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DO WE WANT INTERNATIONAL LAW?

THE period preceding the outbreak of World War II saw International Law at its lowest ebb. Its prestige had approached the vanishing point. "Aggressor" nations exulted in its violation. Its friends were despairing. The world wide turmoil in international affairs, which a short generation before had seemed so solid and enduring, had thoroughly shaken men's confidence in that regimen of international conduct which centuries of experience had been slowly crystallizing into law.

This war itself, of course, has largely thrust aside the usages of law. *Inter arma silent leges*. But, as the Eastern heavens begin again to glow in the half light before the dawn of victory, thoughtful people resume again their questing for a world order based on something else than the immediate presence of superior force. Can we have order based upon international law?

The phrase "law and order" is almost repetitious. The one can hardly exist without the other, and the legal ordering of national behavior in foreign affairs has long been the dream of statesmen everywhere. Before World War I their dreams bade fair to become real. Eased by plenty and confident in a new found knowledge, some nations, at least, became peace minded. Comprehension of the futility of war as an instrument of justice became widespread; justice itself came to be regarded as a practical ideal. Economic and cultural cooperation among nations was hailed as the path of progress. Order based upon law was taking hold of the imagination of peoples.

But countervailing forces were too strong; the war came, and during the world conflict the necessities of belligerency put too great a strain on many of the rules elaborated in easier times. The rights of neutrals both upon land and sea were frequently disregarded by both sides. Treaty rights and provisions of law were disregarded in the invasion of neutral territory. Civilian populations were subjected to treatment not sanctioned by the laws of war. Prisoners were not always accorded their legal rights. Alien property was dealt with in violation of established rules. "Illegal" weapons, missiles and explosives were frequently employed. Both sides and all participants were guilty of some or all of these practices.

Succeeding years, far from bringing a general return to the ways of law, saw greater departures from its provisions. The covenant of the League, broken at first with caution and then with open defiance, virtually lost compelling authority. The Kellogg treaties were tacitly ignored through the easy device of carrying on hostilities without proclaiming a state of war. Other treaties were forgotten when national self-interest lulled conscience and memory.

Yet, in these years, in most of the smaller matters the law was still observed and in some respects its scope was even extended. Routine matters of international intercourse still followed the prescribed channels. The League Secretariat and the World Court were regularly occupied with plenty of business. Some noteworthy successes in preventing international disturbances were recorded, and many matters, settled without notoriety, might well have resulted in serious friction had such settlement not been achieved. But the failure of both law and treaty in the more spectacular matters had induced the popular belief that law observance was optional, not mandatory, and that whenever nations thought the stake was great enough they would take the law into their own hands. The prestige of law, a vital factor in law observance, suffered accordingly.

Here precisely is the Achilles heel of international law. It is weak in the element of sanction. Students of jurisprudence differ as to the necessity for sanction in the definition of municipal (state) law. Austinians deny the quality of law to any rule that lacks the backing of state power. Other juristic schools are willing to bring within the definition provisions backed only by public opinion. But none doubts that law observance is conditioned largely by the readiness of state power to coerce obedience and that the total absence of such power is a serious handicap.

Aside from the provisions of the League Covenant, which required League members under certain conditions to use force to coerce treaty observance, modern international law has had to depend for its observance upon the voluntary action of the nations concerned. As matters still stand, every sovereign state is, by law, the equal of every other and rejects the claim of any other to coerce it. There is no super state, no external power to sanction save the other party to any

international quarrel. The law itself, therefore, is still compelled to recognize the legality of war as an instrument of national policy, an instrument which substitutes force for reason and the procedures of adjudication. But placing law enforcement in the hands of one of the parties to a dispute is tantamount to the abdication of the law itself. Desires, not rights, become the criteria of enforcement, and justice becomes a matter of relative strength.

Lacking the sanction of an overshadowing power, therefore, international law has had to depend upon the growth of a will to obey and of a national sensitiveness to international opinion. The attempt to substitute collective force through the medium of the League of Nations has failed for the same reason that often brings failure to the law—lack of world consciousness among the members and of will to cooperate in international polity. The Kellogg pacts, in which by agreement many nations renounced war as an instrument of national policy, depend in the last analysis upon the same factors and, to date, have failed whenever those factors have been outweighed by strictly national wants or impulses.

The difficulties encountered by international law since the period of the World War are often ascribed to the intensification of the spirit of nationalism. Yet it is well to keep in mind that the development of the whole system of modern international law coincided in time with the development of our nationalistic states. These developments date roughly from the period of the Reformation. Prior to that time the Church was the unifying political force in Europe and undertook the performance of those intermediary services necessary to the intercourse of nations. Throughout the Middle Ages the ideal of a united Christendom was propagated by the Church and dominated the thought of intellectual leaders. Its motif was self-preservation, preservation from the physical attacks of non-Christian peoples as well as from the disintegrating moral influence of incompletely assimilated pagans within the Christian states themselves.

Europe, at last, was freed from serious danger from Turks and Moslems; Protestantism shook the edifice of Christendom, Northern Europe lost its dependence upon the Church and the Holy Roman Empire lost its ghostly hold upon men's minds. New bonds of unity were imperative and these were found

in a consciousness of kind, rooting in national groupings. To the nation-states resulting, modern Europe traces its origins.

The new states, however, were without the old assistance of the Church in facilitating intercourse. Moreover, the need for such facilitation was augmented by geographical discoveries and industrial developments. Trade was becoming increasingly important. The necessity engendered the response. A line of legal scholars usually said to begin with Grotius (1583-1645), drawing upon the resources of Roman law and Church law, adapting the principles of old philosophy and incipient science, fashioning and refashioning its teachings in the light of accumulating experience, slowly built up a body of doctrine for the guidance of nations in their dealings with each other.

