

## THE LAWLESS LAW OF NATIONS.

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## CHAPTER III

## THE DEVELOPMENT OF THE LAW OF NATIONS

All modern authorities on The Law of Nations affirm that no such body of law did or could exist prior to the Peace of *Westphalia*, in 1648, which, ending the *Thirty Years' War*, ushered in the modern *European States system* by confirming the independence and Sovereignty of nearly four hundred distinct absolute political entities.<sup>1</sup> There were nations before that time, to be sure, but The Law of Nations, as had been pointed out, is not a law of nations, but a law of Sovereign States; and not until this large group of autocrats arose was there any other comparable community to be found on the earth's surface. Nothing is vouchsafed to us whence the Protestant princes who met at Osnaburg and the Catholic princes who met at Munster, to conclude this Peace, derived their authority to confirm Sovereignty in any or all of the European States, though we are told by Oppenheim<sup>2</sup> that it was "the *first* time in history a *European Congress* assembled for the purpose of settling matters international by common

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1. Oppenheim I. Chap. II, 54, 55. See Wheaton, History of the Law of Nations (p. 72), who says:

The Constitution of the *Germanic empire*, as finally adjusted by the Peace of Westphalia, formed a singularly complicated political structure. It was composed of no less than three hundred and fifty-five different sovereign states of various descriptions, feudal, ecclesiastical and municipal, of unequal extent and relative importance. Among these were one hundred and fifty secular states, possessed and ruled by hereditary electors, dukes, landgraves, marquisses, counts and burgraves; one hundred and twenty-three ecclesiastical states ruled by electors, archbishops, bishops, abbots, the grand masters of military orders of knighthood, priors and abbesses, chosen for life; and of sixty-two imperial cities governed as republics.

2. Int. Law, I, Sec. 43.

consent of the Powers." Perhaps "the Powers" did not actually confirm or confer Sovereignty upon these States, but merely recognized it as a visible fact in the absolute character which the States uniformly possessed in the persons of their despotic rulers. At any rate, all were Sovereign and in the treaties of recognition we find the confirmation running not to the peoples but to their respective Emperors, Kings, Princes, Dukes and other hereditary and unaccountable rulers.<sup>3</sup>

In spite of the unanimity of so-called authorities on this point, however, it is discernible from history that, as early as the fourth century before Christ, the *Greeks* were practicing a system that has all the earmarks of a Law of Nations, with the modern Sovereign State left out. Thus it comprised such subjects as naturalization, status of aliens, traveling and domiciled, consuls, asylums, extradition, immunity of ambassadors, treaties and alliances, colonies, balance of power, intervention, arbitration, causes of war, declaration, truces and armistices, ransom of prisoners, spies, hostages, reprisals, immunity of temples, burial of war dead, maritime jurisdiction, shipwreck, embargo and blockade.<sup>4</sup>

In spite of the God-given character of the *Greek* state, as humanity perfected,<sup>5</sup> we find no hard and fast qualification of this law as applicable to Sovereign States only, nor do they term it International law, or The Law of Nations; their philosophers do describe it, however, as universal law<sup>6</sup> or *The*

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3. De Martens, *Recueil des principaux Traites d'Alliance*, etc.

4. *International Law and Custom of Ancient Greece and Rome*, Philipson I, 63, 64; *The Law of Nations*, Hosack.

5. Aristotle, *Politics* III, 9. Sec. 14, 1280b.

6. Aristotle, *Rhet.* I, 13.

*Law of Nature*,<sup>7</sup> as distinguished from particular law, the law of any given state. And *Aristotle* speaks of the universal law as the unwritten but universally recognized principles of morality.<sup>8</sup> Again, in referring to the universal or *natural law*, he says law is reason unaffected by desire.<sup>9</sup>

It is obvious, therefore, that while modern authorities may be correct in saying the prevailing system of The Law of Nations was unknown to the ancients, the Greeks ordered their relations with other peoples according to a fairly definite system, though their philosophers conceived it to flow from Nature, morality or reason, rather than from the unaccountable power of Sovereign States.

Turning next to Rome, as the successor to Greece in the political and cultural dominance of the world, we observe that while the *jus civilis*, or the written law of the Roman citizen, was ever expanding through the various methods of legislation peculiar to them, quite a different system was developing to regulate their relations with *aliens*, or *peregrini*, slave and free, and of aliens with each other, who increasingly flocked to Rome as the frontiers of conquest were widened. Aliens in Rome were excluded from the privileges of the Roman law but the necessities of trade and peaceful intercourse and of order, made some common ground of adjustment imperative.

In the theory and practice of the times *law* was *wholly personal*, and the Roman citizen, as we know in the experience

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7. Sophocles, *Antig.* II, 456-7.

8. *Rhet.* I, 10.

