

## INTERNATIONAL LAW OF WAR SINCE THE WAR

**I**N all revolutionary periods customary law tends to suffer from emotional attack and from the popular demand for short cuts to salvation. The function of law as a guaranty of general security, as a source of reliance for the weak, as a necessary foundation for enterprise and commitments, as an alternative to force, corruption, and favoritism, is forgotten in the hysterical exaltation of panaceas, punitive methods, and radical departures from tried experience. This is usually accompanied by a deprecation of tradition and precedent as obstacles in the way of the new revelation.

These corollaries of all revolutionary movements are markedly exemplified in the intellectual ferment pervading the field of international relations which finds expression in a worship of the supposedly new methods of insuring peace by collective "enforcement." Since the formation of the League of Nations, it has been argued that any disturbance of the peace has become so serious a problem that every nation had an interest in suppressing an outbreak, now characterized as an attack on all the members of the family of nations. The organization set up was designed to prevent such disturbance, but if any nation resorted to "war" to solve its difficulties (except to enforce the peace treaties) the others would convene to denounce it as an "aggressor" and take joint action to bring it to heel. Thus, "aggressors" were either to be frightened into remaining contented or at least restrained, or else, if they broke loose and started shooting, all the other nations would, in disgust or anger at such a breach of etiquette or covenant, sever all trade relations with the "aggressor," enjoining abstention on their respective nationals and even preventing "financial, commercial, and personal intercourse" of the covenant-breaker with the nationals of a state not a member of the League. Armed blockade and more severe sanctions might follow. In addition, the territorial integrity of all the members of the League was to be jointly guaranteed.

Why it should have been supposed that any such political scheme could work in practice can only be conjectured. It may be ascribed to a psychosis which not infrequently has been a concomitant and aftermath of war. It had a special explanation in the present case,

because a great war had been fought on the postulate, widely propagated and entertained, of a Holy Crusade, and the infidel having been beaten and disarmed, the conception naturally arose that the late constellation mirrored the general nature of war and pointed the approved method of preserving peace. Philosophical minds with an awareness of history and of human characteristics should not have espoused it. Speaking of a similar scheme to "enforce peace" proposed by the French government, a wise Frenchman, Charles Dupuis, remarked that it was "precise, complete, logical, chimerical, and impractical." The idea has not only failed of realization, but it was certain to fail, because it was founded on a defiance of the elementary facts of human nature and experience. It can only be hoped that the chances for genuine peace through reconciliation have not thereby become hopelessly mired. But even had the idea been theoretically sustainable, rarely has the world, particularly in Europe, been organized with less assurance of natural stability encouraging its success. The result is that, in spite of all the evangelical devotion accorded the "new ideal," the state of the world has steadily deteriorated and armaments have prodigiously increased, until now an unprecedentedly acute nationalism threatens the resumption of hostilities on the grand scale. There is a reason for this, and I venture to suggest that it is due in part (1) to the failure to appreciate what has actually been going on in the world of realities since 1919 and (2) to the disparagement of many time-tested principles and processes of law, errors associated with the nurture of the "new psychology." I would not be understood to deprecate the administrative and non-political functions of the League, or certainly its processes for discussion, conciliation, and adjudication. Its Achilles' Heel lies in the plan and machinery for "enforcing" by sanctions the peace of 1919.

It is perhaps not surprising that the world charted at Versailles and its environs should have appealed to many as a universe justly reconstructed. Its beneficiaries and those whose emotions were domiciled at Versailles may well have believed that the world had reached its ultimate territorial readjustment. The reading of such a book as Nicholson's "Peace-Making" ought to puncture any such illusion, but 1919 was not a time of cold objective consideration of facts. There were represented at Versailles certain Powers which, having arrogated to themselves all that was worth taking, naturally desired to have an unchallenged and unchallengeable title to their possessions and found it useful to enshroud their swollen fortunes

with a moral sanction. Any one who threatened those possessions was not only a law-breaker but a moral pariah. Peace conferences are not distinguished for their sense of humor. Peace as an ideal and the *status quo* as a fact were thus indelibly welded. Emotional morality was enlisted to support the new charter of Europe and the world.

