

DIVERSE CHALLENGES TO THE INTERNATIONAL LEGAL ORDER

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The traditional system of international law as it has been formulated customarily from the time of Grotius and before is being forced to adapt to new developments in technology as well as changing concepts concerning relations among nations. The concepts of national sovereignty and mutual defense, for example, must be re-evaluated in terms of the growth of the two super-powers. The world's prosperity, security, and ultimate survival may depend upon the revision of the principles of international conduct.

Before we can adequately deal with challenges to the system, we must examine some of the fundamentals which comprise international law. The following are based on one author's interpretation of these fundamentals.¹

Among these basic concepts is the fact that "... sovereignty provided a suitable foundation upon which to construct rules and processes for the governance of international behavior."² Citizens looked to their national governments for welfare and protection, and these national governments were entrusted with protecting the nation's interests on the international scale.

A second basis is that of the national government's authority and obligation to establish limits of power where an overlap or conflict of interests occurred. This led to the formulation of the doctrine of territorial integrity and to rules governing the conduct and protection of nationals abroad, necessary in the attempt to achieve and maintain peace and security with regard to contact with other nations.

A third aspect of the traditional basis of international law is the role of war, which became accepted as an effective and moral instrument by which national goals could be achieved. The present situation depends upon the use of any means *except* force. We witness the difficulty encountered by such bodies as the United Nations to remove war as a means of furthering ideology or achieving national interests. It is one thing to forbid war, but it is something quite different to enforce such a policy.

The reform of international law is complicated by the dominant role played by Western European nations in laying the groundwork for the modern system. The Christian heritage these nations shared, as well as their positions as capital-exporting states, bound them together in common interests. As Falk observes, "... there is no

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¹ Richard A. Falk, *Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order*, Vol. II of *The Strategy of World Order* ed. by Richard A. Falk and Saul H. Mendlovitz (2 vols.: New York: World Law Fund), p. 179.

² *Ibid.*, p. 174.

doubt that international law developed at a time when the dominant Western European nations could impose their will upon the rest of the world with the exception, perhaps, of the Western hemisphere where the dominance of the United States produced somewhat equivalent results. This means that international law started the twentieth century with a heavily European bias.³ Now these nations are reluctant to give up their advantages with the result that newcomers on the international scene cannot achieve parity in international legal matters.

The final aspect to be considered in the discussion of traditional, legal order is the favoritism shown to those nations practicing colonialism. The dominant Western powers have been unwilling to do away with the system of colonization. This infuriates anti-colonial groups to the point where they refuse to accept an international legal system which is based on or which supports colonialism. Stability on the international level cannot be realized without the cooperation of all nations, and yet all nations cannot be brought to agree on most issues of international significance.

Present-day challenges to the international order as it appeared at the beginning of this century have arisen in many forms. Although many writers have examined these challenges, their conclusions are basically the same as to how these threats should be classified. The threats which force a re-evaluation of the customary system are:

1) the development of nuclear weapons by which our survival is threatened if we cannot find an alternative method for the settlement of disputes;

2) the decline of national sovereignty as a means of achieving economic and industrial stability together with the doctrine of alignment for security;

3) the emergence of non-national organizations (such as the United Nations) and regional organizations (OAS, NATO) which de-emphasize national authority;

4) the emergence of new nations which claim national sovereignty at a time when the emphasis is shifting away from this national sovereignty in favor of supra-national organizations;

5) the stalemate between opposing super-powers based on fundamental differences in ideology which do not lend themselves to compromise. This stalemate has come to be known as the Cold War.

Let us examine these threats in more detail.

THE NUCLEAR THREAT

The development of atomic energy has presented man with two alternatives. Peaceful application of nuclear power is capable of increasing prosperity throughout the world and of raising the standard of living in technologically underdeveloped nations. On the other hand, such nuclear power has taken the form of weapons capable of mass destruction to the extent that mankind would never recover from

³ *Ibid.*, p. 178.

their use. In order to avoid the destruction a nuclear war would bring, cooperation between nations having such capabilities is essential.

