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THE NEW LAW OF NATIONS*

EDWIN D. DICKINSON¹

1

In these disillusioned years which are the aftermath of the World War the law of nations has come to be regarded in many quarters with a kind of sophisticated skepticism. It is freely asserted that the law has proved a futile reliance, that it has broken down, and it is asked—with an air of unbelief too obvious to be misunderstood—What is there that is ever likely to be done about it?

The answers provoked have not been altogether satisfying. It has been said, truly enough, no doubt, that the skeptical observer expected too much and must now pay for his extravagance in disillusionment.² The retort may explain but it is not encouraging. It has been replied, again, that there is a great deal of the law of nations which remains untouched by war or post-war disintegration and that this is the solid foundation upon which a new and more substantial system must be built.³ This reply is more reassuring, so far as the present situation is concerned, and it may be substantiated easily by anyone who is sufficiently interested to inform himself about the subject matter. But it does not allay misgivings about the future. Men have dwelt before “under a sky of promises.”

* An address delivered before the West Virginia State Bar Association, Parkersburg, West Virginia, October 9, 1925.

Advantage has been taken of this printing to add annotations giving the sources of quotations, citations of cases mentioned in the text, and references to a limited number of articles or books which should be of interest to such readers as may wish to explore the subject further.

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² See MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS*, ESSAY I (1924).

³ See WILSON, “*The War and International Law*,” in *PROBLEMS OF READJUSTMENT AFTER THE WAR*, 129 (1915).

Another way of meeting the skeptic's challenge is to take the skeptic's viewpoint, attack the subject critically, and by understanding the deficiencies which have been chiefly responsible for the law's failures in the past to better appreciate the constructive forces which are certain to deserve more generously of our confidence in the future.⁴ There is danger in attempting such an approach but there is also the possibility of more substantial compensations. One may risk a little to glimpse the stuff of which the new law of nations will be made.

It is of course too evident that anything of the nature of a critical survey, were I presumptuous enough to undertake it, would be impossible within the compass of a brief address. Nevertheless, I believe that something may be accomplished briefly, enough, I hope, to indicate the vanity of the skeptic's challenge, by defining the attack in three rather elementary but very fundamental questions. In the first place, how have nations gained admission into and retained membership in the great international community to which the law of nations applies? In the second place, once admitted, what kind of rights have nations acquired as members in good standing in the great community and what sort of obligations have they incurred? In the third place, if rights were flouted or if a neighboring country refused to abide by its obligations, what could be done about it? Answers to these questions, even brief and superficial answers, ought to illuminate some of the more striking deficiencies in the law of nations of the past. Perhaps they will also help us to appreciate the new law of nations which even now is emerging to guide the future.

⁴ "He who would portray the future of international law must first of all be exact in his attitude towards its past and present." OPPENHEIM, *THE FUTURE OF INTERNATIONAL LAW*, 1 (1921). "Whether fairly or not, the world regards international law to-day as in need of rehabilitation; and even those who have a confident belief in its future will probably concede that the comparatively small part that it plays in the sphere of international relations as a whole is disappointing." J. L. Briery, "The Shortcomings of International Law." *British Year Book of International Law*, 1924, p. 4. "As an answer to such a challenge, why is it not sufficient to establish 'international law' as we have known it hitherto, and as the international jurists of the past and the present have developed it? Why is the feeling so widespread among the public that International Law is largely a failure, and that the war, and what has happened since the War, has established its futility? The answer to these questions is, I believe, to be found largely in the fact that we international lawyers are rather a timid folk; we have failed to comprehend what under modern conditions is the full importance and meaning of our task, and we still tend to cling to conceptions the main utility of which has passed away." Sir John Fischer Williams, "A 'New' International Law," *International Law Association, Report of Thirty-Third Conference*, 434 (1924). "The recent war, despite the strain to which it subjected the structure of international law, has in reality released and made articulate the forces upon which the law depends for its reconstruction and development." Bruce Williams, "Prospective Development of International Law," 11 *VA. L. REV.* 169, 182 (1925).

II

What is it, then, which has determined membership in the great community? How has a new nation, like Lithuania or Poland, or an old nation with a new government, like Mexico or Russia, secured its position in the international society of law? If there have been Ephraimites and Gileadites in the international community, by what shibboleth have they been distinguished? Here, upon the very threshold of international practice, we encounter what might well have been regarded as an anomalous and extraordinary principle. Everything has depended upon recognition.⁵

A new nation, recently organized, may have possessed every element essential to an independent existence. It may have had a definite territory, a numerous population, and an established government independent of external control. Nevertheless, until it was recognized by the governments of other nations it could not claim a normal status in the community to which the law of nations applied. In some respects, indeed, it was no better than an outlaw. It is conceivable, for illustration, that Czechoslovakia should have become in fact exactly what it is today, that it should have the same government, exercising authority over the same territory, and commanding the allegiance of the same people, and yet that Czechoslovakia should still be clinging unsteadily to an abnormal and precarious international position because unrecognized by other countries. There have been more or less protracted intervals in recent years when millions of civilized people in eastern Europe and Asia were living only partially within the aegis of the law of nations because the states which they had attempted to organize were denied recognition. And this anomalous situation was by no means unprecedented in the history of international relationships.

Even after a nation had gained admission to the international community of law it could be subjected to a kind of outlawry by the arbitrary refusal of other nations to recognize a change in its government. Great Britain, for example, refused to have diplomatic intercourse with Serbia for several years after the murder of King Alexander in 1903. And more recently the United States outlawed Mexico temporarily and compelled the Mexicans to change dictators by withholding recognition. In fine, a people which wished to enjoy the normal and effective exercise of international rights must have secured and retained the recognition of other countries.

⁵ See HYDE, *INTERNATIONAL LAW*, I, §§ 36-46; OPPENHEIM, *INTERNATIONAL LAW*, 3rd ed., I, §§ 71-75.

Stating the rule does not adequately describe the situation. There has been at least one aspect of the situation which seems quite as anomalous and extraordinary as the rule itself. The decision to grant or to withhold recognition, upon which so much has depended, has never been the result of an impartial administrative or judicial proceeding. It has been a political decision within the discretion of those officials who happened to be in control of foreign relations.⁶ The officials in control might be influenced by considerations of policy or they might be influenced by whim or caprice. The real decision has usually been made in secret; and the chance, or dicker, or policy which proved decisive has often remained obscure until an ex-diplomat or foreign secretary published the recollections of his official life. Such recollections, of course, have not often been published while there was still an immediate vital interest in what they had to disclose.

Even less does the mere statement of the rule reveal its important ramifications. It fails to reveal that the decision to grant or to withhold recognition of a new nation or government, once made in the office in control of foreign relations, has been conclusive for many important purposes in the same country's courts of justice. This has been highly significant, for it is in the national courts of justice that many of the most important and most valued rules affecting international intercourse have been applied. It is evident that rules affecting foreign nations or governments could be applied only where such a nation or government actually existed. If the political department, by the magic act of recognition, conceded that a certain foreign nation or government existed, the courts could take notice of the concession and apply the appropriate rule of international law. But if the political department withheld recognition, for whatever reasons, the courts in some of the most important cases could take no account of the foreign nation or government. It sometimes resulted that so far as the national courts were concerned it would have been almost as well if the unrecognized nation or government had not existed at all.

