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Contents: International Law— 1.

Introductory - Historical Sketch — Sovereign States as Subjects of International Law

International Law

INTERNATIONAL LAW - LECTURE NO. 1.

Introductory

Definition - Scope - Progress - Necessity for Naval Officers - Historical Sketch - Sources - Authorities - Sovereign States as subjects of International Law.

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Subject.

Introductory -- Historical Sketch -- Sovereign States as Subjects of international law.

LECTURE NO. 1.

(1) International law - its definition and scope.

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International law, as commonly understood, is that body of rules, which governs generally the actions of modern civilized states in their intercourse with one another.

These rules are the outgrowth of the customs arising from the intercourse of nations; of various international agreements; and of the acts of Civilized States which Have in the lapse of time been accepted as of binding force by the various Civilized States of the world. These customs, acts and agreements as shown by text-writers of authority may be considered as being based upon the moral and intellectual convictions of enlightened mankind.

International law differs from the municipal or national law of individual States in that it does not proceed from any authorized law-making power, and that it has no superior tribunal whose function it is to enforce the law in the case of infractions.

On account of the difference just named it may be urged that International law - is not law - but without going into the arguments advanced by Austin and others as to the proper definition of the word law - whether it is the command of a superior; the regulator of conduct; the compliance with the rules of right doing; the producer of uniformity or finally directions proceeding from properly constituted authority, it is enough to say that the term International Law is the definite one generally accepted by all competent writers upon the

subject, as well as those by the rules grouped under this phrase. No better name can be found.

The precepts of International law are obeyed for the most part without question and it is only in increasingly exceptional cases that such precepts are brushed aside and State questions decided by a show of force or a resort to war.

Most States have adopted the rules of international law as a part of their municipal law and a large number of cases that arise under it are settled by the Courts of Law of the individual States in accordance with its generally received precepts.

In Art. of the Constitution of the United States power is conferred upon the Congress of the United States to define and punish offences against the law of nations thus accepting the law of nations as the law of the land.

The fact that international law is the law of the land has been fully recognized not only by the Federal courts but also by those of the several states.

In the definition given of International law it is spoken of as that law which governs generally the actions of modern Civilized States. At one time it was defined as governing the actions of Christian States alone but the progress of time has begun to modify that limitation. With the growth of that intercourse from which no nation, civilized or barbarous, is wholly exempt such nations as Turkey, China, Japan and Korea are included in the category of nations whose conduct is or ought to be regulated by the rules of International law. This obligation is tacitly, or openly, conceded by these nations.

No nation is alone in its affairs - and all governments whether civilized or barbarous have to concern themselves in

the regulation of their conduct towards governments and peoples of other states. The restless activity of the end of the 19th century reaches everywhere and Thibet the vassal Kingdom of China and the internal states of Africa are not free from such external relations whether they want them or not. In fact it has been well said that when, as in former days, China, Japan and Korea adopted a system of non-intercourse with other countries, they could not escape from the necessity of dealing with them. These nations could not act as if they were alone in the world for they were not alone. The very machinery to cause non-intercourse, was created with a view of the existence of other states and caused no little care and exertion on the part of the government.

If then, nations desiring non-intercourse have to give up so much time to external affairs, naturally nations who desire and promote intercourse have to give much more time and attention to their relations with others. The more civilized the States the more intimate and greater the intercourse.

Civilization and freedom tend to extend and make closer the relation between man and man and nations and nations. As Lawrence says "Commerce, intermarriage, scientific discovery, community of religion, harmony in political ideas, mutual admiration as regards achievements in art and literature, identity of interests or even of passions and prejudices, all these and countless other causes tend to knit states together in a social bond somewhat analogous to the bond between the individual man and his fellows. But just as men could not live together in a society without laws and customs to regulate their actions, so states can not have mutual intercourse without rules to regulate their conduct."

I have said that China, Korea and Japan are countries whose conduct is or ought to be regulated by the rules of International law. I do not say that they compare as a rule with the Christian States in the higher ethical ideas and feelings of sensitiveness as to the honor of their country; but they should and doubtless will approach more and more to the standards of Christian countries and even if it be brought about from the desire of equality of consideration rather than from dictates of justice and right, the results will be the same.

