants.

The opinions given to the Crown by the Law Officers form another source of international law. Like all human products they vary in quality. Many of them will be recognized as bearing the imprint of first-class legal minds and as the source or the development of rules of international law with which we are now familiar. I do not claim that these opinions are the law.² No State alone can make law. But it is valuable to know what any State's legal advisers believe to be the law, because in the majority of cases it is that advice which governs the

officer of Her Majesty in the College of Advocates at Doctors' Commons and in the Admiralty and Ecclesiastical Courts... Before the High Court of Delegates and at the Bar of the Privy Council... the Advocate-General took precedence of the Attorney-General and Solicitor-General, and in cases laid by the Crown before the three Law Officers for their opinion the Advocate General had the precedence... It was the practice that... in all international and ecclesiastical questions his opinion should be taken either with or without the Law Officers of the Crown. He was specially consulted by the Foreign Office.' So long as his office continued, only a small minority of questions went to the Attorney and Solicitor jointly with him; he has to a large extent been replaced, so far as international law is concerned, by the Legal Adviser on the staff of the Foreign Office and his assistants.

¹ Atlay, *Victorian Chancellors*, II (1908), 454, states that the old practice was to send the papers first of all to the Queen's Advocate and then to the other Law Officers, apparently to the Attorney-General first. Presumably the Foreign Office decided whether to be content with the Opinion of the King's or Queen's Advocate, or to consult the Attorney- and Solicitor-General as well. All three were comprised in the expression 'Law Officers of the Crown', and until September 1862 the Queen's Advocate's signature came first. The volumes in the Public Record Office contain many requests from the King's or Queen's Advocate that he should have the assistance of the Attorney- or Solicitor-General, and on 20 October 1728 (SP. Domestic, 36, 151) we find Sir Philip Yorke, A.-G., asking for the assistance of the King's Advocate as the question concerned the law of nations. The Reports of the King's and Queen's Advocates carried on the tradition of the 'Opinions of the Doctors' of the sixteenth and seventeenth centuries.

² In *Campbell v. Hall* (1774), Lofft 655, 1 Cowper 204, which was argued four times, several opinions by the Law Officers on questions of constitutional law were cited; their value is discussed (Lofft, at p. 736), and Lord Mansfield, C.J., adopted an opinion given by Sir Philip Yorke and Sir Clement Wearg in 1722 (1 Cowper, at pp. 212, 213); the main question was the constitutional effect of the conquest of Grenada upon the power of legislating for the island.

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practice of that State. Thus they are a 'material source' of the law in Salmond's sense of that term. Moreover, as the opinions given to the British Government are highly confidential and are not likely to be published, if ever, for a considerable time, the authors can deal with the matter quite objectively and without regard to any other factor than stating to the Government their genuine opinion. In this respect they resemble judgments, not the arguments of a pleader. They bear another resemblance to judgments in that the cases upon which they are based usually contain an objective statement of the facts and the opposing legal arguments. Finally the opinions have the advantage of being given not in the abstract but in relation to a given set of concrete facts, which is the best way of testing a rule of law.

They have never been systematically published¹ and are only to be found in the archives of the Foreign Office, whether already deposited in the Public Record Office or still retained in the Foreign Office. Nevertheless, it is evident that many of them have been accessible to successive generations of Law Officers when consulted, with the result that earlier opinions are followed or modified or developed. For the most part they are not given merely *ad hoc* but as part of a system, with intent to create, as the French say of case law, *une jurisprudence constante*. Technically, the Law Officers are asked by the Crown to 'report', and their opinions are known as 'Reports', but I have used the word 'Opinions' in the title of these volumes as being more truly descriptive of their contents.²

The number of the opinions on questions of international law so obtained by the Crown runs into many thousands. These volumes contain what is believed to be a representative selection—mainly from the period between 1782, when the Foreign Office acquired an existence separate from that of the two Secretaries of State, and the end of 1902. The comments preceding the opinions are not statements of what I believe to be the law but are designed to focus the reader's mind upon the main points in the opinions. I have also tried by means of footnotes to throw light upon difficult words or sentences and to refer to some of the relevant judicial decisions and literature, mainly British. I have not attempted to correct or modernize punctuation or spelling except in a few glaring instances.