While it may have been assumed by some that article 19 of the Covenant of the League, which contemplates possible changes in the *status quo*, would be permitted to ameliorate some of the grosser disequilibriums, it was not likely that the vested interests created at Versailles would easily admit diminution or modification. Events have shown that the synthetic countries of Eastern Europe, which did very little, if anything, to win their independence or territorial accretions but which were conceived and evolved primarily to shift the ancient balance of power, are perhaps the staunchest defenders of the *status quo* and openly threaten war if it is changed. The legal argument is advanced that article 19 is quite useless as a source of revision, for it takes the unanimous vote of the Assembly to authorize the consideration of treaties that have become inapplicable, and only reconsideration, and not revision, is possible under the article. Thus, it is construed analogously to the Kellogg Pact, which excludes all wars but "defensive" wars, each nation being the exclusive judge of whether it is fighting in self-defense. Europe has thus created a number of Frankensteins which threaten its future, not only in human lives but as the center of western culture. For the first time the world, with unparalleled instruments of destruction available, faces the ugly possibility of bringing western civilization to its nadir by another international holocaust. It is a little sardonic that the preservation of the newly created or swollen states of Eastern Europe should invite this prospect, and it may yet be hoped that the instinct of self-preservation will help the present managers of the world's affairs to avert the great disaster. Only a sensible revision of the 1919 treaties, and not too great a revision, seems necessary. It would be lamentable if the western world is inexorably bound to surrender before the impossibility of such a task and is doomed to accept the alternative.

The preservation of the *status quo*, identified in Europe with "peace," induced the movement for "sanctions." There was little in human experience to suggest that it was possible to expect that all the states would at any time join in coercing any other state because the latter had not lived up to an obligation, actual or alleged.

Speaking of so cohesive a group of states as those of the American Union, Madison considered the notion of "coercive sanctions" as "exploded on all hands," and Hamilton characterized it as "one of the maddest projects ever devised." Yet this conception of an international *modus operandi* appealed to many as practical; to some of the European victors, because it reinsured their somewhat unnatural political positions; to intellectuals in other parts of the world, because it seemed to them a method of avoiding disturbances of order. That little, if any, substitutes for war had been supplied to effect those changes which life—a continuing process of growth and decay—and time make necessary, had been too largely overlooked; for the conciliation and arbitration provided in the Covenant, important as they are, do not enable many territorial or treaty changes to be effected. Thus, a political system of unusual rigidity was clamped upon the world, at a time when so many new arrangements were projected that some were bound to prove experimental. The refusal to permit of any readjustment, notwithstanding the demonstrated inappropriateness and danger of many of these arrangements, has poisoned the atmosphere of Europe until numerous peoples are ready to fly at each other's throats in sheer desperation. E. D. Morel, a wise and constructive statesman, characterized, in a celebrated pamphlet, the Treaty of Versailles as "the poison that destroys." These peoples are restrained mainly by poverty, by the realization on the part of the disinherited that the effort would probably now be unsuccessful, and by other considerations of expediency. The will to peace, the spirit which makes for peace, which should have been cultivated in the crucible of reconciliation and appeasement, has been overwhelmed in the conflicts engendered on the one hand by the determination to hold down the *status quo* unalterably, and on the other hand by a refusal to accept it as permanent. The treaties of 1919 were therefore not inspired by a desire for reconciliation, which Kant indicated as the essential premise of a durable peace treaty, but contemplated rather the continuation of the war in other forms. Europe therefore lives in a continued state of hatred and uneasiness which makes hope of durable peace unsubstantial. Under these circumstances it was not to be expected that the promises of the Treaty for Allied disarmament, following that of the Central Powers, would be observed, and the world must now await the consequences of that breach. If only a temporary agreement for theoretical equality between France and Germany could be worked out, time could perhaps be

gained for rectifying by diplomacy some of the major mistakes of the past fifteen years.

