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Scholastic Concept of International Law

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THE SCHOLASTIC CONCEPT OF INTERNATIONAL LAW

IN view of the present international situation, which comes very close to resembling the Hobbesian hypothetical "state of nature" wherein there was neither law nor right, a discussion of International Law might irritate the cynically-minded because of its apparent naivete and innocence in face of reality. Because so many nations have performed acts evidently contrary to the "rules" of what we call International Law, because these violations of the International code have been so frequent, it is little wonder that the average person has long begun to doubt the existence of a law for nations, in the proper sense of the term "law." He begins by asking himself: "Who passed such a law?"; "Who enforces it?"; "What are its sanctions?". And he concludes that it must be merely a gentleman's agreement, which goes by the board any time a particular nation does not feel in a gentlemanly mood.

For the Scholastic philosopher, however, International Law is truly a law, and is as firmly grounded in fundamental principles as is the civil law of any individual state. He admits that the frequent violation of such a law is a disheartening thing, but he recognizes that these violations cannot destroy its real existence and fundamental nature.

General Concept of Law

In order to discuss intelligently the particular kind of law known as International Law, it is necessary to determine the Scholastic conception of law as such, the essence of law in general. The term "law" is used in reference to things having essentially different natures. Thus, we speak of the laws which govern the movements of the heavenly bodies; the laws of gravitation, electricity, affinity, cohesion, etc., which dominate the activities of physical bodies; the biological laws of nutrition, growth, and reproduction in organic life; the psychological laws manifest in the operations of the mind. In the social sciences we discuss laws operating in the realms of sociology and economics. The logician and the artist are aware of the laws which must be followed in order to attain the end of their activities. All of us are aware, of course, of the existence of the civil law and of its general nature. Finally, most of us admit the existence of what we call the moral law and are conscious of its directive force in human activity.

It is obvious that the term "law" is not used in relation to all of these spheres in an univocal sense. The term, however, does signify a concept which carries a certain note of meaning that is common to each of the usages mentioned above. This common note undoubtedly is that law is a *rule of action.* It is an ordering of the activities of a thing. Further, since an action that has no particular direction is unintelligible and a real impossibility, the law which directs the actions of a particular thing must point to an end, a final cause of those actions. We can, therefore, add to our initial definition by saying that a law is a rule of action, directive of an agent to its proper end.

So, whether we are considering the mineral level, the plant level, the animal level, or the human level, we encounter reality as essentially dynamic, as acting, and in this universal activity as obeying certain rules of order which we call laws.

Moreover, unless we are willing to admit that all action is purposeless, we will have to grant that every agent, either consciously as a man, or unconsciously as a sub-human being, always acts for a purpose, an end. In its widest sense, therefore, a law is nothing more than a manner of acting in a way which will lead the agent to the end porportionate to its nature, the particular law followed by each agent likewise being determined by that agent's particular nature. In short, every agent, lacking from the outset the full perfection of its nature, seeks to overcome this initial deficiency by a series of acts which will lead it to the desired end wherein it will achieve the perfection due its nature. These acts, therefore, are the means to that end; and law, in its widest sense, is that which puts order into these acts whereby they will be duly proportionate to the end for which they are intended. "It is an ordination of things to an end, by reason of which each creature by pursuing its own particular end, helps to attain the end of the whole universe." [1]

THE ETERNAL LAW

This universal manifestation of law surely leads us to the recognition of a Lawgiver for the universe. For it is obvious that beings below man lack the intelligence either to determine for themselves an end of action or to direct themselves to that end by the proper choice of means. Yet, they do act purposefully; and hence, they must be directed by an Intelligent Being, who has implanted the law within their very natures. Even man, who possesses intelligence and the power of self-direction, recognizes that he is not perfectly autonomous and that he too is under the control of law. For he is aware of the fact that not only does he necessarily obey the physical laws which govern all corporeal substances, but that his reason discovers certain laws of conduct which he feels obliged to follow freely as a man. In both cases he

