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THE COMMON LAW OF MANKIND, by C. Wilfred Jenks. New York: Frederick A. Praeger, 1958.

THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, by Sir Hersch Lauterpacht. New York: Frederick A Praeger, 1958.

The ideal of a world rule of law has fundamentally influenced the development of modern international law. On the one hand, this ideal has focused attention on the integrative factor in international relations, and, to this extent at least, has held out the hope that conflicts between nations could be settled by peaceful means. On the other hand, however, it has been unfortunate that this ideal has led to a serious distortion of the role of law in international relations. There has been a tendency on the part of many concerned with international law to turn what is essentially an aspiration into a rather rigid framework for the interpretation of international relations in general. The effect of this over conceptualization has been an artificial separation of international law from its social setting. The reality of a "world rule of law" remains essentially in the realm of aspiration, a goal to be striven for, but hardly a prescription for contemporary international problems. To prescribe legal principles and procedures to a world fundamentally divided along political and ideological lines is at best an idle intellectual exercise, and, when prescribed as policy, a misleading if not dangerous occupation. We still live in a world where the big issues that divide nations are not reducible to legal terms and, therefore, not amenable to legal resolution. The ultimate test of any legal order is its ability to resolve the big issues of its society. It is on this point where international law has failed to maintain world peace in the past and where any postulated "world rule of law" is bound to fail in our time.

It is with a sense of trepidation, therefore, that one approaches the growing belief in the United States in a "world rule of law" as a solution to the problem of peace. This renewed interest in a "world rule of law" has received special impetus from a statement by President Eisenhower in his State of the Union message in January 1959, in which he declared that it was the intention of the United States Government to "intensify efforts . . . to the end that the rule of law replace the obsolete rule of force in the affairs of nations." This intention was reaffirmed by Vice-President Nixon in an address before the

Academy of Political Science on April 13, 1959. Congress is now considering a less qualified participation in the International Court of Justice. On the academic level, a World Rule of Law Center has been established at Duke University to investigate the possibilities of such an order. The American Bar Association has set up a Special Committee on World Peace Through World Law for the same purpose. What is in prospect, it would seem, is a great revival of interest in the areas of comparative law, to uncover the many similarities of legal principle and practice among the nations of the world; of international organization, to study and devise international institutions; and international law, to elucidate the law as it exists, and if the past is any criterion, to dwell overly long on what it ought to be. This, of course, excludes the immense possibilities offered to the behavioral sciences. It can only be hoped that one of the more important by-products of this activity will be a clearer understanding of the limitations of law in contemporary international relations.

Since much of the work being done on behalf of a world rule of law takes the form of unlimited prescription, it is a refreshing experience to read those works that attack the subject with a full sense of the limiting factors involved. C. Wilfred Jenks' *The Common Law of Mankind* and Sir Hersch Lauterpacht's *The Development of International Law by the International Court* have this virtue. These two works deal with matters vital to the ideal of a world rule of law and both optimistically see in their respective studies the development of a more effective international legal order. There are firm grounds, however, for questioning some of the optimistic assumptions made by the authors.

The thesis of Jenks' work is that postwar international relations presents for the first time in the history of the modern state system a true basis for a world common law. "Contemporary international law," the author states, "can no longer be reasonably presented in the framework of the classical exposition of international law as the law governing the relations between states, but must be regarded as the common law of mankind in an early stage of development." There are three general factors cited by the author that make this reappraisal necessary. The first is the vastly increased content of international law which must now include the public and private "law of economic and

technological interdependence," the "law governing the structure and law making processes of the international community," the international law of human rights, and rules regulating the conflict of laws. Secondly, international law has ceased to be a European centered system and now includes the whole politically organized world. For the first time, the author states, "we have the formal framework of a universal world order and the formal elements of a universal legal order." The formal elements contributing to a universal legal order spring from a "sufficient consensus of general principle" of all the world's legal systems, including those of the communist nations, and from certain emerging and established principles and practices that are receiving greater acceptance by all nations. Among the latter the author points to the breakdown of the traditional concept of sovereignty, the greater acceptance of the principle of third party judgment, the rational limits placed on the principle of self help imposed by modern weapons, the principle of *pacta sunt servanda*, the emerging principle of national liability for damage incurred as a result of state policy, and the universal recognition of basic human rights. In the third place, the author cites the impact of international organizations on the development of international law. This is true not only with respect to the increased effectiveness of the legislative, judicial, and enforcement functions of the United Nations but also, and more importantly, the growth of the operational activities of international social and economic organizations. All these factors, the author contends, offer a substantial basis for the development of a world common law.

