original offense. Such a course can only be regarded as another German violation of the fundamental principles of the laws of war. And it is one which will, if adopted, certainly recoil most heavily on the offenders who first break down the respect for that most ancient of all legal principals—the law of the talion.

ELLERY C. STOWELL

"ACTS OF WAR"

In the course of recent debates as to the policy to be followed by the United States in a world filled with war, the term "act of war" has often been heard in the halls of Congress, and elsewhere. Newspapers have reported that the landing of Australian troops at Singapore was regarded by Japan as an "act of war." As used, the term has apparently been intended to convey the implication that certain proposed steps, such as the "Lease-Lend" bill, being allegedly acts of war, would have the inescapable consequence, under international law, of putting the nation into war. Like other terms of international law, this one has had unwonted use and has been employed as an instrument for shaping public opinion; its use in this fashion, with the implication of legal consequences, justifies inquiry as to what an "act of war" is, and whether it has the consequences attributed to it.

A search of authorities is disappointing. The term is not to be found in the index of a dozen or more texts of international law, including Moore's *Digest;* it is not listed in Calvo's *Dictionnaire,* nor in Strupp's *Wörterbuch,* nor in the *Dictionnaire Diplomatique.* If the term is of such vast importance as has been suggested to voters, it is surprising that it is not easily to be found in the literature of international law. If there really does exist a number of known and specified acts the commission of which inevitably produces war, these acts should surely have been identified and listed by the authorities.

Closer search, involving wide reading, will discover an occasional use of the phrase, usually without explanation or attempt at definition, and from these uses it would appear that it possesses a number of meanings. It is to be found in debates in Congress, similar to those of today, with reference to the constitutional power of the President of the United States. John Bassett Moore, summarizing speeches in Congress in 1871, in which the President was defended for directing the Navy to protect Santo Domingo during negotiations for its annexation, says that "A distinction was drawn in the speeches in defense of the President between making war and merely committing acts of war in the sense of acts involving the employment of force." [1] This is clear enough; it is not so clear what was meant by Secretary of State Cass who, in reply to a request for the use of armed force to protect American interests in Nicaragua, asserted that "The employment of the national force, under such circumstances, for the invasion of Nicaragua

[1] J. B. Moore, Digest of International Law, Vol. VII, pp. 166–167.

is an act of war, and however just it may be, is a measure which Congress alone has the constitutional power to adopt"; [2] nor is it clear what was meant by Mr. Hunter, Acting Secretary of State, in 1876, when he replied to a request for naval force to recover a quantity of silver by saying that the Mexican Government would regard this as an "act of hostility," and that the President is not authorized to order "an act of war in a country with which we are at peace, except in self-defence." [3] In either of these quotations, the Secretary may have meant that the President could not order acts of war, even though they did not constitute war; or he may have meant that since acts of war do constitute war, they lie beyond the powers of the President and belong to Congress. Either interpretation collides with the facts of practice, for the President, on the one hand, has the undoubted right to order the armed forces of the United States where he wishes and to engage in acts of force there not intended as or known as war; on the other hand, it could not be maintained that such acts of force establish the status of war, for there have been many occasions in which force was so employed, yet in which it was never suggested that war existed.[4]

The average citizen, inexperienced in the mysteries of international law, may regard war simply as the use of force between states; to the international lawyer, however, it is a legal status, whether with or without force. This distinction is clearly stated by Mr. Moore:

> Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case, there may be said to be an act of war, but no state of war.[5]

Differentiations of this nature may be found in the diplomatic correspondence of states in dispute. Thus, the British Government, in a controversy with Brazil, asserted that "reprisals are a well understood and acknowledged mode among nations of obtaining justice otherwise denied, and that they do not constitute an act of war." The measures here referred to were the seizure of property by a British naval squadron, and the Brazilian Government was further told that these measures were within the bounds of peace and that "it rests with the Government of the Emperor to remain

[2] Mr. Cass to Mr. Body, March 30, 1860, *ibid.*, pp. 165–166.

[3] Mr. Hunter to Mr. Turner, Nov. 7, 1876, *ibid.*, p. 167.

[4] See Moore, *loc. cit.*, Secs. 1091–1093; J. Reuben Clark, Right to Protect Citizens in Foreign Countries by Landing Forces (Washington, 1912).