9. *Politics* III, 16, 5.

of the *Apostle Paul*<sup>10</sup> in *Jerusalem*, carried his law with him wherever he might go. So, too, the Goth, the Lombard, the Burgundian, the Tuscan, the Umbrian, the Carthaginian, and others, coming to Rome had each his separate law. To meet this condition of conflict of laws, the Romans instituted a new magistracy in 247 B. C., whom they entitled the *Praetor Peregrinus*, to distinguish him from their own legislator-judge, the *Praetor Urbanus*. It was through this office that there was slowly evolved a distinct body of law known as the *jus gentium*,—The Law of the Nations,—which grew and was applied until the extension of citizenship to all subjects of the Empire by the Edict of *Caracalla*, between 212 and 217 A. D. rendered it no longer necessary or useful.<sup>11</sup> It embraced not only private international law, but public international law as well, including the *jus fetiale*, dealing mainly with the practices of war.

The most significant characteristic of *jus gentium* was its reconciliation of the laws of many other peoples with those of Rome, and the basis was the existence in all systems of customs and principles more or less common to all; or, as

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10. Acts XXI, XXII. This conception of law as personal still survives in states of continental Europe; especially do we see it in their criminal law where home courts are vested with jurisdiction of crimes of subjects, wherever committed, on the subject's return to the territory. The Anglo-American doctrine is, however, that criminal jurisdiction is coextensive with the territory only.—ED.

11. It must not be thought that this apparently liberal measure was dictated by any generous sentiment; its simple purpose was to produce more revenue for which the soldiers were always clamoring, more or less threateningly. Roman citizens, who formerly shared in the plunder of other peoples, with the drying up of these sources, were now more and more heavily taxed. They were subject to an inheritance and legacy tax of five per cent, from which alien subjects, who were taxed by tribute, were exempt. When *Caracalla* transformed all subjects into citizens, he not only raised the inheritance and legacy tax to ten per cent but continued the exaction of tribute from the former aliens as of old.—See *Gibbon*, I, 201-218.

*Bryce* remarks,<sup>12</sup> "broadly speaking, the basis or source of the underlying principles of *jus gentium* would, as respects commercial matters, be found in good faith and common sense, and as respects family matters and inheritance, in natural affection." Though moulded by Roman courts it was viewed as the essence of the law previously existing among all peoples and of usages which common sense and the needs of intercourse required.<sup>13</sup> It was, therefore, *common to all mankind*, as *Gaius* tells us, and coeval with the human race itself:<sup>14</sup> the law which natural reason had created.<sup>15</sup> At this point, it became indistinguishable from the Law of Nature of the Greeks.

Again, *Cicero*, who contributed so much to the philosophic development of law, describes it as "the highest reason, implanted in nature, which commands *those things which ought to be done and prohibits the reverse*"; as the highest law "born before all the ages, before any law was written or State formed"; and, "law did not then begin to be when put into writing but when it arose at the same moment with

12. History and Jurisprudence, Chap. XI, 575.

13. Institutes, I, 1. Thomas Alfred Walker says in his History of the Law of Nations, Vol. I, Sec. 29:

In *jus gentium*, in its more public sense, the Roman approached most nearly to our modern International Law. But *jus gentium*, even in so far as it protected the ambassador, was not in conception law international; the foundation of the system was community of observance by men of whatsoever nationality; by men as law-abiding human beings, not by men of different bodies politic. The Greek tutor explained this common observance, if the Roman pupil had not himself already conceived of some such ascription, by reference to a certain *jus naturale*, or a law which Nature herself had implanted in man, immutable and unchangeable, exact justice, self-evident to the individual exercising the right reason or the moral faculty with which he was endowed; but it was the general recognition of this law, its character as rule acknowledged by all peoples who observed any law, which first caught the Roman eye.

14. *Gaius*, Dig. XLI, I, 1.

15. Institutes, I, 1.

the mind of God."<sup>16</sup> The *jus gentium* was more and more considered as flowing from and embodying the *natural law of mankind*, with which there necessarily arose the conception of *natural rights*, a consequence that was to exert so profound an influence on the political condition of mankind in centuries to come.

With the transition of Rome from a temporal power to a combined temporal and spiritual one, we see a further development of the Law of Nature in the hands of scholastic theologians. All law became then, in theory as well as in

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16. De Legit II, 4. Sir *Henry Maine*, in his *Ancient Law*, Chap. III, pp. 51, 52, says:

The oldest Greek philosophers have been accustomed to explain the fabric of creation as the manifestation of some single principle which they variously asserted to be movement, force, fire, moisture, or generation. In its simplest and most ancient sense Nature is precisely the physical universe looked upon in this way as the manifestation of a principle. Afterwards, the later Greek sects, returning to a path from which the greatest intellects of Greece had meantime strayed, added the moral to the physical world in the conception of Nature. They extended the term until it embraced not merely the visible creation but the thoughts, observances and aspirations of mankind. Still, as before, it was not solely the moral phenomena of human society which they understood by Nature, but the phenomena considered as resolvable into some general and simple laws.

