

CHANGES IN INTERNATIONAL LAW.

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Changes in international law, as they may occur from time to time, will always be of especial interest to the United States. We were the first power to recognize in the constitution of our government the existence of such a thing as international law, and the duty of enforcing it. That instrument, it will be recollected, declares that Congress shall have power to define and punish "offenses against the law of nations." Under this provision, our Supreme Court has said: "A right, secured by the law of nations to a nation or its people, is one the United States as the representatives of the nation are bound to protect." It is not necessary for Congress in passing a statute to punish an offense against that law, to declare it to be an offense against it. That it is such an offense is to be determined by reference to the law of nations itself. Congress simply gives it a further buttress.¹

Whatever international law may mean to other peoples, therefore, to us it is and always has been an acknowledged body of authoritative rules entitled to enforcement by the United States.

It is an unwritten law. Just as the unwritten common law has been made by the people who allowed themselves to be governed by it, so the unwritten international law has been made by the peoples who have allowed themselves to be governed by it. It has grown from century to century. It has spread from nation to nation, until all the civilized world treats it with respect. It has been subject to the cosmic law of evolution. Had it not been, it would not be to-day a vital force. All life is change. Law, as the Supreme Court of the United States has said, speaking by one of our former members, is "to a certain extent a progressive science." "While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation."²

¹ *United States vs. Arjona*, 120 U. S., 487, 488.

² *Holden vs. Hardy*, 169 U. S., 366.

Nor can we forget also that changes in law are not always improvements. They will reflect the existing conditions of human society, whatever these may be; and human society may have changed for the worse, or, if unchanged, men may have become satisfied that laws have been adopted which set the standard too high for practical efficiency.

The processes of physical evolution do not always result in general physical advancement. The processes of moral evolution do not always result in general moral advancement. The processes of legal evolution do not always result in better laws. All this is inevitable.

Goethe says in *Faust* that

“He only deserves liberty or life who must conquer them daily anew.”

The world only deserves a common rule of law—a law of nations and for nations—by conquering it daily anew. It does not stay conquered. It must daily express the necessities of the day. It must change as the conditions change on which it acts.

The United States, from their first foundation, have been among the leaders in promoting changes in international law.

In 1784, the Continental Congress, under the Counsels of Jefferson, gave certain instructions to our ministers abroad, to be followed in negotiating all commercial treaties. One was to propose the abolition of privateering. Another was to propose that fishermen, farmers and artisans or manufacturers “unarmed and inhabiting unfortified towns, villages or places, who labor for the common subsistence and benefit of mankind,” should not be molested in time of war. Another was that contraband goods on the vessels of either of the signatory powers should not be confiscated, but only commandeered on paying their full value.³ Most of these provisions were, the next year, incorporated in our first treaty with Prussia, part of which is still in force. It was the most advanced treaty, in the direction of human brotherhood, up to that time concluded between any powers. Similar stipulations were also embodied in a projected treaty negotiated with Portugal, but this was never ratified.

³ Secret Journals of Congress, III, 452, 456, 483, 484.

This American proposition, so far as fishermen are concerned, may certainly be deemed to have resulted in an alteration to that extent in the rules of international law, by subsequent recognition of the principle by nations generally.⁴

President Monroe in his message to Congress in 1823, containing the announcement of the "Monroe Doctrine," informed them also that he had instructed each of our ministers to France, Russia, and Great Britain, to propose to the power to which he was accredited the abolition of privateering by international agreement, and the establishment of a "permanent and invariable rule in all future maritime wars" that no ship of war would molest any merchant ship, whether owned by a belligerent or a neutral, except for "breach of a lawful blockade."

Nothing came of this at the time, but it was one of the circumstances which led, a generation later, to the declaration of Paris. By this, it will be recollected, in 1856, privateering was declared abolished. The United States, Spain, and Mexico, have not, as yet, formally accepted this declaration, but they have acted in practice, ever since that year, as if it were international law, and that it is, may, I think, now fairly be assumed.

In 1868 we engrafted on the law of nations the principle that every man has a right to change his nationality.⁵ This, while contrary to the earlier decisions of our courts and opinions of our public men, was an inevitable result of the facility of passing from one country to another, which is possible and indispensable to modern commerce, and indeed has created it.

In another direction, the achievements of modern discovery have likewise imposed new conditions of maritime warfare. They have varied the reasons which dictated one of the ancient rules of international law, and so required a variation of the rule. I refer particularly to the extent to which the law of blockade has been subjected to changes, in consequence of the invention of steamships. A single steamer may be sufficient to make the entry of a wide-mouthed harbor dangerous, when a single sailing vessel would be entirely incompetent to effect this.⁶

⁴ The Paquete Habana, 175 U. S., 677.

