
Tucholsky
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Zola
Scott
Sydow
Schlegel
Turgenev
Wallace
Fonatne
Freud
Twain
Walther von der Vogelweide
Fouqué
Friedrich II. von Preußen
Weber
Freiligrath
Frey
Fechner
Fichte
Weiße Rose
von Fallersleben
Kant
Ernst
Frommel
Richthofen
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Fielding
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Ebner Eschenbach
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Karrillon
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Darwin
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Luther
Heym
Hofmannsthal
Morgenstern
Klee
Hölty
Goedicke
Roth
Heyse
Klopstock
Kleist
Luxemburg
Puschkin
Homer
Mörike
La Roche
Horaz
Musil
Machiavelli
Kierkegaard
Kraft
Kraus
Navarra
Aurel
Musset
Lamprecht
Kind
Kirchhoff
Hugo
Moltke
Nestroy
Marie de France
Laotse
Ipsen
Liebknecht
Nietzsche
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Leibniz
von Ossietzky
May
vom Stein
Lawrence
Irving
Petalozzi
Knigge
Platon
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The Laws Of War, Affecting Commerce And Shipping

H. Byerley Thomson

Imprint

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PREFACE TO THE SECOND EDITION.

The success which attended the publication of the First Edition of this Treatise, on "The Laws of War, affecting Commerce and Shipping," has confirmed the author's opinion of the utility of such a work; and its hearty acceptance by the mercantile world has induced him to add largely and materially to this edition. The general plan of the former work has not been departed from in the first portion of the present; and although a great number of fresh and popular topics have been here touched upon, the author has endeavoured to preserve (as far as was consistent with accuracy), that concise and popular character which he believes in no small degree contributed to the favourable reception of the first edition.

An Introduction has also been added, discussing the origin of the Laws of War generally, and the utility of the work has been enhanced by an Index for facilitating reference.

In a Second Part, which will shortly appear, the Author proposes to treat of the Laws of War relating to the Army, Navy, and the Militia, as well as the administration of the bodies governing those various sections of the war force of the country.

H.B.T.

8, SERJEANT'S INN, TEMPLE,

APRIL 15, 1854.

CONTENTS.

INTRODUCTION TO PART I.

It would be superfluous to trouble my readers, in a concise practical treatise, with any theoretical discussion on the origin of the Law of Nations, had not questions of late been often asked, respecting the means of accommodating rules decided nearly half-a-century ago, to those larger views of international duty and universal humanity, that have been the natural result of a long Peace, and general progress.

To commence with the question, Who is the international legislator? it must be observed, that there is no general body that can legislate on this subject; no parliament of nations that can discuss and alter the law already defined. The Maritime Tribunals of maritime states always have been, and still are, almost the sole interpreters and mouthpieces of the International Law. Attempts that have been made by our own parliaments, by individual sovereigns, and even by congressional assemblies of the ministers of European powers, to create new universal laws, have been declared by these courts to be invalid, and of no authority. And though it is distinctly laid down, that the Law of Nations forms a part of the Common Law of England, yet it is not subject to change by Act of Parliament, as other portions of the Common Law are; except so far as Parliament can change the form, constitution, and persons of the courts that declare the law.

Lord Stowell says

> "No British Act of Parliament, nor any commission founded upon it, can affect the rights or interests of foreigners, unless they are founded upon principles, and impose regulations, that are consistent with the Law of Nations."

And in another place—

> "Much stress has been laid upon the solemn declaration of the eminent persons (the ministers of the European powers), assembled in Congress (at Vienna). Great as the reverence due to such authorities may be, they cannot, I think, be admitted to have the force of over-ruling the established course of the general Law of Nations."

It is to the Maritime Courts, then, of this and other countries, that the hopes of civilization must look for improvement and advance in the canons of international intercourse during the unhappy time of war. The manner, and the feeling in which they are to pronounce those canons cannot be more finely enunciated than in the words of Lord Stowell himself.

> "I consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the *Law of Nations* holds out, without distinction, to independent states, some happening to be neutral, and some belligerent.
>
> "The seat of judicial authority is indeed locally *here* in the belligerent country, according to the known law and practice of nations; *but the law itself has no locality*. It is the duty of the person who sits here to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to *Great Britain*, in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as UNIVERSAL LAW upon the question."