Now just as the oldest Greek theorists supposed that the sports of chance had changed the material universe from its simple primitive form into its present heterogeneous condition, so their intellectual descendants imagined that but for untoward accident the human race would have conformed itself to simpler rules of conduct and a less tempestuous life. To live according to Nature was to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe. . . . Now on the subjugation of Greece that philosophy *made instantaneous progress in Roman Society*. It possessed natural fascinations for the powerful class who, in theory, at least, adhered to the simple habits of the ancient Italian race, and disdained to surrender themselves to the innovations of foreign fashion. Such persons began immediately to affect the Stoic precepts of life according to Nature—an affection all the more grateful, and, I may add, all the more noble, from its contrast with the unbounded profligancy which was being diffused through the imperial city by the pillage of the world and by the example of its most luxurious races.

practice, of divine origin; the law of Nature became the law of God. And there was biblical authority from the Apostles Peter and Paul:

Submit yourselves to every ordinance of man for the Lord's sake; whether it be to the Emperor, as supreme, or unto Governors, as unto them that are sent by him for the punishment of evil doers, and for the praise of them that do well. For so is the will of God, that with well-doing ye may put to silence the ignorance of foolish men.<sup>17</sup>

Let every soul be subject unto the higher powers. For there is no power but of God; the powers that be are ordained of God. Whoever, therefore, resisteth the power resisteth the ordinance of God; and they that resist shall secure to themselves damnation.<sup>18</sup>

From the fifth to the fifteenth century, the *divine origin of law and government was hardly doubted*. But it was not a new idea; the *Greeks* had deduced the control of the Deity or Deities from the movements and processes of the material universe, and had extended it to the affairs of men. The *jus gentium* of the Romans was developing logically toward that view before the dawn of Christianity, and when the Christian era did come, the philosophic conception of the system was readily adapted and expanded without shock.

The *influence of Christianity* upon law was not merely to support authority, however; there was in it a potent force working in quite the opposite direction. It preached the

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17. I Peter, II. 13, 15.

18. Romans, XIII, 1, 2.

supremacy of the eternal principles of morality which emperors must obey and which the peoples themselves might defend, even against their emperors; it, in fact, gave a sanction and a spirit to the principles of natural law and to individual responsibility, upon which today rest all that we have to civil and religious liberty.

So tenaciously does this idea of the overruling character of the *law of Nature* persist, that we find *Blackstone*, in the eighteenth century, declaring, in the words of Cicero, that—

—being coeval with mankind, and dictated by God himself, (it) is, of course, superior in obligation to any other. It is binding over all the globe in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.<sup>19</sup>

Yet he immediately qualifies that assertion in such a way as to destroy its force by declaring that society implies government and there “must be in all of them a supreme irresistible, absolute, uncontrolled authority in which the *jura summa imperii*, or rights of Sovereignty reside.”

Even as scholarly a modern as the late Viscount *Bryce* was not wholly convinced that the *Law of Nature* is a mere fiction, as the *Analytical Jurists* contend, which we may see in the closing sentence of his essay bearing that title, where he says:

Who can say that an idea so ancient, in itself simple, yet capable of taking many aspects, an idea which has

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19. *Commentaries* (Sharswood) I. Sec. II, 41.

had so varied a history and so wide a range of influence, may not have a career reserved for it in the long future which still lies before the human race?<sup>20</sup>

Although all modern writers on The Law of Nations assert that that system could have had no existence until the birth of that congeries of Sovereign States in 1648 by the Peace of Westphalia, they inform us at the same time that the "Father of the Law of Nations" is *Hugo Grotius*, a Dutch jurist, who, while in exile at Senlis, in France, composed the *first comprehensive work* on the subject, *De Jure Belli ac Pacis*, published in 1625, twenty-three years before that eventful Peace. Thus *Oppenheim* says<sup>21</sup> it has rightly been maintained that no other work, with the single exception of the Bible, has ever exercised a similar influence upon human minds, and that the whole development of the modern Law of Nations takes root from this forever famous book.

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20. History and Jurisprudence.

21. I, Sec. 53. An anonymous contributor to the *British Year Book of International Law, 1920-1921*, pp. 109-24, writing on *The League of Nations and The Laws of War*, has this to say of the influence of Grotius' moral system in the practical affairs of war:

Not only did his work have a great literary success but it was the cause of an immediate and permanent improvement in the practices of war. The *atrocities* of the Thirty Years' War were *not reproduced in the wars of the next two centuries* after he wrote . . . This positive success made the moral force of the laws of war loom very large in the minds of jurists, statesmen and peoples.

