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New Law of Nations

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THE NEW LAW OF NATIONS.

FOREWORD.

IF THE article upon THE NEW LAW OF NATIONS had been written by an obscure man for a sensational periodical, it would not have been worthy of serious consideration. It appeared in September, 1915, however, in the ZEITSCHRIFT FÜR VÖLKERRECHT, generally reputed to be the leading periodical devoted to international law, published in the German language. Its author, Dr. JOSEF KOHLER, is generally conceded to be the most distinguished living German jurist. His PHILOSOPHY OF LAW was deemed worthy of translation into English and appeared as Volume 12 of the Modern Legal Philosophy Series.¹ Dean ROSCOE POUND has referred to him as the first of living jurists. "No one else," he says, "has come so near to taking all legal knowledge for his province. No one, therefore, is so well prepared to reduce all legal knowledge to a system."² Professor KOHLER was born at Offenburg, Baden, March 9, 1849, and was educated at Freiburg and Heidelberg. He was Professor of Jurisprudence at the University of Würzburg from 1878 to 1888, when he was appointed to a professorship in the University of Berlin, a chair which he still holds. He is also a Privy Councillor. Dr. KOHLER'S contributions to law and jurisprudence have been enormous in bulk and in range. He has published much in the field of patent and copyright law, as well as in jurisprudence and legal philosophy. His versatility is remarkable, for his writings are not confined to law and jurisprudence, but he has made excursions into the fields of aesthetics, poetry, and musical composition.

The following article at first sight appears most striking because of the virulence of the animadversions upon everything non-German. In this respect KOHLER has only done what many other distinguished German *Gelehrten* have allowed themselves to do since the outbreak of the present war, notably LASSON, HARNACK, HAECKEL, as well as ninety-odd other German professors who signed a remarkable manifesto soon after the outbreak of the war. In some fields of intellectual activity such an absence of objectivity might be pardoned; less pardonable is it in the field of international law. This was recognized by KOHLER'S collaborator, Dr. HANS WEHBERG, of Düsseldorf, whose monograph upon THE LAW OF CAPTURE ON LAND AND

¹ Boston Book Company, 1914.

² *The Scope and Purpose of Sociological Jurisprudence*, 155, seq., quoted in the editorial preface to the *Philosophy of Law*, xv-xvi.

AT SEA is distinguished by breadth of view and conservatism of statement. Dr. WEHBERG discontinued his association with KOHLER'S ZEITSCHRIFT in a letter printed in the BERLINER TAGEBLATT, September 24, 1915.³ To those who would insist that KOHLER represents completely the German attitude toward international law the statements of Dr. WEHBERG may be opposed. "If all that KOHLER has said was true," Dr. WEHBERG wrote, "he should have gone to the limit and drawn the conclusion that an international law is no longer possible and that a review of international law has no longer any right to exist. If, however, he issues a review of *international law*, he must in that case take preliminary measures in this review for the purpose of effecting an understanding with other nations with reference to questions upon which different points of view may be entertained. Such a review must not hold up neutral nations to public scorn, and thus offending them, claim the right to assert that outside of the German science of international law there is no other such science in the true sense. KOHLER expresses this last idea with even greater emphasis when he flatly denies to other nations the capacity of systematic, juridical thinking. * * * Whoever is well acquainted with scientific research and the peculiar essence of international law, will no doubt comprehend my viewpoint and respect it. In the great crisis by which all mankind was confronted through the outbreak of the war, it became the sacred duty of all learned men, at least within the field of science, to pay just and impartial tribute even to other nations, and to uphold faith in a better future for humanity."

KOHLER'S tirade against all non-German peoples might be considered merely as a disfigurement of his article. A closer examination, however, of his attitude strengthens the conclusion that it is the natural by-product of his general philosophical position: "One of the first to recognize the value of the science of comparative law was not a jurist, but a philosopher whose like, since HEGEL, the world has not seen,"—NIETZSCHE. Again he says, "The Philosophy of Law, as indeed philosophy in general, has recently been much furthered, thanks to the great mind of NIETZSCHE, who subjected the prime cultural questions anew to searching thought and established some of them on a new basis."⁴ The general scheme of neo-Hegelian and Nietzschean philosophy as applied to international law may be seen in his treatise on the PHILOSOPHY OF LAW, especially in Chapter 14.⁵ Therein he suggests the doctrine of the super-state.