⁵ U. S. Revised Stat., Sec. 1999.

⁶ The Olinda Rodrigues, 174 U. S., 516.

Has, from similar causes, the territorial extent, seaward, of maritime powers been increased by improvements in modern artillery?

National sovereignty has long been deemed to extend a marine league from the shore. This limit was adopted because to that distance the cannon of a littoral power could, at that period, under ordinary circumstances, enforce its commands. For the cannon with an effective range of only a marine league we have now substituted one with an effective range of 20 miles, or more.

What is now meant by the phrase "within a cannon-shot"?

In our treaty of 1794 with Great Britain, it is stipulated (Art. XXV) that neither power "shall permit the ships or goods belonging to the subjects or citizens of the other to be taken, within a cannon shot of the coast," and if its "territorial rights shall thus have been violated," it shall use its utmost endeavors to obtain satisfaction from the government of the captor.

Provisions of this kind call for interpretation, and the argument has certainly much force that this interpretation must be determined by the reason of the thing. A littoral sovereign, with cannon that can hit a ship 20 miles away with reasonable certainty, would hardly be justified for not using them to protect the rights of friendly commerce or visitation along his coasts.

But may a belligerent power have the right, under modern conditions of maritime warfare, to mark off a portion of the high seas, outside of the range of any cannon shot discharged from the shore, and either prohibit its use for commercial navigation by the subjects of other powers during the continuance of hostilities, or limit the manner of such use?

Most of the older maritime nations have, from time to time, set up claims of sovereignty over certain littoral waters, otherwise forming part unquestionably of the high seas. The contest as to closed seas and open seas—the *mare liberum* or *mare clausum*—was a warm one, before international law really became a science. England's claim to maritime supremacy over the "Narrow Seas," that is, the waters dividing her from the continent of Europe, was harshly enforced against the Dutch until a Dutch sovereign was on the English throne. She insisted upon it, as against the United States, as late as 1803.¹ This was an incident

¹ Wharton, *Elements of International Law*, II, 2, 163.

of the long-standing dispute between the two powers as to England's claim of right to seize English sailors on foreign ships and impress them for service in the English navy. A convention had been practically arranged at London by our minister, Rufus King, in 1803, by which Great Britain was to relinquish this claim. At the last moment she insisted on excepting all rights as to American ships sailing in the Narrow Seas. This reservation our minister refused to consider, and the affair was broken off in consequence. He did not miscalculate its importance. When John Quincy Adams, then our minister to Russia, some years later, heard of our declaration of war against Great Britain, he said: "The war hangs upon a single point; and that is impressment."

The closed sea, it will be recollected, if there ever was one, was closed at all times, in peace as well as in war. It belonged mainly to the class of commercial restrictions which were imposed to support a monopoly of trade.

But while, for more than a hundred years, the old doctrine of closed seas has been universally abandoned, a new doctrine of closed areas of sea, by the act of a belligerent in time of war, has found considerable support. These have been termed "war areas," "military areas," "strategic areas," "war zones," "areas of operations" or "defence sea areas."

Some color for this practice may be claimed from the great treatise of Grotius on the law of war and peace. The empire, he says, over a part of the sea may be gained in a similar way to that on which the empire over land may depend: by having a fleet or maritime army stationed there, or if off a sea coast by its being commanded by the guns of the littoral sovereign.⁸

Vattel takes a view somewhat more favorable to the segregation and appropriation of part of the seas, but remarks that if a nation, without a title, arrogates to itself an exclusive right to the open sea and supports it by force, it does an injury to all nations whose commerce it violates.⁹

Let us look back for a century to see whether there is any ground for the position that international law has undergone a

⁸ Grotius *de Jure Belli ac Pacis*, II, 3, 13, 2.

⁹ Vattel, *Law of Nations*, I, XXIII, Secs. 283, 289.

change in this respect, and become more favorable to the creation of a temporary *mare clausum* in time of war by one or more of the belligerents.

Two of the great powers, soon after the nineteenth century came in, marked off such a closed sea, and their courts have maintained the validity of such action as against the subjects of neutral states engaged in ocean trade.

In May, 1806, a British order in council declared the European coast from the Elbe to Brest under blockade. In the following November, by the Berlin decree, Napoleon declared the British islands to be in a state of blockade.

In January and November, 1807, Great Britain promulgated further orders in council, forbidding neutral commerce with France and any of her allies; and in December of the same year the Milan decree of Napoleon reiterated his first pronunciamento from Berlin.

