# Our American Legal Philosophy

## MECHANISMS AND TECHNIQUES TO END INTERNATIONAL LAWLESSNESS

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I AM happy to share the hospitality of this occasion—not as a guest, but more nearly as a returned prodigal. When, over a quarter of a century ago, I became a member of this association, it was with the expectation of serving for life at the bar of this state. I was lured away for a time from that strict course, although I cannot say that I did much to prevent my seduction.

To return to labor in the vineyard of the law, even in the most cloistered part of it, brings that satisfaction which comes of single-minded devotion to tasks one would have chosen for himself, had it been his to choose. It is an added enjoyment that the Supreme Court has assigned me to be the Circuit Justice for this Second Circuit. I coveted that assignment, for it makes *de jure* what would in any event have been a *de facto* situation that I more or less represent you to the Court and the Supreme Court to you. The prerogatives of the assignment are conveniently vague. I understand that they include under some circumstances a vestigial privilege derived from a bygone duty to sit as a Judge of your Circuit Court of Appeals or of your District Courts. I hasten to reassure you, however. The work of the Supreme Court is sufficiently overwhelming so that I constitute no immediate threat to these tribunals. The duties of the assignment, so far as I have experienced them, consist of hearing pleas to allow appeals and to grant extensions of time to lawyers of the circuit who find themselves entangled in the esoteric doctrines of federal jurisdiction. But the additional compensation from this assignment I am now collecting. It is the privilege of fellowship with the judges and lawyers of my home circuit as working members of the craft, rather than being regarded only as a cold and distant figure in contemporaneous legal mythology.

The laws and legal institutions which in different ways we all serve already are beginning to feel the impact of war. Measured by former war experiences this shock promises to be neither mild nor temporary nor respectful of our traditions. But grief sometimes begets wisdom, and out of the disruption of their daily lives Americans seem destined to learn the neglected lesson of the interdependence of nations and peoples. To the dullest mind it must now be plain that no national society can be so self-sufficient and so isolated that the freedom, security, and opportunity of its citizens can depend on its own laws alone. They can only function as we intend them to do, in the setting of an international society based on, or at least tolerant of, like principles. If this lesson finds its way to the roots of public opinion, as I have no doubt it will, the United States will win this war to a better purpose than to flee from the peace. One of the things at stake today is the principle upon which reorganization of the shattered post-war world may be attempted. However popular and useful it may be for war purposes to personalize those evil forces we propose to defeat and destroy, it would be a very immature and unstatesmanlike war aim that could be satisfied by the defeat merely of driven peoples and their infamous and perverted masters. Their crushing is a means to win another and equally fateful struggle to establish mechanisms and techniques for putting an end to international anarchy and lawlessness.

The crop of schemes for the millenium that will be fertilized by blood and suffering will be lush and extravagant. To break our lances tilting at windmills would be no more worthy than cynically to withhold our support for measures that are practical and possible. I believe that bold-thinking men of the law, many of them members of this very bar, have already provided a body of international experience in a limited sphere that can be expanded to serve the ways of peace in the greatly strengthened community of law-governed nations which must emerge if our victory is not to be vain in the sight of history. At a meeting of this bar, at which such names as Jay, Evarts, Root, and Hughes became distinguished before they won world-wide fame it is appropriate to recall some of the significant contributions made by the United States to the cause of a law-governed international society.

Our American legal philosophy always has emphasized the unity of international and municipal law, rather than their dualism. From the very beginning of its history as a nation the United States made international law part of the law of the land. The Constitution declared treaties made under the authority of the United States to be the supreme law of the land "anything in the Constitution or laws of any state to the contrary notwithstanding." Treaties can be overridden by an Act of Congress, but Congress has not been in the habit of enacting laws contrary to treaty obligations and Courts in the United States have consistently followed the rule of construction that Acts of the Congress shall be

so interpreted as not to impute to it the intention of disregarding the international obligations of the United States. Such is the importance which courts attach to the faithful performance of treaties that an Act of Congress, otherwise invalid as infringing the powers reserved to a state, has been held valid when passed in fulfillment of a treaty.[1] The courts of the United States had no hesitation in declaring, at the very outset, that customary international law is part of the law of the land,[2] and all branches of the American Government have followed the tradition of voluntary, though revocable, submission to the authority of the law of nations.