The accession of the oriental races to the rules of International law dates from the formal admission of the Turkish Empire into the European family of nations in 1856. The maintenance of permanent intercourse with the countries of the extreme East together with the increasing number of treaties made with them, and it is fair to say on the whole as well observed by them as by Christian powers, have caused the Christian powers to treat them as belonging to the family of nations; though naturally with certain limitations as such as exterritoriality, and also perhaps as in a state of probation and observation.

This position varies as to the individual nation, Japan being far in advance of China, and Korea leaning upon one side or another alternately, as each neighbor in turn, assumes a controlling influence over it. Japan is about to have the abolition of ex-territorial privilege conceded her. She has adopted the rules of the Geneva Convention and upon the whole followed pretty closely the laws of wars. Theoretically her judiciary is based upon European models and so far as concerned as imitation and in a very much less degree assimilation Japan can be said to be upon the road to Western Civilization.

China and Turkey are much less so. The internal strength of each of these countries is less than that of Japan, the inland nature of much of the territory of both renders ~~it~~ their less susceptible to outward civilization and to changes brought by the ready communication of the high seas. China has accepted neither the usages of civilized warfare nor bound herself to the conventions which have led to the amelioration of warfare. During the war with Japan, notwithstanding that the text books of International law were not unknown to the Chinese it may be said that so far as the usages of war are concerned they were ignored.

Japan on the contrary with the exception of the firing upon the Chinese troops in the water at the time of the sinking of the Kowshing (See Vladimir) and the Port Arthur massacre, in the main conformed to the usages of war in a manner quite comparable with the action of the Christian nations of Europe.

The position of China in the family of nations judged by the recent action of Germany in Kiao-Chou, is one neither of probation nor candidacy, so far as the charmed circle of Sovereign States or family of nations is concerned. It is simply the attitude of the ~~strong~~ weak towards the ~~weak~~ strong; of a State desiring colonial territory towards one who has furnished the pretext and possesses the desirable territory. It may be that the huge unwieldly, chaotic mass known as the Chinese Empire as a State is to go, but if it should go in accordance with the precedent established by Germany it will go as a result of force and ~~without any such conservatives as~~ not in accordance with Equity, justice and the rules of international law.

The precedents established by other nations with respect to the murder of missionaries and other subjects were the punishment of the offenders and an indemnity. This was followed

so late as the murder and murderous assaults near Foochow by the United States and the indemnity for destruction of property atCheng Germany's course is a new one.

What can I say, ~~for a moment,~~ as to the progress of International law? In view of some of the incidents of the Franco-German war, in view of events that have occurred with relation To Africa and more recent events in China and the East it would seem as if the principles of comity and the laws of nations had failed of application. No doubt as Hall says "since international law has come into existence it has often been quietly ignored or brutally disregarded." but - it does progress. No state ventures to declare itself independent of it and though the passions of man or the exigencies of nations seem at times to suspend it in certain circumstances its binding effect increases in strength throughout the world while its clientele among the countries of the world is extending.

Like the clock - though the pendulum ~~of action and re-action~~ may swing to and fro - the hands of the dial go steadily forward

In connection with our duties as members of the naval service while actively engaged afloat, the precepts and precedents of international ~~law~~ play no mean part. This part is not as some supposed confined to time of war when we play the part of belligerents, or that of neutrals.

The separate and distinct responsibility placed upon us by the regulations of the navy for our actions - no matter how urged and advised by the civil officials of the government - should impel all of us to be properly prepared for any and all circumstances. Peculiar exigencies may cause us to rise beyond the limitations placed upon us by the tenets of International law, but in such cases we should know perfectly well what we

ignore and how to weigh in the balance. A responsibility for correct procedure and intelligent judgment is with us, which the highest patriotism requires should outweigh all momentary applause from the galleries. The people of all nations like bold actions in critical cases but we should weigh well our movements and dare do what is right, if it be right and for the ultimate good of our country.

A thorough knowledge of the accepted rules and precedents of international law then is necessary to us, for appeals may come to us touching remote questions, from a consular or diplomatic official, for action or assistance - appeals which must be decided upon our own responsibility and often with no other immediate light upon the subject than that possessed by our selves.

