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Mark Weston Janis

University of Connecticut School of Law

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The New Oppenheim and its Theory of International Law

MARK W. JANIS*

The most important English-language international law treatise spanning the twentieth century is Lassa Oppenheim's *International Law: A Treatise* that was first published in two volumes (on Peace and War & Neutrality) in 1905 and 1906.¹ Oppenheim also prepared two volumes for the second edition of 1912.² When Oppenheim died in 1919, he had completed much of the work for another edition; his former student, Ronald F. Roxburgh, edited and supplemented Oppenheim's notes and the two volumes of the third edition appeared in 1920 and 1921.³ Arnold McNair prepared the two volumes (the second volume appeared first and was renamed Disputes, War & Neutrality) of the fourth edition of 1926 and 1928.⁴ Hersch Lauterpacht, who had worked with McNair on the fourth edition, edited the fifth edition of 1935 and 1937 (the second volume appeared first),⁵ the sixth edition of 1940 and 1947 (again in reverse order),⁶ the seventh edition of 1948 and 1952,⁷ and the first volume (*Peace*, the only volume appearing) of the eighth edition in 1955.⁸ Now, at long last, in 1993, the first volume of the ninth edition (on *Peace*) prepared by two eminent international lawyers, Sir Robert Jennings and Sir Arthur Watts, has appeared.⁹

The new *Oppenheim* is monumental in many ways. The first volume of the ninth edition alone fills two books with some 176 pages of prefatory material, 1,333 pages of text, and 66 pages of indices. It costs £440.00. There are thousands of footnoted references. Jennings & Watts plan to prepare a second volume dealing with disputes and armed conflict and a third volume treating international organization. That the ninth edition of *Oppenheim* is a source book of great importance, albeit an expensive one aimed principally at practitioners, is apparent at first glance.

* Fellow of Exeter College, Oxford; Sometime William F. Starr Professor of Law, University of Connecticut.

¹ Lassa Oppenheim, *International Law: A Treatise* (1st edn, 1905 & 1906).

² Lassa Oppenheim, *International Law: A Treatise* (2nd edn, 1912).

³ Lassa Oppenheim, *International Law: A Treatise* (3rd edn, R. F. Roxburgh ed, 2 volumes, 1920 & 1921).

⁴ Lassa Oppenheim, *International Law: A Treatise* (4th edn, A. McNair ed, 1926 & 1928).

⁵ Lassa Oppenheim, *International Law: A Treatise* (5th edn, H. Lauterpacht ed, 1935 & 1937).

⁶ Lassa Oppenheim, *International Law: A Treatise* (6th edn, H. Lauterpacht ed, 1940 & 1947).

⁷ Lassa Oppenheim, *International Law: A Treatise* (7th edn, H. Lauterpacht ed, 1948 & 1952).

⁸ Lassa Oppenheim, *International Law: A Treatise* (8th edn, H. Lauterpacht ed, volume I: *Peace*, 1955).

⁹ *Oppenheim's International Law* (9th edn, R. Jennings & A. Watts eds, volume I: *Peace*, 1993).

It would be presumptuous in a short review article to either describe or critique the whole of the new *Oppenheim*. Instead, the much more limited objective here is to set out some of the basic features of the ninth edition so far and to explore in a preliminary fashion parts of the general theory or philosophy of the ninth edition, comparing it to earlier editions of the treatise especially Lassa Oppenheim's own first edition and Hersch Lauterpacht's eighth edition. The article has three parts. First, it notes and compares some basic aspects of the new treatise's structure, nature, and price. Second, it considers the attempt of the editors of the new *Oppenheim* to banish legal theory from their enterprise. Finally, it turns to a few substantive propositions of the new edition, explaining and comparing its international legal theory.

I

The structure of volume I of the 1993 ninth edition of *Oppenheim* by Jennings & Watts is identical to that of volume I of the 1955 eighth edition of Oppenheim by Lauterpacht except that Lauterpacht's chapter on the development and science of the law of nations is left out (an omission that is considered more fully below), his chapter on the legal organization of the international community is delayed for more extensive treatment in the new volume III, and Jennings & Watts have added a new chapter on outer space. So, the fifteen chapters of the ninth edition of *Oppenheim* by Jennings & Watts treat (1) the foundation of international law, (2) international persons, (3) the position of the states in international law, (4) the responsibility of states, (5) state territory, (6) the high seas, (7) outer space, (8) individuals, (9) heads of states and foreign offices, (10) diplomatic envoys, (11) consuls, (12) miscellaneous agencies, (13) international transactions in general, (14) treaties, and (15) important groups of treaties. The first four chapters are in the first book and the next eleven chapters are in the second book of the ninth edition's first volume.