It has resulted that public and private rights of the greatest moment have depended at times upon the next move in the uncertain game of diplomacy. Thus it is a rule of the law of nations, based upon comity and convenience, that public ships entering the ports of a friendly country shall enjoy generous exemptions from the jurisdiction exercised by the local authorities. A few

⁶ HYDE, *op. cit.*, I, § 41. See the recent case of *Duff Development Company v. Government of Kelantan* [1924] A. C. 797.

years ago two Russian ships sailed into English ports, where they were arrested on behalf of former Russian owners. One of the ships had been captured from the Bolsheviki by the provisional government of Esthonia. The other had been requisitioned by the provisional government of Archangel. The English court which was called upon to decide these cases addressed two humble inquiries to the British Foreign Office, desiring to know about the Esthonian and Archangel governments respectively. In the one case the Foreign Office replied that provisional recognition had been extended to the Esthonian National Council, in the other that although British authorities were cooperating with the government at Archangel recognition had not actually been granted. The court applied the rule accordingly and released the Esthonian ship, while the ship belonging to the government at Archangel was detained.⁷

There is another rule, somewhat similar to the first, which accords immunities from jurisdiction to the visiting sovereign of a friendly country. Some years ago an English maid was wooed and won by Albert Baker, representing himself to be a loyal subject of the Queen. The successful suitor did not take his commitment seriously and the lovelorn maid brought suit for a breach of promise. No doubt the romance would have proved an expensive adventure for Albert Baker had it not transpired that the British Government had recognized him as the Sultan of Johore in the Malay Peninsula. The court dismissed the suit.⁸

The instances in which important public or private rights have hung upon the frail thread of recognition might of course be multiplied. It appears that men capable of insinuating themselves into the confidence of a new government have been able to obtain access to government funds and then live riotously upon the proceeds until recognition opened the courts to the unfortunate principal. On the other hand, confiding men have been cheated by rascals in buying foreign securities only to find the courts closed to them because recognition had been withheld. And it has been demonstrated recently in the United States that recognition withheld may not only produce a legal vacuum in space previously occupied by substance but may also reverse the process and create a legal something out of preceding nothingness. Russian funds, ships, and other public property in America have been administered recently for four years or more by a group of men,

⁷ *The Gagara* [1919] Probate 95; *The Annette and the Dora* [1919] Probate 108; 22 MICH. L. REV. 124.

⁸ *Mighell v. Sultan of Johore* [1894] 1 Q. B. 149.

recognized as representing the Russian state, whose sole authority was derived from a government long since discredited and defunct.⁹

It requires no great accumulation of such instances to convince lawyer or layman that a system of law in which the rights of governments and individuals could be subordinated to the tactics of an adventurous diplomacy was at best a very imperfect system. The law of nations has been such a system. Had some misguided individual proposed for his country a system of private law based upon this principle—a system in which influential persons could exclude other persons from the enjoyment of valued rights by simply refusing to have intercourse with them or to recognize them as persons—he would have been advised quite appropriately to consult an alienist. Yet the law of nations has been based upon just such a principle. If we look beyond the particular instance—if we view the phenomenon in its entirety—we may envisage the chaos which must always have threatened so long as an arbitrary and secret decision could deny to millions of people the normal conditions of intercourse with other peoples. Surely there was demonstration enough in the chaos which swept Mexico after the United States denied recognition to Huerta and drove him from power, and more recently in the scourge of famine, pestilence, and terror which devastated eastern Europe after the great powers determined to outlaw millions of people in order to discredit and overthrow an obnoxious government.

If the law of nations has been deficient in this respect what has been done about it? What is there in the progress of the law of nations which gives promise of a better practice? In despair of a practical solution for the riddle, some have turned to theory and have argued that in theory, at least, every state should be entitled to recognition. Others have urged that in theory recognition need not be essential to normal membership in the international society. Yet it hardly seems likely that the problem could ever have been solved by such dialectical sleight of hand. The theories suggested were significant only as they were in some measure relevant to the facts of international life. It was indispensable that there should be in fact a right to recognition, that it should be possible to establish the right in some kind of impartial proceeding, and that the right once established should be effective in all international relationships.

⁹ For further discussion of the problem and a review of cases, see Dickinson, "The Unrecognized Government or State in English and American Law," 22 MICH. L. REV. 29, 118; "Recent Recognition Cases," 19 AMERICAN JOURNAL OF INTERNATIONAL LAW 263; "The Russian Reinsurance Company Case," 19 *ibid.* 753.

The solution of the problem awaited, not a new theory, but a change in practice. It required such readjustments in the constitution of international society that justice might become the dominant consideration where the methods and strategy of politics had previously prevailed. Thus the essential path of the law's progress was sufficiently indicated. Sooner or later, by some process or development, it was indispensable that international relationships or institutions should be created where claims to participate in the activities of the society of nations could have a hearing, where they could be considered with as much of impartiality as is humanly possible, and where recommendations or decisions could be made which would commend themselves to the opinion of the world. It was essential that a more closely knit or consciously organized society of nations should supplant the old anarchy. When such a new integration had been achieved, then politics could be compelled to surrender a domain which it was inherently unfitted to control, the sphere of justice through law could be extended, and the boundaries between politics and law could be more adequately defined.

It is none too widely appreciated that this indispensable integration of the international community has been going on apace. It has not been deliberately or even consciously related to the problem of recognition. But it has been developing new international relationships in which the old absurd practices in respect to recognition can hardly survive. It has been substituting organized cooperative endeavor for the old anarchy by creating multifarious international administrative conferences, unions, and bureaus. It has been establishing first arbitration under special agreements and later arbitration under a universal scheme in place of more primitive methods of settling international disputes. Throughout the nineteenth century there was extraordinary progress in the development of the international conference in lieu of distant negotiations handicapped by innumerable opportunities for misunderstanding.¹⁰ In years so recent that it is impossible to appreciate their significance the same constructive forces have achieved the systematic reorganization of multifarious international conferences, unions, and bureaus under the auspices of the League of Nations, crowned the progress of arbitration with the creation of the Permanent Court of International Justice at The Hague, and crystallized the phenomenal growth of international conferences

¹⁰ See WOOLF, *INTERNATIONAL GOVERNMENT* (1916).

during the nineteenth century in the periodic conferences of the Council and Assembly of the League of Nations in the twentieth century.

The problems of recognition have not been solved. But in a world thus becoming so rapidly integrated and efficiently organized we may feel confident that anarchic practices will eventually disappear. We may feel assured, indeed, that anarchic practices in respect to such matters as spheres of influence, self-determination, intervention, and numerous others which might be drawn upon for illustration if time permitted, where likewise the boundaries between law and politics have been too ill-defined, where the scope and action of law have been too easily obscured in the scuffle of diplomacy, will also eventually disappear. The progress made during the past century and the triumph of constructive effort in these present days give splendid assurance that the new law of nations will rise apart from and above the confusion and intrigue of diplomacy and be law worthy of the name.

III

Our second inquiry assumed a nation in good standing in the great community and asked—What manner of rights has it acquired and what sort of obligations has it incurred? Have these rights and obligations been something of real significance, something as substantial in their own sphere as the right in private law to have stolen goods restored or the obligation to refrain from defaming a neighbor's reputation? Has the law of nations been a real sword in punishment of wrongdoing and a strong shield in defense of right?

