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International Law

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INTERNATIONAL LAW.*

Not the least among many legacies bequeathed to us by the great war is a markedly increased interest in the theory and practical conduct of international relations. The struggle itself was characterized by an extraordinary volume of argument both between the actual combatants and between combatants and neutrals. Where the latter were concerned governments approached at times perilously near an actual outbreak of hostilities, and differences disclosed were startling in their divergences from supposed standards. The effects were naturally disquieting, and it must be admitted by all friends of international jurisprudence that the very being of the science as an efficient and living organism is now doubted in many quarters, while other views, although more moderate, tend to place the existing system in the category of things whose imagined utility if indeed fully realized might prove desirable, but whose weakness will not permit the assumption of working form. Nor are such conceptions in any manner surprising if there is recalled the fact that the most acrimonious word-engagements of the war time were carried on between foreign offices of administrations confessedly in the forefront of culture and civilization but whose utterances, nevertheless, touching the solution of problems among the most serious and far-reaching of any which could enlist human interest, were diametrically and persistently opposed. We have here a background in view of which it is certain that highly pessimistic forecasts of the future are well justified. If we admit that the law of nations may exhibit a mechanism sufficiently adapted to secure harmony and prosperity in time of peace, what, it may still be asked, has the

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general plan to show for itself as a humanizing and restraining influence in the clash of warfare? And in the light of facts revealed by a candid reply to such an inquiry, is there a remedy at hand or in sight? Will it be sufficient to appoint grave-minded committees charged with the responsible duty of assembling and sifting the acknowledged elements of international law and diplomacy in order to offer for acceptance a more consistent and possibly chastened though similar body of principles and rules as the basis of a scheme full of promise? Or must we look far more deeply into the problem and explore its aspects in the light of ethics as well as law? After all, is international law, in any adequately defensible interpretation, law at all as that term is applied in practical and national life?

Law, itself, in a community politically constituted, may be defined as an enforceable rule of action. That is to say, there must be organized and compelling strength sufficient to execute accepted principles and decisions; there must be an assured guaranty that the determinations of the polity will be carried out to the full as announced. Such a result follows where law is supported by adequate sanctions; failing such support, law must equally fail of its true mission. If we can posit no such sanction for international law, it is plain that it cannot be characterized as law in the highest sense but must be held to be removed by an unbridgeable chasm from what we understand to be law in a sovereign state where unlimited executive power can at all times be called upon to enforce obedience to its prescriptions. Such law has ever behind it the collective *imperium* whose will is final and not to be denied: "If man were to live in a state of nature, unconnected with other individuals," says Blackstone,¹ "there would be no occasion for any other laws than the law of nature and the law of God. Neither could any other law possibly exist: for the law always supposes some

1. 1 Commentaries, 43.

superior who is to make it; and in a state of nature we are all equal without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse called 'the law of nations': which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any but depends entirely upon the rules of natural law or upon mutual compacts, treaties, leagues, and agreements between these several communities; in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*"

Is it, however, practically conceivable that a body of principles, although ever so skillfully adapted to the harmonious conduct and progress of world relations, can assume to be clothed with controlling force if the political units with which it has to deal are severally sovereign and independent of one another? Can sovereignty, in other words, consistently recognize an objectified superior? Before we can safely adopt the affirmative, it becomes essential to glance at the development of thought which, despite adverse happenings and discouraging experiences, has given to the world a science with which it cannot dispense and which if now re-established and firmly upheld will be found to contain the secret of future progress alike in national and international life.

In a classical passage touching our subject, Blackstone

thus outlines a difficult problem:² "How the several forms of government we now see in the world at first actually began is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii* or the rights of sovereignty reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found."

International law, though by no means of recent origin, is nevertheless, as contrasted with general jurisprudence itself, a comparatively late-comer in a world whose civilization owes it much. But the recognition of a law of nations as a distinct department of public law dates from the sixteenth century only, though it had not lacked foreshadowings more or less imperfect and fragmentary in the legal and political theory and experience of Greece and Rome. That theory, however, quite failed to recognize any legal system designed to bind nations through a comprehensive *corpus legum* and hence offers a marked contrast to a true *jus gentium* dealing with supposed systematic relations of states, these latter being regarded as, in a certain though somewhat mystical sense, an entirety or circle for the purpose of admitting the existence and sufficiency of various principles and regulations governing mutual conduct. It will be the object of the present article to indicate briefly the sources and evidences of this system. Dr. Woolsey tells us that the "law of nations can grow up only by the consent of the parties to it. It is, therefore, more a product of human freedom than the municipal law of a particular state. Its natural progress

2. 1 Commentaries, 49.

