> Among the new philosophies of action or those which succeed to them the jurist of the immediate future, thinking of a great task of social engineering, as it were, whereby the conflicting or overlapping interests and claims and demands of the peoples of this crowded world may be secured or satisfied so far as may be with a minimum of friction and a minimum of waste, must find the basis of a new philosophical theory of international law. We shall not ask him for a juristic romance built upon the cosmological romance of some closed metaphysical system. But we may demand of him a legal philosophy that shall take account of the new social psychology, the economics, the sociology as well as the law and politics of today, that shall enable international law to take in what it requires from without, that shall give us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition. Thus it will yield a creative juristic theory and may well enable jurists of the next generation to do as much for the ordering of international relations as Grotius and his successors did in their day by a creative theory founded on the philosophy of that time. The conditions to which international law must be applied today are no more discouraging than those that immediately followed the Thirty-Years War. And we have the immeasurable advantage that we may build upon the permanent achievements of classical international law. Our chief need is a man with that combination of mastery of the existing legal materials, philosophical vision and juristic faith which enabled the founder of international law to set it up almost at one stroke.

We have here a great challenge to a more intelligent and a loftier vision of the enterprise of advancing the science of international law, of facilitating justice and thus increasing the guarantees of peace among nations. The law of nations has suffered serious damage from friend and foe. It is entitled to large and far-reaching reparations.

PHILIP MARSHALL BROWN

NEUTRALITY AND INTERNATIONAL ORGANIZATION

The recent discussion in somewhat controversial form of the place of neutrality in a system of international law goes to the very basis upon which the law itself rests. Is neutrality still a recognized legal position? What would be the effect upon neutrality of the application of sanctions, such as boycott and non-recognition? Is it feasible to define the term "aggressor" so as to make it possible in the interests of justice for third parties to take sides promptly against a state coming within the definition? And would taking sides in a controversy be promotive of war rather than a restraint upon it? These are but a few of the many aspects of a question which is presented in acute form not only by the absence of the United States from membership in the League of Nations, but by the reluctance of the leading members of the League to put into practice the provisions of the Covenant under the existing state of affairs.

Underlying the problem of neutrality is, of course, the larger issue of the

part that is to be played by *organization* in the relations of states. Few scholars today deny the need of some forms of organization to attain the desired goal of international peace. The question is rather whether the organization of the community of nations is to be content with accepting the law of 1914, strengthening its provisions for neutrality, and appealing to states in controversy to readjust their rights and settle their disputes between themselves; or whether, on the other hand, the organization of the community is to go further and seek to introduce new principles of the collective responsibility of all states for the protection of existing rights, and the collective duty of all to seek means of remedying present injustices and creating the underlying conditions of permanent peace.

That stability and justice are but two sides of the problem of peace is a common observation of jurists. Unless the existing order of things presents some degree of permanence, there can be no sense of security and no order in the relations between nation and nation more than between man and man. At the same time, unless the existing order is founded upon a reasonable approximation to justice, unless it expresses what the community as a whole feels is a fair and equitable adjustment of conflicting claims, it can not hope to maintain itself against disintegrating forces to which justice may make a stronger appeal than stability. It is the function of law within the separate states to secure for the citizen body this balance between stability and justice, to protect the existing rights of the individual and yet to make provision for such changes as will insure the readjustment of "rights" which are no longer in accord with justice. Who shall say that the law of the individual state succeeds in so doing to complete satisfaction? Yet who shall say that, in spite of its failures in detail, the collective judgment of the community does not on the whole reconcile conflicting interests and secure peace within the nation better than if each citizen were left to be the judge in his own case and left to take the law into his own hands?

What appears to hold true between citizen and citizen would appear to be true in respect to the relations between the individual members of federal unions such as the United States. The Constitution of the United States provides for the protection of each state against aggression, it requires that each of its members disarm in the presence of such protection, and it thus insures the permanence of the *status quo* in respect to certain fundamental conditions of state existence. But at the same time the Constitution contains provisions by which injustices that may arise between state and state may be corrected by legislation looking to the good of the community as a whole. Federal legislation in the United States of recent years goes so much further than a mere readjustment of the particular claims of states that the parallel with international relations is not as close as it was in 1789. Nevertheless the underlying legal principles are much the same in the two cases.