Some would prefer to have the question put in another way, emphasizing the force or lack of force behind the rule rather than the quality or substance of the rule itself. They would prefer to inquire—How have a nation's rights been secured or its obligations enforced? Everyone knows that rights in the law of nations have never been secured by means of a supernational executive giving effect to the decisions of supernational courts. The idea of a supernational executive or international police has made but little progress even in academic discussion. Unless it is to be the new Court of International Justice, we have as yet created no tribunals capable of exercising supernational authority. Fundamentally, international obligations have been respected, not because they could be announced in court decision and enforced by an executive arm, but because unreckoned millions of the more

civilized people of the earth believed that the rules were right. The law of nations has depended for its observance upon the opinion of mankind.

Now it has been argued with much acumen that law which depends upon nothing stronger than opinion is not law at all but mere positive morality. It is the vanishing point of jurisprudence. It consists, perhaps, of one-half of one percent of legal vitamine diluted with ninety-nine and one half percent of pious aspiration. The matter has been much controverted and the controversy has magnified it out of all proportion to its intrinsic importance. The really important thing has not been the abstract nature of the law of nations but rather the quality or practical utility of its rules. And so we come back to our inquiry in its original form—What kind of rights has the nation acquired and what sort of obligations has it incurred. Has the law of nations been a real sword in punishment of wrongdoing and a strong shield in defense of right?

At the outset it is necessary to take account of the extraordinary influence upon the law of nations of the great philosophical jurists. Their ideas have penetrated into every part of the system and contributed to the development of every important principle. Their influence has been two-fold. In the first place, they have searched history for evidence of important customs and have arranged and written down what they were able to discover. International customs have been recorded in widely scattered sources. Until recently there has been little that was comparable to orders, statutes, or court decisions. Usages have had to be ascertained from a great unwieldy mass of reports, treaties, awards, state papers, diplomatic correspondence, and the like. Their discovery has been peculiarly the province of the trained investigator and writer. The work has been done chiefly by the great publicists or jurists. Their writings, in consequence, have been one of the most influential sources of the law of nations. As the Supreme Court of the United States has remarked, we have resorted to the great publicists for trustworthy evidence of what the law of nations really is.¹¹

In the second place, the juristic writers have influenced profoundly the development of the law of nations through their speculations as to what that law ought to be. If the law of nations had included nothing more than so much of the opinion of mankind as had actually found expression in approved usage, it would

¹¹ *The Paquete Habana* (1899) 175 U. S. 677, 700.

have been the most practical system of law in the world. Only that would have been dignified as law which accorded with conduct already become habitual through repetition. Every rule and principle would have been justified by the accumulated experience of generations. Thus confined, however, the law of nations would not only have been less complete than any other system; it would have been needlessly less complete than it actually came to be at the close of the last century. It would have been even more remote from the vanguard of humanity's onward march. In every system of law there has been a wide, unmeasured, uncharted no-man's land between the actual law established by usage and the ideal law which might have been desirable if it could have been attained. In most systems this no-man's land has been in constant process of being redeemed and at least partially charted by means of legislation, administrative regulations, judicial decisions, and the writings of jurists. In the international system, in the absence of anything really comparable to legislative, administrative, or judicial organization, the important work of redeeming and charting has been left largely to the great publicists.¹² Their opinions have commanded almost universal respect. As much as any other single factor, down to the modern period of international co-operation, their influence has directed the course of the law's development. Both in their search for trustworthy evidence of what the law of nations really was, and in their speculations as to what it ought to have been, the juristic writers have rendered services of incalculable value. They have carried the torch of hope through many a dark night of history.

Paradoxical as it may seem, the influence of the great writers contributed also to one of the law of nations' most serious deficiencies—the impractical and unsubstantial character of many of its principles. Nor was the result surprising. Recall that international relations were chronically unsatisfactory, if not absolutely chaotic, and that every great publicist was animated by a desire to point out a better way. Reflect that in many parts of the vast field there were no settled customs or at best usages which were meager and difficult to ascertain. Finally, remember that until recent times the publicists were unrestrained by the conservative influence of anything really comparable to administration, legis-

¹² "The law of nations was, until the first of the Peace Conferences, essentially a book-law." OPPENHEIM, *THE FUTURE OF INTERNATIONAL LAW*, 56 (1921). "The system possesses hardly any of the apparatus of change that exists within a municipal system. Not only has it no legislature, and until recently no courts; but even the spontaneous growth of a new customary rule is incomparably more difficult than it is within the community of a State." J. L. Brierly, "The Shortcomings of International Law," *British Year Book of International Law*, 1924, pp. 4, 9.

lation, or the decisions of courts. Is it surprising that they formulated the law of nations in principles sometimes remote from the facts of international life? Is it remarkable that they created phantom rights and fanciful obligations? In view of all the circumstances attending its development, it was inevitable that one of the outstanding imperfections of the law of nations should have been its unreality.

The impractical and unsubstantial character of much that has passed for international law may be illustrated by reference to one or two characteristic conceptions or principles. Again and again, for illustration, it was asserted that the subjects of international law are states which may be regarded much as so many human beings would be regarded if living together in unorganized society. One of the most influential publicists of the seventeenth century declared that "states, once formed, assume the personal qualities of men."¹³ Probably the most influential publicist of the eighteenth century began his book with the assertion that "nations or sovereign states must be regarded as so many free persons living together in the state of nature."¹⁴ One of the most renowned English writers of the nineteenth century suggested that states have "a moral nature identical with that of individuals" and that "with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law."¹⁵ These quotations are fairly typical. In one form or another the analogy between states and human beings was invoked repeatedly from the time when the law of nations first became a subject of juristic speculation and practical significance.¹⁶

In reliance upon this analogy, theories which were thought applicable to human beings were taken over boldly to explain international relationships. At one time, for illustration, a great deal of importance was attached to the idea of a state of nature, a sort of golden age of innocence antedating all human sin and corruption, in which men lived in primitive simplicity subject only to natural law. Some of the most influential of the classical publicists adopted this idea, by analogy, to explain international society. They asserted that states live, with respect to one another, in a natural society. They did not suggest, however, that the international state of nature was the golden age. And it remained for some of

¹³ PUFENDORF, *DE JURE NATURÆ ET GENTIUM*, II, III, 23 (1672).

¹⁴ VATTTEL, *LE DROIT DES GENS*, *Introd.*, § 4 (1758).

¹⁵ HALL, *INTERNATIONAL LAW*, 4th ed., § 1 (1895).

¹⁶ See Dickinson, "The Analogy Between Natural Persons and International Persons," 26 *YALE L. J.* 564.

the diplomatic representatives of a later day to demonstrate that it was an age of innocence.

There was a time when almost everyone believed in the existence of an immutable law of nature, ordained by God, and capable of being ascertained by human reason. The publicists translated this idea, by analogy, into the law of nations. "Indeed," declared an influential English writer of the eighteenth century, "if one understands what the law of nature is when it is applied to individual persons in a state of equality, he will seldom be at a loss to judge what it is when he is to apply it to nations considered as collective persons in a like state of equality."¹⁷ Many writers even went so far as to assert that there was no such thing as a law of nations apart from the laws of God and nature.

A great deal was written in the seventeenth century and after about fundamental rights. Analogizing again, the publicists translated notions of fundamental rights into the law of nations. It was less than a decade ago, indeed, that the American Institute of International Law issued a Declaration of the Rights of Nations as a sort of panacea for the ills of a bleeding world. Here was the alchemist's formula. It ran as follows: private law protects certain fundamental rights in human beings—life, liberty, property, equality; these rights may be stated in terms of international law and applied to nations just as they have been applied to individuals; and so stated, they mean that nations have fundamental rights to existence, independence, territory, and equality.¹⁸

The analogy between human beings and nations was also used to justify the taking over into the law of nations of a great many rules and principles from ordinary private law. Rules of property, for example, were taken over to explain the nation's territorial rights, rules of personal status to explain the condition of certain abnormal communities, and rules of contract to explain the obligation and interpretation of treaties. Deficiencies in international usage were supplied again and again from the rich treasury of Roman private law. Indeed, a great jurist of our own time has asserted that "the Law of Nations is but private law 'writ large.' It is an application to political communities of those legal ideas which were originally applied to the relations of individuals."¹⁹

¹⁷ RUTHERFORTH, *INSTITUTES OF NATURAL LAW*, II. ix, 5 (1754-6).

