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Book Review: International Law Chiefly as Interpreted and Applied by the United States

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BOOK REVIEWS


This is a revision of a work first published in two volumes in 1922. In the process of revision it has acquired an additional volume. The work comes down to the fall of 1941, therefore omitting all discussion of the events of the wars then beginning and the question of consistency with the positions taken by the United States toward the events of 1917. Gone are the "enlightened states" of the first edition. Gone is the conceded belligerent right to seize all goods capable of "assisting" the enemy, a concession which would outlaw or terminate neutral trade. Perhaps the same result is achieved by sustaining the right to abolish the category of conditional contraband and the practice, not supported, of sinking merchant vessels at sight. Belligerents, by the way, are not far from abolishing the distinction between combatants and non-combatants, which would accomplish the purpose of abolishing "conditional contraband."

The work is undoubtedly a major contribution to the subject. But the desire to maintain most of the policies of the United States detracts from its objectivity. Perhaps the title takes this into account. On non-controversial issues the work is informative. International law suffers from at least two, if not more, handicaps as a legal subject: (1) It is omnivorous in taking in all types of evidence of practice, whether approved in conclusive form or not, and for that reason differences can easily arise as to what is law and what is not; (2) the same act has both legal and political connotations, and in time of stress and emergency, political motives and considerations are likely to outweigh the purely legal. In this respect, it exemplifies in an extreme form the difficulty of restraining political conduct within legal bounds. The international law of war—e.g., maritime war, contraband, blockade, prize courts, neutrality—has suffered mighty inroads during two great wars in one generation, coming close to justifying in war at least ex-Justice Roberts' (N.Y. Times, July 14, 1945) denial of the very existence of international law and his proclamation that the law between nations is the law of "tooth and claw." This is the opposite of the assumptions made by advocates of "collective security." When society or governments determine that they can dispense with law, the bonds holding society together are extremely fragile.

The author deals in volume 3 with war subjects. He assumes that the law hammered out during centuries of human experience is still valid, as it is likely to prove when small nations go to war or when a large nation fights a small one and the international organization planned at San Francisco proves as innocuous as critics believe. The author is quite justified in regarding the highest achievement of international law—the law of neutrality with all that it has meant for
human welfare—as not rendered obsolete by the practice of the past thirty years and by the romantic aspirations for an even better legal world indulged by a few soothsayers. The author steers fairly clear of the elusive subject of international organization, though he raises the question whether collective security or general participation in war may not be a better safeguard for society than neutrality. The reviewer raises no such question. The first two volumes of this work, which discuss the international law of peace, are a standing refutation of Justice Roberts’ broad aphorism.

I like most of the material in these volumes. The work is not simply an orthodox presentation of traditional views, but a reasoned discussion of the subjects treated, in historical perspective and modern development. Perhaps more emphasis on economic factors would not have been superfluous. Mr. Hyde’s style is rather involved, and though many sentences are heavily packed, they are clear when analyzed. The author usually but not always gives us his personal views. He necessarily deals with many constitutional questions. I like his challenge of those who would substitute the executive agreement for the treaty. But I believe later events would have qualified some of the statements made and positions assumed, and I trust the author will pardon the exceptions I venture to take to some of his assertions.

How, for example, would he square the sections on the equality of states (Sec. 11+) with the San Francisco Charter? What, in the light of current events, is left of the independence of states? Is not that a purely relative term, moulded by politics? And if “defense” of the neutral state and the desire to see one set of belligerents win, could serve as a release (“inapplicability”) from the legal obligations of neutrality (the destroyer deal, Sec. 83 C, 848 A) is there anything left of the law of neutrality? The same thing may be said of page 2360. Indeed, if the obligations of neutrality attach only to political indifference as to who wins the war, it rests on the flimsiest foundation. Are we to infer that anyone who combats Great Britain is “lawless”? How does an assault against England become a “direct attack” on the United States? Evidently this recent discovery puts us in the greatest danger. Are not the conceded privileges of defending neutrality confused with the general assertion of self-defense, as proclaimed in the conditions attached to the “futile” Kellogg Pact? Would it not have been simpler to say that no neutral is obliged to remain neutral and may change to belligerency and commit acts of war, assuming the risks of war, as the United States freely did up to December, 1941, instead of trying to justify the acts of war under the amorphous and ambiguous head of “non-belligerency”? What was done was quite inconsistent with the neutrality proclamation of 1939. Is Section 847 (p. 2229) designed to extol the advantages over neutrality of collective security, of “general participation in war against the particular belligerent which without reason unsheathed the sword”? Who ever heard of a belligerent unsheathing the sword “without reason”? I am unable to reconcile Section 875 with Section 848 A. How can one reconcile Section 875
on the impropriety of changing the obligations of neutrality
due to political interest in a foreign struggle with Section 848 A,
which supports such a possibility? The reviewer is led to believe
by numerous passages in the book that when the United States enters an
European war, i.e., when there is no large neutral left, the principles
of international law cannot be maintained. This might not be the least
of the justifications for abstaining from such a hopeless proceeding.

