

LEGAL FOUNDATIONS OF INTERNATIONAL RELATIONS

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In his introduction to the latest Blue Book published by the Naval War College, Admiral Spruance quoted what he termed "a prophetic utterance" made in 1889 by William Edward Hall. Hall's treatise on International Law was a standard exposition of the British point of view over a whole generation. This was his statement which was quoted by Admiral Spruance:

It is a matter of experience that times, in which international law has been seriously disregarded, have been followed by periods in which the European conscience has done penance by putting itself under stricter obligations than those which it had before acknowledged. There is no necessity to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist.

We live today in a decade following a great war. I wish I might tell you that because of the penance which the world's conscience has suffered, great changes are in progress such as Hall foresaw. I would find it difficult to

make such a statement, however, and perhaps we shall be on safer ground if we confine our attention today to the international law which has grown up in the past, even though in some respects it has been seriously disregarded in recent years.

Our system of international law has been developed over a period of more than three centuries. It is distinctly Western and European in origin. In tracing its growth, we usually refer to the Spanish jurist-theologians of the sixteenth century, but we ascribe first place to Hugo Grotius whose great book on "The Law of War and Peace" was first published in 1625. For a long period, international law was conceived to be not only European, but also Christian, and its application was limited to Christian States. In the course of the nineteenth century, however, we broke ourselves free from such limitations, and in the words of the World Court the principles of international law "are in force between all independent nations" and "apply equally" to all of them.

Fundamental in our thinking on international law is the conception of a community of States. All States are necessarily members of this community. There is no room in the modern world for a hermit State living outside of the community—even Nepal has recently come to a realization of this fact, and

has brought itself into relations with other States.

If you ask me the number of States forming this international community, I cannot give a simple answer and I think you and I might have some differences of opinion. There are fifty-eight "States" which are members of the United Nations—at least they are all called "States" in the Charter, though some of them do not deserve the compliment. A considerable number of States are not members of the United Nations. If we attempted to list them, we should probably be able to agree on fifteen; but we might run into differences of opinion concerning an additional eight or ten, for the status of some political communities is always in doubt. New States have come upon the horizon, and some of those we listed a decade ago have disappeared.

We start basically, then, with the fact that some seventy-five or eighty States exist in the world—they are more interdependent than independent—and with the conception that these States form a community. This community must have a law to regulate the relations of its members. That is the fundamental fact underlying international law.

This community has suffered greatly in the past from lack of organization. In the early part of the last century, what was known as the Concert of Europe assumed a general direction of European affairs in times of crisis; but organization for regulating ordinary peace-time relations was wholly lacking. Soon after the middle of the century, as the progress of inventions began to draw peoples nearer together, we began to get some permanent organizations. An International Telegraphic Union, formed in 1865, still exists as the International Telecommunications Union; and the Universal Postal Union, formed in 1874, is still functioning smoothly.

Such successes led quite naturally to attempts to form international organiza-

tion of a more general character. The series of Peace Conferences held at The Hague in 1899 and 1907—the Conference projected for 1914 never met—represented a feeble effort in this direction. Far more ambitious was the League of Nations which began to function in 1920. In the course of twenty years, it laid many useful foundations. Looking back on the period, its failures can easily be exaggerated—in some part they were due to the abstention of our own country. Yet the successes were notable, and they paved the way for a new effort to be undertaken when a disastrous World War had intervened.

The United Nations follows in the footsteps of the League of Nations. Indeed, its Charter is in a sense a revised version of the Covenant. I am not disposed to overstate the prospect created by such a world organization. It still lacks universality. It is crippled by limitations, some of them formalized in its Charter, some of them due to divisions among peoples which the Charter cannot erase. Of course failures are to be expected—that is true also of the Government of the United States, though it is one of the most stable and successful governments in the world. Yet failure does not always denote the unwisdom of initial effort, and if the United Nations can be kept functioning its successes may far outbalance its failures. A prospect exists, therefore, for a greatly strengthened international law to serve the interests of a community of States, more integrated than it has ever been in the past.