¹⁸ SCOTT, *THE AMERICAN INSTITUTE OF INTERNATIONAL LAW: ITS DECLARATION OF THE RIGHTS AND DUTIES OF NATIONS* (1916). See Root, "The Declaration of the Rights and Duties of Nations," 10 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 211. For critical comment, see Dickinson, "The Equal Rights of Nations," *THE NEW REPUBLIC*, VI, 91.

¹⁹ HOLLAND, *STUDIES IN INTERNATIONAL LAW*, 152 (1898).

It was probably inevitable that this process of borrowing should introduce into the law of nations much that was unreal and impractical. Some of the notions which were taken over never had any foundation in the facts of life, as men came eventually to understand them, and were soon discredited. The system of the law of nations was long encumbered by their influence. Much of the doctrine taken over from private law proved to be unsuited to nations in their international relationships. Some of the unasimilable matter was abandoned after controversy. More of it remained to encumber thinking, although rarely significant in practice.

The truth is that the derivation of the law of nations from other systems of law by means of analogies, while useful within limits, was a device which could be easily overdone. Only in a limited sense were the analogies in harmony with the facts of international life. How small or how large, for illustration, was the smallest or the largest human being which curious folk ever paid admission to see? Including even the exhibition monstrosities, there have never existed among human beings any such extraordinary differences in size and strength as have been common among nations. The little republic of Andorra, for example, is said to have approximately 5,000 inhabitants; Panama has 400,000; the United States has over 100,000,000; the British Empire has more than 440,000,000. The little principality of Monaco has eight square miles of territory; Haiti has 10,000 square miles; Brazil includes more than 3,000,000 square miles; and the British imperial dominion extends over nearly 13,000,000 square miles. There are many other diversities which have had no parallel among human beings. Nations have differed as regards the form of their government, the system of their law, and the degree in which they were really independent from the control of other countries. Does anyone suspect, for example, that Cuba has enjoyed the same degree of independence as Chile, or Persia the same as Denmark? The physiography of nations has varied greatly, affecting such vital matters as soil, climate, natural frontiers, and access to the sea. Compare Japan and Bolivia, or Czechoslovakia and Italy. The jurist who ignored or minimized these diversities ignored realities quite as much as the blundering American diplomat who invited the government of Switzerland to participate in a naval demonstration. The more insistently men scrutinized every pos-

sible basis for analogies between the problems of private law and the problems of the law of nations, the more impressed they were certain to be with the lack of real resemblances.

If the law of nations was to have reality, if it was to become a practical system, it was necessary that its problems be attacked from an international point of view. The theories and principles of systems of private law had to be used with the most painstaking discrimination. Otherwise some perversely logical person might have reverted eventually to the anthropomorphic conceits of an earlier time and explained everything. John of Salisbury, author, diplomatist, and bishop of the twelfth century, represented the clergy as the soul of the state, the chief executive as the brain, the senate as the heart, other officials and judges as the eyes, ears, and tongue, the army as the armed hand, the treasury as the belly and intestines, and the common people as the feet, so that the state had more feet than the centipede, while the protection of the people was the shoeing of the state and their distress was the state's gout.²⁰ No doubt the learned bishop would have diagnosed the condition of the United States at the conclusion of the World War as a case of gout induced by heart failure and complicated by brain fever. By the same simple formula, Germany's recent ailment would have been gout caused by overstuffing the belly and intestines with a malnutritious currency. Such diagnoses are more amusing than helpful.

Widely approved notions in regard to the equality of nations afford another example of the unreality which was certain to be characteristic of a system of law into which exotic theories had been introduced too freely. It was asserted repeatedly that states are equal in the law of nations. The most influential publicist of the eighteenth century declared that "Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights."²¹ In the next century, in a leading English case, Lord Stowell asserted that among nations "relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor."²² In an equally well-known American case,

²⁰ Polycraticus, V, 1 *et seq.* See GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Maitland's transl.), 131, n. 76.

²¹ Vattel, *LE DROIT DES GENS*, (Fenwick's transl.), *Intro.*, § 18.

²² *Le Louis* (1817) 2 Dods. 210, 243.

decided a few years later, Chief Justice Marshall said, "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights."²³ Former President Wilson declared, in his second inaugural address, that "the essential principle of peace is the actual equality of nations in all matters of right or privilege."²⁴

Dogmatic notions of equality were not established primarily by international usage. They were creations chiefly of the juristic writers and were deduced commonly from the application to the community of nations of generally accepted theories in regard to the state of nature, natural law, and natural equality. The logic of the deduction seems hardly more convincing today than the reasoning of the sexton who was accustomed to smoke his pipe in contemplation until he thought that it must be about time for the bell, and then, having rung the bell, to come in and set his watch by it. Nevertheless, the notions were convincing in their time, and they later passed, as Thomas Hobbs would have said, "like gaping, from mouth to mouth," until they attained the dignity of fundamental principle.²⁵

If the equality of nations had been taken to mean no more than equality before the law, no more than an equal right to the protection of the law, there could have been no valid objection to it. Equality in this sense was indispensable in any legal system. But the equality of nations, as the idea was developed by the publicists, came to mean much more than equality before the law. As was said repeatedly, it meant equality of rights or of capacity for rights.

Not only was an equality of capacity for rights widely regarded as axiomatic in the law of nations, but the principle was applied without making any distinction whatever between ordinary legal capacity on the one hand, and political capacity on the other. The right to participate in international organization was regarded in the same way as the right, for illustration, to use freely the common highways of the sea. At the Second Hague Conference of 1907, the delegates representing the great powers were able to agree upon a plan for a permanent international court of justice. It was proposed that the court should be constituted for a period of twelve years and that each nation should appoint one judge.

²³ *The Antelope* (1825) 10 Wh. 66, 122.

²⁴ Congressional Record, 65th Cong., spec. sess. (1917), LV, Pt. I, 3.

²⁵ For further discussion, see DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920). Cf. GOEBEL, *THE EQUALITY OF STATES* (1923). And see Bakér, "The Doctrine of Legal Equality of States," *British Year Book of International Law*, 1923-24, p. 1.

In order to ensure a small tribunal capable of functioning effectively, it was proposed that the working membership should never exceed seventeen judges. Those appointed by the eight most powerful countries were to serve for the full twelve year period, while those appointed by the smaller countries were to serve in rotation for shorter periods ranging from one to ten years, the length of the period in each case depending upon the population, territory, resources, commerce, and influence of the country represented. This plan was denounced vehemently by the smaller nations as an encroachment upon their inalienable equality of rights. The Mexican delegate declared that all countries, great or small, strong or weak, must be represented upon the proposed court "on the basis of the most absolute, the most perfect, equality."²⁶ The Dominion delegate modestly insisted upon the same representation as the British Empire. China, Chile, Denmark, Greece, Haiti, Uruguay, and others joined the chorus. The plan for a permanent court was defeated.

