

## EDITORIAL COMMENT

### LIBERAL AND TOTALITARIAN ATTITUDES CONCERNING INTERNATIONAL LAW AND ORGANIZATION

By general admission these are difficult and dangerous days for international law and international organization. Not for all international law, indeed—for certain branches thereof are developing very vigorously—but for some of the older branches of the law and for some of its basic theoretical aspects. Not for international organization as such—there could be little doubt concerning its general value or its viability—or concerning the older type of special international agency, but concerning the omnibus organization of the type of the United Nations, especially in respect of the attempt to provide peace and security by community enforcement action.

Is it possible to discover any one main source of these dangers apart from the many difficulties naturally inherent in international relations, cooperation, organization, and the law that enshrines them? It is believed that this is possible, and that it may help, in the effort to arrest and reverse the current disintegration, to point them out tentatively.

The most dangerous threat to international law and organization existing today appears to stem from two groups of people—lay citizens, officials, organizations (national and international)—who in many other ways would appear to be found at opposite poles of the social and political spectrum. They may be designated hypothetically as the liberals and the totalitarians. They require, however, some further identification.

The liberals should be, by etymology and by tradition, the devotees of freedom—freedom of thought, word, and action—deriving from the revolutions of the sixteenth, seventeenth and eighteenth centuries. Actually, in their late nineteenth and early twentieth-century incarnation, they are, to judge strictly by the current usage of the word, humanitarians, many of them very prosperous and philanthropic persons, stemming from the great humanitarian movement, mainly English in origin and development, of the same period. Their chief aim has been alleviation of the sufferings of those human beings who for one reason or another—the reason being irrelevant in the heart of the humanitarian—lack health, food, clothing, or other of the essentials of decent life. And the humanitarians, when they consider the matter, attribute these sufferings, which they feel impelled to remedy, to that free economic system which has also been described as liberalism! The implication concerning the liberal's opinion of human equality is very interesting. This leads them, somewhat paradoxically, to sympathize with the totalitarians, who also profess to aim at the alleviation of the lot of the masses by abolishing liberalism!

The totalitarians, on their side, have, of course, simply laid hold of a device or a technique which has nothing to do with any particular subject-

matter content. Its essence consists of a denial of freedom and individualism in favor of complete group control. It is a technique which might be employed for the promotion of a religious creed or any economic interest, proletarian or plutocratic, or any other aim. It is actually employed by devotees of Marxian Communism—protagonists of the needy masses—but it has been employed by German National Socialism, Italian Fascism, and numerous other institutions or movements which shall be nameless here. The aims of the totalitarians sometimes appear to resemble the altruistic aims of the “liberals,” but for the most part appear to be, on the contrary, decidedly selfish in character.

What has all this to do with international law and organization? Just this: Both the “liberals” or humanitarians, and the totalitarians, for somewhat diverse reasons, attack those principles, institutions, and procedures which seem to hold the greatest promise for the development of international justice, law, order, security, and peace. Of course the “liberals” and the totalitarians have inevitably been compelled to devote some attention to the problem of international relations because of its involvement with all questions of social welfare. It is the tragedy of our time that the most serious opposition to world peace and justice comes from both the most vicious and the most righteous of sources.

Thus the humanitarians support the totalitarians (Communists, in the main, today) in criticism of capitalism and imperialism. They are also, in large numbers, pacifists, and as such oppose military action (either preventive, or sanctions, or even defense) against aggression. They question the validity of this last category and even feel some doubts about international law and administration, as being too closely identified with the regime of nationalism and war. Of course not all “liberals” or humanitarians are pacifists, and for that matter not all “pacifists” are pacifists, but the situation remains substantially as described.

The Communists, in their turn, oppose international organization, law, and administration as tools of capitalist imperialism. This is in part merely the application of orthodox Marxism; in part it is the emotional reaction of individuals who feel themselves to be cheated of their just deserts. Contemporary psychology would indicate that it is, however, not lack of capacity so much as lack of motivation—especially social motivation—which explains the state of affairs respecting the “underprivileged.”

The result is that international law, international organization, and international administration are opposed by the totalitarian opponents of individualistic capitalism on the ground that they are but tools of the imperialists, while they are sabotaged, at the very least, by the “liberals” because they are too closely associated with economic inequality, exploitation (national and international), and war. It is quite probable that the totalitarians—today the so-called Communists, although their dangerous character flows not so much from their attitude on strictly economic matters concerning capitalist and proletarian as from their technique of dictator-

ship, especially in the international sphere—are far more dangerous than the “liberals,” but it seems regrettable that this unholy alliance should exist.

Finally we may ask for a verdict on the “liberal”-totalitarian attitude—frankly admitting that we desire international peace and justice and believe that international law and organization are essential to these ends—and for a tentative formula of procedure for the immediate future. Now the principal defect of the opposition to international law and order appears to reside in its oversimplicity. International law is not always perfect and at times should be modified or put aside or defied—this is true of all law—in the interests of peace and justice. International organization and administration are very defective and should be supported and employed with discretion. But any dogmatic and complete opposition to the national state, international law and organization, and peace and order, based on international authority, whether for partisan purposes employing totalitarian techniques or for “liberal” humanitarian purposes, seems too simple to correspond with reality and contrary to the welfare of the international community and of humanity.

What can be done about this situation? The countries—peoples and governments—remaining faithful to the principles of liberty, law and order based on voluntary agreement, justice and peace, must remain strong and outlast the totalitarian adventure. Everything possible must be done to demonstrate the value of world-wide understanding and coöperation—through law and organization—again on a basis of mutual consent. To this outcome the “liberals” might—perhaps, may—be expected to lend their support. Perhaps the totalitarian international anarchists may yet be convinced of the futility of their effort.

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#### INTERNATIONAL LAW BY ANALOGY

Some years ago at an annual meeting of the American Society of International Law, as this writer recalls, there was a discussion from the floor as to cases decided by the United States Supreme Court concerning river boundaries between States of this Union. The opinion was voiced tentatively that this Court perhaps no longer applies international law in such cases and that perhaps the maxim “International law is a part of the law of the land” is in decline. Such and similar opinions, it is submitted, are based on two theoretical errors and it is the purpose of this paper to clarify them.

The first error has to do with the legal significance of the quoted maxim which, it is said, is typical of the Common Law.<sup>1</sup> That international law,

<sup>1</sup> See on this problem: Blackstone, *Commentaries upon the Laws of England*, Bk. IV, Ch. 5; J. B. Moore, *A Digest of International Law* (Washington, 1906), Vol. I, pp. 9-11; Picciotto, *The Relation of International Law to the Laws of England and of the United States* (1915); H. Lauterpacht, “Is International Law a Part of the