INTERNATIONAL LAW

AND THE

PRESENT WAR

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International Law and the Present War.

Until the outbreak of the present European conflict modern wars have been characterized by an ever increasing recognition of the rules of international law, and it has generally been possible at the end of each conflict to register some substantial progress.

In the titanic struggle between Russia and Japan we had a remarkable instance of the homage paid to the usages of civilized warfare by a nation which had but recently been admitted within the pale of international law. The Japanese army and navy were accompanied by distinguished jurists whose duty was to advise the military and naval commanders as to doubtful questions which might arise in the conduct of the war, just as Gustavus Adolphus was said to have kept a copy of Grotius with him in his camp for constant reference.

What distinguishes the present conflict from all modern wars between civilized states is not merely or principally the deliberate disregard by one of the combatants of almost every one of the principal rules of warfare sanctioned by usage and adopted by the conferences at the Hague, but the negation by the most authoritative and influential writers of that nation of the fundamental principles underlying the science of International Law. Indeed the practice is but the logical result of the doctrine.

So firmly were the foundations of the system supposed to be laid that Professor Holland said in 1896, in his work on Jurisprudence, that no one of the States of modern Christendom would venture at the present day expressly to repudiate the duty of conforming to the precepts of International Law in its dealings with the rest. (8th Ed. p. 346).

Contrast with this assurance the answer given in 1914 to another eminent English jurist, Mr. Thomas Barclay, who

desired to ascertain the views of one whose opinions have had a determining influence on German military ethics:—

"Any war between the Great Western Powers at the present day can now only be a life or death struggle. No considerations of humanity, of justice, of treaty obligations, will interfere with its one great object, which will be to annihilate the enemy's power of resistance. All methods are fair when war is no longer a mere duel, but a death grapple in which, just as teeth and nails are used between individuals, what is equivalent to them is used between nations." (*Edinburgh Review*, 1914, p. 1190.)

Bismarck put it even more tersely and bluntly in his famous saying:—

"Where Prussia's power is in question, I know no law."

(Wo Preussens Macht in Frage kommt, kenne ich kein Gesetz).

One of the fundamental principles of International Law is that of the equality of States and the right of each of them to govern itself and to live its own life without interference. Listen to the contempt with which Bernhardi repudiates this doctrine:—

"The weak nation is to have the same right to live as the powerful and vigorous nation. The whole idea represents a presumptuous encroachment on the natural laws of development, which can only lead to the most disastrous consequences for humanity generally."

Starting from this premise the whole system is easily constructed. If there is a state immeasurably superior to all others in civilization, that state alone has rights, while the less civilized states have merely duties of submission and obedience. The obvious privilege of the predominant state is to realize in the highest degree its destiny by imposing its will on less cultured states, and to subjugate them if they offer any resistance. And as some at least of the inferior states may shew a preference for their own civilization, this will generally mean war.

In every text-book that we have ever read the subject of International Law was divided into two parts:

1° Normal relations between states, i.e., in time of peace; and

2° Abnormal relations, i.e., in time of war.

But now we are told that this is all wrong, for war is the normal and peace the abnormal condition of existence. The struggle for existence is the basis of all healthy development and the law of the strong holds good everywhere. The aspiration for peace is directly antagonistic to the universal laws of life, and all efforts directed to the abolition of war are not only foolish, but absolutely immoral and unworthy of the human race. The desire for peace has rendered civilized nations anaemic, and war alone can secure to the true elements of progress the ascendancy over the spirits of corruption and decay.

"Might (concludes Bernhardi) is at once the supreme right, and the dispute as to what is right is decided by the arbitrament of war. War gives a biologically just decision, since its decisions rest on the very nature of things."

This invitation to return to nature in order to ascertain the rules of conduct between individuals or nations is not peculiar to modern German philosophers, historians and generals.

The Roman lawyers founded their Jus Gentium on an imaginary Jus Naturale. Grotius and his followers identified the Law of Nations with Natural Law, and Rousseau and his school based their ethics and their sociology on the theory that men must revert to a state of nature in order to be virtuous.

But to the Roman lawyers to live according to nature meant a life governed by the noble precepts of the Stoics, to Grotius is meant the reign of equality and justice, and to Rousseau an idyllic existence free from competition, jealousy or strife.