That Grotius was appalled by the utter chaos into which the ambitious religious conflict, then raging, had thrown Europe, and sincerely sought to point out a way to order may be seen in his introductory, where he says:

I, holding it to be most certain that there is among nations a common law of rights which is of force with regard to war and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reason or no reason; and, when arms were once taken up, all reverence for divine and human law was thrown away, just as if man were thenceforth authorized to commit all crimes without restraint. Par. 28, Whewell's Trans.

However that may be, the work is *now an antiquarian curiosity* to the modern legal scientist, and the most fruitful and beneficent part of it,—that dealing with the obligations of Natural law and reason,—is rejected as particularly pernicious by modern power-holders and their legal apologists. Oppenheim, one of the most liberal of all of the prevailing so-called Positivist school of writers, himself affirms<sup>22</sup> that there is no doubt that, but for the Law of Nature, which Grotius resurrected from the *jus gentium*, and the work of his disciples, our modern *constitutional law* would not be what it is; that is to say, men in civil society, would still be without any natural rights as against their governments.

*Grotius* expounded The Law of Nations as embodying two kinds of law, the *natural* and the voluntary. The former, which he supported with the testimony of philosophers, historians, poets, jurists and theologians of all ages, “is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that consequently, such actions are either enjoined or forbidden by God, the author of Nature.”<sup>23</sup> The law, which he distinguished as “voluntary law,” comprised such rules as had their origin in the common consent of Sovereigns.

The world order in which he found himself, being dominated by absolutism, though mired in the anarchy of the Thirty Years' War, he perforce founded his international community upon Sovereigns and Sovereign States. His notion

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22. I, Sec. 53.

23. Book I, Chap I, Sec. X.

of Sovereignty combined the internal aspect of supremacy with the external aspect of independence, regulated and restrained, however, by that same Law of Nature which circumscribed the individual. Hence, in his view this international system had the dual character of the Law of Nature and of Nations.

Within half a century a worthy disciple appeared to carry on the work of his great master, in *Samuel Pufendorf*, a native of Saxony, who, in 1672, published *De Jure Naturae et Gentium*, in which he denied that any voluntary, customary or positive Law of Nations had the force of real law; that *the law of Nature*, of reason and morality, alone held sway between nations. So deep was the interest in this new system of law that Pufendorf was called to the first chair of The Law of Nature and Nations, instituted at Heidelberg in 1661.

In 1750 Christian Wolff, a German professor of law at the University of Halle, brought out his *Institutiones Juris Naturae et Gentium*, in which he visualized the coming of the World-State or confederation. While stressing the Law of Nature he also allowed validity to, and defined, three other kinds of law,—the customary, the voluntary and the conventional, the last created by treaties.

The last and most influential writer of this so-called Naturalist School, which was clarifying and extending the message of Grotius, was *Emerich de Vattel*, a Swiss citizen, in the public service of Saxony, who, in 1758, published *The Law of Nations or The Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns*.

The inspiration for his work was drawn from *Wolff*, whose treatise, written in Latin, could be known to be few. Vattel, however, rejected the idea of a world-republic as the ultimate consequence of natural law. The necessity for co-operation and security has prompted men to form civil societies and the natural law approves of that, he says, but there is by no means the same necessity for a civil society among nations. Yet Vattel concedes the need of a limited form of world organization<sup>24</sup> in vindicating the right of all to unite to put down violations of the law.

As to what this natural law is, that is equally binding upon individuals and nations, the definition of Justinian<sup>25</sup> is accepted, as those rules established among all men by natural reason; and again, Vattel describes it as "*the immutable laws of justice and the voice of conscience.*" Although Vattel was the first writer on The Law of Nations to found the modern State upon the free subjection of its equal citizens to the public authority of the whole, in all that relates to the common good, he nevertheless had to reckon with the existence of emperors and kings, possessing absolute power. His law must, therefore, operate upon "nations and sovereigns," a

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24. It is necessary for the reader to bear in mind that when Justinian's Digest was promulgated at Byzantium, the seat of the eastern empire, the people of Rome were in fact ruled by an Ostrogothic king, Athalarich, grandson of Theodorich. And while the laws of Justinian speak in terms indicating that their authority is from the people, the people had been under the absolute rule of emperors for five centuries. Tribonian and his assistants, who formulated the *Corpus Juris Civilis* at the order of Justinian, drew all their norms from the language existing under the republic, where the people had actually legislated in their *Comitia*. With the coming of the empire Augustus the change to absolutism was considered as conferred on the emperor by the people, hence not inconsistent with the theory that they were still the source of law. It is from the philosophy of the republic that we get the three great precepts at the foundation of all law: to live honorably, to hurt nobody, and to render to every man his due.