When an Admiralty Judge investigates the law in this impartial spirit, he occupies the grand position of being in some respects the

director of the deeds of nations; but with equal certainty does the taint of an unjust bias poison all his authority; his judgments are powerful then only for evil; they bind no one beyond the country in which he sits, and may become the motive and origin of reprisal and attack upon his native land.

As the authority of the international judge depends on his integrity, so also does the universal law arise from, and remain supported by, the true principles of right and justice; in other words, by the fundamental distinction between right and wrong. A statute, a despotic prerogative, and an established principle of common law, rest upon different sanctions. They may be the causes of the greatest injustice, may sow the seeds of national ruin, and yet may even require revolutions for their reformation; but any one of the laws of nations preserves its vitality, only with the essential truth of its principles; a change in the feeling of mankind on the great question of real justice, destroys it, and it simply remains an historical record of departed opinion, or a point from which to date an advance or retreat in the career of the human mind.

It is for this reason that International Law has been so differently defined by writers at various periods.

The Law of Nations is *founded*, I have said, on the general principles of right and justice, on the broad fundamental distinctions between right and wrong, or as Montesquieu defines it, "on the principle that nations ought in time of peace to do each as much good, and in time of war as little harm as possible." These are the principles from which any rule must be shown to spring, before it can be said to be a rule for international guidance. But what are the principles of right and wrong? These are not left to the individual reason of the interpreter of the law for the time being, but are to be decided by the *public opinion of the civilized world*, as it stands at the time when the case arises.

It may immediately be asked—How is that public opinion to be ascertained? The answer is—By ascertaining the *differences* in opinion between the present and the past. For this purpose it must be observed, that the views of a past age are easily ascertainable, in matters of law, from theoretical writings, history, and judicial decisions; and these views may be reduced to definition. Modern uni-

versal intelligence will either agree or disagree in these views. In the mass of instances it will agree, as progress on such points is at all times slow; and not only will the points of *disagreement* be few, but they will be salient, striking, and generally of popular notoriety. Present, universal, or international opinion, has therefore two portions. 1. That in which it accords with the views of a past generation, that has become historical. 2. That in which it differs from, or contradicts those views.

In the first instance, then, we are to ascertain what *were* the principles of right and justice, from any materials handed down to us; and if those principles agree with, or support the practical rules recorded by the same, or similar sources of information, such are to be accepted as belonging to the code of the Laws of Nations, as far as those principles are uncontradicted by modern opinion.

In the second instance, those differences which may either overrule, add to, or complete the public opinion of a past age, are to be ascertained, (by those in whose hands such decisions rest,) by looking to the *wish* of nations on these points; and this wish may be exhibited in various ways; either by a universal abandonment of a given law, in its non-execution by any nation whatever, for a length of time; by numerous treaties, to obtain by convention an improvement not yet declared by international tribunals; or by extending to the relations and duties of nations, the improvements in the general principles of right and justice, that are at the time being applied to the concerns of private individuals.

The judges of such matters are not to ignore what is going on around them; all necessary knowledge is to be brought into court to discover what is the universal feeling of nations in respect of right and wrong, at the time they decide, and if they see a departure from the past sense of right and wrong, to make the modern, and not the ancient, the fountain of modern law; thence deducing the modern rules.

Because a precept cannot be found to be settled by the consent or practice of nations at one time, it is not to be concluded that it cannot be incorporated into the public code of nations, at some subsequent period. Nor is it to be admitted, that no precept belongs to the law of nations which is not *universally* recognised as such, by all

civilized communities, or even by those constituting what may be called the Christian states of Europe. Some doctrines, which we, as well as the United States, admit to belong to the Law of Nations, are comparatively of recent origin and application, and even at this period have received no public or general sanction in other nations; and yet, inasmuch as they are founded on a just view of the duties and rights of nations, according to a modern universal sense of what is just, they are enforced here as ascertained laws.[1]

By a similar train of reasoning, not only may the international tribunals of England enunciate new rules of law, as universal law, if founded and fairly deduced from ascertained modern, public, and international opinion; but they may refuse to alter settled rules, however much opposed by other nations, provided those rules are still deducible from that origin.