It is perhaps unnecessary to dwell further on the facts of European political relations to realize why the "new psychology" or "new spirit," professedly discovered by certain writers, seems a figment of the imagination and why the "new system" of enforcing peace by collective sanctions has broken down. Even if the nations could agree upon an "aggressor"—always a political and hardly a legal conception, and hardly a suitable framework to enclose deep-seated historical, psychological, and political sources of grievance—it was not to be expected that any government could persuade its people to launch upon sanctions or war with a foreign nation when its vital interests were not engaged. Only some of the Powers would as a rule be in a position to apply sanctions, and the costs and risks of such an enterprise would hardly be incurred unless profound national interests were at stake. This became even more apparent as nationalism and the struggle for economic survival were intensified. The growing dissatisfaction of the masses made it seem ever more unlikely that any government would readily become an instrument of coercion of other states in an assumed collective interest. The action of the British Government, in February, 1933, in placing an embargo on arms shipments to both China and Japan and insisting on the preservation of British neutrality in that struggle, immediately after the League Assembly had adopted a resolution condemning Japan, should be illuminating. The same reluctance to undertake sanctions, not now even suggested, is evident in the Chaco. The British action was perhaps typical of what every government seeking to avoid war is likely to do; for we must face the paradox that the enforcement of peace by sanctions, collective or otherwise, risks and often invites war. To accomplish peace through war promises no improvement in the world's affairs. Against smaller Powers, sanctions such as a display of force, withdrawal of diplomatic representatives, withholding of recognition, and even landing troops have occasionally been employed by interested nations; and while unilateral sanctions are to be deplored and may well be mitigated by strengthening the processes for conciliation and adjudication, the complicated "peace machinery" was not created to keep the smaller states in order. Not only is the adjustment of disputes between smaller states possible without sanctions, but I venture to suggest that the prestige of the League, handicapped as it has been by the vindictive treaties which gave it

birth, would have been and would now be enhanced if the nations promptly dropped the unworkable and essentially mischievous articles 10 and 16. True friends of the League appreciate that fact.

Devotion to the ideal of peace by sanctions has been accompanied by attacks discountenancing the traditional processes and principles of international law. On the assumption that war had been or would be exorcised by the new arrangements for enforcing peace, and on the assumption that the Kellogg Pact had terminated war as an instrument of national policy, it was argued (1) that war was now outlawed and that the "war to end war" had been fought; (2) that hence neutrality was also a matter of history only, and that forsooth, should war nevertheless break out, war now being a matter of concern to the entire world, neutrality was "immoral," for the states would find the guilty nation and would by sanctions dissuade it from its illegal ways; and (3) that if war broke out, the rules governing its conduct, including the rights of neutrals, if such there were, would not be observed in any event. This ideology was promoted by professed pacifists. Its total disregard of the facts of life, its essential unworkability, its promise of the enlargement of armies and navies, and the encouragement of force which it implies, make its assumptions and consequences a powerful contribution to anarchy. Not only has this ideology no moorings in experience—obvious as it is to the hard-earned lessons of humanity's struggle for a semblance of order—but it actually encourages lawlessness, and by so doing, inevitably promotes a reliance on force. Perhaps the first requirement of a scientist is to observe facts accurately; to shut one's eyes to facts and argue from chimerical assumptions is not a mark of intelligence. Moral convictions dissociated from facts may be praiseworthy, but to preach them as political injunctions to a distracted world can lead only to disappointment and possible destruction. Yet these assumptions have actuated the theology of the more vocal professional "peace" movement since 1919, most especially in the United States; it was to this unfortunate "thinking" that John Bassett Moore addressed his two frontal attacks in "An Appeal to Reason"<sup>1</sup> and in "The New Isolation,"<sup>2</sup> a criticism of the propensity of so many votaries of international law to let their passion for uplift outrun their appreciation of what was going on in the world. When lawyers turn preachers they

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<sup>1</sup> *Foreign Affairs* 547 (July, 1933).