These scholars constructed the framework of modern international law, a comprehensive framework, to which, perhaps, no additions of fundamental character have ever since been made. To a large extent the doctrines evolved rested upon the personal authority of the founders, and practical application of these doctrines was largely a matter of deductive logic. But with the development of a wider and more pragmatic method in jurisprudence generally, international law was enriched by the contribution of men of a different type, men who collated experience, who studied the decisions of courts, of arbitrators, of commissions, and the provisions of treaties, agreements, and other guides to conduct. What was lost in dogmatic certainty was gained in realism and practical workability. It was in this period that international law attained its widest apparent acceptance. Inductive treatment of experience doubtless facilitated the application of law to problems earlier felt to be beyond its scope, but this transition from personal authority to pragmatic sanction involved a shift in the place of lawmaking. No longer in the scholar's study, Sinai was now in the forum or the council chamber. The precedent of case law tended to displace the precept of the text.

Here we come upon another characteristic of international law which has profound significance—general international law in modern terms is not a body of law in the sense that the law of England or of Denmark is a body of law. It is largely a system or pattern of laws upon which laws in England and Denmark and other sovereign states are modeled. How does this come about? The forums or tribunals from which inter-

national case law emanates are for the most part national tribunals, in the United States most often the Federal courts, but the precedents made in such tribunals are at best persuasive, never binding, upon similar tribunals in other countries. Often these tribunals differ as to the law governing a given state of facts; the "internàtional law" of Britain differs from the "international law" of Denmark, and one of them, at least, differs from the cognate rule of "general international law." Clearly it is the international law of Britain or of Denmark which governs subsequent cases arising in these respective countries; general international law may furnish light, but not compulsion.

These divergences of *national* international law from the common or general pattern compounded of them all are often concealed from view—even from the view of the tribunals which declare them. In the United States the Federal Constitution and the laws and treaties made under it are the supreme law of the land. The Constitution mentions "the law of nations." The Supreme Court has upon occasion declared the law of nations to be a part of the law of the United States. But whose version of the law of nations? Obviously the court's own, as the court itself proceeds to demonstrate. The general law of nations is perhaps an official pattern. But each sovereignty reserves the right to follow the pattern with its own variations, and those variations become *its* effective law. The rules of international law, though occasionally, are only rarely "broken." The nation accused typically counters with a different version of what the law on the subject really is. "His Majesty's Government find themselves quite unable to accept the view of the law set forth in the note of On the contrary," Thus runs diplomatic correspondence.

National tribunals declaring the really effective international law, and no supervening power either to declare or to enforce rules binding upon all—this in large part has been the picture of international jurisprudence. True, it has not been the entire picture. International commissions to which disputed questions have been referred, tribunals set up from the Hague panel—these and other non-national agencies have often drawn authority from the general body of international law and their pronouncements, in turn, have often become further sources of international doctrine. But in the last

analysis acceptance of rules and doctrines have been voluntary, with war the ultimate legal alternative.

Based upon recognition of these fundamentals, three different attempts have been made in the present century to mitigate the attendant evils. The Hague Tribunal established ready-made machinery for compromise. This so called "tribunal" is simply a panel of generally acceptable persons, drawn from all the nations, from which panel disputants may select a given number for the arbitration of any quarrel. Resort to the tribunal is largely optional, and the decision of any arbitral body is more likely to be the result of splitting differences than of adherence to rules of law.

The World Court, by contrast, consists of a definite membership. "Adhering" nations solemnly agree to submit certain types of questions to the court for adjudication. Adjudication does not mean compromise; it implies decision according to established rules, principles and standards, let the chips fall where they may. But the court's jurisdiction is limited to "adhering" nations.

The League of Nations, whatever may be left of it, seeks through a kind of bicameral legislature—the Assembly and the Council—to develop a form of collective action in place of the individual action otherwise permitted every sovereign state. Nations refusing to abide by the law or the decisions of the Council or Assembly are to be coerced by force—economic force if that will suffice, war if necessary.

Prior to World War II, no nation interested in the status quo was willing to attempt force for the preservation of law and order. Like the mice in the fable, no one was willing to bell the cat. The League failed for want of international mindedness.

Where, then, shall we be when Victory is achieved? Axis victory would have solved the problem—at least until Germany and Japan fell out. The necessary rules would have been imposed by force. But Allied Victory will be in the name of freedom of free peoples and free nations whose government and law must rest upon assent. A background of might there must be and, doubtless, such occasional force as occasional need demands. But the assent which will support any enduring

system of international law must rest in reason and good will. How, then, shall this be attained?

Appropriate organization, of course, will help, and an organization well launched will generate a strong sentiment for its continuance, but those who put their faith in forms of organization alone depend upon a broken reed. Behind the organization there must be the will to agree, the will to make immediate sacrifice of national interests for the attainment of permanent world order, the will to listen to reason when expounded by others as well as by ourselves, good will, in short, and faith in the good will of others.

Good will, with its concomitants, mutual respect and regard, is the foundation of all community living. In the microcosms of family, church and neighborhood, we understand this thoroughly and understand, too, that these qualities rest upon mutual acquaintanceship and the persistent cultivation of the social as opposed to the anti-social instincts. Religion has contributed powerfully to this development. Must we not rest our case for a legal order in the macrocosm of the world upon the same fundamental concepts?

To the depressing reflection that such development is an historical process requiring time beyond the spans of individual lives, we can only add the observation that modern communication has shrunk the world and hastened the possibility of world acquaintanceship beyond anything hitherto dreamed of. The war itself will help. Just as the Crusades brought East and West together with lasting results, so this war is taking men from every hamlet to the far places of the earth. The possibilities of acquaintanceship are being vastly accelerated.

What shall we say to each other when we meet?

Howard L. Bevis