Why is the confiscation of ex-enemy private property illegal (the
correct view), and the United States not likely to pursue such a course,
and yet excuses are made by the author for the taking of private prop-
erty to pay the claims of nationals against an enemy belligerent? If
all that you need is a plausible excuse, nothing stands in the way of
confiscation. The Bolsheviks are thereby justified. The obloquy of
misbehaving in this fashion by the compulsory “agreement” of the
vanquished or otherwise is likely to plague American investors abroad
for the indefinite future. Past history and the law are made somewhat
absurd by the concessions. The Potsdam agreement, showing the influ-
ence of Soviet Russia, goes a long way in wiping out the distinction
between private and public property. Alexander Hamilton and John
Bassett Moore, who are freely quoted in other connections, might well
have been quoted here. Also the Proceedings of the American Society
of International Law for 1933, pp. 120–122, where Fred K. Nielsen,
co-author of Article 297 of the Treaty of Versailles, deprecated the
hypocrisy of appropriating aliens’ property and then relegating the
stripped alien to the tender mercies of his own insolvent government.
The economic justification for the established rule of law should not
have been overlooked. The Mexican agricultural expropriations are
correctly dealt with, but more attention might have been given, without
changing the result, to the Latin argument in justification. The Beteta-
Robles school is not negligible. The Mexican oil expropriations omit
much relevant material. Five volumes were published by the Standard
Oil Company of New Jersey. Not noticed is the fact that the expro-
priation was contrary to the municipal law of Mexico and that the
Mexican rule to compensate for surface values only was necessarily
confiscatory. Fortunate for Mexico was the European War of 1939,
which doubtless persuaded President Franklin D. Roosevelt in 1941 to
arrange for an appraisal which left subsoil values, promised due con-
sideration, in an uncertain status. The Russian confiscations are only
briefly mentioned.

The illegality of the submarine because of its inability to save pas-
sengers is insisted on, even when it was used by Germany against
British ships. Submarine commanders were purported to be treated
as pirates in one of the unratified treaties of the Washington Confer-
ence of 1922. No reference is made to the fact that the clause as to
piracy was silently dropped from the treaty of 1930, after Mr. Cotton
sought the advice of John Bassett Moore (Hawkworth, Digest of Inter-
national Law, II, pp. 690–691; Foreign Relations, 1930, I, 54). The
discussion of piracy by the author is commendable. On the loss of im-
munity from unwarned attack of an armed merchantman, Sections 742-743 seem at variance with Sections 709 and 863. The author, who in the first edition was, I think, unequivocally opposed to the "intention" test of the note of March 25, 1916, now supports both the note of March 25 and the contradictory note of January 18, 1916. Besides, when some ships arm the belligerent submarine is entitled to conclude that all are armed. The "Altmark" is handled correctly (p. 2339). The comment might have cited in support Fontes juris gentium, Digest of Diplomatic Correspondence, 1856-1871, Vol. II, Document 2928, and (1940) 34 Am. Jour. Int. Law 289.

All enemies are "ruthless"; it does not add to clarity to characterize them by opprobrious adjectives. More facts should have been given in the case of the "Robin Moor," sunk by submarine in May, 1941 (Sec. 749 C). (Read this in connection with Sec. 757, the destruction of neutral prizes.) When Asquith announced in 1915 that England would not be hampered by "juridical niceties," he meant "by the law." The acquiescence of the United States was the first manifestation of unneutrality and led to the inevitable intervention. Mr. Hyde is correct in concluding that the real issue in the "I'm Alone" (p. 796) is whether the one hour's steaming limit was "territorial waters" within the doctrine of hot pursuit. The "I'm Alone" was beneficially owned by an American citizen. The vital question in the "Appam" case (p. 2276) was whether the treaty of 1799 insisted on the prize being accompanied by another vessel or whether it could come in under their own steam. This was neglected by both courts. On the theory of the responsibility of states for injuries to aliens the reviewer happens to be of an opinion different from the author's. Condemnation of "wanton devastation" and "wanton destruction" (Secs. 55-57) might seem to condemn the legitimacy of the atomic bomb as a weapon, a view which the reviewer shares with anxiety.

In spite of the exceptions mentioned, the work is likely to win a distinguished place in the literature of international law.

Edwin Borchard.*


Sixty million jobs, full peacetime employment, is the goal presented to the American people by Secretary Wallace in his book of the same name. He wants not just jobs but excellent jobs with good salaries and wages for all. He foresees that "we can attain this goal without a 'Planned Economy' without disastrous inflation, and without an unbalanced budget that will endanger our national credit." The fuller life for all will be just around the corner. The prospect seems wonderful, we should like for everyone to have a job at an excellent wage so we follow the Secretary's suggestions with interest to see how this is to be accomplished.

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