³ A translation of this letter was printed in the *American Journal of International Law* for October, 1915, pp. 925-927.

⁴ *Philosophy of Law*, 11, 27.

⁵ Pp. 294-307.

with super-national law taking the place of international law, although he admits that super-national law without the support of a super-state cannot, of course, be true legislation, but it can be law that develops in legal custom, it can be customary law.

The logical conclusion of Dr. KOHLER'S article is the negation of international law. That the international law of the future will be based upon the traditional primordial rights of states may well be doubted. Modern international society cannot be organized upon the few fundamental or primordial rights of states (sovereignty, independence, and equality), which have their counterpart in municipal law in the natural rights of individuals as developed in the seventeenth and eighteenth centuries. All law is a social product; and the realization of juristic ideals in positive law is possible only by what KOHLER calls the general cultural process, or as we should say, by the general advance of civilization. To that extent one may agree with the general Hegelian doctrine of law development. The difficulty is, that as yet world society has developed through the interplay of those units of world society which we think of as states; and the basis of international law is the concept that the general furtherance of world civilization rests upon a system of law which recognizes these units, sets up for them standards of legal capacity, and exacts from them measures of legal duty. These standards are, and have been, subject to change. The emphasis of eighteenth century international law was upon the fundamental rights of states. This doctrine has been revamped to an extraordinary degree by the recent declaration of the American Institute of International Law upon the rights and duties of states. Modern international society, however, tends to stress international duties. The present world war is in many respects a world protest against the denial by the German Empire of the foremost of international duties, namely, the duty to fulfill treaty obligations. To hold that the treaty by which Belgium was neutralized was a "scrap of paper," and to act accordingly, is justified by KOHLER'S conception of international law, which fits in with the doctrine of necessity. It was a repudiation of international law. Were the doctrine victorious, world society could not exist save under a world empire.

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J. S. REEVES.

TRANSLATOR'S NOTE.—I am well aware that the translation of "Kultur" by "culture" may be criticized. *Kultur* is an equivalent neither of culture nor of civilization. Their antithesis was well illustrated by a statement made by Professor Karl Lamprecht in a public address made in 1904 at the St. Louis World's Congress of Arts and Sciences. He then said: "*Amerika hat eine hohe Zivilization aber eine geringe Kultur.*" The remark does not appear in the address as published, but was noted at the time by me. It showed that at least in Professor Lamprecht's mind *Kultur* did not preclude hasty generalization, or necessarily include tact and courtesy.—J. S. R.

THE NEW LAW OF NATIONS.

HUGO GROTIUS founded the Law of Nations upon the *Jus Naturae*: for his historical citations are for the most part fables and rococo ornament which have nothing to do with the argument. PUFENDORF and WOLFF enlarged the Law of Nature for international commerce, and the compatriot of HUGO DE GROOT, BYNKER-SHOEK, added many important features. The baroque fashion of the era following lost itself within the tortuous mazes of diplomatic etiquette and found therein a matter of huge importance. But from then on there gradually appeared an historical attitude which sought to substitute a deeper meaning for the pseudo-science. The historical development of maritime law after the *Consolato del Mare*, and especially after the Peace of Utrecht, was more closely investigated and a new wealth of knowledge based on apposite historical incident was brought into the science. Just as in the scattered and un-systematic notices of PLATO and ARISTOTLE lay the germ of the future science of comparative jurisprudence, so the historical method was foreshadowed by the many citations of GROTIUS.

It was, however, HEGEL, who first taught us to know history as the embodiment of juristic reason, and the historical spirit came to animate the science. Its importance will never be forgotten, not that we are to be riveted to the past, but because we can know the present only in the light of the past as the product of a great cultural process. From this product we must begin, for to this extent the actual is also the rational.

