

INTERNATIONAL LAW—ITS FOUNDATION & DEVELOPMENT

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MOST writers of International Law think it fit to put, in the introductory part of their work, the eternal question: "Has International Law a positive character? Is it a law in the real sense of the word?"

The question may seem an idle one; yet it is worthy of examination and discussion. The fact that a State has rights as against other States, has seldom, if ever, been utterly denied. Even savages recognize the obligations of good faith and the wickedness of breaking a covenant. On the other hand, the right of the stronger to impose what terms he pleases, and if necessary to push his demands to the point of the utter annihilation of his enemy as an independent power, has been almost as generally admitted. Besides, covenants have, both in ancient times and in our own days, been treated as mere "scraps of paper"; and these two open and reckless instances of how the rules of good neighbourhood between States are in fact discarded, would be enough to convince one that there is no such thing as a law of nations and that International Law is a fond dream of either interested speculators or benevolent Utopians.

And such a view would indeed be justified when based on certain pages of past and contemporary history. The very fact that so much stress is laid on certain elementary principles which ought to serve as laid on certain elementary principles which ought to serve as the basis of all relations between State and State is a proof that such principles have as yet not attained, on the minds of men, that hold which they ought to have attained. *La fréquence de la proclamation d'une doctrine ne prouve que fort peu en faveur de sa bonté; elle témoigne même contre elle, si la proclamation n'est pas suivie d'acceptation:* and the failure of the League of Nations is a witness to the truth of this assertion of J.Lorimer. laws are promulgated and enforced within the boundaries of a State, because all the forces of the State are united against all actual and possible offenders; but nothing short of a world conflagration can prevent a powerful State from discarding those rules which nations have unanimously accepted as Law.

And yet, the very outbreak of a state of hostilities between nations, far from being a denial of those universal rules of conduct which are supposed to regulate the relation of States, is a confirmation of such rules—if not of their efficacy, at least of their existence and acceptability. For it is the fable of the wolf and the lamb, that, *mutuis mutandis*, repeats itself over and over again: Strong people are never content to destroy their enemies without first proving them to be wholly in the wrong and utterly unworthy to live. An aggressor has never spoken of himself as an aggressor, but as a defender of the rights and liberties of his nation, a champion of truth, honour and justice: and thus, throughout the centuries—and our own century forms no exception—Have the grossest and meanest injustices been committed in the name of Justice.

The development of International Law is to be traced back to the most primitive stages of human society; and just as medical science, which aims at ensuring physical health, is an outcome of the fact that the life of man is beset on all sides by an infinity of diseases, so the rules of International Law, that have as object the peaceful setting of differences between nations, sprung from the innate pugnaciousness of man. It was, as a matter of fact, war, that gave rise to such feelings of chivalry and respect for an antagonist which are a ray of light

amidst a world of cruelty and barbarity. These is a well known story, for example, of the Arkansas of North America who gave a share of their powder to the Chickasaw to fight them with; and the Algonquin are reported to have refrained from pressing an attack on the Iroquois on its being pointed out that might had fallen. Apart from this, the welfare of savage and primitive societies is not without its rules and limitations. Often an open and honourable declaration of War is insisted on; the persons of envoys areas a rule respected; agreements are maintained, bad faith is condemned, and often, permanent injury to enemy property is forbidden. Among the problems, however, that outbreak of hostilities invariably brought with it, there was that of finding a way of dealing with captive enemies, and often enough with their families. Hence the different methods of killing or enslaving the captive warriors or their families. In ancient Egypt, the bulk of the males for sacrifice or for special vengeance. This is how an inscription of the XIX dynasty speaks of the King of the day : "He is a lion who strikes with the claw... he has a heart closed to pity; when he sees the multitude he lets nothing remain behind him." And further on, a general, narrating a single combat with a foe, says: "...and my arrow struck in his neck . he cried out and fell upon his nose I brought down upon him his own battle axe. Then I took his goods, I seized his cattle; I spoiled his dwelling; I grew great thereby" And yet, amidst all this ferocity, we find Rameses II making a treaty with Cheta, providing for the return of deserters from either country to their original home, and promising that neither the deserter himself nor his wives or children shall be destroyed, nor his mother be slain. But this is an exception ; and a very strange exception in an age when the Assyrians were committing unheard of atrocities on the conquered foes. "To the city of Kinabu," says Assurnatsir-pal 9883-858 B.C.), "I approached, I captured it. Three thousand of their captives I burned with fire. "I captured many of the soldiers alive with hand. I cut off the hands and feet of some, I cut off the noses, the ears and the fingers of others; the eyes of the numerous soldiers I put out...Their young men and their maidens I burned as a holocaust." (Sayce, Records of the Past.ii)

