

THE LAW OF REPRISALS AS AFFECTED BY  
THE LEAGUE TREATY.*The Italian Occupation of Corfu.*

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It seems clear, says Lord Grey in a letter to the *Times* of the 9th October, that Italy broke the Covenant of the League of Nations by the bombardment and occupation of Corfu. If this is true—and a fair investigation leaves no doubt upon the matter—then a good deal more is true. The principles of law leave no doubt, if the exposition of them which follows be sound, that when Italy seized Corfu Greece had a treaty right to the immediate forcible assistance of the other fifty members of the League of Nations. The establishment of this proposition, however, is not free from difficulty; and before the fifty states had been given a reasonable time for the examination of their obligation in the case that had arisen, Greece had agreed to a settlement and the Italians were out of Corfu. Moreover, had the Greeks held by their right, and had the nations decided that they were bound to use force against Italy, the latter would have been entitled, as it should seem, to a full opportunity of withdrawal. The rule in the case is at least not clear to transparency. It is not a rule of immediate application to the facts, without any step of legal reasoning in the decision. Against the rule there can be put up an argument which is plausible, and therefore, coming from a party to the case, perfectly honest. Since this is so, it would be absurd to expect that the actual conduct of Italy should come up to the standard of the rule. “Not a day passes on which an honest prosecutor does not ask for what none but a dishonest tribunal would grant.” So says Macaulay, justifying the con-

duct of Hastings in attacking Nuncomar, while condemning that of the court which judged between them and sent the Hindoo to execution. The standard to be applied to Italy's conduct is the standard of the honest prosecutor. If this be allowed, Italy's conduct, so far as the single point of resort to force is concerned, cannot be condemned.

The truth of the matter is this: that the rules of the League Treaty relating to resort to war cannot be applied to the case of reprisals without a careful decision by a court of lawyers. But any rule that purports to provide for the immediate use of force against a nation that violates it, and requires legal reason in its application, could hardly by any possibility be followed in a first case. At the best, the first case can serve to lead the way to the establishment of an explicit rule for future practice. This is what will doubtless be done, after due deliberation, upon the actual case of Italy against Greece. And in pursuit of that object the Council of the League of Nations has put five questions to a special commission of international lawyers for opinion and report.

The fourth of the five questions runs in the cabled report as follows:—

“Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one member of the League against another member without prior recourse to the procedure laid down in these articles?”

By Articles 12 to 15 of the League Treaty, members agree that they will not “*resort to war*” without submitting the matter in dispute to the League procedure and waiting a prescribed time, always a period of at least three months. If this obligation is broken, Article 16 provides a remedy: the breach is *ipso facto* deemed to be an act of war against all Members of the League, and each of them undertakes to cut off immediately the commerce of all peoples with the offending nation. Question 4, then, means briefly: Does a State

“resort to war” by taking measures of coercion which are not intended to constitute an act of war?

To the question of the Council's ought to be appended this complementary question: If such measures of coercion are resisted by the nation against which they are taken, does this resistance constitute a “resort to war” within the meaning of Articles 12 to 16 of the Covenant? Upon the answer to these two questions taken together depends, in all probability, the future of the obligation undertaken in Article 16,—whether that obligation is to be virtually no obligation at all, or a real duty of fifty nations to prevent by force an outbreak of individual war during the time prescribed for inquiry. The slightest acquaintance with the law of reprisals is sufficient to show that reprisals and resistance can not be considered apart, and that the two questions just suggested form in reality but a single inquiry. To make this point plain without any law at all: assume that the Council's question is answered in the negative, that a resort to reprisals is not a resort to war. Let us next suppose that a foreign state, alleging a grievance against Canada, demands a specified redress, is refused, and proceeds to send by way of reprisals what is announced as a friendly little expedition to occupy the island of Vancouver. Let us suppose finally, what is the natural thing to suppose, that the British peoples hastily declare war and begin to evict the foreign power from the island. The Council's question on reprisals being answered in the negative, it is not the invader of Vancouver that has resorted to war; it is the British, and according to the rule of the League Treaty, ratified by all the British nations, the Empire has committed an act of war against the fifty nations, and is liable to war and an all-embracing blockade by the whole forces of the nations in the League.—The question of resistance to reprisals, it is plain, forms an integral part of the question of reprisals.