25. Book II, Chap. IV, Sec. 53. (Fenwick trans.): Intro. Sec. 22.

coupling of terms appearing constantly in his treatise. Yet he boldly denies that there can exist such a thing as "patrimonial kingdom," admitted by Grotius and Wolff. This pretended right of ownership attributed to princes is mere fancy,<sup>26</sup> he declares; the *State is not and cannot be a patrimony*, since a patrimony exists for the advantage of the possessor, whereas the prince is appointed only for the good of the State.

Vattel finds that there may exist a conventional Law of Nations founded in treaties expressly, and a customary Law of Nations, founded in long usage and tacit consent; yet both of these draw their entire binding force from the natural law, which demands that nations keep their compacts. Throughout the whole branch of the subject dealing with the laws of peace, he applies his principle of justice, morality and reason with a courage remarkable for one of his time and situation.

In his treatment of the subject of war, he confined that extreme right to cases of self defense, to put an end to injuries received or threatened, devoting an entire chapter to "The Just Causes of War," in which he bitterly condemns that Sovereign who, without necessity, wastes the blood of his own subjects and heaps injustice upon those whom he attacks.

In that branch of the subject dealing with *neutrality* he appears as the first writer on The Law of Nations to distinguish clearly that the obligations of the neutral did not allow mutual service or *assistance* to both belligerents, as was then the practice, but *consisted in abstention* from service to either,—a view now accepted with so many reservations as still to be without practical value.

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26. Book I, Sec. 61.

The *rules* laid down by Vattel, while falling far short of the demands of justice, morality and humanity, are nevertheless far *in advance of the practices of States, even in our own day*. Not the least of its achievements was its *domination of the political thought of the United States from the foundation of our government until the twentieth century*, as expressive of the true Law of Nations, and as distinguished from the adverse practices of States. And it is to the influence of Vattel alone that *our own country owes its early reputation* as almost the only one on the globe that is animated by any idealism in the furtherance of a just international legal system.

*The fault with Vattel*, if it can be so termed, is that pointed out by Professor de Lapradelle,<sup>27</sup> in the introduction to the Carnegie Institution translation, as the difficulty of every author who seeks to formulate a general conception of The Law of Nations, namely: How to combine the subjection of States to law with their Sovereignty, which does not recognize any law over them.

Of course, no reconciliation is possible or ever will be. It is only when States cease to be omnipotent that peoples will be permitted to build up a system of law adequate to their inter-relations, nor will their public relations loom so very large in such a system. While the consul or commercial agent would probably remain at his post, it is quite certain that the gorgeous embassies, with their hosts of secretaries, and the military, naval and aeronautical attaches would return to the

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27. Intro. LIII.

body of private producers and thus reduce the army of public consumers.

It is worth noting that the revolutionary work of Vattel appeared in the midst of that great intellectual reaction which began in France in the reign of Louis XV, against the servility of letters, enforced under his predecessors, and reached its climax in the chaos that gave birth to the Declaration of the Rights of Man by the French Constitutional Convention in 1793. Vattel's volume was no more permitted to circulate in France, however, than were the works of Buffon, D'Alembert, Diderot, La Harpe, Montesquieu, Rousseau and Voltaire, all of whom suffered fine or imprisonment or both, with the burning of their writings by the public hangman.<sup>28</sup> Vattel must have been particularly offensive to the French monarchy, inasmuch as he had *preached the right of a people not only to depose, but actually to execute, a Sovereign turned tyrant.*<sup>29</sup>

What is particularly remarkable about this period of apparent triumph of the principles of natural law and of natural rights,—that, it was hoped, would destroy the Sovereign attributes of every monarch in Europe and usher in a universal constitutional order in every nation's internal affairs,—is that it marks the *abandonment of the doctrine of*

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28. Buckle, *History of Civilization*, I, Chap. XII.

29. *Book I, Chap. IV.*

*natural law* in the development of The Law of Nations.<sup>30</sup> For it was just at this time, by sinister coincidence, that the so-called *Positivist school* of legal writers on The Law of Nations took the field, *attacking the validity of the law of nature* as no law at all, and at best, but ethics.<sup>31</sup>

The doctrine of *natural rights* was certainly *pushed* to a terrifying *excess in the French Revolution*, and it is not to be wondered at that the violence committed in its name undermined the faith in man of even so staunch a lover of his kind as Edmund Burke. Whatever the cause of the reaction the prophets of the new materialistic school appeared in the persons of two Englishmen, *Jeremy Bentham* and *John*

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30. The natural Law of Nations as expounded by Vattel was eagerly accepted by our revolutionary forbears as complementary to the system of natural rights which we were then vindicating in our war against George III. *Benjamin Franklin* received three copies of Dumas' edition in 1775, and wrote (Wharton's Dip. Cor. II, 64) that they "had been continually in the hands of the members of our Congress now sitting." How fully we then believed the Law of Nature to be the only true Law of Nations may be further seen from the statement of Justice Wilson of the Supreme Court (*Ware vs. Hylton*, 3 Dallas 199) in 1796, that: "When the United States declared their independence they were bound to receive the Law of Nations in its modern state of purity and refinement."

