If it be assumed that the British laws follow the American Zone laws, then should they be applied to this case and if so, is the *res* here "identifiable property"? Is it the property of the plaintiff or of the steamship line of which he owned the stock? The *res* is the proceeds of property never owned by the plaintiff but by his company. Where would a decision for the plaintiff leave the Belgian company and would it arouse the ire of the Belgian Government in its behalf? Perhaps Belgian laws and policy were involved in the purchase by the Belgian company. Would a decision for the plaintiff have interfered with the United States policies in these directions, or with the general question of reparations in respect of all three countries? Judge Hand wisely considered the question of reparations and, while this was not at first an impressive consideration to the writer, the study of the international aspects of this case leads to the conclusion that such cases as this one cannot be adequately handled by local courts of any one country applying principles of local law, but should go before an international tribunal of some sort to be established and governed by mutual agreement of the governments concerned.

While at first blush it seems incongruous that the United States policy in Germany should favor restitution and indemnification for Nazi atrocities to the Jews and that the court in the Van Heyghen case should deny relief here for the same kind of Nazi acts, yet considering the complex international considerations involved in this case, it seems on the whole better for the court to recognize its limitations than to try a case in which it lacked competence to do full justice in an international sense.

L. H. WOOLSEY

THE SWING OF THE PENDULUM: FROM OVERESTIMATION TO UNDERESTIMATION OF INTERNATIONAL LAW

The history of man's spiritual activities, of his attitude toward the world and life as a whole as well as toward particular problems shows a continuous swing of the pendulum from one attitude to the opposite one. Philosophically we see a change between the different attitudes which can be taken—all outlined already by the thinkers of ancient Hellas. It may be that the first attitude has reached its fullness, that its possibilities seem, for the time being, exhausted. It may be that the first attitude has seemingly been disproved by historical events and no longer seems adequate to the needs of a changed situation. Then trends and tendencies appear which may ultimately climax in the establishment of the opposite attitude. And as, in order to establish the new attitude, very likely a distorted picture of the former one will be given, and as the new attitude, once established, itself often goes to extremes, the pendulum not only swings from one side to the other, but from one extreme to the other.

Thus classicism is followed by romanticism in the field of art, literature

and music. The pendulum of philosophy swings between idealism and realism, between idealism and materialism; only the spirit counts, says Hegel; there is only matter, says Marx. Centuries of faith in reason and natural law are followed by the utmost positivism of Comte. In the realm of law natural law with its extravagant claims is followed by strict legal positivism. The optimism of the nineteenth century is followed by the pessimism of the twentieth.

This swing of the pendulum is, of course, particularly great in periods of fundamental crisis like our present epoch, where the very survival of our Western Christian civilization is in question, where the very ideals on which this civilization rests are questioned and attacked, where, in consequence, everything is insecure. This insecurity and pessimism pervade the attitudes toward all problems. Doubts as to the fate of our culture can be found already in Pascal, they become pronounced in Kierkegaard, they are dogmatically laid down by Spengler, followed by Toynbee. Insecurity is the mark of our epoch and it shows itself everywhere in musical atonalism just as much as in Heisenberg's insecurity principle, in the insecurity of human relations within or between the states. Firm faith in science and progress is followed by doubt; natural sciences and reason are minimized in favor of intuitionism. The long appeal to reason is followed by an appeal to the irrational. The pessimism of an age of crisis makes men pessimistically doubt whether social relations are soluble at all.

As far as the attitude toward international law goes, a period of overestimation, so characteristic for the years between the two World Wars, is followed by a period of underestimation. It is, to a great extent, this change of attitude which spells the difference between the League of Nations and the United Nations.

At the end of the first World War, fought under the leadership of Woodrow Wilson "to end war," boundless optimism prevailed. There was everywhere, in victors, neutrals and vanquished, not only the will to achieve a better world through international law, but also the firm conviction that it could be done. Hence, the ambitious experiment of the League of Nations. Away with power politics! No more secret diplomacy, no more entangling alliances, no longer the forever discredited balance of power, no more war! Democracy and the rule of international law will change the world. The Covenant puts international law "in the actual conduct among Governments" and justice first, insists on disarmament as the way to peace, emphasizes the trust principle in the Mandates.

In all the dealings of the League international law was at the heart of the discussion. Idealistic approach, optimism, emphasis on international law created the "Geneva atmosphere." This writer who was so often in Geneva between 1920 and 1932 knows it from experience. One must have been there in order to evaluate the impression, the genuine enthusiasm all around, when Aristide Briand made his famous speech: "*Plus de*

mitrailleuses!'' The legal department of the League played a great rôle; the Permanent Court of International Justice was frequently resorted to. The Mandates Commission was primarily moved by legal considerations. Legal arguments were the core of every debate; every delegate knew that he must justify his attitude legally. Hence, greatest importance was given to international law in the foreign offices. Many a delegate traveled to Geneva with a whole library of international law and always well accompanied by legal advisers. In the Hungarian-Rumanian Optants' Dispute both parties tried to produce the greatest number of opinions by leading international lawyers.

