

EDITORIAL COMMENT

THE EFFECT OF WAR ON LAW

The time has come when the effect of the so-called Second World War on international law and relations must be assessed. While the United Nations Organization pays lip service to the predominance of law in the relations between nations,¹ a glance at the Potsdam Declaration² would seem to indicate that law is one of the forgotten virtues.

Perhaps the most serious inroad upon international law has been the purported abolition of neutrality, which has been under way since the organization of the ill-fated League of Nations in 1919. In thirty years the builders of the new era purport to have broken what it took over 400 years to build. It will probably long be debated how it was possible to bring such an unmanageable entity as the national state under the restraint of external law. The answer seems simple. Self-interest and practice from the 15th to the 19th centuries were deemed self-evident elements in persuading nations that they could stay out of war with dignity and under law. Self-preservation usually dictated neutrality. The greatest figures in international law of the past generation made their reputations on their intimate knowledge of the law of neutrality. In a sudden burst of enthusiasm for new ways, this accumulated wisdom was set aside and the world was now to achieve peace by universal intervention. This was in part a justification of the so-called First World War and became a factor in causing the second. At all events the new dispensation has brought us two world wars in rapid succession, with no serious promise that further wars are not in the offing. It seems remarkable that such a theory could obtain a hold on the minds of men.

The fact that merchant ships are now sunk at sight by submarines or, if in port, that they are requisitioned, has minimized the function of prize courts. With the exception of the *Appam* case, which was not a capture by the United States, there has been no prize case in American courts since the Spanish American War.³ On February 2, 1946, it was announced⁴ that the

¹ The Preamble to the Charter of the United Nations reads in part, "We the peoples of the United Nations, determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . ." United States, Department of State, Publication 2353, Conference Series No. 74.

² The text of the Potsdam Declaration is printed in the *Department of State Bulletin*, Vol. XIII, No. 319 (August 5, 1945), at p. 154.

³ Arnold W. Knauth, "Prize Law Reconsidered," in *Columbia Law Review*, Vol. XLVI (1946), p. 69. Admiral Nimitz is reported, May 23, 1946, to have made an affidavit before the Nuremberg court admitting that United States submarines had official orders to sink at sight Japanese merchant vessels. *The New York Times*, May 24, 1946, p. 11, col. 4.

⁴ *The New York Times*, February 3, 1946, Part I, p. 20, col. 1.

United States had sunk by submarine 1,944 major Japanese merchant vessels and that 276,000 Japanese were drowned, the Navy making an official admission that the United States had by this fact violated the London Treaty of 1930. We are now informed that in the light of the bombing airplane accompanied by the vague "total war," the time-honored distinction between combatants and non-combatants has probably disappeared, thus terminating another safeguard for the preservation of law.

A second feature of the so-called Second World War, and particularly of the United Nations Organization, is that it invites universal intervention as the road to peace.⁵ One might assume that the supposition that all the Great Powers would see matters in the same light is a delusion which would have been exploded by this time.⁶ Not so. Only the event can make it clear that the theory of universal intervention not only strikes at the roots of international law and relations but is ineffective in practice, because it so happens that the Great Powers will rarely see the same way on important matters. It is just as likely that the United Nations Organization will make for war as for peace, since their conflicts do not leave the relations among nations unaffected.

Like the League, the United Nations should not have been assigned the inappropriate task of preserving the peace, especially by force. That impossible task seems likely to affect the valuable non-political functions which the Social and Economic Council is equipped to perform. Hence it seems unfortunate to make the Court of International Justice depend on the life of UN.

The main trouble with the theory of universal intervention has been its attempted substitution of the doctrine of subordination for the doctrine of coordination. It was actually believed that the state could be made, like the individual, subordinate to a central authority. Hence the effort to create a general authority which should have jurisdiction over the members. This proved impossible of achievement without a substantial surrender of sovereignty, which no state seems willing to make. It has, however, resulted in the assumption that the force of the leading Powers would prevail over all the other Powers of the world. The difficulty is that the Big Three are not united and cannot be, and that the small States become appendages or satellites of the larger states in geographical proximity. The doctrine of the equality of states, though preserved in the Preamble of the Charter,⁷ is honored in the breach.

⁵ The Preamble to the Charter of the United Nations states as one of its aims: "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, . . ." Department of State, Publication 2353, Conference Series No. 74.

⁶ Another aim is "to unite our strength to maintain international peace and . . ." Same.

⁷ According to the Preamble of the Charter, the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . ." Same.

From the refusal to surrender sovereignty to a confederation one may judge how much chance there is of the surrender to a world government, as demanded by Judge Roberts and his friends. The difficulty with the one-world theory is that its proponents hardly seem to believe in it, and justifiably so. Because if the theory were sound the United States would be in the depths of a depression caused by the European and Asiatic devastations, the climate all over the world would have to be the same and the peoples the same.