The jealousy with which small or weak nations regard any threatened impairment of their rights has never been a thing to be dismissed lightly. There has been too much in history which justifies it. It calls for sympathetic understanding, not ridicule. Sympathetic understanding, however, does not obscure the fact that insistence upon the asserted right to equality in such a matter as the creation of a permanent court simply helped to perpetuate the old anarchy in which the small or weak nations themselves were usually the first to perish. The organization of the League of Nations was criticized in some quarters because of its failure to assure small countries an equality of participation in all League institutions. For this, however, it should have been commended. It simply accommodated itself, in an imperfect way, no doubt, to the realities of international life. Every one knows that in international life nations never have enjoyed and probably never can enjoy a perfect equality of rights. The differences between them in population, in territory, in productive capacity, in wealth, in armed strength, in conceptions of law and right, in habits of thought, in brief, the differences in almost everything which has contributed to make up civilization, have always made an actual equality impossible. Insistence upon an unreal principle, there-

²⁶ LA DEUXIEME CONFERENCE INTERNATIONALE DE LA PAIX, 1907, II, 650.

fore, has only served to project the law of nations into a world of fictions wherein the necessities of international life were unnecessarily beclouded.²⁷

If the unreal and impractical character of many of its principles has been an outstanding characteristic of the law of nations in the past, what has been done about it? What progress has been made in shifting emphasis from unreal analogies and illusive doctrines to the progressive amplification and improvement of those common rules which really help nations to settle their differences decently and live in peace? What is the prospect for a more realistic and a more useful system?

There has been encouragement for at least a century past in the growing disposition of jurists to take a more realistic attitude toward international problems. The modern tendency, if I may so describe it, has been to seek the ideal from the world of realities as a starting point instead of constructing aircastles first and trying to persuade the world to move in afterwards. This has contributed much of value to the progress of the law of nations. But it has not been capable alone of satisfying the need for a more substantial and comprehensive system. Notwithstanding its valuable contribution, the law of nations has remained a system made up of a modicum of settled usage rather thinly diluted by divergent juristic opinions as to what the law ought to be.

Here, again, the achievements of the more recent past which have justified the highest hopes for the future have been the progressive integration and the more effective organization of the international community. And here, again, the true significance of these achievements has been too little appreciated.

Reference has already been made to the growth of international administration. Important practices in respect to monetary administration, river, railway, and motor transport, suppression of the white slave traffic, regulation of cables, and other matters of international concern have been brought into harmony and uniformity by means of international conferences and conventions. Periodic congresses and permanent international commissions and bureaus have been created to administer agreements with respect to postal communication, telegraphic and radio-telegraphic communication, health and sanitation, patents, trademarks, and copyrights, publication of customs tariffs, suppression

²⁷ "It is also indispensable that the science should free itself from the tyranny of phrases. As things are, there is scarcely a doctrine of the law of nations which is wholly free from the tyranny of phrases." OPPENHEIM, *THE FUTURE OF INTERNATIONAL LAW*, 58 (1921).

of the opium traffic, suppression of the slave trade and liquor traffic in Africa, and other subjects of international interest. In short, in matters of communication, sanitation and health, industry and commerce, and morals and crime, national administrations have been more or less elaborately supplemented by international administration;²⁸ and, as you are aware, this vast network of administrative agreements and machinery has recently been unified, elaborated and strengthened under the supervision of the League of Nations.

Somewhat less striking, although if anything more significant, has been the progressive development of the law of nations through arbitration and judicial decision. The growth of international arbitration as a means of settling international disputes has been quite remarkable. Beginning in comparatively recent years, it progressed rapidly as the nineteenth century advanced and culminated early in the twentieth century in an important series of arbitrations before the so-called Permanent Court of Arbitration at The Hague. It will be enough to refer to the Geneva Arbitration between the United States and Great Britain in 1872, to the Behring Sea Arbitration of 1893, and to the North Atlantic Coast Fisheries Arbitration of 1909 to remind you of the tremendous importance of this development.²⁹ And now, in the twentieth century, in addition to arbitration, we have the Permanent Court of International Justice at The Hague with a gratifying record already achieved in the settlement of international controversies according to law.³⁰ Through the further development of arbitration and judicial decision, we are assured an adequate means of amplifying and adapting a rather meager body of law to meet the needs of a swiftly changing world.

The progressive development of the law of nations through conference and treaty has been rather less noted but is equally significant. In some fields of activity, such as navigation and shipping, the adoption of identic regulations and uniform acts has accomplished much. In other fields of activity, such as travel and commerce or the extradition of fugitives from justice, progress has been made through the multiplication of bilateral treaties. In

²⁸ See REINSCH, PUBLIC INTERNATIONAL UNIONS (1911); SAYRE, EXPERIMENTS IN INTERNATIONAL ADMINISTRATION (1919).

²⁹ Consult MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (1898); SCOTT, THE HAGUE COURT REPORTS (1916); WILSON, THE HAGUE ARBITRATION CASES (1915). Judge Moore is more pessimistic about the progress of arbitration. INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS, xii, 81 (1924).

³⁰ Consult the ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (Jan. 1, 1922—June 15, 1925); HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1925); Mc-RE, "The Permanent Court of International Justice," in INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS, 96.

still other fields, such as the suppression of the slave trade or the regulation of the navigation of international rivers, resort has been had to multi-party or general law-making conventions. Since the establishment of the League of Nations the growth of the law through general treaties or conventions has been undoubtedly one of the most significant phenomena of the time.³¹ The labor treaties, the treaties for the protection of minorities, the treaties with respect to transit and communication, and many others have made an invaluable contribution to the method no less than to the content of the law of nations. In the rapidly accumulating volumes of the Treaty Series, published by the League, there is already recorded a body of new law which is worth many ponderous tomes of the sort of speculative writing which often passed for international law in an earlier period.³²

In the developments and institutions thus briefly indicated there are at work constructive forces which may be expected to influence the growth of the law of nations much as administration, judicial decision, and legislation have affected the growth of private law. The vitality of these forces gives assurance that increasingly in the future as in the more recent past the law of nations will grow most rapidly in the body of those useful principles which are so indispensable in mitigating and adjusting the innumerable frictions of international life. It gives assurance of a new law of quite as much concern to the practical statesman as to the speculative writer. It inspires confidence that the new law of nations will emerge, indeed that it is even now emerging, from the phantasmagoria of its unreality.

IV

Reflecting upon the answer to our first inquiry, we were reminded that an important explanation for the failure of the law of nations to function satisfactorily in the past has been the lack of readily discernible boundaries between the domain of law and the domain of politics. In a community without organization, the ordering of relationships has been almost entirely within the con-

³¹ "In short, the first five years of the League of Nations were years of constant legislative activity, the fruits of which far surpass those of any previous period of the same length in the world's history." Hudson, "The Prospect for International Law in the Twentieth Century," 10 CORNELL L. QUAR. 419, 450 (1925).

³² See Hudson, "The Codification of International Law Through the League of Nations," an address before the American Branch of the International Law Association, New York City, Jan. 27, 1923; "The Outlook for the Development of International Law," an address before the same organization, New York City, Jan. 9, 1925, printed in American Bar Asso. J., Feb., 1925; "The Prospect for International Law in the Twentieth Century," 10 CORNELL L. QUAR. 419 (1925).

trol of political authorities within each individual member of the community. Inevitably the scope and action of law have been too easily obscured in the intrigue and confusion of diplomacy. Pondering an answer to our second inquiry, we were reminded that another important explanation for past failures has been the lack of substance, the unreality, of much that has been relied upon as law. In a community without organization it has been much easier to exploit conceptions than to keep the multifarious rules of everyday conduct abreast of an ever changing need. The scope and action of law have been too often beclouded in an interminable discussion of theories which, whatever their merit as theories, could not possibly supply the need for an indispensable system of rules. Our third inquiry—If rights were flouted, or if a neighboring nation refused to abide by its obligations, what could be done about it?—challenges attention to the most significant explanation of all. Law in a substantial sense has been denied the opportunity to function efficiently because of the appalling want of adequate remedial rules and institutions.