Even among the Hebrews, the chosen people of the Lord, is similar ferocity to be found. When Joab took Rabbah (I. Chron.XX,3), "he brought forth the people that were therein, and put them under saws, and under harrows of iron, and under axes of iron, and made them pass through the brick-kiln, and thus did he unto all the cities of the children of Ammon. " But the Book of Deuteronomy lays down that a female captive must have her time for mourning, and, if married by her captor, not be sold nor dealt with as a slave. Besides, the Hebrews generally showed themselves to be great respecters of a promise given on oath, to strangers. Joshua, for example, kept his word with the harlot who had introduced his men into Jericho, and spared both her and the general massacre. And we must not forget that there are sound theological arguments in explanation of the seeming inhumanity with which the chosen seed treated from time to time the enemies of Israel. Such arguments, however, would be out of place in an essay on International Law. In India and China, chivalry in battle is recognized, honourable methods of warfare are praised, and atrocity is condemned. "We have not laid fire to burn our enemies," says Bhima, in the Mahabharata [V. Duncker, History of Antiquity, Vol. IV, P. 93; "nor cheated them in the game, nor outraged their wives; by the strength of our arms alone we destroy our enemies." And Manu has a complete, though brief, legal code of warfare: "Let not [the soldier] strike with weapons concealed, nor barbed, nor poisoned... Let him not strike an eunuch, nor one who joins the palms of his hands [in supplication] , nor one who flees, nor one who says 'I am thine' Nor one who sleeps, nor one who has lost his coat of mail, Nor one

who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed...nor one whose weapons are broken, nor one who has been grievously wounded.” (Manu, vii, Sec. 90). Passing further East, we find similar ideas among the Chinese; and chivalry in war. but strenuously oppose war and militarism. Mencius teaches that a victorious king should not annex the conquered territory except by the will of the conquered people. When King Senen had conquered Yen, he asked Mencius if he should take possession of it. Mencius replied that, if the people of Yen would be pleased with his doing so let him do it; otherwise not. (Mencius, Book I, pt.ii,Ch.10). “If it were merely taking the place from the one State to give to the other, a benevolent man would not do it; how much less will he do so when the end is to be sought by the slaughter of men?” And this voice calling to us across the darkness of past ages is enough to put to shame our enlightened and highly humanitarian generation!

But the first people to develop something like a regular international law were perhaps the Greeks; it was they who first worked out a regular system of arbitration. Periander of Corinth arbitrated between Athens and Mytilene as to the possession of Sigeum. In the sixth century Sparta arbitrated between Athens and Megara, and appeals to Delphi were not uncommon. (Thucydides, I, 28). Sometimes States were pledged by oath or by the deposit of a sum of money to abide by arbitration. Of course, the history of Greed warfare is not devoid of its aspects of cruelty and atrocity. The merest acquaintance with Homer’s Iliad would be enough to prove this. But the stripping of the slain, the erection of trophies in temples, the ravaging of the land and the burning of houses are all condemned by Plato. Aristotle points out that the enslavement of captured enemies is unjust, at least in theory, for “no one would say that he is slave who does not deserve to be a slave, for if so, those who are held noblest might be slaves and sons of slaves if they happened to be captured and sold.” (Arist. Politics, I,vi).

At Rome a defeated enemy was in principle rightless. The very type and exemplar of property is that which is captured from an enemy. Stranger and enemy are identical terms—*hostes*; and no stranger is acknowledged to have any rights unless he is under the protection of Rome either as a member of an allied State, or as a protégé of a Roman citizen. Yet, there is no reason to doubt that the general feeling of the Roman world condemned excess of barbarity. Camillus says that his soldiers direct their arms not against that age which is spared even in the capture of a town, but against armed men, (Livius, V. 27). The slaughter of non-combatants, old men, women and children is frequently spoken of in terms of condemnation, even of horror and Livy’s words “*jure belli in armatos remanentesque caedes.*” imply the full limitation of the right of killing to active combatants. The generals Marcellus and Scipio condemned the violation of women and took measures to prevent it; (Grotius, Book iii,Ch.iv) and on the whole we may consider Virgil to be quite justified in his boast about the method of Roman warfare : *Parcere subjectis et debellare superbos.*

In the teaching of the Koran, Moslems can never be turned into slaves by Muslem captors. But the attitude towards non-Moslems was very different : “ and when we meet those who misbelieve, then strike off heads until we have massacred them, and bind fast the bonds.” Within the Moslem world the Koran looks forward to universal peace and forbids the enslavement, but even the refusal of quarter.

