

**INTERNATIONAL LAW AND
INTERNATIONAL RELATIONS: AN
ATTEMPT TO ASCERTAIN THE BEST
METHOD OF DISCUSSING THE
TOPICS OF INTERNATIONAL LAW**

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International Law and International Relations: An Attempt to Ascertain the Best Method of
Discussing the Topics of International Law by J. K. Stephen

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J. K. STEPHEN

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AN ATTEMPT TO ASCERTAIN THE BEST METHOD
OF DISCUSSING THE TOPICS OF
INTERNATIONAL LAW.

BY

J. K. STEPHEN, B.A.
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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NOTE.

THE following essay is a dissertation which I wrote last year as a candidate for a Fellowship at King's College, Cambridge. Except in so far as it deals with the theory of International Law it is necessarily a mere sketch, as my object was only to state a theory and to give an outline of its application. It has interested some of its few readers sufficiently to encourage me to publish it. I have not amplified it at all because I can see no value in any work occupying an intermediate position between an essay intended to excite interest in the subject and to indicate what might be done and an elaborate work on International Law such as I may hope to write some day but for which much time and labour would be required. At the same time I have revised the essay and made some alterations in it. Its nature and purpose are further explained in the introductory letter which was prefixed to it in its earlier form and which I here reprint.

Nov. 1884.



INTRODUCTION.

TO THE HON. MR JUSTICE STEPHEN, K.C.S.I.

MY DEAR FATHER,

I wish to preface this essay by an explanation of the relation of its contents to what you have written on International Law: and I think I can best make such an explanation in the form of an introduction addressed to you personally, and inviting your assent to the application which I have tried to make of your teaching. In the xvith Chapter of the *History of the Criminal Law of England* you have occasion to deal with the subject of International Law in connection with the places and persons to whom the English criminal law applies. The passage dealing with the application of "International Law" to the case

of *R. v. Keyn* (vol. II. pp. 34—37), and the reprint of your separate report on the Fugitive Slaves Commission (pp. 44—58), contain the matters to which I particularly refer. They explain and defend two positions: first, that the collection of usage and opinion to which the name "International Law" is conventionally applied, is not in fact at all similar to law properly so called; and secondly, that many of the topics of "International Law" are proper subjects for real laws, and that such laws can be enforced by civilised governments in places and against persons outside their normal jurisdiction. The first of these opinions involves disapproval of the usual method of writers on International Law: the second appears to me to suggest an alternative method for the discussion of the same topics. The object of this essay is to show how this alternative method might be applied to the whole subject, and might free it altogether from the theory involved by the use of the term "International Law."

When we speak of the prohibition of contraband trade, or the adoption of the three-mile limit, as instances of municipal legislation, we are confining ourselves to demonstrable facts, and leaving on one side the difficult questions

of the effect upon these matters both of abstract morality and of the doubtful usages and opinions denoted by the name "International Law." Can we not adopt a similar course with regard to those topics of International Law which are not matters for municipal legislation, and which therefore do not come within the scope of a work on any branch of positive law? Can we not, that is, see what is the true character of those international relations which are in no way concerned with law, and show that they may be discussed in general terms, and at the same time called by their right names?

In the first part of this essay I have criticised at length the use of the expression International Law. Writers on International Law differ very much in their theoretical views and in details of method: but they all agree in the assertion of a common theory which must be used to support any juridical treatise on International Relations. That theory has often been attacked by those who believe in Austin's analysis of the leading terms of jurisprudence. Whatever else a "rule of International Law" may be, it is not a command addressed by a political superior to a subject, and it cannot be enforced by any sanction which would

come within the terms of Austin's definition. Austin himself prefers the expression *International Morality* to *International Law*: and those who accept his teaching have often expressed dissatisfaction with the current theory of *International Lawyers*.

Such attacks however have usually consisted in brief and general denunciations and have not been accompanied by any attempt to show what could be substituted for it. The theory has been constantly adopted even by those who have plainly seen its defects, and the defences put forward on its behalf have been as elaborate as the criticisms against it have been scanty and contemptuous.

I have attempted to criticise the common theoretical views about *International Law* with some fulness of detail, and for that purpose I have selected the theoretical part of the writings of two particular authors. I have given the reasons for that selection in the body of the essay. I thought it better to attempt a comparatively full criticism of two representative writers than to give a cursory glance at the theories of many. In the second part I have tried to show how the field of *International Law* might be adequately covered by a discussion based on a sound theory.

In other words, I have tried to find a methodical arrangement for the well-known questions of "international law" according as they are either the subject of positive law, or else the subject of some other kind of sequence and arrangement which can be easily recognised and accurately described. I have not attempted to go into much detail, and I do not pretend to have anything of novelty or importance to say about any of the vexed questions of International Law. I have only tried to give an outline of a book which should deal with the topics of "International Law" from the point of view of the theory of which I advocate the adoption. This essay is nothing more than the vindication of a theory. Where it is a matter of dispute which of two views of a practical question is correct, I accept one view or the other for the sake of saying how I think it ought to be expressed and where it would find its place in such a work as that of which I am sketching the outline.

These introductory remarks are addressed to any one who may read my essay: but I have addressed them directly to you for the reasons which I have given. You will, I hope, allow me to consider this introduction as a dedication