THE LEAGUE OF NATIONS

AND THE

NEW INTERNATIONAL LAW

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TO

MY MOTHER

AND

THE AMERICAN BOYS WHO

DIED IN FRANCE

"It is wicked not to try to live up to high ideals and to better the condition of the world." — THEODORE ROOSEVELT

December 11, 1918

INTRODUCTION

THAT for which Hugo Grotius plead is coming to pass: war is to be outlawed. Certain kinds of war are to be regarded, for the first time in history, as illegal; and, that which is of equal importance, the nebulous thing known as international law is, likewise, for the first time in history, to have a sanction so that the word "illegal" as applied to the action of States will have real significance.

This is the subject of Mr. Harley's treatise. Few things could be more timely and few statements could be more basic, more refreshingly new nor more happily made. Take this bit, summarizing the kinds of war which are now become illegal for the signatories to the Paris Covenant:

> "1. A war of conquest or external aggression is illegal;
>
> "2. A war resorted to by one member after the matter in dispute has been the subject of an arbitral award which is complied with by the other disputant is an illegal war;
>
> "3. A war is illegal if resorted to by a member in disregard of a unanimous recommendation by the Council (excluding disputants) which is complied with by the other disputing member;
>
> "4. All wars between members of the League are illegal if begun before a *delay period* of from three to nine months has elapsed."

Under the Paris Covenant a signatory beginning war illegally is deemed, *ipso facto*, to "have committed an act of war against all other members of the League," who must thereupon discontinue intercourse of every kind with the offender and may be called upon to make war upon it.

Isn't this worth while, even if the Covenant had done nothing more? But the Covenant does much more. Besides planning new instruments for settling disputes peacefully, such as the court of law, the Council and the Assembly; for controlling the armament madness — the sense of security which will follow the punishment of the wanton aggressor will make this possible — for united action to better the conditions of labor, the Covenant plans that great step toward more enduring peace, namely, the definition of that law under the reign of which the nations may live together and compose their interests just as the individual has long done under municipal law. Mr. Harley points out that these ends are to be achieved by a "new international person" to which the nations surrendered only those attributes of sovereignty needed to effect the purpose in view. In so doing they feel that they are making the residue and more vital part of their sovereignty — that which was retained by them — more secure from outside interference and attack. This is nothing other than the principle, long ago recognized, that true liberty is attainable only through a surrender of license — in this case the license to indulge in the pastime of war whenever it suited a people or their rulers to do so. Under the League, something of that license still persists, but much of it, as we have seen, is gone. Another sovereign right hitherto highly prized, the right to remain neutral, was likewise surrendered in the common interest. The aim of the surrender, as Mr. Harley sees it, is to clothe a "continuous international agency" with just so much power as will make reasonable of expectation "the maintenance of international peace and security, and the promotion of international coöperation, through the development of international law." This agency is not a State, for the territories of the nations

which have set it up are not its territories and their peoples are not its nationals. According to Mr. Harley's view, it does not exercise the powers which Confederations have usually exercised, and, at the same time, is more than an Alliance the action of which is not continuous but which, as a rule, comes into play only under specified conditions. At the same time, this "new international person," the League of Nations, is a subject of international law, its officials and representatives enjoy diplomatic privileges and immunities when engaged on the League's business, and in connection with its trusteeship of the Saar Basin it is vested with legal title to, and authority over, the actual territory administered.

It will be seen, from this brief introduction, what new problems Mr. Harley is here dealing with and what interest and importance attaches to them.

THEODORE MARBURG

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CHAPTER I

CONCEPTIONS OF INTERNATIONAL LAW

"By painful stage after stage," said President Wilson, "has that law [international law] been built up with meager enough results indeed after all was accomplished that could be accomplished, but always with a clear view at least of what the heart and conscience of mankind demanded." [1] Some of those stages, which are referred to by the President, include the academic struggle which has been more or less in evidence since the time of Grotius, as to what conception of international law was correct, if, indeed, there was any law at all, which has by some writers been seriously questioned. The conceptions which have received any considerable following will be considered briefly.

