

RECENT TRENDS OF INTERNATIONAL LAW

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Before getting into the subject of recent trends, I want to say a few words about some of the basic philosophical problems of international law which I'm sure you have discussed. I wish to make sure that you and I are on the same wavelength. I don't ask you to accept my thoughts about this, but I do think you ought to know my ideas on this general subject so that you can understand better what I'm saying and what I'm trying to do.

In the first place, as a professor of international law, I was never concerned, and I am not really concerned today, as to whether international law does, or does not, exist as "law." I've never seen much point in debating that subject. If I were to debate it, I would be happy to take either side of the question. I think it very easy to define law in such a way as to *exclude* international law entirely. I think it is very easy to define law in such a way as to *include* it. And I think that's not a subject we need to debate about because if I read naval regulations correctly, CNO has decided that question for us, since he has told you that in certain circumstances you should abide by international law; therefore, I assume that he believes that it exists, and that we should assume here that it exists.

What is clear, I think, is that statesmen, very less frequently impartial judges, sometimes national judges, and

others—including naval officers—invoke, in justification of something that they are doing, or in protest against something somebody else is doing, rules of international law. The claim or assertion that they make may be generally accepted by others, or it may be vigorously disputed by others. The dispute may be as to the application of a familiar rule to a particular fact, or as to the relevancy of another conflicting rule. (Even in our own domestic law system, as Justice Cardoza once noted, rules of law generally travel in pairs and opposites.) Or the dispute may be even as to the rule itself, the way it is phrased, or what it is designed to do.

If such a dispute exists I think we can assume that very rarely will it be decided as it would be decided within a domestic legal system by reference to an impartial body of judges. More likely it's going to be decided in a particular case by whoever has the power to make the decision stick—whoever can make good that claim, or make good that protest. To the extent that the rule and its application is not generally accepted by others, there's going to be some political cost involved in making the claim, and there may be the additional cost to the state making it, arising from the fact that it can scarcely protest in the future if others do the same thing.

Now nobody would contend that that is a very satisfactory legal system,

or even that it works very well, But I think it would be hard to deny that there are a number of rules of international law which are normally and customarily adhered to by states in spite of variations and differences in formulation and application, and that these rules do, in fact, influence decisions, actions taken, and policies promulgated by various states and other participants in international political arenas. In this limited sense, at least, the existence of these rules, and their acceptance, does contribute significantly to order and to the structure of expectations within the international community. The rules which are most effective and most strictly adhered to are, of course, those in which mutual advantage is perceived in the existence of the rule and in the order which that rule gives. A good deal of the law of the sea, for example, survived for precisely this reason, and has survived for a long time. And those parts which are most in doubt—the three or six or two hundred-mile limits—are those in which at least some states have not perceived a mutual advantage in the rule from their viewpoint.

Now the second point I would make by way of introduction is also quite an obvious one, and that is that any rule, no matter how accepted, may be breached by any state at any time. If a state believes that the immediate advantage to it of ignoring a generally accepted rule is greater than its interest in the rule itself—and it can get away with it—the rule breaks down. Usually these are situations of crisis and I think it's useful to remember that even in a developed domestic legal system, rules frequently break down in times of great stress and crisis. To say that this is a question of weak enforcement of international law is, I think, to beg the entire problem.

The third introductory point that I want to make is that any legal system is necessarily a part of a political system. It is unmitigated nonsense to talk, for

example, about "world law" unless you're willing to talk about world government at the same time, because you're not going to have a developed legal system in the international community, as you would not in a domestic community, unless you have a developed governmental system and political system at the same time. The legal system of any community is just as developed, no more and no less, as the political system.

The final introductory point that I want to make is the very obvious connection between law and policy, and law and politics. Every rule of law, every rule of behavior, in any society, domestic or international, reflects a policy; it's designed to serve a policy by the person or people who formulate the rule. We see this very clearly, I think, in the domestic picture because, in fact, most of our law is made in the Congress and in the State Legislatures, although at times it isn't easy to get them to enact law.