¹ See, however, certain books mentioned in the Note upon Sources at the end of this Preface, and, in particular, Professor H. A. Smith's *Great Britain and the Law of Nations*, vol. I (1932), 'States', and vol. II (1935), 'Territory, Part I', which contain many opinions of the Law Officers placed in the proper setting of the relevant despatches, together with comments of great value. It is unfortunate that so far only these two volumes in this series have appeared. In the preface to vol. I, p. v, will be found a copy of a proposal made in 1854 by Sir John Harding, Queen's Advocate, that a selection from these opinions should be published.

² I have, almost invariably, cited the Law Officers by their surnames only. Some information concerning them will be found in Appendix I to Vol. III. In some cases their biographies or autobiographies contain references to opinions given by them. I have frequently described Sir William Scott as Lord Stowell, as I think that that is the name by which he is best known abroad.

PREFACE

I have already made use of the Reports of the Law Officers for the limited purpose of my book entitled *The Law of Treaties*, which was published in 1938. The following extract from the Preface to that book can conveniently be quoted here:

It cannot be assumed that the action taken by a Government follows the legal advice given to it. Prudent Governments, like prudent individuals, wish to know what their legal position is before deciding what action to take. They may, on grounds of policy, decide not to press their legal rights, or they may feel that their legal situation is so weak that it is better to endeavour to avoid a solution of the controversy upon a basis of strict law. Nevertheless, it is of value to know what legal advice they received. I have therefore not tried to pursue each incident to its conclusion and find out what happened. That would be diplomatic history, a field in which I have no experience and into which I should not dare to enter.

There is a rich source of advice given to the Foreign Office which, through lack of time and absence abroad, I have been compelled to neglect: that is the vast number of Minutes and Memoranda written by members of the expert legal staff of the Foreign Office itself, day by day and month by month, for many years past, and particularly during the last eighty years or more during which the legal work of that Department has so greatly increased. My only excuse for neglecting this source must be the sheer necessity of setting some limit to the time and labour involved in the production of these volumes; nevertheless, it is necessary to state that in this source will be found much material of the highest value. For the same reason, I have not been able to examine the Reports made by the Scottish or Irish Law Officers, and I am sure that these sources will be fruitful, particularly in regard to local matters such as fisheries in Scottish waters. It must be remembered that the separate Scottish jurisdiction in prize survived until 1825.

At the end of this preface will be found a Note on the Sources of the Reports, which may be helpful to future workers in this field.

I must place on record my appreciation of the kindness of my friends Sir Eric Beckett, K.C.M.G., Q.C., and Sir Gerald Fitzmaurice, K.C.M.G., successively Legal Advisers to the Foreign Office, for constant help and advice throughout; but I must make it clear that I am solely responsible for the selection of the Reports and for the comments which accompany them. I am grateful to the Syndics of the Cambridge University Press for subsidizing the publication of these volumes and to the Secretary to the Syndics of the Press and his staff for the application of the experience and skill and care which they possess in so large a measure.

M^CNAIR

March, 1956

NOTE ON THE SOURCES

By far the greater part of the Reports printed in these volumes come from the period 1782 to the end of 1902, which is at present the last date of the open period of the archives of the Foreign Office. My search during that period has been systematic—up to the end of 1860 in the volumes entitled FO. 83. 2203 to 2404 in the Public Record Office,¹ and after the end of 1860 partly in the Public Record Office but more in the printed (but not published) volumes of Reports which are in the Foreign Office.² I cannot be sure that I have read every Report during the period 1782 to 1902 involving questions of international law because the volumes mentioned above relate primarily to Reports made by the Law Officers at the request of the Foreign Office. It sometimes happens that other Departments, e.g. the Home Office, the Colonial Office, the Post Office, the Board of Trade, may require the advice of the Law Officers upon questions of international law; in such cases, the Foreign Office is usually associated with the request for advice and a copy of the Report is usually to be found in the Foreign Office volumes referred to above. But one cannot be certain that this has always been done. For instance, there may be Reports in the archives of the Home Office relating to questions of nationality, naturalization, extradition, etc., copies of which have not found their way into the Foreign Office Papers.

