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INTERNATIONAL LAW

**CHIEFLY AS INTERPRETED AND
APPLIED BY THE UNITED STATES**

SECOND REVISED EDITION



VOLUME THREE

INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

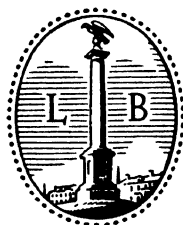
BY

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In Three Volumes

VOLUME THREE



Second Revised Edition

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PART VII

Differences between States. War

TITLE A

§ 596. **Preliminary.** Until the fir tree and the myrtle tree supplant the thorn and the brier,¹ wars may be expected to recur. Despite the growth of opinion pervading the international society that differences between States should be settled by amicable means and, whenever feasible, by judicial process, and notwithstanding the formal renunciation by most States of war as an instrument of national policy,² the opinion still prevails in many quarters that a controversy may come into being for the adjustment of which the parties will probably rely upon the sword, regarding recourse to war as a reasonable and perhaps necessary or honorable procedure. It is this fact, rather than the cause of it, which demands consideration. As long as the most influential States take cognizance of it and formulate their military and naval plans in the light of it, the laws of war retain more than academic interest. When States are locked together in armed conflict they are not shorn of obligations toward each other as enemies; and in relation to States which are non-participants in the conflict they find themselves under special obligations which the outbreak of war brings into being.

If States, or any substantial number of them, still contemplate, however rarely, recourse to war, the principles which are deemed to regulate their conduct as belligerents must still be regarded as constituting a vital part of international law. The study of those which have been applied since the time of the American Revolution may appear to disclose a persistent tendency on the part of belligerents to shape their conduct according to their own needs rather than the requirements of international justice, and unless resisted by some strong external power, to interpret those requirements loosely and unfairly. Appeals to military necessity may seem to render abortive the operation of duties of restraint. The measures and instrumentalities productive of human suffering on a vast scale, and which are callously accepted as normal incidents of belligerent conduct, may produce grave doubt whether any system respectful of the claims of justice prevails in fact as between enemies. Possibly the very examination of what the law of nations is acknowledged to permit may breed fresh intolerance of the claim of any aggrieved State to possess the right to make war upon its adversary save possibly on grounds of self-defense.

§ 596.¹ Isaiah, LV, 13. Perhaps the fir tree and the myrtle tree may sometime do that very thing.

² See Treaty for the Renunciation of War as an Instrument of National Policy, of Aug. 27, 1928, U. S. Treaty Vol. IV, 5130.

Every reason emphasizes the importance of observing to what extent, in the light of American opinion, international law is deemed to restrain belligerent conduct, and how far the principles ascribed to that law are in fact obscured or violated by rules supposedly declaratory of them. At a time when the United States, although a non-belligerent, is intervening in an existing war to a degree which suggests that it may be forced in the near future to become a belligerent, there is thrust upon it the need of close examination of the rights and obligations which the attainment of such a status may entail.

World War I has taught civilization more than one lesson. In every continent there has been perceived the necessity of a general understanding not only conducive to peace and unprovocative of war, but also designed to regulate the course of armed conflicts when they unhappily arise, by defining anew the nature of the burdens to be assumed by every belligerent and the principles to which its conduct should conform. There is needed not only precise arrangement, but also a solid basis for the continuous application of conventional restraints notwithstanding the entry into a conflict of a non-contracting State. The weakness in this regard of certain of the Hague Conventions of 1899 and 1907 was manifest in World War I; for they did not generally purport to be applicable even as among the contracting parties, save when all of the belligerents had formally accepted the particular agreements. Thus they ceased to be binding upon the participants in that conflict whenever a non-contracting State joined one of the belligerents. This circumstance served at times to render inoperative legal obligations previously assumed, in so far as they were due to specific undertakings.³ It is not understood that the Department of State ever deemed the United States to be under a legal duty to follow a course of conduct ordained by a Hague Convention regulating the conduct of war, when the entry into the conflict of a non-contracting belligerent technically suspended the operation of the contractual obligation, unless the rule so announced was conceived to be merely declaratory of what had been generally accepted by the members of the international society.

§ 596A. Efforts to Restrict Freedom to Embark Upon War. The Briand-Kellogg Pact. The extent of the freedom of States to embark upon war, and by so doing to escape with respect to others that became their enemies numerous burdens which in seasons of peace the law of nations seemingly imposed, has long and increasingly shocked the mind of civilization which has liked to assume that obligations as between State and State were not to be rendered nugatory by the mere assumption of belligerency by an aggrieved power.¹

³ Thus Liberia, which, for example, declared war against Germany Aug. 4, 1917 (see, *Declarations of War 1914-1918*, Department of State, confidential document, 1919, 50), was not a party to the Hague Convention of 1899, with respect to the *Laws and Customs of War on Land*. Inasmuch as the provisions of the Hague Conventions dealing with various phases of belligerent conduct were oftentimes regarded as declaratory of what the law of nations prescribed, they were frequently cited by the opposing states as though they furnished correct tests of the propriety of national conduct. See in this connection, E. Wambaugh in *Harv. Law. Rev.*, XXXIV, 693, 694-695; also *Naval Instructions Governing Maritime Warfare*, of June 30, 1917; *War Dept. Rules of Land Warfare*, 1940.

§ 596A. ¹ In reference to practices that continued well into the present century Dr. Lauterpacht found it possible, however, to declare in 1940:

States have become increasingly aware of the fact that a law governing inter-State relationships is irreconcilable with freedom to evade it, and that if a particular member of the international society may at will and without impropriety assume a position in relation to another that enables the former to disregard what the law prescribes, there is an incongruity which betokens the absence of a rule of conduct in a situation where one has been supposed to exist. It has become equally clear, however, that it is not necessarily incompatible with the existence of a rule of law for a State to seek and offer solid excuses for disregarding its precepts as being inapplicable in the situation confronting it. Practical applications are seen in a variety of cases.² A State which embarks upon war is not to be expected to admit that in so doing its conduct is without justification. Even shameless action, however ill-disguised in diplomatic pronouncements, is likely to be defended on grounds of self-defense. Nevertheless, it needs also to be borne in mind that situations may arise where the requirements of such defense afford solid excuse for the commission of belligerent acts, and that when they do the invocation of such a plea is entitled to respect.

What, therefore, the international society has long needed is a common understanding productive of a common sense of duty to test the soundness of excuses for war-making, and thereby simplify the task of determining whether those offered in a particular case are to be deemed legitimate. This need indicates no inherent weakness in the law of nations as such, but merely the absence of concerted effort by the international society to project before its membership a vivid picture of what is in fact war-producing and also of what is not to be deemed to be a requisite excuse for embarking upon war. This dual feature of the problem which involves the taking cognizance of the propensities of States under certain conditions that may confront them, and also of the legal value of excuses proffered in defense of conduct when, under the influence of those propensities, they proceed to unleash themselves and embark upon armed conflict, has complicated the solution of it. Thus far there has been none.

Some steps which, however faltering and indirect, States have taken with a view to maintaining the continuity of amicable relationships deserve attention. It has been perceived that a general renunciation of war would, at least in theory, eliminate a condition that might otherwise in fact be utilized to support

"As an instrument for the vindication of the law, war signified a legally inadmissible identification of victorious power, wielded by the interested State, with legal right. As a means of changing the law, it constituted a radical break in the continuity of the system of International Law and was analogous to an authorization of a revolution in the very constitution of a State. International Law regulated in time of peace the relations of States on the basis of scrupulous respect for the independence and dignity of each of them. It made the limited invasion of the sphere of interests of States through the institution of reprisals dependent upon a number of more or less clearly defined conditions. But by the exercise of a purely discretionary right of declaring war, a State could with one stroke release itself, as against the attacked member of the society of States, from all the obligations of International Law save those appertaining to the conduct of war. It is not surprising that, faced with these difficulties, some writers preferred to regard war not as an institution recognized by International Law, but as a condition or fact found and regulated by it." (6 ed. of Oppenheim, II, § 52g, p. 146.)

² See Intervention, Self-Defense, *supra*, § 70; also The Transfer of Destroyers to the United Kingdom in 1940, *infra*, § 848A.

the claim of a belligerent to freedom from the burdens of particular obligations towards its enemy or towards States that were neutral to the conflict. Such renunciation would thus mark the removal of an opportunity or temptation to lay claim to freedom. In this way it would seemingly lessen occasions when a disaffected State might endeavor to free itself from what it conceived to be harsh or unreasonable or inconvenient restrictions, and also strengthen the habit of deference for what the law might normally be deemed to require. In practice, however, States have not as yet reached the point where they are prepared to agree to abolish war or to give up the right to determine whether recourse thereto may not, under the circumstances confronting them, be excusable. Nor are they disposed to refrain from conduct that encourages armed opposition and is inherently war-producing. Instances are seen when territory is exacted as the price of peace from a foe that is compelled to accept a proffered treaty, or when an independent State is forced by another to become its ward and accept demotion in rank. The minimizing of occasions or excuses for war is, therefore, not to be anticipated as long as contracting parties remain unwilling to give up or to agree to give up war-producing activities that project themselves into the life of the international society in a variety of forms. Yet such sacrifices would serve to establish a stronger barrier for peace than any multi-partite treaty which, however renunciatory of the use of war, leaves the parties free to pursue policies notoriously productive of conflict. The inexorable price of peace is the abstention from conduct of such a character.

States have, however, within recent years proceeded to embark upon a war-renouncing treaty policy, rather than upon one that was essentially sacrificial of war-inspiring activities. The Briand-Kellogg Pact signed on August 27, 1928, is illustrative.³ In the preamble, after acknowledging a deep sensibility of their solemn duty to promote the welfare of mankind, the parties announce that

Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

³ U S Treaty Vol. IV, 5130

See Treaty for the Renunciation of War (embracing text of treaty, notes exchanged, instruments of ratification, and of adherence and other papers), Dept. of State Publication, No. 468, Washington, 1933; General Pact for the Renunciation of War, Hearings before the Senate Committee on Foreign Relations, 70th Cong., 2 Sess., Dec 7 and 11, 1928, Part I; Report of Mr. Borah from the Senate Committee on Foreign Relations, *Cong. Rec.*, LXX, Part 2, 1730, Jan. 15, 1929.

See also, D. H. Miller, *The Peace Pact of Paris*, New York, 1928; J. T. Shotwell, *War as an Instrument of National Policy and Its Renunciation in the Pact of Paris*, New York, 1929; A. N. Mandelstam, *L'Interprétation du pacte Briand-Kellogg par les gouvernements et les parlements des États signataires*, Paris, 1934; Q. Wright, "The Meaning of the Pact of Paris," *Am. J.*, XXVII, 39; H. L. Stimson, "The Pact of Paris: Three Years of Development," *Foreign Affairs, Special Supp.*, XI, No. 1; E. M. Borchard, "The Multilateral Treaty for the Renunciation of War," *Am. J.*, XXIII, 116; Report of the Thirty-Eighth Conference, International Law Association, Budapest, 1934, embracing a report on "The Effect of the Briand-Kellogg Pact of Paris on International Law"; Sir John Fischer Williams, "Recent Interpretations of the Briand-Kellogg Pact," *International Affairs*, XIV, 346; D. P. Myers, "Origin and Conclusion of the Paris Pact," *World Peace Foundation Pamphlets*, XII, No. 2.

See also Lauterpacht's 6th ed. of Oppenheim, II, §§ 52g-52q, and §§ 292h-292i, with bibliography accompanying the several sections.

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;⁴

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

they have agreed to the following articles:

Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.⁵

The bare text does not, however, fully disclose the design of the parties. Examination of the preparatory work reveals what is equivalent to an additional explanatory article, in a definite acknowledgment that the agreement should not curtail the freedom of the parties to have recourse to defensive measures.⁶ These might obviously be deemed to call for non-pacific acts obstructive of amicable adjustments and provocative, or even productive, of war. This understanding of the contractual obligation as set forth in the text served to encourage numerous States to accept the arrangement, and also to render highly difficult the task of proving a breach thereof. The agreement contained no provision requiring a

⁴ Conversely, in the American note of June 23, 1928, cited below, it was declared: "It is no less evident that resort to war in violation of the proposed treaty by one of the parties thereto would release the other parties from their obligations under the treaty towards the belligerent State."

⁵ Art. III pertains to signature, ratification, deposit of instruments of ratification, time of taking effect, and other kindred matters.

⁶ See, Note of the Government of the United States to the Governments of Belgium, Czechoslovakia, France, Germany, Great Britain, Irish Free State, Italy, Japan, and Poland, delivered June 23, 1928, contained in Treaty for the Renunciation of War, Dept. of State Publication, No. 468, Washington, 1933, 56; also British Note to the American Ambassador at London, May 19, 1928, *id.*, 43.

See, also, statement by Mr. Hull, Secy. of State, released to the press August 29, 1940, Dept. of State Bulletin, Aug. 31, 1940, 175.

It should be observed that Secretary Kellogg was far from admitting that the common understandings of the contracting parties were at variance with any construction which the text of the treaty on its face demanded. Nor did he admit that the text as it stood called for an additional or supplementary article reflecting in terms the common design of the contracting parties. See Statement of Secy. Kellogg before the Senate Committee on Foreign Relations, Dec. 7, 1928, Senate Committee on Foreign Relations, Hearings on General Pact for the Renunciation of War, 70th Cong., 2 Sess., 8.

See D. H. Miller, *The Peace Pact of Paris, 1928*, 96; A. N. Mandelstam, *L'Interprétation du pacte Briand-Kellogg par les gouvernements et les parlements des États signataires, 1934*, 157.

See Reservations to Multi-partite Agreements, *supra*, § 519A.

party which might resort to non-amicable measures, on grounds of self-defense, to establish before any particular body the soundness of its pretensions. Nor was there any intimation that a party which embarked upon war in violation of the terms of the treaty thereby automatically released other parties from their normal obligations towards it as neutrals, so long as they elected to retain a non-belligerent status.⁷

Whether the declaration condemnatory of recourse to war for the solution of international controversies and renunciatory of it as an instrument of national policy is to be of greater influence upon the life of the international society than the acknowledgment of freedom to embark upon armed conflict whenever defensive requirements appear so to demand still remains a matter of conjecture. The lofty purpose revealed in the declaration is at least choked by the thorns of incongruous and inconsistent policies which those parties are unwilling to relinquish. In the presence of such interference one can not speak confidently of the value as a deterrent from conflict of the admitted obligation resting upon a disaffected party not to embark upon war capriciously or without reasonable grounds for such action. It is, of course, to be hoped that the Pact may become a deterrent of conflict by inculcating in the several parties a fresh sense of obligation to establish that recourse to war must be invariably a legitimate response to unimpeachable defensive needs. Nevertheless, as has been observed, a war-renouncing treaty policy must be regarded as a weak substitute for a common effort by the members of the international society to abstain from war-producing conduct. Therein is to be found a stronger barrier for peace.