For a complete investigation of the questions proposed, it is evidently necessary to examine with care

the elementary principles of the law and practice of reprisals. The earlier law is first to be explored; then the effect of the treaty rules of the League; and lastly the alternatives for the present law, depending on the direction which is given to practice as a final result of the incident of Corfu: for practice is the great fashioner of international law.

### 1. THE EARLIER LAW.

For our purpose, the earlier law of reprisals can be set forth in two rules, both of them elementary, and both so well established as to have commanded universal recognition. These two rules are as follows:—

1. If nation X violates Y's rights by international law, nation Y, upon rejection by X of a claim for redress, can proceed to reprisals as an alternative to war. Practice had established the following measures, amongst others, as being reprisals, and not war: blockade, occupation of territory, seizure of shipping.

2. In the case of reprisals by acts of force, nation X can treat the attack as war; is perfectly entitled to resist with all forces; or is entitled, without resistance, but upon mere proclamation, to have the situation treated as war by every other State.

Upon the first rule, nothing need be said. Ample authority will be found in the pages of any modern work upon international law, in that part of it which deals with war. The second rule, however, requires examination.

The rule as it is here set forth represents the utmost distance between war and reprisals that international law has ever allowed. According to the earliest jurists, whose definitions are still adopted as fundamental,<sup>1</sup> war included what we now call reprisals. *Contentio publica armata justa*, the launching of the public armament against a foreign State, was called war by Gentilis.<sup>2</sup> Grotius expanded the definition of his pre-

<sup>1</sup> Moore, Digest, vol. vii., p. 154; and Westlake, International Law, vol. ii., pp. 1-3.

<sup>2</sup> De Jure Belli, i. 2.

decessor to include a condition of war that had not yet produced acts of force. For Vattel, war is "that state of affairs in which a nation seeks its rights by force." Bynkershoek includes all that Vattel includes, and more. It is true that Westlake<sup>3</sup> draws his line between acts of force and a state of war by the direction of the text of Grotius, i.l.2.l.: *ut non actio, sed status indicetur*. But Grotius makes it plain, by the learned quotation in his footnote at this point, that his meaning is this: that force between nations constitutes war, but that those nations are also at war who count themselves as such, and have set about military preparations, without having as yet come to blows.

With the coming of the nineteenth century, we begin to fall upon violent hostile actions which fail to set up a state of war, and the sweeping simplicity of the old lawyers has to be done away. The commonest language, right down to the present, as in Moore's Digest, vii, 153, distinguishes between acts of war and a state of war. In 1793 Jefferson, being then Secretary of State, gave the following opinion:—"The making a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisals follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war."<sup>4</sup> The case of the *Boedes Lust*, decided in 1804 by Lord Stowell, is the English law authority for an international law principle, the principle that when reprisals develop into war, the outbreak of war dates from the reprisals. The particular reprisal was a shipping embargo against the Dutch, by way of rupture of the Peace of Amiens. Stowell had brought the reasoning to the following point: the colonial Dutch owner could recover his property if it had been seized in a time of peace. But—"I am of opinion, therefore, that when it is assumed, that the capture is legally to be considered as made in time of peace, the argument legally fails, because in all legal

<sup>3</sup> Vol. ii., p. 2.

<sup>4</sup> Jefferson's Works, vii., p. 628; quoted in Moore, vii., p. 123.

view of the matter it is taken in hostility.”<sup>5</sup> Elsewhere, at page 245, “This property was seized provisionally, an act itself hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of *Holland*. If that conduct had been such as to re-establish the relations of peace, then the seizure . . . would have proved in the event a mere *embargo*, or temporary sequestration.”