Of course, their hypothesis was historically false. There was far more truth in the doctrine of Hobbes that "the natural state of men, before they entered into society, was a mere war and that not simply, but a war of all men against all men." (Liberty, par. 12.) For, as he tells us, "the most frequent reason why men desire to hurt each other, ariseth hence, that many men at the same time have an appetite to the same thing; which yet very often they can neither enjoy in common, nor yet divide it; whence it follows that the strongest must have it, and who is strongest must be decided by the sword." For these reasons, Hobbes

concludes that in the natural state, the *bellum omnium in omnes* is practically perpetual, and, he quaintly adds, "the time remaining is termed peace."

The premise, therefore, of the modern apostles of brute force is true, namely, that the evolutionary course of nature is a history of competition and strife.

But the extraordinary deduction which they draw is that instead of seeking our rules of conduct in the conceptions of a higher form of life which has been developed by ages of progress, we must go back to the predatory habits of the jungle.

No one could repudiate such an inference more forcibly than the evolutionists themselves. Spencer, in the concluding volume of his philosophy, says that his views will not be agreeable to those who follow the apostle of brute force in thinking that, because the rule of the strong hand was once good, it is good for all time. (Data of Ethics, p. 257.)

Having shewn by science that there should be a privileged nation, untrammelled by the restraints imposed on less favoured states, the next step is to prove by the aid of history that the Germans are the chosen people, destined to become the rulers of the world and to establish the *pax Germanica*, that armed peace which will deter all rivals from any attempt to break it any more. This destiny is manifest from the time when Arminius or Herman hurled back the legions of Varus, and although Teutonic pre-eminence has been occasionally obscured by the Hellenic and Latin civilizations, these were ephemeral triumphs of nations doomed to a swift decadence.

It may seem incredible that such crude theories should have any effect on the conduct of a nation in the practical affairs of life. As Mr. Sidney Low observes, in a recent contribution to the subject in the Edinburgh Review (1914, p. 272): "In England, all the dangerous ethics and fantastic ethnology of perverted geniuses would only have set us talking. In Germany, they seem to have induced quite a large number of otherwise sane and sensible persons to believe that any war would be righteous if it were waged to impress upon a sceptical and reluctant world the consciousness of German superiority."

The surest way in which the theories of philosophers can be transmuted into practical maxims of conduct is to incorporate them in the instructions of a Government to its military and naval commanders. If we turn to the German War Manual, we find the following guiding principle enunciated:—

"A war conducted with energy cannot be confined to attacking the combatants of the enemy and its fortifications. It must at the same time be directed to the destruction of the whole of its intellectual and material resources."

In other words, all the progress achieved since the Peace of Westphalia in the mitigation of the horrors of war goes for naught, and the military code is that of Tilly and the Duke of Alva. No distinction is made between combatants and non-combatants, between public and private property, between fortified and undefended places. The rule here laid down will authorize the ruthless murder of innocent persons and the wholesale destruction of industrial establishments, libraries, churches and museums, not for any adequate military reason, but for the purpose of weakening the morale of the enemy and destroying his nerve for resistance.

If any doubt existed as to whether German commanders in the field would put this construction on the rule, it would be resolved by their actual conduct of operations in this war and by the unashamed and unrepentant defiance of public opinion displayed by officers of high rank who have expressed their views.

Major-General von Disfurth contributes the following in the "Hamburger Nachrichten":—

"No object whatever is served by taking any notice of the accusations of barbarity levelled against Germany by their foreign critics. Frankly, we are, and must be barbarians, if by this word we understand those who wage war relentlessly to the uttermost degree. There is nothing for us to justify and nothing for us to explain away. Every act of whatever nature, committed by our troops for the purpose of discouraging, defeating and destroying our enemies is a brave act, a good deed, and is fully justified. There is no reason whatever why we should trouble ourselves about the notions concerning us in other countries. Certainly we should not worry about the opinions and feelings held in

neutral countries. Germany stands supreme the arbiter of her own methods, which must in time of war be dictated to the world.

"It is of no consequence whatever if all the monuments ever created, all the pictures ever painted, all the buildings ever erected by the great architects of the world be destroyed if, by their destruction, we promote Germany's victory over the enemies who have vowed her complete annihilation.