The United States has not hesitated to remind parties to the Briand-Kellogg Pact, when at variance with each other, of its applicability in the situations confronting them.⁸ In his appeal for peace, of September 26, 1938, which President

⁷ Declares Dr. Lauterpacht in his 6th edition of Oppenheim: "In particular, the illegality of the war undertaken in breach of the provisions of the Pact does not automatically deprive the guilty belligerent of the rights of warfare, including those resulting from the law of neutrality." (P. 157.) Subsequently he adds: "For war waged in violation of the Treaty is nevertheless war conferring upon the guilty and innocent belligerents alike all the rights flowing from the accepted law of war and neutrality." (P. 512.) He further declares: "No authorisation to disregard the duties of neutral impartiality against the State breaking the Treaty can be deduced from the passage in the Preamble which lays down that 'any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.' The benefits furnished by the Treaty are immunity from war waged as an instrument of national policy, not a guarantee of the observance of rules of International Law, including the rules of neutrality." (P. 513, footnote 1.)

Cf. Q. Wright, "The Meaning of the Pact of Paris," *Am. J.*, XXVII, 39, 59; same writer, *id.*, XXXIV, 680-689.

⁸ See Statement of Mr. Stimson, Secy. of State, Dec. 2, 1929, embracing text of communication addressed to the Governments of China and Russia in relation to the conflict between them, and his statement, Dec. 4, 1929, Dept. of State Press Releases, Dec. 7, 1929. *Cf.* Russian response, Dec. 4, 1929, Documents on International Affairs, 1929, edited by J. W. Wheeler-Bennett, 1930, 278.

On receiving official information through the French Embassy at Washington, "that Great Britain, France, Italy, Spain, and Germany had sent identic notes to Japan and China calling to their attention their obligations under the Pact of Paris, the American Government has also sent identic notes to these two countries along the same general line." (Dept. of State Press Releases, Oct. 24, 1931, 352.) For the text of the American note, which was dated Oct. 20, 1931, see Senate Doc. 55, 72nd Cong., 1 Sess., 20.

Also, identic note from the American Government to the Chinese and Japanese Governments, Jan. 7, 1932, with respect to the conflict then existing between China and Japan,

Roosevelt directed to the President of Czechoslovakia and the Chancellor of Germany, and through the Secretary of State to the Prime Ministers of Great Britain and France, he said: "It is imperative that peoples everywhere recall that every civilized nation of the world voluntarily assumed the solemn obligations of the Kellogg-Briand Pact of 1928 to solve controversies only by pacific methods."⁹ The American Government has on occasion intimated what it conceived to be the obligations of a foreign State under the provisions of the Pact;¹⁰ and it has gone so far as to declare that the action of a particular State was contrary to the provisions thereof.¹¹

The arrangement appears to have received the definite approval of the Assembly of the League of Nations.¹² At the Inter-American Conference for the Maintenance of Peace, assembled at Buenos Aires in December, 1936, the United States encouraged the conclusion of conventions designed to reaffirm respect for obligations accepted through the Pact.¹³ Nevertheless, during the interval since its consummation, the agreement has not proved to be an effective deterrent of armed conflict. That between China and Japan in 1931-1932, and again in 1937 and thereafter, together with the war between Ethiopia and Italy in 1935-1936, are illustrative of the futility of the plan employed by more than sixty contracting States in order to remove war from the horizon.¹⁴ The European War initiated in 1939, was further illustrative of that futility.¹⁵

Dept. of State Press Releases, Jan. 9, 1932, 41; proposals to those Governments, Feb. 2, 1932, *id.*, Feb. 6, 1932, 110-111. See, in this connection, statement of Mr. Gilbert, American Consul at Geneva, at a meeting of the Council of the League of Nations, Oct. 16, 1931, *id.*, Oct. 17, 1931, 298.

See statement by Mr. Hull, Secy. of State, Sept. 13, 1935, concerning communication addressed to the Emperor of Ethiopia, in July, 1935, in relation to the existing controversy between Ethiopia and Italy. Dept. of State Press Releases, Sept. 14, 1935, 194.

In a statement issued by Mr. Hull, Secy. of State, Aug. 23, 1937, in relation to the existing crisis in the Far East, he adverted to the principles set forth by him in a statement of July 16, 1937, as embracing those embodied in many treaties including the Briand-Kellogg Pact. *New York Times*, Aug. 24, 1937, p. 3.

⁹ Dept. of State Press Releases, Oct. 1, 1938, 219, 220.

¹⁰ See Mr. Stimson, Secy. of State, to the Minister of Foreign Affairs of Peru, Jan. 25, 1933, in regard to the solution of the controversy between Colombia and Peru respecting Leticia, Dept. of State Press Releases, Jan. 28, 1933, 66, 69.

¹¹ Statement by Dept. of State, Oct. 6, 1937, regarding the action of Japan in relation to the Sino-Japanese situation, Dept. of State Press Releases, Oct. 9, 1937, 284.

¹² See Resolution of the Assembly of the League of Nations, March 11, 1932, *League of Nations, Official Journal, Special Supplement*, No. 101, 87; Report adopted by the Assembly, Feb. 24, 1933, *League of Nations, Official Journal, Special Supplement*, No. 112, 56.

¹³ See Convention for the Maintenance, Preservation and Reestablishment of Peace, of December 23, 1936, U. S. Treaty Vol. IV, 4817; Convention to Coördinate, Extend and Assure the Fulfillment of the Existing Treaties Between the American States, Dec. 23, 1936, *id.*, 4831.

See Resolution of the Seventh International Conference of American States, concerning Adherence to and Ratification of Peace Instruments, approved Dec. 16, 1933, Report of the Delegates of the United States of America to the Seventh International Conference of American States, Montevideo, 1933, Dept. of State Conference Series No. 19, 195.

¹⁴ Declared President Roosevelt in an address at Chicago, Oct. 5, 1937: "Some 15 [*sic*] years ago the hopes of mankind for a continuing era of international peace were raised to great heights when more than 60 nations solemnly pledged themselves not to resort to arms in furtherance of their national aims and policies. The high aspirations expressed in the Briand-Kellogg Peace Pact and the hopes for peace thus raised have of late given away to a haunting fear of calamity." (Dept. of State Press Releases, Oct. 9, 1937, 275, 276.)

¹⁵ See statement by Mr. Hull, Secy. of State, Aug. 27, 1940, Dept. of State Bulletin, Aug. 31, 1940, 175.

TITLE B

§ 597. **The State of War.** It always lies within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.

War may in a broad sense be fairly described as a condition of armed hostility between States.¹ Throughout its duration the States at variance are deemed to be enemies, incapable of maintaining normal diplomatic intercourse with each other, and to be expected and permitted to oppose force to force. The belligerents attain, by reason of the conflict, a new and peculiar relationship with respect to States not participating therein and neutral to it. A state of war is a legal condition of affairs dealt with as such, and so described both by participants and non-participants.² It may exist prior to the use of force.³ That condi-

§ 597.¹ "20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together in peace and in war." (Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, Series 3, III, 150, Moore, Dig., VII, 154, quoted in Rules of Land Warfare, War Dept., April 15, 1917, No. 10.)

"We therefore, accepting the definition of Grotius in other respects, will say that *war is the state or condition of governments contending by force*. Governments are here mentioned and not states, because the laws of war belong equally to insurgents not yet recognised as a state but recognised as having belligerent rights." (Westlake, 2 ed., II, 1.)

² "I now recommend to your honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action thereon." (President McKinley, special message, April 25, 1898, For. Rel. 1898, 771.)

See declaration by the United States of war against Germany, April 6, 1917, 40 Stat. 1; also declaration of war against Austria-Hungary, Dec. 7, 1917, 40 Stat. 429.

"The Royal Government . . . has declared to the Austro-Hungarian Ambassador at Rome, in the name of the King, that Italy considers herself in a state of war with Austria-Hungary from tomorrow, May 24th." (Baron Sonnino, Italian Foreign Minister, to Italian diplomatic representatives abroad and to foreign Governments, May 23, 1915, Italian Green Book, translation, *Publication No. 93 of American Association for International Conciliation*, p. 94.)

See, also, Art. II of the Hague Convention of Oct. 18, 1907, relative to the Opening of Hostilities, Malloy's Treaties, II, 2266; preambles of President Wilson's Neutrality Proclamations of 1914 and 1915, American White Book, European War, II, 15, *Am. J.*, IX, Supp., 110.

³ Declares Professor Moore: "Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights" (Dig., VII, 153-154.)

See *United States v. Hamburg American Co.*, 239 U. S. 466, 475, where judicial notice was taken of World War I, causing questions at issue to become moot.

tion which results from the design of the parties to the conflict is usually accompanied by the commission of acts of violence.⁴ From this circumstance it has perhaps been natural to infer that the bare commission of such acts, especially when participated in by both of the countries at variance, suffices to bring into being a state of war, and that such a state is a necessary consequence of the factual situation. The members of the international society do not, however, appear to act strictly upon such a theory. One of their number may for reasons of policy commit hostile acts against another in order to enforce respect for its will without purporting to wage war upon that other, and with no wish to do so. Moreover, various considerations, such as its own relative weakness, or detriments to itself to be anticipated from the production of a state of war, may induce the latter to acquiesce in the theory of its adversary. In such a situation, the State which initiates hostilities and inspires its opponent to embark upon armed conflict may thus be able to control or largely influence the legal aspect of events that ensue. If in fact war as such is avoided and never comes into being, it is because the initiator is unchallenged in declining to assign to its own acts a war-producing quality.

The international society is at the present time dismayed by the efforts of opposing States to engage in armed conflict on a large scale and simultaneously to disclaim a design to bring into being a state of war.⁵ That society suffers

"There may be a state of war without the use of force or after the use of force has ceased, or there may be the use of force without a state of war. The physical results of the use of force may be the same in all cases, but the legal results are clearly distinguished." (George Grafton Wilson, "Use of Force and War," *Am. J.*, XXVI, 327, 328.)

See Naval War College, *Int. Law Situations*, 1932, 90-92.

⁴ See Q. Wright, "When Does War Exist?" *Am. J.*, XXVI, 362, 365, 366.

See, also, A. D. McNair, "The Legal Meaning of War, and the Relation of War to Reprisals," *Grotius Society*, XI, 29, 45; J. L. Brierly, "International Law and Resort to Armed Force," *Cambridge Law Journal*, IV, 308; H. Lauterpacht, "Resort to War and the Interpretation of the Covenant During the Manchurian Dispute," *Am. J.*, XXVIII, 43; W. J. Roman, "English and American Courts and the Definition of War," *id.*, XXXI, 642.

See Address of President Wilson before the Congress, April 20, 1914, on "The Situation in Our Dealings with General Victoriano Huerta at Mexico City," in which he said: "This Government can, I earnestly hope, in no circumstances be forced into war with the people of Mexico." *For. Rel.* 1914, 474, 476; also opinion of Nielsen, Commissioner, for the Commission, in case of *E. R. Kelley v. The United Mexican States*, *Opinions of Commissioners*, convention between United States and Mexico, Sept. 8, 1923, as extended by subsequent conventions, 1931 Vol., 82, 84-85.

⁵ Declared Senator Key Pittman, Chairman of the Senate Committee on Foreign Relations, Aug. 23, 1937: "In the pending conflict, both Governments have denied that a state of war exists. China contends that she is only defending her territory against invasion and is ready to withdraw her troops from Shanghai as soon as Japan shall withdraw her armed forces from Shanghai. Japan, on the other hand, contends that she is not carrying war to China, but is simply conducting military operations for the purpose of protecting her nationals.

"Neither country has taken the first step that precedes a condition of a state of war—this, the breaking off of diplomatic relations.

"Neither government has declared a contraband list or attempted in any way to interfere with the transportation of neutrals of arms, ammunition and implements of war to the other country. Certainly up to the present time no danger to the lives of our citizens or their property has arisen by virtue of exports to either country." (*New York Times*, Aug. 24, 1937, p. 3.) As long as the President found himself unable to conclude that a state of war existed between China and Japan in 1937, he found it impossible to set in operation the prohibitions specified in the Joint Resolution.

Declared Secretary Hull in a communication to Mr. McReynolds, Chairman, Committee on Foreign Affairs, House of Representatives, Dec. 4, 1937: "Neither the Chinese nor the Jap-

acutely from such conduct, which is characterized by assertions of the contestants of the right to restrict and interfere with unoffending life and property associated with outside States and their nationals with a degree of freedom such as might be anticipated or claimed were the actors opposing each other as belligerents in the course of a war.⁶ Such assertions ignore the circumstance that it is the existence of a state of war as such which has in practice been deemed to clothe the participants therein with certain special privileges which neutral States and their nationals were obliged to respect. It is, thus, intolerable that opposing States seeking to avoid possible inconveniences to be anticipated from the production of a state of war, such as the deprivation of much-needed military sustenance from neutral territory,⁷ should, by branding their conflict as something other than a state of war, attain a freedom with respect to the outside world that has not been accorded save when the contestants were acknowledged to be at war with each other, and to enjoy special privileges resulting from that circumstance. Accordingly, as a means of safeguarding its essential interests the international society may be expected ultimately to regard all international armed conflicts of substantial dimensions in which the contestants proceed to achieve their objectives by the sword, as within a single category, and as yielding to a participant no greater or different privileges than it would enjoy as an avowed belligerent. In a word, the character of the acts committed rather than the design of the actors should, and probably will be, regarded as decisive of the legal result. The vast conflict between China and Japan that was initiated in the summer of 1937, reveals the unrealistic aspect of a different approach.⁸

It may be observed that the conflict between Russia and Finland of 1939–1940, was terminated through a “Treaty of Peace,”⁹ and that it was referred

anese Government has declared war on the other. The President of the United States has not found ‘that there exists a state of war.’” (Dept. of State Press Releases, Dec. 11, 1937, 415, 416.)

Compare the terms of a Joint Resolution approved May 28, 1934 (48 Stat. 811), providing for the prohibition, under certain conditions, of the sale of arms and munitions of war in the United States “to those countries now engaged in armed conflict in the Chaco.” See, in this connection, *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304.

⁶ The conduct of which objection may be made may assume the form of hostile acts productive of injury to unoffending foreign life or property in close proximity to a particular military objective. Injuries to such life or property are sought to be dealt with and excused by the actors as merely normal incidents of physical presence close to what are asserted to be legitimate objectives. The legitimacy of such objectives is not admitted to be narrower than if the occasion were an episode of war. In a word, the safeguarding of such life and property from injury is sought to be placed upon the shoulders of the foreign individuals or States concerned who are charged with assuming the risk of violence by permitting themselves or their property to remain in the zone of hostilities.

⁷ According to the Joint Resolution approved May 1, 1937, 50 Stat. 121, providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries, and for other purposes, the applicability of numerous prohibitions was conditioned upon the finding by the President “that there exists a state of war between, or among, two or more foreign states,” and upon his proclamation of such fact.

President Roosevelt, in his proclamation of Oct. 5, 1935, declared that “a state of war unhappily exists between Ethiopia and the Kingdom of Italy,” and thereupon set in operation specified prohibitions set forth in a Joint Resolution approved Aug. 31, 1935.

⁸ See Announcement by the Department of State of Sept. 10, 1937, of a *Danger Zone* along the coast of China, Dept. of State Press Release, Sept. 11, 1937, 223.

⁹ Dept. of State Bulletin, April 27, 1940, 453.

to as a war by the Finnish Minister at Washington.¹⁰ It is not understood, however, that the Government of the United States regarded the conflict as productive of a state of war.¹¹

If international law is, in the course of its evolution, to respond to the requirements of the family of nations as they are accentuated by the acquisition of increasing military power by individual members, it must deny to States that embark upon armed conflict any advantages in their relations with non-participants to be derived from the bare disclaimer that the contest is a war.¹² Accordingly, at the present time, it is believed to be less important to isolate war-producing contests from those which are not war-producing, than to challenge the privileges of States that proceed to subdue each other by the sword and yet grotesquely to profess to be at peace.¹³

¹⁰ See prefatory statement by Dr. H. J. Procopé in Finland Reveals her Secret Documents on Soviet Policy, March, 1940–June, 1941, New York, 1941, v.

