

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852 .

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

---

---

VOLUME 64

June, 1916.

NUMBER 8

---

---

## THE RECONSTRUCTION OF INTERNATIONAL LAW.\*

As a citizen of one of the belligerent countries, I take sincere pleasure in the opportunity afforded by this article to express myself before the lawyers of the United States upon the question how, in my opinion, the mutual relations of the belligerents in the present great world conflict will shape themselves after the war, and what, as a consequence, will be the future of international law.

The great problem of international law, during and after the war, has a very different aspect to us of the warring nations, as compared with the citizens of the powers remaining neutral. We have experienced in our conceptions and in our practical existence in an incomparably more direct manner than they, the sudden breaking down of that community of states, extending over the whole of the earth, on the quick development of which we had accustomed ourselves, with great assurance, to found the highest hopes. And this applies in particular to us citizens of the central powers since we, from the beginning of the war, have been living as under the siege of a giant fortress, entirely dependent upon ourselves, with nothing to fall back on except our close national life, be it in business, in culture, or in law.

\* Translated by Axel Teisen, Esq., of the Philadelphia Bar.

The states remaining neutral have complained of violations of international law, and *à propos* thereof it may be stated, that these very complaints are the very best evidence that none of them for as much as a moment have been in any real doubt, but that international law still exists. Nevertheless, everywhere in the belligerent countries men, both wise and sincere, have constantly asserted that the war is proof positive that no international law, in the true sense of the word, ever did exist, or at least that, even if such law did have existence in times of peace, it has been swept out by the war. And how often must we, even now, after twenty months of war, read that our enemies, also after the war has ended, will know of and recognize no intercourse, on a basis of equality, with the German empire and its allies.

I shall not at this place indulge in any philosophic discussion of the juridic nature of international law. I believe that with me all of my readers will agree that international law is law. Neither shall I go into that question of fact, whether that which we, during the years of peace, called international law, really has been destroyed by the war, be it totally or in certain details. On this point also do I believe myself to be in accord with my readers in asserting that breaches of the law and destruction of the law are two so entirely different things, that only through entirely superficial thinking may they be confused.

I shall finally confine the matter under discussion to this single question: What will be the *post-bellum* situation of the community of nations and of international law? Or, as it also may be put: Will the end of the war bring peace, or simply an armistice?

Even neutral countries ought not to overlook the fact that influential voices have been raised in an affirmative answer to the question whether nothing but an armistice will result from the war. True, at least not from any leading person, neither in Germany nor among her allies. The German chancellor has repeatedly and most solemnly declared that we are willing to conclude peace. But from the other side, and last from the mouth of Asquith, have we heard that the war must be continued

until the Prussian-German military system shall have been utterly destroyed. If these words were said in earnest, and it should become evident that behind them stands sufficient power to translate the desire into fact, then the end of the war would lead to nothing but the instant commencement of preparations for a new war. The armistice would not last for one day after the German nation, through its natural growth and business ability, had recovered sufficient strength to dare a new arbitrament of the sword. During such an armistice a community of nations and an international law would be impossibilities.

Among us, however, nobody takes seriously these words of the English statesman. But what is more dangerous is the openly declared plan of our enemy, after the end of the war of arms, to begin an economic war against Germany and her allies. The carrying into effect of such a plan would simply mean a continuation of the state of war and thereby the negation of all international law, which rests upon the idea of an international life upon the basis of equal opportunity.

My personal conviction is that the end of the war will disclose itself not simply as an armistice, but that a lasting peace will be its result; that with the conclusion of peace the community of nations will arise once more, and with it international law; also, that this new international law will be constitutionally stronger, and will offer a better protection to the peace than was the case with the old international law from before the war. In the following I shall briefly set forth the reasons upon which I build this, my conviction.

I consider it to be out of the question that one or the other of the two groups shall prove itself able to "smash" the other and to dictate to it its conditions of peace. There will be no unconditional surrender, but the peace will be a mutual act as a result of negotiations for peace; it will be concluded by a contract, an agreement among the belligerents. But a treaty of peace contains in itself a mutual acknowledgment of the contracting parties as independent and equal legal subjects of international law. And this cannot be disputed, as the fundamental principle of all international law is *pacta sunt servanda*. The

very treaty of peace will in itself spell the reinstatement of the community of nations and of international law. And more than this. The peace treaty by which this war of the world shall end, must of necessity carry with it an essential advance in international law. It will not, and will not be able to, confine itself to a restitution of the formerly existing relations among the belligerents torn asunder by the war; it will have to regulate a great many of new relations among the powers, in such numbers as cannot even be anticipated today; it must create new ideas and new rules for international law. The negotiations for peace may prove long and difficult, but I feel convinced, even today, that they will produce an advance in international law.<sup>1</sup>