[1] GREDT, J., ELEMENTA PHILOSOPHIAE, Vol. II, p. 275.

recognizes that these laws are not of his own making, but are imposed upon him. Scholastics call this general law of the universe, this fundamental plan of action for all creatures, the Eternal Law. They reason that the Creator of the universe, Who is supremely intelligent, must have created for a purpose, and in order that that purpose will be accomplished, He must have instituted a plan of action for the universe, a law. Thus, in the words of St. Thomas, the Eternal Law is "the Divine Wisdom in so far as it is directive of all actions and movements." [2] Every particular law of the universe, therefore, is but a manifestation of the Divine Plan by which the whole universe is directed to its end.

The Natural Law

Although the Eternal Law is thus universal in its extension, it does not bind all creatures in precisely the same way. As stated before, the action of a being follows the nature of that being, and consequently the nature of the being will determine its manner of obeying the law. In general, we might say that all things below man obey the law with physical necessity, that is, they always and unfailingly act in conformity with the law of their natures. That portion of the Eternal Law, therefore, which applies to creatures devoid of Intelligence and Will, we call Physical Law. But when we come to the human level, we are confronted with an entirely different situation. Here, the Eternal Law, although just as obligatory as it is on the sub-human levels, binds in another way, — in a way, again, consonant with human nature. For man, possessing the specific perfection of rationality, is capable of both *knowing* the Eternal Law and of *determining* himself to follow it. He, therefore, is not constrained to observe the Eternal Law by physical necessity, but rather by moral necessity. We call man's portion of the Eternal Law the Natural Law or the Moral Law, and

2 Aquinas, St. Thomas, Summa Theologica, I-II, q. 93, a. 1.

define it as "the participation of the Eternal Law in rational creatures, the light of reason, as it were, by which we discern what is good and what is evil." The Natural Law is an intellectual participation in the Eternal Law, rather than a "natural" participation as is found in the tendencies and inclinations of irrational creatures. By reason of this participation a man apprehends the fundamental precepts of moral action, which are his guides in conduct.

Precepts of the Natural Law

Common sense testifies to the philosopher's analysis of the "good" as that which is desirable. Just as the apprehension of reality as intelligible is the first principle of the activity of the speculative intellect, so the apprehension of reality as desirable is the first principle of the practical intellect, that is, the intellect as engaged in directing human actions. By reflecting on the nature of his various appetites and inclinations, man sees that they are always ordinated to reality as desirable or good, to objects that are beneficial to and perfective of these appetites. From this analysis, it is an easy inference to apprehend the first precept of the natural law: Good is to be done, and evil is to be avoided. In short, the good is that which is the object of an appetite. The evil is that which is contrary to the inclination of an appetite. By his reason man can become aware of his natural appetites and inclinations and the objects to which they are ordinated. Since these natural inclinations are manifestive of the Eternal Law of the Divine Reason which directs all things to their ultimate end, man can easily recognize the truth of this primary precept, which implies that whatever is in conformity with a natural inclination is good, and whatever frustrates or hinders a natural inclination is evil, — recognizing at the same time that there is an order among his appetites and faculties, and that the lower must be maintained in their natural state of subordination to the higher.

Following St. Thomas we can make a general classification of these natural inclinations in man, and the general precepts of the natural law which are based on them:

a. Inclinations arising from man as a substance: self-preservation and conservation in existence. Precepts which forbid self-destruction, self-mutilation, etc.

b. Inclinations arising from man as an animal: conservation of the species through generation; care of children. Precepts regarding marriage, birth-control, education of children, etc.

c. Inclinations arising from man as rational: knowledge of truth, life in society: Precepts regarding social justice and charity.[3]

All of these inclinations, organic, sensory, and rational, in so far as they are regulated by reason, are ordinated to good ends; and from these natural inclinations can be deduced the fundamental rights and duties belonging to man. Briefly, he has the right to the goods specified by his natural inclinations, (as regulated by right reason), and the duty to respect these same rights in other men.