In closing this part of the lecture I can only repeat in substance what I have said in print that there is no other service, nor body of men, under the government of the United States than that of the Navy that combines permanence of tenure with such constant and practical dealings in matters of international law both in times of peace and those of war.

With this much said as introductiry it may be well before proceeding to a purely techincal discussion and treatment of International law to give a sketch of its historical evolution and development.

-- Historical Sketch --

International law deals with the usages of modern civilized States. As a system it does not date back beyond three hundred years and its development from its systematic origin is linked with the history of modern civilization.

There are certain usages however which existed in earlier

centuries that have become incorporated to a greater or less degree in this modern system. The law of maritime capture for instance dates back to the earliest days and the political ~~edins~~ ideas and history of the early Greek and Roman nations have had their influence upon the formation and development of the modern law which as a body of rules governs the relations and intercourse of one nation with another. With this borne in mind and with the distinct understanding that these were tendencies and usages rather than crystalized rules or systems, the history of International law can be dated back and divided into three periods:

The First Period was from the earliest times to the Roman Empire.

The Second Period was from the Roman Empire to the Reformation, and

The Third Period, during which International law as we understand it was formed and grew, extended from the Reformation to the present times.

The distinguishing mark of the First Period was that nations owed duties to each other if they were of the same race, but not otherwise. Kinship was the basis of relations between the Greek nations or communities.

Among these communities, but confined to themselves alone there existed a rudimentary sort of International law - heralds were respected, burial was given to those who died in battle, the lives of those who took refuge in the temples of a captured city were to be spared, and ~~no-Greek~~ Greeks going to or at the public games or chief seats of Greek worship were not to be disturbed.

When the Island of Rhodes became the great sea power of the AEgean Sea, the conditions existing caused the formation

of a Maritime Code, the first of its kind, which governed Greek commerce and was known as the Laws of the Rhodians. These laws had its influence upon the later code - The Consolato del Mare - which in turn had its formative effect upon the modern laws of naval capture and peaceful commerce.

The Second Period which began with Rome as an Empire had for its distinctive character, the idea that the external relations of States must be regulated by a Common superior. During the supremacy of the Roman Empire its Emperor was such a Superior; Rome being then a universal empire, her laws were practically universal in extent. The idea and practice were one.

After the fall of the Roman Empire the idea of a common superior and regulator of nations continued. The Eastern Empire, and the Romano-German Empire maintained its claims as such a superior but the breaking up of the Roman Empire was followed by an age of confusion. The growth of feudalism which followed, although an improvement upon the preceding anarchy was by no means favorable to the ~~growth~~ development of international good feeling.

Christianity began to exercise an important influence however and its doctrines tended to cause greater humanity. The increased strength of the Church gave a pre-eminence to the Popes The Popes claimed authority over temporal Princes and as a consequence of that authority the right of adjudication in matters of international dispute. This claim was not an idle one,as shown, when the Emperor Henry IV, the most powerful prince in Europe went to Canossa and humbled himself before Pope Gregory VII. The Pope is still a mediator to a limited extent at the request principally of Latin nations. This position of the Pope as an arbitrator upon matters of international dispute,was

in the early days, a distinct influence for good. In the age of force it caused the introduction of the principles of humanity and justice in international quarrels and the position of the Pope as head of the Church caused submission from rulers whose conduct and practice showed nothing in common with the principles upon which such decisions were based. Of this papal supremacy until the time of Boniface VIII the advantages outweighed the disadvantages. Ecclesiastical authority was the only check to the license and lawless power of feudal princes and lords. - and was generally exercised on behalf of humanity and justice. The moral element was on the sice of the Popes.

Afterwards the Papacy declined and the Reformation followed. The protestant princes were often at war both with the German Emperor and the Pope and the idea of a common superior with sovereign rights over all nations gradually ceased to exist.

A re-action set in favoring the rights of the strongest In 1513 Machiavelli published his work favoring the doctrine that in matters of the State ordinary moral rules did not apply. It is my belief that States yet lag behind individuals in these timew as to the application of moral rules, but this open advocacy of their abrogation represented the most degenerate times. The darkest period occurs before the dawn.

