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THE NATURE AND THE FUTURE OF INTERNATIONAL LAW¹

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Returning, in the early days of the war, from a belligerent Germany, through a mobilized Switzerland and a partly mobilized Italy, to an America that was still unperturbed and unprepared, I revisited the famous Museum of Naples. In one of the central corridors, I noticed an ancient mural inscription, which I had doubtless seen before without appreciating its significance—an inscription of the time of Augustus: “To perpetual peace.” Thus even in warlike Rome, and more than nineteen centuries ago, after a series of wars that had shaken the then civilized world from the Alps to the African deserts and from the Pillars of Hercules to the Nile, as after every great war that has since devastated Europe, men’s minds were turning with inextinguishable hope to the vision of a warless future.

I

To keep the peace is the prime and perpetual problem of law. From prehistoric ages, when loosely aggregated tribes first sought to limit feuds between kinship groups and to substitute compensation for vengeance, to our own day, when we are still striving to check the unregenerate human reversion to violence

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in economic struggles, and to persuade or compel the adjustment of labor troubles through negotiation or arbitration, the fundamental command of the state has been the praetorian *vim fieri veto*. This is also the goal, yet unattained, of that body of law, ancient in its beginnings but still imperfectly developed, which we call the law of nations.

To describe a law that is construed and applied in the courts of every civilized state and in international courts of arbitration; a law whose rules are to be found not only in recorded precedents but also in resolutions of international congresses; a law that has been elucidated for three centuries by the labor of hundreds of trained jurists, until its sources and literature form a library far larger than that of many an existing system of national law—at least twenty times larger than the library used in compiling the law books of Justinian—to describe such a law as imperfectly developed seems paradoxical. Many writers, however, go much further, denying that the law of nations deserves the name of law. They call it international morality. Others deny that it merits even this name. Recognizing no world ethics, they assert that international law is nothing more than a body of usages, morally binding upon the single state only in so far as the state accepts them, supplemented by agreements which each state concludes of its own free will and cancels at its own sovereign pleasure.

All these writers, of course, admit that in so far as any state binds itself by international agreements, and so long as it adheres to these agreements, and in so far as the rules of international morals or international usage are recognized by the legislatures or courts of the single state and enforced through its own administrative or judicial processes, what we call international law is indeed law, but only because it is national law. When a controversy arises between states, treaty provisions that are repudiated by either of the parties and rules that are not binding upon both parties by their own domestic law are not law at all, because there exists no superior organized force to constrain obedience.

The assumption that underlies these assertions is that no rules

of social conduct can be regarded as legal rules unless they are supported by superior force, exercised by some generally recognized and relatively permanent superior authority. It is further maintained, by many writers, that law, properly so-called, not only must be enforced, but also must be established by such an authority. To this last contention, however, legal history lends no support. Little national law was originally established by organized political authority, unless recognition is to be regarded as establishment. Usages older than courts or legislatures were interpreted by the earliest courts and embodied in the earliest legislation. Even in the later stages of legal development changes of usage have been similarly recognized.

Among the writers who maintain that international law is really law, some insist, and with truth, that physical coercion is not the only means that a society employs to insure obedience to its laws, nor is it always the most effective means of coercion. Ridicule of unusual conduct and disapproval of anti-social conduct exercise a psychical pressure that is often more effective than fine or imprisonment. If social disapproval is sufficiently strong to entail ostracism, and if this begets a boycott, a society exercises the same economic pressure that a state employs when it supports its laws with pecuniary fines or with confiscation of property. Even in the modern state, the law that is made or recognized by political authority would be far less generally observed if the penalties that are imposed on anti-social conduct by the physical power of the state were not supplemented by the pressure of public opinion. These writers point out that international law has an effective sanction in the sentiments and opinions of civilized mankind, and that no state, however powerful, can without serious risk antagonize the civilized world.