The emphasis placed by the author upon the uniqueness of postwar international relations with respect to the opportunities that exist for the development of a more effective international law is open to question. There is a tendency on the part of those concerned with a "world rule of law" to equate novelty with uniqueness and what is contingent with essential change. While it is possible to postulate tendencies toward a more integrated international society and a more effective international legal order, the opposite tendencies can also be observed; that is, toward a more intensely divided "world society" and greater uncertainty with respect to the law. The uniqueness ascribed to the extension of international law from its Western European base to a legal system including the social and cultural diversity of the whole world represents more than anything else a quanti-

tative extension of the state system which does not necessarily imply any essential change in the existing legal order. The aroused nationalisms of the underdeveloped nations and the cold war itself cannot be viewed as a movement toward greater international integration.

Another unique factor referred to by the author is that of economic interdependence fostered by economic development programs of various kinds. It must be pointed out in the first place that the international economic relationships that existed prior to the political independence of former colonial areas have remained essentially intact; that is, these areas remain exporters of primary goods and importers of manufactured goods. The independence of these areas, however, has imposed national bargaining agents in the trading process where none had previously existed. Thus in the overall structural sense the postwar international economy is not a more but a less integrated trading order. Secondly, the drive for economic development by the underdeveloped nations is toward industrialization and greater economic independence from the more industrially advanced countries. While international cooperation for economic development may be presently productive of closer economic ties, the goal is greater independence for the underdeveloped state. Finally, economic aid has become one of the major weapons of the cold war and, therefore, can hardly be emphasized as an integrative factor in international relations.

The final observation to be made here concerns the frequently asserted assumption that modern weapons have placed a rational limitation on the principle of self-help. The existence of nuclear weapons acts only as a deterrent to an all out war. They do not preclude this eventuality and they have not prevented recourse to arms, as witness the number of small wars that have been fought since the development of the atomic bomb. The point to be made here is that the rational deterrent presented by nuclear weapons does not imply a more peaceful international order. What it does imply, and what has proven to be the case thus far, is that the means of advancing the interests of a nuclear state has been reduced from the maximum power at their disposal to less costly alternatives. The weapons of the cold war are those of propaganda, economic penetration, and political subversion. While these means are less warlike, they are no less hostile in intent. The so-called rights of self-defense and self-

help have been limited only to the extent that total war is to be avoided. The deterrent force of nuclear weapons does not apply to hostile actions below this level of destructiveness.

To concentrate on such factors as common legal principles, the economic relations between states, or the fear generated by new weapons avoids the principal issue facing a world rule of law. This issue, however trite its restatement may be, remains the fundamental political division of the world. The task to be faced is the reduction of conflicts and tensions generated by opposing national interests. Identical legal principles and procedures have served on both sides of international conflicts. "Transnational law" does not touch the substance of the differences between states but rather social and economic relations have increasingly become the function of political policy. And last, but not least, fear not only deters action but provokes irrational action. In any case, the fear generated by nuclear weapons does not in itself provide a basis for a more unified world order. In his call for a rethinking of the role of law in international relations, the author urges a fundamental transfer of man's loyalties from the nation to some higher authority. Whether or not this can be accomplished by positive thinking as the author seems to advocate is questionable. However amazing the results of this approach may be, even positive thinking can be a liability when it is misdirected.