No country has contributed more powerfully than the United States to the cause of international arbitration by actually submitting disputes with other states for arbitral determination. This record must not be obscured by the fact that Congress, for reasons which are not necessarily of a permanent nature, has not viewed with favor the conclusion by the United States of treaties of obligatory arbitration. The beginnings of modern international arbitration as initiated by the Jay Treaty of 1794 between the United States and Great Britain and the arbitral commissions created by it; the bulk of international arbitration during the nineteenth century; the *causes celebres* of international arbitration—the Alabama arbitration, the Behring Sea arbitration, the Alaska Boundary arbitration, and the North Atlantic Fisheries arbitration, which showed the potentialities of international arbitral settlement in matters that matter—all these were due to the initiative or the cooperation of the United States.

It should be remembered that the principal arbitrations between the United States and Great Britain concerned matters of considerable political or economic importance which may well have come within the orbit of the sweeping reservations of "honor" and "vital interests" usually encountered in treaties of obligatory arbitration. The Commissions under the Jay Treaty adjudicated not only on important questions of boundaries; they decided on controversies relating to the difficult questions of neutral rights and duties. This was also the case in the Alabama controversy which, in addition, acquired in its initial stage the typical complexion of a dispute involving national honor. The antecedents of the British Guiana arbitration and its connection with the Monroe Doctrine tended to emphasize the political character of the controversy. The same applies, in a lesser degree, to the Alaska Boundary arbitration. The ultimate political significance of the apparently non-political North Atlantic Fisheries arbitration may be gauged from the opening observations of Senator Root before the Tribunal. He referred to the controversy as one involving "substantial and in some respects, vital interests to the portions of the people of each nation." He pointed out that when in such controversies each party "conceives itself to have a right which it cannot abandon without humiliation, and cannot maintain without force, a situation arises of the gravest importance and the first dignity."

The history and the outcome of the Behring Sea and the North Atlantic Fisheries arbitrations may be mentioned as instructive examples of the extent to which the United States and Great Britain have carried their reliance on arbitration. In the Behring Sea controversy Great Britain objected to the exercise by the United States of protection over fur seals on the high seas in so far as such protection amounted to interference with British vessels in derogation of the freedom of the seas. After a prolonged discussion, not free from occasional bitterness, the parties agreed to submit the dispute to arbitration. But they realized that a solution determined by exclusively legal considerations might not dispose of the issue in a satisfactory manner. Accordingly, they inserted in the arbitration agreement a provision to the effect that should the award of the tribunal leave the matter in such a position that the concurrence of Great Britain was necessary for the issuing of regulations for the protection of the fur seals the arbitrators shall determine what concurrent regulations outside the territorial waters are necessary and over what waters such regulations shall extend. A similar provision was inserted in the agreement providing for the North Atlantic Fisheries arbitration. The tribunal held that, contrary to the assertion of the United States, the Treaty of 1818 did not, in law, establish a so-called international servitude in favor of the United States. After having found that, it availed itself of the authority conferred upon it by the arbitration agreement and proposed recommendations which were subsequently accepted by the parties. It has been said of these recommendations, not altogether inaccurately, that they amounted substantially to the creation of an international servitude of the kind which the tribunal refused to acknowledge as existing in the Treaty of 1818. Thus British-American practice paved the way not only to modern arbitration as a means of settling disputes of a grave nature by means of legal process; it went beyond that. In a spirit of compromise and accommodation it explored and used avenues for amending the law and for adapting it to the circumstances of the situation.

That spirit of inventiveness and of adaptation found expression in the manner in which the two States submitted to arbitration disputes in which they did not feel at liberty to risk an adverse decision given in disregard of the unanimous view of its own arbitrators. Thus, in the Alaska Boundary controversy the two States eventually agreed to submit the dispute to a tribunal composed of an equal number of British and American nationals. This arrangement was based on the hope that one or more of the arbitrators might cast his vote against the interests of his own country. This hope was not disappointed. Lord Alverstone, a distinguished jurist who made many a contribution to international law, joined the American arbitrators in the final award. Lord Alverstone was criticized for his decision against British interests and replied in words which make us proud to be of his profession. He said, "If, when any kind of arbitration is set up, they don't want a decision based on the law and the evidence, they must not put a British judge on the Commission." The *I'm Alone* case is a later example of resort to the same method, and with similar results, for Mr. Justice Van Devanter joined in deciding against the claims of his own government. The same method of arbitration is also one of the features of the Convention of January 11, 1909, relating to the boundary waters between the United States and Canada. Confidence in the availability of experienced courage and integrity to sit in the seat of judgment is a threshold requirement of successful arbitration.

