New Rules of Conduct Needed for Nations

Robert Bacon, Former Ambassador to France, Discusses the Breakdown of International Law and Suggests a Remedy

By Robert Bacon

Robert Bacon, former Ambassador to France, Assistant Secretary of State under Secretary Elihu Root and Secretary of State when Mr. Root resigned from that office, is a candidate for the United States Senatorship in the Republican primaries. He has made a particular study of the relations of the United States with the countries of South and Central America, and three years ago he made a tour of the principal South and Central American countries in the interests of the American Institute of International Law and under the auspices of the Carnegie Endowment for International Peace, of which he is a trustee.

Mr. Bacon believes in popularizing the subject of international law and making it easy to understand for the mass of people. When this is done he believes it will be impossible for any nation to disregard wantonly the law of nations without suffering consequent penalties, the same as any violator of established law and order.

The following article, written especially for THE SUNDAY TIMES, *sets forth his ideas of the fundamental principles of international law.*

FROM day to day the press reports that international law has been violated. Thoughtless people assert that international law has gone by the board, and even statesmen ask themselves whether there really is an international law, or whether it will survive the lawlessness which the war has seemed to engender. Can we hope to make treaties in the future when they have been so shamelessly disregarded in the immediate present? What rôle can Hague conferences hope to play when their work has been thrown to the winds? What is to be the outcome of it all?

Perhaps the wisest way to answer these questions and to overcome these doubts and misgivings of the future is not to appeal merely to the reason of the thing, but to invoke history. If we were asked to pick out the periods of greatest lawlessness in modern times we undoubtedly would select the Thirty Years' War and the wars of the French Revolution and Empire. To a spectator of the Thirty Years' War, which devastated Europe, particularly Germany, from 1618 to 1648, when the Congress at Westphalia not only concluded peace but laid the foundations of modern international relations, it would have seemed that law and order had been thrown to the winds, and that anarchy had taken undisputed possession of the Continent of Europe, which then was almost synonymous and coextensive with civilization and the world.

For these views we can put on the witness stand a high-minded and gifted publicist of Holland, who recognized the lawlessness of that day and generation, and who did not lose hope, notwithstanding his discouragement, and gave his generation the law and the reason for it, which superficial observers declared to be nonexistent, and which, if it existed, had been broken beyond the possibility of putting together. Now, this observer is none other than Grotius, who, in the midst of the crisis which threatened the extinction of European culture, wrote his immortal three books on the "Right of War and Peace," which were published in 1625, and which have caused him to be affectionately regarded as the father of international law. We know why Grotius, unjustly exiled from his country and eking out a miserable existence in France, wrote the first systematic treatise of the law of nations; because he himself tells us that he was moved to do so by the anarchy which prevailed all about him; because nations had gone to war for real or no reason, and, having drawn the sword, they abandoned law and order and indulged in every form of license without let or hindrance.

Grotius believed that there was a law controlling the actions of nations in time of war as well as in peace; and in his immortal treatise he set forth the rules of that law, basing his system upon the reason of the thing and the generous thought of the ages. The appeal did not fall upon a deaf ear, because an experience of war upon a stupendous scale, with its brutalities and its injustices, its violations of elemental right, always compels the generation which has suffered the evils and outrages of war to escape its consequences in the future; and the escape is always found to be in law and its faithful observance.

The Congress of Westphalia, in which Grotius's principles were first tested and found not to be wanting, was the legitimate ancestor of The Hague peace conferences.

Robert Bacon. Photo (C) Underwood & Underwood.

The French Revolution and the lawlessness of its wars serve as an illustration. The French people, for reasons which seemed satisfactory to them, drafted a Constitution in which they limited the powers of the hitherto absolute monarch. Although this was a purely internal act, the European monarchs were up in arms, because the claim to clip the wings of one monarch involved the right to clip the wings of all. The royal brothers accordingly rushed to arms, to force the French people to withdraw their Constitution and to restore their King, Louis XVI., to his unlimited powers. They invaded France, but they were beaten back, and, with their retreat, the old doctrine fell that people did not have the right to organize their Government in such way as to them should seem best calculated to effect their safety and happiness. But an act of injustice, and the invasion of France for these purposes was unjust, breeds injustice. France overran its neighbors in its turn. The Man on Horseback appeared, in the person of Bonaparte, and for twenty years Europe was one vast battlefield and graveyard.

