Marquette Law Review

Volume 48
Issue 2 *Fall 1964*

Article 16

Book Reviews: Review of The Inter-American Security System and the Cuban Crisis, Edited by Lyman M. Tondel, Jr.and Disarmament, Edited by Lyman M. Tondel

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BOOK REVIEWS

The Inter-American Security System and the Cuban Crisis.* Edited by Lyman M. Tondel, Jr. New York: Oceana Publications. 1964. Pp. 96. $3.75.

Disarmament.* Edited by Lyman M. Tondel, Jr. New York: Oceana Publications. 1964. Pp. 98. $3.95.

Everyone knows—with varying degrees of awareness or repression —that political power is managed in the world today within a retarded legal and institutional framework, and that the presence of a 'balance of terror' cannot and will not insure peace. If there is—among men and nations—a growing restlessness and impulsiveness on the one hand, and a suicidal affirmation of responsibility and integrity on the other, these frightfully recurrent human potentialities for tragedy are conditioned ultimately by our polycentric global institutional framework within which man today 'manages,' or precariously balances, power with a built-in suicidal calculus. No wonder then that, under the stilted camouflage of supreme courage, men resort today to meta-politics, occultism, and other magic escapes into relative or even absolute non-involvement.

The two studies under review here recognize a need to transcend politics, but in the direction of institutionalizing and legalizing the problems of international power management through furtherance of the Rule of Law as the only alternative to the rule of force and the conditions of chaos. The two studies are products of the proceedings of the Hammarskjöld Forums originated by James N. Rosenberg and Grenville Clark to involve members of the bar in a discussion of major questions of contemporary politics, with an emphasis upon their legal implications and with a long-range view of furthering the understanding among attorneys of the workings of the Rule of Law. While practical and realistic men may not easily persuade themselves that what is mandatory or necessary is also possible, the editor of the Forums, Mr. Tondel, holds wisely and with temperate hope that "World Law may be impractical, or impossible of achievement at this stage of human history, but these steps and others may have marked the way towards some of the elements of a world at peace under law" (*Cuban Crisis,* p. ix). The participants in the Forums were legal scholars of international repute and top political experts deeply involved in the particular subject matter under discussion. The resumés of the forum proceedings follow closely the outlines of the working papers, and a useful bibliography is in each case appended.

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* Background papers and proceedings of the Third and Fourth Hammarskjöld Forums, published for the New York City Bar Association.

The forum on the October 1962 Cuban crisis elucidates mainly the legal and political questions touching the actions of the Organization of American States (OAS) within the United Nations Charter, and the significance of the Monroe Doctrine today for the defense of the Western Hemisphere. Professor Oliver, from the University of Pennsylvania, the author of the working paper on Cuba, argued that the United States, acting in the Cuban crisis, considered the OAS as a kind of 'clearing-house' for legalizing its actions; however, Sr. Nunez proudly retorted that Argentina had its army, navy, and air force committed in the case; and Mr. Abram Chayes from the Department of State politely pointed out that "the action was a concerted action" where eleven nations of the hemisphere had contributed their contingents (pp. 39-41). The discussion repeatedly rubbed in the Latin Americans' claim that the OAS was ultimately an implementation of their idea from the year 1820, to which the United States responded only tardily and rather inadequately. The Monroe Doctrine, for example, was only a partial implementation of the Latin Americans' demand for an inter-American security system, to which demand the United States did not respond for more than a century. Also, it was pointed out that it was mainly the Latin Americans who fought in San Francisco in 1945 to have the idea of hemispheric security covered by the UN Charter, notably article 51, which guarantees "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the UN" (p. 45). In contrast, article 53 maintains that "no enforcement action shall be taken under regional arrangements . . . without authorization from the Security Council. . . ." In previous instances of OAS action, the Russians had insisted that the Security Council clear its actions under article 53, while in the Cuban crisis of October 1962, the Russians made no such demands for the first time. It was suggested that this was a precedent for legitimizing the invocation of article 51 independently of article 53; *i.e.*, sidestepping Security Council action (p. 53). The problem rests really in defining "armed attack," and Sr. Urutria expressed the consensus of the forum when he maintained that "an armed attack in our atomic age starts when you start building bases and putting missiles a few miles from the continent. . . . When a missile is fired it is too late to take defensive action" (p. 48). But what about our missile bases near the Soviet border? The participants should have pointed out that an "armed attack" when Russians act is not the same as an "armed attack" when the United States acts. The question of legality is here dependent upon motivations and intentions. The American action in the Cuban crisis was considered a case of "anticipatory collective self-defense." In any case, Latin Americans scored strong points: the discussion tended to show that it was their efforts and not those of the United States which enabled the action

against Russia and Castro to pass as legitimate and legal within the purview of international law and international organization.

It is risking subjectivism to discuss—within a single forum—so involved a problem as disarmament. The working paper on disarmament was prepared by Professor L. Henkin from Columbia University, and it rests on the recognition that "disarmament can be acceptable only if it serves better, or as well, the purposes for which nations build and maintain armaments . . ." (p. 5). This is, of course, to say that the problem of disarmament is not really the problem of disarmament. Yet, Professor Henkin states in the same breath that the pressures to disarm have not been great enough, that "we are not sufficiently afraid of war" (p. 47). This sounds too plausible to be true. And in fact it is not true, because sufficient fear from war, inducing disarmament, would not solve the problems of peace. Armaments are effects rather than causes; removal of armaments would not yet remove the causes of armaments. The plausibility of Professor Henkin's claim depends entirely upon forgetting the mentioned institutional framework. If we pay sufficient heed to the institutional trappings of our hopelessly polycentric world, we are bound to conclude that even successfully accomplished disarmament projects would not alter one iota in the arena of politics; they would merely reflect or condition a temporary respite or reduction of tensions. And while tension-reduction may further enhance the chances of tension-reduction, the problem of disarmament still is not the problem of disarmament.

