POLITICAL AND LEGAL REMEDIES FOR WAR

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Political and legal remedies for war by Sheldon Amos

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To My Wife

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POLITICAL AND LEGAL REMEDIES FOR WAR.

CHAPTER I.

OF THE CHARACTER OF MODERN WARS AND THE POSSIBILITY OF PERMANENT PEACE.

Function of the International Lawyer.

If the International Lawyer confines himself to his own proper task, and does not usurp the functions of the International legislator, of the moralist, or of the philanthropist, he is only concerned with War as a means, however violent and irregular, for the support of legal rights, or with the restrictions which civilization has introduced into the exercise of what are sometimes called the extreme rights of War. He is called upon only to register and expound the practical rules based upon the tacit or express consent of nations, and conformable to the dictates of abstract justice, so far as these can be ascertained; and he is not entitled to impair the simple treatment of a subject, engrossing enough in itself, by speculations on a remote future, or even by benevolently suggested reforms for the immediate present.

Its limits not sufficiently observed.

Not, indeed, that the writers of text-books on International Law have generally exercised the self-restraint here commended. On the contrary, they have all but universally assumed the character of legislators as well as lawyers. Nor have they even confined themselves to the

moderate course of hinting at what, in their opinion, the law ought to be, while explaining what it actually is. Their views of what the law is have been largely colored by what they have wished the law to be, and, too often, by what they have conceived the interests of their own States demanded it should be. Some writers, indeed, by publishing Codes of International Law, have combined inextricably together the treatment of the law as it is, and that of the law as, in their opinion, it ought to be. They have given definiteness and precision to principles which are, as yet, of most fluctuating authority, and are only creeping on toward general recognition. They have imparted clearness and simplicity to rules the true import and circumscription of which can only be understood by laying side by side a long series of treaties, despatches, judicial decisions, and desultory utterances of eminent statesmen. They have everywhere substituted order for disorder, the rule of right for that of might, and the claims of humanity for the traditional assumptions of egotistic self-interest.

Uncertainty of rules of International Law.

But, though the motives of these philanthropic legislators have been of the noblest, and the results of their efforts, no doubt, widely beneficent, their method has been one of the causes which has discredited International Law as a system of actually binding rules. It has come about that neither the subject of the law as it is, nor that of the law as it ought to be made, has been adequately treated; and, when those who professed to be teachers of the law acknowledged themselves uncertain as to the existence of any rules at all wholly out of the region of further debate, there might be an excuse for those who were interested in prolonging a period of uncertainty and confusion in declaring there was no law at all.

Laws of War in course of formation.

The Laws relative to War afford a good illustration of these remarks. There is no part of International Law in which the rules are, almost from day to day, undergoing more rapid vacillations; and the proceedings of the Brussels Conference, in 1874, display at once the

number of points in respect of which the law is unsettled, and the extraordinary amount of interest which attaches to their settlement. Thus it might be expected that here, perhaps more than elsewhere, the function of the lawyer would almost unavoidably have slidden into that of the legislator. In fact, the two functions cannot be wholly kept apart, because it sometimes happens that the existing rule can only be understood by examining its reasons, or even by setting forth in full the controversies amidst which it hardly maintains its existence. Nevertheless, it is desirable to separate the legislative function from the strictly legal one where it is possible; and this is especially important in respect of a question like that of War, in which so many strong passions, and generous, though uninformed, instincts, are wont to divorce the discussion of it altogether from a regard to the practical difficulties of national life.

Three legitimate aims of Laws of War.

(1) To mitigate severity of War; (2) to reduce its frequency; (3) to pave the way to its abolition.

There are three distinct aims which are usually regarded as being legitimate objects of concern on the occasion of making a proposed change in International Law, or on that of giving increased definiteness and validity to a rule of law which has hitherto been imperfectly apprehended and recognized. These aims are (1) mitigation of severity in carrying on War; (2) a reduction in the length and frequency of Wars; (3) preparation for a time when War shall become obsolete. Though all these aims are recognized as worthy ones, and the pursuit of the first two of them has undoubtedly operated largely in the reform of the law, yet they have been hitherto treated of after a very desultory fashion; they have rarely been handled in relation to each other; the proportionate claims of each have been rarely ascertained, or, when conflicting, reconciled; the importance of these, especially of the last, has not been rated highly enough—so much so, that many readers of standard text-books would be of opin-