I have thought it best to answer the question whether international law can survive the violations of the present war by showing that international law has survived even greater violations extended through a longer period of years. What has happened not only once, but over and over again, is bound to happen in the future; and just as the steady development of international law has received a great impetus by a catastrophe which was thought to have buried it under its ruins, we are justified in the belief that after this war there will be a greater, a more adequate, and a nobler system of international law as a consequence of the desire existing in every quarter of the world to perfect the law of nations so that it may be a safe and a sure guide for the conduct of nations, as the law of every country is a safe and a sure guide and a standard of conduct for the peoples thereof.

I assume the existence of international law, and for us in the United States there can be no doubt about it, as in the case of the Paquete Habana, decided in 1899, the Supreme Court of the United States expressly held that "International law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." For an American, this settles the question, and I need invoke no other, as I cannot invoke any higher authority. Yet I would like to make a further quotation from this judgment, as it shows not merely the existence of international law, but it shows its sources as well. "For this purpose," continues the court, "where there is no treaty and no controlling executive or legislative act of judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

It may be said that the United States admits the existence of international law, but that the nations at war do not, and that they refuse to allow their conduct to be tested or controlled by any other standard than that of self-interest, of which they claim to be the judges. In answer to this claim, it should be said that the decision of the Supreme Court which I have quoted declared the capture of some Spanish fishing smacks during the war with Spain by United States authorities to be contrary to law, and, therefore, held the United States bound to compensate the owner for the illegal capture. Again it can be answered that each of the nations at war denounces its enemy for violating international law, and asserts that its conduct is in accordance with the law of nations. This means and can only mean that each nation regards international law as the test of right or wrong conduct; that it is an existing system, because, if it were not, an appeal to it as the test of the conduct of the enemy would be futile, as an appeal to a non-existing system. Therefore the very violation carries with it the proof positive of the existence of the law of nations, and we may be thankful that to this extent at least the nations at war united in proclaiming the existence of a law of nations, even although they differ upon its form, content, and interpretation. The jail is an evidence of law, not of its absence.

We must be fair in this matter, and we must admit that the law of nations is not a complete system of law; that its rules do not cover the activities of nations as the rules of municipal law cover the activities of individuals; many of its principles are vague; and that, in any event, there does not as yet exist an international agency crowned with authority by the society of nations to find the facts in dispute, to ascertain and to interpret principles of law, and to apply them to the concrete case. These are great and important matters, and we must reach an agreement about them if we are to have international peace based upon justice, which is the only peace worth having and which is the only peace that can be permanent.

I do not need to argue that we must have justice, for we know that our domestic society could not last overnight if our people thought that it was not based upon justice. The whole order of things would be changed, peaceably if possible, forcibly if force were needed. The whole process of development within each and every country has been to put the fundamental principles of justice into rules of law, which all must accept and observe. As each nation, or the people forming each nation, have been engaged in this process for a very long time, we have had great experience in this matter, and as the result of that process has been substantially the same in every country belonging to the society of nations, we are justified in stating without fear of contradiction that some half-dozen principles everywhere exist, and as they exist everywhere we can call them universal, and as they are universal, we can call them fundamental. These principles of justice, universal and fundamental, are few in number, and for present purposes we can consider that there are half a dozen such. They are very well known to us, and they have a curiously familiar ring to one who has read and pondered over the Declaration of Independence. They are:

1. The right to life.
2. The right to liberty.
3. The right to the pursuit of happiness.
4. The right to equality before the law.
5. The right to property; and, finally,
6. The right to the observance of these rights; because if the right to their observance does not exist, they are either nonexistent or useless. The mere statement of these rights carries conviction, and I do not need to argue that they exist. Our daily experience shows that they do, and that they are the source from which all other rights flow, and they are the basis upon which all other rights depend. They have been tested for centuries, and they have not been found wanting. We are, therefore, justified in asking ourselves if these rights

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everywhere existing and everywhere applied within national lines, and thus familiar to every man, woman, and child of the civilized world, cannot regulate the conduct of nations, which are, after all, merely agencies of these peoples, and control the actions of the nations one with another.