And now we came to the character and effects of Christian doctrine and its influence on the nations as a universal creed.

The Gospels pronounce definitely against violence in any shape or form and though the soldier's profession is not condemned the Church endeavours to lay down the conditions upon which war is justified. "To wage war," says Saint Augustine, "is not a crime but to wage war for the sake of booty." (Sermo xix). War is therefore just if it is waged in resistance to an aggressor. Ambrose declares that he who does not defend a friend is as bad as the aggressor; while on the other hand Augustine strongly condemns malice, cruelty and vengeance, the implacable spirit, savagery in insurrection (*feritas rebellandi*) and the lust of dominion; (Contra Manichaeos, Corpus Juris, 892); and it was also Augustine who laid down the principle: *Hostem pugnantem necessitas deprimat, non voluntas.* (Epist. 207). Franciscus a Victoria goes a bit further and asserts *quod etiam in bello contra Turcos non licet interficere infans. Imo nec feminas inter infidels.* Nay, the very idea of medieval chivalry—the cult of the *parfait gentil* knight, sworn to succour the oppressed, to defend women and children, is true product of the influence of the Church side by side with the barbarities of the period. In time of peace and in time of war the mediaeval world found guidance and power in the spiritual supremacy of the Pope, which accustomed men to the reconciliation of national independence with a spiritual authority to whom all alike could appeal. As a matter of fact, the modern idea of the codification of rules that would govern the relations between communities emerged when the so called Reformation broke up this unity. Men had lost a father and they wanted to bind themselves reciprocally and guarantee brotherly behaviour among themselves. Grotius himself though affirming that the duties of men are not circumscribed by on certain universal attributes of humanity, is in reality building his theoretical edifice on that very Gospel which he is discarding, for what philosophy, more than that of the Gospel, teaches men how to enjoy the blessings of earth without incurring into mutual bloodshed? The beneficial influence of the supremacy of the Head of the Church is admitted also by non-Catholic writers, such as Hobhouse, and Vincenzo Gioberti, in his *Del Primato Morale e Civile Degli Italiani*, says: "

"Il potere unificativo e pacificativo d'Europa appartiene tant piu ragionevolmente al Pontefice, che non si puo con minor pericoko di abuso, con piu speranza di profitto e con maggiore agevolezza di esecuzione, collocare altrove... Se la monarchia universale, un sogno, come l'alleanza democratica dei popoli, immaginata da certi filosofi, si puo bene sperare, senza assurdo una confederazione morale e civile di tutte le nazioni, a mano a mano che esse enteranno nel giro della fratellanza e della paternita spirituale, stabilita dal Crisitanesimo. L'unica paternita di tal genere e il Papa, il quale e quindi l'unico principio acconcio ad attuare la fraternita dei popoli."

But also Gioberti himself was a dreamer, and the study of International Law can never bear any fruit if it discards the actual state of things and limits itself to making suggestions as to what ought and what ought not to be done. The physician who instead of curing his patient's disease, bores him with lectures on the perfection which nature lacks, ruins his time and also the time (if not the life) of his patient.

More practical than Grotius and Gioberti are Mazzini and Comte, who come to the conclusion that each nation is a member of the family of nations which constitutes humanity, possesses duties as well as rights in virtue of its position, and derives a higher honour and more lasting glory from its services to the greater whole of which it is a part than from any exhibition of superior strength shown in rivalry with its fellow members. Just as International

Law rests in its beginnings on the conception of humanity as incarnate in the person of every human being, so in the consummated conception of right and brotherhood between nations, it touches the other pole modern ethics—the conception of humanity as a whole, the sum of all human beings. The Englishman owes a duty to England. He does not owe the same duties to Spain or France, but he owes them recognition as members of the family of nations, and there are times when he can best serve England by reminding her of what is due to them. The true patriotism—patriotism not circumscribed by the narrow limits of the border lines—is the corner stone of true internationalism.