And, outside of Geneva, the very existence of the League, the foundation of the Permanent Court of International Justice, created enthusiasm and led to an overestimation of the efficacy of international law. An enormous number of legal studies on the League were published in all languages. The teaching of international relations centered on international law and the League. The Rockefeller Foundation created the Geneva Institute, the Carnegie Endowment the Hague Academy of International Law. The literature on international law was greatly influenced by this general trend of optimism.

The Covenant did not go to extremes; it recognized realistically that war can be successfully eliminated only insofar as peaceful substitutes are created; it laid down only ''obligations'' (in the plural) not to resort to war. Article XVI contains sanctions in a strictly juridical sense only against a member which had violated its obligations under Articles XII, XIII or XV. The Covenant does not abolish war; is by no means based on the doctrine of *bellum justum;* it does not deal with the just cause of a war, but contains merely procedural obligations. Mr. Kellogg himself never made extravagant claims for the Kellogg Pact.

Even under this optimism the facts were, from the beginning, different. Old-fashioned alliances against Germany and Hungary were concluded *''dans le cadre de la Société des Nations,''* under the escape clause of Article XXI. The delegates to the League had mostly the interest of their own states in view, so that Scelle could bitterly complain of ''merely multinational, not international gatherings.'' Geneva oratory was contradicted by what the states did. The Corfu incident in 1923 gave a foretaste of the unreality of ''collective security'' in the face of a Great Power.

Then came the flagrant violations of the ''thirties,'' climaxing in the second World War. They had, as a first effect, the going to extremes, especially by a literature of wishful thinking. Fancy interpretations of the Kellogg Pact were put forward; the more ''collective security'' was shown to be non-existent, the more the utopian writers emphasized it. The more the facts were in contradiction to their writings, the more lyrical they grew. The confusion between *lex lata* and *lex ferenda,* the mistaking of often contradictory trends and tendencies for new rules of international

law already established, the mistaking of Geneva—or Pan American—oratory for facts grew worse.

The events of the "thirties" also had the opposite effect: the time was ripe for the swing of the pendulum to the other extreme, from overestimation to underestimation of international law, from the emphasis on international law to the emphasis on power, from optimism to pessimism, to the new "realistic" approach. Already books published in the "thirties" show this new approach.[1]

During the second World War the new "realism" appeared in state action and literature. The three leading statesmen on our side were all realists. The bases-destroyer deal and Lend-Lease Act were moves of a realistic policy; legal considerations were less prominent. Not peace through law, but security through power, became the dominant idea and shaped the thinking as to a new world organization, built upon "more realistic bases" than the League. Power, held by the Big Three, and, therefore, their predominance, became essential. In the literature, many war books not only condemned German geopolitics as aimed at imperialism, but tried also to brand it as a "pseudo-science." But at the same time attention was directed again to the writings of Sir Halford MacKinder—exactly from whom Karl Haushofer had started—and an American geopolitics was presented.[2] In the field of international law, important writers [3] came to the conclusion that it is for all practical purposes dead.

The Dumbarton Oaks Proposals do not even mention international law. Only the Chinese proposals and widespread criticism brought about the inclusion of international law in the Charter of the United Nations. The "realism" of the Charter can be seen in the Trusteeships, as distinguished from the League Mandates, in the relative unimportance of the disarmament problem, in the powers of the Security Council as well as in the "veto" given to the permanent members, in the fact that the Security Council, deciding "upon the existence of any threat to the peace, breach of peace or act of aggression," is not bound by rules of international law, so that its "measures" must not necessarily be sanctions in the juridical sense, contrary to Article XVI of the Covenant. Also the practice of the United Nations is certainly very different from that of the League. Legal questions play a subordinate rôle at the United Nations and in diplomatic correspondence. The International Court of Justice is not overburdened; whether its advisory opinion on the admission of new members will be

[1] See, *e.g.*, F. Schuman, International Politics (1st ed., 1933); Simonds and Emeny, The Great Powers in World Politics (1939); and the writings of E. H. Carr in England.

[2] Nicholas J. Spykman, American Strategy in World Politics (New York, 1942).

[3] Friedmann, What's Wrong with International Law? (London, 1941). See also papers and discussions during the war—Vols. XXVI to XXVIII (1940–1942) of the Transactions of the Grotius Society.

heeded, remains to be seen. The oratory contrasts strikingly with that of Geneva. If the most undiplomatic language, bitterness, invectives and political propaganda constitute realism, then there is plenty of realism at Lake Success (*lucus a non lucendo*).