The progress of natural law is thus viewed by *Professor Pound* (*Spirit of the Common Law*, 89, 90):

What is injury to another? What is it that constitutes anything one's own? Grotius and his successors tried to answer by a theory of natural rights; not merely natural law, as before, not merely principles of eternal validity, but certain qualities inherent in persons and demonstrated by reason and recognized by natural law, to which, therefore, the natural law ought to give effect. Thus, again, at the very time that the victory of the courts in the contest between the common law courts and the Stuart Kings had established that there were common law rights of Englishmen which Englishmen might maintain in courts and which courts would secure to them even against the king, a juristic theory of fundamental natural rights independent of and running back of all states, which states might secure and ought to secure but could not alter or abridge, had sprung up independently and was at hand to furnish a scientific explanation when the next century called for one. By a natural transition the Common Law limitations upon royal authority became natural limitations upon all authority; the Common Law rights of Englishmen became natural rights of man.

31. See Hershey's *Essentials of Int. Pub. Law*, Chap. I, Sec. 9.

*Austin*, who preached that *true law* is a command proceeding from a determinate rational being to which is annexed an eventual evil or sanction, but that laws imposed by general opinion are styled laws by an analogical extension of the term, and are not positive laws; for every positive law is prescribed by a given superior or Sovereign to a person or persons in subjection to its author.<sup>32</sup> In their theory coercive power was an indispensable factor and they logically turned to the sixteenth century and rehabilitated the absolutist conceptions of *Bodin and Hobbes* of the limitless and uncontrollable power of Sovereigns as vital in the creation of true law.

When *Austin* turned to consider the rules of The Law of Nature and Nations, he *could find no overruling world army and navy* to enforce them; hence he *denied* that there existed any true Law of Nations. *Austin* had spent a part of his youth in the army, on leaving which he studied law at Heidelberg and Bonn, where he imbibed deeply the spirit of the Roman law. It is not surprising that his doctrines, so agreeable to autocratic authority, should have been favorably received and encouraged by governments, but it is puzzling that so many so-called *legal scientists*, in no way the stipendiaries of government, should continue *blindly to accept them*.

Writers on The Law of Nations henceforth, abandoning Grotius, Pufendorf and Vattel, *seek some other basis* than reason or natural law as the foundation for their system in order to square it with Austinian postulates. The works of

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32. See Bentham, *Morals and Legislation*, II; *Austin*, *Province of Jurisprudence*, Lect. VI.

the Dutch jurist *Bynkershoek*<sup>33</sup> lent themselves to this end. In his theory The Law of Nations was founded either in custom or in convention; there was no other law between nations than these tacit and express kinds. As to its sanction—Austin's coercive element—we are assured that it is found in retaliation or war undertaken by one Sovereign State against another that had violated the law. Thus the right of violence and war became formally justified in the system of Sovereign States.

Clearly, the so-called customary and conventional Law of Nations, of the Positivists, is in no sense commanded from above, since Sovereignty excludes the idea of a superior; as for the sanction or coercive element in retaliation and war, that is available only to the strong against the weak. While the Positivists do not mention this, it is easy to deduce from Austin's society of irresponsible Sovereign and docile subject, that the necessary element of coercion is in practice but a measure for the strong against the weak, and that, therefore, in the Society of Nations, the Great Powers, who now keep the little ones in order, do, in fact, command that their so-called customary and conventional law.

What else does "the political *hegemony of the Great Powers*" mean? Oppenheim tells us that, though all Sovereign States are equal, nevertheless, "all arrangements made by the body of the Great Powers naturally gain the consent of the minor states."<sup>34</sup>

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33. Cornelius van Bynkerstock (1673-1743) *De dominio maris*, 1702; *De foro legatorum*, 1721; *Questionum juris publici libri II*, 1737.

34. *Int. Law I*, Chap. II, Sec. 116. Wheaton tells us (*International Law*, Part II, Chap. II, Sec. 152, Dana, 1866) that "the natural equality of sovereign states may be modified by positive compact or by consent implied from constant usage, so as to entitle one state to superiority over another in respect to certain external objects, such as rank, titles, and other ceremonial distinction. Thus the International Law of Europe has attributed to certain states what are called royal honors, etc." These honors are now accorded to the Great Powers.