The foundation of agencies such as the European Atomic Energy Community (Euratom) and the International Atomic Energy Agency is indicative of the concern for the necessity of controlling the use of atomic energy. Aside from the immediate effects of an atomic war, fall-out

“. . . is unlimited in both time and space. A war between the Atlantic Community and the Soviet Bloc, resulting in mutual destruction, would not only annihilate white civilization, it would also leave behind a world that is biologically impaired. Thus the use of atomic weapons, or their prohibition, is not a matter concerning the belligerents only. It concerns all of mankind”⁴

Yet, it has been noted that although the struggle continues in the IAEA between the United States, the U.S.S.R., and underdeveloped nations “. . . the national policies of the superpowers *outside* its (the IAEA) framework have posed the greatest threat to its effective functioning. Both superpowers, with the United States in the lead, have shown a preference for bilateral and regional arrangements that have bypassed the Agency.”⁵ This illustrates the unwillingness of the superpowers to subject themselves to the authority or control by a supra-national organization.

Disarmament is often proposed as the solution to the threat of nuclear war, but effective disarmament is not easily achieved.⁶ Attempts at disarmament failed at the Hague Peace Conferences of 1899 and 1907, and talks collapsed at Geneva in 1933 at the World Disarmament Conference, established by the League of Nations. No formal agreements were reached. The problem was approached by the United Nations in 1947, 1952, and 1953 with no success. A draft for a disarmament agreement was submitted on August 29, 1957 and accepted by the General Assembly on November 14, 1957, but the Soviet Union withdrew from the commission and its subcommittee and then called for a disarmament meeting of all members of the United Nations. Nothing came of this meeting. Since that time disarmament negotiations have been carried on outside of the United Nations.

The London Treaty of 1930, by setting maximums of naval strength among Great Britain, the United States, and Japan, actually permitted a buildup of American and Japanese fleets.⁷ Thus, one may legitimately question the effectiveness of disarmament agreements in general. A ratio of power cannot be interpreted as disarmament, nor would real disarmament guarantee peace, for restriction of nuclear devices would merely turn attention to conventional weapons. The technology of warfare and the means of conduct would be altered,

⁴ B.V.A. Roling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960), p. xvii.

⁵ John G. Stoessinger, *The United Nations and the Superpowers* (New York: Random House, 1965), p. 177.

⁶ For some further discussion of disarmament, see Hans J. Morgenthau, *Politics among Nations* (3rd Ed.; New York: Knopf, 1961), pp. 373-396.

⁷ *Ibid.*, pp. 406-407.

but the abolition of war would not be guaranteed. "So long as nations advance contradictory claims in the contest for power, they are forced by the very logic of the power contest to advance contradictory claims for armaments. Therefore, a mutually satisfactory settlement of the power contest is a precondition for disarmament."⁸ The value of disarmament lies in its ability to ease tension and create confidence in the national and international governmental agencies, but disarmament alone cannot guarantee international peace.

THE CHANGE IN THE CONCEPT OF SOVEREIGNTY

"The complexity of modern economic development and industrial activity leads to much less sufficiency on the part of the national unit."⁹ Herein lies the second challenge to the traditional international legal system.

It has become necessary for some nations, in order to remain or become economically stable, to align themselves into organizations of regional rather than national emphasis. The popular concept of sovereignty is thus abandoned "in favor of peace and welfare."¹⁰ Two examples are the European Economic Community and the Organization of American States.