And yet, we are bound to admit, such a corner stone does not in fact exist. The ideals of thinkers and statesmen do not coincide at all with the practice of nations. Optimistic statesmen, about twenty years ago, would have thought that the civilized world had passed through the age of blood feud in which any quarrel gave rise to a war of extermination. There was even a time when it was thought that custom had restricted the sphere of fighting, excluded non-combatants from the ring, and prohibited the general massacre of the king folk. But the tragedy is being acted beneath our very eyes which shows us clearly that twentieth century man is a primitive as his forefathers of the remotest antiquity, and the outcast Cain is still thirsty for the blood of his brother Abel. When the League of Nations was founded, it was believed to be an improvement on the Hague Tribunal, for this Tribunal had no power except the moral power of an appeal to opinion. “The next stage is to institute a Court for the settlement of disputes,” wrote Hobhouse in 1906 (*Morals in Evolution*), “it is not difficult to imagine a time when the decisions of that Tribunal shall have gained such authority that to dispute them will be held at once an outrage on justice and a menace to the world’s peace—such a menace as would provoke a combination of powers to coerce the recalcitrant party. But Hobhouse was only reasoning in a vicious circle, for recalcitrant parties will never be lacking so long as man is man. What the Gospel has not succeeded in doing alter twenty centuries is hardly to be achieved by any human institution.

When in 1871, representatives of Russia, Austria, France, Germany, England, Italy and Turkey met in London to establish the international principle that no state can be exonerated from the observance of treaties or permitted to modify its own stipulations without the consent of the contracting parties, it was thought strange that nations still existed that thought themselves and others capable of violating this elementary moral principle—the sacred character building sand castles within the reach of the irresistible violence of the Ocean. For how can nations have a common juridical conscience, says Tullio Giordana (*La proprietà privata nelle guerre maritime*) if men do not agree even on general ideas?

But in spite of all this, there *is* a positive law of nations. The fact that murders, thefts, frauds are being committed every day is no argument against the existence of Criminal Law. Similarly, the instability of the character of man is no proof of the inexistence of a Law of Nations. On the contrary, it is exactly this instability that is the juridical foundation, the very *raison d’être* of International Law, as it is the innate tendency of the individual towards crime that forms the justification of Criminal Law.

For the student of International Law, therefore,, this term stands only for positive International Law, that is the sum of rules that actually govern the rights and duties of States in

their reciprocal relations. (Tullio Giordana). All the rest is nothing but philosophical speculation, philanthropic effort, rhetorical pomp. It is not doctrines and books that determine progress; but the collective force of the masses; and if from time to time a thinker appears who exercises a real influence on the progress of his times, like Voltaire or Beccaria, it is because such a thinker has found expression to a reform that had already silently taken place in the intimate consciousness of the masses. He has found the happy means of revealing collective consciousness to itself. This is why, in spite of the restlessness of human aspirations; such numerous associations have sprung up in recent years, associations of commerce and industry, of scientific research; of art, religion, music, letters. For there are common interests that make man call to man across the boundaries of States. We have witnessed the institution of the International Postal Union, the Universal Telegraph Union, and the Universal Wireless Telegraph Union; and we have positive international agreements for passenger and freight transportation by sea and land, international maritime codes and shipping regulations, international rules of patent and copyright, international rules of war itself.

It has been well said (*Hon. D. Jaques Hill: World Organisation and the Modern State*) that ever since the beginning of the modern era two opposing views of the State have been struggling for predominance. These are:

I. The *Macchiavellian* view that States are wholly unlimited powers owing no responsibility to one another by no rights and obligations save those they choose to establish, and by these only so long as they do not choose to repudiate them; and

II. The *Grotian* or *Althusian* view that States exist for the establishment and maintenance of rights, that therefore their powers are limited and that they have duties towards one another, being themselves members of a society of States. At various times and in different States one or other view has prevailed; but the growth of inter-community is turning the scale generally in the most civilized States in favour of the Grotian view, which, after all, is nothing but an exposition of the Gospel doctrine. For the State is a juristic person, and a juristic person cannot claim arbitrary rights in respect of another juristic person without denying the very nature of both. Just as the life of man in a "state of nature" is, in Hobbies' famous phrase, "solitary, poor, nasty, brutish and short," so the life of a State that chooses to remain irresponsible, unsocialised, a political Leviathan beyond the greater law, must also be poorer, more unhappy, more brutish. Poorer, because of the economic insufficiency of each State, more unhappy, because of the all-round insecurity of men's lives and wealth; more brutish, because public polity reflects and reacts upon every standard of life. One civilized people cannot hurt the interests of another without hurting its own as well. Consider the significance of such a statement as the following made by P.A. Molteno in *contemporary review*, February, 1914: The trade of Germany with the British empire "has more than doubled since 1902, and has now reached the enormous total, in 1911, of 185 millions sterling. In fact... one tenth of our population are absolutely dependent upon German trade." What has been said of England with regard to Germany, can be said of any state with regard to any other state; and, in the words of R.M. Maciver (*Community*, Book III, Chapter IV) "one civilized community, in destroying the commerce and capital of another, is destroying or injuring the investments of its own members."