If we look at the Potsdam Declaration, which indicates the lines along which the new treaty of peace is to run, we are struck by the fact that it purports to abolish the long-established distinction between private and public property, and appropriates private property in liquidation of national claims.⁸ This is an innovation or retrogression likely to have far-reaching effects. American statesmen have always insisted upon its illegality. Not only has it persuaded some nations to confiscate private enemy property, but it looks straight toward the abolition of private property as an institution. Whereas Article 297 of the Treaty of Versailles only authorized confiscation if so desired, the Potsdam Declaration seems to make such expropriation somewhat more obligatory. Whether the nations of the West are ready to take this suicidal course no one can yet say. The experiences of the past would seem to be an ineffective guide. It would be a mistake to attribute the new dispensation entirely to Soviet Russia, for the destructive aspects of the Potsdam Declaration are to be found in Anglo-American recommendations.⁹ It is needless to say that the safety of private property now depends not on law but upon the preponderance of force, so that it actually becomes safer to invest in a weak than in a strong country. Indeed, the institution of foreign investment, if practised at all, will be forced mainly into inter-governmental channels, for it is hard to believe that private capital will run the risk of political expropriation.

It will be observed that neutral Switzerland, according to press reports,¹⁰ has been forced to promise, under threat of sanctions, to surrender to the

⁸ The Potsdam Declaration, referring to private property, announced agreement on reparations as follows: "Reparation claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R. and from appropriate German external assets. . . . The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the western zones and from appropriate German external assets." The U.S.S.R. was also to receive from the western zones certain equipment as specified. The Control Council was authorized to take appropriate steps "to exercise control and the power of disposition over German-owned external assets not already under the control of United Nations which have taken part in the war against Germany." *Department of State Bulletin*, Vol. XIII, No. 319 (August 5, 1945), pp. 156, 157.

See also the Final Act and Annex of the Paris Conference on Reparation in same, Vol. XIV, No. 343 (January 27, 1946), p. 114; the Law on Vesting and Marshaling of German External Assets in same, Vol. XIV, No. 347 (February 24, 1946), p. 283; and the Plan of the Allied Control Council in same, Vol. XIV, No. 354 (April 14, 1946), p. 636.

⁹ See also the Report of the Crimea Conference in *Department of State Bulletin*, Vol. XII, No. 295 (February 18, 1945), p. 213.

¹⁰ *The New York Times*, May 22, 1946, p. 13, col. 2.

United States, England, and France for the inter-Allied reparation pool, 50 per cent of its German-owned property and some \$50,000,000 in gold.¹¹ We leave aside the recovery of Nazi loot. Apart from this, the coercion involves so grievous a departure from what had been deemed to be impregnable rules of international law—not to speak of Swiss law¹²—that one necessarily wonders how the state system and the capitalistic system can proceed under the new dispensation.

Another feature of the new era has been the doctrine of non-recognition which made recognition an approval and non-recognition a disapproval of the government to be recognized. There is a strong literary movement which asks rather logically but not soundly that governments intervene in the internal composition of foreign states to prevent dictatorships.¹³ The misfortunes attending this theory in Argentina and in Spain seem to have induced some realization that perhaps the Founders of this country were better advised in endorsing the recognition of *de facto* governments as the only tolerable way of international life. We are now informed by Secretary Byrnes that the recognition of *de facto* governments will again become an axiom of American policy.¹⁴

We have observed that there is strong objection in the country to military conscription at this time and in times of peace in general. This creates a curious dilemma for the government, since the policy of occupation, now extended, it is believed, to some twenty countries, requires conscription as its handmaiden. The objection, therefore, really lies to the policy of occupation, and yet so deeply involved has this government become that occupation of foreign countries has the semblance of a permanent policy with which the people disagree. How this dilemma can be solved I will not suggest.

There are other features of the Potsdam Declaration which give rise to equal doubts, such as territorial amputations, mass migrations, the restoration of slave labor, and so on. It must be recalled that there are only two elements of restraint upon the natural tendencies of a belligerent, first, the law of neutrality, whose violation always carried with it the danger of converting the neutral into an enemy, and, second, the fear of enemy reprisals. While the latter has not altogether exhausted its force, evident in the large number of prisoners taken by both sides, it has decidedly weakened in effect. Indeed, the *atom bomb* puts a premium on the speed of belligerency. The whole question needs a fundamental reëxamination in the cold light of reason. Otherwise the human race will have shown its incapacity to suffer civilized restraints. It will have determined that its major activities no longer justify the restraints imposed by law.

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¹¹ Above, note 8.

¹² "Shall Switzerland Surrender Its German-Owned Property?", by F. X. Peter, of Lucerne, Switzerland, translated by Dr. Konrad Gutman, New York, 1946.

¹³ Karl Loewenstein, *Political Reconstruction*, New York, 1946. See also this JOURNAL, Vol. 40 (1946), p. 164, note 8. ¹⁴ *The New York Times*, April 20, 1946, p. 1, col. 6.