The emergence of Afro-Asian nations from colonial territories has placed Western nations in the minority in the community of nations. The majority then is comprised of poor and technologically underdeveloped countries with a low standard of living. They require protection against states with superior economic and military strength. This demand for protection in turn requires the presence of a supra-national authority such as the United Nations. At the present time, the United Nations is not powerful enough to suit the needs of these weaker nations, and indeed the stronger nations are reluctant to give the United Nations such power. The Charter of the United Nations grants sovereign equality to all its members (Art. 2, sub. 1) as well as self-determination and equal rights (Art. 1, sub. 2) and the principle of non-intervention (Art. 2, sub. 7), but the poor states

want the law to protect them against exploitation by the economically stronger and they want the family of nations to take good care of its weak and indigent members. Starting from the concept of a world community, they demand a law that gives expression to the idea of mutual responsibility. Together with 'protective international law', they want a law of nations based on the principle of mutual assistance. For them the state cannot but strive to be a welfare state, and in the same way the community of nations, the world-community, should be a 'welfare-community.'¹¹

⁸ *Ibid.*, p. 411.

⁹ Falk, *Historical Tendencies*, p. 179.

¹⁰ Roling, *International Law*, p. xxii.

¹¹ *Ibid.*, p. 50.

The trend toward regional alliances certainly is not limited to the newly-emerging states, for the EEC and the European Coal and Steel Community are examples of the trend of community law and organization among well-established nations.

The second phase of alignment, aside from that designed to protect the state economically and militarily, is that which protects the uniting nations' ideology or attempts to extend its sphere of influence. The Cold War is an example of the alignment to protect ideology, even though the alliance may not be entirely voluntary on the part of some members.

The belief in collective security ". . . may be a vital contribution to the evolutionary development of the conditions of peace through international organization . . .",¹² but it has not yet been fully realized. Collective security may be successful as to some degree United Nations action was successful in Korea in 1950 (although this too is open to question), but it must be noted that ". . . collective security is based upon the inherently contradictory proposition that states are both irresponsible enough to create the urgent problem of war and responsible enough to solve the problem . . ."¹³ Collective security, like disarmament, has contributed to the awareness of the threat of war and has lain the groundwork for the development of a world community.

THE CREATION OF SUPRA-NATIONAL ORGANIZATIONS

The evolution of non-national or supra-national organizations presents an unusual challenge to the traditional legal system.

The League of Nations, founded in 1919, was largely the product of World War I in that ". . . it was a response to the realization, now more widespread and intense than ever before, of the vital need to prevent wars."¹⁴ But, the League failed to do just that. The Japanese seizure of Manchuria in 1931 brought a demand from the League that Japan withdraw, but this demand was refused. Japan ignored the recommendations of the League and ultimately withdrew from that body. The Italian invasion of Ethiopia in 1935, after which the League tried unsuccessfully to bring sanctions against Italy, further illustrated the ineffectiveness of that organization. Germany seized Danzig in 1939, but the action was ignored by the League. After that time, no one sought League intervention, and it was, for all purposes dead. The death of the League has been blamed on the fact that the members refused to practice collective security.¹⁵ Mere warnings were not enough to turn back Germany, Japan, and Italy. Only through war, which the League sought to prevent, could order be restored.

¹² Inis L. Claude, Jr., *Swords Into Plowshares* (3rd Ed.; New York; Random House, 1964), p. 259.

¹³ *Ibid.*, p. 258.

¹⁴ *Ibid.*, p. 39.

¹⁵ A.F.K. Organski, *World Politics* (New York: Alfred A. Knopf, Inc., 1958), p. 416.

The League of Nations had hardly been buried when the United Nations was born with the same intention of keeping universal peace. The organizations differ, however, in that the United Nations has as one of its members the United States, which is determined that the United Nations shall survive. "The United Nations also differs from the League in that it places a greater emphasis upon economic and social problems. The League, of course, was interested in such problems, but it was primarily a security organization."¹⁶ The United Nations, although concerned with maintaining peace, has little power except persuasion to achieve this end.¹⁷ The real power in the United Nations lies in the hands of the great powers, and one of these nations is behind every major action taken by that body. The Korean Conflict of 1950, for example, brought action against North Korea in the name of the United Nations but was more accurately a case in which the United States sought to suppress Communist aggression from the North. Even though the force was called a United Nations force, the troops involved were primarily American and South Korean with token detachments from other nations.

