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Neutralization of Belgium and the Doctrine of Kriegsraison

Jesse S. Reeves
University of Michigan

THE NEUTRALIZATION OF BELGIUM AND THE DOCTRINE OF KRIEGSRAISON.

ANYTHING which Professor Niemeyer has to say in the field of International Law is deserving of serious attention. Under his editorial supervision the ZEITSCHRIFT INTERNATIONALES RECHT has become a valuable factor in the development of International Law in Germany. The foregoing article, which recently appeared in the JURISTISCHE WOCHENSCHRIFT, has been translated with his consent with a view to its publication in these pages. The leading thought of the article is to arrive at a justification of Germany's failure to observe the Treaty of London of 1839 from the point of view of International Law. He rests his case (1) upon a legal conception: that of *Kriegsraison,* to which the translator has not very aptly given as an English equivalent the phrase "the necessity of war," and (2) upon a question of fact. Let us consider these two elements in order.

I. It is unnecessary to go into the old discussion as to whether International Law is law, or as AUSTIN put it, positive international morality. The traditionally positive conception of law in England and America has produced no word for law as that term is used in the continental languages: *Jus, Recht, Droit, Diritto,* and *Derecho.* That International Law is *Recht* (*jus*) no one so far as I am aware has denied. It is the Austinian idea carried to its logical conclusion which denies to *Recht* a truly legal character. Only if a narrow view of law is maintained is the sanction of law necessary, if sanction is used to denote the determinate power which enforces the law. Such a sanction International Law manifestly does not and by its nature cannot ever have. If, however, the sanction of law in the sense of *Recht* (*jus*) exists, it must be found in the concord of the norms of *Recht* (*jus*) with the standards of conduct and *Sittlichkeit* which are recognized by society. Such standards exist within the state and transcend the boundaries of states. This idea was never better expressed than by the framers of the Declaration of Independence who sought to justify their act as "the decent respect to the opinions of mankind" required. International public opinion is but another name of this decent respect of mankind. In the long run, putting away the limitations of the "here and now," that state will suffer which in its international acts refuses to accord its acts with those norms of international conduct which the decent respect of mankind justifies. This suffering may not be material, it may not mean loss of territory, or the payments of war indemnities, but it

will mean loss of prestige, of reputation. A man frequently dreads the loss of reputation which the disgrace of public intoxication entails much more than he fears the payment of a fine, the penalty for the petty misdemeanor. The ultimate sanction of the penal laws against drunkenness is not the fine but the social punishment. President WILSON in his response to the Belgian Commission set forth the sanction of International Law very impressively when he said, "Presently, I pray God very soon, this war will be over. The day of accounting will then come when I take it for granted the nations of Europe will assemble to determine a settlement. Where wrongs have been committed, their consequences and the relative responsibility involved will be assessed. The nations of the world have fortunately by agreement made a plan for such a reckoning and settlement. *What such a plan cannot compass, the opinion of mankind, the final arbiter in all such matters, will supply.*" The sanction of International Law rests then not upon force; great armies and navies may determine boundaries and assess fines, penalties, and indemnities but they cannot ultimately arrest the judgment which the ideals and the sentiments of mankind dictate.

Where then does *Kriegsraison* appear in the scheme of International Law? It is observable that we have no English word which exactly expresses this conception. I am glad there is none. The doctrine I believe was first systematically propounded by the late Professor LUEDER in HOLZENDORFF'S HANDBUCH DES VOELKERRECHTS. He opposes *Kriegsraison* to *Kriegsmanier*. The latter are the rules of military conduct toward the enemy usually observed in war; while *Kriegsraison* includes the exception to such usual rules which the commander makes because of necessity. Professor LUEDER maintained that International Law recognized such exceptions. After all is not this distinction a negation of law? Instead of relying upon the dictum of GROTIUS, *"Omnia licere in bello quae necessaria sunt ad finem belli"* which Professor NIEMEYER quotes with approval, one might substitute, not *inter arma silent leges* but *inter arma silent jus et caritas et misericordia et autem fides.* For it is the extreme statement of selfhelp, that *Faust-recht,* upon which nations rely in the state of nature, of *bellum omnium contra omnes,* HOBBES'S description of which is a classic. The doctrine of *Kriegsraison* gives to the belligerent the right to decide not only when the necessity exists, but what the things are which are necessary *ad finem belli.* It is not the purpose of law to enable the strong to wreak his will but to protect the weak against the strong. Until this purpose is realized International Law cannot be law in full development and action but only an approximation to it. The doctrine of

the equality of states sets forth the ideal. Can it be said that International Law recognizes the doctrine of *Kriegsraison?* Not only do the customary rules of war deny it but the Declaration of Paris, the Conventions of the Hague Conferences and all other international agreements bearing upon land and sea warfare proceed upon another theory. I am not here seeking to praise or to justify the conventions of the Hague Conferences which attempted to regulate the rules of warfare. They have been tried and they are largely worthless. Why? Because in them all is the work of the military and naval strategist who, try as he may, is less interested in International Law than in the way particular rules will affect the success of his professional plans. The strategist is at heart a disciple of CLAUSEWITZ, not of GROTIUS or VATTEL. A declaration of war, or an *ultimatum motivée* coupled with a conditional declaration, was agreed upon as the proper method of beginning war. Yet on the ground of strategy it was impossible to introduce a period before the actual beginning of hostilities so that a sober second thought might be permitted. "Strike first and strike hardest" was the principle which overrode all provisions for a deliberate appeal to reason before the final recourse to hostilities. The conventions forbidding the dropping of projectiles from balloons and limiting the use of submarine mines were so disfigured for the same reasons of strategy that they would be ridiculous were they not diabolic.