What the forum on disarmament lost with one hand, it gained with the other: the discussants, presuming the possibility of disarmament, were led to point out how much any eventual violation of an eventually instituted disarmament agreement or treaty would immediately cease to remain a merely legal problem and become a hot political question, particularly if those upon whose compliance the success of any disarmament treaty really and mainly depends—the major powers—become involved in violations (p. 61). Furthermore, the discussants show how inspection, particularly in the United States, would run into insurmountable institutional obstacles (pp. 37-40). We take very seriously the inviolability of property, the immunity of business records from inspection, constitutional guarantees against unreasonable search and seizure, patent rights, etc. American courts would find themselves in a quandary: the requirements of effective inspection would frequently clash with constitutional guarantees against search and seizure. The high American constitutional standards would thus seriously hamper an effective implementation of an inspection system.

One may well ask here how could a treaty be signed that clashed with our laws? In the *Missouri v. Holland*[1] decision, the United States

[1] 252 U.S. 416 (1920).

Supreme Court held that a congressional law implementing a treaty can evade the usual standards of constitutionality, because the treaty is concluded "under the authority of the United States"[2] and not under the Constitution. Yet, American courts have refused to apply in California the human rights provisions of the UN Charter (to which the United States was and is a treaty partner) as the law of the land, superseding discriminatory state laws.

Perhaps Mr. Dean's point that one could "convince practically everybody in the world of the good intentions of the United States except the scholarly world of American Universities" (p. 57) is somewhat overdone. Not that one is not readily reminded here of the contortious sentimentalizing of some of our avant-gardistically inclined colleagues who sincerely believe, in a fit of moral simplicity, that the road toward peace resembles the pavement of Constitution Avenue and that beautiful intentions are in and of themselves bound to move mountains, so that we can consequently dispense with armaments.

Disarmament negotiations between the United States and the Soviet Union are indeed deadlocked. We ask the Russians to sacrifice their advantage, secrecy, before we pay with our advantage, nuclear superiority; while the Russians, in turn, demand that we sacrifice our nuclear superiority before they abandon secrecy and permit inspection. The participants of the Forums try to dispel the notion that our position on disarmament, where we demand inspection first in order to insure meaningful disarmament afterwards, could be consistently maintained were we not deadlocked with the Russians, in view of the implications of inspection within our constitutional system. The implication is left that we would encounter as many difficulties with what we think is only the Russians' sacrifice as we do facing the prospects of giving up our nuclear superiority which their disarmament plans consistently demand. This is rather hypothetical and requires us to forget that the real problems would be sanctions against violations and not relative constitutional obstacles to effective inspection. However, all of this only brings us back to the points made at the outset.

The problem of tacit agreements, or what is called 'disarmament by examples,' is barely mentioned. Since then, the Johnson administration has boldly undertaken exemplary disarmament gestures which, unfortunately though predictably, were not even partly reciprocated by the Russians. Mr. John McNaughton from the Department of Defense ably discusses unilateral arms control measures designed to prevent war by miscalculation or accident (pp. 50-53), a topic he brilliantly handled at the First International Arms Control and Disarmament Symposium at Ann Arbor in 1962, since published.

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[2] *Id.* at 422.

The two booklets are refreshing to read. They contain arguments and points made by men whose backgrounds and involvements accustomed them to "call a spade a spade." The task of translating political issues into legal ones, and ultimately transforming the polycentric political world into a monocentric legal and institutional one, is an eminently practical task. If this task will be shirked by those who know what must be done, it will be done by others whom only God can forgive or understand. While it is not true that ill-will is so disproportionately divided, or that no common ground exists between those concerned (the test-ban treaty is an example), at least there *are* men who know that the Rule of Law is always preferable to the rule of men; and even Communists are coming around to see that the Hobbesian solution of the crude rule of some men, however therapeutic to some for some of the time, is hell for most of the people most of the time. The problem of peace can be tackled, if it can be, by an effective global legitimization of the Rule of Law, and its realization requires that men have persistence, endurance, courage, and magnanimity. The Hammarskjöld Forums are an encouraging and laudable step in the right direction.

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A Treatise on the Law of Contracts. Third Edition. By Samuel Williston. Revised by Walter H. E. Jaeger.* Mount Kisco: Voorhis & Co., Inc. 1957-1963. Vols. 7; pp. xxii, 826; xv, 1095; xii, 937; ix, 1167; xii, 903; ix, 727; viii, 1047. $20 per vol.

In the realm of music, the work of the symphonic synthesist, the recapitulator in wholly orchestral terms of a great operatic statement, is similar in many regards to the work of the reviser of a great and classic treatise in the domain of the law: the symphonic synthesist must attempt to give new life to the work by reforming its principal themes in the musical idiom of the day, which he does by rendering the main ideas in a new union with linking material which, together, while avoiding any alteration of the original thought, result in a new rendition which is consonant with the older statement and wholly identifiable with it, yet which radiates with new brilliance the grandeur of the original. In like manner, the reviser of a classic statement of the law, one with the symphonic compass of Williston's treatise on contracts or Wigmore's treatise on evidence, essays the task of reorganizing the principal themes of the master and of adding new strains to these themes so to frame a modern statement of the law which, while current and up-to-date, will avoid any alteration of the original statement that would make the revision a mere masquerader in the garments and

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