<sup>2</sup> 27 *Am. J. Int. L.* 607 (Oct., 1933).

rarely solve any problem, and it perhaps tends to disqualify the value of their advice.

War has not been exorcised. It has been a common phenomenon from the day the Treaty of Versailles was signed. The Turco-Greek, Russo-Polish, Chinese-Japanese, and Paraguay-Bolivian wars are only the more prominent demonstrations of the unreality of the assumption. Yet while it is true that the laws of war have been neglected by learned societies, and that some governments have exhibited a certain unwillingness to discuss them, this is due to some extent to the fact that they do not wish to permit certain recent practices to be brought up for discussion. It would be hard, for example, to justify on legal grounds the British Orders-in-Council of the late war which strangled the trade even between neutral and neutral without blockade, which abolished the category of goods conditionally contraband, which undertook to bar all trade between neutrals and the enemy by legislative restrictions in conflict with international law, and which extended contraband lists to include almost anything usable by a human being. In the days when the United States was just beginning its career, Washington and Jefferson had sufficient capacity to prevent such gross violations of the rights of neutrals; yet in 1916 the United States was apparently not able or willing to prevent them. History will ask the explanation. The cause of the law has thereby been greatly weakened, and the cause of force and the chances of future war greatly strengthened. The Treaty of Versailles is a hard fact and not a theory. That treaty incorporated provisions to the effect that the victor is unaccountable for his violations of international law, but that the vanquished is not only so liable, but liable as a quasi-insurer for all losses sustained by nationals of the victor states, whether caused by the vanquished or not. The private property of nationals of the vanquished countries was confiscated by article 297 of the Treaty of Versailles, a principle which makes foreign investments extremely insecure.<sup>3</sup> These violations of fundamental principles are derogatory to law as an institution, and should be combated by those interested in the development of an ordered international life. Many of the violations occurred not during the war, but in the treaty of peace, as an expression of deliberate and often ill-advised force. Thus, self-restraint, which is the distin-

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<sup>3</sup> See Bitter and Zelle, *No More War on Foreign Investments* (Philadelphia, 1933).

guishing mark of civilized man, was thrown aside and precedents created which may plague the human family for many a day. But it is the part of the defenders of civilization to struggle for law and not to weaken the law by extolling force or supporting policies which make resort to force inevitable. The latter road can lead only to one end; the former may retain the hard-won victories of reason over violence.

But in spite of the repugnance to consideration or reconsideration of the laws of war, the nations have not been entirely oblivious to them. Delegates of the principal Powers assembled at The Hague in 1922 to draft a code of law on the use of aircraft and radio in time of war, and numerous recent bilateral and multilateral treaties, including those concluded at Havana in 1928, reflect the realization that war may break out and that, if it does, it must be regulated so as to prevent reckless destruction and preserve the possibility of restoring a sane peace and resuming civilized life. That has always been one of the main purposes of the laws of war, so that those who manifest congenital indisposition to consider them and who believe either that it is impossible to control the conduct of belligerents or that it is best not to seek to do so are contributing to the intensification of the horrors of war and to the impossibility of resuming civilized life after the war is over. Possibly they were too greatly impressed by the belief that all wars are world wars, or that all countries are likely to be involved, or that belligerents will always violate the law. There is very little justification for such belief. Heretofore it has been regarded as a service to limit by rule the devastating effects of the scourge of war by restraining the belligerents and holding them to that established compromise between neutral and belligerent claims which constitutes the laws of war. Centuries of tradition, the possibility of reprisal, the arousing of hostile public opinion, and their own claims when neutral have served to restrain belligerents; but if it is suggested that there are no rules of war, that expediency alone determines the limits of recklessness, then even these safeguards for restraint and the resumption of peaceful ways are decisively weakened. In no earlier period of which I am aware has there been a suggestion that by weakening the law, order or civilization was promoted. The fact that such ideas now prevail is symbolic of the disorganization of modern society and arouses fears of its incapacity to preserve itself.