The Grotian School. — Properly enough the conception of international law held by Grotius has been made the basis for the discussions of later writers and statesmen. This great Dutch jurist, who is well called the father of international law, set forth his views in 1625 in a work that has become a classic. "Natural law," he believed, "is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions

[1] April 2, 1917.

a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that consequently such actions are either forbidden or enjoined by God the author of nature. Actions which are the subject of this exertion of reason are in themselves lawful or unlawful, and are, therefore, as such necessarily commanded or prohibited by God. . . ." [1]

"In the subject now in question [that is, natural and international law] this cause [of concurring sentiment of writers, historians and philosophers] must be either a just deduction from the principle of natural justice, or universal consent. The first discovers to us the natural law, the second the law of nations. . . . If a certain maxim, which cannot be fairly inferred from admitted principles, is, nevertheless, found to be everywhere observed, there is reason to conclude that it derives its origin from positive institution." [2]

Grotius saw clearly enough that the law of nature was of itself insufficient for governing the intercourse between nations, and he recognized that principles of international law arose by agreement of minds and by common consent found in custom and tacit compact (*moribus et pacto tacito introductum*).[3] This class of law he called *jus gentium voluntarium* or *jus constitutum*. Here is seen a distinction between natural law and the law of nations which is created by positive institution: a distinction which gave rise to the two schools of international law called the *naturalists* and the *positivists*. The difference between natural law and international law, as conceived by Grotius, was that the former is a body of necessarily existing, fundamental principles determined by God, the author of nature, without

[1] *De Jure Belli ac Pacis*, lib. I, cap. I, sect. X, 1, 2.
[2] *Ibid.*, Prolog. sect. XLI. [3] *Ibid.*, sect. XVII.

which nations as such cannot exist. The latter is a body of laws created by universal consent, positive institution, and agreement of the collective opinion of mankind.

The Hobbes' Conception. — The philosopher Hobbes identified natural law and international law. Writing in 1647, about two decades after Grotius' great work appeared, he stated that "natural law may be divided into the natural law of men and the natural law of States, commonly called the law of nations. The precepts of both are the same; but since States, when they are once instituted, assume the personal qualities of individual men, that law, which when speaking of individual men, we call the law of nature, is called the law of nations when applied to whole States, nations, or peoples." [1] While Hobbes here identifies *natural* and *international* law, he does differentiate the subjects to which each applies. In his conception there is no place for positive or instituted law which was conceived by his predecessor, Grotius.

Pufendorf's Conception. — The German writer, Pufendorf, who while ambassador to Switzerland, was imprisoned in violation of international law, wrote a volume on international law while he was in prison. Doubtless he was inspired to his task by the breach of the age-long principle of inviolability of an ambassador's person and premises and by the further fact that he had ample time, while in his lonely prison cell, to set down his thoughts. "Natural law," he wrote, "is that which is so exactly fitted to suit with the rational and social nature of man that he cannot maintain peaceful fellowship without it. Positive law, on the other hand, is sometimes called voluntary, because no positive law has such an agreeableness with human nature as to be necessary in general for the preservation of man-

[1] *De Cive*, cap. XIV, sect. 4 (1647).

kind, or as to be known or discovered without the help of express and peculiar promulgation." [1]

Elsewhere, he held that positive international law actually flows from natural law, besides which there is "no other sort of law of nations, voluntary or positive, at least which has the force of law properly so called, binding upon nations as emanating from a superior." [2] It is here seen that Pufendorf practically identifies natural law, and international law, which he believed had no force unless it were founded on natural law itself.