In the treaty of peace the foundations for the future commercial relations between the warring nations will also be laid, even if the conclusion of commercial treaties will have to be reserved for separate agreements. True, the winning side will not renounce its chance to gather in the fruits of its victory in the realms of commerce. But the idea, after the conclusion of

<sup>1</sup>"The treaty of peace will, first of all, form the foundation, upon which a comprehensive system of international treaties between the powers now at war, will be built up. Then, the lines of direction for their economical interrelations will be laid down, for it may even now be asserted that the two groups of states which at present carry on the most bitter, economical war against each other, will not, and will not be able, after peace is concluded, to shut themselves in, one against the other. The wishes and hopes of a contrary nature, which the temporary hatred of one people towards another allows to find expression occasionally and locally, will certainly never see their consummation. A victory, by either side, will, of course, be utilized in order to obtain favorable treaties of commerce, and in case the result of the war should be that neither side had gained a decided victory, then in particular will it be to the interest of both parties to reach equitable agreements concerning the exchange of goods. It will become necessary to conclude collateral agreements about the evacuation of occupied territories, the return of prisoners of war, the determination and satisfaction of numberless questions of damages (not considering even the direct damage caused by the war operations) the manner of arbitration of such claims which cannot be settled by the treaty of peace; and numberless other problems, which cannot be even seen or surmised as yet. Then it will be necessary to conclude new treaties and agreements concerning all those matters, the former treaties about which have been cancelled or voided by the war, such as shipping, consular affairs, extradition, legal aid, railroad agreements, literary conventions, and all similar matters, the name of which is legion. It is necessary only to recall the numberless agreements which existed before the war between neighboring states such as Germany and France, or Germany and Russia, or between Austria-Hungary and Italy." Dr. von Liszt in *Deutsche Juristen-Zeitung* of January 1, 1916.

peace, to continue to carry on an economical war, to prevent the former enemy from carrying on commerce, also after the conclusion of peace, is but the manifestation of a hatred which has grown blind. More than ever are the various countries dependent upon the mutual exchange of commodities, and this fact will prove itself stronger than any national or political fanaticism. Notwithstanding the English dominion of the seas, the foreign commerce of the continental states will develop on a broader foundation and in wider circles than heretofore. It may be that certain states will enter into preferential arrangements, but even this will not make it possible for them to avoid the conclusion of commercial treaties with the outsiders. And around these a number of other treaties will be gathered just as formerly, probably even to a greater extent. When the arms have become silent, then the community of interests will show itself to be stronger than the spontaneous hatred.

And the neutral states will do all in their power to secure and expedite this development. They will take care that the international unions which have been very much embarrassed by the war, but nowhere destroyed, again shall be carried into full effect, that they be amplified, and that new territory of human endeavor be included within the co-operative activities of the states.<sup>2</sup>

I wish to call the special attention of my American readers to an apparition of the highest importance for the development

<sup>2</sup> "The treaties between the individual warring nations and the neutral states, have not suffered any legal interruption or abrogation by reason of the war; as legal enactments they will be carried over into the coming period of peace. Then there are the great joint agreements, and those conventions to which practically the whole world has become a party, such as the postal union, the telegraphic union, the conventions about protection for literary productions and trademarks, about white slave, and slave trade. These have suffered a great deal under and by reason of the war, but they have not been destroyed, they are still alive, and after the war they will come into full operation once more, in so far at least as they shall not have been abrogated by the required notice given by individual states or been superseded by new treaties. Once more, as before the war, the states of the world will be as if surrounded by a net of treaties, the meshes of which will ever become narrower and tighter. International law will unfold its indestructible vitality, all misunderstandings, all suspicions, all bitterness notwithstanding." *Id.*

of international law, and which we are able to perceive even today, at least in its first manifestations, namely, the rise of a new kind of inter-state law which, even if it is not international law in the technical sense of the word, still joins different powers into separate and independent groups. What I refer to will become clear at once by recalling the so much spoken of "American International Law". A closer relationship in political, commercial, and cultural interests may join a number of states into a group which may proceed farther in the development of inter-state laws and institutions, than is possible for the general community of civilized states; but for this very reason they may serve as patterns and incitements for the latter. Within such a group, it will be much easier to introduce the obligatory submission to arbitration of all questions without exception, than within the general community of states. But if this form of settling disputes first shall have become part of the life of such groups, then it will prove much easier than today to introduce it universally.

It cannot be contradicted that the present war has brought the powers allied on both sides closer together. Without doubt is this the case with Germany and Austria-Hungary, and most likely can the same be said about the relations of both of these powers with Bulgaria and Turkey. These powers will after the conclusion of peace, continue to form a close group, and, for instance, conclude their commercial treaties with other powers on the basis of similar principles. How far this *rapprochement*—the sovereign independence remaining intact—will proceed cannot now be predicted with any certainty. Personally I cannot recall from the history of man any case where a political thought has, within so short a time, gained such a dominion over the minds and hearts of nations as has the idea that the two Central Powers and their allies hereafter must enter into and maintain the closest possible mutual relations. I do not consider myself competent to judge how far and with what success a similar movement among the powers of the Entente might carry. What I desire to point out is of what great importance for the development of international law is this creation of groups of states.