As between citizen and citizen, as between state and state of the United States, so between nations there is need of an organization which will meet

the two fundamental conditions of international peace. Stability, security in present possessions, the *status quo* and territorial guarantees, for all their unhappy connotations, must be for the time being maintained against violence of any kind. Once admit the principle that each nation may be the judge in its own case and may take forthwith the law into its own hands, and the door is open to wars which will with difficulty be confined to the original parties. But while stability is being maintained, equally determined efforts must be made to bring about the changes that are needed to correct the injustices connected with the *status quo*. It is here that the existing organization of the nations has proved deficient. It was perhaps but natural that at the close of a war that had shaken the community of nations to its foundations, the primary purpose of the League of Nations should have been to put an end to violence, to consolidate the new order set up by the treaties of peace, to offer mutual guarantees of territorial integrity, to put stability before justice. Hence the emphasis laid by President Wilson upon Article 10 of the Covenant as the corner-stone of the League. Hence the provisions for arbitration and conciliation and the sanctions to support them, but no clear indication of an intention to correct injustices as the condition of a permanent peace. If Article 19 of the Covenant looked to the possible correction of situations whose continuance might endanger the peace of the world, it did so in the form of advice from the League to its individual members,—advice which was not supported by the sanctions attached to the maintenance of the *status quo*.

Recent critics of the League system seem to suggest that those who support it have accepted the *status quo* as final and that they are primarily interested in retaining the territorial adjustments of the treaties of 1919, the revision of which the critics believe to be an immediate condition of a just peace. At the same time the supporters of the League are supposed to be ready to go to war for their principles almost at the drop of the hat. These assumptions are certainly not borne out by the evidence. Within the official circle of delegates to the Assembly of the League there have been numerous warnings of the need of changes in the international relations of particular states, while the writings of jurists who have given their general adherence to the principles for which the League stands constantly reflect the importance of supplementing the existing functions of the League with greater activity in the direction of the readjustments needed to make law reflect justice. If it can be said that the League has submitted to exasperating delays in the correction of present wrongs, it may also be said that in most cases this has been due not so much to indifference to a particular wrong as to the absence of ways and means to correct it other than to permit the aggrieved party to resort to force, a procedure likely to produce new wrongs in turn.

In the presence of the forces seeking stability and those seeking justice, in the face of the grave problems in Europe, Asia and South America, is neutrality a constructive rôle for a great nation to play? It is obvious that a powerful state, such as the United States or Great Britain, is free to retire

to the side-lines and witness the outbreak of war without any greater personal concern than a determination to maintain the traditional rights of a neutral state to trade with either or both belligerents subject to the rules of contraband and blockade. Apparently it is the belief of certain advocates of neutrality that the assertion of those traditional rights would limit the area of the conflict and encourage mediation on the part of third states. It would seem to be their conviction that there are no dangers in this attitude of neutrality. If in the past neutrals have had difficulty in maintaining their position of neutrality, if they have on more than one occasion been forced to enter the war which they had done nothing to prevent, that apparently was an accident, not a normal consequence of resistance to the interference of belligerents with neutral trade with the enemy. Why, after all, should a nation of super-morality concern itself with the origin of the wars of other states or with the results of those wars except to make it clear that if those states choose to go to war they must not disturb the commerce of the neutral more than the traditional rules permit? Possibly the neutral may try to mediate between the belligerents before the conflict breaks out. But his mediation being rejected, his duty to the international community is done and his duty to his own national interests now prevails.

It would seem that the advocates of this neo-neutrality have definitely rejected the principle of the collective responsibility of the whole community for the protection of its members, and that they see in that principle, as laid down in the Covenant of the League of Nations, only the provocation of new wars, wars which would have the disadvantage of not being formally declared and which might possibly seek to restrict the rights that were enjoyed by neutrals in the old wars of the declared kind. Apparently in the mind of these jurists it is not the attitude of neutrality, the policy of international *laissez faire* in regard to war, that constitutes international anarchy; it is the attempt of the community of nations as a whole to use its collective influence, and it may be to use coöperative measures of an economic or possibly military character, that is anarchical. It being impossible, as the neo-neutrals see it, to define an "aggressor," to distinguish between the outlaw and the peaceful nation, there is apparently nothing to do but let the outlaw have his way and in the meantime remain on such friendly terms with him as to make him amenable to reason should he find that his war is not going as well as he hoped it would.

