

# INTERNATIONAL LAW AND THE GREAT WAR

BY

COLEMAN PHILLIPSON

WITH INTRODUCTION BY

SIR JOHN MACDONELL

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# INTERNATIONAL LAW AND THE GREAT WAR

BY

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WITH INTRODUCTION BY

SIR JOHN MACDONELL, K.C.B., LL.D., F.B.A.

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ADELPHI TERRACE

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## PREFACE

My aim in the present work is to give a systematic account, from the point of view of international law, of most of the questions and incidents that have so far arisen in the Great War.

Since the beginning of last August international law has been subjected to severe trials. I have endeavoured to ascertain to what extent it has emerged from its ordeals inviolate, to what extent homage has been honourably paid to it, in what respects it has suffered hurt and its behests have been disregarded. The number of violations that we have to examine is large. Indeed, so many have been committed, that it seems as though the whole fabric of international law has been demolished, and the sacred law of humanity—to which it is indissolubly joined—rejected and spurned. But, happily, not all the belligerents have contributed to bring about this deplorable result. For we shall find that nearly all the infractions of law are to be laid to the account of Germany.

It is obvious, therefore, that in an undertaking of this kind I must necessarily pay considerable attention to the theories of the law of war and of international law in general advanced by German writers, to the views held in German military circles, and, especially, to the practices of the German forces in this unparalleled conflict. I have tried to show, by referring to earlier examples and proceedings, that these theories, views, and practices were not suddenly adopted on this present occasion in order to justify and ensure the attempted realization of a certain object, but that they are, rather, the natural consequences of the general attitude that has long been assumed by

the governing authorities and militarist enthusiasts of Germany. I have examined the conduct of the German forces both on land and on sea; I have analysed it out so as to enable us to consider its constituent elements in relation to the provisions laid down by the conventional and the customary law of nations; and thus I have indicated wherein the established law was observed or violated. Where, in any particular circumstances, there were no definite rules of international law to invoke, and where the German authorities have sought to show that their rigorous and "frightful" measures were permissible on the ground that this or that Convention was not previously ratified, or that some minor belligerent was not a party to it, or that some reservation had been made at the Hague Conference, I have none the less applied the fundamental principles underlying the whole structure of the law of nations and have considered whether the excuses alleged were tenable and the defended actions legitimate.

Despite the numerous breaches of international law that have been committed, we need not despair of its future. Those who have traced its course of development, who have noted its trials and tribulations, its failings and its triumphs, are sure that its inherent vitality will never and can never be entirely destroyed, and are confident that, notwithstanding the many wounds inflicted on it during the war, it will arise again healed and invigorated, and will assume its inalienable dominion over the Society of States. Where there is life, where there is a nation, where there is a community of States there must be restraint, discipline, law. The existence of international law, then, is inevitable. Every infringement of it that is recognized as such implies its existence, its validity, and its applicability. The main problem to which men and nations should devote themselves is how to fortify it by such potent sanctions as will make its violation not merely dishonourable, but unprofitable to an offending member of the community of States.

COLEMAN PHILLIPSON.

INNER TEMPLE, *March* 19, 1915.

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## INTRODUCTION

INTERNATIONAL law is passing through a crisis. According to a common opinion it has come to an end. In view of the breaches of treaties, the avowal of doctrines subversive of all engagements between States, the use of cruel and hitherto forbidden means of warfare, the disregard of the lives, property, and rights of non-combatants, many observers think that the rules of international law, built up for centuries, have disappeared. Never true law, they are pronounced to be not even recognized morality; they are now no more than so many well-meaning counsels of perfection, certain to be ignored when they thwart, as they often must, the interests of belligerents. If that were indeed so, more would have been lost than battles could retrieve. A spiritual force of incalculable value, "a great and noble monument of human wisdom," to quote Mr. Gladstone's words, "founded on the combined dictates of experience, a precious inheritance bequeathed to us by the generations that have gone before us," would no longer exist; and the world would have travelled a stage back to barbarism.

That judgment is common, but it is, I believe, erroneous. It rarely comes from those best acquainted with the history of international law. It is no more true than was a similar judgment often expressed during the anarchy of the Napoleonic wars. It does not take note of the fact that the contraventions of international law have chiefly been by one

of the belligerents. It makes too much of recent events and too little of the necessities of human intercourse, out of which those rules grew, and which will survive this war.