Concerning the Sino-Japanese conflict initiated by Japan in September, 1931, see Manchuria, Report of the Commission of Enquiry Appointed by the League of Nations (known as the Lytton Report), League of Nations Document, C.663.M.320.1932.VII., reprinted as Dept. of State Publication, No. 378, 1932. The Report declared that "the relations between China and Japan are those of war in disguise." (138.) See, also, H. L. Stimson, Letter to the editor of the *New York Times*, Oct. 6, 1937, *New York Times*, Oct. 7, 1937, p. 12.

¹¹ See statement by President Roosevelt on the Finnish-Soviet Situation, Dec. 1, 1939, Dept. of State Bulletin, Dec. 2, 1939, 609.

¹² The requisite response may be made in various ways. It is not impossible that if outside States find themselves persistently subjected to treatment that they conceive to be sharply at variance with those requirements of international law which are supposedly applicable in time of peace, they may for their own protection become disposed to brand the conflicting States as belligerents and their conduct as constituting war, demanding the privilege of claiming all the benefits to be derived from a condition of neutrality. The habitual determination of outside States to act in this way might be expected ultimately to lessen the desirability of recourse to armed conflict in the minds of such other members of the international society as might be unwilling to do more than press for such advantages as might be procurable from a non-war producing contest.

¹³ See C. Eagleton, "The Attempt to Define War," *International Conciliation*, June, 1933, No. 291; Q. Wright, "Changes in the Conception of War," *Am. J.*, XVIII, 755; W. J. Ronan, "English and American Courts and the Definition of War," *id.*, XXXI, 642.

TITLE C

KINDS

1

§ 598. **General in Contrast to Limited War.** At the present time wars as between opposing States are commonly *general*, in the sense that each belligerent regards the whole domain of its adversary as hostile territory, and the inhabitants thereof as enemy persons, applying against the Government and the people, and the property of both, all the pressure which the law of nations permits.¹ While the United States in declaring war against Germany April 6, 1917, emphasized the fact that the "Imperial German Government" had committed repeated acts of war against the "Government and the people of the United States," and announced that a state of war was declared to exist between the United States and the Imperial German Government,² a general war was contemplated. The United States proceeded accordingly to exercise its rights as a belligerent in such a conflict, and without discrimination between the people and government of its enemy.³

2

§ 599. **The Franco-American Conflict, 1798-1800.** Between 1798 and 1800, the United States assumed a unique relationship towards France. American commerce by sea had suffered grievously through depredations committed by France during her war with England.¹ In response, Congress authorized Ameri-

§ 598.¹ Declared Chase, J., in the course of his opinion in *Bas v. Tingy*, 4 Dall. 37, 43: "Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."

See, also, Marshall, C. J., in *The Amelia*, 1 Cranch, 1, 28; Dana's *Wheaton*, § 296, quoted in Moore, Dig., VII, 155.

² 40 Stat. 1. The caption of the joint resolution setting forth the declaration describes it as "declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States and making provision to prosecute the same."

See, also, joint resolution approved Dec. 7, 1917, declaring war with Austria-Hungary, 40 Stat. 429.

In his address to the Congress April 2, 1917, President Wilson, while arraiging the Imperial German Government and its ruthless methods of conducting war, as well as the designs of Prussian autocracy, declared: "We have no quarrel with the German people. We have no feeling towards them but one of sympathy and friendship. It was not upon their impulse that their Government acted in entering this war. It was not with their previous knowledge or approval. . . . We are, let me say again, the sincere friends of the German people, and shall desire nothing so much as the early reestablishment of intimate relations of mutual advantage between us." (*American White Book, European War*, IV, 422, 425-426, 428.)

³ This was manifest throughout its conduct of hostilities. See, also, provisions of the Trading with the Enemy Act, of Oct. 6, 1917, Chap. 106, 40 Stat. 411.

§ 599.¹ J. B. C. Davis' Notes, U. S. Treaty Vol. (1776-1887) 1298-1306, and documents there cited.

can vessels: to resist searches by French public vessels; to capture any vessel that should attempt, by force, to compel submission to search; to recapture any American vessel seized by a French vessel; and to capture any French armed vessel, wherever found, on the high seas.² Whether or not these enactments were incompatible with the theory that the United States retained its neutral status,³ war was not in fact declared in general terms; nor was authority given to commit hostilities on land, or to capture unarmed French vessels, or even to capture French armed vessels in a French port.⁴ French citizens came simultaneously into American courts, and in their own names claimed and obtained restitution for property seized by American cruisers.⁵ "There were hostilities authorized by both France and the United States and the intention of the two governments at the time seems to have been war."⁶ The contest was described as a limited or partial war.⁷

It is not believed that at the present time the United States would find it expedient or possible to maintain a similar relationship with any other State with which it might be at variance.⁸ Its conduct as an intervening participant in the war initiated in 1939, and which became apparent during the Summer and Autumn of 1940, did not purport to be of belligerent aspect, and was not in pursuance of Congressional authority declaring that the nation had embarked upon war of any character.⁹

² Act of May 28, 1798, 1 Stat. 561; Act of June 25, 1798, *id.*, 572; Act of June 28, 1798, *id.*, 574; Act of July 9, 1798, *id.*, 578; Act of March 2, 1799, *id.*, 709, 716; Act of March 3, 1800, *id.*, II, 16-18.

See, also, Chase, J., in *Bas v. Tingy*, 4 Dall. 37, 44; The *Amelia*, 1 Cranch, 1, 29-30; Carnegie Endowment for International Peace, Division of International Law, the Controversy over Neutral Rights between the United States and France 1797-1800, edited by J. B. Scott, New York, 1917, being a collection of American State Papers and Judicial Decisions. See historical introduction by the editor, 14-22.

³ "In view of the authorities and the legislation of Congress to which we have referred, it is apparent that the theory adopted by the court was most advantageous to the claimants, as the legislation of Congress authorizing the arming of merchant vessels—coupled with commissions from the President to seize French armed vessels and recapture American vessels was rather the act of an enemy than that of a neutral." (The Schooner *Endeavor*, 44 Ct. Cl. 242, 273, *Am. J.*, IV, 204, 214.)

Declared Chase, J., in the case of *Bas v. Tingy*, 4 Dall. 37, 44: "This suspension of the law of nations, this right of capture and recapture, can only be authorized by an act of the government, which is, in itself, an act of hostility. But still, it is a restrained or limited hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defence and aggression."

⁴ *Id.*, 43.

⁵ See Mr. Webster's speech on French spoiliations, 4 Webster's Works, 163-165; Moore, Dig., VII, 157-158; Gray, *Adm'r v. United States*, 21 Ct. Cl. 340, 374, where it is said that "Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, 'war should break out with France.'"

⁶ W. J. Ronan, "English and American Courts and the Definition of War," *Am. J.*, XXXI, 642, 649. See, also, *id.*, 648.

⁷ Chase, J., in *Bas v. Tingy*, 4 Dall. 37, 43.

⁸ Nevertheless, Professor Borchard found it possible to declare in October, 1940, that "the United States is now, and it is submitted, has been for some time, in a state of limited war, analogous to but not identical with that which prevailed between the United States and France in the period between May, 1798, and May, 1800, when the ships of the United States, under authority of an Act of Congress, made attacks upon and captured French vessels which had been spoliating American commerce." (*Am. J.*, XXXIV, 690, 697.)

⁹ See The Transfer of Destroyers to Britain in 1940, Kindred Acts, *supra*, § 83C.

3

§ 600. **Insurrection. Civil War. Rebellion.** A State may encounter uprisings of its people against its authority. Such movements are described according to their nature and scope.

The rising in arms of a people against their government, or a portion of it, or against its laws or its officers is called insurrection. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same which seek to throw off their allegiance to it and set up a government of their own. Civil war is described as war between two or more portions of a country or State, each contending for mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to a war of rebellion when the rebellious provinces or portions of the State are contiguous to those containing the seat of government.¹

Whether a condition of hostility becomes also a state of war in a legal sense, depends upon the recognition of the insurgents as belligerents by either the parent State or foreign States.² The according of such rights by the latter does not, however, compel the parent State to do likewise.

As has been observed elsewhere, the distinction between recognition of belligerency and recognition of a condition of political revolt, "between recognition of the existence of war in a material sense and of war in a legal sense," appears now to be clearly understood.³

4

§ 601. **Private War.** That individuals should undertake to wage private war, independently of the authority of their country, cannot be permitted in a well-ordered society.¹ Hence the law of nations necessarily forbids them to do so.² At the present time the commission of acts of war is entrusted to persons clothed with public authority for the purpose of accomplishing a public end.³

§ 600.¹ The paragraph of the text is taken from §§ 149-151 of Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, Series 3, III, 163, Moore, Dig., VII, 159. Also *id.*, §§ 152-157, Moore, Dig., VII, 159-160.

² See Recognition of Belligerency, *supra*, §§ 47-49; Acts Falling Short of Recognition of Belligerency, Insurgency, *supra*, § 50.

See Q. Wright, "Changes in the Conception of War," *Am. J.*, XVIII, 754, 759.

³ The Three Friends, 166 U. S. 1, 63-64.

See, also, Acts Falling Short of Recognition of Belligerency, Insurgency, *supra*, § 50; Dana's Wheaton, Dana's Note No. 153.

§ 601.¹ The language of the text is that of President Jefferson in his Annual Message, Nov. 8, 1804, Richardson's Messages, I, 370, Moore, Dig., VII, 161.

See Lauterpacht's 5 ed. of Oppenheim, II, § 56.

² Mr. Webster, Secy. of State, to Mr. Jewett, Aug. 21, 1852, 40 MS. Dom. Let. 300, Moore, Dig., VII, 161.

³ Respecting the prevalence of a different doctrine in ancient times and even in the Middle Ages, see Walker, Hist., I, 84; also C. Phillipson, International Law and Custom of Ancient Greece and Rome, II, 196-197.

See Reprisals, *supra*, § 589; Privateers, *infra*, § 704.

TITLE D

THE COMMENCEMENT OF WAR

1

§ 602. **Processes of Initiation.** By various processes a state of war may come into being. The fact of its existence is a matter unrelated to the question concerning the propriety of the mode by which it is brought about. What constitutes the beginning of a war must be observed without reference to the causes regarded as productive of it.

A state of war may come into being, first, by the commission of hostile acts by one country directed against another with the design of making war upon it. A State may in fact, suddenly and without warning, employ its whole available military strength against a weaker neighbor, with a view to obtaining by means of war what could not be gained by any other process.

A state of war may come into being, secondly, by any unequivocal act on the part of the government of a State, indicating that it regards the conduct of another, whether or not deemed by the latter to produce such an effect, as having brought into being a condition of war.¹ Thus on April 21, 1898, war between the United States and Spain came into being when the Spanish Government announced to the American Minister at Madrid that it regarded the joint resolution of Congress, approved by President McKinley the previous day, denying the legitimacy of the sovereignty of Spain over Cuba, and threatening armed intervention therein, as "equivalent to an evident declaration of war."² In his address to the Congress, of April 2, 1917, President Wilson advised that "the

§ 602.¹ See, for example, declaration of France, Nov. 5, 1914, recognizing the existence of a state of war with Turkey, as brought into being by the hostile acts of the Turkish fleet, which took place on Oct. 29, 1914. See Declarations of War, Dept. of State, confidential document, 1919, 26-27, citing case of *The Mahrousseh*, *Journal Officiel*, Dec. 17, 1915.

See A. D. McNair, "The Legal Meaning of War, and the Relation of War to Reprisals," Grotius Society, XI, 29, 45.

² Mr. Woodford, Minister to Spain, to Mr. Sherman, Secy. of State, April 21, 1898, For. Rel. 1898, 767; see, also, *The Pedro*, 175 U. S. 354.

On April 22, President McKinley announced the institution of a blockade of ports on the north coast of Cuba from Cardenas to Bahia Honda. 30 Stat. 1769. On April 23, the Queen Regent of Spain issued a decree declaring that a state of war was in existence between her country and the United States. By an Act of Congress approved April 25, war was declared to have existed from April 21 inclusive. 30 Stat. 354. See, also, statement in Moore, Dig., VII, 170-171.

The Government of the United States may have believed that the approval by the President of the joint resolution respecting Cuba would cause Spain to announce the existence of a state of war between the opposing countries, but the Government of the former did not regard its own conduct as an act of war, or as necessarily incompatible with the maintenance of diplomatic relations.

See letter of the German Ambassador at Paris to the French Minister for Foreign Affairs, Aug. 3, 1914, French Yellow Book, No. 147, *Am. J.*, IX, Supp., 277.

Congress declare the recent course of the Imperial German Government to be in fact nothing less than war against the Government and people of the United States," and "that it formally accept the status of belligerent which has thus been thrust upon it."³ It may be observed that an act of reprisal, especially if directed against the property of the government or nationals of a strong and sensitive State, may be regarded by it as productive of war and dealt with accordingly.⁴

Thirdly, a state of war may come into being by non-compliance with an ultimatum containing a declaration or clear warning that war will ensue in the event of failure of the respondent State to yield to demands made upon it within a specified time. The Power issuing such a warning may not, however, deem failure to comply with its demands as automatically productive of war, but rather as justifying its own initiation thereof. In such case the failure is indicative of the cause of war or of the excuse for waging it, rather than of the beginning of the conflict. Germany, in the absence of any response by Russia to the demand of July 31, 1914, that the latter begin to demobilize against both Austria and Germany within twelve hours, announced that the refusal of Russia to make appropriate answer served to create a state of war.⁵ Austria-Hungary, on the other hand, upon the failure of Serbia to comply with the demands contained in the note of July 23, 1914, formally declared war against the latter upon the expiration of forty-eight hours after the time specified for compliance.⁶

A state of war may come into being, fourthly, by a declaration of war. Such a declaration is a formal announcement by one power to another that a state of

³ American White Book, European War, IV, 422, 424. See, also, the terms of the joint resolution declaring war against Germany, approved April 6, 1917, 40 Stat. 1.

It should be observed, however, that it was the acceptance by the United States of the "status of belligerent," through a formal and appropriate declaration, that served in fact to bring into being a state of war, which was not deemed to exist prior to that action.

Thus oftentimes the acceptance of the challenge, although provoked by the previous commission of hostile acts, does not purport to indicate that a state of war is already in existence, but rather marks the initiation or commencement of a war of which the conduct of the opposing State is merely regarded as the cause. In such case, if the acceptance assumes the form of a declaration of war, that act may be said to mark the initiation of the conflict.

⁴ In such event the acts of force have been deemed to possess a warlike as well as a hostile character *ab initio*, and in legal contemplation, the state of war to have existed from the moment of their commission. See *The Boedes Lust*, 5 Ch. Rob. 207, 219; also Westlake, 2 ed., II, 23-24. It should be observed that an act of reprisal, such as the establishment of a pacific blockade, not being intended to create a state of war, cannot in fact bring one into being until the country against which it is directed concludes definitely that it has produced such a result. In view of the importance of keeping clear the distinction between acts of force not amounting to war, and the legal condition of things known as a state of war, it seems wiser to describe as the beginning of such a condition, the decision of the State subjected to force to attach a warlike quality retroactively to what was committed against itself, than to refer that beginning to the initiation of conduct not intended to produce war.