Phillimore's Conception. — The eminent English authority, Sir Robert Phillimore, has expressed in very clear terms the relation between natural and positive law:

"The necessity of mutual intercourse is laid down in the nature of States, as it is of individuals, by God, who willed the State and created the individual. The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and it is expressed in the consent, tacit or declared, of independent nations. The law which governs the external affairs, equally with that which governs the internal affairs, of States receives accessions from custom and usage, binding the subjects of them as to things which, previous to the introduction of such custom and usage, might have been in their nature indifferent. Custom and usage, moreover, outwardly express the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them. But it is to be remembered that, in this

[1] *Law of Nature and of Nations*, Book I, ch. IV, sect. 18.
[2] *Ibid.*, Book II, ch. III, sect. 23.

latter case, usage is the *effect* and not the *cause* of the law." [1]

The Austinian School. — The English jurist, Austin, and others who have looked to him as the expounder of their views, denied that international law was law at all, in the true sense. He thought that there was no international law in the same sense that there is a municipal law, because there was no common political superior to enforce the former. His view is the more interesting when the sanctions established by the Covenant are kept in mind. He wrote thus in 1832:

"Laws are commands proceeding from a determinate rational being, or a determinate body of rational beings to which is annexed an eventual evil as the sanction. Such is the law of nature, more properly called the law of God, or the divine law; and such are political human laws prescribed by political superiors to persons in a state of subjection to their authority. But laws imposed by general opinion are styled laws by an analogical extension of the term. Such are the laws which regulate the conduct of independent political societies in their mutual relations, and which are called the law of nations or international law. The law obtaining between nations is not positive law; for every positive law is prescribed by a given superior or sovereign to a person or persons in a state of subjection to its author. The rule regarding the conduct of sovereign States, considered as related to each other, is termed *law* by its analogy to positive law, being imposed upon nations and sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of

[1] *International Law*, I, Preface (1832); italics mine.

sovereigns, of provoking general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected." [1]

The Conception of International Law under the League of Nations. — From these conceptions of international law held from the time of Grotius down to the present time, what satisfying conclusions can be drawn? Can these older views be restated or harmonized in such a way that a student of international law may not be confused by a variety of conceptions of his science? And, finally, what conception best harmonizes with the underlying principles of the League?

It is evident at the outset that the view of Austin and those who hold that international law is not positive law must be discarded. One has only to cite that section of the Versailles Treaty which provides for the trial of certain Germans for the violation of the laws and customs of war to convince those who are inclined to doubt the existence of positive law for the nations.[2] Additional evidence is furnished by the sanction article of the Covenant which provides punishment for those members who disregard the principles agreed to in the document (Article XVI). The inadequacy of the Austin view is well pointed out by the English writer, T. J. Lawrence. He shows that Austin's conception of law utilizes " one element only [that is, force] in the ordinary conception of law, elaborating it to the exclusion of the rest." [3] Instead of making the definition of international law turn on force, Mr. Lawrence suggests that the universal desire for order should be the essential

[1] *Province of Jurisprudence*, pp. 147–148. (London, 1832.)

[2] See Article 4 of the new German constitution, footnote to Appendix VI. This article declares that the principles of international law are recognized as an integral part of the law of the German Commonwealth.

[3] International Law, p. 12 (Boston, 1900).

element in the definition. The underlying philosophy of the League of Nations is just that. The purpose of the League is to make international law the actual rule of conduct to the end that international order may be maintained. To accomplish this purpose it adopts certain sanctions which will be used as a last resort, but the desire for order as expressed by the public opinion of the world is the true and ultimate force which will sustain the League in its effort to maintain order through international law.

Public opinion is based on natural law which is that body of rules of justice and right which God the author of these rules unfolds to nations in their intercourse with one another. But these rules must be expressed. They cannot all be expressed at once; as nations progress, however, more and more of the natural laws are adapted as positive international laws. They are made known to all nations through the five methods of development of international law outlined elsewhere in this study.[1] Until so expressed and made known, they are only potential. They are, to adapt the phrase of Phillimore, binding upon States in matters which, "previous to the introduction of custom and usage, might have been in their nature indifferent. . . . Usage [and this last statement applies to the other methods of developing the law] is the *effect* and not the *cause* of the law." [2]

[1] Pp. 8–13.

[2] International Law, I, Preface (1832); italics mine.

CHAPTER II

METHODS BY WHICH INTERNATIONAL LAW IS DEVELOPED

THERE are five methods by which international law comes into being: first, by agreement of eminent authorities upon a principle; second, by custom; third, by treaties; fourth, by judicial decisions; and fifth, by international congresses.