I think one can safely speak today of a growing body of constitutional international law. Even since 1945, great progress has been made in this direction. The Charter of the United Nations is more than an ordinary international treaty. Some of its provisions expressly envisage States which are not parties to it. And under the Charter a number of specialized agencies have been brought into relations with the overall Organiza-

tion— a feat which was never achieved by the League of Nations despite the anticipation put down in Article 24 of the Covenant.

One can also speak today of a great volume of international legislation which orders our international intercourse. It is true that we do not have an international parliament exercising legislative functions analogous to those of the Congress of the United States or of the Parliament at Westminster. Yet it would be a mistake to draw from this fact the deduction that we have no legislation operating across national frontiers. Over almost a hundred years, a clear-cut legislative process has been developed; after preparations which are frequently very protracted, representatives of many States assemble in an international conference, and they often succeed in reaching agreement on legislative texts which later become operative in consequence of their ratification. International legislation is like national legislation in that there is no requirement that it be universally applicable, or that it should bind those who do not assent to it.

Thanks to this international legislative process, we have today a great volume of world law, some of it accumulated over a period of many years. Unfortunately, it is little known. Even writers on international law often ignore it, so that we cannot be too severe in our reproof of those lay writers and speakers who advocate the creation of a vague "world law" without taking account of what we have already. In a series of fat volumes entitled "International Legislation," I have attempted to collect the legislative texts of the past thirty years; these volumes are in the Library of the Naval War College, and if you will glance at them I think you will be impressed with the extent of the achievement.

During the past hundred years, progress can also be noted in the field of international adjudication. Here, too,

we have suffered from lack of organization in the past. Yet in the course of a century, scored of *ad hoc* international tribunals have been created for the judicial application of international law, and with but few exceptions they have functioned with remarkable success. The fact inspired a robust movement for creating a permanent tribunal to which States might take their differences for adjudication according to law. The Permanent Court of Arbitration, created in 1899, as a consequence of this movement, was indeed a feeble step; yet for a quarter of a century, it yielded some results. If it is now somewhat moribund, it still exists with the support of more than forty States. The Central American Court of Justice, created under a Convention of 1907, had a checkered career and expired at the end of a decade.

A more important step for strengthening international law was taken in 1920 when the Permanent Court of International Justice was created. For almost twenty years before the recent war, it functioned actively to the general satisfaction of the world. As I was for ten years a judge of this Court, it was a happy day for me when the Conference at San Francisco decided to take the Court over as an organ of the United Nations, and to annex its Statute, slightly refurbished, to the Charter. It was rechristened the International Court of Justice, but the chain of continuity was not broken. This Court is now in session at The Hague, dealing with the *Corfu Channel Case* between the United Kingdom and Albania—a case of great interest to naval officers. I am now engaged in writing the story of its activities during its twenty-seventh year.

I do not minimize the difficulty of persuading States to confer on the World Court jurisdiction over their legal disputes. In 1945, as in 1920, a determined effort was made to write into its Statute provisions which would have invested the Court with what we call

“compulsory jurisdiction”—i.e., jurisdiction independent of States’ consent given at the time. While that effort failed, provisions were adopted to enable States desiring to do so to confer such jurisdiction on the Court as between themselves, and thirty-two States are now bound by declarations which have this effect. It is to me a matter for regret that the declaration made by the United States in 1946 was narrowed by two frustrating reservations, one of which would disable the Court from exercising jurisdiction over a dispute to which the United States is a party if the United States declares the dispute to relate to a domestic matter. Fortunately, this American example has not been followed by many other States. Despite such difficulties one can only conclude that very considerable progress has been made in this matter.

More encouraging, perhaps, is the fact that general agreement now exists in the world on the basic features of international adjudication. Opinion is unanimous as to the nature of the judicial function, and as to the essential elements of the procedure to be followed. Nor is there disagreement concerning the obligation of States to comply with a judgment of an international tribunal. As a matter of history, the record of such compliance over the years is quite remarkable. If there have been a few cases in which losing States have refused to carry out international judgments, they are the exception and not the rule. Not once has any State defied the World Court by declining to abide by its judgment declaring the applicable law.

