International Law and International Society*

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I

Any work on law and society in the relations of States must *a limine* take a position on the question, Is there a society between States at all? Any serious author must be willing (if that is where inquiry leads) to reject, in whole or in part, the traditional assumption that there is. Such a work must, at the least, extend to the international field the ambition of sociological jurisprudence generally, namely, to check the law in the books against the law in action.

The new title which Professor Corbett has added to the series issued by the Institute of International Studies of Yale University has an excitement which is not allayed by the learned author's introduction. His object, he tells us, is "an attempt at unprejudiced evaluation of the role of international law"; and the framework upon which he sets this evaluation falls into three main parts. In Part I he wishes to see how the theories of international law came into being and "imposed a lasting fashion of *a priorism* upon the literature". In Part II, he surveys "the familiar patterns of international practice" in chapters entitled, "Land", "Waters", "Air", "Individuals", "Immunities", "War" and "Neutrality".[1] In Part III, entitled "Organised Development", which (despite the shortcomings shortly to be mentioned) is still in the writer's view the

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[1] Being Chapters V-XI.

most deep-reaching of his inquiries, Professor Corbett examines the United Nations and its specialised agencies by confronting the verbal entities of their working instruments with the harsh realities of contemporary international politics.

II

But against this wide and varied canvas Professor Corbett does not lose sight of the necessity for the due testing of basic assumptions. To the question whether there is a Society of States his answer is clear enough. Subject to many qualifications concerning the possibilities of the future, his general conclusion is to deny the present reality of such a Society. Such a position must in part render meaningless the very question presupposed in the author's title. If there is no society between States, but only the hazardous potentiality of segmental societal reachings, that very fact would foreclose most of the answer to the inquiry concerning "law and society in the relations of States".

Some scope might, it is true, still remain for inquiry. First, why and how has the illusion of an international society arisen and persisted, despite the day-to-day refutation of actual inter-State relations? Professor Corbett's answer to this is essentially in terms of the work and influence of the publicists, *la doctrine*.[2] The burden of Chapter II, on "The Great Society", is that the classical writings of international law have combined an unquestioning assumption of the existence of a society between States with the elaboration of principles concerning the legal relations of States which were, in the ultimate analysis, a denial of that very assumption.[3]

Much of this is, of course, not new. The ground, indeed, was traversed again and again in the ferment which preceded and followed the establishment of the League of Nations, and little will be found in Professor Corbett's summary that was not well said a generation and more ago in Suckiennicki's *La souveraineté des états dans le droit international moderne*. Nevertheless Professor Corbett's account is essentially novel in tendency.

For the earlier literature has almost invariably ended with an exhortation to States and to jurists to conform their practice and doctrine to the assumption that a society of States does exist. If, as it were, the practice of States did not agree with the assumption

[2] His Introduction and Chapter I traces these onwards from the foreshadowings of Greek philosophy and Roman fecial law, with special stress on its modern phases from Francisco de Vitoria to the rise of positivism, and the reviving currents of natural law in the present century.

[3] Pp. 36-52.

of an international community—why then, the practice and the formulation must be corrected! This, of course, was in the spirit of nineteenth century political and social reformist optimism.

For Professor Corbett, on the other hand, the incongruity between the verbal assumption of an international community, and its denial in practice, is a reason for re-examining the assumption. He requires us to face with courage the possibility that there may be "something in the very nature of the State as it is understood and valued by the mass of human beings which militates against its subordination to law".[4] If this possibility were found to be a reality, "it would explain not only the weakness of the alleged society of nations, but also the fact that the movement to strengthen it by measures explicitly subordinating the State has continued to be an activity of intellectuals without mass backing".[5]

If the expectations which men attach to their State cannot be fulfilled if it be subordinated to a world community, then both the demand that sovereignty be surrendered and the refusal of States to surrender it, may present themselves in a new light. The economic advantages to citizens arising from the exclusiveness of economic sovereignty, for example, and the reflected glory and prestige with which even the basest citizen of a great Power may feel himself invested as against citizens of all other States, would last only so long as that Power denies the *civitas maxima*. Delegates to international conferences have no international constituency to applaud their work for the international community. They must seek their applause and reward primarily from their own peoples.[6]