Properties of the Natural Law

It is because the natural law is grounded in the very essence or nature of man and upon the essential relations which his natural inclinations have to their objects, that we ascribe the following properties to it:

a. It is *Universal* both in the sense that it is co-extensive with mankind, and in the sense that it is universally knowable to all men. Since all men possess the same nature, the law of that nature is binding upon each of them. No one, likewise, can deny that the primary precepts of that law have always and everywhere been recognized by men; even though a few degraded tribes have erred in the application of its secondary and more remote precepts.

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3 *Ibid.*, q. 94, a. 2.

b. It is *Unchangeable.* This property again follows from the fact that it is based on the essences of things and their essential relationships. Just as there is an unchanging and essential relationship, say between the radius of a circle and its circumference, so there is an equally unchanging and essential relationship existing between man and God, between man and his fellow-man, between the faculties of man and the ends for which they are designed. These relationships are just as unchanging as the natures which they relate. They are founded on the real, objective order of things, which remains as it is in spite of any arbitrary perversion of that order on the part of individual human acts, or social custom, or even by an unjust human positive law.

c. It binds with an *absolute necessity.* Because perfect happiness is the ultimate subjective end for all men, they cannot help but always to act in view of that end. Because this is a necessary end, the adoption of the means leading to it becomes equally necessary; and hence, the Natural Law, which guides us in the choice of those means, obliges with an unconditional or absolute necessity. In other words, the necessity of the means merely reflects the necessity of the end.

Such, in brief, is the Scholastic conception of law in general, and of the Natural Law in particular. The recognition of the existence of a natural law that is an objective, universal, and immutable rule of conduct for all mankind has not only been an integral part of traditional Christian culture, but was explicitly acknowledged by the best thinkers of pagan Greece and Rome. This existence of a natural law is expressed by Aristotle in his division of law into particular and universal: "Particular law is that which each community lays down and applies to its own members: this is partly written and partly unwritten. Universal law is the law of nature. For there really is, as every one to some extent divines a natural justice and injustice that is binding on all

men, even on those who have no association or covenant with each other." [4] Here Aristotle speaks of the existence of the natural law, describes it as universal and obligatory, and recognizes it as something quite distinct from the civil law and from individual human contracts. This conception of the natural law was perfected by Christian thinkers, who with the aid of revealed truth showed its relation to the Eternal Law of God and how its temporal sanctions are completed by the perfect sanctions of the next life. This traditional conception of the Natural Law is the basis for our appraisal of human positive law, both national and international.

International Law

Because, as we have seen, man has a natural inclination expressive of his need and aptitude for group living, society is natural to him and to that extent the state is a natural institution. Neither as an individual nor as a member of the family can man "live well," can he attain even the imperfect happiness possible in his temporal life. He requires the aids given by civil society in order to develop completely the virtues of his rational and moral nature. Hence the state owes its existence to the Natural Law. Further, since the state must have a ruler and laws by which the actions of its members are directed to the common good, it is evident that these necessary political elements are likewise justified by the Natural Law. Civil laws, therefore, owe their ultimate "legality" to the Natural Law, in as much as they are the necessary means by which men can live together in society. The civil law contains two kinds of precepts: (1) Those which are identical with the precepts of the natural law, *e.g.*, those forbidding murder, theft, etc.; (2) Those which are a more specific and explicit determination of precepts which exist in the natural law in only a general and implicit

[4] Aristotle, Rhetorica, I, 13, 1373b, 3. (Oxford.)

way, — the bulk of detailed laws passed by an individual state in reference to its particular institutions and practices.

It is evident from this relationship between the civil law and the natural law that the justice of a civil law is determined by its conformity with the natural law, and the obligation to obey it arises from this same relationship. Conversely, it is evident that a civil law commanding or forbidding an action contrary to the natural law is not truly a law, but in the words of St. Thomas "an act of violence."