From the nineteenth century onward we are assured by a constant succession of so-called international authorities that The Law of Nations is founded first, in the *practices of Sovereign States*, a plurality of like acts *thereby creating customary law*; and second, in treaties, special and general, thereby creating special or general conventional law. Whether these practices and treaties are moral or immoral, just or unjust, whether they violate reason or the natural law, is no longer the concern of legal science, the Positivist writers tell us. Morality, justice, humanity,—these are terms known to ethics but no longer known to The Law of Nations since its divorce from the Law of Nature. Thus Austin asserts that a law may be unjust but it is nevertheless binding; wherefore to resist it may be virtuous but can never be legally right.<sup>35</sup> And as late authority as Sir *Frederick Pollock* declares:

Though much ground is common to both, the subject-matter of law and *ethics* is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct.<sup>36</sup>

By the same process of reasoning that deduces the existence of a valid rule of The Law of Nations from the like practices of Sovereign States and clothes any act, however outrageous with the sanctity of law as soon as there are imitators, the repeated bank robberies and other crimes inflicted upon us would repeal our Criminal Codes. *Lorimer* is the only outstanding author who has *perceived this absurdity*.

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35. Lect. VI, 275.

36. First Book of Jurisprudence, 44.

He says:

There are many forms of crimes and folly which differ from ordinary crimes and follies only in that, being committed by large numbers of persons simultaneously, they partake of the character of customs. Customs of this class, though as reactions against each other they occasionally yield a resultant which becomes a source of law, have in themselves no claim to that character. Agrarian or communistic outrages are not sources of law, even in cases in which they lead to more accurate definitions of the natural rights of persons or the limits of private property.<sup>37</sup>

Elsewhere Lorimer posits this unanswerable argument:

It is obvious that, as there is no intermediate region of indifference between justice and injustice, so there can be no jural relations which are partly normal and partly abnormal. Indifferences between related entities is a contradiction in terms—an attitude which is not abnormal alone, but *anti-jural*—which carries us out of jurisprudence altogether.<sup>38</sup>

But he immediately attacks the foregoing argument in these incomprehensible words:

In consequence of their abnormality they are right relatively only, not absolutely—temporarily, not permanently. They are right only in relation to conditions that are wrong, because not wholly independent of human volition.

Then he wavers, as though not quite convinced that conditions that are wrong can be the source of rights, saying:

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37. Institutes of The Law of Nations, Chap. II, 32.

38. Ibid. I, 6, 7.

But these conditions are not natural phenomena, either ordinary, like the changes of the seasons, the alterations of day and night and the processes of growth and decay; or extraordinary, like earthquakes and thunderstorms. They are aberrations from the natural life of man—unnatural phenomena like preventable disease—the existence of which and of their consequences, can be jurally recognized only with a view to their removal. A system of jurisprudence which rests on the assumption of the fundamental rectitude of human nature, this admits the *laws of belligerency* and *neutrality* only conditionally and under protest.

Without fully comprehending its profound truth *Lorimer* presents this *definition* of The Law of Nations:

But we have seen that the perfect relation of all separate rational entities, when realized, is freedom—liberty to be and to develop themselves in accordance with their idea, or in other words, with the special character which their nature has assigned to them. Assuming this to be so, The Law of Nations may be further and more specifically defined as:

The realization of freedom of separate nations.<sup>39</sup>

He failed to perceive that the prevailing system means freedom only for the Sovereign States—the dominant politicians composing their governments—and subjection for the nations themselves. However, *Lorimer* was progressive—relatively; none of his predecessors since *Vattel*, or his successors, questioned the jural character of abnormal relations between Sovereign States.

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39. *Ibid.* I, 1, 2.

The authors of this profound change in the system of The Law of Nations from a highly moral one, promising much for human liberty, to a grossly material one, have at their head with *Bynkershoek*, two German contemporaries, *Johann Jakob Moser* and *Georg Frederich von Martens*, who constitute the founders of the prevailing Positivist school. Thus *Bynkershoek* declares:

The Law of Nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary.<sup>40</sup>

As for the law of Nature or the principles of justice and morality, or natural reason, they can become law, he affirms, only through positive adoption in practice and are without validity in themselves, for—

We must now see what usage has approved; that must prevail, since the Law of Nations is thence derived.<sup>41</sup>

Usage and custom are unquestionably the source of law, and of the truest law, because of its evolution from below rather than from its imposition from above, but a society of free individuals is something quite different from a group of omnipotent States, armed to the teeth and empowered to sacrifice the lives of all their able-bodied citizens in their own good pleasure. In man's individual societies no law, customary or statutory, has any validity if opposed to the recognized laws of morality and justice. Among every civilized

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40. De foro legatorum, Chap. 7, Sec. VIII.

41. Ibid.

people a law that is *contra bonos mores* is void. Violations of the moral law are not punished by ostracism alone, they are frequently considered legal wrongs, and some have legal consequences such as removal from office, statutory deprivation of civil rights, disciplinary correction and criminal punishment.<sup>42</sup>

It may be asserted, therefore, that though the legal scientists in the international field have succeeded in their treaties in separating the *legal law* from the *moral*, the former is *tending to approximate* the latter in our national systems with a constancy that promises their ultimate reconciliation.