"War is war, and must be waged with severity. The commonest, ugliest stone placed to mark the place of burial of a German Grenadier is a more glorious and venerable monument than all the cathedrals of Europe put together. They call us barbarians. What of it? We scorn them and their abuse. Let them cease to talk of the cathedral of Rheims and of all the churches and all the castles in France which have shared its fate.

"These things do not interest us. Our troops must achieve victory. What else matters?"

To international lawyers who have been taught to look upon public opinion as being, in the last analysis, the final arbiter as to the propriety of the conduct of one state towards another in time of war, the claim now advanced that Germany is the supreme arbiter of her own methods which must be dictated to the world, and the view that a belligerent "should not worry about the opinion and feelings held in neutral countries" will appear to be subversive of all accepted theories and practice.

And what are we to think of a nation which is charged with having needlessly and without any compelling military reason, devastated some of the fairest provinces of Europe, destroyed priceless monuments of architecture and art, pillaged beautiful homes, desecrated churches—and which merely answers: "these things do not interest us."

Let it not be supposed that this attitude is confined to the military caste. No one will suspect Herr Maximilien Harden the editor of "Die Zukunft" who flayed the camarilla about the Kaiser so unmercifully, of any undue prepossessions in favour of the ruling class in Germany. With characteristic courage and independence he advises his countrymen to drop their miserable attempts to excuse Germany's action. "We

willed it," he says, "we had to will it. We do not stand before the judgment seat of Europe; we acknowledge no such jurisdiction. Our might shall create a new law in Europe: It is Germany that strikes. When she has conquered new domains for her genius then the priesthoods of all the gods will praise the good war." As regards Belgium he declares that there was never a more righteous war than that which crushed her, and never one which conferred a greater benefit on the conquered. Germany will remain in the Belgian Netherlands, and add thereto the narrow strip of coast as far as Calais. "The object," he says, "is to hoist the storm-flag of the empire on the narrow channel that opens and closes the way to the Atlantic." (*The Times*, New York.)

Throughout all these extracts there is one argument which deserves to be noticed. It is urged that all laws of war, whether customary or contractual, cease to be binding in cases of necessity. The German writers distinguish between the ordinary rules of war (Kriegsmanier, or the Etiquette of War) and the necessity of war (Kriegsraison) which overrides these rules whenever their observance would hinder the attainment of the object of the war or place a belligerent in a position of extreme danger. Mr. Westlake characterizes this doctrine as "highly pernicious," and shews that the pretended "necessity of war" is in reality a "necessity of success." He says:—

"It is contended, in effect, however innocent may be the intentions of authors, that the true instructions to be given by a state to its generals are: "'succeed—by war according to its laws, if you can—but, at all events and in any way, succeed.' Of conduct suitable to such instructions it may be expected that human nature will not fail to produce examples but the business of doctrinal writers should be to check and not to encourage it. Otherwise, the most elementary restraints on war, which have been handed down from antiquity, are not safe." (International Law, Pt. II., pp. 126-8).

But it is not merely theoretical writers who repudiate this view of the necessity of war. If we turn to the admirable "Instructions for the Government of Armies of the United States in the Field," we shall find a very different definition of 'Kriegsraison'—"Military necessity, as under-

stood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, *and which are lawful according to the modern law and usages of war.*" (General Orders, No. 100, par. 14.)

In the next rule (No. 15) the soldier is reminded that "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."

With instructions like these the soldier will take as his exemplars the humane and chivalrous figures of Bayard, of Washington and Havelock, instead of emulating the hideous records of an Alaric, an Attila or a Gengis Khan.

As we have seen from the foregoing quotations it is not merely the customary law of nations that is denied any binding authority, but also the obligations resulting from express contracts. In ancient Rome there was a college of priests (*collegium fetiale*) whose function it was to act as the guardians of the public faith. When any dispute arose with a foreign state it was their province to demand satisfaction, and to determine the circumstances under which hostilities might be commenced and under which existing treaties could be denounced without incurring the anger of the gods. The modern blood and iron chancellors are not hampered by any such preliminaries and their contempt is unbounded for parchment, seals and scraps of paper. Treaties cease to be obligatory from the moment it becomes inconvenient to observe them, and the question of inconvenience is left to the general staff.