I have spoken of the growth of a constitutional international law for the community of States, of the development of a fecund process of international legislation, and of the reassuring record of international tribunals. Let me now say a word concerning the vast number of bipartite treaties by which States have sought to regulate their conduct.

I suspect that most of us do not appreciate the number of treaties in force in the world at any given time. Some twenty years ago, a colleague of mine estimated that not less than fifteen thousand treaties were then in force. I believe his estimate today would go beyond that figure, though the precise status of some treaties may be in doubt. The Department of State is now issuing an excellent publication entitled *United States Treaties and Other International Acts Series*. If you will leaf through the recent numbers of that Series, I think you may be surprised at the extent of your *American* treaty law. Such bipartite treaties are followed and applied in every-day life as a matter of course. Rarely, in time of peace at any rate, does any State refuse to meet its treaty obligations as it understands them to be. No country wishes to have the reputation of violating its pledged word.

Two facts are outstanding from this review: *first*, that judgments of international tribunals are as a rule always complied with; and *second*, that treaty obligations are habitually met.

There remains another field in which international law has been and continues to be developed—the field of customary law. When over a considerable period of time we find that a number of States have followed a course of action in the belief that they were acting in accordance with what the law ordains, we can say that a customary rule of law has come into being. Such a situation must be appreciated, of course, and the appreciation must be made by men trained in legal technique. I do not wish to exaggerate the extent to which existing international law is based on practice evidencing custom, but within limits this must be recognized as one of the ways by which law accumulates.

Perhaps, I should illustrate this point. Over a course of many years, numerous States asserted jurisdiction over a part of the seas bathing their coasts;

gradually, the range of cannon-shot was taken as the limit of such jurisdiction, and in the nineteenth century this range came to be measured in terms of leagues or miles. The States of the world are not agreed on the number of miles—some take three, some take more; but there is now a rule of customary law that the marginal sea forms part of the territory of a littoral State, subject only to the innocent passage of the vessels—at least the merchant vessels—of other States.

What I have said may be summarized in a statement concerning the sources of International Law. Basing myself on Article 38 of the Statute of the International Court of Justice, I must put first “international conventions, whether general or particular, establishing rules recognized by the States concerned.” Then a second source is “international custom, as evidence of a general practice accepted as law”; these are the words of the Statute, but I should prefer to say “international practice, as evidence of a general custom accepted as law.” Then the Statute lists “the general principles of law recognized by civilized nations”—this seems to mean that the Court may apply principles of national law; as all nations are “civilized,” though not in one mould, perhaps the limitation in the Statute is a bit invidious.

Fourth and fifth sources are put down in the Statute as “judicial decisions and the teachings of the most highly qualified publicists of the various nations”; but these are referred to as only “subsidiary means for the determination of rules of law.” International judicial decisions do not narrow down from precedent to precedent as do the decisions of national courts in our common law. A case seldom involves a

situation precisely analogous to that of a previous case, and precedent plays less of a role in international adjudications than in the work of national courts.

As to the teachings of publicists, I would suggest that one must be on his guard. Few are writers whose works can be used without careful attention to their nationality, the date and place of their writing, and the circumstances which inspired it. Writers, even dead ones, seldom deserve the compliment paid in calling them “authorities.” In this country, the treatise published by Wheaton a century ago is outstanding—it has gone through many editions, and has been widely published in translations—and yet I should hesitate to consider it authoritative.

If you wish to have at hand a useful readable treatise which is not too bulky for following the development of international law, I can suggest two such small volumes to you: “The Law of Nations,” by my Oxford colleague Professor J.L. Brierly—now in its third edition; and “International Law” by my friend Charles G. Fenwick, of the Pan American Union—also now in its third edition. I can also suggest two periodicals which you may wish to have at hand: the weekly *Bulletin of the Department of State*, and the quarterly *American Journal of International Law*, over the past forty-two years.

My lecture today is of an introductory character. I have sought to give you only a general account of the legal foundations of international relations, without going into the substantive content of our existing law. In our future work we shall have occasion to muster some of its precepts and principles, and to relate them to the concrete situations with which a naval officer is frequently faced.