Man's natural bond to his fellow-man, however, does not disappear at the boundaries of each man's particular state, but rather it is co-extensive with all human society. The fundamental precepts of justice and charity, of mutual aid and respect for the rights of others, obtain just as truly among men of different states as among men of the same state. Consequently, the same intimate relationship which exists between the domestic civil law and the natural law also exists between International Law and the natural law.

We may define the law of nations as "the sum total of the duties and rights, customs and usages, by which states are bound together in their dealings with one another. Like the domestic laws of nations, it contains two elements: Natural and Positive. The former comprises those principles and rules governing international relations which are immediately drawn from the moral law of nature written there by its Creator. The positive element consists mainly of treaties, customs and usages which the states have formally accepted or sanctioned. In so far as accepted international law does not include pertinent precepts of the natural law, . . . it falls short of completeness; in so far as it contains articles contrary to the precepts of the natural law, it loses all binding force and frustrates its own purpose." [5]

It is evident, therefore, that our conception of International Law is opposed radically to that too current opinion

[5] RYAN, J. A., INTERNATIONAL ETHICS, p. 4.

which regards the law of nations, and in fact all positive law, as merely a more or less arbitrary code of rules, having only that binding force that can be imposed by external compulsion. Rather, we maintain that all positive law, both domestic and international, that coincides with the fundamental principles of the natural law, is absolutely binding in conscience with a moral obligation, — regardless of whether or not there happens to be on hand a physical force capable of enforcing its observation.

Our conception of the natural law as the underlying rule of conduct for all men is also the basis for our position that certain acts are good or bad in themselves, irrespective of the particular consequences which might follow their performance. For instance, murder, theft, and lying are forbidden both by natural and by positive law because men recognize that these acts are contrary to the natural order of things. We know that these acts are bad in themselves, and would be so even if the state should not have positive laws forbidding them. This is what we mean by objective, intrinsic morality; a morality that is not based on immediate consequences, or pragmatic expediency, or subjective impulses, but rather is one that is buried in the real, unchanging natures of things. One, therefore, that is above not only the individual, but also above any collection of individuals in the form of the state, regardless of its physical might.

There are those who claim that international law is not really law in the proper sense, since it lacks an authority which can impose its rules upon the community of nations. This position is indeed a perfectly logical one to those who deny the existence and binding power of the natural law, which has as its authority God Himself, the Author of all nature; and who also regard the State as an end in itself, an absolute entity than which there is no higher authority. But to the Scholastic, who sees the State as constituted of individual men for whose common welfare it exists, the idea

of that state being superior to the moral law appears as a monstrous contradiction. For the state is just as much a moral being as are the members which constitute it, and as an organization of individual men it has the same obligations under the natural law as do these men as individuals. Further, the Scholastic philosopher, recognizing the fact that all authority ultimately comes from the Supreme Lawgiver for the universe, sees no difficulty in acknowledging the validity of international law, even though it may not have at present a human authority instituted by the community of nations. "The natural law is the law which prescribes the things that are necessary for our human natural perfection, and it includes every kind of natural necessity; necessities of mind and of body, the things necessary for each man personally, and the things necessary in our dealings with one another, the state, which is a necessity of nature, and the necessary relations of states. Thus, international law, which prescribes the things necessary for states in their mutual relations and dealings, is nothing more than a part of the moral law, and must be regarded as governed by moral considerations." [6]

Not only is it evident that the moral law furnishes the natural element in international law, but a little consideration will make it clear that even the positive element (treaties, pacts, covenants, etc.) would have no binding force unless the various states recognized that there was a moral obligation under the natural law to keep faith with one another.

Precepts of International Law

On the basis of the above general principles, let us outline a few specific precepts of the natural law governing international relations: firstly, those grouped under Justice, and secondly, those under Charity.