Neither do I have the least doubt that after the war the labors of The Hague conferences will be resumed, and especially both in the direction of an evolution of settlements by arbitration, and of a codification of the law of war, both on land and on sea.<sup>3</sup> The rules for the conduct of war on land have, generally speaking, been lived up to, but a number of gaps in the law have appeared, and these require to be filled, such as the interning of civil prisoners, the treatment of contracts entered into with enemy foreigners, and many others. But the rules of war at sea must be entirely reconstructed; for reasons, which do not need to be set forth, practically no part of them remain except the Declaration of Paris of 1856, and even this has practically collapsed, at least as far as its most important aspects are concerned.

There is, however, to be found in wide circles, also inside Germany, a deep-seated skepticism regarding the possibility of reaching new agreements concerning the law of war, and especially maritime war. One hears the argument that in a fight for life or death, no power will bind itself to an agreement, whereby its defense against, or its victory over, an opponent may be made impossible, or even appreciably more difficult. This objection is partly, but only partly, correct.<sup>4</sup> The rules setting limits for

<sup>3</sup> "The so often ridiculed Court of Arbitration of The Hague will have to exhibit a strenuous efficiency, in order to be able to settle the numberless controversies which must be left undecided by the main treaty of peace. At the conclusion of the war there will exist in all states a yearning for a lasting peace, and in particular in those states actually engaged in the war, for whom long years of peace only will make it possible to recover what the war has destroyed. This mood, will, by necessity, focus the attention upon the rehabilitation of the machinery and procedure provided for arbitrations, which require the most thorough reform and improvement, before they can become a really effective means for the prevention of wars." *Id.*

<sup>4</sup> "We must not demand more from international law than it can give. He who does so, misapprehends its value and its office. International law can regulate the peaceful relations among states; it has done so before, and will do it again even to a greater extent. International law can furnish means for the prevention of war, and the immediate future will be especially occupied in rearing institutions with this object in view. Such work will not be wasted, even if the final decision about war and peace will continue to rest with the sovereign states. Finally, international law can regulate war, can keep the arbitrariness of warring nations within certain boundaries, and make the dictates of humanity the rules of conduct, even on the fields of battle. But always provided, that the war remains more or less localized; that states remain outside, which have the power to call the warring states to order, and to force them to live up to the rules of war.

the manner of conducting war in the interest of neutral powers and humanity are all based upon the supposition of a war between two or a few states; in a war of the world, they must of necessity become more or less inoperative. A prize fight between two men is governed by established rules, and it happens but seldom that one or the other of the gladiators disregards them; for he knows that all of the spectators will take the part of the other side. But where a general fight is going on, no such rules exist; and anybody among the spectators trying to control the participants would inevitably be drawn into the fight. Where the war is between two states, the neutral powers form the audience; and as long as the intervention of the neutrals must be feared, none of the belligerents will dare to tread under foot the rules of war. But the greater the number and power of the belligerents, the less becomes the influence of the neutrals upon the manner of carrying on the war. In case of a war of the world, into which all the powers without exception have been drawn, there remains no power to watch over the obedience to the rules of international law. The war of all against all is the negation of all law; the war of the world, the negation of all international law.

At this time it is but an academic question whether in this war, in which seven of the eight great powers are involved, an armed alliance of all the neutrals, under the leadership of the United States, to enforce obedience to international law might have been feasible. Past is past, and lost opportunities do not recur. I am interested in the future only. We must make up our minds that we have but two alternatives before us: Either a lasting peace resting upon an acknowledged strong international law as its indispensable condition; or a succession of wars which will involve a constantly increasing number of states and end in the destruction of all human civilization.

Here ends the power of international law; it cannot regulate a war of the world. In the last instance, all law rests on the will for peace of those under its jurisdiction, and this applies to intra-state as well as to inter-state law. The very best constitution cannot prevent civil war, when the citizens have lost their will for peace. The war of the world cannot be prevented by international law; the will for peace of the nations only, can do this." *Id.*

I, for one, believe in the coming peace of the world, not as if any international law can prevent war—such a goal is beyond, not only its strength, but its object—but because the will to peace of the nations, the only means for securing the peace of the world, will—that is my absolute conviction—be the unavoidable result of this war. *The will to peace*, which according to all historical experience has arisen like another bird Phoenix out of every great war, will be stronger after this war, in proportion as it exceeds its predecessors in duration and destructive effects. The storms of this destructive war are, so I believe, but the travail preceding the birth of a new and happier era.

*Franz von Liszt.*

*Berlin.*