

the positivist and the naturalist. Perhaps the work should go on through the normal channels of the printed page, the platform, the round table, the seminar, the class room. Perhaps it should be organized in national groups or in international groups of private persons or associations. Perhaps it is in this day and age the rôle of government to marshal the forces. Under whatever guise or auspices, the work needs to be done. It is a responsibility of the international lawyers of the world, a responsibility to be discharged before the great peace conference meets, as meet it will. Whether one likes it or not, that conference will as a matter of fact lay down rules by which the world will be governed for years to come. One hopes that the wisdom of the statesmen will see to it that at least upon subjects of universal concern and of permanent importance, the group of conferees will be composed of delegates invited to come from all quarters of the globe. The fiat of that conference will be law; the fundamental philosophy of that law must be determined during the time which intervenes.

PHILIP C. JESSUP

OF THE ILLUSION THAT WAR DOES NOT CHANGE

It is one of the more pleasant characteristics of man, and usually justified, that he does not anticipate outrageous conduct upon the part of his fellow men. He lives happily as part of a society in which he may usually feel sure that he will not be attacked or robbed, and he has therefore developed a habit of confident and unsuspecting security. He may even forget that this confidence is the result of his own efforts in building round about himself a system of law and law enforcement. It is not a perfect system, and it needs constant study and repair; but on the whole, it justifies his confidence. In the society of nations, there is no such system of law enforcement, and, consequently, no such feeling of security. The individual, feeling secure against outrage within his state, is shocked by an outrage within the community of nations, where he has not provided similar defenses for his security. Since there are not such restrictions, worse and worse outrages are perpetrated in the community of nations. Each nation must be prepared continuously to resist attack; and the international lawmaker must always anticipate the commission of increasingly outrageous deeds against which his law must be built and maintained. The law can not stand still; it must always look forward to new eventualities; it must recognize that changes will occur, and it should foresee them.

These reflections arise from the reading of some incidental words in a paper recently delivered before the Grotius Society in London, in which the speaker made reference to the dangers, in a functional approach to international law, of the illusion of novelty, and of over-emphasis upon the dynamic aspects of current events.¹ He quotes from T. J. Lawrence, and the

¹ Georg Schwarzenberger, "The Aid Britain Bill and the Law of Neutrality", *The Grotius Society* (London, 1941), reprint, pp. 7-13.

warning of Professor Jessup that "of all the clichés which infect patriotic exhortations, the most subtly poisonous is that which calls the war in progress at the moment 'different from all other wars.'" ² He quotes also from the well-known essay of J. B. Moore concerning current illusions as to international law.³

During the past century and a half, revolutionary changes have affected our habits of life; and the character of war has been affected by these changes. It is doubtless true that the fundamental principles of warfare have remained the same from Caesar to Clausewitz; that the same definition of war would cover the situation of today and that of two or three thousand years ago. Yet war has changed, in its applications and its effects; it has, indeed, changed to such an extent that humanity can no longer afford it. What were regarded as illusions a few short years ago have now become shocking facts. "It is hard to believe," said Mr. Moore, "that the world is prepared to concede that, in the next war, the first and legitimate measure of the belligerent forces will be to bomb or otherwise destroy producers of food-stuffs and other contributory classes heretofore considered as non-combatant."⁴ However incredible, and whether or not legitimate, this is happening every day in the present war. The distinction between combatant and non-combatant has always been of great importance in the law of war; but the basis of that distinction has now been destroyed, on the one hand, by submarines and aëroplanes and other new instruments, and on the other hand, by the fact that every man, woman or child, whether in uniform or not, can be and is used in the belligerent effort. And, aside from these changes in the conduct of war, the belligerent finds it necessary to break the backbone of popular resistance, and therefore to destroy morale by terrorizing civilians.

Similarly, international law has long and bitterly struggled to uphold the principle that private property is not subject to confiscation by the enemy, nor to destruction, except as a matter of military exigency. It is a principle deserving of the support which Mr. Moore gave to it.⁵ Yet today, private property may be of direct military value. Railway lines, power houses, factories of almost any sort, food depots, practically any article, contribute to military strength; and the enemy regards it as necessary to destroy or take such private property. Military exigency has a far broader meaning when a barrage may sweep the whole width of a state or of a continent, and when an aëroplane, aiming at a fort, drops its bombs instead upon private residences. From another angle, the belligerent seeks private property because the amount of materials called for by modern war is so enormous that it must be obtained from every source and in every way pos-

² *Ibid.*, p. 9; P. C. Jessup, *Neutrality, Its History, Economics and Law* (New York, 1936), Vol. IV, p. 76.

³ J. B. Moore, *International Law and Some Current Illusions* (New York, 1924).

⁴ *Op. cit.*, p. xi.