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[6] Cronin, Science of Ethics, Vol. II, p. 639.

a. *Justice* between individuals is based on the natural equality of all individuals as men, who are naturally equal because they have the same natural final end. Because no man is the means to the accomplishment of another man's end, no man may lawfully interfere with another or with his property, or treat another as a means to himself or his own convenience by attempting to exercise control over that other, or by interfering with his freedom in any way. In the same way, each state is juridically the equal of every other, since all states have the same end, that is, to promote the welfare of their peoples. Each state is a moral person, sovereign and independent, deriving its jurisdiction from its own nature and the Author of nature, and not from any other state. No state, therefore, is subordinate to another or may be treated as subordinate. From this juridical equality arise three chief rights in justice enjoyed by every state:

1. The right of *existence* and *self-preservation.* This right includes the rights of independence, integrity, and peaceable existence, to safeguard which the state has the right to wage war and the right to equip itself remotely for war. It is obvious that in so exercising these rights, the state cannot injure the rights of other states.

2. The right of *property.* This right includes both the property of its citizens and state-owned property, including its own territory. Without going into detail regarding this right, we might state briefly that the state can set up property in territory not owned by another state. This is usually signified by the two acts of annexation and settlement; and the extent of the land claimed must be only that amount that the state is able to control. In regard to the occupancy of territory already occupied by uncivilized races some distinctions must be made: (1) Territory merely over-run by nomadic tribes is considered unoccupied and may be taken over by any organized state. (2) Territory occupied by an uncivilized people having no economic or juridical organ-

ization may be taken over by the civilized, organized state, but the private property rights of the inhabitants must be recognized. (3) A community, even though uncivilized, which possesses an organization sufficient for other states to enter into public relations with it, may not be lawfully occupied.[7]

Scott describes the traditional Scholastic position on this matter as follows: "For both Vitoria and, later, Suarez the Jesuit, the essence of the system of international law was equality among nations as among individuals. In regard to imperfect communities which were not in a position to organize themselves in such a way as to protect their own interests, they maintained that a responsibility for such imperfect communities lay with more advanced peoples, and they charged the latter with the task of assisting the backward states to a position in which they would be able to look after their own welfare and interest. The world has recently rediscovered that doctrine and christened it the mandate" . . .[8]

3. The right of *free action.* Under this general right are included the rights of self-development; to make treaties without interference from other states (unless some right possessed by those states has been infringed); to expand, even though, by such action, it becomes a rival to other states in commerce or military power. In short, every state has the right to full and free development of its own powers, provided that no actual aggression is committed against other states.

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[7] It may be mentioned here that it was on the occasion of the Spanish discoveries in the New World that the Dominican, Francisco do Vitoria, wrote his two famous treatises, "On the Indians" and "On the Law of War," which are now considered to be the first formulation of the modern law of nations, being recognized as such in 1933 by a resolution of the Seventh International Conference of American States. In these works, Vitoria claimed that the Indians were true owners of their territory, and that the only possible titles by which the Spaniards could lawfully subjugate them would be the refusal of the Indians to allow natural travel and communication and the carrying on of commerce in goods necessary for good living; or the desire on the part of the majority of the converted Indians for a Christian ruler; or the practice of tyranny by the Indian chieftains.

[8] SCOTT, CATHOLIC CONCEPTION OF INTERNATIONAL LAW, p. 486.

b. *Charity*: Just as individuals are bound to one another by laws of charity because of their common human nature, so also states are bound by duties of charity because they are all members of the family of human kind. Thus, just as individuals ought to aid one another in distress, so one state ought to come to the aid of another state in its hour of need. This conception of the duties of charity is in direct opposition to the modern principle of "non-intervention," whereby third parties have no right to interfere in or attempt to regulate the actions of one state in regard to another, no matter what may be the rights and wrongs of these actions and relations. For, it is just as reasonable to claim that no state has the right to protect another from unjust attack as to claim that no individual has the right to protect another in time of need. Further, another state, by the same reason, has the right to defend the subjects of a particular state when their own government is subjecting them to an intolerable tyranny; or to help another government in overcoming anarchy and wanton revolution within its borders.