Between those who assert that rules enforced by psychical pressure may be regarded as legal rules, and those who insist on the criterion of forcible coercion by a political superior, an intermediate position may be taken. It may be admitted that social imperatives can properly be regarded as legal only when they are supported in last instance by force, without admitting that this force must needs be exercised by an organized political authority.

If a society that has no political organization, or none that is efficient, exercises physical coercion, either through spontaneous general action or through extemporized organs, to punish acts that are regarded as anti-social, or if it recognizes the right of its individual members to exercise physical coercion against offenders and protects them against retaliation, it may well be maintained that social usages thus sanctioned are legal.

From this point of view it is possible to distinguish tribal law in its earliest stages of development from tribal manners and morals, and to find in early tribal usage a core at least of true law. From this point of view it may also be said that some at least of the rules that govern the relations between independent modern states are to be regarded as legal rules.

Not a few writers have compared international law in its present stage of development with national law in its infancy or adolescence. In the law of nations, as in all early law, the greater part of the recognized rules rest on precedent; they are customs. In either system, law may be supplemented or even changed by agreement, and agreement must in principle be general. Decision by a majority of voices was no more recognized in the Teutonic folkmoets or in the Polish Diet than in the international congresses of today. Agreements bound only those that agreed. In both the historic instances cited, however, the principle of general consent was modified by the greater influence of the more important members of the community. In the Teutonic folkmoot, a handful of common free men would hardly attempt to groan down a proposal supported by all the chiefs. In the Polish Diet an ordinary nobleman would hesitate to interpose his *liberum veto* against a resolution supported by all the magnates. Today the general agreement of the more important states sometimes suffices to establish a new international rule.

The most striking analogy between the society of nations and early tribal society is to be found in the fact that the early tribe was not primarily a society of individual human beings, but a society composed of more or less independent groups. The Teutonic tribe, for example, was a society of kinship groups.

The legal molecule was the *Sippe*, for which you will permit me to use the good old Saxon word "sib." The atoms in this social molecule were disregarded. As in the society of nations a wrong to an individual is a wrong to his state, so in the Teutonic tribe an injury inflicted on an individual was an injury inflicted on his sib. The absence or imperfect development of superior political authority inevitably leaves the redress of wrongs to self-help; and in the Teutonic tribe this was the affair of the sib, as in the society of nations it is the affair of the state. In the one case the ultimate means of redress was sib feud; in the other, it is war. To the Teutons, feud between sibs and war between tribes were essentially the same thing; the only difference was in the scale of operations.

As early as the fifth century, however, and probably earlier, the Teutonic tribe had taken a step forward which the society of nations is today endeavoring to take. It had suppressed feud in the case of minor injuries, compelling the injured sib to come into the popular court and demand penalty. It permitted feud only in cases of "blood and honor." And even here, if the injured sib was willing to waive vengeance and sue for penalty, the offending sib was forced to answer in court.

Again, in dealing with acts that clearly injured not only a sib but also the whole tribe, the Teutons had established in a pre-historic period the rule that such an act put the offender out of the peace of the tribe, and that any freeman might slay him with impunity. In such a case the slain man's sib was restrained from raising feud. The list of offenses recognized as crimes against the tribe was indeed a short one, but the list of offenses recognized today as crimes against the world is still shorter. Piracy is perhaps the only clear case. The attempt to assimilate the slave trade to piracy has not been fully successful.

A very important difference between modern international and early national law is found in the fact that early society was working out slowly and with infinite travail those notions of substantive right that are today familiar to every civilized human being. Courts were instituted to terminate controversy; justice has been a by-product. From this point of view,