[5] Moore, *loc. cit.*, p. 153; see also J. L. Kunz, *Kriegsrecht und Neutralitätsrecht* (Wien, 1935), p. 5.

within these bounds or to transgress them." [6] Brazil, again, was informed by another nation that "reprisals are means of obtaining reparation before proceeding to war . . . everything beyond this is an act of war, and if resistance takes place, it is the beginning of war." [7] Earl Russell, in an instruction to the British representative at Vienna in 1864, asserted that the practice of taking possession of the territory of a state as a guarantee for obtaining certain demands "is destructive of peace because it is an act of war and if resistance takes place, it is the beginning of war." [8] Another British Minister denied to consuls and naval officers the right to determine "whether coercion is to be applied by blockade, by reprisals, or by acts of an even more hostile character. All such proceedings bear more or less the character of acts of war . . ." [9]

From such quotations, some elements of a definition of an act of war may possibly be gleaned. Reprisals are a part of peace; they are clearly not regarded as acts of war, though if accompanied by force they might be so interpreted. The act of war can be nothing less than an act of force—seizure of territory, blockade, landing of an armed force; but even such uses of force do not establish a state of war, nor do they lead in legal consequence to war. Other factors must be added before it can be said that war is present. Professor Quincy Wright—who says that an act of war is an invasion of territory or an attack on public forces—offers the opinion that "an act of war can always be construed by either the attacker or the attacked as initiating war, but if neither of them does so construe it, war does not exist." [10] He suggests, as do others, that a powerful state is more apt to make an issue by resisting some act of war than would be a weaker state; in other words, the issue is not one of law but of discretion. Likewise, the stronger state is usually the one which is able in the exercise of such discretion to commit an act of war.[11] There is no evidence of any legal duty to resist an act of war in any way, or of announcing a state of war in reply to it; presumably, if either wished the state of war to exist, it would declare war. In the absence

[6] *Fontes Iuris Gentium*, Series B, Sectio 1, Tomus 1, Pars 2, p. 81, No. 2398. Brazil replied that the manner in which the reprisals were carried on *i.e.*, by exercise of force within Brazilian waters, was more than reprisal, and constituted an act of war; she did not contend that this meant a state of war. *Ibid.*, p. 82, No. 2400.

[7] *Ibid.*, p. 88, No. 2413. [8] *Ibid.*, p. 98, No. 2438. [9] *Ibid.*, p. 79, No. 91.

[10] Q. Wright, "Changes in the Conception of War," this JOURNAL, Vol. 18 (1924), pp. 756, 759; and on p. 759, he says: "apparently acts of war include only attacks on the territory or public forces of a state."

"Allgemein angenommen, dass es sich um *militärische Gewaltakte*, um Akte der bewaffneten Macht handeln muss. Daran ist soviel richtig, dass nach diesem Kriterium Akte der Retorsion und der nicht-militärischen Repressalien, dass sog. 'Handels-, Währungs-, Zollkrieg' *kein* Krieg im Sinn des Völkerrechts sind." J. L. Kunz, *op. cit.*, p. 5.

[11] "As a general rule these means of putting pressure upon recalcitrant states were resorted to by stronger powers against weaker powers, the latter not being in a position to take up the challenge by a declaration of war." C. G. Fenwick, International Law (New York, 1934), p. 433.

of a declaration, the problem of undeclared war appears, which can not be discussed at this point: whether war can be judged objectively, or whether intent must be shown and how, are matters of controversy. Thus, it is possible, according to one's definition of war, to say that the status of war does not exist even when an act of war has been resisted by force, and fighting continues on both sides. President Wilson, in his address to Congress on April 20, 1914, in connection with the Tampico incident, said "This Government can, I earnestly hope, in no circumstances be forced into war with Mexico"; on the next day, in accordance with his instructions, a naval force occupied Vera Cruz.[12]

In the above discussion, the term "act of war" has been found employed with regard to acts of force short of legal war. It is, of course, often employed with regard to acts performed after the status of war has come into being. Such references are to be found in the Hague Conventions for the conduct of war, and in questions concerning the responsibility of a belligerent for illegal acts. The meaning is obvious in such cases, and the use of the term here can imply no danger of producing war, since war is already in course. Among the acts of war in this sense, one at least is taken as evidence of a state of war, even in the absence of other evidence. The blockade by Germany, Great Britain and Italy against Venezuela in 1902 was admitted by Lord Lansdowne, British Foreign Secretary, to have "created *ipso facto* a state of war between Great Britain and Venezuela." [13] Likewise, the blockade of the Confederacy during the American Civil War was accepted by neutral states as an act possible only under the status of war and therefore as an admission on the part of the United States that a formal state of war existed, justifying recognition of the Confederacy as a belligerent. This situation does not appear to exist (though there may possibly be other examples) except for blockade; it may perhaps be explained by the fact that blockade interferes with the rights of third states and will not be recognized by them except under the status of war.

A distinction between war and acts of war appears in the Covenant of the League of Nations. According to Article 16 thereof, "should any member of the League resort to war in disregard of its covenants under Article 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League . . ." This wording represented a change from that of the second draft of President Wilson, which read: "it shall thereby *ipso facto* become at war with all the members of the League." [14]

[12] Foreign Relations, 1914, p. 476; see also Hyde, International Law, Vol. II, p. 178, where is quoted the Act of Congress of April 22: "That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico."

[13] Hyde, *loc. cit.*, p. 181 and note 2.