The positive element in international law, namely, that constituted by particular treaties, is also subject to the precepts of the natural law, of which the following are important. The conditions required for a valid treaty are practically the same as those which determine the validity of ordinary contracts, — suitable matter, competent persons, mutual consent, etc. Naturally, treaties violating the moral law are absolutely invalid; *e.g.*, a treaty having for its object the unjust subjugation of a particular nation. The obligations of a state to observe a treaty which has been unjustly imposed upon it is a difficult ethical question. Some authorities maintain that all treaties must be kept; for if the individual states were left ethically free to decide whether it should be kept, a grave injury would be done to international good faith. The majority of Catholic moralists, however, hold that unjustly imposed agreements which cover performances and conditions of secondary importance are

not always obligatory, but the provisions of treaties which terminate wars are universally binding unless they have been made under extreme duress and inflict an extreme amount of injustice.

The precepts of International Law given above are merely those that are easily deducible from the first principles of the Natural Law. Experience and a better understanding of international relations enable statesmen to determine more specific precepts that are applicable in varying times and circumstances. The individual treaties and covenants between states specify in an even more detailed way certain rules of action which express the particular policies existing between these states. Just as in the civil domestic law, International Law embraces both precepts of the Natural Law and also precepts which are found in the Natural Law only in a general and implicit way.

Conclusion

Western Civilization has experienced in the past three general forms under which international affairs have been regulated: (1) The pagan empires, culminating in the Roman, in which the emperor was the supreme law-giver; (2) The Holy Roman Empire, in which the pope, sometimes alone and sometimes together with the emperor, acted as the international authority; (3) The practice among the sovereign nations, after the break-up of the mediaeval empire, of appealing to the pope to act at least as an arbiter in their disputes. After the Reformation, of course, this last practice disappeared, and there was left only the Natural Law to serve as a common standard of conduct for the nations and as a basis for settling disputes. Men like Vitoria, Suarez, and Grotius formulated the precepts of an International Law as based on the Natural Law. In our own day the attempt to establish a league of nations and a world court was a vain effort to provide a new means for regulat-

ing international affairs. The primary reason for the failure of this attempt undoubtedly is the fact that most of the nations now refuse to recognize even the Natural Law as a standard of action which underlies what they call International Law. With the break-up of the empire they lost the emperor; with the break-up of the mediaeval culture they lost the pope; and now with the collapse of man's faith in reason itself, they have lost the last basis for common agreement, the Natural Law.

The empire and the mediaeval period are things of the past. We cannot, even if we willed it, return to those past conditions. The modern world has its own role to fill in the course of history. But, unless Western Civilization is to be destroyed utterly, the nations must at least make a beginning toward an international reconstruction on the basis of the Natural Law, that universal moral law that is above the particular law of any one nation and therefore common to all of them. The present revolutionary crisis makes such an attempt appear impossible, but after the present revolution has either spent itself or has been crushed, the reconstruction of national and international institutions must be founded upon the long-forgotten concepts of the Natural Law, or else be destined to failure. Only on this basis can a league of nations and a world court be practically effective. In short, international arbitration in justice can be accomplished only when there is a recognized common law upon which the practical decisions of an international court can be based.

If the concepts of a Natural Law, objective morality, acts intrinsically evil, moral obligation, and all the other principles which form the basis for the Scholastic doctrine of International Law, appear idealistic and ineffective in promoting international peace and good will, it is surely because they have not and are not being applied. The moral law is not easy in its demands; but the difficulty of obeying it does

not render its precepts false or unimportant. The miserable condition of the world today both nationally and internationally is a sorry indictment of our blind trust in so-called "practical" methods of an amoral expediency, with immediate consequences as the only criterion of their validity. Let us hope that the peoples of the world and the leaders of its nations soon begin to realize that there is an objective moral law and that its precepts of justice and charity must be obeyed. It should be evident to all that the temporal reward for observing the law is peace, just as the punishment for its violation is war.

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