It may be objected that these rights are indeed fundamental principles of municipal law, but that they cannot be stated in terms of international law, and that even if they are so stated they would not apply to nations as they undoubtedly and admittedly apply to individuals. I believe I could show by argument that they could be translated into terms of international law, and that they one day will regulate the conduct of nations, just as they regulate the conduct of smaller communities. But I prefer to deal with facts rather than theories, and I shall quote a decision of courts of justice on each one of these fundamental principles, stating them in terms of international law and applying them to nations.

The right to life of national law is the right to existence in the law of nations, and on this point I quote a sentence or two of the Chinese Exclusion case, decided by the Supreme Court of the United States in 1888, in which that august tribunal said: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers."

It will be observed that the Supreme Court says "nearly." It does not say that all considerations are to be subordinated to the fundamental duty of State "to preserve its independence, and to give security against foreign aggression and encroachment."

A nation cannot, under this decision, claim that certain acts are necessary to preserve its independence and give security against foreign aggression and encroachment, and so stating, ride roughshod over the rights of others on the theory that necessity knows no law. The meaning is, that a nation can take all measures calculated to preserve its independence, provided that in so doing it does not unjustly injure the rights of other nations, for all nations have the same right to existence.

An English court has placed the limit upon necessity, without which anarchy would prevail within nations, as unfortunately anarchy does prevail between nations. In a leading English case, decided some thirty years ago, some shipwrecked sailors were indicted for having killed and fed upon one of their number in order to sustain their own lives. The plea of necessity was interposed and rejected by the court.

The right to liberty of national law is, in the law of nations, the right to independence, and the right of equality is the same in each system. On these two points, taken together, I beg to quote two decisions by the most distinguished and authoritative Judges of the English-speaking peoples. In the case of Louis, decided in 1777, Sir William, later Lord, Stowell, said:

> Two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct States.

The great Chief Justice of the United States thus proclaimed the doctrine of equality, overruling the action of his own Government as contrary to it:

> No principle of general law is more universally acknowledged than the perfect equality of nations.

For the right to the pursuit of happiness I do not quote a decision. The Declaration of Independence is to an American a sufficient authority.

The right to property in national law is, in terms of international law, the right of each nation to territory within defined boundaries, and to exercise exclusive jurisdiction over all persons, native or foreign, within such boundaries. As authority for this fundamental principle, I invoke the authority of the great Chief Justice Marshall, who, in this matter, again decided against the contention of his country, saying, in the case of the schooner Exchange, decided in 1812, that:

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitations not imposed by itself.

The right to the observance of these fundamental rights need not be translated in terms of international law, because, like equality, it is the same in any system of law. It is only necessary to show that the right which the individual has to the observance of his fundamental rights exists in the same form, and indeed in the same degree, in the law of nations, and it was so interpreted and applied by the Supreme Court of the United States in the Arjona, decided in 1886, by Chief Justice Waite. After stating that under international law each nation has the exclusive right to fix its standard of money, the Chief Justice held it to be the duty of the United States to protect a foreign nation in the exercise of this right.

I have been careful to cite an adjudged case of the Supreme Court of the United States for each of these principles which, everywhere existing, I consider universal and fundamental. They are admittedly so in municipal law; they are declared to be so by the Supreme Court of the United States in international law. If they are the firm foundation of municipal law, they are the source from which all other rights are derived which men and women, as such, possess and enjoy. They are declared by the Supreme Court to be the universal and fundamental rights, and from this source all other rights can be derived which nations should enjoy. According to this court, the law of nations not only exists, but "is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Supreme Court has rightly declared that the rights of municipal law are also rights of international law, and, in so doing, has solemnly stated that the principles of justice apply alike to individuals as to nations. We, in this country, must admit this to be so; we cannot overrule the Supreme Court of the United States. Its decision is law for us, and, armed with its authority, it is for us to insist that these principles be recognized by the nations of the world, just as they are recognized and must be recognized by us, for in recognizing these principles we apply them; and, in applying them, we introduce justice into the practice of nations and at one and the same time we introduce law and order, which are the outcome of justice, whether it be national or international. The rule of law is destined at no distant date to supplant "the rule of man."

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