Each power defended its action as retaliatory, and the English prize courts supported the orders in council mainly on that ground. The ministry took the position in the House of Commons, in speaking of the whole series of them, from 1806 to that of April 26, 1809, that they were not in accord with the existing law of nations, but were defensible as a just and necessary extension of that law—necessary because France had violated it first.¹⁰

Without such a reason, during the War of 1812, Great Britain took a similar position in regard to parts of our Atlantic coast. Our Secretary of State, John Quincy Adams, alluded to this in 1817, in a dispatch to our minister to England, in these words:

So irresistible is the tendency of precedent to become principle in that part of the law of nations which has its foundation in usage, that Great Britain, in her late war with the United States, applied against neutral maritime nations almost all the most exceptionable doctrines and practices which she had introduced during her war with France. The maritime nations were then, too, so subservient to her domination that in the Kingdom of the Netherlands a clearance was actually refused to vessels from thence to a port in the United States on the avowed ground that their whole coast had been declared by Great Britain to be in a state of blockade.¹¹

¹⁰ Adams, *History of the United States*, V, 61.

¹¹ Moore, *International Law Digest*, 800.

President Madison, in a proclamation issued June 29, 1814, described this measure as "destitute of the character of a regular and legal blockade, as defined and recognized by the established law of nations, whatever other purposes it may be made to answer." The treaty of peace with Great Britain, soon afterwards negotiated, contained no provision in reference to the validity of the proceedings. Our attitude towards any such extension of the right of interfering with neutral trade continued the same, and there was soon an occasion to assert it.

In 1816, Spain declared a blockade of a part of the ocean near Carthagena, of some 3000 square miles in extent. We refused to accept it, our Secretary of State, James Monroe, saying that there can be no blockade which is not confined to particular ports.¹²

Blockades not so confined, but extending to areas of the high seas, were however declared by Great Britain in 1854 and 1897, and by France in 1870, 1893, and 1896.¹³

With these precedents before it, the Japanese government, in 1904, promulgated an ordinance giving the naval department power, in case of war, to designate a part of the seas off the coast as a "defence sea area," and close it to commerce. Twelve such areas were thereupon so created, marked off by degrees of latitude and longitude.

Her official regulations for captures at sea, of March 15, 1904, forbade, however (Art. II), captures "in neutral waters clearly placed by treaty stipulations outside the zone of hostile operations." Blockade was defined as including the right to close an enemy's coast with force, and as being effective when the force is strong enough to threaten any vessels that attempt to approach the blockaded coast.¹⁴

By these proceedings of Japan, the leading power of Asia has pronounced in favor of the validity of zones of exclusion, other than ports and harbors, created by a belligerent, in restraint of

¹² Moore, *Int. Law Digest*, 800; Atherley Jones on *Commerce in War*, 126.

¹³ Atherley Jones on *Commerce in War*, 158, 172, 181, 183.

¹⁴ See *Proceedings of U. S. War College for 1912*, 122, and Takahashi on *International Law as applied to the Russo-Japanese War*, 359, 360, 778, 781, 789.

neutral trade. She thus virtually affirmed, ten years ago, that the law of nations had been so changed as to permit what, prior to the acts of England and France in 1806, was generally considered as forbidden.

Her action and the general question involved were the special subject of discussion at our Naval War College in 1912.

Stated in form, the proposition before it was thus expressed :

A belligerent may be obliged to assume in time of war, for his own protection, a measure of control over the waters which in time of peace would be outside of his jurisdiction.

In the course of the discussion this pronouncement was formulated as in his judgment sound, by one of our most distinguished scholars in international law :¹⁵

The definition of the area of operations of a blockade, even if in such a manner as to include a large range of high seas, is regarded as a legitimate act of war, and the belligerent right is respected. The principle which is recognized is that the belligerent has the right to put pressure on his opponent, without interference by neutrals. It is undoubtedly an inconvenience and may be a loss to neutral commerce to be excluded from the blockaded area, but it is a recognized consequence of war.

The result of the conference was the adoption of the view that if such a strategic area were designated by a belligerent as for the time closed to commerce, the commander of a neutral man-of-war, if appealed to to escort one of his country's merchant ships through it, should decline, and should advise the master of the merchantman to keep out of it.¹⁶

This conclusion of the discussion has, of course, no binding force upon the United States. It is important, however, as a matter of intrinsic weight, in view of the insistence on the war zone theory, and the practice under it of Great Britain, Germany, and Italy, in the present European wars.

It will not be forgotten that a blockade of the old type is quite a different thing from a " war zone " of the new type.

Such a blockade is designed to shut up a particular port. Such a war zone is designed to exclude because it endangers entrance into a particular part of the high seas.

¹⁵ Professor George G. Wilson.

¹⁶ Proceedings of the Naval War College for 1912, 117, 128, 129.

Any neutral vessel breaking a blockade takes the risk of being captured and condemned. Any neutral vessel entering a war zone, if the doctrine be once admitted that such a military area can be effectually created, as respects neutral powers, may be in peril of being stopped and seized, if not of being sunk.