we may compare the society of nations to a community of at least moderately civilized human beings that has no political organization or none that is able to maintain order. Such was the situation—if I may cite an ancient instance taken from records readily accessible but less frequently consulted than they should be by modern students of politics—of Israel, in the days when it had escaped from its long Egyptian bondage and had not yet developed any political organization superior to that of the tribe. In Egypt the Israelites had become acquainted with a higher civilization, but after conquering and settling Palestine they had, as we are told, “no king, and every one did that which was right in his own eyes.” An outrageous breach of hospitality, that is, a breach of the customary law which alone made intertribal intercourse possible, a breach coupled with rape and murder, so stirred the anger of all Israel against the tribe of Benjamin, in whose territory the outrage occurred and which refused to surrender the criminals, that all the other tribes united to exact reparation. Although the allied tribes raised by conscription forces superior to those of Benjamin, they encountered bitter and obstinate resistance. Benjamin seems to have been exceptionally prepared for war. It had what may be called superior artillery; it had “seven hundred men, left-handed, who could sling at an hair-breadth and not miss.” The allies suffered two serious defeats, but they prosecuted the war until Benjamin was conquered. Then the chastened tribe was restored to its place in the society of the tribes of Israel.²

In continental Europe, in the later middle ages, there were many countries in which law was not efficiently enforced by determinate political superiors. In this period we have repeated instances of the formation, in emergencies, of leagues to enforce peace. Some of these, such as the Hansa, developed into powerful federations. Others like the Vehm, which may be described as a great central European vigilance committee, served their temporary purposes and disappeared. The Vehm devel-

² Judges, chapters xix-xxi.

oped no determinate superior that could be called sovereign, but the rules it enforced, until it succumbed to internal corruption and decay, were well recognized legal rules and their enforcement was as efficient as in the average modern state.

We have had similar experiences in our own country. In the settlement and development of the West, men imbued with notions of civilized justice were thrown together, in frontier settlements and in mining camps, beyond the pale of organized political authority. They enforced such rules as were necessary for efficient coöperation by reverting to primitive processes, to self-help and to lynching. In some instances, notably in California, they organized vigilance committees. Whether the rules they enforced, and enforced very effectively, should be called law, is of course a question of definition. An apparently prosperous New York business man once told me that he did not believe in government or in law; he thought they did more harm than good. In his youth he had lived in western mining camps and had found that "they got on much better before the law came in." I asked him what they did with claim jumpers and with horse thieves. He replied that claim jumpers were usually shot and horse thieves usually hanged. He was unacquainted with the formal philosophy of law or of politics; but he was one of Touchstone's "natural philosophers," and his theory of law was that of the analytical jurist of the most formalistic type.

In the society of nations, the redress of an international wrong by the concerted action of a number of states is a significant step. Such action has been taken more than once against small states, and against nations imperfectly organized or temporarily disorganized by internal conflicts. The most recent illustration is the concerted action of the Powers to protect their legations in China against the Boxers. That such concerted action is possible against more powerful offenders has been demonstrated in this war, in the gradual extension of the alliance against the Central European Powers. Germany and Austria expected to fight two European Powers and two or three small European states. Today they see arrayed against them six Powers and thirteen states containing the majority of the inhabitants of the civilized world.

This vast league of nations has been called into being and into action by Germany's disregard of treaties and of international law. The moral reaction began with the rape of Belgium; but more decisive than this or any other offense Germany has committed in arousing the active hostility of the world—clearly decisive in bringing the United States into the war—is the ruthless and indiscriminate destruction of enemy and neutral merchant vessels. German submarine warfare against ocean commerce not only affronts the general sense of justice and outrages the universal instincts of humanity, it also disturbs the economic intercourse of the world. It not only inflicts material damage, direct and indirect, in every quarter of the globe, it also imperils to an unprecedented degree the agencies of intercourse which gave birth to civilization and by which civilization is still chiefly maintained. This is the principal, although not the only reason, why Germany finds itself confronted by something very like a World Vigilance Committee.

In every such concerted action of the still unorganized society of nations, we find, if I may revert once more to the analogy between international and early national law, a forward step resembling that taken by the tribe when it began to react in its entirety against offenses for which there had been previously no redress except by feud. In the development of tribal law, such reactions indicated that offenses previously regarded as torts were beginning to be viewed as crimes. Concerted action by the society of nations against an offending state seems to imply a recognition that a state may be held accountable, not only to other single states which it has directly injured, but also to the world for a crime against civilization.