The *law of Nature*, which embraces the terms morality, justice and reason, is entirely *too vague* to form the basis of any Law of Nations, *the Positivist* writers tells us, yet the law of Nature of the Greeks and the Romans *has its counterpart* in the *English common law* in its constant *deference to reason and reasonableness*. In the law of sales, for example, a controversy over price is solved by appeal to what is reasonable; reasonable care and what a reasonable man would do in the circumstances, are old and familiar ideas.

Though we speak of a *violation* of the *laws of Nature*, the phrase means generally that an act in disregard of a certain sequence of phenomena, in the animate or inanimate world, involves an inevitable consequence in the nature of a *penalty*. No governmental power is necessary to enforce this penalty; it is quite as potent in chastising *governments and nations as individual men* when disregarded. The affliction and misery of man in political society reveal this clearly enough. As

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42. Gareis. Science of Law, Secs. 6, 47.

*Montesquieu* long ago said,<sup>43</sup> those who assert that a blind fatality produced the various effects we behold in this world talk very loosely; for can anything be more unreasonable than to pretend that a blind fatality could be productive of intelligent beings?

There is then, in this sense, a *natural Law of Nations*, quite *distinct from* those rules of convenience and that *adjective* and so-called customary and *conventional* law, which monopolize the attention of textwriters. It is the same law, which, according as it is confirmed to or disregarded, unites or separates men in families, families in nations and nations in the great world society. Whether we call it natural law or natural reason, or the principles of justice, morality and humanity, it is undeniable that, if it acts in the *individual* relations of man, it *operates as fully in his collective relations*. If these general terms are still too vague, it is admittedly possible for men and nations to live honorably, to injure no one and to render to every man his due. That can be comprehended by even the dullest mind.

However, as has been pointed out, the *only so-called law* known to Sovereign States today is of two kinds, the *customary* and the *conventional*. The latter may properly be termed law since it is founded in the obligation of treaties; and *treaties* between States are nothing but *contracts* which may make good special or general law, according as they are

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43. *The Spirit of Laws*, Chap. I, 1 (Nugent trans.). While not a legal philosopher it is nevertheless interesting to find Schopenhauer saying:

The conceptions right and wrong as equivalent to injury and non-injury, are obviously independent of positive legislation and antecedent to it. Thus there exists a pure ethical or natural law and a pure science of law independent of all statutes. *Preßschrift über die Grundlage der Moral* (Griesbach) III, 598.

limited by the same general principles which limit contracts between man and man. Unfortunately the international contract is not so limited. As to the alleged customary law, founded in the practices of Sovereign States in denial and defiance of all community restraint, springing from uncontrollable self-assertion and recognizing no principles of justice and morality as of restraining force,—this is mere caricature of law. It can be considered law only if it is possible to conceive of a law of lawlessness or of an order of disorder.

As *Jackson H. Ralston* has pointedly said in his admirable little volume, *Democracy's International Law* :

If a thousand times men have been overcome by their enemies and despoiled of their pocketbooks, there is not thereby created a law of robbery. A thousand like instances between nations cannot create a law of war sanctioning such conduct. The fact that under given circumstances men or nations have taken advantage of one another does not create a law of wrongdoing, but only indicates a tendency on their part, their passions being excited, to ignore the laws of decency.<sup>44</sup>

While Mr. Ralston appears to blame the nations for thus having created a spurious law of international robbery, they are actually but secondarily culpable. For the instincts of peoples are, in the main, fair and honorable and their love of peace is a genuine one. The phenomena of war and violence, constantly afflicting the earth, are not of their origination—the necessity for the conscription of armies reveals this plainly enough—but are the product of the indulg-

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44. Chap. III, 35.

ence of the vices of power by their governments; they follow the adventures of the Sovereign State, with which the people are denied any connection but for which they are compelled to make every sacrifice. So long, however, as people permit a few of their number, deceptively garbed as Sovereign States, to wield so awful a power, they cannot escape some measure of responsibility.

Many suggestions of the advisability of *codifying The Law of Nations* have been put forward in recent times but it must now be clear that a system so essentially vicious cannot be codified without *stereotyping the most grievous wrongs*. Codification of law, even nationally, as we find it in our statutes, is largely an artificial device working in the interest of the power-holders and against that of the citizen. It is *custom alone,—the freely developed usages of society,—that has any elasticity and that alone maintains* a close connection with the sources of law. Statute law can be maintained only by the constant action of a legislature, which, it is devoutly to be hoped, will never be imposed upon man universally. The warning is very clear in our individual societies where, as Lomimer remarks,<sup>45</sup> obsolete law has a tendency to become encrusted in a mass of intricate technicality from which it is exceedingly difficult for common-sense or common honesty to dislodge it. *It can do nothing to advance jurisprudence*; it actually retards progress since every step in advance is a violation of the code.

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45. Institutes Chap. II, 35.