It would be impossible to find a more solemn compact than the Regulations respecting the Laws and Customs of War on Land, which formed the subject of the Hague Conferences of 1899 and 1907, and which were signed by nearly all the nations of the world along with an undertaking to issue to their armed forces instructions conformable to the regulations.

It is not my purpose to examine the particular violations of these contractual rules which are alleged to have occurred during the present hostilities. The time has not arrived for a final judgment upon all the infractions which are charged, inasmuch as the enquiry is still proceeding and as it is at present impossible to hold an investigation in which all the

parties concerned are represented before an impartial tribunal. Enough materials have been collected, however, and sufficient *prima facie* evidence has been adduced to make it imperative that at the proper time such an investigation should be made. But what I wish to emphasize at the moment is the intolerable pretension of a nation which in advance declines the jurisdiction of the civilized world over its actions, defies public opinion and asserts its intention of disregarding the law of nations and its treaty obligations.

Of the flagrant and deliberate violation of one treaty at least there can be no possible doubt. I refer, of course to that which guaranteed the neutrality of Belgium. A bold and cynical admission on the part of the German Chancellor that this great wrong had been committed because of an alleged military necessity, has been followed by a series of special pleas which have been sufficiently refuted by M. de Lapradelle in the December number of the *North American Review*. It was urged, for example, that the treaty signed by Prussia in 1839 was not binding on the Germanic confederation, that by acquiring a colony in the Congo, Belgium had lost its neutral character, and that its neutral status had also been forfeited by arrangements made with Great Britain and France for the preservation of its neutrality in the event of an aggression by Germany.

It may be interesting, before concluding this address, to draw your attention very briefly to some of the debateable problems of international law which recent events have presented for solution.

The question of the employment of automatic submarine contact mines is one upon which a diversity of opinion still exists. The danger to neutral shipping from unanchored mines is obvious, and even when they are anchored there is a likelihood that in rough weather they will shift their position or break adrift altogether. It is said that during the two years which followed the Russo-Japanese war a great number of disasters resulted in the eastern seas from the use of mines by the belligerents. (Westlake, vol. 2, p. 312). At the sitting of the Hague Conference held on the 9th October, 1907, an article was adopted which prohibited (1) the placing of unanchored contact mines not so constructed as to become innocuous an hour at most after those who have placed them have lost control over them, and (2) the placing of anchored

contact mines which do not become innocuous as soon as they have broken their moorings. As this convention was to be in force for seven years, it became inoperative on the 9th of October last. And inasmuch as the discussion of the subject revealed a considerable difference of opinion, it seems very doubtful whether even this "emasculated convention" (as Mr. Westlake calls it) would be renewed. Great Britain strenuously argued in favour of the greatest possible restriction of the right to use mines in order to insure the security of neutrals in the navigation of the high seas. The German delegation on the other hand advanced the view that it would be well not to issue rules the strict observance of which might be rendered impossible by the force of things; that military acts are not governed solely by principles of international law but by conscience, good sense and the sentiment of duty imposed by principles of humanity, which would be the surest guides for the conduct of sailors and would constitute the most effective guarantee against abuses. And Baron Marschall von Bieberstein, the spokesman of the delegation, added: "The officers of the German navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization." This certainly sounds a good deal better than the sentiments of Major-General von Disfurth, but the North Sea fishermen and the inhabitants of Hartlepool, Scarborough and Whitby, may be pardoned for thinking that the noble baron had underestimated the degree of "Kultur" of the naval branch of the service.

This brings me to the consideration of another point in connection with bombardments by naval forces. By the first article of the ninth convention of the Hague Conference of 1907, "the bombardment by naval forces of ports, towns, villages, habitations or buildings which are not defended is prohibited."

A second paragraph providing that "A locality cannot be bombarded for the sole fact that automatic submarine contact mines are moored before its port," was not assented to by Great Britain, France, Germany and Japan. Mr. Westlake is of opinion (vol. 2, p. 182) that the objection is well founded because "a place cannot be deemed undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open to the enemy to enter."

It seems certain that Scarborough and Whitby were undefended towns in the strictest sense, but there appears to be some doubt whether Hartlepool was not to some extent at least defended.

