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THE DEMISE OF PUBLIC INTERNATIONAL LAW

JOHN KUHN BLEIMAIER*

The field of international law has traditionally been divided into two distinct areas, private international law and public international law. Private international law concerns itself with the transnational problems encountered by individuals, defined to include corporations as well as natural persons. This area embraces problems of international conflicts of law, choice of law, and international immigration laws. Public international law, in contrast, deals with the relationships between and among nation states and embraces diplomatic law, consular law, and the law of war. At the close of the Middle Ages, political units which began to evolve into states came into contact with one another. This contact took the form of commerce as well as war. Although individuals had maintained contacts between countries, they did so as emissaries and representatives of their respective sovereigns rather than in their private capacities. Thus, it has been said that the individual is not the subject of traditional public international law.¹

The body of public international law doctrine began to evolve in the 16th Century, when legal scholars and philosophers of law started to record the developing conventions of international intercourse and expound on the appropriate future development of this body of law.² The macropolitical perspective of the earliest international lawyers is evidenced by the fact that the area was originally called The Law of War and Peace.³ Public

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¹ G. SCHWARZENBERGER, *INTERNATIONAL LAW* 139-55 (3d ed. 1957). Recently, treaties such as the European Human Rights Convention have granted rights to individuals as subjects of international law. R. BEDDARD, *HUMAN RIGHTS AND EUROPE* 5-7 (1973). The Charter of the Organization of American States provides that "[e]ach state has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality." Charter of the Organization of American States, art. 13, [1951] 2 U.S.T. 2419, T.I.A.S. No. 2361. For further discussion of the role of the individual in international law see Eagleton, *Some Questions as to the Place of the Individual in the International Law of the Future*, 37 AM. J. INT'L L. 642 (1943); Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956); Lauterpacht, *The Subjects of the Law of Nations*, 64 L.Q. REV. 97, 102-03 (1948).

² Perhaps best known of the early scholars was Hugo Grotius whose *De jure belli et pacis*, published in 1625, still remains one of the most important works in international law. In 1672 Samuel Pufendorf published *De jure naturae et gentium*, which expanded on the earlier work of Grotius. This early thinking in international law was based largely on the *Corpus Juris Civilis* of Justinian, A. D'ENTREVES, *NATURAL LAW* 39 (1970), and is the underpinning of the civil law prevalent on the European continent, J. CRABB, *THE FRENCH CIVIL CODE* 2-7 (1977).

³ This is illustrated by the title of Hugo Grotius' great work, *De jure belli et pacis*.

international law grew up in a political environment dominated by the monarchical form of government and in a philosophical climate thoroughly imbued with the spirit and doctrine of natural law. The natural law concept was the product of the great legal minds of the Church who believed that there exists a body of divinely promulgated law superseding the will and acts of men.⁴ Thus, public international law had its genesis in an environment dominated by the concept of the divine right of kings to rule their people and in the concept that there exist fundamental laws establishing rights and wrongs which these sovereigns must observe in their interaction with one another.

From the beginning of its development, private international law exhibited an altogether different perspective. This body of law evolved at a time of increasing individual mobility and expanding commercial intercourse, which necessitated the development of laws to govern activities having contacts with two or more political units. When a contract is made between individuals from different legal systems, whose law is to apply? This fundamental and practical question, in addition to numerous other issues, has been addressed by private international law.⁵ Of necessity, private international law has been an extremely pragmatic area. Solutions to choice of law and conflict of laws questions have been most heavily influenced by the practical aspects of individual situations.⁶ The choice of law governing a contract must be made with a view toward commercial reality and the possibility of enforcing judgments. Consequently, private international law has developed in such a way as to stimulate mutually beneficial international contact. Occasionally, this dictates sacrificing principle for the exigencies of the moment.⁷

⁴ See A. D'ENTREVES, *NATURAL LAW* 38-58 (1970).

⁵ It has been said that "[p]rivate international law is commonly called the conflict of laws. It is an aspect of private law which involves such juridical relations between individuals as transcend the sphere of national law and, therefore, is not international law in the true sense." Phleger, *Some Recent Developments in International Law of Interest to the United States*, 30 DEP'T STATE BULL. 196 (1954).

⁶ Illustrative of the practical orientation of private international law is the choice of law rule applicable to contracts:

Ordinarily, the federal courts determine which law governs a contract by "grouping the contracts" or "finding the center of gravity" of the contract. The law of the jurisdiction having the closest relation with the contract is selected because, it is felt, the parties contracted probably with that law (if any law) in mind, and that jurisdiction would probably have the greatest interest in defining the rights of the contracting parties. This doctrine, however nebulous in its statement, seems to fulfill more adequately the expectations of the parties than the definitively worded, but often artificially applied, doctrine of *lex loci contractus*.