Moreover, it is idle to deny that the members of almost every nation-state attach to it an expectation that only through it and through its autonomy can their distinctive ways of life be preserved. The importance of this expectation in no way depends on whether the national way of life is indeed distinctive, much less, desirably so. The way of life may, indeed, have no distinctive

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[4] P. 44.
[5] *Ibid.*
[6] There have, of course, been moments when this was not true. Perhaps the successes of the English League of Nations Union in 1936 in marshalling a body of British opinion behind the League of Nations action against Italy was an example. The more exalted phases of the discussion of peace aims during any great war provide other similar moments, witness the public opinion marshalled behind President Wilson's programme after the First World War. Even there, however, the programme though ostensibly international based itself, through the principle of self-determination, upon national rather than international aspiration. And, in any case, these are but transient moments in the historic process; in terms of social analysis, Professor Corbett's position is regrettably beyond serious question.

content, except the very intensity of the conviction that it has; it is the conviction which is the operative force.

The obstacles, however, to the subordination of the State to a Society of States are not limited to such expectations as only the unsubordinated State seems capable of satisfying. They lie also in the problems of leadership in a State and in a world community respectively. Any citizen of a federal State, such as the United States of America or Australia, who has followed the perennial debate whether the constituent state governments are obsolete and redundant and should be abolished or merged into the federal structure, will give ready assent to this part of Professor Corbett's thesis. The political leaders of a State who are invited to subordinate their State to a larger collectivity will, he points out, "demand assurances of adequate compensation for a new political orientation that will reduce the functions of national government and the importance of its leaders and confront them at the same time with unfamiliar problems in achieving and holding supreme power".[7] This, indeed, is part of the reason why, broadly speaking, the national leaders of small Powers are more amenable to the appeal to surrender sovereignty than those of great Powers.

This position may seem reminiscent of the position which Oppenheim, Professor Brierly and many others have taken in our century, that the infirmity of international law lies not so much in the absence or merely embryonic presence of executive, judicial and legislative organs, but even more in the puny weakness of any sense of community across national frontiers. On closer examination, however, Professor Corbett's analysis will be found far more searching and significant.

III

Even if the assumption of a Society of States *in esse* be rejected, the task still lies to hand of examining whether and how far existing State practice and doctrine rationalising that practice tolerate or promote the growth of such a society *in posse*. Broadly, this would involve, in the present opinion, a selective evaluation of the contents of international law under heads such as the following.

First, there are elements tending to abort such growth, for example, the pervasiveness of "vital interests" clauses in arbitration treaties, or of the reservation by each State for its own determination not only of domestic matters, but of the question what matters are domestic. To say that such elements tend to

[7] P. 47.

abort the growth of an international community is not of necessity to condemn them. They could not, for instance, always be condemned where the values realizable through the State cannot be realized through the international community; and where these values are regarded as "indispensable".

Second, there are elements that are merely *a priori*, having no relation to the values presently sought, either through the State or through a Society of States. Such merely *a priori* elements, for example, might include a wide range of doctrines which stand in the books as mere deductions from the assumed existence of an international community. For a proper view of the place of international law, these must first be boldly discarded.

Third, there are elements which may be merely anachronistic, having some relevance to the growth of interstate relations in the past, but no such relevance under present conditions.

Finally, it cannot be overlooked even by the most sceptical that elements do exist, both in practice and doctrine, manifesting the actual self-subordination of States to a wider community functionally delimited. These elements as detected would represent areas of potential growth of a Society of States proportionate to the relative importance of the functions assigned and of the values sought to be realized through them.

IV

In so far as I have been able to follow him, it is Professor Corbett's objective in his chapters on the patterns of State practice[8] to submit traditionally acknowledged rules of international law to this kind of analysis. In the present opinion, it is a part of his plan not yet adequately carried through.

The chapters constitute, indeed, a solid little monograph of 166 pages, which could usefully be read by the law school and college student as an introduction to a full course on international law. They consist of brief, readable and often interesting summations of international legal doctrine, which may be found in more technical form in the major standard works. They do not fail, on most of the topics they touch, to provide a biting phrase or a delving insight; yet the phrase and the insight are rarely related to the main purpose of the present volume, to the confrontation of the verbal doctrines of international law and practice by the realities of the relations between States.