Writers. — Concerning this method of developing the law, the observation of Triepel respecting the right of enemy merchantmen to oppose capture, is to the point: "Es ist hier wie so oft in unserer Diziplin gegangen: der Spätere schrieb von den Früheren ab, ohne sich viel Gedanken zu machen." [1]

While the influence of learned writers upon the development of international law has been considerable,[2] in the very nature of things their opinions can only aid in the slow process of developing the law. Particularly is this true regarding questions which are of a broad and complex nature or which involve national interest. In no better way can this point be illustrated than by a consideration of the opinions of authorities concerning the great law of angary which was applied by the Allied and Associated Powers, particularly the United States and Great Britain, when they took over 1,000,000 tons of Dutch shipping in

[1] H. Triepel, "Widerstand feindlicher Handelsschiffe gegen die Aufbringung," *Zeitschrift für Völkerrecht*, VIII, p. 392.

[2] Upon receiving some copies of Vattel's work on international law, Benjamin Franklin wrote in 1775 that it had come to him "in good season, when the circumstances of a rising State made it necessary frequently to consult the law of nations," and that the work "has been continually in hands of the members of our Congress now sitting." Wharton's *Diplomatic Correspondence of the American Revolution*, II, p. 64.

1918 during the World War. The range of opinions regarding this law extended from those denying entirely the right to apply the law, to those which held it might be applied even in case of a customary military necessity. Among sixty-eight authorities treating the subject, fifty were of the opinion that the law was applicable, while eighteen believed that it was not.[1] Other examples of questions as to which wide difference of opinion exists among authorities is the obligation to ratify treaties, and the immunity of private property from capture at sea.

Custom. — A rule of customary law may be described as a rule which is legally necessary and permissible and which develops from oft-repeated practices and procedure among the nations. The body of rules respecting ambassadors and ministers have largely developed by this method. The diplomatic privileges and immunities which these representatives enjoy are for the most part the outcome of a long historical and cumulative growth.

The international commission and administrative agencies develop customary international law. Speaking of the international commissions which served in connection with the making of the Versailles Treaty of 1919, Professor Charles H. Haskins of Harvard who served on the Saar Basin Commission said: "Considered at first as gatherers and sifters of evidence these commissions tended to acquire more responsibility and to make their reports in the form of draft articles for the treaty. . . . The historian of the future will be able to compare the printed minutes and reports, and see how far they were followed." [2]

While the temporary commissions thus actually wrote

[1] J. E. Harley, "The Law of Angary," *Am. Jour. Int. Law*, April, 1919, p. 275.

[2] From a lecture delivered in Boston under the auspices of the Lowell Institute, Jan. 6, 1920. Boston *Evening Transcript*, Jan. 7, 1920.

into the treaty principles, some of which will become international law by virtue of being agreed to by many nations, the more permanent commissions should, in the nature of the case, be more fruitful in developing principles of the law. After the Lower Danube Commission had been in operation for some time, the European Powers which took part in that commission declared that the arrangement relating to the administration of the river "henceforth forms a part of the public law of Europe and is placed under their guarantee."[1] It is from the numerous commissions set up by the League Covenant and the Versailles Treaty that international law will derive many of its principles.

Treaties. — The so-called conventional international law is developed by treaties. When treaties between a considerable number of nations, particularly the great Powers, substantially agree as regards a given subject, the principles so agreed on are soon regarded as international law. As in case of customary law, however, this method of developing the law is slow. Changing conditions develop needs which should be met before waiting for conventional law to be brought into being. Moreover, the conventional method is an inadequate way of attaining universal recognition of a rule. Carried to the extreme case, each Power would by this method have to make a treaty with every other Power, and if 48 Powers are considered, a total of 1128 treaties would have to be made.[2]

The network of conciliation treaties concluded by Mr. Bryan in 1913 and 1914 while he was Secretary of State went far on the road toward universality, but only

[1] Edward Krehbiel, "The European Commission of the Danube," *Polit. Sci. Quart.* March, 1918, p. 38.

[2] If n is the number of Powers, the number of possible treaties is expressed by the formula $\frac{n(n-1)}{2}$.