In the international community you don't have the kind of separation of powers that we have in the domestic community. You don't have a legislative branch to enact the laws; you don't have an executive branch to carry them out; you don't have a judiciary to rule with respect to disputes; and these functions are tied together so that under the guise of impartially applying a rule of international law, what you may be doing is formulating a little bit of international policy that from the viewpoint of the person saying it, would seem to be a sound policy for his particular government, and perhaps for the international community as he sees it or would like to see it. We can, therefore, see these rules shifting and changing with somewhat more uncertainty, somewhat more flexibility, in somewhat less of a developed system. It is helpful to think of this process in terms of efforts within international society by these various participants to

formulate what we would call in a more developed system a legislative policy—to formulate rules which they believe would usefully serve participants within the international community. Thus any discussion of recent trends of international law has to take account of the changed political structure of the world community, of the new problems, the new political groupings, which have come to pass in what is often a too rapidly changing, as well as a too dangerous world.

Most of the international law doctrine that we have—that you have been studying—is inherited from the 19th century. It developed throughout the last part of the 18th century, and it became a relatively developed system of rules in the 19th century. To understand how that set of rules came about and what the differences are today, and to understand trends, we ought to look at the political system which then prevailed and particularly its security aspects. Fundamentally any system of law is designed at heart to preserve order as well as to serve other policies within the community. It's an effort to create an orderly way of doing things, and an orderly way of doing things means, at a minimum, that you remove, as much as possible, violence or the threat of violence. These rules developed as a system of law governing states within the international community. They became a developed system as nation-states developed.

Now what was the security system in which this operated and what were the essentials of that system? The security system was quite obviously the balance of power system which characterized international society and achieved its most developed form in the 19th century. The essentials of that system were that you had a group primarily of European states which were mutually suspicious and whose best security lay in a system of flexible alliances. That is, the best way of preserving peace within

that system was to align yourselves with others. If one alliance became stronger than the other, there was a real risk of war, and the members of the weaker alliance could offer to a member of the stronger alliance the necessary incentive to move over into that alliance. A shifting series of alliances is what I mean by flexibility of alliance. Thus, any state within that system had to be willing to get up and dance with any other partner within it. And that, I think, is essential to understanding much of the legal doctrine that we have inherited.

Within the balance of power system war was not outlawed formally; it was legally nobody's business but the state making it. We got away from earlier concepts of rights and wrongs of war, and simply depended entirely upon this political system.

There were other characteristics to it. If you are going to be willing to change partners, one of the things you can't afford to do is get involved in ideological disputes with other countries. You have got to take them as you find them, if you are going to join them, or if you may have to join them and switch from one alliance to another. And so you have a very strong rule in the 19th century of noninterference in the internal affairs of other states; at least other strong states. In fact, states were defined in such a way as to have viable entities that were capable of preserving their own independence, and not becoming pawns of someone else—a characteristic which is clearly not the case today.

Now, in addition to that security system there existed throughout the European countries during the 19th century a common ideological basis, at least with respect to economics. You didn't have it with respect to politics. It was an age of revolution. But you had it with respect to economics. There was the dominance of *laissez faire* as a philosophy shared by virtually all of the participants. One of the conditions

which a state had to be able to attain to be a "state" was to preserve enough domestic order so that others could trade with it and do business with it. They had to share a variety of rules with the more developed countries which permitted foreign investment, at least in the sense of foreign trading. Only if they preserved a system of local law and order which was sophisticated enough to allow you to trade with them, could they really hope to maintain their independence. Within those areas of the world where those conditions were not possible to achieve, trade led to a considerable growth of colonialism inherited from an even earlier day, and then a series of protectorates and mandates. There was very little interference in the internal affairs of these countries aside from maintaining sufficient order to do business with them. And I would remind you just briefly in passing that the whole concept of the freedom of the seas which I will discuss a little bit later on, is very closely related to laissez faire philosophy—to the economic freedom which existed.

Now the security system began to break down when the alliances became less flexible toward the end of the 19th century. I am inclined to think (I think a lot of historians would dispute me) that it broke down in large part because France and Germany had to be lined up on the opposite sides of the balance, and Alsace may have been one of the important reasons why it broke down. But be that as it may, it began to lose its flexibility—began to become impossible to shift—and as a result we had the first world war.

