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Law, the Free Peoples, and International Peace

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LAW, THE FREE PEOPLES, AND INTERNATIONAL PEACE.*

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PEACE, at least international peace, it has often been said, is indivisible. However much we are many nations, we are one world. However strongly we may feel that the world is half slave and half free, by the compulsion of geography and the invention of science, it is inescapably one world.

No dissatisfied segment of humanity can depart from this Earth by migration—at least not yet. The lawyers as well as astronauts are beginning to think about the law that rules men when they move into outer space. Let me mention the article of the Assistant Director General of the I.L.O., Mr. C. Wilfred Jenks, in the International and Comparative Law Quarterly a year ago, entitled "International Law and Activities in Space", and the pioneering of Andrew G. Haley, general counsel of the American Rocket Society, in what he calls "metalaw", that is, in his words, "the law governing the rights of intelligent beings of different natures and existing in an indefinite number of different frameworks of natural law."

No part of humanity, then, can for an inestimable future escape the rest of humanity except by destroying it. This choice, however, is one that we are all resolved not to make, however strong our hostility to the ways of some nations; although we hear an occasional voice raised in favor of a "preventive war" meaning a war of enslavement or annihilation. Neither in personal relations nor in international relations is extermination or enslavement a debatable alternative to coexistence, least of all is it debatable among those who profess the law. Today between the free peoples there is an almost universally expressed and acclaimed ambition to achieve sure peace, peace that is more than the absence of war, peace that is the art of living together whether we like or dislike those with whom we have to live.

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Why is the problem one of the living together of nations rather than of persons, when it is not crowns or states but people that are our real concern? For our purposes we might answer, "because *international* peace is what we are discussing." But that is a postponement not an answer; it only leads to a renewal of the fundamental question but now in the form: why is international peace a problem quite different from that of peace between persons or families or churches; why is international peace a problem entirely distinct from interracial or industrial peace. The answer is not that loyalty to race or loyalty to an industrial group is never as strong as loyalty to one's nation. In past centuries have we not seen thousands whose loyalty to kings by alleged divine right was stronger than loyalty to the nation? Have we not seen more recently tens of thousands preaching class warfare and overthrow of social institutions by violence? Have we not seen hundreds of thousands whose loyalty to church or race (sometimes in combination), wrongly expressed in disdain, if not hatred, of some other religion or people, has led to extreme cruelty, to slavery, to apartheid in South Africa, to mob conflict between Moslems and Hindus a few years ago in India, to Crusades and other so-called wars of religion, to inquisitions and oppressions and lynchings, that have undermined, divided, even destroyed nations that had not developed sufficient cohesion to withstand these terrible waves of devotion to intolerant aims related to race or religion?

No, the difference between international peace and the peace that is needed in industrial and in race relations is in the garment of law that clothes the nation, a garment in part made of organized physical power.

The combination of standards and force to compel the observance of the standards is now the monopoly of what the political scientists call the state, that is, the people rooted in a geographic area bound together by political ties of nationality, ties of public law, whatever their race, religion, or industrial status. These ties are the core of law. Each nation—a term I prefer to state—requires of its nationals, and of those assimilated partly and temporarily to its nationality by coming within its frontiers, obedience to its rule. It is the rule plus the compulsion that distinguishes law from other social controls. It is the rule of law making the force orderly, and presumptively, just that distinguishes the force of the state from the force of a mob.

Law governs not only the relations between man and nation but also the relations between group and group and between man and man within each nation. Thus the problem of industrial and interracial

peace becomes, in an important part, a problem of making proper law and thereby accomplishing incidentally an orderly application of force to assure the freedom of permitted conduct and to prevent successful use of force in other ways.