The third period - is roughly defined as from the Reformation, but it more definitely dates from the short era between the appearance of the great work of Grotius in 1625 and the peace of Westphalia in 1648. Influences had been at work for years before making the ideas which Grotius so clearly stated and logically applied welcome. Some we have mentioned the conception of territorial sovereignty due to the middle ages was another idea, an outgrowth of feudalism, the cruelty of war

still continued to the end of the second period, but a feeling of revulsion was growing. The exchange of prisoners had begun and though the worst features of the thirty years war took place after the appearance of Grotius' book still all these horrors led Christian Statesmen to appreciate the humane laws which Grotius advanced. The success of his work was astonishing, Gustavus Adolphus is said to have carried a copy with him in his campaigns of the 30 years war. Finally the harvest time came when at the end of the thirty years war, in the Peace of Westphalia its leading principles were recognized and acted upon. The difference between the conduct of war and warriors in the Thirty Years War and in the war of the Spanish succession which followed years after, is said to be the differencebetween darkness and light.

Lawrence says of the peace of Westphalia that "It was the first of that series of great public instruments which have regulated the State system of Europe down to our own time. It recognized the independence of each separate state, even within the boundaries of the Emperor. The equality of States and the territorial character of sovereignty were ideas involved in the arrangements that it made, and it showed the possibility of settling the gravest disputes between nations by mutual agreement, arrived at through the machinery of a Congress, and embodied in comprehensive treaties ".

The key note of the third and last period of the history of international law is that there exists a society of independent states the members of which have mutual rights and obligations, and complete equality before the law which regulates their intercourse.

The occupation of America, the influence of the extension of commerce, and the quickened and more intimate intercourse

between countries due to the use of steam and electricity has developed International law and made its use of daily moment, but since the Peace of Westphalia its continuity has not been broken and the development has been upon the lines then established. Some theories and nomenclature may have been changed but the principles remain the same. The rights and duties of neutrals have since been developed from the very imperfect suggestions of those days, and it follows naturally that as we reach higher standards of humanity and justice, the precepts and practice of international law will follow in parallel lines linked as they are will all advancement in the civilization and enlightenment of the world.

SOURCES OF INTERNATIONAL LAW.

I will now treat somewhat briefly of the sources of international law. By the sources of international law we mean the places where its rules and principles are first found.

Before going farther let me impress upon your minds that no rules can have authority as international law unless it has generally been adopted by the civilized states. A recent writer upon the subject well says in this connection that "Custom is, as it were, the filter bed through which all that comes from the fountains must pass before it reaches the main stream."

International usage is then the touchstone which gives life and worth to the principles of international law. No matter how sound in ethics a principle may be if an exceptional and opposing usage be found the principle cannot be considered a governing one.

When, as sometimes occurs, two principles, apparently both sound and to an extent accepted by authorities, conflict, then the

practice - the bare usage - must govern.

Note Conflicting usages / Weigh as evidence is weighed -Giving regard both to amount and character.

Following mainly the classification of Wheaton and considering the modifications ~~made and~~ suggested by T.J.Lawrence and others the following may be given as the sources of International Law.

1. The works of great publicists - the text-writers of authority.
2. The decisions of prize courts, international conferences and arbitral tribunals.
3. Treaties.
4. State papers of jurists, opinions of Attorney Generals, confidentially and otherwise given to their respective governments.
5. Instructions, regulations and ordinances issued by the States for the guidance of their own subjects, officers and tribunals.
6. History of wars, negotiations and current events.

Though an attempt is made by the order of classification to give the relative value of these sources, still in practice, with the different writers and different schools in existence it is almost impossible to make such distinction rigid. Some writers approach the subject simply as theorists, some as men of affairs, some as lawyers and judges, while others, as Kent and Story in our own country, were both judges and text writers.

~~There must be considered~~ The difference always existing between the Continental school or publicists, and those of the English and American School must not be neglected in this consideration

Hautefeuille and the continental writers generally give little weight to the decisions of prize courts, but much to the speculations and reasoning of text writers.

English and American writers give a higher place to precedents and judicial decisions.

This of course can in the main be attributed to the different systems of municipal law. Continental law writers look to the decrees and codes of legislatures and after these, or in their absence, to scientific treatises.