In the interwar period there took place a series of rather vague efforts to find some new kind of security system—treaties, resort to courts—the Hague Tribunal, the League of Nations, and efforts of this kind, because the alliance system no longer could be counted upon. The complicated economic system was breaking down, too.

Throughout that period there grew up a good deal of economic nationalism, changing somewhat the character of war, the character of military preparedness, and certainly changing the free economic system which had existed. There was an effort to replace this with, as I said, the League of Nations. It always has seemed to me a vague response to a real problem, an effort to create parliamentary government on an international basis. A lot of idealism was involved in it, and whatever its defects nobody came up with anything very much better. The effort, of course, of the French and the British throughout that period, was to recreate an alliance system, which was probably just as hopeless.

Let me skip World War II. What kind of a system are we operating in today? What kind of a political system is international law operating within today? Clearly it is a very different system from the 19th century system and it's different in many important respects. First, it is no longer exclusively a state system, although states exist and states are still important participants. But what we really have today, more and more, are groupings of states—acting together—rather than single states each pursuing its own individual interest.

After World War II, with the emergence of Russia as a major power, and the emergence of the Communist Party as a very important new element in international politics, we faced the effort by the Russians to dominate other nations through the device of the Communist Party. This technique of disciplining people, taking over a local government, and operating that government in conjunction with the domestic and foreign policy of a foreign state, was totally different from the express forms of domination of the 19th century.

The response to the communist threat of the West, which had no

equivalent to the Communist Party and no desire to dominate internal affairs of other countries, was to create a group of states, acting together with respect to certain limited matters, as, for example, NATO. Although formally set up as a treaty arrangement of a group of separate states, actually NATO went far beyond that in its planning, in its attitude, and in the way in which it did business. We did not have, and don't have today, the complete separation of states within NATO that would have characterized the 19th century system.

There were other than military institutions that were created—other groupings of states for various limited purposes. And so there was created within the Western world a kind of supranational authority, within limited areas—not always strong, but viable and continuing and existing.

In addition, there took place the emergence of the new nations of the world, made possible by this change in the political structure, or at least speeded along by this change. They have a rather different attitude than new states of the past. Nationalism has served, as it has always served, its function of being a unifying force. But there are the problems of a colonial heritage, some of the fears that go with it; and coming out of that, a tendency toward neutralism, fear of alliances, demands for social progress, for help, but always without interference in their internal affairs.

And, of course, we have too, the United Nations. Perhaps I should have started with the United Nations, because in the League it had a predecessor with, it seems to me, unclear ideas—or perhaps conflicting ideas—as to what it might do, and what it might accomplish within the society. Whatever the aspiration and the hope, it has become clear that there are very basic divisions within the world, and it has become clear that major powers can't rely upon the United Nations as any kind of a security

system. It can serve, and does serve, other useful functions. It does, for example, improve communication. It certainly has served a very useful function for the new nations who are heavily represented, particularly in the General Assembly, and who have an opportunity thus to make demands and to air problems which would not otherwise be aired. But the possibility of the United Nations taking strong and vigorous action is limited to the relatively few situations where the interest of major powers, particularly the United States and Russia, are likely either to coincide, or, at least, not to conflict.

I suggest that the real developments of international law are not in terms of a universal international law with rules equally applicable to all. More significant growth has been within these groupings of states. We have had a development of regionalism, and, more importantly, of functional approaches to shared problems.

Now some development has been accomplished on a universal basis, but it has become more of a pragmatic approach, less of a doctrinal one. We have, for example, on a universal basis, not done badly on meteorological or health problems. Within smaller functional groupings we have, I think done quite well.