⁵ British White Book, Cd. 7467, No. 138, p. 70; also telegram of the Imperial German Chancellor to the Imperial Ambassador at St. Petersburg, Aug. 1, 1914, No. 26, German White Book, *Am. J.*, VIII, Supp., 409. See, also, speech of the Imperial Chancellor, before the Reichstag, Aug. 4, 1914, German White Book, Appendix, as translated in Collected Diplomatic Documents Relating to the Outbreak of the European War, London, 1915, p. 437.

⁶ Note verbale, July 28, 1914, enclosure in No. 50, British White Book, Cd. 7467, p. 31. The Austro-Hungarian note of July 23, 1914, however rigid in its demands, was not technically an ultimatum containing a conditional declaration of war. The Imperial and Royal Government described it as a "*démarche* with a time limit attached." *Id.*, No. 14; also comment in E. C. Stowell, *Diplomacy of the War of 1914*, 85-87.

war exists or is about to exist between them.⁷ A declaration of war may not, however, mark the beginning of a war. It may succeed in point of time not only the commencement of hostilities, but also the establishment of a state of war.⁸ Thus, the declaration by Paraguay on May 10, 1933, that a state of war existed between itself and Bolivia was long subsequent to the beginning of hostilities between forces of those States, and which had occurred as early as June of the previous year.⁹ A declaration of war may precede the existence of it as by announcing a future hour when war shall be deemed to exist. A declaration itself initiating war may obviously precede the commencement of hostilities.

In 1933, the Naval War College declared that before 1907, there was no legal obligation to make a declaration before engaging in hostilities, and that the legality of war without declaration was admitted in practice and by the courts.¹⁰ No declaration of war preceded the commission by Italy, in October, 1935, of acts on Ethiopian soil which were regarded by a committee of the Council of the League of Nations as a resort to war in disregard of obligations accepted under Article XII of the Covenant of the League of Nations.¹¹ Nor did a formal declaration of war precede the making of war by Germany upon Poland in

⁷ "A declaration of war is a communication by one State to another that the condition of peace between them has come to an end, and a condition of war has taken its place. In former times, declarations of war used to take place with greater or lesser solemnities; but during the last few centuries all these formalities have vanished, and nowadays it may take place through a simple communication." (Lauterpacht's 6 ed. of Oppenheim, II, 237.) See, also, Fauchille, 8 ed., §§ 1027-1043 (with bibliography).

Concerning the ancient practices respecting declarations of war, see D. J. Hill, *Hist. European Diplomacy*, I, 9-10, C. Phillipson, *International Law and Custom of Ancient Greece and Rome*, II, 197-199; Woolsey, 6 ed., § 120.

⁸ See, for example, Act of June 18, 1812, 2 Stat. 755, declaring the existence of war with Great Britain; Act of May 13, 1846, 9 Stat. 9, declaring the existence of war with Mexico; Act of April 25, 1898, 30 Stat. 364, declaring the existence of war with Spain. Each of these declarations was subsequent in point of time to the commencement of the war with the State specified.

See, also, T. E. Holland, *Studies Int. Law*, 115, concerning the beginning of the war between China and Japan in 1894.

⁹ In A. Toynbee's *Survey of International Affairs*, 1933, London, 1934, it is stated that in certain quarters at Geneva it was felt that although Paraguay, in view of the terms of the Covenant of the League of Nations, "might have put herself technically in the wrong, she had in fact done nothing more than give formal recognition to the state of war which had been in existence for ten months, so that it would be unreasonable to treat her as if she, and she alone, had just committed a breach of the Covenant." (420-421.) This thought was in harmony with that expressed by Paraguay in its declaration. See Decree No. 47-451, *República del Paraguay, Ministerio de Relaciones Exteriores, Libro Blanco, II Parte*, 66, Asunción, 1933.

¹⁰ *Int. Law Situations* 1933, 95; also *id.*, 1910, 45-48.

Lieut. Col. J. F. Maurice, in his work on *Hostilities Without Declaration of War*, from 1700-1870, published at London in 1883, declared that as a result of his investigation there had not been, "unless in mere theory, and in the tone adopted by historians as to what ought to have been, any established usage whatever on the subject [of declarations of war]," adding that during the 171 years which his investigation covered less than ten instances of the kind had occurred. (4.)

A collection of the texts of declarations of war by the several participants in the World War beginning July 28, 1914, is contained in *Naval War College, Int. Law Documents*, 1917.

A table setting forth declarations of war, recognitions of the existence of a state of war, etc., in the European War beginning in 1939, is contained in *Dept. of State Bulletin*, March 1, 1941, 224-227.

¹¹ *League of Nations, Official Journal*, November, 1935, 1223.

Declared the President of the Council of the League, Oct. 7, 1935: "To-day, October 7th, five days after the opening of hostilities, the establishment of the existence of a state of war, in relation to the obligations of the Covenant, compels the members of the Council to face their responsibilities." (*Id.*, 1225-1226.)

1939.¹² On June 22, 1941, the Russian Foreign Minister, Mr. Molotoff, made complaint that without a declaration of war, German troops had attacked his country.¹³

The act whereby a State, pursuant to the requirements of its fundamental law, formally announces that a state of war exists between itself and the government of another country is commonly described as a declaration of war. In the case of the United States the power to declare war is, by the Constitution, lodged in the Congress.¹⁴ The exercise of that power by that body, together with a proclamation by the President announcing the fact,¹⁵ appear to be regarded as sufficiently informative to the foreign State which is thus given the character of an enemy. It is understood that the United States undertakes to make direct announcement of such action to foreign States generally.¹⁶

2

§ 603. **Extent of Warning. The Hague Convention of 1907.** According to Article I of the Hague Convention of 1907, relative to the Opening of Hostilities, hostilities "must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."¹ Compliance with either requirement does

¹² See Dept. of State Bulletin, March 1, 1941, 224; also Lauterpacht's 6th ed. of Oppenheim, II, 236.

¹³ See his broadcast on the outbreak of war with Germany as translated by Tass, the Russian News Agency, and printed as from the Associated Press in *The New York Times*, June 23, 1941.

¹⁴ The Constitution, Art. I, § 8, par. 11.

Concerning the Power to Make War in the United States, see *The Prize Cases*, 2 Black, 635, 668, where Mr. Justice Grier declared in the course of the opinion of the Court: "By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." See, also, Moore, *Dig.*, VII, 162-168, and documents there cited.

¹⁵ See, for example, proclamation of President Wilson, April 6, 1917, announcing the declaration of war against Germany on that date, *American White Book*, European War, IV, 429.

¹⁶ The Judge Advocate General of the Army on June 30, 1917, announced the opinion that the date of the commencement of the war with Germany should be regarded as the date of the approval of the Joint Resolution of April 6, 1917, declaratory of the existence of a state of war. *Official Bulletin*, No. 120, 6, Sept. 29, 1917.

According to Section 2, of the Trading with the Enemy Act of Oct. 6, 1917, the words "the beginning of the war" as used therein, were to be deemed to mean "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war." See, also, *Declarations of War*, Dept. of State, official document (confidential), 1919, p. 68, note II.

§ 603. ¹ Malloy's *Treaties*, II, 2259, 2266.

As Westlake rightly says: "The declaration must be in writing, since it must contain an expression of reasons, and it must be directly addressed to the government to be affected, since the old form of a manifesto might conceivably fail to give a previous warning, and

not, however, prevent a contracting power from taking its adversary by surprise, especially if the aggressor relies merely upon a declaration of war. Even an ultimatum containing a conditional declaration of war, that is, an announcement that a state of war will exist upon failure to comply with the demands made within the time specified, may allow so short an interval for compliance as to rob the warning of substantial value to an opponent taken unawares.²

It is to be regretted that it was found impossible to incorporate in the Convention a provision requiring the giving of a warning likely to be of real value to the State to be notified. The duty to comply therewith would doubtless serve to deter from war a State encouraged to resort thereto by knowledge of the certain advantages assured to itself through a sudden initiation of hostilities.³ In 1933, the Naval War College expressed the view that the experience of the world since 1907 would seem to be sufficient "to prove the legal value of a convention which would fix the time of and prerequisites for the opening of hostilities": and also that "the demarcation of the line between the use of force in time of peace and the hostile use of force in time of war should not be left uncertain."⁴

Despite the insufficiency of any applicable conventional law, a State contemplating war may in fact have recourse to conduct designed not merely to deceive a prospective foe, but also to hold out assurance that it will not embark

could not in any case convey an ultimatum with a conditional declaration." (2 ed., II, 28.)

"It is universally admitted that a formal declaration is not necessary to constitute a state of war. From this principle, however, an unnecessary and perhaps unwarranted inference is often drawn, namely, that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. Such a theory would seem to be altogether inadmissible. Although a contest by force between nations may, no matter how it may have been begun, constitute a state of war, it by no means follows that nations, in precipitating such a condition of things, are not bound by any principles of honor or good faith. If, for example, a nation, wishing to absorb another, or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow, but it could not be said that the principles of honor and good faith enjoined by the law of nations had not been violated. In other words, to admit that a state of war exists is by no means to justify the mode by which it was brought about or begun. Nor is the practice of fraud and deceit permitted by a state of war supposed to be admissible in time of peace." (Moore, Dig., VII, 171.)

² See War Dept. Rules of Land Warfare, 1940, No. 15.

³ Concerning Art. I of the Hague Convention of 1907, see Report of L. Renault to the Hague Conference, *Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, I, 131-136; J. B. Scott, Reports to Hague Conferences, 502-507; A. P. Higgins, Hague Peace Conferences, 202-205; J. B. Scott, Hague Peace Conferences, I, 516-522; Naval War College, Int. Law Situations, 1910, 49-55; *id.*, 1933, 94-98; Lauterpacht's 6 ed. of Oppenheim, II, §§ 94-96; E. C. Stowell, "Convention Relative to the Opening of Hostilities," *Am. J.*, II, 50. C. Eagleton, "The Form and Function of the Declaration of War," *Am. J.*, XXXVIII, 19.

According to the Resolutions adopted by the Institute of International Law in 1906, with respect to the Opening of Hostilities:

"1. It is in accordance with the requirements of international law, and with the spirit of fairness which nations owe to one another in their mutual relations, as well as in the common interest of all States, that hostilities must not commence without previous and explicit warning.

"2. This warning may take place either under the form of a declaration of war pure and simple, or under that of an ultimatum, duly notified to the adversary by the State about to commence war.

"3. Hostilities shall not commence before the expiration of a delay sufficient to make it certain that the rule of previous and explicit notice cannot be considered as evaded." (*Annuaire*, XXI, 292-293, J. B. Scott, Resolutions, 164.)

⁴ Int. Law Situations, 1933, 96.

upon war until the happening of a particular event such as the break-down of diplomatic negotiations looking to the amicable adjustment of an existing controversy. In such case the commission of hostilities during such a period of negotiation would smack of infamy.

It may be doubted whether as yet the family of nations has undertaken to impose upon any of its members a legal duty not to wage war for the purpose of exacting redress for wrongs sustained when reparation is obtainable through other processes. Recourse to war under such circumstances is, however, essentially injurious to the welfare of the international society. The extent of the harm which it sustains suffices to justify its members in uniting to compel an aggrieved State to give reasonable opportunity to an adversary not merely to accept its terms, but also to negotiate with respect to them or to decline to permit an adjustment of the issue by some international body, as a condition precedent to a just initiation of war.⁵

According to Article II of the Hague Convention of 1907, Relative to the Opening of Hostilities, the existence of a state of war must be notified to neutral powers without delay, and does not take effect in regard to them until after the receipt of notification, which may, however, be given by telegraph. It is declared that neutral powers cannot rely upon the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.⁶

3

§ 604. **Civil War.** A rebellion or a civil war always begins by acts of insurrection against the lawful authority of the government, and is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. When the parties in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.¹

“The late Civil War began and terminated at different times in different States. Its commencement may be referred to the proclamation of blockade of the 19th of April, 1861, in those States to which it applied; and to the proclamation of blockade of the 27th of April, 1861, in the States to which it applied. Its termination may be referred, in various States, to the proclamations declaring it closed in those States.”²

⁵ See Hague Convention of 1907, respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Malloy's Treaties, II, 2248.

⁶ Malloy's Treaties, II, 2266; also, Westlake, 2 ed., II, 30-31.

§ 604. ¹ The paragraph in the text is substantially the language of Mr. Justice Grier in the Prize Cases, 2 Black, 635, 666-667.

² The paragraph in the text is the language employed in Moore, Dig., VII, 172, citing *The Protector*, 12 Wall. 700; *Brown v. Hiatts*, 15 Wall. 177; *Adger v. Alston*, 15 Wall. 555; *Batesville Institute v. Kauffman*, 18 Wall. 151.

See, also, *Chesapeake & Ohio Ry. Co. v. United States*, 19 Ct. of Cl. 300, Moore, Dig., VII, 172.

TITLE E

EFFECT OF WAR ON NORMAL RELATIONS BETWEEN OPPOSING BELLIGERENTS

1

§ 605. **In General.** War breaks down every relationship between the opposing belligerents which owes its life and vigor to a condition of friendliness and hence, to the maintenance of peace. Diplomatic relations, although unbroken at the beginning of the conflict, need to be, and are in fact severed.¹ Consular services are brought to an end if they have not previously been forbidden.² The same event marks the termination, by common design, of various types of agreements and the suspension of certain others.³ Between the peoples of the States at variance barriers arise that may be a blight upon friendship and an obstacle to future amicability. The whole mental attitude of the opposing States with respect to each other is rendered abnormal; and the abnormality may not lightly vanish when peace finally ensues.⁴

It is not believed that the bare existence of war between a protected State and its protector would serve necessarily to destroy the political relationship subordinating the former to the latter. If by force of arms the inferior State won its independence, the success of its endeavor rather than any other circumstance would be the cause of the dissolution of the bond.

2

ON INTERCOURSE BETWEEN TERRITORIES OF OPPOSING BELLIGERENTS

a

§ 606. **General Suspension of Communication.** It is inconsistent with a state of war that the inhabitants within territory controlled by one belligerent

§ 605.¹ The severance of diplomatic relations is, in such a situation, produced by the affirmative and unequivocal action of a belligerent, which is rendered imperative by the outbreak of war.

A collection of the texts of documents expressive of the effort to break off diplomatic relations immediately prior to, and during World War I, by States that were participants therein is contained in Naval War College, Int. Law Situations, 1917.

² See Pierre Bouffanais, *Les Consuls en Temps de Guerres et de Troubles*, Paris, 1933, 25.

³ See Termination of Treaties, Outbreak of War Between Contracting States, *supra*, §§ 547-551.