The new "realism" makes itself felt everywhere. International law as a special subject has been dropped as an examination topic for entrance into the U. S. Foreign Service. It is significant that the Rockefeller Foundation and the Carnegie Endowment, although certainly many other motives were of influence, have withdrawn their subventions from the Geneva Institute and the Hague Academy. Although the Carnegie Endowment—traditionally a bulwark of international law—continues to do much for international law, for publications on and the teaching of international law, the new "realistic" tendencies can be seen in top decisions of recent years. The whole trend in teaching international relations shies away from international law and puts the focus on politics and power.[4] The Institutes at Yale and Princeton emphasize the "realistic" point of view. So does the new journal *World Politics*. Professor Harold Sprout states that earlier the study of international relations was carried on "in the sterile atmosphere of international law."[5] Excellent international lawyers like P. E. Corbett and Hans J. Morgenthau have, so to speak, "deserted" international law and gone with flying colors into the "realistic" camp. The latter has given us, one might say, the bible of "realism."[6] The balance of power is being honored again and Macchiavelli quoted with approval.

Yet, even under the United Nations and in the literature, not everything is "realism." The United Nations is based on the belief of the continued coöperation of the "Big Three," although a study of world history from oldest times could have shown that alliances of heterogeneous states are likely to disintegrate, as soon as the common enemy is vanquished. It was not foreseen that the "realistic" veto may lead to paralysis. It was not seen that "collective security" and other tasks cannot be fulfilled by an association of "sovereign equal States," which has scrupulously to respect the "*domaine réservé*" of the members. The facts are as under the League. As there is no collective security, new alliances and counter-alliances are concluded, shamefully veiled as being "within the framework of the U.N."—only the language has changed since League times from French to English. And both camps again make use of the two escape clauses—the West of Art. 51, the East of Art. 107.[7] Far-reaching utopian

[4] See Wm. T. R. Fox, "Interwar International Relations Research," World Politics, Vol. II, No. 1 (October, 1949), pp. 67–79; and Frederick S. Dunn, "The Present Course of International Relations Research," *ibid.*, pp. 80–95.

[5] World Politics, Vol. I, No. 3 (April, 1949), p. 404.

[6] Hans J. Morgenthau, Politics Among Nations (New York, 1948). See below, p. 219.

[7] G. Schwarzenberger, "The North Atlantic Pact," The Western Political Quarterly, Vol. II, No. 3 (September, 1949), pp. 310–11.

schemes appear also under the reign of the United Nations and a new utopian trend—"world government" and so on—can be seen in some parts of the literature.

Insofar as the new "realism" tends to correct mistakes of the earlier attitude, insofar as it is directed against the *overestimation* of international law, it is to be welcomed. International lawyers must not forget that international law does not operate in a vacuum, that even proposals *de lege ferenda* have sense only within the boundaries of political possibilities of being realized at a particular juncture of history. They must not confuse the law that is with their wishful thinking. They must recognize that many of their utopian proposals presuppose a world state under world law, whereas the present international community is only a loose society of sovereign states under international law and is likely to remain such for the foreseeable future. Good international lawyers, who, as lawyers, are trained in looking to the law that is and to realities, rarely make this mistake. Thus Edwin D. Dickinson [8] has given us a severe—perhaps, too severe—critique of positive international law. Alf Ross [9] always urges a "sober, realistic attitude" toward international law. No one will say that J. L. Brierly [10] neglects the realities.

But insofar as the new "realism" tells us that there is nothing but power and that international law is "sterile," insofar as it tends toward an *underestimation* of international law, it must be opposed with all energy. In so doing, it sins against its own "realism." It is not true that problems of international law "are largely irrelevant." International law *is* a factor in international relations: Brierly,[11] and Jessup in his *A Modern Law of Nations,* have recently written pages proving convincingly that this is so. Municipal law, too, moves in a political atmosphere. Will this country, therefore, accept Hitler's "Might is right" or Lenin's "Law is politics"? *Ubi societas, ibi jus.* The law has necessarily to play an important rôle, and so has international law. Extremes are always wrong: the truth lies in the golden middle way. The correct attitude must be equidistant from utopia, from superficial optimism and overestimation and from cynical minimizing; neither overestimation, nor underestimation: International law is "neither a panacea nor a myth." [12]

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[8] "International Law: an Inventory," California Law Review, Vol. 33, No. 4 (December, 1945), pp. 506–542.

[9] A Textbook of International Law (1947).

[10] The Outlook for International Law (Oxford, 1947).

[11] *Op. cit.*

[12] J. L. Brierly, The Law of Nations (4th ed., Oxford, 1949), p. v.