II

There is today a widespread feeling that the fabric of international law has fallen into ruin and that it must be rebuilt from the foundations. This feeling is not new; it has appeared in every general European war; it was widely expressed during the Napoleonic wars. When men's minds are engrossed by war,

they forget that the rules they see overridden are only a part, and not the most important part, of the law of nations. It is only the law of war that is menaced; the law of peace is unassailed and will assume its sway when peace returns. And it is a hasty judgment that affirms that even the law of war has broken down when, as is the case today, many of the combatants have been drawn into the struggle by Germany's disregard of the restrictions imposed upon warfare between civilized nations and are fighting, in part at least, for the maintenance of the law of war. Only if Germany wins and its offenses remain unpunished, will it be possible to assert that in this world war the law of war has been overthrown.

After this war, it will doubtless be necessary to fill some gaps in the law of war. The use of submarines and of aircraft must be regulated. The right of retaliation must be defined and limited. It must be made clear that the violation of neutral rights by one belligerent gives the other no right to violate the same or other rights of the same or other neutrals; and even as between belligerents some check must be imposed upon reprisals that cannot properly be called retaliations, upon reprisals that are clearly disproportionate in their illegality or in their inhumanity to the alleged offenses by which they are evoked. In the Brussels conference of 1874, it was proposed that "the choice of means of reprisal and their extent should bear some relation to the degree of violation of law committed by the adversary," that they "should not exceed the violations committed." Without some such check, reprisals and counter reprisals, each exceeding the other in illegality and inhumanity, tend to carry warfare back to its earliest and most barbarous form. There must also be an examination and a limitation of the conception of military necessity. An unlimited right of reprisal and a right to violate the rules of war whenever, according to a purely military judgment, there exists a necessity for their violation—these alleged rights reduce all rules of war to scraps of paper.

Acceptance of such restrictions will be facilitated by the experience of this war. There seems to be a growing recogni-

tion that excessive cruelty and inhumanity do not pay. The Austrian jurist, Lammasch,³ has recently written:

"After the conclusion of this war, all parties will have sufficient occasion to consider whether the direct advantages they have derived from acts justifiable or excusable only from the point of view of reprisal or of necessity outweigh the indirect disadvantages that they have incurred."

He cites the German jurist Zietelmann as saying: "In the great political game of the future every concession to humanity, the avoidance of rivalry in cruelties, will bring rich gain."

There is indeed one branch of international law that needs to be built up from the foundations, not because it has been overthrown in this war, but because its construction had hardly begun. This is the branch of the law that deals with the maintenance of peace. Its development will require limitation of the war-making power of the single states, not solely by self-imposed restrictions, but also by the law of nations. Proposals that are in process of formulation in many countries contemplate the prohibition of war in what are termed justiciable cases and the postponement of war in other cases. If a controversy between states turns upon a disputed interpretation of international law or of a treaty, or upon disputed facts, the matter is to be referred to a court of arbitration. If the controversy springs from a collision of interests, there is to be no resort to war until an attempt has been made by mediators to discover a settlement that may prove acceptable to both parties.

In the outbreak of most wars another factor is notoriously operative—a factor which may be associated either with disputed questions of law or of fact or with collisions of interests—the point of honor. In the opinion of some writers, the point of honor should be disregarded. This, in the present state of general feeling, seems impossible. According to other writers, this point also should be submitted to arbitration, in order that it may be determined by an impartial authority whether the honor of the aggrieved state has been impaired and how it shall

³ *Das Völkerrecht nach dem Kriege* (Christiania, 1917), pp. 17 et seq.

be rehabilitated. It is well known that in some countries, where duels are still fought, at least in certain social classes, similar arbitrations are found possible; but it must also be noted that, in many if not in most cases, the so-called courts of honor find that the only possible redress is by conflict. The majority of writers appear to hold that the point of honor can be dealt with only through mediation.