⁴ Treaties which mark the termination of a war and which purport to replace it by what is perhaps genially referred to as "a firm, just, and durable Peace" (preamble of the Treaty of Versailles, of June 28, 1919) do not suffice as restoratives of friendship or as dissipators of hatred unless the provisions thereof are calculated to inspire by their inherent worth and soundness, a common desire on the part of the contracting parties to coöperate in support-ing the contractual achievement.

should hold intercourse with those within territory controlled by the enemy, primarily because of the danger of the communication of information of military or political value, and secondarily, because of the neutralizing effect of any commercial transactions tending to increase the resources of the enemy upon hostile operations undertaken against it.¹ It is believed, therefore, to be the presence of an individual on belligerent soil, rather than any other consideration, which serves to render objectionable his entering into communication with persons within the territory of the enemy,² and which justifies every effort to restrain him from so doing.³

§ 606.¹ Declared Story, J., in *The Julia*, 8 Cranch, 181, 194: "But, independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited." See, also, *The Rapid*, 8 Cranch, 155.

"It is scarcely to be doubted that the origin of the rule prohibiting trade with the enemy was neither the abstract notion of the impossibility of any jurial relation between enemies, nor the modern notion of the injury which can be inflicted upon a country by declining to trade with it. Examination of the cases discloses the fact that the origin of the rule lay in the danger of permitting unauthorised communication with the enemy. Besides the obvious danger of facilitating sheer treason, there is the further danger of leakage of information and honest unweariness." (T. Baty and J. H. Morgan, *War: Its Conduct and Legal Results*, New York, 1915, 294.)

Declared Sir Samuel Evans in his judgment in *The Panariellos*: "When war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State. Where the intercourse is of a commercial nature, it is usually denominated 'trading with the enemy.' This proposition is true also, I think, in all essentials with regard to intercourse which cannot fitly be described as commercial." (1 Lloyd's Prize Cases, 364, 381.)

See, also, T. Baty, "Intercourse with Alien Enemies," *Law Quar. Rev.*, XXXI, 30.

² "215. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

"216. Exceptions to this rule, whether by safe-conduct or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority. Contraventions of this rule are highly punishable." (War Dept. Rules of Land Warfare, 1940.)

See, also, Section 86, Gen. Orders No. 100, April 24, 1863, Instructions for Government of Armies of U. S. in the Field, Moore, Dig., VII, 238.

Compare, however, with the statement in the text, *Mitchell v. United States*, 21 Wall. 350, Moore, Dig., VII, 239, where the continued domicile of an individual in a loyal State during the Civil War appears to have been regarded as decisive of whether he was trading with the enemy, with respect to business transacted by him in territory of the rebellious States to which he had been permitted to pass by Federal authority, in July, 1861, and where he had remained until late in 1864.

³ The cases oftentimes describe loosely the individuals with respect to whom the prohibition is applicable, and intimate, either inadvertently or unnecessarily, that intercourse between nationals of the opposing belligerents is forbidden. In the case of *The Julia*, the "subjects of the belligerent nations" were the persons between whom intercourse was said to be forbidden. 8 Cranch, 181, 194. In *Scholefield & Taylor v. Eichelberger*, the "citizens of the hostile States" were said to be incapable of contracting with each other. 7 Pet. 586, 593. In *McKee v. United States*, the "unlicensed business intercourse with an enemy" was deemed unlawful. 8 Wall. 163, 166.

Johnson, J., in *The Rapid*, 8 Cranch, 155, 162, made a more satisfactory and accurate statement in declaring that the object, policy and spirit of the inhibition was "to cut off all communication or actual locomotive intercourse between individuals of the belligerent states."

In his Notes on Prize Courts, Mr. Justice Story said: "It is a fundamental principle of Prize Law that all trade with the enemy is prohibited to all persons, whether natives,

It has been said by the Supreme Court of the United States that no domestic regulation is necessary to bring into operation the inhibition of intercourse between territories of opposing belligerents.⁴ Moreover, there has been a tendency on the part of American tribunals to attribute the inhibition to the law of nations.⁵ American judicial and political opinion has, however, failed to reveal careful inquiry concerning the source or character of the rule of prohibition, and has not shed light on the solution of the question whether international law as such purports to forbid intercourse between territories of the opposing belligerents, or merely yields to a State engaged in war the privilege of making desired prohibitions in the exercise of which local practices obtaining particularly in England and America have attained a significance such as to cause them to be regarded as part of the common law and hence operative as such without the aid of statute upon the coming into being of a state of war.⁶ It suffices to observe that most American statements of judicial or political origin merely refer to the fact of inhibition when war ensues, or to the necessity of it.⁷

There can be no doubt of the right of a belligerent State to prohibit intercourse between its territories and those of its enemies. In the exercise of it such State may enact laws designed to prohibit various forms of conduct within a large field.⁸ Thus, the cases presented for adjudication thereunder may raise

naturalised citizens, or foreigners domiciled in the country during the time of their residence, under the penalty of confiscation.

"The same penalty is applied to subjects of allies in the war, trading with the common enemy." (Pratt's ed., 69, quoted by Sir Samuel Evans, in *The Panariellos*, 1 Lloyd's Prize Cases, 364, 382.)

⁴ *United States v. Lane*, 8 Wall. 185, 195, where Mr. Justice Davis declared: "At the time this contract purports to have been made, this country was engaged in war with a formidable enemy, and by a universally recognized principle of public law, commercial intercourse between states at war with each other, is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease. If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen."

⁵ *Kershaw v. Kelsey*, 100 Mass. 561, 572.

⁶ See McNair's 4 ed. of *Oppenheim*, II, § 101; also A. D. McNair, *Legal Effects of War*, London, 1920; Garner, *World War*, §§ 141-143.

⁷ See *Sutherland v. Mayer*, 271 U. S. 272, 286.

On April 6, 1917, the Postmaster General announced that in consequence of the state of war then existing, the suspension of the exchange of postal money orders between the United States and the German Empire was directed. For. Rel., 1918, Supp. 2, 412.

Declared the Department of State in a communication to the Hercules Powder Co. May 23, 1917: "You are doubtless aware that the existence of a state of war between the United States and Germany is regarded as making illegal all intercourse between residents of the respective countries." (For. Rel. 1918, Supp. 2, 418.) See also, to same effect, communication to the Fidelity and Casualty Co. of New York, June 2, 1917, *id.*, 419. In a communication to Mr. J. Charmatz, July 13, 1917, it was declared: "It is the opinion of the Department that the transmission of funds from the residents of this country to residents of territory under enemy occupation is illegal." (*Id.*, 421.) It will be observed that these communications antedated the enactment of the Trading with the Enemy Act of Oct. 6, 1917.

⁸ "As to the Acts of Congress, proclamations, etc., during the Civil War, see Gay's Gold, 13 Wall. 358; *United States v. The Henry C. Homeyer*, 2 Bond, 217." (Moore, Dig., VII, 240.)

See *The Trading with the Enemy Act* of Oct. 6, 1917, Chap. 106, 40 Stat. 411.

See, also, Circular of Acting Secy. of Treasury, to Collector of Customs, April 27, 1898, directing attention to the Act of Congress approved April 25, 1898, declaring the existence of war between the United States and Spain, and announcing instructions in consequence thereof. For. Rel. 1898, 1172. "These instructions forbade the clearance of an American vessel for

questions concerning the interpretation or the violation of the local statutory law, rather than call for decisions concerning the effect of war as such upon the propriety of particular acts.⁹

A belligerent State may make appropriate effort through its laws or regulations to prevent its own nationals, wheresoever they may be, from holding commercial intercourse with enemy persons in any foreign country. Such a mode of bringing pressure to bear upon the enemy is quite different from that attributable to the necessity of cutting off communication between territories controlled by the opposing belligerents.¹⁰

At the present time practically every form of unlicensed intercourse or communication between the territories of opposing belligerents may be regarded as inconsistent with a state of war. Acts wholly unrelated to trade with the enemy are none the less objectionable.¹¹ Transactions of a commercial character are obviously forbidden. Declared Mr. Justice Gray in the case of *Kershaw v. Kelsey*, in 1868:

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy.¹²

The existence of a state of war does not render illegal intercourse between adherents of opposing belligerents within the territory of one of them, or within places such that intercourse requires no communication between territories under

a Spanish port, but the only restriction they placed upon the clearance of any other vessel for such a port was that the vessel should not carry cargo of contraband of war or of coal. Thus the clearance of a neutral ship with an American-owned cargo for a Spanish port was permitted, and to this extent trading between enemies was allowed" (Statement in Moore, Dig., VII, 241.)

⁹ See, for example, *United States v. Sheldon*, 2 Wheat. 119; *United States v. A Canoe*, 5 Hughes, C. C. 490, *United States v. The Henry C. Homeyer*, 2 Bond, 217; *Walker's Executors v. United States*, 106 U. S. 413, 422.

¹⁰ Viscount Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Oct. 10, 1916, in explanation of "The Trading with the Enemy (Extension of Powers) Act, 1915," a measure enjoining those who owed allegiance to Great Britain to cease having trade relations with persons who were found to be assisting or rendering service to the enemy. American White Book, European War, IV, 87. The purpose of the act was to restrict trading between British subjects and enemy persons not resident in enemy territory, and between such subjects and other persons in neutral territory having business associations with enemy persons. For the text of the act, see Mr. W. H. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, Jan. 19, 1916, American White Book, European War, III, 54; also Mr. Lansing, Secy. of State, to Mr. Page, Jan. 25, 1916, *id.*, 55.

¹¹ *The Rapid*, 8 Cranch, 155, 162-163; Sir William Scott, in *The Cosmopolite*, 4 Ch. Rob. 8, 10.

¹² *Kershaw v. Kelsey*, 100 Mass. 561, 572-573, also comment by Pickford, L. J., in *Robson v. Premier Oil and Pipeline Company, Ltd.*, Times Law Reports, 1915, 420, 421; *The Ouachita Cotton*, 6 Wall. 521; *United States v. Lane*, 8 Wall. 185; *McKee v. United States*, 8 Wall. 163; *Montgomery v. United States*, 15 Wall. 395.

opposing flags.¹³ A belligerent may, however, as a matter of domestic policy, forbid its own nationals to enter into communications not otherwise unlawful; and it may punish those who are disobedient to its command.¹⁴

Obviously the alien who is the national of a neutral State and who does not reside in or inhabit belligerent territory is not so easily to be dealt with.¹⁵ Justification for any attempt by a belligerent to restrict directly his intercourse with its enemy or with persons in the territory thereof must be based on the ground that he has become a participant in the conflict, guilty of unneutral conduct, and hence subject to restraint.¹⁶

The inhibition of communications between persons within the territories of opposing belligerents has broad implications that serve to challenge the propriety of communications through some indirect channels. Thus a neutral diplomatic mission representing the interests of a belligerent State at the capital of its enemy lacks the right there to communicate to the nationals of that State information sought to be given them by their sovereign. Such information, however, may be given the Government of the State where the mission is located for transmission by itself to the individuals concerned, if it seems fit to pursue such a course.¹⁷ That State must be deemed always to retain the exclusive right to judge for itself whether, and under what circumstances, and to what extent, information from enemy territory is to be communicated to enemy persons within its own domain.

§ 607. **The Same.** The Trading with the Enemy Act, approved October 6, 1917,¹ marked an attempt by the United States as a belligerent, to exercise its rights as such for various purposes. In 1921, the Supreme Court of the United

¹³ See, for example, *Bond v. Owen*, 7 Baxter (Tenn.), 340, Moore, Dig., VII, 241; *Kershaw v. Kelsey*, 100 Mass 561, Moore, Dig., VII, 245.

See Opinion by Prof. John Bassett Moore on the Legal Position of the United States Branches of Foreign Insurance Companies in the Event of War between the United States and the Country of their Incorporation, New York, March 22, 1917. See, also, proclamation of President Wilson, April 6, 1917, relative to the branch establishments of German insurance companies then engaged in the transaction of business in the United States, Official Bulletin, May 11, 1917, 2.

¹⁴ See, for example, the British Trading with the Enemy (Extension of Powers) Act, 1915, *Am. J.*, X, Special Supp., Oct. 1916, 111, American White Book, European War, III, 54; "Trading with the Enemy," an article respecting measures adopted by Germany in retaliation for those promulgated by other nations, by T. H. Thiesing, of Library of Congress, Senate Doc. No. 107, 65 Cong., 1 Sess.

¹⁵ Nevertheless, such a neutral may in fact be directly affected by the effort of a belligerent to compel its own nationals to refrain from commercial intercourse with him, by reason of his business association with the nationals of its enemy. See Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, telegram, Jan. 25, 1916, respecting the operation of the British Trading with the Enemy (Extension of Powers) Act, 1915, *Am. J.*, X, Special Supp., Oct. 1916, 112, American White Book, European War, III, 55.

¹⁶ *Young v. United States*, 97 U. S. 39, 63, Moore, Dig., VII, 239, where Chief Justice Waite declared. "A non-resident alien need not expose himself or his property to the dangers of a foreign war. He may trade with both belligerents or with either. By so doing he commits no crime. His acts are lawful in the sense that they are not prohibited. So long as he confines his trade to property not hostile or contraband, and violates no blockade, he is secure both in his person and his property. If he is neutral in fact as well as in name, he runs no risk."

¹⁷ See Mr. Harrison, office of the Counselor, Dept. of State, to Commander McCauley, Assist. Director of Naval Intelligence, Jan. 18, 1918, Hackworth, Dig., IV, 504.

§ 607. ¹ 40 Stat. 411. For the text of the Act with subsequent amendments, see 50 U.S.C.A., Appendix.

States declared it to be "strictly a war measure" and to find its sanction in the constitutional provision (Art. I, § 8, cl. 11), empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."² In 1926, that Court further declared that the purpose of the Act "was not only to weaken enemy countries by depriving their supporters of their properties (*Miller v. Robertson*, 266 U. S. 243, 248), but also to promote production in the United States of things useful for the effective prosecution of the war."³

In order to prevent intercourse with enemy territory, the Act was employed to specify comprehensively classes of individuals with whom intercourse was to be prohibited, both under the normal operation of the law, and under special proclamation of the President. The resident alien enemy person was not placed in the former class. Such an individual was not deemed to be an "enemy" within the meaning of the law, save under the special conditions when the President might find it necessary to include him among the persons designated by that term.⁴ The acts rendered unlawful were not, however, confined to those necessitating communications with enemy territory, but embraced also what might, directly or indirectly, inure to the benefit of an "enemy."⁵ There was no design

² *Stoehr v. Wallace*, 255 U. S. 239, 242, citing *Brown v. United States*, 8 Cranch, 110, 126; *Miller v. United States*, 11 Wall. 268, 305. Cf. J. B. Moore, *International Law and Some Current Illusions*, New York, 1924, 21-22.

³ *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 9-10.

See *Control of Enemy Property Within the National Domain, The Conduct of the United States During World War I*, *infra*, § 619.

⁴ The word "enemy" as used in § 2 of the Act was deemed to mean

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.' " The words "ally of enemy," to which the Act was generally made applicable, were also broadly and fully defined, and on the same theory as the word "enemy." § 2. The President was, however, empowered, if he should find it compatible with the safety of the United States and with the successful prosecution of the war, to suspend by proclamation the provisions of the Act so far as they might apply to an "ally of enemy," and to revoke or renew such suspension from time to time. § 5.

See memorandum of Dr. E. E. Pratt, Chief of Bureau of Foreign and Domestic Commerce, Department of Commerce, Hearings before House Committee on Interstate and Foreign Commerce, respecting Trading with the Enemy, 65 Cong., 1 Sess. (on H. R. 4704), p. 24; statement by A. Mitchell Palmer, Alien Property Custodian, Official Bulletin, Nov. 14, 1917, No. 159; also statement by same, Dec. 10, 1917, concerning effect of declaration of war with Austria-Hungary, Official Bulletin, Dec. 10, 1917, p. 2.