Generally, every doctrine fairly deduced, by correct reasoning, from the rights and duties of nations, and the nature of moral obligation, may be said to exist in the Law of Nations. Those rights, duties, and that moral obligation, are to be ascertained from the enunciation of them in past times, unless they have been relaxed, waived, or altered by universal modern opinion.

We may regard, then, the Law of Nations to be a system of political ethics; not reduced to a written code, but to be sought for, (not founded,) in the elementary writings of publicists, judicial precedents, and general usage and practice; but *continually* open to change and improvement; as the views of men in general, change or improve, with regard to the questions—What is right? What is just?

Now to apply the above to one example.

Undoubtedly up to the present time the system of granting Letters of Marque to the adventurers of a power friendly to the enemy, has received the sanction of the world. These buccaneering adventurers have, under the laws of war, when taken, claimed and been allowed the rights of prisoners of war; have exercised all the privileges of regular privateers, and cast little or no responsibility on the countries they issued from, who still claimed to be entitled to the full position of neutral powers. Yet these unprincipled men differed from pirates in one respect only—that their infamous warfare was waged on one unhappy nation alone, instead of against the power

of mankind. Uninfluenced by national feelings, their sole object was the plunder of the honest trader, and the means to that end—murder. Are there any modern principles of right and justice by which such persons are still to claim consideration? That there were such principles formerly, when the whole system of war was barbaric and unmerciful, cannot be doubted, unless such enemies were to be condemned when others equally bad were to be excused; but those reasons have now disappeared. Universal opinion is against these principles; numerous treaties have condemned the practice; the municipal laws of several states have made it punishable in their own subjects; America has even attempted, in two cases, to bring it in as piracy; and the highest authorities have pronounced it a crime.

Are not then the foundations of the laws that governed this case changed? It may be going too far to declare it piracy by the Law of Nations, but is it asking too much, in calling upon our maritime tribunals to proclaim the practice contrary to the Law of Nations; to deprive these privateers of the protection of neutrality, when in their native waters, and to subject the nation that permits them to fit out in, or issue from their ports, to the danger of reprisals, from the offended belligerents.

This I suggest as an example of the application of the principles of right and wrong, as at present understood, to the investigation of the continued soundness of an accepted precept of law. In the judgments of Lord Stowell there are many such examples; and *guided* as he was by precedent and authority, he could not be said to have been *led* by anything but the principles of universal justice. At no time does he appear for a moment to have hesitated in putting aside precedent, when the true doctrine was unsatisfied. Mr. Justice Story acted on the same plan. The granting of salvage for the recapture of neutral property—the denial of the right of the Danish Government to confiscate private debts—the declaration of Mr. Justice Story, that the slave trade was against the law of nations—are a few amongst many remarkable examples of the fundamental principle being allowed to alter and overrule the authoritative precept.

THE LAWS OF WAR.

PART I.

THE LAWS OF WAR AFFECTING COMMERCE AND SHIPPING.

CHAPTER I. COMMENCEMENT OF WAR.

SECTION I.

The Immediate Effects of War.

For some months the state of war that has been impending between Russia, and the Allied Powers,—England, France, and Turkey,—has now become actual; and though there have been many acts of preparation and precaution on the part of England and France, we have not been, up to the present crisis, engaged in what is termed by international writers, Public and Solemn War; such a position of affairs has at last arrived.

[Sidenote: Solemn War.]

The War then, that England has entered into, is of the most Public and
Solemn kind. Public War is divided into Perfect and Imperfect. The

former is more usually called Solemn. Grotius defines Public or Solemn
War to be such Public War as is declared or proclaimed.

