

## THE LAWLESS LAW OF NATIONS!

## CHAPTER I

## INTRODUCTION

There is to be found in the whole realm of legal learning react powerfully on the conduct of government at home; and no more anomalous collection of fallacies, no more deceptive body of affirmations masquerading under the name of science, than that pseudo-branch of jurisprudence which, for nearly three centuries, successive historians have presented to us under the title, The Law of Nations or International Law.

This is strong language but I believe I shall be able to justify it.

All who have sought to expound The Law of Nations since the time of *Grotius* have treated it as a distinct system of law for Sovereign States with which peoples themselves have no concern. They utterly fail to observe its vital connection with municipal systems of law and its direct influence upon man's political well-being, nationally as well as internationally.

The Law of Nations so-called is not a law of restraints upon Sovereign States, but rather a law of condonation; a law sanctioning every outrage that a Sovereign Government may commit against other peoples for its own aggrandizement. Obviously, a system which approves of tyranny on the part of a Sovereign Government in the international field must

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the appetite for blood and loot acquired abroad will invariably be satisfied at home.

No people who ever permitted its government to strip another people of its liberty ever saved its own; and according to the magnitude of the subjugations of its government it has itself been ground under the heel of domestic despotism. Consider the history of Rome, and of France.

Within the last century and a half man has put forth the most heroic efforts to safeguard himself against domestic tyranny, adopting all manner of expedients in his municipal systems of law. They have all been futile. He does not perceive that the grand error lies in the fact that nothing has been done to limit that plenitude of power still enjoyed by Sovereign Governments in international action, before which all attempted limitations upon domestic governmental oppressions are hopeless.

Yet political science so-called goes on teaching the fallacy that while a people may limit the powers of its government in domestic administration its Sovereign character renders restraint impossible in external action.

The teaching of a false science dealing with the physical world may have but negative consequences, but the teaching of a false system ordering the relations of man and justifying a false structure of society can have only consequences of the most far-reaching and calamitous magnitude, which indeed are everywhere visible.

It is bewildering to the student of The Law of Nations to find that the annalists and chroniclers, at least since *Vattel*,<sup>1</sup>

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1. Emerich de Vattel (1714-1767) *The Law of Nations or The Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns*.

who pass as explorers in this, the most fateful of all fields of knowledge in its bearing upon the happiness or misery of the human family, should be so uniformly indolent of thought as to have made no search for the causes of the afflictions which come with such constant recurrence upon political societies under this system. Not all of these writers have been government functionaries, committed to the established order, or personally profiting thereby, though, in the main, the master masons who have reared this so-called legal structure, have been diplomats, schooled in a privileged game, and enjoying the favors of governmental power.

We know that in the study of physical sciences the laws of the physical world have been revealed to us through generalizations drawn from particular facts, disclosing the laws by which those causes are governed; and that by this patient and laborious method empirical observations have been raised to the plane of scientific truths. The organic and inorganic worlds have thus been exhibited to us as under the control of constant and uniform law, with the regularity of many events, once shrouded in superstition and mystery, now commonplace and predictable with certainty.

Yet, beyond the feeble and confused efforts of *Grotius*,<sup>2</sup> *Buddeus*,<sup>3</sup> *Pufendorf*,<sup>4</sup> *Vattel*, *Wolff*<sup>5</sup> and a few others,—now wholly discredited by the prevailing *Analytical School of Jurists*,—such a method of inquiry, so miraculous in its revolutions of nature, has never been attempted with respect to the actions of men, and therefore, of societies. In fact, our

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2. Hugo Grotius, *De Jure Belli ac Pacis*, libri III.
  3. John Franz Buddeus, *Elementa Philos*, pract.
  4. Samuel Pufendorf, *De Jure Naturae et Gentium*.
  5. Christian Wolff. *Institutiones Juris Naturae et Gentium*.

so-called legal scientists are so far behind the physical scientists that what appears to be a not unnatural jealousy has prompted them to deny that the universality of order and method which rules the physical world, is the result of law at all; rather, they say, is it the result of a "property" or "quality" of matter.<sup>6</sup> Having rejected the idea of natural law as appertaining to human societies it is at least consistent in them to deny its validity everywhere.