For the period before 1782 it is very much more difficult to find the Law Officers' Reports because they do not appear to have been systematically collected into any such series of volumes as FO. 83. 2203 to 2404, with the result that before 1782 it is largely a question of 'hit or miss'.

The following are some of the bundles in the Public Record Office in which Reports have been or are likely to be found, or at any rate which require examination:

State Papers Miscellaneous [SP. 9], Bundle 240, which contains Reports by Sir Leoline Jenkins beginning in 1665 (but the best of his Reports are probably those to be found in his *Life and Letters*, referred to later).

State Papers Domestic. Anne [SP. 34], Bundles 34 and 37.

State Papers Miscellaneous [SP. 9], Bundle 4, containing a 'Collection of Extracts and copies relating to questions of International Law', marked

¹ The final dates in this series are not uniform; many of them go as far as 1876. The later Reports will be found in the appropriate volumes of dispatches to and from the British ambassador or minister accredited to the foreign Government concerned.

² I have come across a few slips and omissions in these printed volumes; in a given instance their accuracy can be checked by reference to the original in the Public Record Office.

NOTE ON THE SOURCES

'Paper Office 1766'; they mainly relate to the late sixteenth and the seventeenth centuries; their origin and, for the most part, their authorship are not apparent.

Admiralty Secretary's Department, Miscellanea [Adm. 7], Bundles 298-316, which contains Law Officers' Opinions (Admiralty) from 1733 to 1830 (largely on Courts Martial).

Admiralty Medical Department. Miscellanea [Adm. 105], Bundle 43, which contains 'Legal Opinions 1756-64'.

Home Office Legal [HO. 48], Bundles 1-31, which contains Law Officers' Reports from 1782 to 1836.

Privy Council Unbound Papers [PC. 1/1-45].

Treasury, Miscellanea, Various [T. 64].

Law Officers' Letter Books [HO. 49/1-71], containing letters to and from the Law Officers.

State Papers Naval, Law Reports and Papers 1704-82 [SP. 42/138].

War Office, Law Accounts, 1761-1842 [WO. 49/212].

Doctors Commons' Records [P.R.O. 30/28], from 1796 onwards.

Before the early years of the eighteenth century the Reports are not separated from the other papers relating to the incident calling for a Report. Accordingly, the seeker must either consult the long series of State Papers *ad hoc*, that is, in relation to some particular incident likely to have given rise to a Report, or, in so far as the State Papers are calendared, he can search the calendar.¹

State Papers Foreign are calendared up to 1589; State Papers Domestic, with the exception of the years 1685-8, up to the year 1775 (the years 1705-60 being in manuscript or typescript volumes in the P.R.O.); Reports of the Law Officers can occur in either series.

I need hardly add that the Assistant Keepers in the Literary Search Room in the Public Record Office are most ready to give advice. I have profited from their help and advice greatly.

The following are some printed sources of Reports by the Law Officers:

Life of Sir Leoline Jenkins (1724), by William Wynne.

Burrell, *Admiralty Cases* (1885), a volume of judgments, which contains a few Reports on prize law in the eighteenth century.

Opinions of Eminent Lawyers (1858), by George Chalmers.

Cases and Opinions on Constitutional Law (1869), by William Forsyth, Q.C.

Law and Custom of the Sea (1915-16), vols. I and II, by R. G. Marsden.

Great Britain and the Law of Nations (1932-5), vols. I and II, by Professor H. A. Smith; these are of particular value for the ground covered by them and contain very much more than Reports by the Law Officers.

The Law of Treaties (1938), by the present writer; a second edition is now being prepared.

Recognition in International Law (1947), by Professor H. Lauterpacht.

The Law of State Succession (1956), by D. P. O'Connell.

¹ See also Vol. III, p. 411.