But arbitration makes at the end another requirement, not of the arbitrators, but of the people of the countries which have submitted their causes to the hazards of arbitration. They must have that discipline of temper and intellect which leads to the sportsmanlike acceptance of results. In the *I'm Alone* case a joint commission composed of Mr. Justice Van Devanter, of the Supreme Court of the United States, and of Mr. Duff, a Judge of the Canadian

[1] *Missouri* v. *Holland*, 252 U. S. 416.
[2] *The Paquete Habana*, 175 U. S. 677; *Hilton* v. *Cuyot*, 159 U. S. 113 at 163; *The Nereide*, 9 Cr. 388, 423.

Supreme Court, recommended that, in addition to a compensation to the persons affected, an acknowledgment of illegality and an apology, the United States ought to pay to Canada the sum of $25,000 as a material amend in respect of the "wrong." In making that recommendation it proposed a solution which, among many other States, would have been regarded as detracting from national sovereignty and as an affront to national dignity. It penalized a State. It asked a nation to pay a penalty as distinguished from compensation. When in 1913, in the *Carthage* case, France asked the Permanent Court of Arbitration to impose a fine of one franc upon Italy as compensation for an offense against the French flag, the Court thought it improper to accede to that request. In the recent dispute between Belgium and Holland before the Permanent Court of International Justice concerning the diversion of waters from the Meuse, one of the judges expressed pained disapproval of the Dutch submissions, inasmuch as they asked the Court to "condemn" Belgium to discontinue a certain course of action—an expression which he regarded as improper in international proceedings. But certainly few persons in the United States took umbrage at a finding imposing upon the United States what was essentially a fine in the respect of the sinking, not without some claim of right, of a vessel engaged in liquor smuggling and owned by citizens of the United States.

We are not likely to make an accurate appraisal of the significance of our own contribution to the development of international law unless we realize that it has been achieved in full cooperation with Great Britain. It takes only one to start a war; it requires two to keep the peace. The Jay Treaty and the prolonged and vigorous work of the commissions established under it, the almost continuous activity of the Anglo-American mixed commissions during the nineteenth century and the great classical arbitrations from the Alabama controversy to the North Atlantic Fisheries arbitration—none of these would have been possible except between nations among which there existed the requisite spiritual and psychological basis for such cooperation and adjustment.

While these successful efforts judicially to settle our controversies has not been due exclusively to the common heritage of law—of the common law—the importance of that factor cannot be exaggerated. The community of legal approach, of legal concepts, and of legal tradition transformed these arbitral proceedings into forensic contests—occasionally of inordinate duration—delightful to those who participated in them and of absorbing interest to the two nations at large. When in the British Guiana arbitration—for although Venezuela was the party directly interested, it was in essence an American-British arbitration—the opposing counsel discussed with vigor the intricacies of the doctrine of estoppel; when in the North Atlantic Fisheries arbitration Mr. Elihu Root elaborated in great detail the mysteries of the real nature of common law easements as compared with Roman law servitudes; when in the Behring Sea arbitration both sides discussed with learning and acumen the common law rules for determining property in bees, pigeons, deer, and in animals *ferae naturae;* when in numerous arbitrations they argued about the merits of laches in relation to prescription—in all these the community of law was of assistance. British and American lawyers did not have to educate each other as to their basic assumptions.

But even more effective than that unity of law has been the common qualities of reasonableness, of accommodation, and of compromise—all of them manifestations of the true temper of democracy—which alone makes law workable and acceptable. Governments and leaders cannot arbitrate if hot temper rules the people. The custom of reliance on the law, a culture that accepts the judicial process as a normal and honorable method of settling grievances, must be made world-wide before we can be sure that any international court or other tribunal is on solid ground.

The world's hope for peace depends in the last analysis upon establishing patterns of national behavior that will sustain international institutions strong enough to settle conflicts before they break into wars. We must forge and use stronger and more inclusive instrumentalities for the hearing and settlement of grievances which may be used as an alternative for war without compromise of national honor. Their construction and composition must inspire confidence that grievances will be adjudged by the application of principles of law and of justice that rise above the policies and interests of the nations from which the judges must come. Reliance on the notion of the rightness of might will disappear only when a convincing history of experience in legal forums proves the might of rightness. Men who profess the law know the weaknesses and limitations of courts and tribunals. But also they know they are the best instrumentalities that our civilization has yet devised to subdue violence by giving that which is rightful a forum where it may prevail over that which merely is strong. Public leaders who are themselves skilled and experienced in the use of judicial and arbitral processes do not despise them, nor think it weak or humiliating to submit to them. This successful extension and adaptation to international uses of the philosophy and technique of our daily law practice may yet constitute a priceless contribution by our profession to the future peace and happiness of mankind.