Fricke v. Isbrandtsen Co., 151 F. Supp. 465, 467 (S.D.N.Y. 1957) (footnotes omitted). As a general proposition, courts will respect the desire of the contracting parties to be governed by the law of a particular jurisdiction. See, e.g., *Overseas Trading Co., S.A. v. United States*, 159 F. Supp. 382, 384 (Ct. Cl. 1958).

⁷ See, e.g., *Aboitiz & Co. v. Price*, 99 F. Supp. 602 (D. Utah 1951), where the court stated: [W]e are free under international law to choose our own theories of conflict of laws, and, that is particularly true, where the acts to which we refuse recognition are the

Enforcement of judgments in the area of private international law has been a subject of constant concern for all parties involved.⁸ As the subjects of private international law are either natural or legal persons, they are amenable to the jurisdiction of at least one sovereign.⁹ If they are physically present in, or if their assets are located in, more than one state, the individuals are potentially subject to the jurisdiction of several governments.¹⁰

Enforcement in the public international law area is quite a different matter. There traditionally has not existed a central forum for the resolution of disputes between sovereigns. Thus, the rules of public international law only had force to the extent that sovereigns felt themselves either as a moral or as a practical matter bound to observe them. Early scholars, however, were not troubled by the lack of centralized authority. It was accepted that the sovereigns who were the subjects of public international law ruled their respective states on the basis of divine right and in conformity with divine authority. Thus, compliance with the precepts of public international law on a regular basis was expected. This system functioned tolerably well at the time that public international law emerged. The sovereigns of the civilized world, which at that time was thought to encompass basically only Europe and European dominions, were able to conform their interaction to the precepts of public international law. Such conformity may have been induced by the belief that it was the divinely ordained duty of each sovereign to act in conformity with traditional public international law or by the recognition that the rules of public international law were the rules of the game and the offending player might be punished by the other players.

The theory of the divine right of kings has been gradually whittled

acts of an enemy. Even neutral sovereign states enjoy considerable latitude in the solution of their own conflict-in-law problems according to their own choice of law theories. *A fortiori*, that is true of a sovereign which is an ally of the occupied state, and which had as close a relationship to the Philippines as we had in 1942, in a war against the common enemy. It must be remembered that in this decision we are required to go back into war time relationships.

Id. at 623. See also *Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934).

⁸ See G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 629 (9th ed. 1974), wherein the author pointed out:

If a plaintiff fails to obtain satisfaction of a judgment in the country where it has been granted, the question arises whether it is enforceable in another country where the defendant is found. It is clear . . . that owing to the principle of territorial sovereignty a judgment delivered in one country cannot, in the absence of international agreement, have a direct operation of its own force in another.

⁹ See H. GOODRICH, *CONFLICT OF LAWS* §§ 73, 75 (4th ed. E. Scoles 1964); G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 69-84 (3d ed. 1963).

¹⁰ J. CASTEL, *PRIVATE INTERNATIONAL LAW* 153-54 (1960) ("It is well-established . . . that immovable property is exclusively subject to the law of the place it is situated."); *id.*, at 233 ("jurisdiction is territorial and attaches to all persons either permanently or temporarily resident"); H. GOODRICH, *CONFLICT OF LAWS* §§ 72-73 (4th ed. E. Scoles 1964).

away, however, and it can fairly be said that monarchy now only exists by the consent of the ruled.¹¹ What is the role of public international law in a world where sovereigns are not monarchs but governments composed of many individuals and where principles of natural or divinely ordained law have been superseded by legislation? The answer is that public international law is waning. Its demise was foreshadowed by the age of nationalism.

The most important manifestation of the spirit of nationalism in international affairs can be observed in the disregard for basic principles of public international law in European relations with non-European peoples and countries during the 19th Century.¹² With the dawning of the 20th Century and the birth of the age of ideology, it became inevitable that the final blow would be struck to the concept of public international law. The conflagration of competing ideologies represented by different states made it inevitable that the political units which are the subjects of public international law no longer would feel an obligation to deal with one another in conformity with established rules of public international law.

Illustrative of the demise of public international law principles in the face of an ideological divergence are the relations between the Soviet Union and the German Third Reich. Treaties and understandings were entered into by the parties with no intention on either side of living up to their provisions.¹³ Once hostilities between these two ideologically incompatible countries commenced, the laws of war were not observed.¹⁴ This is hardly surprising, as both the Soviet Union and the German Third Reich viewed each other as illegitimate and sought each other's complete destruction.¹⁵

Public international law developed in an atmosphere where individual sovereigns took for granted each other's basic rights and royal prerogatives; it has declined in an era in which ideologies have sought to destroy each other. The Nuremberg Trials which followed World War II were designed to bolster public international law. The prosecution of war criminals was based upon the existence of natural law precepts which had been violated by the offenders.¹⁶ As appeared during the course of the trials, however,

¹¹ See S. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 177-91 (1968).