is to start from those provisions which are necessary in conducting political and commercial intercourse, while it leaves untouched, for a time, many usages which are contrary to humanity and morality; until, with the advance of civilization, the sway of moral ideas becomes stronger; . . . opposition to external force is an aid to the highest civic virtues. But if this were all there could be no recognition of obligations towards foreigners, no community of nations, in short, no world. These conceptions grow up in man, from the necessity of recognizing rules of intercourse, and intercourse is itself a natural necessity from the physical ordinances of God. Self-protection and intercourse are thus the two sources of international law; they make it necessary, and the conception in man of justice, of rights and obligations, must follow, because he has a moral nature.”³

The course of development of international law reflects, indeed, that which must also characterize the appearance and growth of jurisprudence itself and flows, in similar fashion, from a practical realization of the concepts of association and organization. The association, too, must be reached under the protection of justice, that is to say, its conduct must be in harmony with man’s moral endowment, or, again, it may be said that it should accord with the nature of things as revealed in the creative plan. Such concepts will exhibit their earliest illustration when tribal life experiences the insufficiency of isolation as a permanent condition and finds its continuance altogether impracticable if man is to attain the inherently social ends of his existence. Moreover the conduct of intercommunication must conform, it will be discovered, to ethical standards. Relations must be systematized to attain success and *law* finally offers a solution. Such a method of thought or action, however, is necessarily the result of long development; thus the prehistoric community of the Homeric age

3. Introduction to the Study of International Law, 4th Ed., pp. 21-22, and note.

knows nothing of an organization directing its *collective* strength to the enforcement of sentences intended to punish crime or settle disputes. *Law* is not seen in these early pictures. Even the *themistes*,—declarations imparted by the gods to the chieftain (*basileus*), must find satisfaction, if at all, only by way of *personal* execution. Homer's world, nevertheless, acknowledges a measurably effective influence springing from fear of divine displeasure together with respect for tribal clamor. Accordingly Amphinomus tells the suitors⁴ that he is quite willing to slay Telemachus provided the oracle of Zeus favors such an act but not otherwise; and, again, Ulysses himself, relating his adventures to Eumaeus, declares that it was the clamour of the people (*demou phemis*) which compelled the expedition on his part to Troy.⁵ In effect, public opinion interprets or enforces a measure responsive to an imagined urgency, nor is the result scarcely less effective than would be the enforcement of actual law in a later age. It is fairly supposable that the friends of international law in our own day need not doubt the compulsive strength of world opinion where world law is to be upheld. Such a law, however, if it is to surely prevail, must spring from no less a foundation than the law of unchangeable right as seen alike in ancient and modern ideals. When Greek life first came within historical vision there appears a conception of law clearly outlined as divine in origin, immutable and so quite beyond either the creative or restrictive power of man. Thus Antigone in a celebrated passage of Sophocles, declares that her brothers shall have due burial rights accorded them despite the contrary orders of King Creon who would thus disregard one of the most sacred canons of Greek religious thought:—the obligatory force of burial rites says Antigone can be limited by no royal decree since "it comes from the skies; its life is not of today or yesterday but for all time,

4. *Odyssey* XVI., 400.

5. *Odyssey*, XIV, 239.

nor does anyone know when it was instituted." Grotius, who devotes chapter XIX, book II (*De Jure Sepulturae*) of his "de Jure Belli et Pacis" to this subject, cites these lines from Sophocles as well as the dicta of many ancient authorities to show a belief that burial rites, like the privileges of embassy, are under the guardianship of religion.

In a later and historical age Greek philosophic thought developed conceptions of law universal, destined to be interpreted and transmuted by Cicero and handed down by juristic tradition as *jus gentium* or the law applicable to all nations alike. Aristotle⁶ accordingly classifies all law under the titles of particular (*idios*) and common or general (*koinos*); or, again, law derives its existence from nature (*phusikos*), or from human institution (*nomikos*); that is to say law is a regulation adopted by individual peoples for themselves, or it is, on the other hand, the voice of reason or the natural order not springing from agreement or institution but of its own force binding all men. Instituted law, Aristotle adds, may be written or unwritten. Bearing these distinctions in mind we turn to pertinent aspects of that Roman jurisprudence which has bequeathed such permanent legal patterns to our own day.

At Rome the word *gentium*, genitive plural of *gens*, was frequently employed to mark a concept of generality or universality; as, for example, "ubinam gentium," where in the world? "minime gentium," by no means, etc. In classical usage this term denoted:

- (a) The customs of the ancient clans or gentes;
- (b) The law of nature (*naturalis ratio*);
- (c) The commercial and domestic law, regarded as a system, common to many peoples, its principles being those which, springing from a religious or equitable source, might alike claim respect from all men.

6. Rhetoric 1.15; Ethics 5.17.

- (d) The usages of diplomatic intercourse and warfare common to Rome and many of her peoples, here approaching but not quite reaching a characterization identical with modern international conceptions.

