Principles of the law of nations, with practical notes and supplementary essays on the law of blockade, and on contraband of war

Polson Archer
Title: Principles of the law of nations, with practical notes and supplementary essays on the law of blockade, and on contraband of war

Author: Polson Archer

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THE LAW OF NATIONS
UNIFORM WITH THIS VOLUME.

POLITICAL ECONOMY.

BY

NASSAU WILLIAM SENIOR, M.A.,
LATE PROFESSOR OF POLITICAL ECONOMY IN THE UNIVERSITY OF OXFORD.

PRINCIPLES
OF
THE LAW OF NATIONS,
WITH
PRACTICAL NOTES AND SUPPLEMENTARY ESSAYS
ON THE
LAW OF BLOCKADE AND ON CONTRABAND OF WAR.

BY ARCHER POLSON,
OF LINCOLN'S INN, ESQ.

TO WHICH IS ADDED,
DIPLOMACY.

BY
THOMAS HARTWELL HORNE, B.D.,
OF SAINT JOHN'S COLLEGE, CAMBRIDGE.

SECOND EDITION.

LONDON AND GLASGOW:
RICHARD GRIFFIN AND COMPANY,
Publishers to the University of Glasgow.
1859.
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PREFATORY NOTICE.

The substance of the following pages was originally published as part of a Treatise on Law contributed to the Encyclopædia Metropolitana by Mr. Jebb, of Lincoln's Inn, Mr. Graves, then Professor of Jurisprudence at the University College, London, and myself. It has been thoroughly recast and revised, and extensive additions have been made, so that in many respects it deserves to be considered a new work. Practical notes have been added, as well as two Supplementary Essays on the Law relating to Blockade and Contraband of War, which it is hoped will render it a useful manual for officers in Her Majesty's service, and for persons connected with, or interested in, commercial pursuits. But the original design—that of furnishing a succinct but complete view of the principles of international jurisprudence—has not been lost sight of, and references to works of higher pretension and more detailed information have been given, so that the reader, desirous of prosecuting his inquiries into a subject upon which recent events have conferred peculiar importance, has the means indicated him of satisfying his requirements.
It has been thought desirable to add the excellent article on Diplomacy, which was contributed to the Encyclopædia Metropolitana by the Rev. Thomas Hartwell Horne, an eminent scholar, whose good fortune it has been to have distinguished himself as well by the depth of his learning as by the diversity of his acquirements.

A. P.

London,

Trinity Vacation, 1848.
INTRODUCTION.

I. The Law of Nations is that law by which the relative rights and duties of nations, whether belligerent or neutral, at war or peace, are defined and enforced.

It is not to be confounded with the Jus Gentium of the Roman civilians, who by that term intended what has been usually understood and discussed as the law of nature. *Quod naturalis ratio inter omnes homines constituit, id apud omnes peraque custoditur, vocaturque jus gentium.* (D. i. 1, 9.) The law of nature, according to the civilians, embraced the whole animal kingdom in its operation; while with us the law of nature is, like the jus gentium, considered as operating upon mankind alone.

II. Opinions differ as to the origin and proper character of this system. Hobbes and Puffendorf deny that the distinction between the laws is other than verbal, and affirm that "what, speaking of the duty of particular men, we call the law of nature, the same we term the law of nations when we apply it to whole states, nations, and people." Grotius, on the other hand, treats the distinction as real and substantial: "When," he says, "many men of different times and places unanimously affirm the same thing for truth, this ought to be ascribed to a general cause, which in the question whereof we are treating can be no other than a just inference drawn from the principles of nature or a universal consent. The former shows the law of nature, and the latter the law of nations."

That," he adds, "which cannot be deduced from certain prin-
principles by just consequence, and yet appears everywhere observed, must owe its origin to a free and arbitrary will." The authority and origin of the law of nations he ascribes to "the will of all, or, at least, many nations;" its proofs, he affirms, to be "the same as those of the unwritten civil law, viz., continual use and the testimony of men, skilled in the law." Vattel, perhaps the most popular writer on the subject, seeks to reconcile these discordant opinions. He observes that "the application of a rule cannot be reasonable or just unless it is made in a manner suitable to the subject." We are not to believe that the law of nations is precisely and in every case the same as the law of nature, the subjects of them only excepted, so that we have only to substitute nations for individuals. A civil society or State is a subject very different from an individual of the human race, whence, in many cases, there follows, in virtue of the law of nature itself, very different obligations; for the same general rule applied to two subjects cannot produce exactly the same decision when the subjects are different, since a particular rule, which is very just with respect to one subject, may not be applicable to another. There are many cases, then, in which the law of nature does not determine between State and State as it would between man and man. We must therefore know how to accommodate the application of it to different subjects; and it is the art of applying it with a justice founded on right reason that renders the law of nations a distinct science.”

III. The position so broadly laid down by Hobbes is based on an assumption altogether at variance with truth, and he states it thus: nations, once instituted, become endued with the personal properties of individuals, and are therefore, like individuals, subject to the law of nature. This fashion of considering States as being possessed of the qualities and capacities of individuals, and, consequently, subject to the same general law, is gravely vindicated by Sir James Mackintosh, who observes that so to consider them is no "fiction of law," but "a bold metaphor," and pregnant with the useful moral, that States in their dealings with each other should respect those great principles of justice which avowedly ought to regulate the intercourse of individuals. The metaphor is bold, and may carry a moral, but most assuredly metaphors form no safe foundation for reasonings, and, if we may credit history, have in every age served only to perplex and obscure the researches of the philosophical inquirer.

IV. Plainly to speak, we may safely affirm that States differ from individuals in every quality in virtue of which individuals are subject to the natural law. A State is a metaphysical entity, a

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5 Droit des Gens, prol.
6 De Cive, XIV. iii. 2.