

The Ethical Basis of International Law

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Loyola University Press

TO
MY FATHER
JOSEPH A. ROEMER
THIS VOLUME
IS AFFECTIONATELY
DEDICATED

PREFACE

The signing of the Treaty and Concordat between the Italian Government and the Vatican on February 11, 1929, wrote the title page to a new chapter in the history of international relations. Without exaggerating the value of the reconciliation, one may easily foresee that the Treaty will be productive of numerous opportunities for the pacific settlement of international disputes. It cannot be denied that an auspicious day has dawned for the modern world, bringing with it undoubted prospects for that international amity, stability, and unity which has been beclouded for decades and whose absence was evidenced by the World War and subsequent fear of wars.

The significance of the Vatican-Italian Pact very likely will be entirely missed by the casual observer. Many will interpret it as an unwarranted blunder, an undesirable resurrection of Papal temporal power. They will allege that the new order will complicate international relations between those governments whose people or whose statesmen disagree with the principles and policies to which the Head of the Church is unalterably committed.

Doubtless it will be many years before various parties and groups will become reconciled to the present status of the Pope. It may be many years before the Papacy's strategic position as the chief moral power for the maintenance of peace will be universally acknowledged. I am not prepared to prophesy that he will ever be elected to exercise the functions of *permanent* arbiter in international quarrels that involve such varied cross-currents as were at work, for example, in the World War.

The air is charged in certain quarters with antagonism toward any assumption of civil power on the part of organized churchmen, Protestant and Catholic. This hos-

tility is not uncommonly voiced with considerable animus in the "market places." Clergymen are readily suspected of harboring hopes that some day political directorship, wherever expedient, may be taken over by the Church. Similarly, as the author of this book, in devoting a separate chapter to an analysis of the fitness of the Papacy as an agency for arbitration, I might seem to lay myself open to the charge of propagandism. Again, I may be stigmatized as a pessimist when I do not manifest the customary enthusiasm and applause which seems to be expected for every superficial scheme designed to outlaw war and bring about disarmament. I may be accused of overlooking the noble disinterestedness of the authors of such plans and failing to affirm unreservedly my sincere aversion for war. I prefer to assume that no one can deny that the need for international peace in the family of nations is the most crucial issue of our day. At the same time to be a reasonable optimist in the face of many failures written across the annals of history, both ancient and modern, one must make a close scrutiny of the inherent worth of the policies as well as the agencies that propose remedies for lawlessness on the part of sovereign states. I prefer to be frank, addressing myself to the open-minded student of history.

After writing this monograph, I requested the Hon. Judge Dudley G. Wooten, that outstanding scholar and student of Roman Law and the origins of Law, to pen an introduction to the work. I felt that with his many long years of experience in the practice of Law, during which time his best personal interest was always given to research, he could bring to bear upon the problems of international law all the force and erudition for which his brilliant mind was distinguished. He agreed to write the preface and intended especially to stress the importance of the observation that there are "three striking and significant facts noticeable in connection with the

early rise of law and government, wherever they took root: that rights and wrongs, legally speaking, were originally asserted or redressed by the personal action of those concerned; that there is an intimate relation and blending between law and religion among all peoples, whether civilized or uncivilized; that, finally, there is a fundamental sense of natural justice, of right and wrong as regards the relations of men recognizable through their conduct."

A fatal illness prevented the Judge from writing more than a hundred words of the preface. His kindly encouragement and advice, however, have more than anything else influenced me in submitting this volume to the public.

The works of text-writers and other valuable books to which reference has been made are given in the bibliography, and I acknowledge my indebtedness to these, particularly to that of Hannis Taylor. I wish to thank the Rev. Charles C. Miltner, C.S.C., Ph.D., head of the Department of Philosophy at the University of Notre Dame, and the Rev. John A. Ryan, D.D., professor of Moral Theology at the Catholic University of America, for reading and offering helpful criticism of the Chapter on "St. Thomas and the Ethical Basis of International Law," which chapter was originally a paper read before the American Catholic Philosophical Association, in 1927. I am also indebted to Professor R. R. McGregor, Ph.D., Teachers College, Hayes, Kansas, for his many literary suggestions, in the revision of the manuscript.

Chapters I and VIII have previously appeared as essays in "America." Chapter III, "The Influence of the Church and Papacy in International Affairs," was submitted at the annual convention of the American Catholic Peace Association as a report of the Historical Committee, of which I have the honor of being Chairman.