Force has two strong arms—the arm of the murderer and the arm that stays the arm of the murderer, the strength that is riotous and the strength that guards the prisoner, the armament that violates the adolescent body of international law and the armament that, whether wielded by a nation or by a world authority, defends, fortifies and develops the growing body of international law, the bludgeon of injustice and the tool of justice. Force well-wielded removes mountains, dams rivers, builds good societies of men, and force ill-used builds Chinese walls and iron curtains, enslaves peoples, and today could swiftly annihilate mankind.

It is nations that monopolize organized force. Within each nation this force is an aspect of a legal order more or less friendly to justice, an order which we can firmly believe will bring forth good fruits, if it is fertilized by knowledge, watered by prophetic vision, and firmly rooted in popular will. But between nations law not only lacks assurance of the companionship of force, but the weight of organized force may even be aligned against it. Even if the law of nations were clear, and of course it is often obscure, it faces nations able to flout it. Thus internationally we live in a perpetually unstable equilibrium, unstable not only because international law is immature but chiefly because it lacks means to overcome the organized forceful opposition with which any nation or combination of nations may defy its standards.

There is nothing novel in saying that international law is immature because it lacks sanctions, or that international institutions of government—courts to apply law, legislatures to change law, and a big stick to enforce law, are all needed to assure the rule of law between nations. The problem is how, and how fast can good leadership of popular opinion achieve them.

I was struck by what Professor Louis Sohn of the Harvard Law School said recently in describing his course on UN Law. "The course", he said, "is concerned with the mysterious process of creation of new law . . . with investigation of the process of legal growth", and he remarks, "there is hardly a parallel in history for the amazing growth of the UN since 1945; it compares favorably even with the development of the United States in the first twelve years of its existence"—that is, the 12 years from 1776.

Mr. Sohn spoke of the earliest years of the United States, those years in which our union was as shaky, after the pressure of the Revolutionary War was over, as the UN sometimes appears to be today. But the clamor of every nation, old or new, to enter the organization of nations proves its significance. However much it may seem a fool's paradise if we judge it by its immediate success in replacing war and the threats of war by law and the enforcement of law, the UN is a complete success if we appraise it by the many who wish to join and the none who wish to resign, even though they sulk in their tents from time to time. We need to recall the setbacks of our own vision, events not only of the dozen years before the framing of the Constitution but of the whole first century of our nationhood, the failures of law between states—such as the flouting of law by Georgia in ignoring the decrees of the Supreme Court and by the President in refusing to enforce them when the Cherokee Indians were brutally driven west; and the epic failure of law that was the four years' war between the states. Yet today within the United States we live in a house of law, confident that it can not be torn down from the inside.

In contrast, to prepare to meet the use of force by other nations we expend our wealth in evanescent armament. The transformation of the loose league of revolting American colonies of Great Britain in 1776 into the union of 1789 that was effected by the adoption of the Constitution seems to me less revealing of what we may strive for or expect to occur between nations than the pattern of another union. Ours was an almost miraculous jump. We can not, now, imagine that anything like it will occur between nations more diverse than were our 13 states. So I turn to another country whose development was slow but, in the large, constant as it progressed from a revolutionary league to a nation. In the twentieth century, however, the sort of progress that it took centuries to make, might be compressed into decades, so fast is social change today.

I speak of Switzerland, which grew by accretion of city and country groups, each proud of its individuality and independence, but learning by experience to appreciate more highly its interdependence with its neighbors. From the Pact of Rütli of 1291 between three Alpine valley communities rebelling against Hapsburg rulers, a pact prophetically self-styled an "everlasting alliance", these forest cantons bordering Lake Lucerne extended individually or jointly the bonds of alliance to other urban and rural political units within the German or Holy Roman Empire. Later, by wars against the Dukes of Milan on the south and the Kings of Burgundy and of Savoy on the west,

Italian and French-speaking people, as subject folk in the earlier period but eventually as partners, came within the Swiss complex. In this checkered story of alliances and military struggle, the great advances, the inclusion of Zurich, of Bern, and later of Basel, were made by voluntary agreement, usually to face a common enemy.