When rights have been disputed between nations, the one aggrieved could negotiate for a settlement. If a settlement was not obtained by negotiation, there was a possibility that the offending nation might be persuaded to submit the dispute to arbitration. To this extent our international institutions for settling controversies have been superior to those of the primitive ape-men. It is unlikely that ape-men either negotiated or arbitrated. If negotiation failed and arbitration was rejected the aggrieved nation might try coercion in the form of threats, display of force, the so-called pacific blockade, reprisals, or other measures of forcible self-help without a declaration of war. Such measures gave no assurance of a just settlement, but they sometimes produced a kind of settlement, especially when the aggrieved nation was much more powerful than its offending neighbor. On the other hand, if power was more or less evenly balanced, measures of self-help were usually the preliminaries of war. If no settlement was produced by negotiation, arbitration, or the milder forms of self-help, there remained nothing which the aggrieved nation could do but abandon its contention or declare war.

Until comparatively recent times the law of nations recognized only one remedial proceeding in which an independent nation could be compelled to participate against its will. A nation could not be compelled to negotiate. It could not be compelled to arbitrate. It could not even be compelled, against its wish and free decision,

to meet reprisal with reprisal. It could be compelled to go to war. This did not mean that it could be made to fight. It might choose non-resistance if it pleased. But it did mean that war was war for both sides, with all its legal incidents and its legal consequences, and that one nation could start it. At the Second Hague Peace Conference of 1907, the Chinese delegate desired to know what would happen if one nation declared war upon another and the other did not wish to fight.³³ No reply appears to have been vouchsafed, but there could be no doubt about the answer. The second nation would have been at war with the first, whether it wished to fight or not. The one proceeding in which a nation could legally compel another independent nation to participate against its will was war.

It may be because war was the only compulsory remedial proceeding between nations that it was dignified traditionally as their litigation. To the primitive mind it was like the judicial combat in private law. It was an appeal to the God of Battles, a proceeding in which "princes and states, that acknowledge no superior on earth, shall put themselves upon the justice of God for the deciding of their controversies by such success as it shall please Him to give to either side."³⁴ With the passing of time the God of Battles became symbolic, but the notion of war as litigation endured. "To be justifiable," said Grotius, war is "to be carried on in a no less scrupulous manner than judicial proceedings."³⁵ "War," remarked the Supreme Court of the United States, "is a suit prosecuted by the sword."³⁶

The law of nations did not create war, for war was one of the most obvious facts of international relationships long before ever the law had been conceived. The law of nations found war. Being impotent to abolish it, and feeling too weak to outlaw it, the law of nations accepted an unnatural alliance. It attempted to make war a little more endurable by developing a system of restrictive regulations. For those who believe that the attempt was worth while, there may be some crumbs of comfort in comparing the

³³ HIGGINS, THE HAGUE PEACE CONFERENCES, 205.

³⁴ See MAINE, INTERNATIONAL LAW, 2nd ed., 132.

³⁵ DE JURE BELLI AC PACIS, (Whewell's transl.), *prolegomena*, § 25.

³⁶ *Harcourt v. Galliard* 12 Wh. 523, 528 (1829). See *Foster v. Neilson*, 2 Pet. 253, 307 (1829); PHILLIMORE, INTERNATIONAL LAW, 3rd ed., I, 215; III, 77. "Force still remains the only ultimate remedy available for nations to obtain satisfaction for their grievances. . . . In municipal law a plaintiff can compel a defendant to appear before the courts of his country, and if he succeed in his suit the courts will enforce for him the judgment he has obtained. There is no similar procedure available as between nations. This has always been recognized by international law, and nations who resort to force may acquire special privileges and special rights." *Counter Case of Great Britain, in The Venezuelan Arbitration Before The Hague Tribunal*, 1903, Sen. Doc. No. 119, 53th Cong., 3rd sess., 974, 983. And see the Award, *ibid.*, 106.

conduct of wars in the middle ages with the conflicts of modern times. It may be that through law wars were made slightly more tolerable. Even so, there was a death's-head on the other side of the medal. The immeasurable calamity was that war made the law imbecile.

The attempt to regulate war by law, as much as any other single factor, was responsible for the insufficiency of the law of nations. It absorbed thought and toil which otherwise might have been spent constructively. It emphasized rules which broke down repeatedly at the moment when they ought to have been efficacious. For the lay mind, it identified the law of nations and the law of war, and so, periodically, when war came and the rules of war were disregarded, it brought the whole conception and system of the law of nations into disrepute.³⁷

It can never be estimated how much thought and toil have been lavished in the attempt to make war decent by regulation. The earlier treaties were usually entitled concerning the rights of war. The classical treaties of all periods gave more attention to war and its incidents than to peace. Until comparatively recent times nations rarely assembled in international conference except to end a particular war; and when they finally met in conferences called to promote peace their most labored accomplishment was a new statement of rules to regulate war. Of three declarations and thirteen conventions submitted by the Second Peace Conference at The Hague, two only of the conventions were devoted primarily to questions of peace.³⁸ The recent conference at Washington, called chiefly to check competition in armament and adjust rivalries in the Pacific and the Far East, prepared a treaty which purported to taboo the use of noxious gases in warfare and the use of submarines as commerce destroyers and also a resolution calling for a commission of jurists to consider the amendment of other rules of war.³⁹

³⁷ See "The League of Nations and the Laws of War," *British Year Book of International Law*, 1920-21, p. 109, reprinted in 19 *MICH. L. REV.* 833; Sir John Fischer Williams, "A 'New' International Law," *International Law Association, Report of Thirty-Third Conference*, 434 (1924).

³⁸ Mr. Joseph H. Choate, first delegate to the Second Hague Peace Conference from the United States, remarked: "We have done much to regulate war, but very little to prevent it." *LA DEUXIEME CONFERENCE INTERNATIONALE DE LA PAIX*, 1907, II, 330. Sir John Fischer Williams says: "The spectacle of two successive international world 'Peace' Conferences at The Hague engaged in the production of two Conventions for diminishing, and eleven Conventions for regulating, war, if it arouses the impatience of pacifists, provokes, what is perhaps more serious, the amused contempt of the ordinary man." *International Law Association, Report of Thirty-Third Conference*, 434, 443.

³⁹ *Treaties, Conventions, etc., Between the United States and Other Powers*, III, 3116. See also MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS*, 182-238. Cf. Dickinson, "The Rules of Warfare," *THE NEW REPUBLIC*, XXVIII, Supplement, 30; Haldane, "Chemistry and Peace," *THE ATLANTIC MONTHLY*, Jan. 1925.

No more can it be estimated how much the flouting of war has cost the law of nations in diminished prestige. Consider, for illustration, the regulations which established a distinction between combatants and noncombatants, saving for the latter as much immunity as possible from the effects of belligerent activity. Here, as elsewhere, the evidences of usage were searched out and systematized. Usages were tempered by treatise-writers' opinions. Conventions prepared in international conferences were widely adopted. Thus, by persistent effort, the stigma of illegality was attached to devastation, deportations, executions, and the like.