With the permission of the Committee on International Ethics of the Catholic Association for International Peace, and through the courtesy of the Paulist Press, the report of the above Committee has been added as a second Appendix.

WILLIAM F. ROEMER

July, 1929

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CHAPTER I.

INTRODUCTORY

SECURITY and world peace could well be likened to a subterranean river. Some nations have believed it to exist. Their belief has not been entirely due to credence in the geniculations of some magic hazel stick, as many sceptics suppose. They know it to exist on saner grounds. They have delved for it many years. Some of the drillings have found it, and have brought up "fellowship" and "co-operation." Others, however, have found only holes of unrequiting aridity. As a matter of fact, lasting peace has not been an arrived reality, as yet; and we are acquainted only with a seepage from an adventurous, but informing exploration in search of this tranquil stream.

Much diplomatic energy has been, and is being devoted, however, to practical schemes of peace and security. The professional diplomatist is fully aware that the genuine kind of peace, a *pax perpetua*, can be won only by much hard work, and that the work can be sustained only if the general condition of the world is free from fear of political disturbance. Many students of world affairs see in the present time one of the best opportunities yet vouchsafed to diplomacy to do the work. A confluence of events and tendencies seems to be pushing the world into it. The League of Nations for example, has inaugurated its Disarmament and Security Commissions; the British, and other Foreign Offices, in Europe, are engaged in compiling memoranda about arbitration, conciliation and instruments of security; in February, 1928, the historic Sixth Pan-American Congress adjourned at Havana after hopefully discussing peace in the Americas; M. Briand and Mr. Kellogg have

managed to link up the two continents in this general tendency by adopting a treaty renouncing offensive war; not long ago the chief naval powers of the world, United States, Japan and Great Britain, discussed a further step towards the ideal of naval disarmament. Nearly every government in the world finds it expedient, in the prevailing international atmosphere, to pay, at least, lip-service to peace as an ideal. The fact that lip-service is expedient is a very, very important phenomenon. Even renegade Russia displayed the olive branch, when her mouthpiece, M. Litvinov, launched a drastic proposal of immediate disarmament in 1928.

No "visible" progress has been made. Those who disbelieve in progress anywhere in human affairs, can find, however, as much satisfaction in the present accomplishments of diplomacy as in those of religion, or in any other field of human endeavor. Yet conditions for harvesting the fruits of peace were never more propitious. How is the harvest to be managed? Who are to be the harvesters? These matters have to be decided. It is just for this reason, that the conditions are so ripe for the accomplishment of something actually worth while, that the only practical and just basis of world security needs reiteration. Thus we are still face to face with the same old questions: Can the nations of the world *in practice* outlaw war? Is intervention justifiable? Can there be organized tribunals fitted to decide in all matters of international dispute? What is the value of international law? Whence does it derive its authority? What are its sanctions?

Especially since 1918, there has been a pronounced interest in such queries as these, and to encourage their study many peace organizations have succeeded in provoking thought among a few college students and professors. But there is no doubt that the atmosphere of such discussions would be appreciably clarified, if we could discard all the rubbish and twaddle that has been mar-

keted during the last fourteen years and foisted on a gullible public by professional peacemakers, noisy politicians and half-educated reformers. The world would be better off, and our real statesmen, who are unfortunately all too few, would be less heavily handicapped in their herculean task, if most of this literature and prejudiced propaganda (because of its failure to present all the important points of view) could be utterly obliterated.

Lately while the United States' policy of intervention in Nicaragua has been the recipient of considerable criticism, our attention has been called to the advantages which would accrue from a more specific codification of international law. It is quite evident that citizens in our country, for example, are protected in many of their rights by a constitution and by civil laws whose fortifying sanctions are obtained by a system of militia, police force and an army. Certainly, too, a great many people recognize the relationship which truly exists between moral conduct and the observance of civil law. Yet there are few who seem to perceive any fundamental connection between ethics and international law. To most men the term, "international morality," is a hazy and altogether abstract shibboleth. Nevertheless, a conviction remains deep-rooted in the minds of honest men that the hope of international peace depends upon the successful application of moral principles to international differences, just as surely as the peace of a city or of a state depends upon the respect, spontaneous or forced, that is paid to its laws.

It is this most basic and important problem which in the past has received insufficient consideration. The study of the correlation of a sound ethics with international law has heretofore met with only an inadequate interpretation, outside of a very few lightly appreciated manuals whose circulation is quite limited to moral theologians, and a few students of law and philosophy.

