THE RÔLE OF ORGANIZATION IN INTERNATIONAL LAW

The appearance of a recent volume* in which the traditional basis of international law is discarded and a new "functional approach" is proposed, directs our attention once more to the part which organization must play in the development of international law. We have been told on various previous occasions that the international community was over-organized, that the various procedures for the compulsory settlement of disputes and particularly for the enforcement of the law went too far ahead of the sentiment of the international community, and that it would have been wiser to have sought to cultivate good will among the nations rather than coerce them into obedience to a law which they might not recognize as just. Whenever, it has been said, organization seeks to impose rules of law which have not behind them the support of public opinion, it is inevitable that the rules will be challenged and the organization be found ineffective to uphold them.

According to the functional conception of the law, now advocated, not only were the efforts made during the past twenty years to organize the international community misdirected, but they had quite the opposite effect from that which was intended—they operated not in the interests of peace and order but actually "as an agency of disharmony and conflict." Organization should have been a secondary, not a primary, objective. Legal rules should not be created in anticipation of the conditions calling for them; rather they should be sought in the "immanent lawfulness of actual behavior," so that states may be enabled to function "in the manner in which they necessarily must if they are to give expression to their inherent significance." There must be a system of law which "instead of restricting states, represents the conditions under which their functional ends can be best attained"; there must be a system of law which "by suggesting a frame of reference for the highest degree of constructiveness in coördinate conduct, stimulates an inherently orderly functioning, and thereby counteracts any arbitrary use of power."

The new functional theory points out that the traditional system of international law made the mistake of thinking of states as "persons" and endowing them with the qualities attributed to persons by the individualistic theory of private law. Rules of law were formulated in terms of the rights and duties of these artificial units, rather than in terms of standards of conduct based upon their actual "inter-relatedness." This necessarily led to emphasis upon the sovereignty and independence of states, and it had the effect of isolating them from one another as if by decree of international law itself. Hence it was to be expected that they should seek to settle their conflicting aims not in terms of the common interest of the international community, but in terms of their immediate self-interest. Moral principles were indeed acknowledged as binding upon nations, after

* *Law Without Force. The Function of Politics in International Law.* By Gerhart Niemeyer. Princeton University Press, 1941. *See, infra*, p. 527.

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the analogy of the moral law governing the conduct of natural persons; but these proved to be unequal to the task of restraining arbitrary conduct.

The indictment brought by the new functional theory against the exaggerated degree to which the conception of "sovereign states" was carried during the last decade of the 19th century and the opening decades of the 20th can readily be accepted. New means of transportation and communication had made possible closer political, economic and social relations which called urgently for international regulation; but the most that could be obtained was a succession of conventions dealing with the mechanical means involved in the regulation of these relations, together with conventions looking to the promotion of relatively minor common interests, such as international public health, where there were no conflicts of policy. None of these conventions attempted to meet the clashes of national interest which contained a standing threat of war. When we look back with the perspective of recent years and survey the proceedings of the Hague "Peace Conference" of 1907 we are appalled at the blindness of the statesmen at that "august gathering." Eleven of the thirteen conventions there adopted related to the conduct of the next war. Not a single convention dealt constructively with the underlying causes of war. When we read the works of Hall and of Westlake, of Bonfils and of Rivier, of de Louter, von Liszt, or any of the other outstanding treatises, even that of Oppenheim, we are unable to comprehend how they could have failed so completely to foresee the future and call for a constructive development of the law. The conception of a "positive" approach to the law had laid a heavy hand upon international lawyers. It was thought of more importance to determine whether a particular rule had or not received the consent of states, irrespective of its intrinsic worth, than to criticize the inadequacy of the law as a whole to meet the needs of the international community.

What statesmen and scholars of the pre-World War period failed to perceive was clearly seen at the close of the war. The primary need of the international community was the need of protection against violence. Here was a "function" of the first order, to be met before any other functions could be considered. The mistake of 1920 was not the mistake of creating an "organization" before there was "an inner sense of order" in the international community. The need for the organization was there, demonstrated beyond question by the anarchy of the World War. The mistake was rather in the failure to realize that there were other needs of the international community of almost equal importance, other functions to be performed if a lasting order was to be obtained. Unless international law could be extended so as to cover the hitherto unregulated relations of economic conflict, it was over-confident to believe that the organization created to give protection against violence would be able to function effectively. Doubtless it was too much to expect that the statesmen assembled at Versailles should have seen that the traditional rule of *laissez-faire* in

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international economic relations had outlived its day. By far the graver blunder was the failure to see that fact during the years succeeding the conference, when the evidence of the need of bringing order out of the anarchy of competitive production and distribution became more and more compelling.