It is too much to expect in the present state of knowledge that we can follow out the principles of a Law of Nations through all the crosscurrents of human action or that any one man is sufficiently endowed to complete such labor; but we may at least gain a perception of some large and general truths indicative of the universal order by a comparative study of the experience of man in his individual societies. For the Society of Nations is but the aggregate of civil societies scattered over the earth's surface, or, as has been said, "but the individual grown large";<sup>7</sup> and as *Phillimore* tells us,<sup>8</sup> "to live and move and have its being in the great community of nations is as much the normal condition of a single nation as to live in a social state is the normal condition of a single man."

One would assume from this that the principles of justice, morality, and humanity, professed to be the only true bases for the regulation of the relations of man in his individual societies, would be found equally valid and binding in the relations of this larger association. Yet, we read the utterings

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6. Holland, *Jurisprudence*, Chap. II. Yet see Maine, *Early History*, pp. 371, 372.

7. Ralston, *Democracy's International Law*, 41 (John Byrne & Co. 1922).

8. *Commentaries I*, Sec. VII.

of diplomats and search the archives of governments and the textbooks of publicists in vain for anything resembling the fundamentals evolved by man as a moral and social being in his municipal systems. Not only do we fail to discover them but, to our astonishment, we meet with the constant repudiation and denial of their validity with respect to the relations of nations. It is this utter irreconcilability and actual conflict between the essentials of the municipal and international systems that presents the most serious puzzle to the new student of The Law of Nations. He cannot comprehend how a principle solemnly enunciated in one branch of jurisprudence and its opposite, as categorically affirmed in another, can both be true. And when he reaches the chapter on The Laws of War—not laws against war but laws conceding it as an unlimited right—and finds such concrete instances as murder by mutilation, torture and starvation, and robbery, sanctioned on a national scale by this Law of Nations, he can only abandon the faculty of reason and take refuge in faith.

If he is discerning, however, he will discover a remarkable incongruity, if not deception, at the very beginning of his study; he will note the invariable repetition—to use an apt phrase of *Bentham's*—of “an Imposter-Term,”<sup>9</sup> in the very title of the subject itself,—“The Law of Nations.” For almost immediately he is informed that The Law of Nations has nothing to do with nations, or with peoples or with parliaments;<sup>10</sup> that it is the law between Sovereign States only. As to the nature of a Sovereign State, he is told that it is

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9. Book of Falacies.

10. Oppenheim. (1912) I, International Law, Sec. 69.

an *International Person*<sup>11</sup>—and a Male International Person<sup>12</sup>—and it has a body and a spirit and a will, distinct from and independent of the individuals it commands.<sup>13</sup> The most striking attribute of this International Person, however, is its *Sovereignty*. This word was coined by *Jean Bodin* in 1577 in his work *De la Republique*, to justify the policy of French absolutism inaugurated in the preceding century by Louis XI, as descriptive of a necessary and inherent quality of all monarchs; and it was defined as “Supreme power over citizens and subjects, unrestrained by the laws.” *Grotius*,<sup>14</sup> a half century later, adopted it into the Law of Nations to signify the unlimited and irresponsible power of the State in international, as well as in national, action. And it remains an unaltered prerequisite of this system to-day, as we may observe in the work of the most recent and respected British authority, the late Professor *Oppenheim*,<sup>15</sup> who describes this necessary quality of States as “Supreme authority, an authority that is independent of any earthly authority, both within and without the borders of the Country.” It follows as an accepted doctrine flowing from such a view that these *International Persons* are incapable of committing a *crime*<sup>16</sup>—that is, can do no *wrong*—because, as Sovereigns, they are above the law. All publicists readily concede this as a corollary of *Sovereignty*.

When we come to examine the State more particularly, we shall see that this *International Person* has his own peculiar

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11. *Ibid.* I, Sec. 63.