There has been no lack, indeed, of ambition and sentiment displayed in the numerous proposed solutions of the peace problem. The fallacy which underlies these proposals is that they begin at the wrong end; they place the cart before the horse. In their frantic striving after practical measures which shall present the appearances of a plausible cure-all for the ills of international society, the pacifists concoct a few simple prescriptions, and neglect the fundamental principles that should govern their art, congratulating themselves beforehand that their potions will have immediate and satisfactory results. Their poor patients! They are expected to swallow the draughts, regardless of their particular needs and constitutional ailments, aware only that the remedy is calculated to kill or cure. Meanwhile the public is supposed to be oblivious to the fact that the diagnosticians are quacks.

It was refreshing to hear the voice of the Honorable Charles Evans Hughes above the heckling of the Pan-American Conference of 1928, advocating a vigorous pronouncement of the fundamental rights and duties of nations in the codification of international law. "Our States," he said, "are not mere abstractions; our relations are not mere concepts of the intellect; they are practical. We cannot perform our duties to each other; we cannot adequately recognize the rights which each of us should cherish unless we have a realization of the principles which are to govern our actions. It is these principles which are commonly recognized by civilized states as governing their relations, which constitute international law. . . . Of course, in codifying international law we cannot attempt to change fundamental principles." Here is a vibrant appeal to the first principles of morality. Here is a recognition of the categorical imperatives which a man of reason cannot fail to acknowledge, the basic criteria of conduct with which he has been endowed by the Author of human nature. These obliga-

tions are intuitive, and comprise what is commonly known as the primary precepts of the natural law.

It is easy to comprehend that any abortive achievement of one country in furthering its own selfish interests, any *brutum fulmen* of a group of nations, however advantageous temporarily it may be, which in its obtaining has entailed a disregard for the fundamental rights of any other nation or group, will resolve itself into a Pyrrhic victory, a retrogression in civilization rather than a progression.

Mr. Hughes evidently saw the fruitlessness of building the Pan-American Union on the shifting supports of camouflaged expediency, when in his eloquent address of February 18th in the plenary session of the Conference at Havana, he insisted on the necessity of incorporating in the codification of international law only those principles which square with generally accepted standards of justice. "I will try to help you," he said, "in coming to a just conclusion, as to the law; but it must be the law of justice infused with the spirit which has given us, from the days of Grotius, this wonderful development of the law of nations by which we find ourselves bound."

What, indeed, is more apparent in every conference on international questions than the need for a universally acceptable standard of ethics? Is not public international law, as it exists today, only a composite body of treaties, laws and conventions? Long ago, as will be shown in a succeeding chapter, in 1628, at Westphalia, International Law may be said to have lost its soul, and ever since, men like Mr. Hughes have endeavored to infuse a new spirit into its lifeless body. The truth is that if we want order in the world of nations, we must recognize the underlying principles of world-order. The principle of the "balance of power" adopted in the seventeenth century, as the most feasible plan to prevent un-

necessary warfare, has failed time and again to accomplish its purpose, and the competition in armaments has waxed rather than waned.

For the last four hundred years the world has drifted from one war into another. And what is the condition in Europe at the present time particularly in Russia? In China? In Mexico? The treaty of Versailles, at the close of the World-War, marked but the over-throw of one militaristic government, that of William II of Germany. The newly-formed League of Nations was established, designed to prevent all future wars. But has it proved its ability to stabilize international relations, to reduce armaments? Has it systematized, as yet, any universally accepted code of International Law? Is the World-Court in good repute in the Americas? Has the Soviet Government of Russia the confidence of the United States and Great Britain? Is Germany satisfied with her burden of reparations? Is not China but the playground of revolutionaries and foreign rascallions? Apparently her extra-territoriality troubles are still a long way from a satisfactory settlement.¹

The Senate of the United States, in 1926, voted in favor of the entry, with reservations, of this nation into the World Court project. On the other hand such prominent men as Senator Borah and the small group of "Irreconcilables" succeeded in arousing considerable antagonism to the action of the majority of the Senate. As a result, in the primaries of 1926, public opinion in several states withdrew its support from those candidates who had voted for the court.²

¹ (Senator Lodge, "The Senate and the League of Nations," Scribners.)

² Moreover, the "reservations" which the Senate attached to the resolutions of entry of the United States into the court, as conditions of acceptance, have been rejected practically by England and France, and viewed with disfavor by other members of the League of Nations, to which the World Court is closely