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Ethical Basis of International Law

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THE ETHICAL BASIS OF INTERNATIONAL LAW

Any thoughtful reflection on the subject of international relations raises important questions regarding the fundamental postulates underlying these relations. There is the question whether, independently of treaty or custom, there must be recognized a transcendent natural law binding states as well as individuals. Again, does so-called "Public international law" deserve the name of law and command the same respect as civil law? What is the physical and ethical basis of such law? And what permanent success in diplomatic relations can be expected as long as statesmen do not admit any universal and absolute standard of ethical principles according to which concrete judgments of justice may be enunciated?

It is not uncommon for one to hear the utterance of the positivist that "customs and treaties are the two exclusive sources of the law of nations." Or that "there is no such thing as international law since there is no international superstate to make such law, or any power physically capable of commanding respect for such law." "You will never again bring the democracies of the world to transfer sovereignty to a league of nations capable of imposing its will upon all the people of the civilized world. Hence, there will never be any such thing as international law."

The answers to such questions as these involve considerable philosophic scrutiny, as well as an investigation of practical jurisprudence. Perhaps the pivotal problem, and therefore the more important and fundamental problem relating to the value of Public International Law, is the philosophic question regarding the ethical basis of the law of nations. Of secondary importance would be the historical study of the origin and source of modern international law

and the evaluation of the practicability of those rules which are generally incorporated under the title of International Law.

In the words of the Hon. William G. Miller, "The ideas which form the basis of a code may be philosophic, and, in truth, the only satisfactory arrangement of legal rules will be one where the philosophical ideas underlying them are kept clearly in view. But the scientific arrangement of a great body of laws for practical purposes must not be taken for the sum and substance of the philosophy of law. Beyond practical jurisprudence we have the Philosophy of Law. The scientific stage indicates that the idea of Right is explicit—that mankind has become conscious of Right, as an idea distinct from other ethical and intellectual phenomena. But science merely arranges in groups legal phenomena, and stops there; its practical end is served, and it has no need of going further, either to inquire into the history of the doctrines laid down or to discover whether there is any ultimate reason for them. In point of fact, however, science and philosophy shade into one another, and no hard and fast line can be drawn between them. And so, as in the physical sciences, discussions on legal topics frequently assume a philosophical aspect. The systematic development of positive law and treaty may be taken to represent the 'Natural History' stage of the science in which the legal phenomena are catalogued and arranged. But the human mind refuses to stop arbitrarily at this point and ask no more questions. If we could conceive law in an ideal state of perfection, and reduced to a perfect code, so that litigation would be a practical impossibility, and legislation absolutely unnecessary, a series of questions would still present themselves, and press for a solution. What is Law, as distinguished from a particular law? Is it a decision of every conceivable case that can occur? Or is it a general rule that embraces a large number of individual cases? Whence

does it derive its authority? Is it the authority of the parliament or king who has enacted it, or its own inherent reasonableness? Whence is our knowledge of law derived? Is it a revelation from God? It is a mere generalization from the facts of external nature? Is it an arbitrary invention of man himself? By what faculty do we declare one act to be right and another wrong? Are legal judgments merely a portion of our moral ones? These questions, and such as these, belong to the philosophy of law."

A similar acknowledgment of the role which philosophy plays in a complete account of jurisprudence might be added from the pen of a distinguished late Professor of Law at the University of Notre Dame. The Hon. Dudley G. Wooten begins his Lectures on the History of Law with the statement that "Philosophy has been defined as 'completely unified knowledge' or as 'the science of totality of things.' Literally and by tradition it signifies the love or pursuit of knowledge or wisdom.

"Any subject that is capable of being reduced to a historical system and analyzed into its nature, origin, sources, development and fundamental principles, is in itself one for philosophical study, as part of the science of unified knowledge or the totality of things. In this sense, Law is a proper subject for study as a branch of philosophy."