12. Bluntschli, *The Theory of the State*, Chap. I, 23.

13. *Ibid.* Chap. I, 22.

14. *Ibid.* I, Chap. 3, Sec. 7.

15. *Int. Law*, I, Sec. 64.

16. *Oppenheim*, I, Secs. 67, 156.

“honor,” which, unlike that of his subjects, can be wounded through no act of his own, however dishonorable, but only through the act of another; that he may possess in his own rights “*vital interests*,” which he may acquire and defend at whatever cost to his citizens or subjects; that he may hold in his “sovereign right,” such supreme wrongs as *Spheres of Influence, Spheres of Interest, Colonies, Protectorates, “Leased” Territories, Hinterlands* and whatnots, throughout the world in denial of the clear equitable title of others,—if his army and navy are sufficiently powerful. And these, we are told, are his *Minor Territorial property*.<sup>17</sup> And he may, and usually does, bestow the use and enjoyment of these modern seignories upon his modern courtiers—economic and banking cliques—in his own good pleasure.

With such monstrosities running around loose, independent each of the other, possessing supreme power, accountable to no territorial superior and recognizing none celestial, and commanding absolutely the lives and fortunes of their respective peoples, is it to be marveled at that devastation and desolation are the normal condition of the earth and calamity that of mankind?

We shall grasp the utter anarchy at the bottom of this system more clearly if we will advert to the smaller unit, the nation itself, and the part of man therein. Whatever the primitive and pre-political condition of man have been,—whether one of uninterrupted warfare, as imagined by some,<sup>18</sup> in justification of modern State Sovereignty, or whether one

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17. Westlake, *Int. Law*, I. Chap. VI.

18. Hobbes, *Leviathan*, Part I, Chap. XIII, XIV. Spinoza, *Tract Pol.*, Chap. II, Sect. 14.

of comparative peace, which *Sir Henry Maine*<sup>19</sup> declared proven as far as knowledge is extant,—the fact is that men are to-day endowed with certain faculties and have desires and wants which bestir them to action; but it is self-evident that the unlimited and unrestrained exercise of these faculties on the part of any will necessarily diminish their exercise by others; from which we deduce the principle that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man. And the preservation of this condition we express by the word Justice,<sup>20</sup> which, in the Anglo-Saxon view, at least, is the sole end of Government.

As *Gareis*<sup>21</sup> remarks, if men, not living an isolated life, should satisfy their wants without regard to others the struggle of all against all (*bellum omnium contra omnes*) were inevitable. Yet this is the essence of the practice of Sovereignty and the foundation of the prevailing international system. And the resulting *bellum omnium contra omnes*, which we witness throughout the international field is the inevitable consequence.

The idea of sovereignty—which on the other side of the shield is unlimited liberty for the ruler, and a corresponding subordination of the ruled—is not new; everywhere from the most remote antiquity we find it openly proclaimed under various names wherever we find a community. The Sovereign thus achieves liberty, but, in that system, for himself alone. As *Lieber*<sup>22</sup> says, the Sovereign “has not elevated himself to

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19. *Early History of Institutions*, 356.

20. *Spencer, Social Statics*, 34.

21. *Science of Law (Kocourek)*, 4.

22. *Civil Liberty and Self-Government*, Chap. II, 25, 26.

the idea of granting to his fellows the same liberty which he claims for himself, and of desiring to be limited in his own power of trenching on the same liberty of others.”

Many who have a fair knowledge of history and of those great political movements which shook Europe during the end of the 18th Century and continued until about the middle of the 19th, will be surprised to learn that the old Sovereign is still with us. It is the popular impression that in getting rid of the King “by divine right” and the erection of Constitutions to place certain rights of man beyond the reach of the ruler, particularly in England and America, we had achieved liberty. Now we observe that while the absolute King, by divine right, has gone, the *Sovereign State* that can do no wrong, has taken his place. It is a mere change of names. There is this difference, however, that the Sovereign State is now confining its practices of absolutism largely to the external affairs of nations though, in such circumstances, their internal freedom must remain precarious, if it exists at all.