⁵ *Ibid.*, pp. 14-24.

sible. And finally, and again, the object of the enemy is to destroy morale, and it is an effective way of accomplishing this purpose to seize or destroy private property, to bring privation and suffering upon individuals, to cast upon the government under attack the burden of caring for those so impoverished.

On the sea, the situation is, if possible, even more terrible. As to the law of contraband, said Mr. Moore, we must not permit ourselves to be betrayed by illusions of novelty; our ancestors realized that food destined for civilian use might be appropriated by the army; times have not changed, and the suggestion made by such writers as Hyde and Oppenheim, that the category of conditional contraband be abandoned, is a startling one, since its acceptance would "render illicit practically all trade with countries at war, and put in jeopardy much of the trade even between countries not at war."⁶ Startling or not, illusion or not, illicit or not, it is a fact that all such trade is now put into jeopardy. Circumstances have changed, and the whole classification of contraband is disregarded. The submarine and the aëroplane, weapons of which Grotius and Vattel knew nothing, are useless if they must obey the law and take captured vessels into port for adjudication. And, aside from this, it has become far more important than formerly to prevent supplies from reaching the enemy, and the range of supplies which must be stopped is much wider. Indeed, not only the law of contraband, but the whole concept of neutrality is endangered. War has so expanded that it can not be held within the confines of the belligerent countries; it overflows into those which would be neutral, and destroys not only their neutrality, but their independent existence.

The changes which have taken place in human habits during the past century and a half have resulted in the expansion of government and the revision of laws within states; they are likewise inevitably reflected in the conduct of war, and they call as insistently between states as within states for changes in government and law. It is perhaps a "supposed novelty" to organize a whole nation for war; but the process in these industrial days means a centralized governmental control incompatible with democracy and individual freedom. It is a fact to be faced that war now reaches into every state and into every home; it makes little or no distinctions between civilians and fighters, between contraband and non-contraband, between private property and enemy property; it is not content to stay within belligerent boundaries but spills over and engulfs even those states which would have nothing to do with it. It has become too costly, too menacing, for humanity to endure.

It is still war; but it is a different kind of war. Things which were fantastic illusions a few decades ago are everyday facts now. The international lawyer can not disregard these facts. Plain before him lies the conclusion that no unsupported customary law can restrain war within the limits of

⁶J. B. Moore, *International Law and Some Current Illusions* (New York, 1924), p. 27.

polite conduct. The law must be re-oriented; it must now aim at the control of the use of war itself, and not merely at its polite regulation. It is no more than evasion to say that there are no changes, and that therefore the good old law is still good. The fears derided by Mr. Moore in his essay are not now illusions; they seem stark and naked and fearful in their reality today. And if they are not illusions, perhaps it is not an illusion "that we must forthwith create a sanction, and declaring war to be outlawed, be done with it."⁷

CLYDE EAGLETON

THE INTERNATIONAL RIGHTS OF MAN

The reference in President Roosevelt's message to Congress of January 6, 1941, to the four essential human freedoms to which he looked forward as the foundation of a future world—(1) freedom of speech and expression, (2) freedom of every person to worship God in his own way, (3) freedom from want, and (4) freedom from fear—recalls previous humanitarian hopes for and efforts toward what the President termed "a good society" conceived in the moral order. The work of the President's predecessor, Woodrow Wilson, at the Paris Peace Conference of 1919 in behalf of the protection of minorities comes readily to mind. The series of treaties concluded at the end of the World War contained a number of provisions of this kind. The basis for their inclusion was explicitly stated by M. Clemenceau in a letter of June 24, 1919, to M. Paderewski, transmitting the treaty for the protection of minorities which Poland was required to sign simultaneously with the Treaty of Peace with Germany on June 28, 1919. Said M. Clemenceau to M. Paderewski:

This treaty does not constitute any fresh departure. It has for long been the established procedure of the public law of Europe that when a state is created, or even when large accessions of territory are made to an established state, the joint and formal recognition by the great Powers should be accompanied by the requirement that such state should, in the form of a binding international convention, undertake to comply with certain principles of government. This principle, for which there are numerous other precedents, received the most explicit sanction when, at the last great assembly of European Powers—the Congress of Berlin—the sovereignty and independence of Serbia, Montenegro, and Roumania were recognized.

The following passages from the protocol signed at Berlin on June 28, 1878, recalling the words then used by the British, French, Italian and German plenipotentiaries, to which M. Clemenceau called the attention of M. Paderewski, make interesting history in the light of more recent happenings:

Lord Salisbury recognizes the independence of Serbia, but is of opinion that it would be desirable to stipulate in the Principality the great principle of religious liberty.

Mr. Waddington believes that it is important to take advantage of this solemn opportunity

⁷J. B. Moore, *International Law and Some Current Illusions* (New York, 1924), p. 36.