In England and America judicial decisions form a binding precedent and the dicta of text writers have very much less weight. In the days of the great early text writers - Grotius, Bynkershoeck and others there were no precedents and little usage, and they reasoned from the laws of nature and justice and the great principles of right and wrong.

Dana in his notes upon the text of Wheaton reasons very strongly as to the practical nature of the decisions of prize courts and tribunals. While conceding the necessary impartiality of text books, written as they are in seclusion, and removed from the attendant prejudices and passions of actual cases, he says "With the English and American lawyer or scholar, it is the habit of life to consider a decision by a judicial tribunal, on an actual case, as ordinarily the best attainable evidence of what the law applicable to the case is. The fact that parties have been engaged in actual conflict, in which property, character, or life, have been staked upon the law of that case, and learned counsel employed, creates a probability that the law has been thoroughly examined and shown in the various lights in which open contestation tends to place it. It is thought, too, that the law evoked by actual cases, after they have arisen

and been presented, with all their consequences, is more likely to be practical, than the meere abstract speculations of the ~~wise~~ wisest. The Court too in ascertaining the law and applying it, beside having the aids referred to , is acting under the sanctionsof public official duty on a matter known to involve interests, which the law it shall declare will settle finally, and with the further caution of knowing that the principle or rule it adopts is to become a general precedent for the law of other cases, and to be subjected afterwards to the test of time, not only by critical examinations of text writers, but in respect of its applicability to the actual transactions, brought before the same or other courts, under other circumstances and in other times."

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"Every decision of a prize tribunal is, or results in a national act. The sovereign must either carry it out or set it aside. The latter he will not be permitted to do unless it is in his own favor. As a judicial decision, it is the most solemn and responsible opinion a learned doctor of the law can give; and, as a national act, it is done on the most solemn responsibility that can rest on a sovereign."

AUTHORITIES.

For an extensive and comprehensive reading in International Law one may well begin with the history of the subject and read the treatises upon its history.

Hosack's Rise and Growth of the Law of Nations to the Treaty of Westphalia ~~would~~ will be found interesting and instructive.

As to the most recent books the following can be recommended for general reading and reference.

Snow's Cases and Opinions on International law.

Snow's lectures on International law.

Walker's Science of International law.

Hall's International law (4th edition)

T.J .Lawrence's Principles of International law,

and Woolsey's International law. (last edition)

The great text book however is Wheaton's Elements of International law and the best edition to my mind is that of Richard Henry Dana. A copy of this is to be found in the library but is otherwise difficult to obtain.

After Dana's edition ~~the best and~~ most recent is the English edition of A. C. Boyd.

For the discussion of collateral subjects much is found in

Lawrence's - Essays on disputed points on International law.

Davis' Outlines of International Law.

Hare's Constitutional law

and Winthrop's Military law (2d Edition.)

while for exclusively American practice and for reference/

Cadwallader's Digest of Opinions of Attorneys General

and Wharton's Digest of American International law are of value.

--Sovereign States --

The great units or subjects with which International law primarily deals are Sovereign States

To a less degree international law deals with Part-Sovereign States, belligerent communities, corporations and individuals.

A Sovereign State, may be defined , as a body politic, supreme over its members, subject to no external authority, and

which has attained a certain size, importance and degree of civilization. Fixed in its own territory, with well defined boundaries, it must Have arranged for its continuity of existence

Cicero in his time defined a state as a "body politic or society of men united together for the purpose of ~~uniting~~ promoting their mutual safety and advantage by their combined strength".

But this definition will not apply to the modern conception of a sovereign state. Cicero's definition would be met by a body of pirates, it would apply to an organization of people for commercial purposes like some of the African companies of today or to the East India Companies of times gone by.

It would apply to roving tribes of savages or to small isolated communities like that formed by the mutineers of the Bounty on Pitcairn's Island. A contracted definition of that nature would also include dependent States like Canada and like one of the States of our Union with ~~the~~ certain limitations as to external sovereignty and as to war making and diplomatic powers.