It may be said, then, that the political emancipation of man from absolutism is but very meagerly achieved, and that small part, in his internal concerns, where the liberal use of the scaffold and the guillotine was necessary to win such little liberty as he now enjoys. In his external relations, however, daily growing more important to his material well-being, man is still in subjection to irresponsible power.

How insignificant has been the achievement from centuries of bloody sacrifice and struggle against the inherent oppressions and cruelties of political power, may be seen from consulting those successive written concessions, variously termed *Great Charters* and *Bills of Rights*, which the English, the

sturdiest in their love of liberty, have wrung from government by the sword. These instruments may be said to embody the sum of accomplishment towards man's political emancipation. Studying these documents we will observe that practically every article has to do with domestic administration alone; with limitations on governmental power exercised over the subject at home. There's not a word to restrain the Sovereign in forming alliances, making war, plundering neighboring territories or otherwise playing the madman abroad. however fully the liberty of the subject vanishes in the recoil.

One can understand that the force of tyranny was most immediately felt and most constantly visible in its direct domestic manifestations, and that to curb these was a first consideration. It was not perceived, however, nor is it yet understood, that the reactions of active absolutism in the foreign field must level every buttress of protection in the domestic; that, in fact, *civil liberty* is not possible to any people whose government is Sovereign externally or internally.

I am aware that so-called authorities affirm that *Constitutional law*,—that law which seeks to bind down governments against their innate proneness to oppression,—is not law at all, since “the power of the *Sovereign* cannot be legally limited,”<sup>23</sup> but I also know that if a people can take from its government the power of summary arrest it can strip that government of any other power it possesses; and that by no other process will man ever release himself from the tyrannous grip of these privileged abnormal institutions.

Up to the present time, however, no people has gone farther in seeking to free itself from absolutism than to lay down

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23. Sidgwick, *The Elements of Politics*, II, 17, 18.

certain prohibitions against arbitrary action at home, which have invariably failed of effectiveness the moment its government went to war.

Thus, if we reread *Magna Charta* (1215) we will find out of its seventy-nine sections but one having any relation whatever to external affairs; namely, Article 49, relating to the seizure of enemy merchants found in the territory and provision for their treatment on the basis of reciprocity. All of the others have to do with taxation, writs, jury trial, due process of law and other matters of internal government. In the Petition of Right (1628) again, the complaints are the abuse of court processes, unlawful exactions, the quartering of soldiers, and like domestic excesses of *Charles I.* The *Bill of Rights* (1689) under *William and Mary* is substantially a ratification of its predecessors.

The *Declaration of Independence* of 1776 and the *French Constitution* of 1793 occupy themselves wholly with the natural rights of man in their own respective societies, however broad their implications may be, and fail utterly to grasp the irreconcilability between internal freedom and external absolutism. The quick transition of France from licentious freedom to completed enslavement under the *Emperor Napoleon* proved the futility of the experiment in the latter case, as the imperial foreign policies of the *United States* to-day are confuting our own inspiring Declaration.

When we come to consider the *Constitution* of the United States we observe the same blindness to the fact that to concede Sovereignty with respect to foreign relations is wholly incompatible with a limited government at home. Hence we find in Section 7, Article I, that Congress is empowered to

declare war, offensive or defensive, grant letters of marque and reprisal, and define and punish offenses against The Law of Nations—powers as plenary as those that any monarchical despot can wield.

In confiding the power to declare war to *Congress*, however, it was clearly intended to limit the ambition of the executive, who everywhere else under the title of King or Emperor, was using and abusing that power. Yet, after all, the *Congress* is but another organ of Government, while *Government* is a mere organ of the Sovereign State.<sup>24</sup> And governments are bodies of men and all act alike in like circumstances, if power is allowed them.<sup>25</sup> We know, in fact, that our *Mexican War* was made by the President's Cabinet, and that not until afterwards was Congress called on for ratification, which it can hardly ever withhold. There have been innumerable instances since of like acts of war committed at the President's sole direction which have not resulted in war only because of the suicidal disparity of power between the United States and the nation aggressed upon.