NOTE ON THE SOURCES

The following books throw some light on the history of international law in England:

Phillimore, *International Law*, 4 vols., particularly pp. liv–lxxvii of the Preface to vol. I.

Nys, *Le Droit romain, le droit des gens et le Collège des Docteurs en droit civil* (1910).

Nys, *Notes pour servir à l'histoire littéraire et dogmatique du droit international en Angleterre* (1888).

Senior, *Doctors' Commons and the Old Court of Admiralty* (1922).

Holdsworth, *History of English Law*, v, 1–60, xii, 605–702 and index to the complete work.

See also the general bibliographies preceding §§ 37*b* and 43 of Oppenheim's *International Law*, vol. I.

LIST OF ABBREVIATIONS

Adm.	Admiralty papers in P.R.O.
A.J.I.L.	<i>American Journal of International Law</i> .
<i>Annual Digest</i>	<i>Annual Digest and Reports of Public International Law Cases</i> .
Bernard	Mountague Bernard, <i>Neutrality of Great Britain during the American Civil War</i> (1870).
B.F.S.P.	<i>British and Foreign State Papers</i> .
<i>British Year Book</i>	<i>British Year Book of International Law</i> .
Chalmers	G. Chalmers, <i>Opinions of Eminent Lawyers</i> (1858).
<i>Crimean War Reports</i>	An unpublished printed volume in the Foreign Office Library containing Reports arising out of this war arranged in chronological order.
D.N.B.	<i>Dictionary of National Biography</i> .
FO.	Documents indexed under FO. in Public Record Office.
Forsyth	Forsyth, <i>Cases and Opinions on Constitutional Law</i> (1869).
Grotius Society	<i>Transactions of the Grotius Society</i> (London).
HO.	Home Office papers in P.R.O.
Hogan	Hogan, <i>Pacific Blockade</i> (1908).
Hurst and Bray	Hurst and Bray, <i>Prize Cases (Russian and Japanese)</i> , 1904-5. 2 vols.
Hyde	Hyde, <i>International Law</i> , 2nd ed., 3 vols.
I.C.J.	Publications of the International Court of Justice.
I.R.	Irish (Law) Reports.
Lauterpacht	H. Lauterpacht, <i>Recognition in International Law</i> (1947).
Manning	Manning, <i>Diplomatic Correspondence of the United States, Canadian Relations, 1784-1860</i> .
Marsden	R. G. Marsden, <i>Law and Custom of the Sea</i> , 2 vols. (1915-16).
McNair, <i>Treaties</i>	McNair, <i>Law of Treaties</i> , 1st ed. 1938, 2nd ed. in course of preparation.
McNair, <i>War</i>	McNair, <i>Legal Effects of War</i> , 3rd ed. (1948).
Moore, <i>Arbitrations</i>	Moore, <i>History and Digest of International Arbitrations</i> , 6 vols.
Moore, <i>Digest</i>	Moore, <i>Digest of International Law</i> , 8 vols.
Oppenheim	L. Oppenheim, <i>International Law</i> , I, Peace, 8th ed. (1955); II, Disputes, War and Neutrality, 7th ed. (1952) by Lauterpacht.
Pitt Cobbett	Pitt Cobbett, <i>Leading Cases on International Law</i> , 5th ed. (1931-7).

LIST OF ABBREVIATIONS

P.C.I.J.	Publications of the Permanent Court of International Justice.
Phillimore	Robert Phillimore, <i>International Law</i> , 3rd ed., 4 vols. (1871-4).
P.R.O.	Public Record Office, London.
Satow	E. M. Satow, <i>Guide to Diplomatic Practice</i> , 3rd ed.
Smith	H. A. Smith, <i>Great Britain and the Law of Nations</i> , vols. I (1932) and II (1935).
SP.	State Papers; it is a Public Record Office reference, <i>not</i> the series of <i>British Foreign and State Papers</i> .
Westlake	J. Westlake, <i>International Law</i> , 2nd ed., vol. I (1910), vol. II (1913).

(The English Law Reports are usually cited in the manner customary in England.)

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