It must be confessed that the advocates of the new isolation have on their side the argument that the principle of collective responsibility embodied in the Covenant of the League began its career under inauspicious circumstances. There is little doubt but that certain of the Powers who appeared as its champions were more intent upon stability, upon retaining possession of the fruits of victory, than they were upon readjusting international conditions to meet the demands of justice. The failures of the League can thus, if the critic wishes, be read as failures of principle, not as failures of leading members of

the League to live up to principle. But this merely raises the question in the minds of those who uphold the principle, as to what principles of law the neo-neutrals would accept if the present League should disappear and a new organization had to be created. Would their new organization go beyond that of the community of nations in 1914? Would it include an agreement of the nations to consult together in time of danger to the general peace? Would it provide for collective mediation by the organization in the event of a threatened outbreak of war? Would it, if mediation were rejected, acquiesce in the result and leave its individual members to assert the old law of neutrality? Most important of all, would the new organization contain any provisions for bringing collective pressure upon states to readjust their national claims in the interest of justice?

In respect to these fundamental questions the advocates of neo-neutrality are not only vague, but they are not in agreement among themselves. One would not do this, another would not do that. All are opposed to "war" on behalf of the *status quo;* but in that respect they do not differ from the leading members of the League of Nations in spite of the provisions of Article 16. Arms embargoes come in for fairly general criticism by the neutrality advocates, although it is held by one of their number that if the aggressor in a conflict could be determined by judicial process, then measures of economic pressure against him would not be out of order. What of the doctrine of the non-recognition of territorial conquests? This, it would seem, is dangerous, as involving neutrals too closely in the conflict and as raising the question whether certain acquisitions of territory in past centuries might not come up for reconsideration. On the positive side, what of "consultative pacts," agreements to take counsel in advance of the outbreak of war? These, however, are all the more dangerous because to the unwary they seem to involve so little danger. If you consult you might be led to take action as a result of the consultation, and this might take away your control over your own destiny. Nevertheless, some opponents of international "commitments" are willing to see the League of Nations reduced to a "forum of discussion and negotiation," at which statesmen could meet regularly. It is not clear, however, how a forum of discussion would be any the less dangerous than a "consultative pact," since there would be the same tendency for discussion to lead to action as for consultation to lead to action. The dilemma is undoubtedly embarrassing to the neo-neutrals. They, therefore, show a tendency to appeal to nations to be good, and to insist that until there is a change of heart not much can be done. This appeal is so obviously sound and compelling as to distract attention from the constructive problem of organization, although it is weakened somewhat by the accompanying assurance that human nature can not change.

Whether or not the principle of collective responsibility as it has been applied by the League of Nations has failed thus far to reconcile stability and justice in international relations, the present writer submits that the principle

itself is the only one upon which law between nations can ever be made effective. It is the principle that the community as a whole must accept the obligation to maintain the general peace by prohibiting individual violence and substituting its own decisions for the old right of individual states to be the judges in their own case. It may be that for the time measures of collective force, or even of collective economic action, are inadvisable; it may be that it is inexpedient for the present to do more than rely upon public opinion as the sanction of decisions; it may be that in view of the divisions of opinion among the leading Powers the other members of the community of nations may find it necessary to see wrongdoing prevail for want of means to prevent it. But the principle itself must be maintained intact. The community as a whole must assert its claim to be the judge of disputes and must seek in its collective character the measures for correcting wrongs. It is unfortunate that those who now insist so strenuously upon neutrality should have gone so far at times as to repudiate the principle upon which an adequate organization of the nations must necessarily rest. It will not do to restore the law of 1914 because we have thus far failed to put the new law of nations into effective operation.

C. G. Fenwick

SALM v. FRAZIER: DIPLOMATIC IMMUNITY

Reappearance of contentions in regard to the non-exemption of ambassadors from jurisdiction of receiving states is reminiscent of the sixteenth and seventeenth centuries. In those days there were many volumes of controversial literature upon the rights over ambassadors as to both criminal and civil jurisdiction. The writers usually refer to Roman law principles, as does Gentilis in 1585, when he says, "if the time for bringing a suit is about to expire, a judgment may, after investigation, be given against an ambassador, which shall provide for legal or some similar procedure, on the basis of which action may subsequently be taken against the ambassador, where and when it is possible," but the problem then became one of "where and when it is possible" as well as what are the liabilities of the diplomatic agent.[1]

A case brought in the French courts in 1931–33 by Elrich Salm, "landed proprietor," Austria, on account of a lease by Arthur Frazier of premises for the American Embassy in Vienna, and in order to execute in France a judgment against Frazier, given by the Austrian courts in 1923–24, is a modern illustration of some of the early controversies.

The Civil Court of First Instance of Les Andelys, France, on December 11, 1931, after reciting that judgments were given against Frazier in Vienna and that France is asked to prosecute these judgments, decides that the French court has the right to examine the validity of the Austrian judgment. Considering that the suit brought on account of the lease of the embassy building

[1] On Embassies, Chap. XVI.