So far as I am aware no proponent of *Kriegsraison* has widened the doctrine so as to include exceptions to any but the customary rules of warfare. Professor NIEMEYER'S argument would have rendered null all the Hague Conventions were they otherwise unobjectionable. A narrow view of sanction might permit *Kriegsraison*: reprisals would be looked for. But a belligerent does not refrain from poisoning wells or from refusing quarter because of the danger of reprisals. Since Greek times he has had some regard for the decent respect of mankind. Not only this: a state does not resort to these measures because by doing so it would thereby violate its own standards of civilization, because in short it does not want to do so. As the Preamble to the Fourth Hague Convention of 1907 put it, "Populations and belligerents remain under the rule of the principles of the law of nations, as they result from usages established by the civilized nations, the laws of humanity and the requirements of the public conscience."

Upon the same ground of *Kriegsraison* Professor NIEMEYER justifies the non-observance of the Treaty of London of 1839 by which the neutralization and independence of Belgium were recognized and guaranteed by Great Britain, France, Austria, Russia, and

Prussia. It is interesting to note that he does not justify Germany's action upon the ground of state succession. Prussia as a signatory was merged into the German Empire and thereby Prussian treaties were invalidated, according to certain apologists—a doctrine upon which there is an interesting commentary in *Terlinden* v. *Ames* (184 U.S. 270). Nor does Professor NIEMEYER explain away the obligations of the treaty by the *rebus sic stantibus* doctrine. Instead he says that the neutralization of Belgium had for a long time no valid existence. *"Belgiens Neutralität galt schon längst nicht mehr."*

II. And now leaving *Kriegsraison* to "lie as a secret worm" Professor NIEMEYER proceeds to a question of fact. What is it? "Everyone knew that as well for France as for Germany the taking of Belgium for the purpose of attacking the other country was *necessarium ad finem belli.*" Certainly BERNHARDI took it for granted that Germany would invade France through Belgium, but the reports of conversations between the German minister at Brussels and the Belgian foreign minister do not lead us to think that this was quite common knowledge. So far from this being the case it was only in a very confidential communication as late as August 2, 1914, that Herr VON BELOW-SALESKE made it known to the Belgian government that "reliable information had been received by the German government to the effect that French forces intend to move on the line of the Meuse by Givet and Namur. This information leaves no doubt as to the intention of France to march through Belgian territory against Germany." So far there was no overt act. Some hours later, we are informed, Herr VON BELOW-SALESKE told the Belgian foreign minister that France had prior to a declaration of war thrown bombs, not into Belgium, but into German territory—"acts which were contrary to International Law and calculated to lead to the supposition that other acts contrary to International Law would be committed by France." Even yet no overt acts against Belgian neutrality.

Professor NIEMEYER says that the neutrality of Belgium was made impossible by the Belgian-French, French-English, and Belgian-English understandings and military measures that preceded the German 'invasion.' Why then were the *status quo* of Belgium, and Germany's duties to it, distinctly recognized April 29, 1913, in the Reichstag by both the Secretary of State and the Minister of War? Why so late as July 31, 1914, did Herr VON BELOW-SALESKE state to the Belgian Minister of Foreign Affairs that he was certain that the sentiments expressed in the Reichstag had not changed? Much has been made of the alleged discovery after the invasion of Belgium of papers indicating the existence of an agreement between

Belgium and Great Britain for the protection of Belgium against Germany. The text of any such agreement has not been produced and Great Britain has officially denied that such existed. The despatches of Baron GREINDL, the Belgian minister at Berlin, have been discovered, it is said, since the German occupation of Brussels. These, it is claimed, disclose the existence of such an agreement. An examination of the portions of these despatches as published shows that Baron GREINDL was criticizing the Belgian policy of defense as shortsighted because it contemplated the possibility of invasion by Germany only and not of invasion by France and Great Britain. If any understanding or agreement existed between Belgium and Great Britain or between France and Belgium it was not sufficiently a matter of notoriety for Baron GREINDL to have known of it. It is significant that the suggestion that Belgium fortify against France and Great Britain came from Berlin. Again, if these understandings were so notorious, why had not Germany complained of them as in violation of the Treaty of 1839? Why did not the German chancellor use them to justify Germany's disregard of the treaty? To say that on the 3rd of August, 1914, Belgian neutralization, by which one means the Treaty of 1839, was no longer valid is an assumption the proof of which is not yet forthcoming. Were these understandings in being or had Germany known of them (and it is surely no credit to the German foreign office not to have been aware of what everyone else, according to Professor NIEMEYER, so well knew), there would be no need of any doctrine of *Kriegsraison* to justify the German invasion of Belgium. Had Belgium made alliance with France and Great Britain against Germany as is intimated, though not distinctly stated, Belgium would rightly have been considered on August 3, 1914, as belligerent and not as a neutral territory, for the spirit and the letter of the Treaty of 1839 would then have been violated as well by Belgium as by Great Britain and France.

But why labor *Kriegsraison* as the justification for the invasion of Belgium? The statement of the German Chancellor to the Reichstag has at least the merit of frankness and it is free from casuistry. "Gentlemen, we are now in a state of necessity and necessity knows no law. Our troops have occupied Luxembourg and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of International Law. * * * Anybody who is threatened as we are threatened and is fighting for his highest possessions can have only one thought: how he is to hack his way through (*Wie er sich durchhaut*)." On the other hand Belgium was not a passive factor under the Treaty of 1839. She was affirma-

tively and positively bound "to observe neutrality towards all other states." In accordance with this stipulation she refused to allow German troops to cross her territory, though she was assured of the protection of Germany if permission were given and of ultimate payment for all damage done. Belgium stood by the Treaty. Germany did not. And what is the result?

JESSE S. REEVES.

University of Michigan.