The nature of the treatise was well described in 1905, when John Westlake¹⁰ in his review of Oppenheim's first volume of the first edition, called the work 'a treatise on a large scale, whether we consider the number of questions, actually arisen or imaginable, which are passed in review, or the treaties and other documents which are noticed or referred to'.¹¹ It is interesting that Westlake noticed the 'special character' of the volume: it 'consists of the German mould in which the thought is cast, while the details coincide largely with those to which we are accustomed in English writings'.¹² It is just this combination of the German passion for organization and the English love of detail that has

¹⁰ John Westlake was the holder of the Whewell Chair in International Law at Cambridge. In 1908, he was succeeded by Lassa Oppenheim, a German immigrant who had lectured at the London School of Economics. Third Edition, above n 3 at v-viii. Oppenheim filled the Whewell Chair until his death and several subsequent *Oppenheim* editors—Arnold McNair, Hersch Lauterpacht, and Robert Jennings—have all been Whewell Professors.

¹¹ John Westlake, Book Review, 'International Law: Vol. I, Peace. By L. Oppenheim, LL.D.' (1905) 21 *LQR* 432.

¹² *Ibid.*

helped make *Oppenheim* in its many Twentieth Century editions such a successfully enduring venture in international law.

To give a more or less random example of this combination of organization and detail, note the thorough-going organization that contextualizes page 975 of the ninth edition: page 975 is within (1) Volume I: *Peace*, (2) Part 2: 'The objects of international law', (3) Chapter 8: 'Individuals', (4) a sub-chapter: 'The Protection of Minorities', and (5) Section 427: 'The sanctions of the minority clauses'. Then note its detail: page 975 is evidenced by twenty-nine cited references, including earlier editions of *Oppenheim*, books and articles in English, French, and German, a bilateral treaty between Germany and Poland, a resolution from a conference of American states, and judgments of the International Court and the Upper Silesian Arbitration Tribunal; all this is supplemented by a headnote to the section that lists more than seventy books and articles.¹³ As a source book, *Oppenheim* is outstanding. Evidences of international law are easy to find and copious.

Now price. In 1905, Westlake paid 'tribute to the great erudition of which Dr Oppenheim has given proof, and by which those who use his book are sure to profit'.¹⁴ The ninth edition is just as sure to be profitable to its users but look at its cost. The 1905 *Oppenheim* cost 18 shillings. The 1955 eighth edition of *Oppenheim* by Lauterpacht cost £4.10s for volume I. The 1993 ninth edition of volume I of *Oppenheim* by Jennings & Watts costs £440. The high cost of the new edition seems to be linked to a decision of the editors and publishers to abandon the traditional role of the *Oppenheim* treatise as a student's as well as a practitioner's text. Jennings & Watts signal the ninth edition's 'status as a practitioner's book, rather than as an academic treatise';¹⁵ a lamentable departure. In 1905, Oppenheim wrote about his new treatise: 'It is a book for students written by a teacher'.¹⁶ As late as Lauterpacht's 1955 eighth edition, Longman's dust jacket could praise *Oppenheim* as an 'indispensable tool for student, teacher and practitioner alike' and call it 'almost a household work'.¹⁷ Sadly, this formerly 'household work' now costs more than most modern households' refrigerators.

The price of the ninth edition is an important marketing decision. The first volume of the new *Oppenheim* as priced is out of the reach of many of erstwhile purchasers of the earlier editions. Virtually all students, many teachers, and some libraries will be precluded from buying it. The price will, however, not be viewed as a deterrent by many private practitioners who will recover the cost of the volume when billing for legal research. Nor will the price be much of an obstacle for government lawyers whose ministries will probably want to purchase the new treatise.

One result of the editorial judgment made to serve this clientele has probably been to expand the number of citations. Jennings & Watts explain that they

¹³ Ninth edition, above n 9 at 975, 972-3.

¹⁴ Westlake, above n 11 at 434.

¹⁵ Ninth edition, above n 9 at xiii.

¹⁶ First edition at vii.

¹⁷ Eighth edition, above n 8, dust jacket to the 10th impression, 1974.

'believe that the wealth of material relating to state practice which it is possible to include in the footnotes makes a valuable contribution to the use of "Oppenheim" by practitioners' and that it 'is a similar concern for the interests of practitioners which has led us to include in footnotes extensive citations of decisions of national courts as well as of international courts'.¹⁸ This, too, has probably contributed to the length and the cost of the new *Oppenheim* and hence to its inaccessibility to erstwhile users.