In the late fifteenth century, rivalry between urban and rural cantons in disputes over the admission of new members, threatened the integrity of the Confederacy. At the Diet of Stans in 1481 when it seemed probable that the failure of all attempts to come to an understanding would result in the disruption of the League, the mediation of Nicholaus von der Flüe (Bruder Klaus, as he often is called), a holy hermit of Sachseln in Obwalden, succeeded in bringing both sides to reason and the Pact of Stans was agreed on. New pledges of mutual assistance and standards for division of war booty and for government of conquered territory were set up, and Fribourg (a French-speaking city) and Solothurn were admitted to the Confederacy.

In the next century cleavage between town and country was succeeded by an equally bitter, largely coinciding, struggle between religious regulars and religious dissenters.

But even during the Reformation, which struck heavily in Switzerland, especially in the cities, under the leadership of Zwingli in Zurich and under the stimulus of Calvin at Geneva (then an independent city-nation), the Swiss Confederation did not fall apart. Before it was thus deeply divided and politically weakened, it had fully established its practical independence from the Holy Roman Empire in 1499. It maintained it, and despite the turmoil of the following century and the frightful war that decimated Germany in the seventeenth century, Switzerland, now comprising thirteen cantons, abandoned all policy of conquest. It was absorbed in internal religious struggles that repeatedly broke into intercantonal warfare. But this warfare was moderated by some sense of continuing confederacy. The armed struggles between the Catholic and the Protestant cantons—an outward conformity in religious allegiance of the people of each canton was the prevailing practice—were relieved by truces, by fissions of cantons, and by the common bond of administering the bailiwicks or subject territories of the confederation, where some freedom, or at least local option, of religious allegiance was allowed. Most notably too, during internal hostilities, certain cantons were constantly mediating between belligerent neighbor cantons, and offers of peaceful intervention to create understanding between enemies became an established technique in intra-confederation relations, a precursor of the policy

of affirmative neutrality that characterizes Switzerland as a nation today.

The Swiss Confederation, prior to its subjugation by Napoleon, hardly had a government. It had a Diet, which was a continuous diplomatic conference, a small-scale UN General Assembly, in which met the representatives of powerful and of weak units, of Protestant and of Catholic units, of units of German, French and Italian speech, to consult concerning common interests, but without power to command one another by any sort of majority vote. The basic law of Switzerland at this period, says one Swiss historian, was "a formless conglomeration of international compacts." Perhaps that is also a good description of the relations of the free nations today.

But the increasing practice of mediation and arbitration as a method of settling those intercantonal differences that were not dissipated by direct negotiation or by discussion in the Diet, marked the increasing will to abolish war between cantons. "Common to all the intertwining treaties of alliance between the thirteen old cantons"—those before Napoleon's instrusion—"is the principle that controversies must be settled by arbitration in a manner binding on all members", says Ernst Brand, the legal historian. Many of these treaties had detailed provisions regarding such means of settlement; all required the arbitrators to achieve settlement either by conciliation or, if that failed, according to law, that is, according to international law, including this elaborate fabric of treaties that tied the cantons to one another, basically the same sort of law that the Swiss Federal Tribunal applies today in the cases between cantons that it is constantly deciding.

The late Judge John Bassett Moore remarks that it was "a distinctive phase of Swiss arbitral procedure" of all sorts that arbitrators should first attempt to achieve settlement by mediation, a practice, one may note, that marks Swiss judicial administration even today. It was only if mediation did not produce agreement, that the abritrator or group of arbitrators was bound to decide and then to decide by law.

