

THE INFLUENCE OF MENTAL REACTIONS ON THE DEVELOPMENT OF
INTERNATIONAL LAW

What effect do particular manifestations of State conduct have upon the minds of the peoples of other States and upon policies attributable to their mental reactions? Such an inquiry might well be made with respect to the following situations:

(1) Compelling a State to cede territory and to register the transaction in a treaty of which the validity is not to be challenged on the ground of compulsion.

(2) The sending of armed forces into foreign adjacent territory for a protracted sojourn on grounds of self-defense.

(3) The attack without warning by a belligerent warship of an enemy merchant vessel known to be unarmed and laden with neutral persons and property.

(4) The destruction or diversion by a belligerent of an enemy owned cable connecting territory of a co-belligerent with neutral territory.

(5) The patrolling by belligerent warships of the waters on the high seas adjacent to the territorial waters of a neutral State.

(6) Habitual failure of a State to offer adequate local remedies as against itself for the benefit of aliens subjected to internationally illegal treatment at its hands.

(7) The penalizing by a State of a former national for going abroad and acquiring, without its consent and in disobedience to its command, the nationality of a foreign State in pursuance of its naturalization laws.

(8) The harsh or reactionary treatment of nationals, causing their emigration to foreign territory where they become a public charge.

(9) Unwillingness to care for indigent or infirm aliens lawfully resident in the country within which they live.

(10) Occupational discriminations against aliens permitted by treaty to enter and remain within the territory of the country where they live.

(11) The exclusion, by statutory enactment, of alien peoples deemed ineligible for naturalization.

(12) Retention of the classification of diplomatic agents laid down in 1815 and 1818, and the withholding of the ambassadorial grade from particular groups of States.

(13) The withholding of full privileges of independent statehood from countries recognized as new members of the international society.

Such activities, typical of those which take place in a variety of fields, pertain to differing aspects of State life, are themselves attributable to widely differing causes, and produce emotions which vary greatly in intensity and kind. Numbers (1) to (5) refer to manifestations of sheer power or force, applied for the most part in seasons of war. Numbers (6) to (11) concern the relation of the State to the individual—usually an alien. Numbers (11) to (13), and also Number (7), pertain to conduct impressed with a political character. Number (9) is typical of what may be productive of slight and perhaps inconsequential reactions abroad. Number (6) refers to conduct respecting which international law, according to American opinion, opposes

no obstacle, regarding the State action as a domestic matter. The correct answer to the query put above, in respect to any of these activities, in any quarter, may not be unascertainable. If it is within reach, it should be had, for the light which it sheds may be of utmost public concern.

Sound estimates of the probable consequences of accurately anticipated foreign reactions to particular acts are never unheeded; and they may become a definite deterrent of those acts. Such anticipatory tests are habitually applied by foreign offices and utilized as warnings. A very few years ago the Government of the United States urged that of a maritime State engaged in suppressing a serious insurrection, not to mine the approaches to certain of its ports, because of the conviction that the destruction of any American vessel through the agency of any mine there planted would reproduce a reaction in the United States similar to that caused by the destruction of the *Maine* in Havana harbor, February 15, 1898, and would, accordingly, greatly jeopardize the maintenance of friendly relations.

The convention of January 11, 1909, concerning the boundary waters between the United States and Canada, is also illustrative. Both parties realized that neither could afford to assert its full rights in the face of the other by unrestricted use or diversion of boundary waters within its own domain. Certainty on both sides of the line that such action would produce adverse reactions easily to be transmuted into conduct of lamentable consequences was the reason for the convention, which has already served a highly useful purpose.

The ability of foreign offices to foretell reactions on contemplated policies is doubtless greater than heretofore; and there is no lack of zeal on the part of diplomats to endeavor to master the art. Nevertheless, mistakes are not infrequently made; and the consequences of some of them within recent years have, from every point of view, proved to be disastrous. This circumstance raises the inquiry whether there might not be available to a foreign office some scientific rather than political agency, expert in the measuring and appraising of foreign State reactions in any quarter, and competent in a practical way to minimize the danger of incorrect governmental anticipations.

How does the international society concern itself with these reactions? That society seemingly manifests an interest in the conduct of any member which arouses in any other a sense of outrage, or injustice, or begets a desire for revenge, or is for any reason provocative of ill-will. In theory, the extent of that interest ought possibly to be measured according to whether the conduct productive of such a reaction is or is not to be deemed internationally illegal; and it might be contended that that society should evince no interest in the fact that one member smarts under the stern treatment applied by another which the law of nations does not proscribe. This argument implies that there can be no general interest unless the reaction is reasonable, and that the test of reasonableness is invariably seen in what the law of nations is

believed at the time to ordain. The international society has not, however, acted in this way. It shows its concern in the recurrent sinister reactions of even an unruly member howsoever brought about, and with the forms of conduct known to be certainly productive of them. Roughly speaking, it takes cognizance of any conduct serving to arouse in one or more of its members reactions indicative of a sense of outrage, or a desire for revenge, or profound ill-will. When such reactions are widespread and acute and persistent, they serve to create doubt whether the law which tolerates the conduct which produces them makes adequate response to the needs of the international society; and they themselves become the source of a constant stream of fresh amendatory suggestions for the improvement of that law and for incorporation into it. In a word, external mental reactions to State conduct serve to bring about a remolding or refashioning of the standards by reference to which international law finds itself unceasingly adjusted to the requirements of the time. It is not suggested that these reactions suffice in themselves to change the law. They do, however, set in operation forces which may result in changes, and which will surely do so if their influence is sufficiently widespread and prolonged.

It may, therefore, become important for a State to learn what is the direction and strength of the tide of general opinion on a particular rule of conduct or matter of policy, regardless of its acknowledged propriety. That tide may be incoming, manifesting a broad sweep of increasing approval, or it may be outgoing, slowly yet perceptibly welding together a common sense of disapproval of acts which a State tenaciously asserts the right to commit. Or the tide may be about to turn. Whatever be its direction, the facts are of public concern. If they can be ascertained and statesmen thereby enabled to see beyond the horizon, the nature of the development of the law may be anticipated, and the very trend of that development be furthered or retarded. Thus it is that scientific examination of foreign mental reactions to any activity of State life may be expected to bear much fruit, for it commands a vision not elsewhere to be had. It is capable of revealing what general opinion may demand that the law of nations require or denounce, and of so enabling the international society to avoid devious paths, and in the shortest time to lay straight its course for the advancement of justice.

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THE ACCESS OF INDIVIDUALS TO INTERNATIONAL COURTS

In recent years there has been a growing demand by certain jurists and publicists that aliens be given by international treaty the privilege of suing States before an international court. Two members of the Committee of Jurists which framed the Statute of the Permanent Court of International Justice in 1920 wished to confer such jurisdiction on the Permanent Court. The demand springs from a feeling that justice is now often unobtainable by