¹² See F. SCHUMAN, *INTERNATIONAL POLITICS* 395-402 (7th ed. 1969). Professor Schuman pointed out that new colonies often were acquired by the great powers during the 19th Century through bloodshed. These wars, which usually involved "atrocities, abuses, . . . and savage repression," *id.* at 402, were often claimed to be justified "in the name of humanity and self-determination." *Id.* at 399.

¹³ Wheeler-Bennett, *Twenty Years of Russo-German Relations, 1919-1939*, 25 *FOREIGN AFF.* 23, 41-43 (1946).

¹⁴ M. BELGION, *VICTOR'S JUSTICE* 22-23, 43-50 (1949); P. CALVOCORESSI, *NUREMBURG* 47-54 (1948).

¹⁵ See Wheeler-Bennett, *Twenty Years of Russo-German Relations, 1919-1939*, 25 *FOREIGN AFF.* 23 (1946).

¹⁶ The Nuremberg Trials were based on three separate classes of crimes. They were:

(a) crimes against peace, which means . . . planning, preparation, initiation or waging of a war of aggression; (b) war crimes, by which term is meant mainly violation of the

flagrant violations of public international law and the precepts of natural law also had been committed by the victors in World War II.¹⁷ Since no attempt to prosecute the victorious offenders was undertaken, the incident gives rise to an impression that only the unsuccessful violator of public international law is brought to justice.

In the post World War II world, public international law has not been significantly rehabilitated. Treaties continue to be broken and renegotiated.¹⁸ Indeed, it is generally recognized that agreements between states are merely a matter of publicity or public relations. Moreover, diplomats in foreign states are harassed with either the tacit acquiescence or the active complicity of host governments.¹⁹ Finally, the laws of war have come to be viewed as obsolete or academic in the case of guerilla wars of national liberation and in view of the technological possibility of total world annihilation by nuclear war.

Although lip service to its basic dictates may still be paid in some quarters, public international law is extinct. It was a historical phenomenon and its time has passed. Where does this leave the international community today? Macropolitical relations are kept reasonably stable by what has been called the "balance of terror." The fear of global conflict restrains the great powers and prevents their ideological disdain for each other from

laws and customs of war; and (c) crimes against humanity, in particular murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

Wright, *War Crimes Under International Law*, 62 L.Q. REV. 40, 41 (1946). Such conduct violates "that sense of right and wrong, of the instincts of justice and humanity which are the common heritage of all civilized nations." *Id.* at 40.

¹⁷ Among the war crimes alleged to have been committed by the Allies in the Second World War are the murders of hostages, plunder of property, murder or ill-treatment of prisoners of war, and wanton destruction of cities. M. BELGION, *VICTOR'S JUSTICE* 95-117 (1949). Throughout the Nuremberg Trials, the defendants repeatedly pointed out violations of international law which they claimed were committed by the Allies. See J. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 73-76 (1954).

¹⁸ Modern history contains many instances of a treaty violation being followed by renegotiation. For example, the Treaty of Paris of 1856 was violated by Russia when the Russian fleet entered the Black Sea. J. BRIERLY, *THE LAW OF NATIONS* 332-33 (6th ed. 1963). The treaty was later renegotiated to provide for the presence of the Russian fleet in that body of water. *Id.* at 333. This phenomena also has been observable in the post Second World War era. In fact, modern international agreements often allow parties to renounce unilaterally their legal obligations. See T. ELIAS, *THE MODERN LAW OF TREATIES* 101-18 (1974). For example, the United States, rather than breach an international air travel agreement, served notice, as provided in the agreement, that in 6 months it would no longer consider itself bound by the terms of the agreement. Press Release of Nov. 15, 1965 reprinted in 53 DEP'T STATE BULL. 923. After a renegotiation of the agreement, the notice was withdrawn. Press Release of May 14, 1966 reprinted in 54 DEP'T STATE BULL. 956 (1966). See generally A. DAVID, *THE STRATEGY OF TREATY TERMINATION* 56-84 (1975).

¹⁹ The United Nations has promulgated the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. In the preamble of the convention it is noted that "crimes against diplomatic agents and other internationally protected persons jeopardiz[e] the maintenance of normal international relations which are necessary for co-operation among States." U.N. Doc. A/9030 (1973).

manifesting itself in active aggressiveness. Nonetheless, a general disregard for the principles of public international law is demonstrated by the hundreds of small "wars" and armed conflicts which have erupted around the world in the last quarter century.

What remains of international law is its inauspicious "lesser half," private international law. As international trade and commerce have expanded due to technological advances and the evolution of ever greater international economic interdependence, the importance of private international law has increased. This discipline, with its historic pragmatism and practical orientation, has survived the age of nationalism as well as the present age of ideology. When trading partners are based in ideologically divergent political systems, they take account of this in their commercial relations by providing for binding arbitration of disputes in a third country where a fair adjudication is expected and where execution pursuant to the judgment is hopefully available. With the passing from the scene of personal sovereigns, public international law has withered away. In an age of economic interdependence of the international community, private international law has come to ascendancy.