This program closely follows that by which feud was checked in early tribal society. Adjustment of quarrels without armed conflict was originally obtained only by direct negotiations or by mediation. Submission of such controversies to a court was originally a matter of agreement; it first became compulsory in minor cases; ages passed before feud was suppressed in cases of "blood and honor." It was not deemed cowardly that the offender should buy his peace, but that the wronged party should sell his vengeance seemed base. National feeling today is quite similar. When, for example, Italian citizens were lynched in New Orleans, our government was prompt to offer pecuniary compensation; but Italy was loath to accept any satisfaction save the punishment of the murderers.

All these proposed rules may be established by treaties. The United States, for example, has already negotiated many such treaties. They may be established by international congresses; but the resolutions of these congresses will be no more than treaties between each ratifying power and all the others. What security will there be against breaches of such treaties?

In minor matters such treaties will doubtless be generally observed. Nations rarely go to war for trifles; if trifling causes have been alleged, these have been pretexts. What guaranty will there be, however, that in disputes not justiciable, in collisions of interests in which national passions are fired by the assertion that the national honor is at stake, a powerful state will stay the march of its armies until mediators have considered alleged grievances, investigated disputed statements of facts and submitted to each nation concerned their findings and their plan of settlement? What convincing arguments can be opposed by statesmen to the military authorities, if these allege,

as they always allege when they think themselves better prepared than their adversaries, that every day's delay strengthens the prospective enemy and lessens their own chance of victory?

It is proposed today in many quarters that the society of nations shall act collectively through permanent organs to enforce submission to the proposed rules. More or less elaborate schemes have been formulated for the establishment of the requisite organs. The idea is not new, nor is there much that is novel in these plans. Similar proposals have been made from time to time during the past six centuries. What is new is the wide support given to these plans and the endorsement they have received from responsible statesmen.

The crucial question is that of sanctions. We shall gain relatively little, it is urged, by establishing new international organs unless it is possible to give something more than moral authority to their decisions and mandates. The decision that a controversy is justiciable must be followed by some joint action of the civilized world against the state that refuses to submit its case to arbitration. The prohibition of hostile action in other cases, until reasonable time has been given for mediation, must be followed by some joint action against the state that refuses to obey the injunction. The first question is: What shall be the nature of the joint action? When this question is answered, a second arises: Can the joint action required be secured? Who shall coerce unwilling neutrals to join in coercing their quarrelsome neighbors?

This last question needs only to be stated to be answered. In the society of nations, as it exists today, any such general coercion is unthinkable. All that can be deemed feasible is to affirm the legal right and the moral duty of nations not primarily interested to join in penalizing breaches of the proposed rules. How far they will recognize such a duty and exercise such a right will depend in part upon the nature of the action they are expected to take.

On this point, there are many proposals. It is suggested that joint action should be confined to measures short of formal war. In case one party accepts and the other rejects arbitration; in

case either party, after arbitration, refuses to accept the judgment of the arbiters; in case a state disregards the injunction to refrain from hostile action pending mediation, the states not primarily interested are to have the right and it shall be their duty, upon the outbreak of the war, to say to the offender: We shall allow no goods to be exported from our territories to yours and we shall permit you to float no loans within our jurisdiction. To the other party involved in war, they may and should say: You may draw from our territories whatever supplies you need, including munitions of war, and you may borrow from our citizens whatever funds they are willing to lend you. This differential treatment, it is suggested, may be carried further: the citizens of states not primarily interested may be forbidden to enlist in the army or navy of the offending state and may be encouraged to offer their services to its enemy.

Other supporters of coercion go much further. According to their plans, it shall be the right and the duty of the society of nations to take military action against the offending state. The economic sanctions are to be supported by the sanction of physical force. It is even suggested that a world army and a world fleet, composed of contingents furnished by the several states, shall be organized and held in readiness for immediate use against states that disregard the proposed international rules regarding arbitration and mediation. This proposal is not infrequently coupled with schemes for the reduction of national armaments.