See definitions of "enemy" in proclamation of President Wilson, of May 31, 1918, 50 U.S.C.A., with amendments to March 10, 1928, historical note p. 192.

Sustaining the power of Congress to declare residents of Germany to be enemies, without regard to citizenship, see *Kahn v. Garvan*, 263 Fed. 909.

Regarding as enemies of the United States persons who resided in Cuba during the Spanish-American War, see *Herrera v. United States*, 222 U. S. 569, 572.

⁵ The words "to trade" were broadly defined and were made to include the having of "any form of business or commercial communication or intercourse with." § 2.

The acts that were prohibited were set forth in § 3.

to render generally illegal trade with alien enemy nationals within the domain of the United States.⁶

As a matter of domestic policy, a belligerent State may relax its prohibitions respecting communications with enemy territory, and permit under license from its highest authorities and under conditions specified by itself, certain intercourse therewith.⁷ A grantee accepting such a license may be fairly regarded as bound by such limitations as the grantor has seen fit to impose.⁸

It may be observed that the Trading with the Enemy Act of October 6, 1917, made certain provision for the licensing of enemy or ally of enemy insurance or reinsurance companies doing business within the United States.⁹ The Act also permitted an "enemy" person to file and prosecute in the United States an application for letters patent, or for registration of trade-mark, print, label or copyright, and also to pay any fees therefor pursuant to the requirements of the existing law, as well as fees to attorneys or agents for filing and prosecuting such applications.¹⁰

Broad powers were also conferred upon the President embracing authority to suspend the provisions of the Act in so far as they applied to an ally of enemy; to grant licenses to do business and to perform acts; and also to regulate as by means of licenses transactions in foreign exchange as well as the export of monies and the transfers of various forms of property between the United States and other countries by persons within the United States.¹¹

⁶ See statement of Mr. Charles Warren, Assist. Atty. Gen., concerning the general principles governing the Act, in Senate Report No. 113, 65 Cong., 1 Sess. (to accompany H. R. 4960), 2. This Report by Mr. Ransdell, from the Committee on Commerce, relative to the proposed Trading with the Enemy Act, contained, as Appendix B, memorandum of American and English cases on the law of trading with the enemy prepared by Mr. Warren. See, also, Report of Mr. Montague from the House Committee on Interstate and Foreign Commerce (to accompany H. R. 4960), 65 Cong., 1 Sess., Report No. 85.

⁷ Mr. Moore, Assist. Secy. of State, to Messrs. Alexander and Green, May 19, 1898, granting the request of the Equitable Life Assurance Society for permission to obtain from the Spanish Government a license to enable the Society to protect its assets in Spain during the Spanish-American War, 228 MS. Dom. Let. 586, Moore, Dig., VII, 255.

See Mr. Adee, for the Secy. of State, to Messrs. Kenefick, Cooke, Mitchell, and Bass, July 10, 1918, For. Rel. 1918, Supplement 2, 431.

⁸ *Hamilton v. Dillin*, 21 Wall. 73, Moore, Dig., VII, 239.

A belligerent may not regard it as inconsistent with its relations towards the enemy, to promote the increase and diffusion of scientific knowledge in territory thereof, and to permit a scientific society to send its publications thereto, provided that care be taken that no published material containing information relative to scientific discoveries or advances in military and naval warfare and kindred subjects be furnished. Mr. Adee, Acting Secy. of State, to Mr. Langley, Secy. of Smithsonian Institution, April 27, 1898, 228 MS. Dom. Let. 52, Moore, Dig., VII, 243.

⁹ § 4. See, also, in this connection, Effect of War upon Existing Contracts and Relationships of Contractual Origin, *infra*, § 609.

¹⁰ § 10.

¹¹ See § 5, as amended Sept. 24, 1918, 40 Stat. 966.

See statement as to the licensing of the American Red Cross by the War Trade Board to "trade with the enemy," Official Bulletin, Feb. 18, 1918, No. 337, p. 7.

b

Contracts

(1)

§ 608. **Limitations on Power to Contract.** It is important to observe the effect, if any, of the general inhibition of intercourse between territories of opposing belligerents upon the conclusion of contractual relationships by persons within the territory of a State engaged in war, or by the nationals of such State, with persons closely associated with its enemy, as by being within its territory or by being impressed with its nationality. A tribunal may in fact regard a contract between a person connected by various ties with the enemy, as invalid or unenforceable by reason of some requirement of the principles of conflict of laws as understood by the State of the forum, or on account of domestic prohibitory legislation or regulations.¹

The circumstance that the parties to a contract concluded after the outbreak of war are nationals of opposing belligerents,² or that property which is the subject of agreement is within territory of the enemy, or that both of the contracting parties are nationals of the latter, or enter into their agreement within its domain,³ does not necessarily serve to render the transaction void.

In the opinion of American courts the law of nations is seemingly unconcerned with the differing places of residence, or the opposing nationalities of contracting parties, so long as no forbidden intercourse is involved in, or necessitated by, the making of the agreement. That law as interpreted by those tribunals is regarded, however, as rendering illegal a contract of which the conclusion requires communication by one party with another in a place under the

§ 608.¹ See, generally, in this connection, R. A. Chadwick, "Foreign Investments in Time of War," *L. Q. Rev.*, XX, 167; F. Gore-Browne, *The Effect of War upon Commercial Relations*, 2 ed., London, 1918; E. Meignen, *Les Contrats et la Guerre*, Paris, 1915; A. Latifi, *Effects of War on Property*, London, 1909; A. Page, *War and Alien Enemies*, London, 1914; C. Phillipson, *Effect of War on Contracts*, London, 1909; W. S. Schwabe, *Effect of War on Stock Exchange Transactions*, London, 1915; L. Scott, *The Effect of War on Contracts*, London, 1914; F. Wirth, Jr., *War: Its Effect upon the Commercial Relations of the Belligerents*, Constantinople, 1913; *Int. Law Assn., Proceedings*, 36th Conference, 1930, 59-118; *id.*, 37th Conference, 1932, 89-121.

See, also, T. Baty and J. H. Morgan, *War: Its Conduct and Legal Results*, 294-303; Westlake, 2 ed., II, 48-55; W. F. Trotter, *The Law of Contract During and After War*, 3 ed., London, 1919; J. M. Hall, "The Effect of War on Contracts," *Columbia Law Rev.*, XVIII, 325.

² *Kershaw v. Kelsey*, 100 Mass. 561. In that case Gray, J., adverts to the numerous *dicta* and sweeping statements in the textbooks expressive of a different view. Thus, for example, in *Scholefield & Taylor v. Eichelberger*, 7 Pet. 586, 593, it was said that "the citizens of the hostile States are incapable of contracting with each other"—a statement which was unnecessary, because outside of the question at issue.

³ *Conrad v. Waples*, 96 U. S. 279, 286-290, Moore, Dig., VII, 245-247; *United States v. Quigley*, 103 U. S. 595; *Carson v. Dunham*, 121 U. S. 421, 429, Moore, Dig., VII, 247; *Briggs v. United States*, 143 U. S. 346, 351, 353, Moore, Dig., VII, 248; *Brown v. Gardner*, 4 Lea (Tenn.), 145, Moore, Dig., VII, 250. Also *Kershaw v. Kelsey*, 100 Mass. 561; *Hart v. United States*, 15 Ct. Cl. 414, Moore, Dig., VII, 250.

See *Crawford & McClean v. The "William Penn"*, Peters, C. C. 106, *Scott's Cases*, 580, where an alien enemy was permitted to sue on a contract made by the owner or master of a cartel vessel in enemy territory to repay advances made to enable the ship there to refit and procure provisions. The question at issue related to the enforcement of a valid foreign agreement, rather than to the validity of the agreement.

control of the enemy.⁴ They would also doubtless regard as unenforceable, if not internationally illegal, an agreement the performance of which necessitated such communication.⁵

(2)

§ 609. Effect upon Existing Contracts and Relationships of Contractual Origin. The general inhibition of intercourse between territories of opposing belligerents is said to produce certain effects upon existing contracts and relationships of contractual origin between inhabitants of territories under opposing flags. Thus the outbreak of war is regarded as serving to dissolve the contract, or to clothe either of the parties with a right to terminate it, or to suspend a right of recovery thereon, or to render nugatory the operation of a particular term, or to prevent the running of a statute otherwise applicable to the agreement. In each case it seems important to observe whether the outbreak of war produces a direct effect upon the agreement; and if it does, whether that effect is, in the minds of the courts, attributable to the domestic and possibly unwritten law of the belligerent forum rather than to any other circumstance. It is greatly to be doubted whether international law as such necessarily operates directly upon a valid contract concluded prior to the war between private parties in territories of opposing belligerents.¹ That law does not, however, regard a belligerent sovereign as guilty of internationally illegal conduct if its local law, howsoever established or applied, attributes the dissolution of a contract to the occurrence of war.²

If a contract necessitates communication between the territories of opposing belligerents, its continuance would be incompatible with the state of war. Numerous agreements are of such a kind, and consequently appear to suffer dissolution when war ensues.³ This result may be imputed to the design of

⁴ *Scholefield & Taylor v. Eichelberger*, 7 Pet. 586; *Conrad v. Waples*, 96 U. S. 279, 286; *Walker's Executors v. United States*, 106, U. S. 413, 422, a case involving, however, a violation of the laws of the United States respecting commercial intercourse.

"The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent Com. 63." (Gray, J., in *Kershaw v. Kelsey*, 100 Mass. 561, 573.)

⁵ *Montgomery v. United States*, 15 Wall. 395, Moore, Dig., VII, 244.

§ 609.¹ It may conceivably do so, however, if the object of the agreement is the achievement of an end or the performance of an act which, although not locally forbidden by the laws of the opposing States, is, nevertheless, at variance with, and contemptuous of, what the law of nations itself is acknowledged to proscribe.

² It is significant that in American cases where it has been said that war operates to dissolve a contract or a relationship of contractual origin, the judges have usually been reticent as to the source of the law, even when they have assigned reasons for it. See, for example, statement of Clifford, J., in *The William Bagaley*, 5 Wall. 377, 407, relying upon *Esposito v. Bowden*, 7 Ellis & Blackburn, 763. The judges appear to have assumed that the rule of dissolution is a part of the local law, not necessarily because of a requirement of the law of nations, but rather for the reason that it has in some way become incorporated in the common law, and is hence to be enforced when applicable without the aid of statute.

³ "Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress." (Clifford, J., in *The William Bagaley*, 5 Wall. 377, 407, citing *Esposito v. Bowden*, 7 Ellis & Blackburn, 763.) See, also, *Zinc Corp., Ltd. v. Hirsch*, 85 L. J. (K. B. and C. A.) 565.

the contracting parties who could not well be deemed to have intended that their agreement should continue to exist after the commencement of a period when performance would be regarded as unlawful by the opposing belligerents, or it may be attributed to the will of those belligerents whose right to forbid performance and to penalize the performers (in case performance were sought) would render it highly inequitable to demand that the contract be kept alive. The very basis of an agreement, as well as the terms expressive of it, as in a contract for life insurance, may demand regular and punctual payment, the failure to make which would render it inequitable to keep alive the agreement, or to revive it upon the restoration of peace.⁴ When performance does not involve unlawful communications, the outbreak of war does not necessarily terminate the agreement, although it may subject it to the operation of a condition subsequent that one of the parties may, upon a sufficient showing, not unlawfully elect to abrogate it. The situation may exist, however, where it would be wholly unjust for a contracting party to utilize the occasion of war as a means of ridding himself of preëxisting obligations. In such case the outbreak of the conflict would appear merely to suspend the right to demand, or the duty to effect performance of certain acts during the period of the war.⁵ The Court of Appeals of New York made the following statement in 1926:⁶

The effect of war upon an existing contract between belligerents will vary with the nature of the obligation that is yet to be fulfilled. If the contract has been fully executed by the enemy before the outbreak of hostilities, if all that is left is a unilateral obligation for the payment of a debt, the obligation is suspended.⁷ The citizen must pay his debt when the war is at an end. On the other hand, if the contract is still executory at the beginning of the war, if there are mutual obligations that are yet to be fulfilled, the contract will be terminated when the essential purpose of the parties would be thwarted by delay, or the business efficacy or value of their bargain materially impaired.⁸

⁴ *New York Life Insurance Co. v. Statham*, 93 U. S. 24, where it was held that while the failure to pay an annual premium caused by the outbreak of war between the territories in which the insurance company and the assured were respectively located, involved a forfeiture of the policy, if the company insisted on the condition respecting forfeiture, the assured was still entitled to the equitable value of the policy arising from the premiums actually paid. See, also, *Abell v. Penn Mutual Life Ins. Co.*, 18 W. Va. 400, 423-431; *Semmes v. Hartford Ins. Co.*, 13 Wall. 158; *Rowlatt, J., in Distington Hematite Iron Co., Ltd. v. Passehl & Co.*, March 1, 1916, 85 L. J. (K. B.) 919.

⁵ "A state of war does not put an end to preëxisting obligations or transfer the property of wards to their guardians, or release the latter from the duty to keep it safely, but suspends until the return of peace the right of any one residing in the enemy's country to sue in our courts." (*Gray, J., in Lamar v. Micou*, 112 U. S. 452, 464.)

See also *Frenkel & Co., Inc. v. L'Urbaine Fire Ins. Co.*, 1929, 251 N. Y. 243.

⁶ *Neumond v. Farmers Feed Co.*, 244 N. Y. 202, 206.

⁷ *Citing Williston on Contracts*, § 1748; *Birge-Forbes Co. v. Heye*, 251 U. S. 317. See also *Sutherland v. Mayer*, 271 U. S. 272.

⁸ *Citing Williston on Contracts*, §§ 1749, 1957, 1958, 1978; *Distington H. I. Co., Ltd. v. Possehl & Co.*, 1916, 1 K. B. 811; *Met. Water Bd. v. Dick, Kerr & Co.*, 1917, 2 K. B. 1, 21; *affd.*, 1918 A. C. 119; *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24; *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626; *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610.

See also *Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Company Limited*, House of Lords, 1919, 120 L. T. 386, *Williams and Lauterpacht, Annual Dig.*, 1919-1922, Case No. 278.

A relationship arising from contract may, by reason of its nature, necessitate forbidden intercourse, or else constitute an inequitable bond. A partnership is deemed to possess such a character and, therefore, to suffer dissolution in consequence of war.⁹ It seems to be acknowledged, however, that a relationship, such as one of agency, by virtue of which powers have been previously conferred by a principal in the one country upon an agent in the other, is not necessarily dissolved in case the exercise of those powers does not require communication between the territories of the opposing belligerents.¹⁰ As the Supreme Court of the United States declared in 1926, "agencies, created before the war, and not requiring intercourse across the enemy's frontier, such as for the collection of debts, preservation of property, and so forth, are not terminated by war."¹¹

In applying these principles difficulties present themselves. An agent may abuse or exceed his authority by attempting to bind his principal, with whom he cannot communicate, to an arrangement hostile to the interests of the latter.¹² Again, the agent may decline to act as such, and to accept, for example, payment of an obligation from a third party in the same belligerent country with himself and due to the principal.¹³ On the other hand, the donor of a power may in fact invoke the aid of a court of equity to nullify the consequences of the acts of his donee in enemy territory although they may not have been disadvantageous to the donor and have been ratified by him,¹⁴ or under circumstances when the exercise of the power was solely for the benefit of a third

⁹ *Griswold v. Waddington*, 16 Johns. 438, 488; *The William Bagaley*, 5 Wall. 377; *Hanger v. Abbott*, 6 Wall. 532, 535. See, also, *Matthews v. McStea*, 91 U. S. 7, respecting a partnership relationship between a resident of New York and others in Louisiana in the earliest days of the Civil War.