It is remarkable that in none of the great reforms of government attempted by peoples in the past has there been any adequate appreciation of the extreme dangers involved in the

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24. Oppenheim, 1 Sec. 69.

25. So long as a people grants to its government an unlimited war-power, it matters not at all whether it is in the hands of the King or a President and Congress; it scourges mankind quite as often. As *Alpheus H. Snow* remarks in *The American Philosophy of Government*, page 13:

Experience has shown, however, that each individual has quite as much to fear from the action of governments—even from popular legislatures—in infringing his fundamental rights as from other individuals. A government, or the legislative part of it, is after all, only a group of individuals, and it may, like any other group of individuals, violate the fundamental rights of individuals.

unfettered control of foreign policy or an attempt to hedge that field about with corresponding safeguards. The right to bail, to a writ of habeas corpus, to trial by a jury of one's peers, unquestionably merit all the prohibitions that written Constitutions can lay upon Government, but they appear almost inconsequential in comparison with a right to be free from war, involving the citizen in the immediate loss of his liberty and the subjection of his life and property at once fully and despotically to the powers of his rulers, and involving his whole posterity.

This inattention to external affairs may be accounted for in the insularity and isolation of nations and the comparative insignificance of foreign commerce and travel before the advent of steam and electricity as means of rapid transportation and intercommunication within the last century. Quite naturally, under such conditions, domestic affairs would engross the field of thought and interest. But the steamship, the railway, the telegraph have made it impossible for a people to live to itself to-day; all are sharers whether they will or no in the benefits of a vast and increasing system of exchange constantly knitting them in closer union and interdependence. It is, therefore, not enough to-day that peoples should strive for liberation from meddlesome tyranny at home in the pursuit each of its own well-being; they must establish like safeguards against the capricious irresponsibility of their Sovereign Governments in the international field as well.

It must not be forgotten that all true progress, all civilization, all wealth, all of the discoveries of science, all increase of knowledge, has come from the arduous private labors of man, and that this progress has been greatest when he was

least bedeviled, prohibited, restrained and regulated by his government; that governments have not only created nothing but have constantly repressed and retarded progress by their persistent restraints and exactions, by their slaughter of the flower of the citizenry in their wars of ambition and by the deadening regimentation of their peoples in preparation for war-like service.

Nor is there longer any mysterious glamor about Government. Time was, when Kings were gods, that they were sacrosanct. That illusion is now happily dispelled, and we know Government for what it is—groups of ambitious politicians, who through a perversion of the theory of representation win political power over their fellow-men from an opposing group in the periodical scramble for these seats of privilege, and who use that power largely for their own ends; composed in the main of men lacking the habits of industry and inferior mentally and morally to the mass of men they govern; a huge and ever-growing parasitic privileged body that absorbs the maximum of the earnings of private industry and becomes more arrogant, more slothful and more corrupt as these extortions mount in princely proportions.

Government as such—which, if we concede that man has natural rights, can never rightfully be more than a limited agency—is not only never entitled to any reverence but always merits the deepest distrust; it is entitled to respect only as it remains strictly within its limited commission, which it rarely ever does, so prone are power-possessors ever to seize more power. For as *Locke* long ago observed:

For he that thinks absolute power purifies men's blood and corrects the baseness of human nature, need read but the history of this or any other age to be convinced to the contrary.<sup>26</sup>

Unless we keep these disagreeable truths in mind we shall fail fully to understand the grim and tragic jest of the Sovereign Government, as the organ of the Sovereign State, to which the prevailing system of The Law of Nations attributes such exalted station.

The longer we study the prevailing system of the so-called *Society of Nations* the clearer it becomes that its inherent vice lies in its fraudulent organization of ruling politicians throughout the world disguised and glorified as Sovereign, that is, omnipotent, States, whose power no people can limit, constitutionally or otherwise. Nations, peoples, are rightfully the ones at interest in any genuine Society of Nations, yet in the prevailing one they are reduced to mere pawns in the game of power which Sovereign States are ever engaged in.