In requiring that a subject state should not be subject to external authority it is not meant as a condition that it should be entirely exempt from occasional external pressure, for that would bar Greece and Turkey of the European powers and China and Japan of the Asiatic powers, not to speak of some of our own weak American nationalities. Even Russia among the Great Powers had to yield to European pressure and sacrifice the Treaty of San Stefano in order to allow a settlement to be made by the Concert of the Great powers. Hence we mean rather habitual freedom from external authority when we speak of a sovereign state as we ~~will be a~~ mean habitual supremacy over its members, ~~as~~ rebellion insurrection and riots ~~will occur~~ being liable to occur in a greater or less degree and frequency in the best ordered of States.

The continuity of a sovereign state must be provided for in some form also, for with that continuity is linked the possibility of fulfilling its general and particular obligations. In this connection the usually understood difference between a State and a Nation must be mentioned. Although atnthe time of the adoption of the phrase international law, nations and states were ~~supposed~~ considered to be identical there has in later years arisen a differentiation in the terms. Nations are held to be peoples of the same race whereas a State may be composed of several nations or a nation divided up by several states. The Jews are non-existent as a State, though still held to be a nation, Austria-Hungary is composed of three nations or races, Germanic, Slavic and Magyar, while the Poles are subjects either of Austria, Prussia or Russia. This distinction has of late become of political importance because of the tendency of unity under race conditions, each forming its own State. The disintegrating condition of the AustroaHungarian Empire is due to this, as well as the pan-Slavic movement and the agitation of the Irridentist party in Italy.

So long as a State possesses the necessary qualifications mentioned in the preceding definition of a sovereign state - international law does not concern itself as to its system of government, it may be an absolute monarchy or a republic, it may be a strongly centralized state or a federal union, or it may change its dynasty or form of government at will without affecting its position as a unit and as a sovereign state in the view of international law.

--- Internal and External Sovereignty --

"Sovereignty," says Wheaton, "is the supreme pow er by which any state is governed. This supreme power may be exercised internally or externally."

"Internal sovereignty is that which is inherent in the people of any state, or vested in its rules by its municipal constitution or fundamental laws." Constitutional law treats of internal sovereignty.

"External sovereignty, says the same author, consists in the independence of one political society (or State) in respect to all other political societies.

"It is by the exercise of this branch of sovereignty that the international relations of one political csociety(or state) are maintained in peace and in war, with all other political societies."

International Law treats of, and has to do with, external sovereignty alone.

It is well to fix in your minds definitely the distinction between the two forms of sovereignty.

Internal Sovereignty is a matter of fact and does not depend upon the recognition of that fact by any other state, while External Sovereignty depends upon the consent and recognition of other states, either tacitly or directly given. Of course a country lacking internal sovereignty lacks one of the elements of a sovereign state but a country may have perfect internal sovereignty and yet not be a sovereign state.

The standing of a state as such, and its continuity, is not affected by any internal changes of government, ~~of course~~ unless ~~it~~ all authority disappears and the state becomes an anarchy so long continued as to render re-constitution highly improbable or

impossible then the State identity becomes lost. So if the State becomes split up in several great portions its State identity is lost, but ordinary annexation or partial loss of territory does not affect its existence and good standing as a State.

Under the head of Sovereign States are classed those confederations and unions which have some agent or ruler who deals with foreign states and manages the external affairs.

Confederations are divided into two principal classes, one class, like the United States, provide a central authority to deal with foreign affairs, and exercise external sovereignty, while the numerous states or members of the Union have control of internal affairs only. The German phrase for these is Bundesstaat the other class, like the old German Bund, from 1815 to 1866 is one in which the States retain for themselves the power of dealing with foreign states in some matters, the remaining foreign matters being reserved to the central authority. In Germany they are termed Staatenbund. The central authority in these cases is a sovereign state while the members of the confederation do not reach beyond the status of part-sovereign states. There are in addition to these other unions under a common monarch like Sweden and Norway, the Austro-Hungarian Empire and Great Britain and Ireland which are permanent in their character - or only temporary as Great Britain and Hanover has been.

We have now finished the discussion of the primary subjects of international law and with this [illegible] the lecture will be brought to a close reserving for the next lecture the question of the partly or Semi Sovereign States, and the technical and real equality of the States of the World .