In discussing the validity of the concept of modern International Law one ordinarily turns the pages of history back to the 16th and 17th centuries when modern nations were beginning to take shape. The Peace of Westphalia, in 1648, definitely closed the conflict that had convulsed Germany for more than a century. This peace became a formal abrogation of the sovereignty of Rome as well as the sovereignty of the Emperor. Hannis Taylor says "That peace set the final seal on the disintegration of the World Empire, at once of pope and emperor, and made possible the complete realization of the doctrine of Grotius,

the doctrine of sovereignty of states. The Peace of Westphalia did not create international law, but it made a true science of international law realizable." [1]

Judge Wooten takes exception to this interpretation and declares that "on the contrary, it renders it impossible of realization as a harmonious and solvent instrument of ethical conduct. After the Peace of Westphalia and its ensuing treaty the ardent conception of the *jus gentium* and of *jus inter gentes* was completely shattered and for *jus* was substituted *lex*—a wholly different concept—the difference being between fundamental justice and artificial, arbitrary rule which necessarily can have no binding sanction because it emanates from no supreme law-making power, and can only be enforced by coercion or war. In fact, modern 'International Law' is no law at all, but a series of contractual and conventional obligations, dependent for their origin and enforcement upon a consent of the contracting nations."

In this forceful indictment, Judge Wooten does not mean to imply that there is no ethical basis for international law, nor does he mean to say that the Protestant revolt destroyed that ethical basis. In his Lectures on the History of Law he defines international law as that "system of rules and usages governing the relations and intercourse of sovereign states. It is founded partly upon divine law and partly upon agreements and customs, expressed or implied." He defines divine law as law "prescribed by divine authority, either directly by revelation or indirectly through the operations of the forces of nature as discovered by human reason and experience."

With this conception of the natural law as the basis of International Law the common sense of mankind is in perfect accord. It is not difficult to substantiate the validity of the natural law theory. It is not difficult to show to any mind that admits the existence of a personal God who

1 TAYLOR, PUBLIC INTERNATIONAL LAW, p. 37.

is not indifferent to the ethical conduct of His creatures that states are "moral persons" subject to the natural law. The natural law with reference to the conduct of nations may correctly be called the natural law of nations in contradistinction to the positive public international law. There is no denying the fact that a natural law of nations in this sense truly exists, and would surely exist in the mind of God and the reason of man even though no treaties, customs or usages obtained between nations perfectly deserving the name of Public International Law. It may be admitted that Public International Law is woefully incomplete. It does of necessity differ radically from civil, municipal and state law in so far as there exists no world-state with legitimate power to enact and execute laws for the conduct of independent sovereign states. Nevertheless there does exist a supreme Law-giver with the authority to direct the conduct of these moral persons, or aggregates of peoples which we rightfully call states, namely, God Himself, the Author of nature, who designed the law of nature and the moral law for all men and all nations.

In the Natural Law a firm foundation is laid for public international law. It is not odd that the foundation should exist when public international law itself receives so little observance, for the foundation of a building can be firmly laid without a perfect superstructure. The foundation may be of such texture that it is capable of supporting a perfect edifice. The ethical basis of public international law is deeply set in the principles of justice and charity. To deny the existence of such a basis is to deny the wisdom of God who would otherwise be indifferent to the ethical conduct of His people merely because they had agreed to live in communities called states.

The question of the ethical value of International Law is not inextricably bound up with the political values of the League of Nations or the World Court. The universal ac-

ceptance, however, of the natural law theory seems to be a necessary condition for the establishment of a set of rules regulating international conduct in times of peace and war, a *sine qua non* of the concept of modern international law. Without such an accepted basis, law between nations might otherwise be construed as depending solely upon custom. In such a case imperialism, military force, and economic expediency would be readily excused and justified. In substitution for peaceful customs built upon solid ethical imperatives, there would remain, based on the custom of ages, those unscrupulous manipulations of diplomacy which inevitably tend to the perpetuation of war.

I have had occasion, elsewhere, to express the same thought, with special reference to the historical background of political and religious changes which occurred prior to and occasioned the conception of modern international law in the mind of the publicist, Grotius.[2]

"Some so-called Christians may fail to see why positive law need be referred back to the Natural Law as the source of its binding power. We need but to call their attention to the recent World War, to show them the evil consequences that follow upon the widespread propagation of such fallacies. For when people are persuaded that positive law has no other foundation than the will of human legislators, they will readily reject the moral binding power of treaties and agreements, and scorn them as scraps of paper. To those who recognize the Natural Law to be the expression of God's will, it is clear that He must have intended every state to be bound by the same moral law in dealing with other states. For their relations with each other could not be firm and lasting unless each state were bound by the same principles of morality as the other. 'Moral' integrity and honor without the Natural Law are anachronisms. And when one reflects on the dependence of a nation's commerce

2 See GROTIUS, DE JURE BELLI AC PACIS (1625).

upon the commercial reliability of her neighbors, one is forced to conclude that, were it not for the sanction of the Natural Law, the whole economic structure would be nothing better than a house built on sand.