Those who declare that international law is dead generally confuse two sets of facts. The Germans have broken treaties and conventions because it suited them; military necessity has been to them an excuse for any excesses. They have made war more brutal than it has been for centuries. All this is retrogression; the exhibition of the presence of a spirit of barbarism which "culture" and industrial efficiency have not mitigated. But there is another set of facts not to be confounded with these. There have been breaches of the old rules ascribable to the altered conditions of warfare; to changes on land and at sea; to new methods of attack and defence; to the use of new weapons and munitions; to the altered relations of combatants to non-combatants and of belligerents to neutrals; to changes in trade; to the introduction of steam and the increased size of vessels; and to greatly heightened facilities for the conveyance by railways of goods from one country to another. With mines and torpedoes as weapons, with an increasing number of articles used both in war and in industry, with the readiness with which goods really intended for the armies or navies of belligerents can be conveyed to their destination by way of neutral ports, rules as to many points, notably contraband and continuous voyage, must change. No matter what was the temper of the belligerents, the changes in war and industry could not fail to produce some strain in the relations of belligerents and neutrals and a revision of old rules. There has been an appalling reversion to barbarism; there has also been growth, rapid, unexpected, and still incomplete.

In forming a judgment as to the present situation, and in

forecasting the future, these two sets of facts are, as far as possible, to be separated; and no one, so far as I know, has attempted this task with the same care, impartiality, and knowledge as Dr. Coleman Phillipson in the book to which I have been asked to append a preface. It has been truly there said that more questions have arisen in the course of this war than in the whole Napoleonic contest. Many writers have dealt with some of such questions. There was needed a work in which they should all be calmly reviewed, not as isolated matters, but in their connection. This book is a history of the legal aspects and incidents of the war, and much more. It is an acute analysis of the causes of the war. It is a criticism, based on wide reading and much thought, of existing rules; and Dr. Phillipson's book will, if I mistake not, be consulted with profit when the time comes, as it must, for a revision of them in the light of the searching experience of this war.

He is hopeful as to the future of international law, despite the many breaches of it. The closing paragraph of his preface bids us not despair as to it. "Its inherent vitality will never, and can never, be entirely destroyed." His last chapter predicts that "with the conclusion of peace a brighter day will surely dawn for it." He shows that its rules rest upon the permanent necessities of intercourse between nations. The arguments for the supremacy of military necessity over all other considerations are not new, though there may be some novelty in the cynicism with which they are now often avowed. They are, in substance, stated by Thrasymachus in the "Republic" and by Callicles and Polus in the "Gorgias" as plausibly as by Nietzsche, Bernhardt, Treitschke or the German General Staff. They have been tried, and the experience of the world is against them. In the long run brute force proves weaker than ideals. Even the most successful conqueror finds that he

must pay homage to them. Principles, good enough for the carnivora, prove unsuitable for human beings.

Dr. Phillipson has some interesting observations upon the future line of evolution. Whether he is right in stating that "the nations of the world must necessarily be bound together more closely by some kind of federal system, subject to a reinvigorated federal law that shall be fortified by sanctions more authoritative and more potent than those which have hitherto been applied to safeguard the law of nations"; whether future Hague Conventions will "be so fortified and their sanctions made so strong through the jurisdiction of a world tribunal that the evil consequences following their violation will outweigh the gains expected from their breach"; whether force in some form is to be used to give effect to international law—all these questions, now pressing upon many minds, I do not examine. I see difficulties in drawing, as so many projects of reform now put forward purport to draw, between Europe and the rest of the world a sharp distinction. *Sittlichkeit* does not vary geographically. We in this country stand nearer to the United States than to certain European countries. Further, China and Japan are likely to count for more and more in the history of the world, and in the determination of questions of peace and war. Besides, experience does not encourage much belief in the accuracy of predictions, or the practicability of schemes, as to "the organization of the world," which goes its own way, and one that has many incalculable turnings and windings.<sup>1</sup>

International law is not dead. But Dr. Phillipson will convince his readers that it is signally incomplete in many respects, of which I mention only one or two. First as to

<sup>1</sup> "*Il est des hochets pour tout âge; l'amour pour les adolescents, l'ambition pour l'âge mûr, les calculs de la politique pour les vieillards.*"—Frederick the Great, "Mémoires de 1763 jusqu'à 1775," *Œuvres*, vi. 72.