This criticism is not always apposite. The author's review of the intellectual apparatus hitherto used in deciding international

[8] Chapters V-XI.

claims sponsored by a State on behalf of its citizens is certainly not open to it. The author convincingly demonstrates that

> . . . the traditional international procedure in cases of injury to aliens has mingled in one hodge-podge what are essentially different claims by different claimants. In one and the same decision the interest adjudicated appears at one time as that of an individual, at another as that of a State, at yet another as that of all States. A partial remedy for this confusion can be found in permitting the individual to plead as party where his is the main interest involved. But to clear it up entirely, a further development is necessary. This would consist in authorising international agencies dealing with these matters to impose penalties in appropriate cases. Like the prosecutor in criminal proceedings, the government laying the complaint might then be regarded as representing a common social interest.[9]

The reviewer agrees that conformity to this differentiation of underlying claims would give important play to the promotion of the potential common interests of a Society of States.

The general level of these chapters of substantive law, however, falls regrettably short of this standard. The treatment of the air[10] never really comes to grips with the emergence of the problem of national control of the superjacent airspace. The shift from strategical to economic preoccupation of the subjacent State,[11] in the interpretation of "international airways" under article 15 of the Paris Convention of 1919, is an absolute prerequisite for understanding the system of bilateral bargaining for commercial air rights now prevalent. While this history might be ignored in a systematic exposé of the law, it is clearly central in any study of the adjustment of law to economic, political and social factors.

"Waters" fare little better than the air. The main problems involved are not brought into the full context of modern changes in communications, of the scarcity drive to the exploitation of marine and submarine resources, or of advances in the technological means of exploitation. The problem of the width of the marginal belt, however fashionable to debate it, is an anachronistic curiosity compared to the problematical basis, still to be worked out, of State appropriation and exploitation of the resources of the oceans and their beds. Even more disappointing is the discussion of the régimes of the Suez and Panama Canals with little reference to the context of British naval supremacy in which they were established, or to future United States supremacy in which, if at all, they will be maintained.

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[9] P. 188.
[10] Chapter VII.
[11] D. Goedhuis, Civil Aviation after the War (1936), 36 Am. J. Int'l L. 596.

V

These and other shortcomings[12] do not argue more than an uneven cultivation of a field that is formidable in its range. But one deeper criticism must be made. Professor Corbett thinks that the State "is visibly losing its supernatural accouterments".[13] Yet on a balance of all the changes which are proceeding in the structure of the state this is most questionable.[14]

The point has a scope of reference far beyond the context of the author's discussion. It provokes, indeed, a criticism of Professor Corbett's general position. The learned author has largely overlooked what may be the most important single force conditioning the growth or abortion of a Society of States. I mean the prevalent, and unhappily increasing "nationalisation of truth", the reduction of human judgment within the insulated chambers of State Societies from the free exercise of the intellectual and moral faculties to the acceptance of the authoritatively promulgated version of the State Society — or briefly "the nationalisation of truth".

It is as easy to confabulate concerning the growth of totalitarianism in the modern State as it is to overlook its profounder implications. And not least among these is this. Opinion within each State Society is increasingly controlled by the organs of mass communication (itself a revolutionary fact which Professor Corbett does not consider); and even democratic governments are increasingly limiting the versions of truth which these organs can propagate. These two factors together threaten the severence of even the tenuous links which formerly linked men across State frontiers; and not even economic interdependence and rapid travel and communication can neutralize their effect. The hackneyed truisms about the shrinking of the physical world under the impact of economic and technological advance, offered to support pleas

[12] It is not desired to unbalance this appreciation by further illustrations in the text. One other instance may however be noted, in the author's treatment of the immunities of diplomatic agents, heads of States, and States themselves. While Professor Corbett does recognize (pp. 204-6) the iconoclastic effect here of the growth in the economic functions of the State, the chapter seems not aware of the full implications for the resulting adjustment of traditional rules. For instance, the author's approach is in terms of the injustice of maintaining the immunities in respect of trading activity; but it is surely even more critical that, in order to trade effectively, even a government must in the long run accredit itself. Just as the liability of the Roman *paterfamilias* for the trading debts of his slave was necessary if slaves were to be used as managers of business, so there is a certain drive among States themselves to renounce their traditional immunities in order to establish their credit as trading entities.