After adverting to the decision of Chancellor Kent in *Griswold v. Waddington*, 16 Johns. 438, 489, and to the views of Hall (5 ed., 390), Mr. R. A. Chadwick declares: "Thus there are three reasons given for the rule:

"(1) Owing to the prohibition of all intercourse between the two countries at war, the power of mutual control which enables one partner to check another's dealings is gone.

"(2) After the war it is impossible for the partners to pick up the threads of the business at the point where they were abandoned.

"(3) A person should not reap benefit out of his partner's trade in the enemy country; therefore the partnership must be either dissolved or suspended till the restoration of peace, and as the latter is impossible in the case of a partnership, it is necessarily dissolved." ("Foreign Investments in Time of War," *Law Quar. Rev.*, XX, 167, 176-177.)

¹⁰ "It is entirely plain, as we think, that the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency." (Peckham, J., in *Williams v. Paine*, 169 U. S. 55, 73-74.) See, also, *Conn v. Penn*, 1 Pet. C. C. 496, 524-525.

¹¹ *Sutherland v. Mayer*, 271 U. S. 272, 288, where the Court added: "And so here, we have to deal not with a contract made during the war or requiring commercial or other intercourse across military lines, but with an adjustment of rights after the restoration of peace, under lawful articles of partnership entered into before, and existing at the outbreak of, the war. The advent of a state of war put an end to the partnership and postponed all remedies relating to the dissolution; but it did not petrify rights and duties resulting therefrom. Its effect only was to suspend the enforcement of the obligation of each of the partners in respect of the assets and past transactions of the partnership; and the essential inquiry now is: What was the obligation which resulted from the dissolution?"

¹² *Fretz v. Stover*, 22 Wall. 198, 205-207.

¹³ *Insurance Co. v. Davis*, 95 U. S. 425.

¹⁴ *Williams v. Paine*, 169 U. S. 55.

party having an equitable right to demand such action in consequence of the payment of money.¹⁵

The Supreme Court of the United States has necessarily concluded that war renders it impossible for an individual to create a lawful agency within the territory of the enemy during the conflict.¹⁶ The outbreak thereof is doubtless deemed to terminate an existing agency designed for the purpose of or requiring forbidden communications.¹⁷ An agency established prior to the outbreak of war, even though not requiring such communications, is, nevertheless, regarded as subject to termination, with respect to third parties in case either the agent or principal, deeming the continuance of the relationship as contrary to his interests, declines, respectively, to act under it or reap the benefits of it.¹⁸ Thus the Supreme Court has declared that where it is obviously and plainly against the interest of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the outbreak of war will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. It is said that where, on the other hand, it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his conduct is subsequently ratified by the principal, his acts are said to be just as valid and binding upon the principal as if no war had intervened.¹⁹ It may happen that an irrevocable power under a sale is conferred upon a donee, and that circumstances arise whereby a creditor acquires a legal and moral right to have the power, which was made for his benefit, duly executed. In such case the absence of the donor in enemy territory does not afford a sufficient reason for arresting his agent (who in such case is regarded also as the agent of the creditor) in performing a duty which was imposed upon him before the war began.²⁰

A belligerent may see fit to prevent its enemy or nationals of the enemy, where-soever located, from gaining any advantage from the continued operation of agreements or relationships established prior to the war with persons within the national domain. The act of prevention thus expressive of the domestic policy of the State removes the necessity of judicial inquiry respecting the effect of war as such upon the particular relationship concerned, or upon the rights of the parties thereunder.²¹

¹⁵ *University v. Finch*, 18 Wall. 106.

See also, *Hugh Stevenson and Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie* (1918), A. C. 239.

¹⁶ *United States v. Grossmayer*, 9 Wall. 72; *Insurance Co. v. Davis*, 95 U. S. 425, 431.

¹⁷ See the reasoning in *Montgomery v. United States*, 15 Wall. 395.

¹⁸ *Insurance Co. v. Davis*, 95 U. S. 425, 429-433.

¹⁹ The language of the text is substantially that of Mr. Justice Peckham in *Williams v. Paine*, 169 U. S. 55, 73, *citing Insurance Co. v. Davis*, 95 U. S. 425.

Compare dictum in Stumpf v. A. Schreiber Brewing Co., 242 Fed. 80, 82.

²⁰ *University v. Finch*, 18 Wall. 106; *Tingley v. Müller*, 116 L. T. 482.

²¹ See, in this connection, § 10 (*h*) of The Trading with the Enemy Act of Oct. 6, 1917.

Where a relationship such as one of agency is not terminated by the war itself, the rights of principal and agent with respect to each other are obviously not identical with those existing between the principal and a third party. The very maintenance of the agency, by the

§ 610. **The Trading with the Enemy Act.** By the Trading with the Enemy Act of October 6, 1917, the Congress rendered unlawful not merely the attempt to contract on the part of persons within the "United States" as broadly defined, with others resident within enemy territory, but also the carrying on or performance of existing contracts between parties so located.¹ It forbade, moreover, a person within the United States to "trade," in the broadest sense, with another, also therein, even pursuant to an existing agreement, when there was reason to believe that such other person was acting on account or in behalf of a principal within enemy territory.² The design appears to have been that, subject to certain specified exceptions,³ no individuals in enemy territory should profit from benefits derivable from business continued in their behalf within American territory, irrespective of whether the transaction thereof necessitated communications with Germany. It was not asserted that the war or even the Act itself served to terminate existing contracts or relationships. It was declared that a contract entered into prior to the beginning of the war "between any citizen of the United States or any corporation organized within the United States" and "an enemy or ally of an enemy," the terms of which provided for the delivery "during or after any war in which a present enemy or ally of enemy nation has been or is now engaged," of anything produced, mined or manufactured, in the United States, might be abrogated by such citizen or corporation by serving thirty days' notice in writing upon the Alien Property Custodian of the election to abrogate the contract.⁴ It was provided that nothing in the Act should prevent the carrying out, completion or performance of any contract originally made with an "enemy or ally of enemy," where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and where no enemy or ally of enemy would be benefited by

appropriate action of principal and agent, may serve to keep alive and operative during the war a contract between the former and a third party, although they are in territories of opposing belligerents.

§ 610. ¹ 40 Stat. 411, § 2.

The Act made an exception in case the President granted a license either to a person within the United States or to an enemy or ally thereof.

Concerning the meaning of the term "enemy" as employed in the Act see § 2 thereof; also General Suspension of Communication, *supra*, § 607. It may be here briefly observed that the national character of a resident alien enemy was not deemed sufficient to subject him under normal circumstances to the restrictions of the Act.

² § 3.

³ See, for example, the provisions of § 4, concerning the licensing of enemy or ally of enemy insurance or reinsurance companies.

See proclamation of President Wilson relative to agencies in the United States of German insurance companies, No. 1366, April 6, 1917, *Am. J.*, XI, Supp., 201, and proclamation prohibiting marine and war risk insurance by German companies, No. 1386, July 13, 1917, *id.*, 202. See also decision of the Secretary of the Treasury, pursuant to authority vested in him by the President, stopping the fire insurance business by enemy or ally of enemy companies in the United States and calling for the liquidation of their affairs under the supervision of the Alien Property Custodian, Official Bulletin, Nov. 27, 1917, 1.

⁴ § 8. Also § 4 (a), declaring that "no insurance company, organized within the United States, shall be obligated to continue any existing contract, entered into prior to the beginning of the war, with any enemy or ally of enemy insurance or reinsurance company, but any such company may abrogate and cancel any such contract by serving thirty days' notice in writing upon the President of its election to abrogate such contract."

such carrying out, completion or performance, otherwise than by release from obligation thereunder.⁵ It was also provided that nothing in the Act should be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, "for the benefit of such person or of any other person within the United States, not an enemy or ally of enemy," if the funds so paid should have been received prior to the beginning of the war and such payments arose out of transactions entered into also prior thereto and not in contemplation thereof. It was declared, however, that such payment should not be made without the license of the President.⁶ It was announced that nothing in the Act should render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for, on account of, or on behalf or for the benefit of an enemy, performed or engaged in after the beginning of the war and prior to the passage of the Act, or any such act or transaction thereafter performed or engaged in except as authorized in the Act, "which would otherwise have been or be void, illegal, or invalid at law."⁷

From the foregoing provisions it is apparent that the Congress, aware of the latitude enjoyed by the United States as a belligerent with respect to contractual relationships associated with persons within its domain, undertook to lay down fresh and appropriate restrictions. It is not sought to discuss generally the American judicial construction of this domestic legislation; for the judicial task involved chiefly the ascertainment of the design of the Congress rather than an inquiry whether in the exercise of the legislative function that body had violated any external obligations resting upon the nation under conventional or customary law.⁸

C

§ 611. Judicial Remedies. The Statute of Limitations. The reasons prohibiting intercourse between territories of opposing belligerents have long been deemed to be applicable to the case where an inhabitant of the domain of one of them endeavors to institute judicial proceedings in that of the enemy.¹ In

⁵ § 7 (b). The situation here provided for suggests that arising in *University v. Finch*, 18 Wall. 106.

⁶ § 7 (b). According to § 10 (h) "All powers of attorney heretofore or hereafter granted by an enemy or ally of enemy to any person within the United States, in so far as they may be requisite to the performance of acts authorized in subsections (a) and (g) of this section, shall be valid." The subsections specified were those relating to the filing and prosecution of applications for letters patent, or for registration of trade-mark, print, label, or copyright, and the institution and prosecution of suits in equity to enjoin the infringement of letters patent, trade-mark, print, label, and copyrights in the United States.

⁷ § 7 (b).

⁸ Consciousness of the breadth of the belligerent privilege under international law doubtless minimized the judicial sense of need of close scrutiny of the fact whether there was any design on the part of Congress to impose restrictions which were to be deemed at variance with the requirements of that law.

§ 611.¹ *Wilcox v. Henry*, 1 Dall. 69, 71; *Sanderson v. Morgan*, 39 N. Y. 231; *Perkins v. Rogers*, 35 Ind. 124, 145; *Grinnan v. Edwards*, 21 W. Va. 347, 357-360; *Haymond v. Camden*, 22 W. Va. 180; *Sturm v. Flemming*, 22 W. Va. 404; *Stephens v. Brown*, 24 W. Va. 234; *Hanger v. Abbott*, 6 Wall. 532; *Plettenberg, Holthaus & Co. v. Kalmon & Co.*, 241 Fed. 605; *Stumpf v. A. Schreiber Brewing Co.*, 242 Fed. 80.

See also *The Hoop*, 1 Ch. Rob. 196, *Scott's Cases*, 521; *A. D. McNair*, "Alien Enemy Litigants," *Law Quar. Rev.*, XXXI, 154.

1454, Assheton, J., declared at the Hilary Term, that if an alien enemy came into the country under license and safe conduct and took a house there, he could maintain an action of trespass if any one broke in and took away his goods.² In 1697, in the case of *Wells v. Williams*, it was declared that "an alien enemy who is here in protection, may sue his bond or contract; but an alien enemy abiding in his own country cannot sue here."³ The distinction so enunciated was not based upon the legal home or domicile of the individual, and was unaffected by his allegiance to the enemy. No heed was paid to the gains which might accrue to the litigant and eventually, if not during the conflict, to the benefit of his sovereign. The abiding of a man in enemy territory deprived him of the privilege of bringing suit; the lawful presence of an individual in the national domain, and no other circumstance, shielded him, although an alien enemy, from disability. Possibly by reason of the very paucity of alien enemies found to be lawfully residing within the realm and who sought to invoke judicial aid, the English judges when stating the law, were prone to declare broadly that such persons were under a disability, without intimating that this result was not attributable solely to their national character. When, moreover, an alien enemy, although resident in England, endeavored to maintain an action, he was confronted with the burden of proving that he possessed the requisite license.⁴

In the United States, expressions of judicial opinion continued to resemble the English in the form of statement respecting the disability of alien enemies to start suit;⁵ but a broader view obtained as to consequences of the mere

² Lord Reading, C. J., called attention to this statement in *Porter v. Freudenberg* [1915], 1 K. B. 857, 870.

The views imputed to Assheton, J., were: "*Si vn alien come Lumbarde, Galiman, ou tiel marchaunt que vient icy par licence et sauconduyt et prent cy en Lundres ou ailours un measō pur le temps, si aucun debruse le meason et prent ses biens il auer acc'de Trespas, mes sil soit enemy le roy et vien einz sauns licence ou sauconduyt auter est.*" (32 Y. B. Hen. VI, fol. 23, b. 5, Richard Tottel, London, 1556.)

³ 1 L. Raym. 282, 283. The decision was rendered at the Michaelmas Term, which expired in November, 1697, and not in 1698, which is the date sometimes inadvertently assigned to the decision.

⁴ See, for example, the views of Lord Ellenborough in *Boulton v. Dobree*, 2 Camp. 163, and in *Alciator v. Smith*, 3 Camp. 245; also Campbell, C. J., in *Alcinous v. Nigrou*, 4 E. & B. 217. Lord Reading in *Porter v. Freudenberg* [1915], 1 K. B. 857, discusses fully the early English cases.

In *Princess Thurn and Taxis v. Moffitt*, [1915] 1 Ch. 58, it was declared that the effect of registration under the Aliens Restrictions Act, 1914, amounted to a license to the complainant, an alien enemy, to remain in the country, and served to give her "a clear right to enforce that right in the courts of this country notwithstanding the existence of a state of war." See, also, *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, to the effect that internment of a registered alien enemy does not deprive him of the right to sue.

C. M. Picciotto, discussing the English cases in "Alien Enemy Persons, Firms and Corporations in English Law," *Yale L.J.*, XXVII, 167, 169, concludes that "a person who is a subject or citizen of a State at war with Great Britain, puts off his enemy character for the time being and may appear as a plaintiff in the English courts if there is clear evidence that he has the license of the Crown to reside, such evidence being very strong in cases where the Crown has contemplated and made provision for the continued residence of alien enemies by making enactments for their registration and internment, and where, in consequence, the alien enemy has in fact been registered or interned."

See, also, *Ragus v. Les Commissionnaires du Havre de Montreal*, 26 *Rapports Judiciaires de Québec, Cour du Banc du Roi (en appel)*, 87.

⁵ "An alien enemy has no right of action whatever during the war." (McKean, C. J., in *Wilcox v. Henry*, 1 Dall. 69, 71.)