I would not contend that the stigma was entirely vain, but I do wish to insist that the medal has had another side. The Palatinate was ravaged; Georgia and the Shenandoah Valley were branded by the flaming sword; South Africa was terrorized by burning farms and fetid concentration camps; and Belgium was devastated and depopulated by an invading host. And after each event there came disillusionment. For its meager achievement in mitigating hardships for noncombatants, the law of nations paid many times over in confidence impaired and prestige destroyed.

Consider another type of restrictive regulation, inspired by the detestation which new and unusual implements of warfare have usually provoked. It is well known that the use of new weapons often encountered the most embittered opposition. Prohibitory regulations were decreed and even enforced by refusing quarter to those who failed to observe them. Nevertheless the invention and use of new weapons moved on apace. There is the famous instance, often cited, of the mediaeval anathema against the use of the crossbow pronounced by a Catholic Council of the twelfth century. This implement's use was stigmatized as an art "death-dealing and hateful to God" and its employment against Christians was forbidden. It is probably significant of the futility of such inhibitions that little more than a century passed before the rule was construed to mean that the crossbow must not be used unless the cause were just.⁴⁰

The crossbow was soon rendered obsolete by the discovery of gunpowder. Again new contrivances were denounced as unfair and illegal innovations forbidden by the rules of war. For a long period it was no uncommon thing for troops to be slain without mercy as a penalty for using the prohibited weapons. There is a tradition that the good knight Bayard received his death-wound

⁴⁰ See NYS, *LES ORIGINS DU DROIT INTERNATIONAL*, 192; STOWELL AND MUNRO, *INTERNATIONAL CASES*, II, 115 n.; WALKER, *HISTORY OF THE LAW OF NATIONS*, 125 n.

from an arquebus ball and died thanking God that he had never given quarter to an arquebusier.⁴¹ Whether founded in fact or in fiction, the tradition symbolizes neatly the contest waged between the ostentatious chivalry of knightly combat and the newer methods and machinery. The contest was a picturesque one, but its only achievement was to delay a little the impending revolution.

The contrivance of new weapons, the invention of new projectiles, and the use of new methods followed in swift succession. We are told that there has been hardly a new device known to military science which has not at one time or another had an inhibition pronounced against it. Chivalric commanders of the eighteenth century forbade the use of hot shot, hollow shot, and other tabooed projectiles.⁴² In the twentieth century commanders charged the enemy with the use of dum dum bullets and other forbidden contrivances, thus providing the raw materials for propaganda. Viewed as an essay in legal regulation, each successive attempt seems if anything to have been more futile than the last.⁴³

And history, as is its wont, has repeated itself. At the outbreak of the World War, poison gas was denounced as "a barbaric means of warfare prohibited by the laws of war."⁴⁴ Imperial Germany used it, other belligerents retaliated, and since the war we have been busily exploring its possibilities as a superhorror in another great contest. It is probably as certain as any so-called law in reference to the instrumentalities of warfare could be that the use of submarines against merchant shipping was illegal in 1915 according to the old traditional code. If there were truly legal limitations upon the weapons of warfare, the British Attorney-General was probably right when he declared: "The use of submarines against commerce must necessarily remain illegal until international law has made express provision for their employment. The introduction of new engines of destruction must conform to the law as it is; it is contrary to all reason and all conceptions of jurisprudence for any nation to claim that the existing law becomes obsolete on the invention of new appliances of warfare."⁴⁵ Nevertheless the submarine made its own atrocious code. And who can doubt that it will be employed even more effectively if another great maritime war ever comes?

⁴¹ See WALKER, HISTORY OF THE LAW OF NATIONS, 190.

⁴² See HALLECK, INTERNATIONAL LAW, 398.

⁴³ See MAINE, INTERNATIONAL LAW, 2nd ed., 123, 138.

⁴⁴ Report of the Belgian Commission of Inquiry, April 24, 1915, in STOWELL AND MUNRO, INTERNATIONAL CASES, II, 117

⁴⁵ SIR FREDERICK SLIETH, THE DESTRUCTION OF MERCHANT SHIPS UNDER INTERNATIONAL LAW, 53 (1917).

The second treaty of Washington, recently drafted by representatives of the United States, Great Britain, France, Italy, and Japan, expressly prohibited the use in war of asphyxiating, poisonous, or other gases. It also purported to outlaw the submarine by restating the old code of the sea, making any infraction thereof piracy, and prohibiting the use of under-surface craft as commerce destroyers. We are reminded again that when Treves had been well nigh destroyed by the barbarians the first petition from its few surviving nobles implored the Emperor to re-establish the circus games as a measure of relief for the ruined city.

If it should be thought that the illustrations selected have been in any respect untrue to the mass, then call the publicists themselves to testify. Richard Hooker, in his *Ecclesiastical Polity*, published in 1594, referred to the "laws of arms which yet are much better known than kept."⁴⁶ Writing a generation later, Hugo Grotius saw many and grave causes why he should write a book on the rights of war and peace, for he saw "prevailing 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."⁴⁷

William Edward Hall, an eminent British publicist, writing in 1889, made the following prophetic observations:

"In times when wars have been both long and bitter, in moments of revolutionary passion, on occasions when temptation and opportunity of selfishness on the part of neutrals have been great, men have fallen back into disregard of law and even into true lawlessness. And it would be idle also to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half century and more, will all be given their answers at once. Some hates moreover will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great."⁴⁸

⁴⁶ LAWS OF ECCLESIASTICAL POLITY, I, x, § 13.

⁴⁷ DE JURE BELLI AC PACIS, (Whewell's transl.), *prolegomena*, § 28.

⁴⁸ INTERNATIONAL LAW, 3rd ed., preface.

Only a few years before the outbreak of the World War, Sir Thomas Barclay warned us that "too much confidence must not be placed in regulations concerning the conduct of war." "Military necessity," he continued, "the heat of action, the violence of the feelings which come into play will always at times defeat the most skillfully combined rules diplomacy can devise."⁴⁹

Too much confidence could not be placed in the codes of war because confidence thus placed would be requited with disillusionment. Then must we not have the courage to say that the law ought to have disowned war?⁵⁰ Must we not accept the inexorable conclusion that effective legal regulation of war was an impossibility? The reasons supporting such a conclusion seem obvious enough. For one thing, the attempt to regulate war by law was necessarily an attempt to make law *in vacuo*. The war codes were formulated in peace time in the light only of an earlier war time experience. More recently, indeed, they were not only made in peace time but in international peace conferences. Of necessity they were wholly static. And yet, while they were being formulated, while statesmen were giving lip homage and soldiers were hardly concealing their skepticism, dynamic science and the progress of discovery were transforming the conditions under which the next war would be waged. There was no adequate test of the codes until the next war came and they are almost certain to be shattered in the test.

For another reason, the inherent nature of war has precluded effective legal regulation. War was abnormous, the denial of regulation, the exaltation of force.⁵¹ As well legislate for the waves of the sea or attempt to prescribe the tempest's course. In the middle ages lawgivers attempted to define the procedure of jettison and stipulated who should be first consulted and the goods first to be thrown overboard. An old judge of Genoa is said to have observed that in more than a half century's experience he had known of only four or five instances of jettison according to the rule and these were suspected of fraud because the forms

⁴⁹ "Laws of War," ENCYCLOPEDIA BRITANNICA, XXVIII, 312, 316.