Some decades ago another element came into International Law. Since the armed neutrality of KATHERINE II, even more since the Vienna Congress, and especially since the Declaration of Paris, international treaties have come to be emphasized as a creative element of juristic norms; and in The Hague Peace Conferences this point of view celebrated its apparent victory. It was thought that the goal had been reached: a new international community which embraced all states. The belief became steadily stronger that now the angel of peace had spread its broad wings, that international arbitration and conciliation had reunited erstwhile quarreling brothers, and if War as an atavistic reminiscence should indeed occur, it would be but a duel, hedged about by many rules, at which the rest of the nations stood watch as seconds in order to assure the punctilious observance of all its conventionalities. War, like the duel, was bound gradually to disappear. Meanwhile, the members of the family of nations decided to conduct themselves as brothers do when they

disagree. It was assumed that they could not behave so very badly and that, at the worst, strife would soon softly expire in the bosom of universal peace.

This phantasmagoria of a family of nations which would dictate the norms of International Law and by judicial methods decide international disputes, so that only exceptionally and here and there the structure of the international community would be convulsed by War—all that is far behind us. Twelve months only have passed, but they divide us from all that has gone before as if years had intervened. The occurrences of the past year have accomplished more than decades. The Hague Peace Conferences were dreams of peace which have burst like bubbles, and the Peace Palace at The Hague can appropriately open its halls for other praiseworthy aims of mankind.

We also were enthralled by these illusions, and we are frank enough to confess it, if we are rebuked for being unpractical and short-sighted for doing so, that it was our honorable German nature which permitted us to overlook cunning and wickedness; it was our belief in mankind which led us and the thought that at least a spark of our German idealism was to be found among other peoples. We fully believed that we had to do with civilized peoples, who, like us, were constantly striving to solve the greatest problems of humanity. We assumed that every nation had its own task in the furtherance of culture. We believed that the world was big enough so that all nations in furthering their own interests would by straight-forward intercourse increase the spiritual assets of the entire world. This illusion was a huge deception of race psychology, but it was the deception of a man of honor who falls into the grip of a cunning band; such an error honors him who errs, and loyalty to a mistaken morality raises him who is thus deceived giant-high above the reptile which crawls about him.

Then we became clear-visioned. The German SIEGFRIED, who has never learned to know fear, is awakened at the right moment. Just as SIEGFRIED once understood the speech of birds, so now we recognize in the buzzing and tumult of the world-strife the true soul of our opponents, and the dragon of cunning, lies, and slander is stretched beneath our victorious sword. The noble myth of our people has become a reality.

An International Law based on international treaties can no longer be. International association can only lead to norms of law if the peoples are actuated by legal endeavors. Treaties with liars and falsifiers cannot form sources of law; only those peoples can cooperate in the development of law who have a living conscience.

Shall we recognize as brother nations having kindred conceptions of justice those like the French—a nation of bragging tricksters, who drench us with most miserable abuse and outrageous slander—or a perfidious company of peddlers, like the English, who from the first day of the war have flooded the world with statements which they knew to be calumnies and lies—a nation whose government did not hesitate, like bandits following the fashion of CAESAR BORGIA, to undertake sneaking bribery in order to get rid of a ROGER CASEMENT? Or a nation of barbarians, like the Russians, whose excesses in East Prussia have suddenly brought before our eyes the whole Muscovite brutality? Or the Italians, among whom a miserable lottery-playing group made up of the immature and half-educated proletariat, and of phrase-drunken demagogues, could bring the government to violate sacred treaties, and to fall upon the flank of their sworn allies? No, and thrice, No! These ties are forever broken. And as for neutrals, the United States, glorying in an empty play of moral platitudes with the blessing of the VANDERBILT-MORGAN millions, has done enough injury to us with its munitions policy. Neutral states like Spain, Switzerland, and Sweden will always appear to us dear and worthy. On the other hand, a portion of the press of Holland, Norway, and Denmark has wounded us sorely by its unjust treatment of us. And Holland has persuaded herself, by putting her trade under English control to further England's war of starvation! In all these circumstances these peoples can never be bound with us into an Areopagus wherein every state works with even justice in order to lay down for the world the statutes of the Law of Nations.