The Roman *jus civile* itself is the common law of the city-state. Into this originally strict system of *jus civile* requiring most rigid forms of language and procedure there will have crept in the course of time many a modifying principle introduced by magistrates at the imperial demand of right decision. The application of such principles, also, would be increasingly required when the commercial aspects of Roman life had changed the one time primitive agricultural community into a complex city-state expanding to world conquest and bringing to Rome the subjects and claims of every nation. The name given to this new modifying system would be one to suggest its universal application, an application which beyond all doubt beginning in disputes chiefly between Roman citizens claiming the protection of their own *jus civile* would be now expanded to satisfy the legal pretensions of men bred in the knowledge of equitable principles administered everywhere. It is not therefore remarkable that when Livy and other historians came to describe ancient diplomatic and warlike happenings, the term *jus gentium* should be employed in a manner most suggestive of international law, yet in reality the picturesque ceremonies incident to a declaration of war, to a conclusion of peace, to the attestation of treaties, etc., can scarcely claim close kinship with a modern law of nations. Their source is seen in profound recognition of divine superintendence marking the conduct of the ancient city-state whose very breath of life was identified with an exclusive conception of religious functions. While, therefore, it is true that the modern world has inherited much of both form and spirit from ancient patterns (of which the international treaties of comparatively recent times afford many a striking example) it is, nevertheless, necessary to

carefully distinguish the essential differences characterizing times old and new. "The law," says Fustel, de Coulanges⁷ "was unchangeable because divine."

In the view of the ancient world the abstract concept of law identified it unhesitatingly with things sacred; thus the quality of permanence was a feature of its divine endowment. Nor was it necessary that the law, in early ages, should be reduced to writing since it was a part of tribal inheritance. In the end, indeed, it was consigned to the people's sacred books and placed under priestly guardianship. At Rome during many centuries, it is well known, both the physical guardianship of the laws and their exposition lay with the *pontifices*.⁸

In his work on Duties,⁹ Cicero conceives of an association embracing not merely the clan (*gens*) and the city-state but all mankind as well: ("*societas est enim latissime quidem qui pateat hominum inter homines; interior eorum, qui ejusdem gentis sunt; propior eorum, qui ejusdem civitatis*"). Further the principles of *jus gentium*, he thinks, should be admitted as part of *jus civile* although the converse cannot be asserted. He tells us that the celebrated Pontifex Quintus Scævola, administering law both sacred and secular (in the second century B. C.) looked with special favor on those forms of actions and on that procedure which permitted the infiltration of *bona fides* into the ancient and rigid symbolic law (*jus civile*); such infiltration, says Cicero, occurred in cases involving guardianship, partnership, trust, agency, letting and hiring, buying and selling, etc. Now these form the special domain, in Justinian's *Corpus Juris*, of the *jus gentium*. It is plain that we have here the true origin of this system as an elemental and expansive force in Roman law and, at the first, between Romans. The authors of most modern treatises, however, on the law of nations have supposed that *jus gen-*

7. La Cité Antique, Livre III, Ch. XI.

8. Cf. Fustel De Coulanges, La Cité Antique, Livre III, Ch. XX, La Loi

9. De Officiis 1.7; 1.16; 3.17.3.

tium came to Rome from *without* being formed by, in fact, such adaptations from alien legal systems as might primarily find application in suits between Romans and aliens or between aliens claiming justice from a Roman magistrate though not admitted to any benefit under the exclusive *jus civile*. But in *jus gentium* the Roman had what later became a widely extended system of private international jurisprudence. There was subsequently developed on this foundation by mediæval scholars a conception of public or universal law which in the 16th century and chiefly, at first, in the writings of theologians advanced to the idea of a *systematized* scheme of jurisprudence in harmony with the order of nature (*jus naturale*) and now seeking to apply to the dealings of nations with one another principles similar to these characterizing the ancient Roman *jus gentium*. Even prior to the revival or expansion in the 12th century of the study of Justinian, Isidore, Bishop of Seville, gave to the world in his encyclopedic work termed *Etymologies* (A. D. 600) a picture of *jus gentium* as distinguished from *jus naturale* and *jus civile* intended to reproduce the classifications and definitions from Justinian already noted. This work of Isidore came to be the great reference book of mediæval scholarship and assisted in preserving through the centuries a love for the study of Roman classical jurisprudence. In the 16th century the names of two Spanish writers stand out with striking distinctness amid those of many scholars seeking to examine and humanize the principles of intercourse between nations both in diplomacy and in the ruder clashes of war: Fernando Vasquez (1509-1566), and Francisco Suarez (1548-1617), the latter a professor of Theology in various Spanish universities. These authors conceived of a new *jus gentium* which should apply as a definite system of law between national as distinguished from personal units, and thus fairly opened a way to the work of Grotius a few years later. Grotius while chiefly seeking to soften the prevalent savage customs of warfare, lays down also the true principles through which alone in both