As to the law which Sovereign States profess to be guided by, I have already remarked that the so-called *Law of Nations* is not conceived as a law above, but as a law between, them. Obviously, if a Sovereign State were subject to law it would cease to be Sovereign; it is, therefore, a contradiction in terms. And a law to which none is subject is no law at all. As *Lorimer* has pointed out,<sup>27</sup> it results from their Sovereignty—omnipotence—that separate States are completely isolated, and “International Law, having no relations to declare loses the object of its existence.” While *Lorimer*

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26. *Two Treatises on Government*, II, Chap. VII, Par. 92.

27. *Institutes of The Law of Nations*, 1, 10.

failed to grasp the wholly artificial character of the Society of Sovereign States, as accounting for the absence in its so-called law of any "definite and proximate terminus ad quem," he readily perceived, without explaining, its chaotic condition. He says:

There is scarcely one of its doctrines with reference to which a scientific determination has been arrived at, or even a ripe public opinion has been formed, nay, with reference to which two hostile parties at least do not find themselves face to face, the moment it is mentioned.<sup>28</sup>

It is not to be wondered at that this system defies scientific analysis save as a manifestation of the baseness of human nature.

But for the perversions of the power of Government a natural system of liberty would promptly establish itself everywhere, in the national as well as in the international field; and while some police power might still be necessary the need for armies and fleets to perpetuate existing injustices would disappear. Economic man, in pursuing his self-interest, would, as invariably results, promote the general interest of all. That there would still remain a limited and legitimate sphere in which government could be useful is not questioned, but not in its present role of an all-powerful and irresponsible international instrument, able and willing to hazard the life of a whole people for the benefit of great exploiting economic and banking favorites.

If men have natural rights which no government can infringe—which all enlightened minds must concede—then the

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28. *Ibid.* I. 24.

unlimited power conceded to Sovereign States by The Law of Nations is plainly a fraud upon the liberty of peoples internationally, as any domestic despotism is a fraud upon their liberty nationally. It is vicious usurpation which will sooner or later be comprehended and put down.

It is only as a free man, through his own labors, trials and struggles, that one can grow strong, fine and great; that he can, in fact, reach those heights of knowledge and happiness which his Creator has obviously marked out as the ultimate perfection of the human race.

But before this ideal condition can be attained he must shake off the evil political genius of Sovereignty which has misused and degraded him from the beginning of history; he must reaffirm, strengthen and enlarge those limitations and prohibitions upon the power of his rulers which the last century and a half have taught him are vital to his freedom in his individual societies; he must close the circle of constitutional protection about his person, under the threat of penalties, if need be, by extending like prohibitions upon the power of his government in the field of his international brotherhood. That peoples thus left to their own reason and interests will establish among themselves the principles of justice and decency which they have everywhere learned to apply in their individual societies, there need be no doubt.

All modern writers on the so-called science of the Law of Nations divide the subject into three principal branches; the laws of *Peace*, the laws of *War*, and the laws of *Neutrality*. That is to say, when the Sovereign States of the world are enjoying those periods of armed quiet called Peace, one set of laws obtains; when two or more Sovereign States are at

War, another set of laws, giving them liberty of action, comes into force; and still a third set designed to subordinate the activities of States remaining at peace in the interest of the States at war. There is no *criminal law* or *law of torts* in The Law of Nations for the obvious reason that there is no law above *Sovereign States*; it is merely law between *Sovereign States*.

It need only be pointed out that, if jurisprudence conformed to these divisions and subdivisions generally, we would have in our individual societies one system of law when the gun-toting community was peaceful; another system which authorized any group of individuals to take possession of the streets and murder and plunder their neighbors; and a third system founded on the assumed duty of all others to remain in doors until the combatants were satisfied. Incidentally, the law would authorize any who wished to come to the aid of one or other group, and even countenance the offer of an inducement in the form of the property of others in no way involved.