Imperfect Wars between nations, that is such wars as nations carry on one against the other, without declaring or proclaiming them, though they are Public Wars, are seldom called wars at all; they are more usually known by the name of reprisals, or acts of hostility. It has often been important to determine, on the re-settlement of peace, what time war commenced, and when reprisals ceased.[2]

According to the Law of Nations, two things are required for a Solemn War; first, it must be a Public War; that is, the contending parties must be two nations, or two parties of allied nations, contending by force under the direction of a supreme executive; and secondly, it must be proclaimed, notified, or declared. And probably it must be general in its character, and not simply local or defensive. Presuming that the coming contest will be of the widest character, I shall proceed to examine its legal effects on Commerce, on that supposition.[3]

[Sidenote: Declaration of War]

Declarations have existed from the most ancient times, having been borrowed by modern nations from the manners and customs of the Romans. But in present times, (although they may be very properly put forward,) they are not necessary to a state of actual war, or as it is technically termed, to legalize hostilities. A Declaration of War is not a matter of international right.[4] Acts of hostilities, without such an instrument, cannot be denounced as irregular or piratical, unless committed in manifest bad faith. But though war may lawfully commence without an actual declaration, yet a declaration is of sufficient force to create a state of war, without any mutual attack. It is not a mere challenge from one country to another, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also in a state of war, though, he may, perhaps, think proper to act on the defensive only.[5]

[Sidenote: War, how commenced.]

War now generally commences by Actual Hostilities, by the Recal or Dismissal of an Ambassador or Minister, or by a Manifesto published by one belligerent power to its own subjects.

Manifestoes are issued to fix the date of the commencement of hostilities; for as a state of war has many various effects on commercial transactions, such as the confiscation of certain property, and the dissolution of certain contracts, it is very necessary that such a date should be accurately known. When a Manifesto or Declaration is issued, it is said to legalize hostilities, that is to say,—to make all acts done, and all breaches committed, under pressure of war, good and lawful acts and breaches.

I have given this explanation, because it is a popular notion that a declaration always precedes war; but in reality, in modern times, few wars are solemnly declared;—they begin most often with general hostilities; thus the first Dutch War began upon general Letters of Marque, and the War with Spain, that commenced by the attempted invasion of the Armada in 1588, was not declared or proclaimed between the two crowns.[6]

[Sidenote: Contents of Declaration.]

The Manifesto not only announces the commencement Contents of and existence of hostilities, but also states the reasons of, and attempts the justification of the war; and it is necessary for the instruction and direction of the subjects of the belligerent state, with respect to their intercourse with the foe; it also apprizes neutral nations of the fact, and enables them to conform their conduct to the rights belonging to the new state of things.[7]

Without such an official act, it might be difficult to distinguish, in a Treaty of Peace, those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.

When war is duly declared, it is not merely a war between one government and another, but between nation and nation, between every individual of the one state with each and every individual of the other. The subjects of one country are all, and every one of them,

the foes of every subject of the other, and from this principle flow many important consequences.[8]

[Sidenote: Property of Subjects of Belligerent States in the Enemy's Country.]

On the commencement of hostilities a natural expectation will arise that the Property, (if not the Persons) of the Belligerent State, found in the Enemy's Territory, will become liable to seizure and confiscation, especially as no declaration or notice of war is now necessary to legalize hostilities. According to strict authority, the Persons and Property of Subjects of the Enemy found in the belligerent state are liable to detention and confiscation; but even on this point diversity of opinion has arisen among institutional writers; and modern usage seems to exempt the Persons and Property of the Enemy found in either territory at the outbreak of the war, from its operations.

Without entering on the long arguments that have been produced on this subject, and which it is not the intention of this treatise to reproduce, the rule may be stated very nearly as follows.[9]

That though, on principle, the property of the enemy is liable to seizure and confiscation, yet it is now an established international usage that such property found within the territory of the belligerent state, or debts due to its subjects by the government or individuals, *at the commencement* of hostilities, are not liable to be seized and confiscated as prize of war.

This rule is often enforced by treaty, but unless thus enforced it cannot be considered as an inflexible, though established, rule. This rule is a guide which the Sovran of the belligerent state follows or abandons at will, and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule, but depends on considerations which continually vary.[10]

[Sidenote: Rule with respect to Immoveable Property.]

The rule is different with respect to Immoveable Things, such as Landed Estates. He who declares war does not confiscate the Immoveable
Estate possessed in his country by the enemy, but the Income may