"In the treaty of Nimwegen and adopted at Westphalia, we find the new principle that 'the religion of the prince is henceforth to be the religion of the land.' This spirit, doubtless, was the fruit of the Reformation. Moreover, it is correct to say that the Reformation in addition to effecting the subversion of the old faith in many parts of Europe, destroyed the confidence of the nations in the Papacy. The scourge of materialism and the disregard of authority helped to obscure and diminish the prestige of the Papacy. Having ignored the Papacy, the governments lost for a time a powerful mediator who applied her standards of justice in case of dispute. No other tribunal could be found, whose principles were so lofty, and which was so disinterested as the Papacy. No single man, no government, no court, could be found which was prepared to state with authority what were the true basic obligations and rights that underlie the relations of man to man, and man to state. The Papacy, constant in its adherence to the principles of justice, right and duty as found in the Natural Law and interpreted by scholastic philosophy, alone proclaimed a system of morality which was absolute and unchanging and, therefore, available and reliable at all times.

"Whereas, before the Reformation, the outlook for unlimited progress toward more enduring peace and prosperity was very encouraging, by reason of the fact that the Church's moral teaching was accepted as standard, after the Reformation new sources of discord arose which obscured the foundations of international law, and opened the way for a flood of chaotic private opinions and self-destructive contradictions.

"Religious principles were called into question, and when left to individual interpretation, lost their influence in many sections of Europe. Religion ceased to be interwoven with the warp and woof of daily life, and was relegated to separate departments of interest along with thousands of others. And as people emancipated themselves from spiritual ties, material interests came more and more to crowd out their esteem for the higher values, and international morality lost its unity of interpretation. For each nation undertook to be a law unto itself, chose to have its own religion, and its own standard and norm of morality.

"In the sixteenth century, the era of the so-called 'birth' of international law, the nations of the world lost the compass that might have guided them to pacific shores where their difficulties might have been solved, not always by the sword, but by a supreme and permanent court of equity.

"Today there is no universal standard. Nations wisely show diffidence in submitting their sovereignty to a superstate, or to a court whose moral laws they do not understand. Such a course by some is held suicidal. The tendency of the age in its desperation is to multiply laws—to substitute *leges* for *jus*. The conception of philosophers, namely, that the recognition of the Natural Law has its source in God, has been lost sight of.

"Evidently the chief cause of the failure to observe peace in international affairs is the want of international observance of morality. Then who can say that the statesmen who are responsible for needless wars are not guilty before the High Court of God? Is it reasonable to suppose that the Almighty should demand an accounting of one individual's offence against his neighbor, and yet be indifferent to the violation of rights vested in a sovereign people? Yet such would be the only theory which could be advanced to justify the belief that there is no such thing as international morality, the most essential foundation of international re-

lations. There is no doubt that the moral law, and its clear dictates are binding on conscience, even without reference to the added sanctity of human contract. There is need of contracts or treaties, as well as customs, however, in order to bind the individual states, since international law, unlike the laws of a single state, has no single subject of authority or permanent supreme legislators and executors, nor any army or competent police power to enforce its prescriptions.

"At the same time, can we expect the statesmen and diplomats who represent the various nations to observe the principles of international morality, such as we have indicated, if the people whom they represent, and the money-powers who influence them, admit no such basis of international morality? For the final achievement of success which will involve the consent of all people, nothing is so necessary as an intelligent program of education regarding the ethical basis of international law. It is hard to overestimate the power of the written word, and of instruction in the classroom, press and forum. When these forces are enlisted in such a worthy cause as that of world peace the result will be greater enlightenment, and the final realization of those things which are most desirable to a peace-loving people. It is not within the scope of this discussion to hazard any visionary forecast of an approaching realization of this desideratum. Still this much may be said with respect to the future, that the war-drums will throb no longer, and the star of Peace will be in the ascendant permanently, only when the nations and people of the world have returned for guidance to religion—or at least to the reign of international law, as a categorical imperative clearly demanded by the philosophy of the Natural Law." [3]

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[3] ROEMER, THE ETHICAL BASIS OF INTERNATIONAL LAW (1929).