When the Security Council, which gives veto power to each of the great powers, planned to investigate the Communist takeover of Czechoslovakia in 1948, the Soviet Union vetoed the proposed action. It is clear then that the great powers use the United Nations to achieve national goals or to prevent the organization from acting contrary to their interests. If the great powers do not choose to act, the United Nations is powerless to enforce its will. Any international organization will remain ineffective if it does not have the power to enforce its will without the support of a great nation or group of nations. The United Nations can only offer means for peaceful settlement of disputes, but even this ability becomes meaningless if the settlement is not satisfactory to all parties concerned. The United Nations simply does not have the capability to force its decisions upon any nation not willing to accept those decisions. "As long as national governments have the power to make war, no international body can have the power to keep peace. That power still resides with the governments of nations and with the groups to which they are responsible."¹⁸

The value of the United Nations lies in its function as a "sounding board" for the ideas and the opportunities it presents for airing views. When peace is desired, the United Nations provides useful channels for negotiation although private meetings (such as the 1955 Geneva Summit Conference) are more likely to have results. The United Nations General Assembly gives small nations or third parties in disputes the opportunity to make their opinions known. By uniting, groups of smaller nations may hasten the settlement of disputes which could possibly be detrimental to their security or economic well-being. The United Nations thereby acts as a balancing force among the nations of the world. International organizations increase each member nation's chances to influence one another through alignment with groups of nations or with one of the great powers. For this purpose

¹⁶ *Ibid.*, p. 417.

¹⁷ *Ibid.*, p. 423.

¹⁸ *Ibid.*, p. 426.

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¹⁶ *Ibid.*, p. 417.

¹⁷ *Ibid.*, p. 423.

¹⁸ *Ibid.*, p. 426.

such organizations are useful and important. They also provide opportunities for mutual assistance. But, in a world of sovereign states, we must not overrate the importance of international organizations. Unfortunately, they remain largely ineffective.

THE EMERGENCE OF NEW NATIONS

The newly-independent states of Africa and Asia generally distrust traditional, international law because of its European heritage. Although these nations do not deny that such a system is necessary, they feel that a change is required to protect their sovereignty and economic as well as social stability. Newly-emergent states seek to throw off any remnants of Western colonization; therefore, they have invoked the principle of "self-determination" in order to limit any further colonization or to restrict the power of capital-exporting states.

Questions have been raised as to whether a new nation shall be obliged to recognize treaties or maintain economic relations with other nations in cases where such agreements were made before independence was achieved, that is, under a colonial system. Some nations have agreed to honor such treaties, but any obligation to do so would constitute exploitation. Parent nations would, of course, like to see such an obligation exist thus creating an area for controversy.

In addition to the many new nations, less-developed countries pose a considerable threat to the customary legal order. Disputes over the extent of territorial waters is one illustration of a problem intensified by the acquisition of power by a small or weak state. Among Latin American countries and in Iceland, the desire to protect fishing rights against foreign exploitation has resulted in their claiming control over considerably more than the customary three mile limit. Chile, Ecuador, and Peru have claimed to control up to as much as 200 miles.¹⁹ Such claims are potential sources of friction but often have shown a tendency to resolve themselves through multilateral agreements. The case between the United Kingdom and Denmark, Iceland, and Norway is an example of this tendency.

Röling notes that new nations have sought to solidify four concepts into international law in the attempt to bring this law into focus with the changes which have come about during this century. First, the European-based concept of colonialism must be abolished and with it any bilateral agreements of aid or support, since they imply a colonial relationship. Second, references to "civilized nations" must be deleted, since they suggest inequality. Nations which feel they will not receive equal treatment naturally hesitate to apply to international courts for jurisdiction. They also demand a more even distribution on such bodies as the International Court of Justice, where ". . . only three of its 15 members come from the Afro-Asian part of the world."²⁰ The third demand calls for the reform of international law to protect economically weak states. The recognition of national

¹⁹ Oliver J. Lissitzyn, *The Less Developed Nations*, Vol. II of *The Strategy of World Order*, p. 256.