In what fashion are to be shaped the relations of the great sources of culture for humanity, the relations of Germany in union with Austria, which draws within our circle of culture the highly gifted Hungarians and an important group of Slavs, and in alliance with Turkey as the powerful fortress of Islamic culture—that is not now a subject for discussion. But we are indeed clear-sighted enough to form a correct estimate of the past. The look into the future is denied us and to make guesses is fruitless and dangerous.

We can, however, speak with confidence as to the future of International Law, and here we must be guided back into the path of HUGO GROTIUS. Just as he depended upon the Law of Nature, so ought we. But for us the Law of Nature is not an eternal, inflexible, changeless thing. It is for us the historical Idea controlling culture. This Idea is a rational one, and is therefore to be developed as a logical one. Because, if an illogical element now and then enters

in, it becomes engrafted upon the system of the science. Of course International Law is not a conceptual science in the sense of a speculation wholly divorced from actualities which we wish to en-throne, but a science which draws its guiding principles from the observation of life and its rational culture-aims, forms them into conceptions, and out of the conceptions constructs the particulars of law. This is German science, for German science alone has been able to work in systematic fashion. How incapable of this other peoples are may be shown by a single illustration. The French, who are yet far beyond the English, did not succeed in creating a system of the CODE NAPOLEON. So that in their incapacity they were compelled to lay down as a basis the system of a German, ZACHARIA, wherein they have attempted to escape from their antiquated commentary. If we are to frame the International Law of Peace and the International Law of War, we must fix our eyes upon the aims and efforts of culture. We must test the means which may be suitable; we must make the best choice and in this we must of course consult the expert. Science acts here as a legislator. If it were a question of the efforts of Peace, something, let us say, about traffic over roads and rivers, we should decide that those regulations are the best which direct traffic upon the best road. No reasonable man can possibly doubt that the great trade streams must be common to all peoples, and so must be the use of the atmosphere. The law of the air is to be developed and constructed in this manner, and quite without international legal agreements. As to that which concerns War, there are three controlling principles. One—War is waged, not between peoples, but between states, so that only the organs of the state may be concerned in it; two—War may destroy, but the destruction must be sanctified by its aim; it may only be carried on so as to overcome the enemy without unnecessary injuries and suffering; and, three—War should not bring about a lawless condition of the civil population, but a governmental organization for the occupied territory should be effected as quickly as possible. All of these ideas are so extremely fruitful that out of them a complete Law of War might be developed. For example, the whole Geneva Red Cross Convention is but an emanation of the second of these statements. So also is the provision as to prisoners of war; so also the further provision as to reprisals and hostages, requisitions and contributions. Execution of details follows almost everywhere automatically. Whether we designate the sanitary corps with the Geneva Cross, or, as the Turks do, with the Crescent, is one of the many small details in execution which cannot disturb the unity of the fundamental idea.

Hence it appears that International Law has to work for the most part with logical constructions from fundamental principles. So far as particular practices are concerned, their importance is not to be exaggerated. They are at any rate valuable as examples of practice, which is often striving after rational expression, but a greater significance they do not have. If peoples like the English and the Americans merely follow their particular practices because they are not logically constructive, they must forego taking part in the development of the science, and confine themselves to the fetching of materials.

At this re-building of International Law, upon historical foundations, with a logically constructed plan motivated from the culture world, we have to work. It is a great, elevating, and fruitful endeavor. The future will demonstrate the ever increasing importance of this constructive International Law. The claim is often made that there is no International Law because it is trampled under foot by our enemies. This is as erroneous as it would be to assert that there is no municipal law because at the present time one might be liable to be robbed by the banditti of the Italian Abruzzi, or assaulted by Parisian *apaches*, or by the Milanese rabble. Naturally, International Law needs its sanction just as every branch of law does, but we shall, as I hope, be so vastly fortified by our victorious war that we can undertake the protection of International Law just as centuries ago the Lombard DANTE invoked the German Emperor as the protector of law and the shield of justice.

JOSEPH KOHLER.

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