INTERNATIONAL LAW REPARATIONS

International law suffered much damage and discredit from the World War. The laws of war and of neutrality were violated by various nations. Worse still, a legitimate pessimism was created concerning the value of the law of peace in the minds of many who had previously given the subject but slight consideration.

Since the war, international law has been subjected to a terrific test by reason of the unprecedented situation arising from the treaties of peace and from the general economic and social demoralization. The treaties to end the war gave few signs of respect for the law of nations. The confiscation of private property in time of war was legalized. The principle of the international criminal responsibility of heads of states was enunciated in the case of the German Emperor but was neither defined nor applied. Disregard for elementary principles of justice was accompanied by a rather casual attitude that injustices might later be rectified through the League of Nations. I recall the remark of one of the most astute of the legal advisers to one of the Peace Delegations to the effect: "The Conference would do well to avoid as far as possible anything to do with international law."

The consolidation of the power of the Russian Soviet Socialist Union, with its avowed hostility to the existing international order, its national planning and state business operations, has given rise to a series of juristic problems which *de jure* recognition by other states has not solved. The conflict of theories of the nationality of married women, the enforcement of municipal laws outside the three-mile maritime limit, and the assertion of the claims of individuals under international law are among the problems which have created fresh legal difficulties.

There is every evidence of a marked revival of interest in the subject of international law which indicates that it is much more alive and effective than the sceptics have insinuated. Many amateurs have entered this field of study with enthusiasm and have produced numerous studies and books of dubious value. Scholars have been encouraged by the universities and colleges to advance the knowledge of the subject. Jurists have revealed a tendency in recent court decisions to regard the law of nations as something more vital than a mere "code of morality" or an exiguous system of frozen legal precepts.

But what of those publicists and jurisconsults who have firmly established their reputation as authorities in international law? Have they been equal to the demands for creative juristic thinking in this chaotic period of readjustment to changing conditions in the society of nations? It is not easy to classify or to estimate justly their respective contributions. Nor does one care to comment adversely concerning his contemporaries, particularly concerning his personal friends. But candor compels the recognition of what would seem unfortunately to be the case, namely, that few of these authorities have possessed the erudition and originality of mind requisite to carry on the

work of Grotius in meeting the needs of a rapidly evolving international society. In their respect for their predecessors and for precedents they too often have been content merely to restate international law. They have rendered great service in the classification of the subject and in devising methods for its exposition, notably through the use of the "case method." For the most part, they have been positivists and have minimized or completely abjured the law of nature as the present basis of the science. Oppenheim would seem to represent a consensus of opinion when he says: "The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times." [1]

At the present moment we may discern without much difficulty certain fairly distinct schools of thought among the international law publicists. First of all, there inevitably are those who in their craving for authority and security fall back on the law of nature. This tendency is most apparent in German circles where the disappearance of arbitrary authority was succeeded by a trying period of political disorder and insecurity. This school, however, would not seem to be numerous or of much influence.

The positivists are clearly in the ascendancy but are divided into two camps. There are those of the historical school who hold strongly to the accepted body of principles and prefer to keep on the beaten track without much concern for grades, curves, or alternative routes. They respect precedents and believe in the gradual evolution of law by natural processes.

The other camp of positivists contains those who think largely in terms of conventional, treaty-made law, rather than of a coherent system of jurisprudence possessing its own inner tendencies for adaptation and evolution. An instance of this attitude is to be found in the interesting article entitled "The Law of Nations, Static or Dynamic" by Dr. Josef Kunz, published in this JOURNAL.[2] Under this conception the dynamic element is to be provided by external action.

A new school of thought is now emerging which holds that the World War marked not simply a severe dislocation of international relations, but a violent rupture with the past. They appear to believe in a "new world order" where many of us can only see derangement and disorder.

The economic breakdown, the social revolution, the weakening of political authority, in fact, the weakening of *all* authority, and the substitution of new sets of values have led many to look for the reconstruction of international law through legislation rather than through the expansion and evolution of juristic principles. They look to the League of Nations to remedy the defects of the law of nations by summary decisions or diplomatic agreements fostered by the League. The adherents of this school hold that the law of neutrality is "obsolete"; that no rights may be acquired by force; that an iniquitous *status quo* is preferable to further alterations by violence, etc.; and that we must now proceed *per saltum* over a dizzy and dangerously wide chasm. As

[1] Int. Law, Vol. I, p. 102. [2] Vol. 27 (1933), p. 630.

I listened to the stimulating discussion on neutrality during the annual meeting of the American Society of International Law in Washington in 1933, I was reminded of the remark of the Irishman to the man rushing to catch the ferryboat just leaving the slip, "you can do it in two jumps." It is difficult

to believe that progress in international law is to be made by any such assumptions. The partisans of this school, which includes several men of scholarly talent, by reason of their fervid convictions would seem to deserve the classification suggested by Professor Borchard in his stimulating editorial comment in this JOURNAL on "Realism *v.* Evangelism." [3] In their sensitive appreciation of changes in international conditions and of the necessity for the evolution of international law, they seem to be thinking more in terms of making new law than of strengthening and adapting the old. Their crusading zeal is admirable, but it may be permitted to observe that it also has something of the confident attitude: "*nous allons changer toute cela.*"