Still another unsettled question is that of the rights of a belligerent as to the cutting of submarine cables. It was much discussed at the time of the Spanish-American war. There is no doubt as to the right of a belligerent to cut cables connecting different portions of the enemy's territory or cables connecting the territories of the two belligerents. It is equally certain that a cable connecting two neutral territories is inviolable, although by subsequent stages of transmission messages might reach the enemy. But the difficulty arises when a cable connects the territory of the enemy with the territory of a neutral. It appears to be conceded that in such a case a belligerent is entitled to cut the cable in the territorial waters of the enemy even if the cable should happen to be neutral property, subject to the obligation of indemnifying the owners. This invasion of neutral rights is justified on the ground that neutral property whose *terminus ad quem* is in the territorial waters of a belligerent is subject to the same inconveniences as neutral property on occupied portions of the land of a belligerent.

But the controversy is as to whether the belligerent right can be exercised on the high seas. Against this extension of the doctrine we have the high authority of Professor Holland (letter to *The Times*, 21st May, 1898), of Professor von Bar (19 Annuaire, pp. 16, 308, 316) and of the Institute of International Law (19 Annuaire, p. 332). Their view is that a cable connecting a neutral territory with the territory of one of the belligerents cannot be cut in the open sea unless there is an effective blockade.

On the other hand, this view has been vigorously assailed by Mr. Goffin (15 L. Q. R. 145), who suggests that it proceeds upon an erroneous application of the rules of land warfare to maritime warfare. Under the rules governing the latter, he contends that "it would be open to a belligerent to cut a cable beyond the limit of his enemy's territorial waters, just as it would be open to him to seize a despatch boat on the high seas." This contention was also made before the Institute of International Law by the French jurists, MM. Renault and Lainé, the former of whom

pointed out, in line with Mr. Goffin's argument, that ships carrying contraband despatches are undoubtedly confiscable, that at the present day despatches are conveyed, not by boats, but by telegraph, and that "belligerents must find in the new situation an equivalent for the protection which they have lost." The German jurist, Herr Perels, declined to discuss these subtleties and urged that it was impossible to sacrifice the interests of belligerents, because military necessities must be reckoned with, and while the Institute might propose what its members liked, the question was what governments could adopt. (Annuaire, pp. 309-10.)

Mr. Westlake strongly objects to the attempt to impose fresh burdens on neutrals by extending the rules of blockade and contraband, because these rules "are not due to principle, but to compromise, and, therefore, furnish no standing-ground on which an extensive deduction can rest," and concludes that, until some agreement is reached, the general principles of neutrality "deny to a belligerent, blockade or no blockade, the right of cutting a neutral or neutral-belligerent cable outside territorial waters." (Vol. 2, p. 118.)

At an early stage in the present war, the cables connecting German territory with neutrals were reported as having been severed by the allies, but details are wanting as to the exact place where the cutting was effected, and it is uncertain whether it occurred in the high seas or in a blockaded area.

It has been a pleasure to turn for a moment from the exponents of the new barbarism, what M. Boutrou calls "barbarism multiplied by science" (Revue des Deux Mondes, 1914, p. 398), to the serener atmosphere of legal discussion, where the disputants all acknowledge, outwardly at least, the binding nature of solemn agreements, the supremacy of the law, the claims of humanity and the overruling authority of public opinion.

But now that all our accepted notions are put to the test of a world conflict of unparalleled magnitude and ferocity, now that the great nations of Europe are locked in a struggle for their very existence, we cannot help asking ourselves anxiously whether International Law will survive the ordeal or whether it is destined to be relegated to the category of discarded and discredited sciences. The almost universal reprobation which these excesses have aroused

throughout the civilized world, and the firm determination expressed to reinstate the reign of the law, encourage us to believe that the principles of International Law will emerge victorious from the struggle, and rest on a firmer footing than ever. Grotius wrote his great work in the welter of the Thirty Years' War, and in the Prolegomena you will remember the oft-quoted passage:—

"I saw prevailiing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint."

Just as the unspeakable horrors of that conflict prompted the great Dutch jurist to write his immortal treatise, so may the present calamity bring forth new efforts for the uplifting and betterment of mankind.