The fundamental error of the proposed functional approach to international law is that it insists that organization be delayed until such time as the need for it would be so obvious that it could be set up without the aid of sanctions or other methods of force to enable it to attain its ends. Apparently nothing can be done to promote, by means of organization, a better understanding of what constitutes the common interest of the community as distinct from the more immediate interests of its individual members. This is a reversal of the experience of history in respect to national institutions, which show us that parliaments, in the course of seeking concrete ways and means of protecting interests already recognized as calling for legislative regulation, may develop a clearer conception of the content and scope of the national interest. When the Constitution of the United States was being drafted in 1787 the delegates at Philadelphia had, indeed, before them certain definite evils of the existing Confederation which they wished to remedy; and they created an organization which seemed to them adequate to attain the desired objectives. Once the organization was set up and undertook its task of correcting the special conditions that called for correction, the conception of the common interest of the whole nation, as distinct from the mere reconciliation of the conflicting interests of the several States, widened greatly. A forum had been created in which there could be a free exchange of views as to the respective relations of local and national interests; with the result that the conception of national interest grew stronger year by year, and the organization was enabled to anticipate national needs and thereby build up a sense of national unity. The demand for unity can, of course, be carried too far—further than the point at which there is assurance of the support of public opinion in the local areas of the nation. But that is an eventuality not likely to be witnessed in a freely established international organization for many generations to come.

It was not "too soon" in 1920 to organize the international community in the interest of law and order. To have delayed the organization until there had developed among the nations a greater realization of the need of law and order, would not have hastened the realization. What was needed was, indeed, a clearer understanding of the scope of the objectives of "peace" and "security" set forth in the preamble of the Covenant of the League of Nations. Peace should have been conceived in dynamic rather than in static terms, as a continuing process of adjusting individual national interests to the interest of the community of nations as a whole. Security should have been conceived, not in terms of maintaining a political *status quo*, but

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in terms of the assurance to each member of the community that the vital needs of its people would be taken into account in the formulation of general economic policies. It is to be hoped that the catastrophe that has come upon the world will enable us to see more clearly what the objectives of a future organization must be, so that strong measures to meet the primary need of the suppression of violence and the substitution of peaceful procedures will be accompanied by equally vigorous action looking to the improvement of the social and economic conditions that lead to acts of violence.

C. G. FENWICK

LAW WITHOUT FORCE*

It is impossible in the space of a review to give an adequate critique of a book as important as Dr. Niemeyer's *Law Without Force*. The reviewer will, therefore, limit himself to indicating something of its nature and scope and to urging his colleagues to read it. Much of the book is written in the unhappy jargon of the sociologist, but the content repays the effort required to translate that jargon into the English language.

The purpose of the author is nothing less ambitious than "a conceptual renovation of international law"—a searching analysis of the function of that law in contemporary society and a suggested new orientation to the dilemma which he phrases aptly as "the unreality of international law and the unlawfulness of international reality." This task the author approaches with intelligence, with relentless honesty, and with a breadth of learning which permits him to tap the fields of jurisprudence, political philosophy, economics, sociology, psychology, and history for the guidance they may give in the erection of his conceptual structure.

His sections on the historical rôle or function of international law are most illuminating. International law—such as it then was—could be a reality for the precursors of Grotius because of the conception of a harmonious universe unified by God and because in fact "the church and the spiritual universality of religious institutions provided a social group which had international ramifications and whose influence succeeded in imposing certain limitations on the particular interests of national states." (pp. 77, 137.) With Grotius came a new conception of the state as both the subject and the creator of international law. The Roman law concepts of the person and his individual rights, and of society as a voluntary combination of persons, were attributed to the state and the international community, and flourished in the personalistic and atomistic thought of the 17th century (pp. 294, 139 ff.). But here, also, international law was a reality because the dynastic solidarity of the European balance of power system was strong enough "to carry the main

* *Law Without Force: The Function of Politics in International Law.* By Gerhart Niemeyer. Princeton: Princeton University Press; London: Humphrey Milford, 1941. pp. xiv, 408. Index. $3.75. *See supra*, p. 524.

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