The suggestion that neutrality is undesirable or immoral is even more subversive of an ordered future for mankind. Since 1919 it



has been suggested that the system of collective sanctions made neutrality impossible; perhaps the final breakdown of the notion of collective sanctions—for it never was a system—will convince the abolitionists that neutrality is still within the realm of possibility. That it is more than a possibility, but an actual fact, is demonstrated by the wars above mentioned and by the fact that other Powers refused to become entangled and maintained neutrality. But the suggestion that it is not desirable may again be regarded as symbolic of the false thinking that marks the proposal for collective sanctions. To abolish neutrality would mean that every people must become a party to wars or abandon their trade or risk becoming involved at the pleasure of a belligerent. Heretofore it had always been thought that neutrality was a service to peace and sanity, that the smaller the conflict, if it had to come, the sooner it was likely to be ended, the less devastating its effects, and the better the chances for a reasonable and enduring peace. As John Bassett Moore has remarked, heretofore war-mongers had been the only ones opposed to neutrality; now, *mirabile dictu*, pacifists are opposed to it. And in the devotion to the assumption that wars are caused by evil aggression on one side and gentle passivity on the other, the suggestion, discarded for nearly two centuries, is now revived that partiality toward the “good” belligerent shall mark the neutrality of the future, although that involves the partial nation in war or the risk of war. The suggestion that neutrality is a thing of the past finds its source in a statement of Woodrow Wilson, made after the British Government had declined to accept the principle of the freedom of the seas, the second of the Fourteen Points, to establish which was the ostensible ground of American intervention in the European War. When he was informed that the rejection of the freedom of the seas was not so serious a matter because hereafter there would be only collective wars and that in such a war all the members of the League would be engaged, he rationalized the unenviable position by announcing that after all neutrality was a thing of the past and presumably that the freedom of the seas, a time-honored claim of the neutrals, had gone down with it. The assumption that neutrality is a thing of the past is not only without foundation, but its abandonment would leave the world in a precarious condition. John Bassett Moore has said: “No matter how it is viewed, the demand that the law of neutrality shall be considered as obsolete is so visionary, so confused, so somnambulistic that no concession to it can be rationally made.”

The suggestion that neutrality is undesirable promotes the cause

of belligerency and makes the return to reason more difficult. But American intervention in the late war, followed by a disparagement of neutrality and the refusal of certain Powers to admit the principle of the freedom of the seas, is undoubtedly a source of danger for the future. Struggles for law that had been won may have to be fought again and the gains of a century may have been sacrificed to Mars. Intellectual support for such a reversion to naked force can be regarded as little less than tragic. The price that may have to be paid for this mistaken ideology may be high.

The unworkability of the recent schemes for enforcing peace finds its demonstration not only in resignations from the League and its possible extinction, which for many reasons would be extremely unfortunate, but in the fact that the entire world is conjecturing the possibilities of another great war in Europe or in Asia. The mere fact that fifteen years after one of the most destructive of all wars, from which the world would in any event require decades to recover, mankind should now be profoundly concerned over the outbreak of a new war, is of itself an indictment of the theories of enforcing peace prevalent since 1919. A League of unequals could hardly last. The attempt to enforce peace caused the collapse of earlier leagues. The chance of this League's survival depends on early elimination of its useless and dangerous clauses and the restoration of political peace in Europe by reconciliation and appeasement. There is no other road to peace. The refusal to take it has brought the world to its present pass. But if Europe should risk the consequences of another war, and embark upon it, its results on the social and economic order would be incalculable. The United States, at least, should endeavor to retain its sanity and its nationhood by refusing to enlist in the fratricidal strife. Hardly any goal now apparent could justify the risks to American welfare which belligerency would entail. It therefore becomes necessary to consider what practical steps the United States should take, and preferably in time of peace, to insure its neutrality. This can best be accomplished by strengthening its neutrality laws and, if possible, by coming to an arrangement with European maritime Powers for the restatement of the laws of maritime warfare. In the matter of American legislation, it would be desirable, in addition to the existing neutrality statutes, to authorize the President to embargo the shipment of arms and munitions (to be defined) to both or all the belligerents, and not merely to one or some of them, as contemplated by the ill-conceived embargo resolution of the spring of 1933, which was actuated by the theory of