²⁰ Röling, *International Law*, p. 76.

sovereignty, the weaker nations feel, is one method by which this protection can be realized; yet, the Western nations look upon national sovereignty with less favor than an international cooperative system. In this way, the weaker nations are in opposition to the changing legal system because the methods, in their opinion, do not coincide with their interests. "Finally, the new majority demands an international law that will promote the welfare of all and will thus guarantee the possibility of a decent standard of living."²¹ A welfare community should be established for their protection and well-being. Articles 55 and 56 of the Charter of the United Nations elaborate on the foundations of this welfare system, but the contradiction is clear. Shall the nation-state be promoted when it is apparent that the answer to worldwide peace and prosperity can most likely be found in a world-state based on cooperation rather than competition? The problem is a difficult one.

THE IDEOLOGICAL CONFLICT

The dominant conflict today, that between Communist and non-Communist nations, presents the most serious threat to the existing legal order.

The Sino-Soviet bloc is a revolutionary force seeking internal reorganization as well as external expansion of its ideology and domination. This bloc is thereby placed in opposition with non-revolutionary nations, which seek to maintain their way of life without intervention. The Cold War, as the conflict is known, has brought forth problems of disarmament, alignment or non-alignment, the problem of establishing a peaceful coexistence, the threat of mutual destruction, and others.

Peaceful coexistence is supported by the Soviet bloc as the solution to Cold War tension, but Soviet support rests on the belief that the Soviet system, inherently superior, will win through ideology and peaceful, economic competition with the West, without resort to war. Coexistence then takes the place of cooperation in solving differences, and little progress may be expected from a policy of coexistence. It has been shown that cooperation as in the settlement of the Nuclear Test Ban Treaty may be the method by which agreements will be reached.

The Soviet Union shows a distrust for the United Nations because of the fear that it is a body influenced and dominated by the West and also regards the United Nations as an unsatisfactory method for settling fundamental East-West differences. This opinion is not exclusively that of the Soviet Union, however, for the United States also seems to rely on means outside the United Nations.²² The tendency of the great powers to act outside the United Nations further reduces that body's effectiveness. "Only in so far as it is possible, consonant

²¹ *Ibid.*, p. 83.

²² As in President Kennedy's action during the Cuban missile crises. For a further discussion, see Edward McWhinney, *Soviet and Western International Law and the Cold War in the Era of Bipolarity*, Vol. II of *The Strategy of World Order*, note 44, pp. 208-209.

with vital national interests, to observe the procedures of the United Nations Charter, will the major Powers conform with them."²³

Several rules of conduct have evolved from the Cold War confrontation, and the security of both sides and indeed of the entire world depends on the acceptance of these rules by both parties and their adherence to them.

First, the principle of bipolarity is to be accepted with the condition that neutral nations may be persuaded to ally with either bloc by any method short of the use of force. Cultural, economic, ideological, or any other means of enticing neutral nations to join shall be permitted, except aggression. Related to the principle of bipolarity is the recognition of territorial integrity and non-intervention within the other bloc's sphere of influence.

Both sides must and have renounced nuclear war as a method of solving the conflict. It is realized that mutual destruction would result. The balance is likely to remain as long as both sides maintain a relative balance of military power and as long as both are capable of effective reprisals.

Another principle in the current inter-bloc relationship is the advantage of limiting the number of nations capable of conducting nuclear warfare. It must be assumed that the United States and the Soviet Union are capable of calculating the risks of a nuclear war and that they will not resort to such action without excessive deliberation. This power in the hands of Egypt or Israel, however, would pose a more vital threat to world security. It is therefore to the advantage of the great powers to restrict nuclear capability as much as possible and to reserve for themselves the decision to use such weapons.