Supporters of the new doctrine, in other words, maintain that the neutral ship which enters upon what she knows to be the special military area of active operations on the sea, is in a similar position to a neutral traveller who in a country which is the actual seat of war, enters upon what he knows to be a special military area of active operations.

In October, 1914, Russia delimited a war zone on the seas off her coasts, in which she proposed to place concealed bombs and torpedoes, and in November the British Admiralty announced that the whole of the North Sea would be considered a "military area" for like purposes.

At the Hague Conference of 1907 the special committee on submarine mines reported in favor of a limit for laying them of three miles from shore, or if laid in front of military ports, ten miles, but with the exception of creating "danger zones" in waters beyond these limits, when the sphere of immediate naval activity. The conference struck out these limitations."

On February 4, 1915, the German Admiralty issued an order declaring that "the waters around Great Britain and Ireland, including the whole English Channel, are declared a war zone from and after February 18, 1915"; that every enemy merchant ship found in this war zone would be destroyed; and that neutral ships entering it would be in danger. A similar zone was likewise constituted in a strip of at least 30 miles in breadth along the Dutch coast.

Against this step the United States promptly made a protest, and Great Britain issued several retaliatory orders in council. The main one of these, published in part on March 15, 1915, prohibited all commerce with Germany after a certain date, and provided for the seizure of neutral merchantmen engaging in such trade. This was not called a blockade, and that which Germany termed a "war zone" was referred to as a "military area."

" Scott, *The Hague Peace Conferences*, I, 582, 829; II, 480.

Against these measures the United States at once protested; not failing to refer to the fact that in one sentence the order claimed a right pertaining only to a state of blockade, and in another proposed to proceed as if there were no blockade.

It should be noted that Great Britain, in taking her action, referred by way of justification to the conclusions of our Naval War College in 1912.

Italy, in June, 1915, issued a decree declaring the whole of the Adriatic Sea a war area.

All the great powers, except the United States, have thus created, from time to time, military areas of sea; but generally against the protests of neutral sovereigns, including the United States.

The American position in regard to the use of torpedoes in them, as announced in our note to Germany of July 21, 1915, is, first, that our government "is not unmindful of the extraordinary conditions created by this war, or of the radical alterations of circumstance and method of attack produced by the use of instrumentalities of naval warfare, which the nations of the world cannot have had in view when the existing rules of international law were formulated"; but, second, that submarine operations, within a "so-called war zone" on the high seas, can and should be conducted in substantial accord with the practices of regulated warfare accepted before the submarine reached its present point of development.

It is probable that some of these points will soon be brought before the Hague tribunal. Great Britain, in her note of July 31, 1915, to our ambassador, has intimated her readiness to assent to a review of that nature, of any judgment of her courts based on Orders in Council claimed by us to derogate from the principles of international law; and yesterday's newspapers show that we have virtually agreed with Germany on a similar disposition of the question whether those principles justified the sinking of the *William P. Frye* on the high seas.

This discussion would be incomplete without reference to a suggestion recently made by one of our associates that our immense coasting trade calls for a safety zone around the two Americas, extending far beyond cannon shot from the shore, into which no belligerent ship should have the right to enter on a

hostile errand without incurring the peril of internment.¹⁸ A war zone, in other words, might come to be deemed desirable by neutrals as a shield, and so created by them against the belligerents, instead of, as now, by the belligerents against them.

There is no time to speak of other changes in the law of nations which have, from time to time, been attempted, and in some cases with ultimate success, such, for instance, as giving, under our lead, within a hundred years, to the slave trade, formerly a lawful traffic, the brand of piracy.

No form of human law can endure which is not capable of amendment. To the law of nations change comes slowly, for it must be the act of many different peoples. It will change irregularly and in detachments. Macaulay has observed that there are in the administration of government two kinds of wisdom: the highest wisdom, which is conversant with great principles of political philosophy, and a lower wisdom, which meets daily exigencies by daily expedients.

In respect to the development and application of international law, these two kinds of wisdom often come in conflict, and when they do, it is seldom the higher that controls. Nations are self-centered. Each views rules of international conduct mainly as it is itself, at the time being, affected by them. And back of all, at all times, we must reckon with the impulses of self-preservation. In the eloquent words of our late associate, Frederick R. Coudert, "Self-protection and self-preservation constitute the corner stone of modern international law. This instinct is as strong in communities as in individuals, and will, when aroused by real or imaginary perils, sweep away forms and law, as worthless incumbrances, if they interfere with their first duty and most valuable right, the duty to resist aggression, and the right to live."¹⁹

¹⁸ Paul Fuller, in the *Annals of the American Academy of Political and Social Science*, LX, 157.

¹⁹ Coudert, *Addresses*, 126.