2

The cost of the ninth edition reflects, of course, more than just a marketing decision. It also illuminates a mind-set that is practice-oriented and outwardly hostile to academic or theoretical insights. Take, for example, the decision already mentioned to strike out the traditional chapter that the earlier editions by Oppenheim, Roxburgh, McNair, and Lauterpacht had devoted to the development and science of the law of nations. Jennings & Watts say in their preface: 'In order to allow more room for dealing with matters of contemporary relevance, we have deleted the chapter dealing with the history of international law; this again is now a matter which is well-treated in specialised works'.¹⁹ This is misleading for two reasons. First, the lost chapter dealt as much with the theory or philosophy of international law as it did with its history. Second, their mention 'this again is now a matter which is well-treated in specialised works' seems to refer to the new editors' earlier justification of their treatment of the traditional chapter on international organizations which though deleted in volume I is far from lost altogether but is meant to become a whole new volume III just because of the mass of materials available.

It is more likely that the real reason why Jennings & Watts have deleted Oppenheim's traditional chapter on the development and science of the law of nations is that they believe a rendition of history and philosophy will be unimportant for the practitioners whom they expect will buy their volume. The editors expect that the purchasers of the ninth edition will not seek theories about international law but evidences of it that can be profitably employed in real life transactions. Fortunately, Jennings & Watts do not go as far as that early English treatise writer on international law, William Manning, went when he asserted that, though 'the fundamental principles of the law of nations' did 'arise from the law of nature', overly discussing the law of nature swamped the reader 'with a vast quantity of extraneous matter' and 'embarrassed and disgusted' them.²⁰ However, the ninth edition does abandon some of the philosophical rigour that characterized the original and its seven successors. Oppenheim wrote in the first edition 'I have tried to the best of my power to build my system and my doctrines on a thorough jurisprudential, which is equivalent to a positive,

¹⁸ Ninth edition, above n 9 at xiii.

¹⁹ *Ibid* at xii.

²⁰ W. Manning, *Commentaries on the Law of Nations* (1839) at 3-4.

basis. My definitions are as strong as possible'.²¹ Jennings & Watts have perhaps tried to be non-theoretical and somehow commonsensical, but they are still encircled by their own theory and sometimes beset by their own not-so-strong definitions.

3

Unlike Molière's Monsieur Jourdain who was astonished to learn that he was already speaking prose,²² Jennings & Watts are too able to be really surprised to learn that they are, despite their disavowals, still speaking theory. Here are a few examples. The first sentence of the first section of the new edition reads: 'International law is the body of rules which are legally binding on states in their intercourse with each other'.²³ This is theory. Indeed it even seems to be a definition of international law. It comes first thing in the text just where Oppenheim and his successors put their definitions of the subject.

A close look will reveal that Jennings & Watts' definition is far from being what Oppenheim might call a 'strong definition'. The ninth edition's definition, short as it is, is eclectic and includes bits of two different and more or less conflicting theoretical approaches towards a number of important questions about international law. At first blush, the first sentence seems to be a statement in the tradition of the narrow legal positivism that characterized much international legal theory in the nineteenth century and early twentieth century and reflected Bentham's opinion in 1789, when he decided to give the law of nations the new name, 'international law': 'There remain then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *internationale*'.²⁴ Bentham's term 'international law' soon became synonymous with the classical term 'the law of nations' but Bentham's restriction of the subject to inter-state relations was neither faithful to the more generous scope of the classical law of nations nor a fair approximation of state practice.²⁵

Jennings & Watts are quick to step away from the strict positivistic states-only presumption of their first sentence. Their second and third sentences immediately admit the possibility of international organizations and, sometimes, individuals being subjects of international law: 'These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organisations and, to some extent, individuals may be subjects of rights conferred and duties imposed by international law'.²⁶ It is hard to see how

²¹ First edition, above n 1 at viii.

²² 'Par ma foi il y a plus de quarante ans que je dis de la prose sans que j'en susse rien', Molière, *Le Bourgeois Gentilhomme* (1670), II.iv.

²³ Ninth edition, above n 9 at 4.

²⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Burns & Hart eds, 1970) at 296.

²⁵ M. W. Janis, 'Jeremy Bentham and the Fashioning of "International Law"', 78 *American Journal of International Law* 405 (1984).

²⁶ Ninth edition, above n 9 at 4.

this fits together with the first sentence into a coherent position about non-states as subjects of international law.

Another doctrinal development has to do with the sources of international law. Begin with Oppenheim's own first edition definition: 'Law of Nations or International Law (*Droit des gens, Volkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other',²⁷ a sentence exactly followed by later editors except that Lauterpacht's eighth edition put 'treaty rules' for 'conventional rules' and took out the adjective 'civilised'.²⁸ Jennings & Watts make rather more departures. Unlike Oppenheim, they speak only of International Law and leave out Law of Nations, *Droit des gens*, and *Volkerrecht*. This change is perhaps meant to be either merely cosmetic, especially leaving out the foreign terms, or to make the sentence more palatable to the modern reader. If so, a small quibble would be that the deletion of the foreign terms makes the definition a little less-cosmopolitan. Also, instead of talking about International Law as a 'name' for a body of rules, Jennings & Watts say it 'is' a body of rules. Again, the aim may be to simply spruce up Oppenheim's language. If so, they may be bolder than they think since saying something 'is' a body of rules is a good deal more assertive than saying it is the 'name' of a body of rules.