Emil Usteri, another Swiss historian, writing of Swiss arbitration, again referring not specifically to intercantonal arbitration, says:

> "The arbitral tribunal on Swiss soil, besides the friendly procedure (Minneverfahren) of mediation proper and the legal settlement (Rechtsspruch) also knew and used the equitable settlement (Minnespruch), that is, the award based on considerations of fairness (Billigkeit)",

but of course only with the parties' consent. William Bross Lloyd, an American member of the Religious Society of Friends, who has studied

deeply the history of political mediation in Switzerland and has gathered his learning into a book (still unpublished) called "Swiss Experience of Waging Peace" says similarly of political intervention by cantons:

> "Two general lines of procedure were developed by the cantons; disputes were settled either 'in Minne,' meaning literally in love, connoting a process of friendly compromise embracing conciliation and mediation, or 'in Recht', namely by arbitration under the pacts between cantons."

Between these two solutions a Minnespruch was also possible if the parties requested it—a final decision like a Rechtsspruch, but a decision made by love rather than by law, or, as it is called in the Statute of ICJ of this century, a decision *ex aequo et bono.*

These institutional methods were expressed in a wealth of Swiss practice and pervaded all intercantonal treaties. They were the mortar that held the pugnacious bricks together, too loosely to resist the invasion of Napoleon, but strongly enough to prevent collapse during the six preceding centuries.

In 1799 Napoleon set up the Helvetic Republic, a unified state. But, though the French yoke was not removed until Napoleon's downfall, he re-established Swiss federalism by the so-called mediation of 1803, adding to the Republic at the same time three lesser leagues in the southeastern frontier to form the polyglot canton of Graubünden.

This federal regime imposed by France for a decade was, of course, abandoned, when Switzerland regained its freedom. But, the looseness of the old confederacy was not resumed, for its weakness in 1799 was borne in mind. The new constitution, the Pact of 1815, created for the first time a national army.

Perhaps the Swiss Confederation from 1815 to 1848 may be compared to NATO today, a unit for certain military purposes, but still without a government in any proper sense: no executive body; nothing but the diplomatic conference of the Diet as a rudimentary legislature; no judicial organ. There was no customs union of the cantons, no such common market as is now in sight for the six west European nations that comprise the Coal and Steel Community, which moreover already has specialized organs of legislation, adjudication, and execution. The Diet was, however, given power to declare war and make treaties of peace and alliance, provided the representatives of three-quarters of the cantons concurred. Other treaties could be made both by the Diet and by the cantons.

The number of cantons was raised, in 1815, to twenty-two by the recognition of all previously subject territories as cantons, a French innovation that persisted, and by acceptance to membership of Geneva and other formerly independent political entities, and a national flag was adopted.

Political turmoil in Europe in midcentury moved Switzerland to a stronger union. A short civil war in 1848—the last organized fighting that has occurred in Swiss territory—made the victors resolve to increase central authority. The Pact of 1815 was replaced by the Constitution of 1848, modeled more on that of the United States than on that of any other country. It established a bi-cameral legislature with substantial powers, a full-time executive council, and a supreme court. The executive council and the court between them were empowered to settle all intercantonal disputes. By an important constitutional revision in 1874, the court, previously manned by judges on per diem hire, was reconstituted as a bench of full time judges elected by the legislature and the court's powers were enlarged, particularly in the field of intercantonal disputes. With the establishment of these permanent bodies, arbitration between cantons has withered, but an ever firmer and fuller intercantonal law has developed, molded by judicial decision, and in recent years, much affected by federal legislation. Swiss intercantonal litigation today is much greater in number of cases and in variety of controversy than is interstate litigation in the United States Supreme Court.

Here is a historical development which seems to me the best prototype of what the free nations can do in the building of peace between one another. At least, some of them are at this work. Are we doing our share?

Can we thus build an international peace that will embrace all nations? An answer to this is not within the scope of the present discussion, but therein lies the truly difficult area, for international peace is indivisible, and the development that took place between the varied cantons of Switzerland, if it occurs only between the free nations, is, after all, no large step toward international peace.

For a century the United States has not armed against Canada, nor Canada against the United States. In this century we do not arm against free countries nor they against us. But until this very month, national armament, the barometer, not the enemy, but of international peace, has given no sign of clearing weather between the free nations and those behind the Iron Curtain.