enforcing sanctions against an "aggressor"; to prohibit the floating of public loans in the United States on behalf of either belligerent; to prohibit the enlistment of American citizens in foreign armies, not only in the United States, as the law now provides, but also abroad; possibly to prohibit foreign or native representatives of the belligerent Powers in the United States from making public appeals for support; to prohibit the entrance into the United States of armed merchant ships or prizes of war; to prohibit the supply of coal or other equipment from American ports to warships at sea; to prohibit to American citizens, and possibly to American cargoes, if the President deem it necessary, carriage on belligerent merchant vessels.

With foreign nations the effort should be made, as a condition of the debt settlement or otherwise, to restate the law of maritime warfare, as was done by the Declaration of London, or else to conclude bilateral treaties, as was done in the seventeenth and eighteenth centuries. Every effort should be made to limit contraband lists, as was done in earlier treaties. It is not so necessary, although desirable, to conclude agreements on blockade or continuous voyage, because existing international law, in spite of the violations of the late war, can be invoked. Visit and search should be redefined. It is not impossible to permit joint certification of cargoes by belligerent and neutral representatives in neutral ports. Unless trade with belligerents, and possibly even trade between neutrals, is to cease or to lead to serious irritation, the new understanding on the law should be arrived at. In this connection, Great Britain is the principal Power seeking to avoid commitments on the observance of law,<sup>4</sup> and that fact has had much to do with the growth of navies, especially submarines. It seems hardly likely that weaker Powers will abandon the physically effective submarine unless Great Britain will agree to conform to international law. It does not seem possible that Great Britain will always be a belligerent. There are many factors involved in Great Britain's position as an island which might well persuade that country to remain neutral and return to a conventional position approximating that of the Declaration of London. The Permanent Court of International Justice, should the United States adhere to the statute, might well be designated as a Prize Court of Appeal. But in any event, the United States, while defending its right to trade in legitimate commerce, must avoid entanglement in another European war if its future is to be assured.

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<sup>4</sup> See art. 3 of the Executive Agreement of May 19, 1927.

The destructiveness and hence possible shortness of another war in Europe might well aid the policy of neutrality. What the effect of war in Asia might be, it is not possible to forecast; but that any good can come from American intervention seems equally unlikely. The United States can become as bogged in Asia as it now is in Europe, but that can hardly promote either American, Asian, or European welfare. A return to the traditional principles on which this country was founded, after the demonstration of what departure has involved, would be a boon to the United States and to the world at large. The position has, however, been made more difficult for every nation concerned by the unfortunate type of "so-called peace" treaty, to use President Roosevelt's term, concluded at Versailles and by the unfounded idealization of the supposed "peace machinery" there brought into being. The disparagement of international law consequent thereon has weakened the fabric of international relations and has contributed to that accentuated nationalism which promotes hostility and conflict. The support of revolutionary projects, to which the harsh facts have refused to yield, has weakened the traditional law, now more badly needed than ever. The panaceas have failed and have left us with a weakened constitution and a weakened legal resistance to force. It was but little service to peace to try to disavow the law in the name of the new dispensation. It is time to escape from the psychosis of unreality and to take up again the thread of law which connected the past with the present and will connect the present with the future. There are no short cuts to keep in order so motley a world as this. It was once the opportunity of the United States to serve itself and the world by promoting the doctrines of neutrality, non-intervention, arbitration, mediation, and the recognition of governments in fact. These conservative doctrines helped to bring to the nineteenth century one of the greatest periods of prosperity the world has known. Radicalism in international relations, especially when unfortified by experience, brings its own reward. It is now with us. Let us return to the time-tested respect for the law which has at least brought us occasional peace and permitted some advancement in human affairs.

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