[13] He is suggesting a reason for the constriction of diplomatic and State immunities, on which see the last footnote.

[14] Even though it may be sound as applied to the State as a trading entity.

of international solidarity, may be worth little or nothing in the balance.

We recognize this clearly enough when we criticize the iron curtain between the Soviet peoples and those of the West. It is less than realism, and less than sociology, not to see that in the stress of chronic international tension, and our efforts to convert democratic polities into fortress States, the United States, as well as other Western countries, may be submitting to similar long-term trends.

In terms of the intellect and the spirit, this means a reinforcement rather than a weakening of the "supernatural accouterments" of the State. By the very token that the dominance of nationalized truth insulates the men and women of one State from those of another, it also deprives the citizens of a State of any criterion by which they can effectively criticize their government, or acquire any community consciousness transcending their own State frontiers.

Failure to take account of all this leaves Professor Corbett's treatment of the Nuremberg Trials somewhat superficial.[15] Beneath the various grounds which he there urges for doubting the standing of the trials as "adjudication properly so-called", as well as for doubting their deterrent effect, lies, it is submitted, the present consideration. The issue of responsibility for aggressive war is supremely an issue on which truth goes not by humanity but by nationality. And it is perhaps the most tragic paradox of our century that the first collective attempt to bring home to individuals their responsibility for the scourge of war should have been made in an age when the appropriation of truth by the State makes failure inevitable. The *mens rea* which bases criminal responsibility presupposes the accused's access to criteria of moral judgment transcending the nationalised truth of his State. That access is being increasingly cut off.

These are unpleasant thoughts. But if we draw back from giving them credence, we should contemplate the progressive release that is proceeding in Germany of persons convicted of heinous war crimes, counts far less controversial than that of making aggressive war. The absence of any strong public reaction to these releases in Western States only completes the demonstration.

VI

It is regrettably easy not to be very interested in the law of war and neutrality; and to conclude "that available energy will be

[15] Pp. 227-237.

better spent if it is concentrated upon removing causes and preventing the outbreak of war rather than deflected into the mitigation of war's effects".[16]

Yet some of the most fascinating contrasts between international law in the books and international law in action are, in the present opinion, to be found in the law of war and the law of neutrality. Problems of capital importance cry out for attention, for example, on the principles governing the effectiveness of retaliation as a deterrent to violations of the laws of war. What are the factors which have prevented the large-scale resort to bacteriological warfare in the last two wars, and to gas warfare in the Second World War? What rôle did threat of retaliation play in this belligerent self-denial? Why did both Britain and Nazi Germany respectively feel able to ignore the threat of retaliation so far as large-scale bombardment of civilians was concerned?

Such questions are neither academic nor merely historical. If, indeed, the threat of retaliation were a main factor, and if we could detect the conditions which made it effective as such, important directives for policy with regard to atomic weapons might well emerge. If the Soviet Union is gathering its own stockpile of bombs, will this increase or decrease the prospects that either side will use the bomb? That question is not answerable without the further inquiries into the conditions under which the threat of retaliation can be an effective deterrent.

The present point, in short, is that the courageous inquiry upon which Professor Corbett has entered cannot stop with the truistic observation that the conduct of States in war and neutrality in many instances ignores the law in the books. It must press further and seek the *differentia* which explain both law-observing and the law-violating behaviour in these relations. This is the more necessary if we are to exploit the insight that law violation in the international (as distinct from the municipal) field is itself an important mode of law creation.

VII

But since Professor Corbett assesses as barren efforts to mitigate the effects of war, he sees as a more fruitful task to "discover the weaknesses of contemporary international organs and seek ways of remedying them". To this inquiry he devotes Part III of his work, consisting of one chapter on "Contemporary Organization" and a concluding chapter on "New Directions". Here he offers an assessment of the United Nations as an organ of a supposed So-

[16] Pp. 256-257.

ciety of States, a diagnosis of its ills, and a sketch of a proposed remedy. These chapters are, in the present opinion, of basic importance to any thoughtful student of international politics or organization; and their brevity should not be mistaken for lack of depth. They abound in keen insights, clothed in striking phrases.