Finally, Jennings & Watts replace 'customary and conventional rules' with 'rules'. Here, something very important is going on in terms of international legal theory. There has been a long-standing debate in international legal theory between positivists and naturalists about whether international legal rules can be made otherwise than by state consent.²⁹ Jennings & Watts are indicating in their first sentence that they will be more naturalistic and rather more generous about the role of non-consensual international rules than were the earlier editions of *Oppenheim*.

As late as the eighth edition of *Oppenheim* by Lauterpacht, the treatise was insistent that state consent formed the foundation for the rules of international law: 'If law is [as had already been defined] a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, then common consent is the basis of all law'.³⁰ Since consent is supposed to be crucial to all law, including international law, '(t)he sources of International Law are therefore twofold, namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, that is, implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct'.³¹

²⁷ First edition, above n 1 at 2.

²⁸ Eighth edition, above n 8 at 4.

²⁹ M. W. Janis, *An Introduction to International Law* (2nd ed 1993) at 59-61.

³⁰ Eighth edition, above n 8 at 15.

³¹ *Ibid* at 25.

The eighth edition is quite sure that 'treaties and custom must be regarded as the exclusive sources of the Law of Nations'.³²

The theoretical departure of Jennings & Watts about the sources of international law is made plain in their second section entitled '*Ius cogens*', an addition to the traditional *Oppenheim*: 'States may, by and within the limits of agreement between themselves, vary or even dispense altogether with most rules of international law. There are, however, a few rules from which no derogation is possible'.³³ Jennings & Watts explain that 'there is no general agreement as to which rules have this character' and suggest that this 'category of rules of *ius cogens* is a comparatively recent development',³⁴ but they mistake the antiquity of the category. For as long as international law has existed, there have been debates about 'necessary' rules as against 'positive' rules. The controversy about *ius cogens*, eg, whether it exists and its ambiguity, is a modern replay of the longstanding debate between natural law and positivism.³⁵ Whatever the antiquity of the concept, Jennings & Watts in admitting it go well beyond the narrow positivistic point-of-view of the earlier *Oppenheims* that simply have no place for any sort of rule generated other than by state consent.

Another manifestation of the leaning by Jennings & Watts away from positivism might be thought to be found in the great reliance that the new editors put upon judicial decisions as evidences of international law. Here, however, they have been anticipated by the earlier editions of *Oppenheim* which of course also cited judicial decisions copiously. There has been, of course, theoretical care taken to ensure that judicial decisions fit well within the positivistic structure of Article 38 of the Statute of the International Court of Justice where judicial decisions along with teachings of the most highly qualified publicists are listed merely 'as subsidiary means for the determination of rules of law'.³⁶ In Lauterpacht's eighth edition, in wording repeated by Jennings & Watts, it is stressed not only that judicial decisions are subsidiary but that they are 'indirect' and that neither decisions of international or municipal tribunals can be treated as 'sources' of international law though they 'exercise considerable influence' and can be 'often relied upon in argument and decision'.³⁷

The detail for which *Oppenheim* is famous and which Jennings & Watts have accented in their transformation of the treatise into a practitioner's manual may also be the slippery theoretical slope down which the *Oppenheim* treatise has slid towards admitting non-consensual rules. Once it is admitted that judges do in fact significantly affect the nature of the rules of international law by their interpretation of the rules in deciding the concrete cases presented to them, then

³² Ibid.

³³ Ninth edition, above n 9 at 7.

³⁴ Ibid.

³⁵ To avoid this conclusion, some view *ius cogens* as a form of customary international law. See the points of view in M. W. Janis, Mary Ellen Turpel & P. Sands, 'Colloquy: *Ius Cogens*', 3 *Connecticut Journal of International Law* 359 (1988).

³⁶ Statute of the International Court of Justice, art 38(1)(d), as annexed to the Charter of the United Nations, I UNTS (signed at San Francisco 26 June 1945; entered into force 24 October 1945).

³⁷ Eighth edition, above n 8 at 31; 9th edition, above n 9 at 41.

it is hard to say that all the judge does with an international legal rule is to find it. Then, too, it is hard to deny that the lawyers help the judge with the rule when they provide the judge with justifications for interpreting the rule in one way or another. Such admissions, not really very positivist, fit very well with the traditional strengths of *Oppenheim* that Jennings & Watts have accentuated in giving practitioners a large number of easy to find evidences of international law that can be used to justify both international legal arguments and international legal judgments.