I have already mentioned NATO in particular; there are other alliances with some similarity—the regional organizations such as the Organization of American States—all with some small elements at least of supranationalism, some small elements of acting together as an entity, of working together to solve problems. Far more dramatic has been the development of the Common Market. We have something very close, with distinct supranational characteristics, to the creation of a new federal state within Europe. This is a situation which would have been wholly impossible in the 19th century. No European state could have afforded to create those kinds of bonds

and ties. No state could have afforded to have delegated to other authorities, to supranational authorities, so much power over its own economy, over its own trade, and over many of the most important functions of government. In fact, I do not believe that any of the members of the Common Market, had it existed in the 19th century, could have met the traditional international law definition of what a state was.

Now what has this meant, this change in the political structure, with respect to changes in legal doctrine? The one point I have given major emphasis to is that we really are somewhat less concerned today with finding universal rules which will be applicable to all states within the community. It seems to me the area of progress, the area of development, the area of excitement, is the area which says, How do we get together to solve a problem which is common to all of us? And this is the kind of activity that we have had occasionally on a universal basis, or close to a universal basis (I have mentioned some of the examples), and on a military or security basis within other groupings. It exists with respect to economic development within still other groupings.

There are also necessary changes as the result of all the technology and the change in politics. You have looked at the laws of war. It seems to me that there are obvious changes with respect to the law of war. This doesn't mean it is all to be thrown out the window. Not all of the inherited doctrine is inapplicable in this new situation, but it has to be adjusted to it. And I think today that you would have far less confidence in those areas of the inherited rules of law with respect to warfare, particularly in terms of protection of private property, with respect to theft aspects, and even more particularly with respect to laws of neutrality (I am assuming here that this is not an atomic war, that it's a limited war of some kind). I think you

would have an absence—an obvious absence—of powerful neutrals, and the power of the neutrals which supported the inherited doctrine up to World War I and partly through it; rules of neutrality are likely to go by the board in considerable measures. Some can survive. That is, in a limited war perhaps you can respect the territory of various other states. I think very little of the rights of neutrals on the high seas would be expected to survive, and you would have the sort of change that you already had in World War II with respect to the law of the sea in war.

Other doctrinal rules have changed dramatically. We have foreign troops today stationed on the soil of other nations; some of our troops are abroad; the troops of others are here and in other countries. This was an unheard of proposition in peacetime within a 19th century system. And it has meant that there is a whole body of law which has grown up with respect to this peacetime stationing of troops, coming in on the invitation of a foreign government, and various rules of conduct in respect to them which have grown up and which I would expect to be developing.

There was a lot of doctrine, some of it nonsense, about measures short of war, and a fair amount of freedom on the part of major powers to go into certain parts of the world to protect certain values which were shared by other states, if they could do so under circumstances which gave assurance that this was not an effort to conquer. A good deal of that, perhaps not all of it, has gone because of the change in the political system.

In the law of the sea which you have studied, I am sure you have found that giving a forum for the first time to nonmaritime powers with respect to formulating rules of the sea, has led to considerable changes in those rules. The law of the sea was really a law created by the United Kingdom, but quite acceptable to all maritime powers, but

as we have gotten into larger multi-lateral arenas smaller nations have had a voice. Where these have not been maritime nations, the three-mile limit faded before a desire to monopolize fish on the part of some small and poor countries, who for the first time have had a voice and have used that voice (in what I think is a mistaken way) to promote their own interest by extending their control as a way of subsidizing their fishing industries.

I have already mentioned changes in terms of the participants—that no longer do we just have states. We have a lot of other participants within the international community taking active roles and governed by rules of international law. And I take it that the problems of communist domination have raised very new questions for us in terms of internal subversion, and in terms of aiding and abetting revolution, not merely because you didn't like the existing government,

but as a technique of foreign domination.

These, then, are the trends that I see: More efforts to solve in groups of states certain functional problems, continuing with a heavy emphasis on security measures, but also including and developing more and more efforts at economic development, and of creating in response to the demands of many countries better economies, more viable governments, and governments which are not dominated by any foreign power. I would see these attempts at problem-solving as a great growth of international law, less universalism but still a great growth among the nations marked by the growth of institutions that don't break apart. It is, and will be, a period of flux, of crisis, and considerable shaking down of rules—a time of shaking them up and shaking them down to the point that one would sometimes doubt if they still existed. But I would expect some survival in some form for most of these.

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