The necessity for constructive juristic thinking, which is always required in the administration of justice, is more apparent than ever in the present chaotic epoch. It has been clearly realized by many publicists and others who are partisans of both the school of the positivists and the "evangelists." A compromise solution has been sought in a concerted effort to restate international law and supply its *lacunae* by means of a series of resolutions and draft conventions prepared by such competent bodies as the *Institut de Droit International,* the American Institute of International Law, the International Law Association, the Harvard Research in International Law and the Commission of Jurists appointed by the League of Nations. These projects represent an honest and conscientious attempt to face realities and facilitate the evolution of the law of nations to meet modern needs. But there would seem to be two defects in this process of accelerating the law, one that these proposals bear evidence in part of being dictated by diplomatic considerations in order to ensure acceptance by certain nations; and the other that they savor too much of statute-making: the hand of the lawyer is evident. It is to be feared that a law evolved from ideas of political opportunism can hardly stand the juristic test in litigations. And it would seem nothing short of a calamity if a similar fate should befall international law as has befallen municipal law, where the living law has been cramped and suffocated by technicalities and by subtleties of legalistic interpretation. "In the rough jurisprudence of the law of nations there is no room for the refinements of the law courts." If the desire to "codify" international law should result in the formalizing, the crystallization, the stereotyping, and the devitalizing of that vital and noble science, it would be a tragic achievement.

There is an imperative duty imposed on all who are concerned with the problems of international law and justice, as we have been eloquently reminded by that great jurisconsult John Bassett Moore, in his challenging article "The New Isolation" in this JOURNAL,[4] to face more objectively and cour-

[3] Vol. 28 (1934), p. 108. [4] Vol. 27 (1933), p. 607.

ageously all the facts. We must not only face the realities of modern conditions in the family of nations, but we must re-examine the nature and the history of the science of international law in order that it may be made adequate to those conditions. We may seriously question with Roscoe Pound whether international law has been properly fostered and advanced during the nineteenth century and after. His observations on this subject, presented in his address on "Philosophical Theory and International Law" at the University of Leyden in 1923 deserve to be quoted at length.

> Looking back, then, it is not hard to see why the nineteenth-century achieved relatively so little in international law. The jurists of the last century had no confidence in themselves *qua* jurists. They did not seek to be active agents in legal development. They expected legal development to operate itself from some internal momentum; to guide itself from some internal power. The jurist was to follow, arranging and ordering and systematizing, or observing and verifying and thus discovering the foreordained lines of growth. Creative work in law, as in any other field, requires a plan, a design, a picture of what the worker seeks to make. The nineteenth-century jurists gave us no new picture and the old picture no longer sufficed. The old picture was filled in with some new details, partly by idealization of the local law for the time being with which the particular writer was familiar, partly by systematization of the consensus of juristic opinion in the classical period. For the rest each people was left to set up a practical design for any case in hand in terms of rationalized self-interest.
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> International law was born of juristic speculation and became a reality because that speculation gave men something by which to make and shape international legal institutions and a belief that they could make and shape them effectively. Juristic pessimism has given us instead an international régime of conferences, proceeding by a method of bargain, establishing nothing certainly and giving results which are confessedly as temporary as they are usually arbitrary.
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> Recently there has been a conspicuous revival of philosophy of law throughout the world. The nineteenth-century historical school has lost its uncontested leadership of the science of law and has begun visibly to break up. A new social philosophical and a new sociological jurisprudence have been making great strides. Moreover this development of new methods in legal science and breaking up of the old historical school goes along with a general abandonment of the nineteenth-century historico-metaphysical thinking in every field and revival of faith in the efficacy of effort. It goes along with the rise of philosophies of action which afford no support for the political fatalism and juristic pessimism of the immediate past. These phenomena were to be observed at the opening of the present century and have been given an impetus by the experience of the war. For the war showed visibly the rôle which human initiative may play in the building of institutions and the shaping of events. It palpably overturned the psychological presuppositions of nineteenth-century thought. The conception of a slow and internally ordered succession of events and of institutions, whereby things perfect themselves by evolving to the limit of their idea, has ceased to reign.

> Among the new philosophies of action or those which succeed to them the jurist of the immediate future, thinking of a great task of social engineering, as it were, whereby the conflicting or overlapping interests and claims and demands of the peoples of this crowded world may be secured or satisfied so far as may be with a minimum of friction and a minimum of waste, must find the basis of a new philosophical theory of international law. We shall not ask him for a juristic romance built upon the cosmological romance of some closed metaphysical system. But we may demand of him a legal philosophy that shall take account of the new social psychology, the economics, the sociology as well as the law and politics of today, that shall enable international law to take in what it requires from without, that shall give us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition. Thus it will yield a creative juristic theory and may well enable jurists of the next generation to do as much for the ordering of international relations as Grotius and his successors did in their day by a creative theory founded on the philosophy of that time. The conditions to which international law must be applied today are no more discouraging than those that immediately followed the Thirty-Years War. And we have the immeasurable advantage that we may build upon the permanent achievements of classical international law. Our chief need is a man with that combination of mastery of the existing legal materials, philosophical vision and juristic faith which enabled the founder of international law to set it up almost at one stroke.

We have here a great challenge to a more intelligent and a loftier vision of the enterprise of advancing the science of international law, of facilitating justice and thus increasing the guarantees of peace among nations. The law of nations has suffered serious damage from friend and foe. It is entitled to large and far-reaching reparations.

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NEUTRALITY AND INTERNATIONAL ORGANIZATION

The recent discussion in somewhat controversial form of the place of neutrality in a system of international law goes to the very basis upon which the law itself rests. Is neutrality still a recognized legal position? What would be the effect upon neutrality of the application of sanctions, such as boycott and non-recognition? Is it feasible to define the term "aggressor" so as to make it possible in the interests of justice for third parties to take sides promptly against a state coming within the definition? And would taking sides in a controversy be promotive of war rather than a restraint upon it? These are but a few of the many aspects of a question which is presented in acute form not only by the absence of the United States from membership in the League of Nations, but by the reluctance of the leading members of the League to put into practice the provisions of the Covenant under the existing state of affairs.

Underlying the problem of neutrality is, of course, the larger issue of the