war and peace the world might hope for the institution of more truly normal relations between peoples. War, indeed, may be justifiable, he holds, by way of punishment for crime, in actual self-defence, or to secure reparation for injury done. Prior, nevertheless, to a formal declaration of hostilities (lacking which no offensive step should be undertaken) friendly inquiry or arbitration ought to offer, with the assistance of impartial neutrals, a means of averting a struggle. To produce a work exhibiting these many phases of his great subject, Grotius was necessarily led to define and examine the law of nature together with the framework of a system which, resting on sure foundations of the imprescriptible nature of things, should reveal possibilities of a system uniting for world purposes the races of civilized mankind. In the ancient *jus gentium* there already existed elements appropriate to the elaboration of such an ideal. To adapt principles long familiar in history and jurisprudence, to expand and to illustrate them with a wealth of literary citation scarcely ever equalled, and to thus lay down for all time the outlines of a great science, these constitute Grotius' claims to the lasting gratitude of all men. In his great work are reflected the reasoning and ideals of Greek tragedians and philosophers and Roman jurists together with the immortal spirit of Roman jurisprudence itself. The law eternal of Sophocles and Aristotle, the association (*societas*) of mankind, of Cicero, the even-handed maxims of *jus gentium* are fused in a scheme of transcendent merit.

It is important to note that Grotius,¹⁰ in positing an eternal and self-imposing law of rightfulness, necessarily excludes that conception of the State which would make governmental sovereignty a final standard of moral action. The infallible and triumphant State of Machiavelli must accordingly yield its claims before those of self-existent justice. Precisely here we discern the value of Grotius' message to

10. 1.1.5.

future times. As developed in the world of practical politics the idea of Grotius leads logically to a state democratically governed and belonging to an association of all nations acknowledging the reign of justice and law and expressing the spirit of Suarez in his *Tractatus de Legibus ac Deo Legislatore*:¹¹ "Humanity though variously divided into peoples and kingdoms should yet exhibit a certain political and moral unity springing from the precepts of nature and extending the guidance of love and pity to all mankind."

The spirit of Grotius is best interpreted by Leibnitz¹² who declares, speaking in terms of logic: "The final cause of the law of nature is the welfare of those observing it; its object is whatever may lie within our power to do for others; its efficient cause is the light of eternal reason divinely kindled in our hearts."

Grotius was followed by many writers seeking to interpret or limit his teaching. Eminent among these was Bishop Cumberland (1632-1718) who in 1672 published an elaborate essay *De Legibus Naturae*, later (1727) translated into English by John Maxwell at London:—"Those propositions of unchangeable truth," says he, "which direct our voluntary actions about choosing good and refusing evil" constitute natural law;¹³ "they impose an obligation to external actions even without civil laws in laying aside all consideration of those compacts which constitute civil government." These propositions taken together "form a rule, the nature of things for all by which the reason of all ought to be tried whether it be right or not."¹⁴

In the same year which saw the production of Cumberland's great work an equally important treaty was published by Pufendorf, Prussian Councillor of State, and later (Oxford,

11. XII *Theologia Cursus Completus*, Column 337, Book II, Caput XIX, Paragraph 9.

12. *Opera Omnia*, ed. Dutens v. 4, Part 3, p. 282.

13. Ch. 1, P. 39.

14. Ch. 2, P. 106.

1710) translated from its Latin into English under the title "Of the Law of Nature and Nations." Defining the subject of his work Pufendorf says:—"We make enquiry into that most General and Universal Rule of Human Actions, to which every man is obliged to Conform, as he is a Reasonable Creature. To this rule, Custom hath given the Name of Natural Law, and we may call it likewise the law Universal or Perpetual."

Grotius' book saw the light in 1625 and was dedicated to Louis XIII. Twenty-three years earlier Sully had sketched for Henry IV an elaborate plan of international union known as the "Grand Design." A century later Leibnitz conceived a plan of a European Christian Republic subject to both pope and emperor and governed by Roman law. Later still (1795) Kant produced his famous plan for an association of states whose collective will might guarantee international harmony. Kant's conception of the force of public opinion was taken up in 1860 by Heron whose History of Jurisprudence deserves to be better known than it is. These and many other more or less well reasoned plans to secure international peace are enumerated by Dr. Darby in his "International Tribunals" published by the London Peace Society (1899); a more complete list is contained in Mr. Arthur Call's article "The will to end War" in the Advocate of Peace (April-May, 1924); the Covenant of the existing League, and Professor Levermore's plan which won the Bok prize, are known to all. In the Advocate of Peace for May, 1924, Mr. George A. Finch of Washington outlines a most able "American Plan for an Association of Nations" which assumes as its starting point President Harding's memorable inaugural address of March 4, 1921.