the position of neutral States. What is their duty when conventions to which they are parties have been violated? Are they to be silent when the violations do not directly affect them? Are they to leave the condemnation of such conduct to newspapers and private individuals? The Governments which treat conventions as "scraps of paper" claim to be above rules which bind private individuals who enter into agreements. But are neutral States bound to do less than such individuals would do in case of breaches of private agreements? It seems to me that neutral Governments have not merely the right but the duty to condemn violations of conventions or well established international usages. Dr. Phillipson would go further. "The entire world has, properly, a right to consider whether an alleged grievance is a justifiable and sufficient cause for making war. It has, further, a right to intervene when the alleged cause is unfounded, and to do its utmost to prevent the commencement of contemplated hostilities, or their continuance if they have already begun." He agrees with Dr. Charles Eliot that "some adequate force must be behind an international Supreme Court, as it always is behind every other Court, otherwise it may be feared that the Court will not command in practice the confidence of civilized mankind."<sup>1</sup>

I shrink from the consequences of these proposals, which, it is right to admit, events since August last have induced many persons to espouse. I fear that they might lead to more wars than they stopped. But if there is to be no Armed Neutrality—if that means frequent interventions with consequent hostilities, and is therefore to be deprecated—there should, if possible, be Organized Neutrality; every neutral State claiming the right to express, if practicable, in concert with others, the condemnation of conduct

<sup>1</sup> *The Road Towards Peace*, p. 25.

abhorrent and detrimental to all; the world never again seeing foul deeds done without protests from Governments looking on. It is not minding one's own business to be silent about matters of supreme importance to all, as are conventions and usages flagrantly violated.

“A neutral (State),” says Dr. Phillipson, describing an obligation sometimes of late forgotten, in words apt and precise, “having signed a convention, impliedly, if not expressly, undertakes to protect it, and do everything possible to secure its observance by other States, especially so at a time when there is a temptation to set it aside. Neutrality does not mean standing aside, and contemplating with apparent indifference wanton contraventions of that law which the neutral has helped to establish. A breach of neutrality is primarily, no doubt, an offence against the State whose territory has been violated; but it is also, even if it be so secondarily, an offence to every neutral. It may be that neutrals tacitly, and in their conscience, condemn such unprincipled disregard of established law; but the silent manifestations of their conscience and their tacit condemnation do not amount to a proper fulfilment of their legal duty.”

There is a recognition, full of promise, admirable, if somewhat belated, of these principles in the United States Note of protest in the name of “the rights of humanity” and justice against the crimes committed on the high seas by German vessels of war.

The evolution of international law has been for a time checked by this war. But this book, with its calm survey of the present situation and its hopeful spirit, leads one to believe that there may be an onward impulse when the struggle is over, and when there is time for all concerned to reflect upon its causes.

A great change for the better is not likely to come while certain obstacles not to be removed by new conventions or any mere new machinery bar the way. Before the war broke out, within the borders of most nations were unrest, racial antipathies, unsatisfied covetousness, anarchical passions,

false ideals of national greatness; and all these, overflowing frontiers, could not fail to disturb the relations of States. Out of the inner life of a nation comes its foreign policy, and I do not see how that can be stable while within are the elements of discord and aggression.

A second obstacle. Here, too, though not so much as elsewhere, has been taught the doctrine that the State may do what seems good to it as between itself and its subjects; that there is no limitation of its legitimate activity. It is but a natural continuation or expansion to hold that the modern State is a sort of super-State; that it may do what it thinks fit between itself and other States; that it is outside or above the region of morals; that "the State is self-sufficient"; that its maintenance justifies any conduct, and is "superior to every moral rule." It is hard to believe that while this doctrine of national egotism—"Neo-Machiavellianism," as the late Henry Sidgwick called it—is widely believed, the basis of international law can be stable. Much the same things were once said, with perhaps as much truth, about the family, the sept, the clan, the tribe, out of which the modern State grew. Each of these groups was at a certain stage of society believed by most of its members to be above any rules which were in conflict with its interests; and the results were feuds and private warfare, the ancient counterparts of the gigantic modern wars.

This latest war, greater than any before, challenging and subverting so much which has passed unquestioned, compels the student of international law not to despair, but to dig deeper for its foundations. Some dubious matters may be cast out from the books. There may be less reliance than there has been upon conventions without adequate provision for their performance or the punishment of those responsible for breaches of them.

The work done at the Hague and London Conferences will need revision in the light of the experience of the past ten months. There will remain a core of sound doctrine. Far from destroying International Law, the ultimate effect of this war may be to strengthen it.

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