Book Review: Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War

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Under the auspices of the Research in International Law a committee of students of neutrality under the leadership of Professor Philip C. Jessup, reporter, drafted and published, after some years of deliberation, a draft convention on the rights and duties of neutral states in naval and aerial war. Drawing on the resources and experience of history, they drafted a code of one hundred fourteen articles which attempts to bring certainty into the relations between belligerents and neutrals. To a considerable extent the code follows the rules of The Hague Conventions as developed and amplified by approved experience subsequent to 1907. The draft of the Committee of Experts which met at The Hague in 1922 and 1923 under the chairmanship of John Bassett Moore is drawn upon for modern rules concerning radio and aircraft in time of war.

Each article of the code is accompanied by a commentary which records the experience and literature supporting or opposing the rule. Some of this literature is on occasion accepted at face value, as, for example, Dr. Mootham’s article on “The Doctrine of Continuous Voyage, 1756-1815,” cited in the comment under Article 63(b). In the opinion of the subscriber, Dr. Mootham endeavors to justify continuous voyage with respect to “blockade” in historical fact situations that do not sustain his conclusion, for in some of the cases he cites the illegal character of the voyage was established by the ship’s papers.

The draft code makes suggested advances on existing international law in providing for the certification of neutral vessels and requiring belligerent acceptance of the certification. Even as to cargoes a greater amount of neutral certification is provided for. But it is not suggested, as unfortunately was provided for in the Neutrality Acts of 1937 and 1939, that the neutral country of origin shall assume responsibility for what the neutral consignee of cargo does with it—a responsibility impossible to discharge. The instability of such a test is indicated by the President’s recent announcement that the exactly opposite rule will now be applied in connection with shipments of arms, ammunition and implements of war to Egypt, now called neutral, since no responsibility is assumed for what the Egyptian consignee will do with the goods. This at least comes closer to international law, for it leaves the belligerent to prove the destination of contraband. Objection is also raised in the comment (see, e.g., Article 47) to some of the British prize cases which suggested during the late war that cocoa imported into
Denmark could be considered as nitroglycerine destined for Germany because German chemists could, if they got the cocoa, convert it to army uses. The draft also favors the quota system of pre-war imports to safeguard neutrals against a termination of their supplies. The draft and comment deserve the serious study of students of law.

Not as much can be said for an accompanying draft convention on the "Rights and Duties of States in Case of Aggression." The theory of suppressing "aggressors" rests on the Covenant of the League of Nations which assumed that in the event of "aggression" (whatever that may mean) a decision of a unanimous League of Nations would enjoin upon its members the obligation of discriminatory treatment between the aggressor and his victim, thus ending the obligations of neutrality. Since such a unanimous decision has proved impossible to obtain, what has remained of the theory is the apparent assumption that the United States Government, or, to use Attorney General Jackson's suggestion in his Havana speech of March 27th, the countries on this continent, shall determine who is aggressor and victim and govern third-party conduct accordingly. It is not likely that the rest of the world will admit the superiority of the countries of this continent or their privilege to constitute themselves judges of the morality of European or Asiatic countries, and to pitch in to help the victim of alleged aggression. In fact, the results would be very unhappy if the alleged aggressor happened to be the winner.

Indeed, the whole conception is founded on a fallacy as to the nature of international relations, so that the structure built upon the fallacy is not only bound to collapse but in fact might keep the world in constant and uninterrupted war without any legal rules to sustain a reasonable structure. The theories thus emanating from Geneva have done enormous harm to the world in substituting non-existent postulates for hard facts, in stretching the law beyond its possibilities to govern political conduct, in denying to law its limited authority and substituting romance which defied both analysis and practical application. It was a paper theory, appealing particularly to people in the United States, far removed from the hard problems and unpleasant facts of international relations. The draft on the "Rights and Duties of States in Case of Aggression" nevertheless makes interesting reading. It will serve as evidence of the romantic and somnambulistic thinking which laid the foundation for the current war. To demand so much of law was to abuse the law and weaken it. It is unfortunate that the Attorney General, in the Havana speech, also committed himself to the repudiation of neutrality as a legal conception and to the adoption of a system of discrimination based upon the assumption that the United States now determines on supposedly objective, but actually entirely subjective, tests who is the aggressor and who is the victim. Until these conceptions are recognized for the anarchy they actually are, there is little chance for
the world to climb out of its present abyss. It is unfortunate that so many lawyers or pseudo-lawyers were unwilling to realize either the functions or the limitations of law and that they defaulted in their opportunities for constructive statesmanship.

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In the words of its author this volume is “designed to present a general introduction to American administrative law that is reasonably abreast of recent important developments in this field and suitable for use as a supplementary text in courses on public administration.” The author expresses the hope that his book will prove serviceable as a text in a quarter or semester course on administrative law as such, and as the basis of a course on this subject. This is probably the most outstanding and scholarly publication of a general introductory character on the subject of administrative law that has been produced since the publication in 1905 of Frank Johnson Goodnow’s “Principles of the Administrative Law of the United States.” Mr. Hart studied under Goodnow, who was President of Johns Hopkins University and famous for his pioneering work in giving to administrative law the broad scope and important role that it has today.

Since the publication of Goodnow’s work the unprecedented expansion of public administration and of statutory and judge-made administrative law has given rise to problems undreamed of in 1905. As a result there has been a great multiplication of treatises, case books, law review articles, comments and other writings on the subject of public administrative law. This material, however, is so scattered that it has been difficult to make it available and useful to students in the ever increasing number of courses on public administration and public service. Furthermore, the rapid growth of administrative law in the fields of modern government and public law beyond the realm of the mere technicalities of public administration has created an urgent need for a comprehensive and efficient work on this subject. High finance, trade unionism, corporate entities and urbanism, all outgrowths of the American industrial revolution, have created a tremendous increase of governmental functions of a regulatory nature which has, in turn, greatly increased the number of administrative and semi-judicial bodies. This unprecedented expansion of public administration has led to the emphasis, especially during the last decade, upon the study of public and administrative law. Since a large part of this is judge-made law, it cannot be disputed that its subject matter cuts across the traditionally recognized branches of the law and that this increasingly important phase