[14] D. H. Miller, The Drafting of the Covenant (New York, 1928), Vol. II, p. 79; see also the Cecil Plan, p. 63. Miller explains this change as an effort to avoid conflict with the American Constitution; it produced, as he says, "a very great change in meaning." *Ibid.*, Vol. I, p. 49.

The interpretative resolution adopted by the Assembly of the League on October 4, 1921, took the position that "the unilateral action of the defaulting state can not create a state of war," and that such action merely entitles the other members "to resort to acts of war or to declare themselves in a state of war with the Covenant-breaking state." [15] There can be little doubt, in view of the subsequent application of this article in practice, that no member of the League was obligated to consider itself as at war with the Covenant-breaking state, even though the latter had committed an "act of war" against all other members of the League.

It may be concluded, so far as this cursory survey goes, that the term "act of war" is employed in various meanings; that it has no distinctive technical significance in international law; but that, wherever used, it refers to the employment of force. It may have the paradoxical meaning of an act which would be an act of war if there were a war, *i.e.*, measures of force short of war; it may refer to the act of a belligerent, called an act of war because it occurred under the legal status of war; it may refer to an act which could be legitimate only under the status of war. In practice, various other terms seem to be used as synonyms, such as measures of war, acts of hostility, etc. There is no evidence that it creates or by any legal process produces a state of war. If the attacked party declares war in opposition, war appears as the result of the declaration, and not as the result of the act of war. If there is no declaration, there can be no war, according to those who follow the Third Hague Convention; to those, an act of war could not possibly have the consequence of war, since there must be a declaration. To those who hold that war may exist without declaration, it would appear that an act of war does not automatically produce war, since there must be some evidence of intent to make war, or some objective determination.

Certainly, none of the measures thus far taken by the United States could be regarded as an "act of war," for none of them involve the use of force; they do not measure up even to the stature of reprisals. Further, even if they could be called "acts of war," the consequences which it is averred would follow—that the United States would inevitably be plunged into war —would not be produced by that fact. The state against which an act of war has been committed is free to make its own decision as to whether it will reply by war, and that decision does not in the least depend upon international law or etiquette. A foreign state could take umbrage at any action of the United States and undertake war against us; it could do so because of the measures of defense which are now being prepared; it could do so for no reason whatever. It will decide upon its course as a result of consideration of the advantages and disadvantages which might accrue to

[15] League of Nations document A.14.1927.V, pp. 42–43. Fauchille, in discussing this article, says "acte de guerre n'est pas nécessairement synonyme d'état de guerre." P. Fauchille, *Droit International Public* (Paris, 1926), Vol. I, Pt. 3, p. 714.

it from a decision to make war; and these forces of decision would operate whether or not an act of war had been committed. Indeed, the mere fearfulness to take action against aggression and injury could be as much an "act of war," in the sense of causing war to come, as would a direct use of force, for the aggressor might consider such a supine attitude as an invitation to attack.

There can be no objection to the exercise of ordinary reason and discretion in seeking to anticipate the results of our actions in terms of the possibility of war; but international lawyers should guard their science against such misuse of its terms as is now frequently to be heard in public discussion.

CLYDE EAGLETON

CONFLICT OF FEDERAL AND STATE LAW IN RESPECT TO THE REGISTRATION OF ALIENS

The decision of the United States Supreme Court on January 20, 1941,[1] affirming the injunction granted against the Secretary of the Pennsylvania Department of Labor and prohibiting the enforcement of the Pennsylvania Alien Registration Act of 1939, has forged another link in the chain of decisions which endow the Federal Government with the power of a constitutionally centralized sovereign state in matters affecting its relations with foreign powers. The extent of the reserved sovereignty of the States has often been brought into question with reference to the treaty-making power. A different angle is presented where a State assumes to legislate with respect to the rights and duties of aliens in such manner as to interfere with the freedom of action of the Federal Government in matters affecting foreign relations.

The Pennsylvania Alien Registration Act of 1939 required resident aliens of eighteen years and over to register each year, to supply certain information demanded by the Department of Labor of Pennsylvania, to pay a registration fee and to carry at all times an alien identification card. Two aliens of different nationalities brought action to enjoin the Pennsylvania Secretary of Labor from enforcing the Act upon various constitutional grounds all of which were left open by the Supreme Court with the exception of the contention that the power to regulate and register aliens as a distinct group is subordinate to the supreme national law. At the time of the passage of the Pennsylvania statute, Congress had not yet passed its own registration statute, but during the pendency of the action the Federal Registration Act of 1940 was enacted. It was therefore contended that, having adopted a comprehensive integrated scheme for the regulation of aliens, Congress had precluded State action of the nature of the Pennsylvania statute.

The court does not say that federal power in this field is exclusive, but it lays particular emphasis upon the importance of maintaining the supremacy of national power in this field without harassment of divergent State legislation. Justice Black, writing the opinion of the court, quoted with approval

[1] Lewis G. Hines *v.* Bernard Davidowitz *et al.* (1941), United States Supreme Court, Advance Opinions, L. ed., Vol. 85, p. 366.