One of the chief objectives of the world rule of law "movement" and the announced policy of the present administration is the strengthening of the International Court of Justice. One could consult no better study than Judge Lauterpacht's recently revised edition of *The Development of International Law by the International Court* to discover the limitations of this approach to the problem of world peace. While the author views the history of the Permanent Court of International Justice and the International Court of Justice as a steady growth in judicial effectiveness, he minimizes the importance of the two courts as instruments for the maintenance of peace. The chief value of the Court lay in the fact of its availability to nations for the settlement of disputes. "For what matters," the author states, "is not the number of disputes actually decided by the court, but the fact that a contemplated wrong was not proceeded with or that controversies have been settled without its intervention in conformity with justice for the reason in the absence of a satis-

factory solution, one party was at liberty to bring the dispute before the court." The limited use of the Court and the substance of the contentious cases brought before it seems to belie even this modest claim to its effectiveness. The fact is that the Court has been by-passed on those issues that bear directly on peace. It is inconceivable that the German question, the issue of the off-shore islands, or the border dispute between India and China could be settled by judication. Such issues involve political considerations which nations are still unwilling to leave to third party judgment; that is, issues where an adverse decision is unacceptable. The power contest between the United States and the Soviet Union is one that involves the fundamental question as to which legal system shall prevail. This question cannot be settled by a court. The present state of international relations will allow at best an uneasy coexistence of legal systems and, if one accepts the revolutionary objectives of international communism, it will be a far from peaceful coexistence. If it is true, as the author states, that the achievements of any court "is dependent upon the state of political integration of the society whose law it administers," then the insistence on a greater reliance on the World Court as a part of American foreign policy can lead to no greater results than litigations involving questions that do not touch the core of the basic political conflicts or, if carried beyond this point, holds out the danger of turning the Court into a new propaganda battleground of the cold war.

Judge Lauterpacht is primarily concerned with the work of the Court from a procedural standpoint. The key to the operation of the Court is summed up in the idea of "judicial caution." "Judicial caution" is defined as "an attitude of mind resulting, in addition to the ordinary counsels of prudence, from the fact that the courts have to apply the law in force." The degree of uncertainty as to what the law is in international law makes "judicial caution" by far the dominant attitude of the Court. The phrases "judicial caution," "judicial restraint," "judicial hesitation," and "the appearance of judicial indecision" employed by the author sum up rather well the Court's "judicial effectiveness" as well as its procedural pace. The procedure of the Court depends essentially upon diplomatic agreement. In an overwhelming majority of cases there must be agreement between the parties of a dispute to accept the jurisdiction of the Court and agreement in the execution of the Court's decision. Thus the World Court does not decide in the sense of a domestic court

but is forced into the role of a moderator. While this is neither an undesirable nor meaningless role, it falls short of providing a basis for the expectation that issues which fundamentally divide two states can be settled through the Court.

The vital question for a world rule of law remains one of the degree of agreement over what these rules should be. The two works under review here illustrate, whether intended or unintended, the areas where agreement is possible and also where disagreement is inevitable. Both works are eminently worth the attention of those concerned with international law. Those concerned with a "world rule of law," however, will find only slender straws to which to cling.

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THE STUDY OF POLITICS, by Charles S. Hyneman. Urbana: University of Illinois Press, 1959. Pp. xi, 232.

The sub-title of this book is "The Present State of American Political Science," a subject which of late has heavily engaged the principal students of politics — the political scientists. In fact, inquiry into what political science is doing seems to preoccupy so many members of the profession that one sometimes wonders whether they have not abandoned the study of politics for the study of one another.

The present volume is a by-product of an elaborate examination of the curriculum of the political science department at Northwestern University, which was undertaken with the assistance of a munificent grant from the Carnegie Foundation. During a substantial part of the time that this study was being carried out Professor Hyneman, who is best known for his work in the field of public administration and was at one time director of the school of government at Louisiana State University, served as chairman of the department at Northwestern. The self-evaluation attempted to penetrate to the core of the discipline in order to build a program of studies on a sound epistemological basis.

Those who know Professor Hyneman and/or his works would expect to find in a wide-open discussion of this type many examples of his characteristic forthrightness in tossing out chal-

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