Neither of the opponents should unduly provoke the other as Premier Khrushchev did in the Cuban crisis of 1962 by injecting the element of surprise into what was already a precarious world situation. The mistake was realized and the threat withdrawn, but results could well have been catastrophic. Moderation is suggested as another element in maintenance of peace, that is to say, by using no more force than is absolutely necessary to achieve the essential goals. President Kennedy employed such moderation when he decided not to bomb Cuban missile bases as had been suggested to him,²⁴ but relied on a blockade to achieve results. Self-restraint in claiming victory permitted the opponents to withdraw gracefully from what could have been an untenable position. The parties thereby avoided the possibility of a confrontation in defense of policy, which in turn could have led to a more crucial conflict.

It is possible that through the observance of the Cold War rules (which seem to work well), reasonable advances can be expected in East-West relationships. Both the United States and the Soviet Union have shown the desire to reshape customary views of international law in order to conform to today's problems. If cooperation on the part of the leaders of the two blocs could be realized, the long-sought

²³ Wolfgang Gaston Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964), p. 34.

²⁴ Edward McWhinney, *Soviet and Western International Law and the Cold War in the Era of Bipolarity*, Vol. II of *The Strategy of World Order*, note 63, pp. 216-217.

establishment of peaceful relations between them could be achieved and solidified.

Now we are faced with the task of evaluating the alternatives and determining which is most capable of establishing a lasting peace. The formation of a collective security organization such as NATO or the Warsaw Pact does not lead to world security, in the opinion of one writer, but rather "... only reduces the number of belligerents."²⁵ Inis Claude also said that collective security is not the answer, and he agrees with Morgenthau that effective disarmament is not likely. The reform of the existing system should be considered, "... but the international system is peculiarly ill-adapted to accommodate the pressure of change because it lacks legislative institutions and technique."²⁶

"The imminent prospect is the confrontation of the Sino-Soviet alliance with a like combination of two dynamic, ideologically-related super-states — the United States and unified Western Europe."²⁷ This statement, however, must be examined in the light of growing dissension between China and the Soviet Union and of de Gaulle's unwillingness to allow Britain into the European Common Market. Thus, alliance does not appear to be the solution either.

Perhaps the answer lied in the recognition that:

Diplomacy is the best means of preserving peace which a society of sovereign nations has to offer, but, especially under the conditions of modern world politics and of modern war, it is not good enough. It is only when nations have surrendered to a higher authority the means of destruction which modern technology has put in their hands — when they have given up their sovereignty — that international peace can be made as secure as domestic peace. Diplomacy can make peace more secure than it is today, and the world state can make peace more secure than it would be if nations were to abide by the rules of diplomacy. Yet, as there can be no permanent peace without a world state, there can be no world state without the peace-preserving and community-building processes of diplomacy. For the world state to be more than a dim vision, the accommodating processes of diplomacy, mitigating and minimizing conflicts must be revived.²⁸

To solve unique new problems such as nuclear war, inter-bloc law, and a multitude of new states we must turn to the method which men have employed for centuries. We must get together, discuss, and settle the disputes which, if permitted to grow to proportions beyond our control, could eventually spell our destruction. Diplomacy has always been available as a method of solving differences; how ironic it is that we should have overlooked diplomacy for so long. Our future rests on the immediate and successful employment of diplomacy and negotiation.

²⁵ Friedmann, *Changing Structure of International Law*, p. 258.

²⁶ Falk, *Historical Tendencies*, p. 178.

²⁷ George Liska, *Nations in Alliance — The Limits of Interdependence* (Baltimore, The Johns Hopkins Press, 1962), p. 289.

²⁸ Morgenthau, *Politics Among Nations*, p. 569.