LAUTERPACHT AND VATTEL ON THE SOURCES
OF INTERNATIONAL LAW: THE PLACE OF PRIVATE
LAW ANALOGIES AND GENERAL PRINCIPLES

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I. INTRODUCTION

For one of the most influential 20th century Anglophone writers on international law, Hersch Lauterpacht, Vattel’s account of the sources of international law introduced a fundamental and terrible mistake. Vattel’s work, objects Lauterpacht, lowers the moral standards applicable to States: it carries “a hall-mark of what is considered to be the realistic approach to expatiating on the lower morality of States as compared with that of individuals.”¹ In the place of an account of the sources of international law that should be occupied by general principles and analogies with private law, Vattel erects a doctrine of non-justiciability, an “elegant manner of evasion […] typical of the attempts to reconcile the insistence on the rights of sovereignty with the appearance of a recognition of a legal order among nations.”²

This essay traces the issues at stake in Lauterpacht’s criticisms of Vattel on the place of general principles and private law analogies. I argue that Lauterpacht misreads Vattel, and, in the spirit of this collection, ask how far this misreading pertains to a 21st century Anglophone perspective on Vattel’s account of the sources of international law.

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¹ Hersch Lauterpacht, “The Grotian Tradition in International Law” (1946) 23 B.Y.B.I.L., pp. 1–53, p. 28, n. 3. See also Hersch Lauterpacht, The Function of Law in the International Community (Clarendon Press, Oxford, 1933), p. 9, para 332: Vattel “is very eloquent on the duty of a nation ‘when one should seek to rob it of an essential right, of a right without which it cannot hope to maintain its existence,’ not even to attempt pacific settlement, but to ‘exhaust its resources, and nobly shed the last drop of its blood.’”

² Lauterpacht, supra, p. 7. See similarly Philip Allott, tracing to Vattel the articulation of a “spiritual and psychologically dislocated” vision of “a human world which human beings in general think is natural and inevitable but which requires each of us to be two people – with one set of moral judgements and social aspirations and legal expectations within our national society, and another set of moral judgements and social aspirations and legal expectations for everything that happens beyond the frontiers of our national society.” Philip Allott, The Health of Nations: Society and Law beyond the State (Cambridge University Press, Cambridge, 2002), p. 418.
II. LAUTERPACHT ON PRIVATE LAW ANALOGIES AND HIS CRITIQUE OF VATTLE

A. Lauterpacht’s Positions on Private Law Analogies and General Principles

At the very start of his career, working on his doctoral dissertation in Vienna (submitted in 1922), Lauterpacht had rejected “private law analogy in any form, arguing that such an approach “endangers the independence of international law and fails to recognize its peculiarity.” But by 1927, in his book on Private Law Sources and Analogies, Lauterpacht had rethought this position. The reference to ‘general principles’ that had been recognised as a source of international law in Article 38(3) of the Statute of the Permanent Court of International Justice (1920) Lauterpacht now treated as a mechanism for drawing private law analogies, for articulating general principles’ of law that were “neither international law proper nor considerations ex aequo et bono.”

Article 38, as Lauterpacht was well aware, is deliberately unspecific; in adopting the interpretation he did in Private Law Sources and Analogies, Lauterpacht was defending a position close to that of the British delegate, Lord Phillimore, in the drafting debates on the PCIJ’s Statute. In Thirlway’s accurate summary, Lauterpacht argued that Article 38 “contemplated a way in which general principles present in national law, but not, as such, in international law, could be taken over into international law:’ national legal systems could be “mined by the international lawyer for arguments by way of analogy.” That ‘mining’ was to involve the help of comparative lawyers: Lauterpacht argued that the relevant general principles were limited to those “ascertained by comparative study and, if possible, declared by scientific legal opinion as fit objects of any future attempts at unification of private law.”

Over the subsequent 20 years, Lauterpacht again rethought his position. In an essay written in 1946 that Lauterpacht reportedly regarded “as probably the most important that he ever wrote,” he sets out his mature position on private law analogies.

The analogy – nay the essential identity – of rules governing the conduct of States and of individuals is not asserted for the reason that States are like individuals; it is due to the fact that States are composed of individual human beings; it results from the fact that

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5 Lauterpacht’s Private Law Sources and Analogies was based on his LSE doctoral dissertation, supervised by McNair.
7 Lauterpacht, supra note 4, p. 85, para. 36.