The language of international law during the last century, though it cannot be said to have fully allowed a distinction between war and warlike reprisals, has nevertheless, in the best authors, and in conformity with practice, decidedly departed from the definitions of the earliest law,—just so far as our second rule indicates: violent reprisals make peace or war at the option of the defender. Calvo gives a convenient collection of authorities in his sections upon pacific blockade.<sup>6</sup> He finds that the largest group of authors deny the existence of a difference between violent reprisals and open war. He himself takes his stand upon practice, and describes these reprisals as acts of war, in accordance with the language of state-practice by the examples of Guizot and Palmerston; but he distinguishes them from that whole change of status, of rights and duties in relation to other States, which brings in complete war. Lastly, we shall vouch to war-ranty the very accurate expositions of our latest English authors. Hall states that reprisals are

“*primâ facie* acts of war, but they are not complete war: . . . acts of war in fact, though not in intention . . . and the state affected determines whether the relation of war is set up by them or not.”<sup>7</sup>

Westlake, that

“Acts of force are not war unless either a government does them with the intent of war or the gov-

<sup>5</sup> 5 C. Rob., p. 248.

<sup>6</sup> *Droit International*, vol. iii., §§ 1858-9.

<sup>7</sup> *International Law*, 7th ed., p. 380.

ernment against which they are done elects to treat them as war."<sup>8</sup>

And Oppenheim, that

"Unilateral acts of force performed without a previous declaration of war are not war in themselves, as long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers them to be acts of war."<sup>9</sup>

Lord Birkenhead<sup>10</sup> echoes Westlake; and the American Professor Hyde,<sup>1</sup> in a work published last year, agrees closely with Oppenheim.

Just so far, then, international law had before 1923 carried the distinction between acts of force and war. Exactly the same acts which are war if *assailant* or *defendant* so chooses, are merely reprisals in the absence of an indication of such a choice on the part of either.

## II. THE LAW AFTER 1920.

Fifty nations had established the treaty rule found in the Covenant of the League: should one Member "resort to war" against another without putting the matter in dispute before the League and waiting a fixed time, *ipso facto* an act of war is deemed to have been aimed at all the others, and fifty nations are under obligation immediately to cut off the commerce of the offending nation.

The case now to be considered is this: *Y* claims redress against *X* for an alleged wrong. *X* refuses the redress claimed, and undertakes to abide by the League's judgment. With or without an equal willingness to submit the matter to the League (in Italy's case against Greece, without) nation *Y* resorts to military reprisals. *X* elects to treat these reprisals as war, and either makes a proclamation to that effect or

<sup>8</sup> Vol. ii., p. 2.

<sup>9</sup> Vol. ii., § 55.

<sup>10</sup> 5th ed., 1918, p. 177.

<sup>1</sup> International Law, vol. ii., § 602.

resists by war in return. Which nation, X or Y, has "resorted to war," and so in law brought down upon itself fifty nations waging war and utter blockade?

It is submitted that Y has done so by adopting reprisals. And the short reason is this: that if it were not so, attacking nations, since anything short of complete war is permissible as reprisals,<sup>2</sup> could render Article 16 utterly null by taking measure after measure of reprisals until resistance brought war. Any law must be interpreted so as not to be a nullity.

Other principles of interpretation would cover the case. Usually, as we shall see, these legal principles are identical in the Civil Law and in the Common Law, being in truth founded upon the clearest grounds of reason. Their value, however, is in the present case only the value of confirmation. Some of the maxims of construction, as has already been said, constitute such an argument in favour of permitting reprisals as to justify a nation in *prosecuting a claim* to make reprisals for good cause. But the overriding decisive principle, found in the Civil Law, found in the Common Law, found in the classics of International Law, and rooted in reason, is that no law is to be subjected to a construction that shall make it worthless or absurd.<sup>3</sup>

<sup>2</sup> Hall, p. 382; and Oppenheim, ii., §§ 37 and 40.

<sup>3</sup> NOTE:—Professor Black's article will be concluded in the December number of the REVIEW.

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