⁵⁰ "How can we defend a conception of International Law which puts rules for the conduct of a process destructive of civilization on a par with the rules for the organization of the civilized relations of States? The function of International Law is not to spend half its time as a despised and ineffective referee at a peculiarly bloody form of gladiatorial contest—a contest, indeed, in which the distinction between spectators and gladiators has worn very thin." Sir John Fischer Williams, "A New International Law," International Law Association, Report of Thirty-Third Conference, 434, 443.

⁵¹ "In treating the laws of war between belligerents as being law at all, we have little else on which to ground ourselves than that the general opinion of the international society assists in shaping the rules, and allows each party to enforce their observance towards himself if he is able to do so. But again we are met by the fact that here, of all parts of international law, the opportunities for giving a definite expression to opinion, and for a party's doing himself that right which opinion demands, are at the lowest." WESTLAKE, COLLECTED PAPERS, 238.

had been too well observed. The law's neat precepts proved futile when subjected to the stress of storm.⁵² What was war if not a seething storm?

While the law of nations must eventually disown war and all its incidents, we need not shudder at the prospect of wars waged without restraint. On the contrary, there is every reason to believe that conduct in war will conform in the future, as much as in the past, to primitive but no less indispensable regulations. These regulations are not of a legal kind. They are the expression in rules of residuary moral forces, of our more humane instincts, and even of bald expediency. No doubt they will continue to be written down in manuals for the use of armed forces in the field. Uniformity will be attained in respect to at least the more elemental principles through conventions prepared in international conferences attended by military and naval experts. Such codes will continue to be an indispensable part of the soldier's equipment. Within the armed forces they will aid, as they have in the past, in maintaining discipline, while without they will insure against the more pitiless forms of retaliation. In their improvement the best traditions of the service may be conserved and strengthened.

Useful as they may be, in their own peculiar sphere, the new law of nations will include naught of such regulations. If it is to deserve the confidence so essential to its progress, it will be divorced from all elaborately legalized methods of self-redress. It will outlaw war.⁵³ Does the suggestion, thus moderately defined, seem idealistic? It is no more idealistic than what we have attempted in the past. If wars cannot actually be abolished by being outlawed, neither can they be civilized by being subjected to regulation. To attempt the one is no more idealistic than to attempt the other; and there is this difference, that outlawing war at least makes the law respectable and opens the way to rational progress, while attempting to regulate war destroys con-

⁵² EMERIGON, *TRAITE DES ASSURANCES*, I, 591 (1827).

⁵³ To "outlaw war" in the sense in which that expression is here used is not to interdict or proscribe it. That would be absurdly futile. It does not even imply that war is to be denounced as illegal. The significance of such a denunciation would probably depend upon the efficacy of instrumentalities created to prevent war. To "outlaw war" as the expression is here used is to deny it the countenance and approval of the law, to relegate it to the class of those abnormal acts or conditions which are admittedly incapable of effective regulation by any system of positive law. The author's conception of outlawed war probably goes but little beyond the conclusion of Sir John Fischer Williams, who says: "What is the upshot? Not that we have reached a point in human development when we can do without a law of war; on that point Ayala is still in the right. As long as war remains, lawyers must make an effort to subject it to rules, but that at our present stage of development the International Law of War is far less effective and far less important than the International Law of Peace, and that the effort of the new International Law must be to develop the law of peace and no longer allow itself to be pre-occupied almost as much with war as with peace." *International Law Association, Report of Thirty-Third Conference*, 434, 446. See also BROWN, *INTERNATIONAL REALITIES*, 3, 6.

fidence and obstructs the natural avenues of growth. Wars will be no better for being outlawed; neither will they be any worse. But the law of nations may become infinitely better as the forces determining its progress are directed to the improvement of rules controlling peaceful intercourse and especially to the development of essentially lawful methods for settling international disputes.

There is much to assure us that the forces determining the progress of the law of nations will be thus directed in increasing measure as time goes on. I have already referred to the remarkable development of arbitration and of the methods and machinery of arbitration. It is evident that this development is still in an early stage and that much more may be expected from it in the future. Even more significant has been the establishment of the Permanent Court of International Justice and the organization of the processes of international judicial decision. The court has been signally successful in its beginning years, has already demonstrated its indispensable utility, and may be expected to grow in usefulness and prestige in the years to come. It is especially significant that the commission of jurists which prepared the plan for the court recommended that it have compulsory jurisdiction in certain classes of controversies in which it was thought that judicial settlement would be peculiarly appropriate and that more than a score of the less powerful nations of the world have accepted such jurisdiction in ratifying the court.⁵⁴

Reference has also been made to the extraordinary progress achieved in the nineteenth century in the use of conferences and to the natural culmination of this progress in the periodic conferences of the Council and Assembly of the League of Nations. It is noteworthy that conferences have not only contributed in innumerable ways to the progressive integration of the international society and provided an invaluable means of supplementing and improving the content of the law but that they have also become an indispensable agency for avoiding, assuaging, and settling international disputes. They have been increasingly useful in the disposition of disputes which are not well suited for arbitral or judicial settlement. Furthermore it is a striking thing that recent conferences of the League of Nations have been content to labor in the vineyards of justice and conciliation. They have so far contributed

⁵⁴ Annual Report of the Permanent Court, 137 (1925).

nothing whatever to the refinement of the so-called laws of war.⁵⁵ Better one abortive Geneva Protocol dedicated to the hope that nations in their mutual relationships may achieve justice through law⁵⁶ than a dozen conventions on war and neutrality. Better a single security compact, of the kind now under consideration in Europe,⁵⁷ than many futile attempts to prescribe in detail what shall be done when security is gone.

The new law of nations, I am convinced, will place less emphasis relatively upon the right of each separate nation to ignore its neighbor, exalt its own particular interest, or set the world aflame in seeking redress of its grievances. It will lay increasing stress as time goes on upon the social interests of the great society. The demand for a better organized community will become progressively more insistent. We shall have a vast deal of experimenting with commissions, courts, and conferences, informal unions and more formal leagues—crude, ungainly institutions in the beginning—and out of this experimenting we shall build institutions which are competent not only to delimit the domain of law more clearly in relation to politics, not only to contribute more of substance to the body of the law, not only to provide indispensable remedial methods and institutions, but above all and comprehending all to conserve and advance the common well-being of the great society in a way commensurate with its paramount importance.

⁵⁵ See "The League of Nations and the Laws of War," *British Year Book of International Law*, 1920-21, p. 109, reprinted in 19 *MICH. L. REV.* 885. See also Wickersham, "The Restatement of International Law," *AMERICAN LAW SCHOOL REV.* V, 455. It is significant that the League's Committee of Experts on Codification has thus far considered only questions of peace, postponing questions of war and neutrality to a later day.

It is significant, also, that the American Institute of International Law, in preparing draft projects of conventions for the codification of so-called American international law, has confined its efforts to the law of peace. See *Codification of American International Law*, 3, 6, 25 (pamphlet published by the Bureau of American Republics, 1925); Scott, "The Codification of International Law in America," *Proceedings American Society of International Law*, 1925, pp. 14, 17.

⁵⁶ See BAKER, *THE GENEVA PROTOCOL* (1925); MILLER, *THE GENEVA PROTOCOL* (1925); HUDSON, "The Geneva Protocol," *FOREIGN AFFAIRS*, Dec., 1924.

⁵⁷ Texts of the Locarno treaties have been printed, since this address was delivered, in the *New York Times*, October 20, 1925.