It is to be noted that some at least of these proposals involve the establishment of a world government. It is not proposed to organize a world state with federal government, but there is to be something approaching a world confederacy. If this confederacy is to hold periodical legislative congresses; if it is to have a supreme court, a council of mediation, and a board clothed with a certain degree of executive authority—a board which in one of the plans is called (most unwisely, it seems to me) a “ministry”—and if it is to have a federal army and navy, it will have much of the outward semblance of a world state; and its powers—on paper, at least—will not be sensibly inferior to those exer-

cised by some of the looser national confederacies that have existed in the past and that have finally developed into federal states. They will not be sensibly inferior to those exercised by our own Union under the Articles of Confederation.

That some such world organization will ultimately be established is not improbable. The development of law has always been accompanied and conditioned by the subjection of smaller to larger groups—of kinship groups to tribes, of tribes to small states, of small states to national states—and the development of international law may well bring similar subordination of the single states now sovereign to the authority of a world league. That any such world organization will be developed in the near future, few students of history and of politics will deem probable. The subordination of smaller to larger groups has always encountered intense and obstinate resistance—a resistance based on that human instinct which is most essential to efficient coöperation, the instinct of loyalty. When we remember what stretches of time have been needed to transfer allegiance from each smaller to each larger group, when we recall that, in most cases, this transfer of allegiance has been accomplished only through war, we may well conclude that it will be no easy task to imbue the people of the great modern national states with the conviction that they owe any real allegiance to humanity, and that it will be even harder to convince them that this allegiance is in any respect higher than that which they owe to their own national states.

It will be easier to carry resolutions through international congresses and to secure their general ratification than to establish new methods for their enforcement. It will be easier to obtain general recognition of the right of disinterested states to insist on arbitration or on mediation, when war seems imminent, and to participate in joint action against an aggressive state, than to secure formal pledges of eventual participation in such action. It will be less difficult to secure pledges to join in a boycott against future offenders than pledges to take part in military action. It will be far less difficult to establish permanent boards for arbitration, for investigation and for media-

tion, than to clothe them with real powers. Plans for facilitating voluntary coöperation will encounter far less opposition than proposals that suggest the establishment of anything resembling a world government.

In pointing out some of the obstacles that will be encountered in any effort to organize the society of nations and to give more efficient sanction to its laws, it is far from my purpose to discourage such efforts. If they are wisely directed, I believe that substantial progress may be achieved. The temper of the world is far more favorable to such efforts than at any former period. Never before were the nations so closely knit together by material and spiritual bonds of every kind as in the years immediately preceding the outbreak of this war; never before has it been so convincingly demonstrated as during the past three years that the common interests impaired by war outweigh any separate and selfish interests that war can possibly promote; never before have neutrals so clearly seen that they have a vital concern in the maintenance of the world's peace. Until now, the attitude of neutral governments towards a war has resembled that taken in 1439 by the authorities of Namur towards a local feud. "If the kin of the slain man will and can avenge him, good luck to them, for with this matter the Schöffen have nothing to do, nor do they wish to be reported as having said anything about it."⁴ In the present war our government found such a neutrality of thought and of word increasingly difficult, and neutrality in conduct was ultimately found to be impossible.

For the successful working of any international organization to maintain peace it is essential that every civilized state should not only claim the right but should also recognize the duty of aiding in its maintenance. This involves the acceptance of the international point of view, the development of the international mind. In this matter all who teach and write in the fields of history, sociology, economics, politics and law have grave duties. Never before, except possibly in the period of the French Revolution, have the dynamic potencies of what seemed

⁴ Brunner, *Deutsche Rechtsgeschichte*, vol. 1, sec. 21, note 11 (p. 159).

abstract theories been so strikingly revealed. Many of the theories we have held are being tested, as never before, in the furnace of this greatest and most terrible of wars. Some of them have developed unforeseen and deplorable corollaries. It is our duty today to reëxamine our theories from the point of view of the interests of humanity. Let us ask ourselves whether they work for the welfare and the progress of the world; whether they tend to further the immemorial effort of humanity to rise from the mire of brute struggle for survival to the clean heights of a noble rivalry in common efforts for the general good.