That is not to say that the reviewer is always in accord either with the analysis or its adequacy. The author's treatment does not escape a fault shared by most writing on the United Nations, and by much of the practice of the United Nations organs and its secretariat. Neither human experience nor politics nor international politics, nor, indeed, international organization, began with the United Nations Charter, or its creation at San Francisco in 1945 or even at Dumbarton Oaks in 1944. But no one would suspect this from most of the literature on it, and the action under it. A deep cause of present confusion in United Nations practice arises from this attempt to treat human experience as discontinuous. Professor Corbett's acute and valuable insights might have been greatly enhanced if he had attended more closely to this source of error.[17]

VIII

Pioneering work in the field of the sociology of international law deserves the close attention of all students, as well of law as of jurisprudence generally. The pioneers of international law and international politics, of country so difficult, need great courage to challenge basic assumptions, and to move in the face of current

[17] It would extend beyond the ambit of this article to particularize this observation, especially since the reviewer has been engaged for some time upon a study in which he hopes to display more fully the effects of this discontinuity upon the Security Council's practice.

Perhaps one example may be given to vivify the above generalities. On p. 273, Professor Corbett suggests that there was no differentiation in the powers of the League Council and Assembly similar to that between the Security Council and the General Assembly of the United Nations. In fact, of course, there was such a differentiation. What Professor Corbett is thinking of, no doubt, is the contrast between the majority rule in the Security Council as contrasted with the unanimity rule in the old League Council, so far as these affect the liabilities of the smaller Powers. Even this differentiation, however, can only be appreciated after a careful examination of the manner in which the unanimity rule came to be manipulated by the League Council and Assembly, as well as the members of the League, during its generation of activity. See J. Stone, The Rule of Unanimity (1933), 13 Brit. Y.B. Int'l L. 18. And it will be a main thesis of the writer's forthcoming study that, whether its architects or its maintenance men acknowledge this or not, the practice today of the Security Council and the General Assembly under the Charter is merely fumbling its way back to the principles which emerged from the experience accumulated by the League of Nations during its period of operation. That experience would have been available at Dumbarton Oaks in 1944, at San Francisco in 1945, and in the day to day business of the United Nations, but for our persistence in ignoring it, and our ignorance in persisting.

prejudices and illusions. In all these respects, this work of Professor Corbett commands admiration and gratitude.

It is finally to be observed, however, that this subject will not progress beyond its pioneering days until far more thought has been given to its theoretical basis. It is not self-evident that the categories, conceptions and methods of the sociological jurisprudence of municipal legal systems can be transposed *simpliciter*, or even at all, to international law. For instance, the raw material of sociological jurisprudence, in the form in which Professor Pound has applied it to American law, and the present writer to British law, consists of the asserted claims of human beings. Yet in what sense, and with what qualifications, can this be regarded as true at all in relation to international law?

Does not the interposition of the State entity between a State's citizens and those of other State entities make a crucial difference? Can the State entity itself really be treated as a complex resolvable finally into the asserted claims of human beings? If it can, how is the resolution to be achieved? Can the answers to such questions be assumed to be similar for political structures as varied as those included within the seventy odd State entities of the contemporary world? Has a sociology of international law the choice only of concluding either that there *is* a Society of States or that there *is not* a Society of States? Must not the possibility be explored that there may be two or more Societies of States at any particular stage of world history?

These are some of the questions which point the tasks of the future. We need many Corbetts even to approach them. Not many Corbetts are given to us; nor is much time.[18]

[18] The second edition of Georg Schwarzenberger's *Power Politics* (1951) only became available to me after this article was on the press. While not directed precisely to the questions raised by Professor Corbett, this thoughtful and courageous work must be regarded as a further sign that a line of international lawyers may well be emerging willing and able to explore this important field. I have to add, however, that Dr. Schwarzenberger does not appear, any more than Professor Corbett, to have explored sufficiently the preliminary questions of theory and method in the sociology of international law posed in the text.

THE
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Editor: G. V. V. NICHOLLS

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