"Total inability on the part of an enemy creditor to sustain any contract in the tribunals of

presence or residence of such persons within the national domain. It was declared by Chief Justice Kent in New York in 1813, that according to the law of nations, an alien who comes to reside in a foreign country is entitled, so long as he conducts himself peaceably, to continue to reside there under the public protection and until the territorial sovereign expresses the will to order him away. Prior to that event he was said to be entitled to maintain an action.⁶ It was thus acknowledged that the mere outbreak of war did not deprive him of his judicial remedies. Nor was it believed that the use of them necessitated communication with territory of the opposing belligerent. Such appears to be the prevailing American view to-day. The principle is recognized in the United States that the connection between an individual and the territory of the opposing belligerent resulting from his presence there, rather than his national character or any other circumstance, affords the true basis for the disability which in consequence of war is impressed upon him. When such a connection appears to exist, the alien enemy cannot sue as a plaintiff.⁷

§ 612. **The Same.** When the United States became a belligerent in 1917, there were resident within its territory a vast number of alien enemies, a substantial proportion of whom had previously declared an intention to become American citizens. The law of nations did not deprive these individuals, whether or not such declarants, of access to the courts; nor did the statutory law enacted the same year, known as the Trading with the Enemy Act, purport to do so.¹

the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors of the courts. Absolute suspension of the right, and the prohibition to exercise it, exist during war by the law of nations." (Clifford, J., in *Hanger v. Abbott*, 6 Wall. 532, 539.)

Hazel, J., in *Stumpf v. A. Schreiber Brewing Co.*, 242 Fed. 80, 82, in enunciating a general rule as to alien enemies, was careful to note as exceptions, instances "where commerce is continued between the nations at war, or where it is shown that the alien enemy is only a nominal plaintiff, or the co-plaintiff of a nonbelligerent, who is a substantial plaintiff, or a denizen or inhabitant of the United States," citing *Aktien Gesellschaft, etc. v. Levinstein, Ltd.*, [1915], W. N. 85.

⁶ *Clarke v. Morey*, 10 Johns. 69. Attention was called (73-74) to early treaties providing for privileges of residence and protection for the nationals of one contracting party in the territory of the other in the event of war between them. The learned Chief Justice adverted to the treaty between the United States and Prussia of 1785 (see Art. XXIII, Malloy's Treaties, II, 1484), and to the Jay Treaty of 1794 (see Art. XXVI, *id.*, I, 605).

⁷ See, for example, *Posselt v. D'Espard*, 100 At. 893. See extended note on this case by E. M. Borchard, *Yale Law J.*, XXVII, 104. Also *dicta* in *Fritz Schulz, Jr., Co. v. Raimes & Co.*, 164 N. Y. Supp., 454.

According to Art. XXIII (h) of the Regulations annexed to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, it is forbidden "to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." (Malloy's Treaties, II, 2285.) This paragraph appears to be deemed by the United States and England as merely restricting the "authority of commanding generals and their subordinates in the theatre of belligerent activity." (A. P. Higgins, Hague Peace Conferences, 263-265.) See, also, G. B. Davis, in *Am. J.*, II, 63, 70-71; Opinion of Lord Reading, in *Porter v. Freudenberg* [1915], 1 K. B. 857, 876-880; C. M. Picciotto, in *Yale Law J.*, XXVII, 171-172. Compare views of continental publicists as set forth in Garner, *World War*, I, § 83.

§ 612. ¹ Act of Oct. 11, 1917, 40 Stat. 411; 50 U.S.C.A., Appendix, embracing subsequent amendments.

The Act confined restrictions respecting the right of bringing suit, to the case of an "enemy or ally of enemy." The individuals thus placed under a disability did not include resident alien enemies (save when the President might, by proclamation, if he should find

A consequence of closing the courts to a class of alien enemies is to remove from them certain penalties which might otherwise be incurred through failure to initiate proceedings during the period of disability. Thus the statute of limitations does not run against such individuals while they are being deprived of their judicial remedies.²

Again, where a non-resident alien who has started suit finds himself, upon the outbreak of war between his own State and that of the defendant, in the position of an alien enemy with respect to his opponent, and in consequence deprived of access to the courts, the existence of the conflict will impel the tribunal having jurisdiction of the cause to order a suspension of the proceedings until peace is restored, but not to dismiss the action.³ Whether the litigant who becomes an alien enemy is defendant or plaintiff, the courts of the United

that the safety of the United States or the successful prosecution of the war should so require, enlarge the body or class of individuals within such category).

It was declared that nothing in the Act should be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by "an enemy or ally of enemy" prior to the end of the war, except as provided in section ten of the Act, subject to the provision, however, that an enemy or ally of enemy licensed to do business under the Act might prosecute and maintain any such suit or action so far as the same arose solely out of the business transacted within the United States under such license and so long as such license remained in full force and effect. § 7b. See *Held v. Goldsmith*, 153 La. 598.

According to § 8c, the running of any statute of limitations was to be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom was an enemy or ally of enemy, and containing any promise to pay or liability for payment which was evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country; and no suit was to be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property should be released for the payment or satisfaction of such contract or obligation, subject to the provision, however, that nothing "herein contained" should be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

The following provision is also to be noted: "Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be *prima facie* defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war, any contract or other obligation." (§ 7b.)

See *Krachanake v. Acme Mfg. Co.*, 95 S. E. (North Carolina) 851.

The Act declared it to be lawful for an "enemy or ally of enemy" to file and prosecute in the United States an application for letters patent, or for registration of trademark, print, label, or copyright. It gave him, moreover, additional time for so doing after the close of the war if, on account of conditions arising therefrom, he was unable to take such action within the period prescribed by law. § 10a. Such an individual was also given the right to prosecute suits in equity against a person other than a licensee under the Act, to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by such "enemy or ally of enemy." § 10g.

² *Hopkirk v. Bell*, 3 Cranch, 454; *Hanger v. Abbott*, 6 Wall. 532. See, also, *Semmes v. Hartford Insurance Co.*, 13 Wall. 158; *Brown v. Hiatts*, 15 Wall. 177.

See C. N. Gregory, "Effect of War on the Operation of the Statute of Limitations," *Int. Law Association, Hague Papers*, 1914, 148.

³ *Hutchinson v. Brock*, 11 Mass. 119; *Plettenberg, Holthaus & Co. v. I. J. Kalmon & Co.*, 241 Fed. 605; *Stumpf v. A. Schreiber Brewing Co.*, 242 Fed. 80; *Speidel v. N. Barstow Co.*, 243 Fed. 621; *Rothbart v. Herzfeld*, 167 N. Y. Supp. 199; *Taylor v. Albion Lumber Co.*, 176 Calif. 347.

See also *The Birge-Forbes Co. v. Heye*, 251 U. S. 317; "Status of Alien Enemies in Courts of Justice," *Harv. Law Rev.*, XXXI, 470; Jules Valéry, "*À propos de la 'condition des sujets ennemis devant les tribunaux français'*," *Clunet*, XLII, 1009-1024.

States are scrupulous to exercise their discretion so as to protect the privileges of the enemy litigant during the period of his disability.⁴

The opinion prevails both in the United States and England that an alien enemy, although abiding in hostile territory, may be subjected to suit, and that when made a party defendant, cannot reasonably be denied a hearing.⁵ The right of defense is said to embrace the right to appeal from an adverse judgment entered prior to the war.⁶

§ 613. **Suits against Persons in Enemy Territory.** The subjecting to suit in a local forum of an individual abiding within enemy territory presents legal difficulties. The maintenance of action commonly involves communication with such territory, both for the purpose of notifying the defendant of the existence of the suit, and in order to enable him to defend his case adequately.¹ It may be doubted whether a private individual should be enabled, through the in-

⁴ See Opinion of Mr. Justice Brandeis in *Watts, Watts & Co. v. Unione Austriaca &c.*, 248 U. S. 9.

"In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the Imperial Government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice, which respects the rights of an enemy; second, the broad principles of international intercourse, which lead courts and nations that believe in international rights, to be the more careful to observe them toward belligerents; and lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago, in *Re Boussmaker*, 13 Vesey, 71, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace." (*Buffington, J.*, in behalf of the Circuit Court of Appeals, Third Circuit, in *The Kaiser Wilhelm II*, 246 Fed. 786, 789-790.

See *Kinter v. Hoch-Frequenz-Maschinen Aktien-Gesellschaft für Drahtlose Telegraphie*, 256 Fed. 849; *Kuhnhold v. Netherlands-American Steam Nav. Co.*, 264 Fed. 320.

According to *Porter v. Freudenberg*, [1915] 1 K. B. 857, 884, an alien enemy appellant (of the disabled class) was without the right to appeal from an adverse judgment rendered against him as plaintiff prior to the outbreak of war.

⁵ *Id.*, *Robinson v. Continental Insurance Co.* [1915], 1 K. B. 155; *McVeigh v. United States*, 11 Wall. 259. In the course of his opinion, Mr. Justice Swayne said: "It is alleged that he [the respondent] was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject." (267.) The learned Justice declared that it was clear that an alien enemy was liable to be sued, and quoted Bacon's Abridgment, title ALIEN, D.

Sir Samuel Evans declared in the case of the Schooner "*Möwe*," that as a matter of practice of the Prize Court rather than of international law, "whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court." (2 Lloyd's Prize Cases, 70, 89.) See, also, in this connection, Note in *Harv. Law Rev.*, XXXI, 470, 475. Also decision of the *Council des Prises* in the case of the German ship *Czar-Nicolai II.*, *Journal Officiel*, April 19, 1915, 2369, *Rev. Gén.*, XXII (*jurisprudence*), 9.

⁶ *Porter v. Freudenberg*, [1915] 1 K. B. 857, 891.

§ 613.¹ § 7 (b) of the Trading with the Enemy Act provided that "an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

"It is perfectly inconsistent with the whole doctrine of the suspension and cancellation of contracts, as well as with the substantial reason for non-intercourse (namely, the danger of permitting communication) and the historical reason (namely, the want of a *persona standi in judicio*), that an alien enemy should be capable of being sued during war. How can he properly defend himself? His position would be most unfortunate and most unjust." (Baty and Morgan, *War: Its Conduct and Legal Results*, 288.)

stitution of proceedings, to cause or promote any relaxation of prohibitions designed to prevent intercourse with the domain of the enemy. Difficulties also arise in clothing a court with jurisdiction when the action is a personal one.² It is not believed that any circumstance attributable to war should be permitted to lessen what in times of peace are regarded as the requisites of jurisdiction. On the other hand, the evil of communication may appear of less significance in certain situations than the denial to an individual of the right to enforce his legal remedies against an alien enemy. The equities of the plaintiff are strongest where the action is one *in rem*. In such case jurisdiction is not dependent upon actual communication with or notification of the defendant. It may be urged, moreover, that the owner of property within the State of the forum contemplates the risk of being interfered with in making proper defense of his case, if in time of war he happens to be within territory of the opposing belligerent, and if the object of the suit is primarily to reach and dispose of his interests in that property.

d

§ 614. **Cessation of Interest.** The effect of war upon the running of interest accruing on a debt when the debtor and creditor are in territories of the opposing belligerents is a matter that until recent years has lacked the careful scrutiny of American tribunals.¹ If the prohibition of intercourse between those territories renders it unlawful for a debtor to make payment when it becomes due, that circumstance doubtless justifies his claim to the abatement of interest thereafter.² The prohibition does not, however, have the same significance when the impossibility of lawful communication with the creditor does not deprive the debtor of any opportunity to fulfill his obligation according to its terms or when it matures. Thus it is not apparent why the outbreak of war should serve to abate the running of interest not due until a fixed date succeeding that event. The creditor lacks the right to demand payment until the date of maturity; prior thereto interest on the debt represents the amount agreed to be paid for the use of money for a specified period which has not elapsed.³

Again, if by the establishment of an agency not terminated in consequence of war the debtor and a representative of the creditor are within the territory of the same belligerent, where it may be fairly asserted that payment ought to be made, the reason for abatement disappears.⁴

² Note in *Harv. Law Rev.*, XXXI, 470-475, and the comments therein on difficulties presented in *Porter v. Freudenberg*, [1915] 1 K. B. 857. See, also, in this connection, *Watts, Watts & Co. v. Unione Austriaca &c.*, 248 U. S. 9, 22.

§ 614. ¹ See discussion of American cases by C. N. Gregory, in *Law Quar. Rev.*, XXV, 297-316.

² *Hoare v. Allen*, 2 Dall. 102; *Foxcraft and Galloway v. Nagle*, 2 Dall. 132.

³ "The point which it is desired to make is, that when interest is stipulated on an instrument till maturity, that interest should be payable in any event. The interest up to maturity is the consideration for the immediate use of the money, not for any forbearance to sue, as no suit can be brought till then, except perhaps in certain special cases provided for in the deed or instrument." (R. A. Chadwick, "Foreign Investments in Time of War," *Law Quar. Rev.*, XX, 167, 171.)

See *Nash v. Lambert*, 15 Minn. 416, commented on by C. N. Gregory, in *Law Quar. Rev.*, XXV, 297, 309; also *Pillow v. Brown*, 26 Ark. 240.

⁴ See *Washington, J.*, in *Conn v. Penn*, 1 Peters C. C. 496, 524, where it was said: "A prohi-

In a word, the duty to pay interest expressly or impliedly agreed upon cannot in theory be affected by the occurrence of an event which does not cause the debt to mature or prevent payment when it becomes due. While this principle did not for many years appear to receive the general approval of American tribunals, it may be doubted whether the Supreme Court of the United States ever committed itself irrevocably to an opposing doctrine.⁵

In 1925 that tribunal, through Mr. Justice Holmes, expressed itself in the following terms:

"The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young v. Godbe*, 15 Wall. 562, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a

bition of all intercourse with an enemy, during the war, and the legal consequence resulting therefrom, as it respects debtors on either side, furnish a sound, if not in all instances, a just reason for the abatement of interest, until the return of peace. As a general rule, it may be safely laid down, that wherever the law prohibits the payment of the principal, interest during the existence of the prohibition is not demandable; and no reason is perceived, why the rule should not be the same in courts of equity, as in courts of law. But, the rule can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there, authorised to receive the debt; because the payment to such creditor or his agent, could in no respect be construed into a violation of the duties imposed by a state of war, upon the debtor."

See also *Ward v. Smith*, 7 Wall. 447, 452.

⁵ See *Brown v. Hiatts*, 15 Wall. 177. In this case a citizen and resident of Virginia, after the Civil War, brought suit in Kansas to foreclose a mortgage upon certain real estate there located, to secure the bond of the mortgagors for \$2400 with interest. On May 29, 1860, the mortgagee had loaned the sum of \$2000 in Kansas to the defendants, citizens of that State, with interest at 20 per cent. a year, and had taken the bond in suit, payable in twelve months for the amount, with interest for the period included, making the sum of \$2400, the whole drawing the stipulated interest after maturity. The mortgagee residing in that portion of the State of Virginia declared to be in insurrection against the Government of the United States during the Civil War was cut off from communication with the mortgagors during the conflict. The Supreme Court of the United States, in determining the amount of the judgment to be entered in favor of the complainant, declared (p. 187) that it should be "for the amount due on the bond in suit; such amount to be made up by adding to the principal the interest due to the date of the judgment, at the rate stipulated, deducting the period intervening between the 27th of April, 1861, and the 2nd of April, 1866," marking the limits of the period of war. According to Mr. R. A. Chadwick, "Apparently interest was allowed for the first year, that is to say till maturity, because judgment was given for the 'principal' sued upon, namely \$2400, plus certain interest, and this 'principal' included \$400, one year's interest on the real loan." (*Law Quar. Rev.*, XX, 171.) It should be observed that Mr. Justice Field, in the course of the opinion of the Court, said (185-186): "Counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those to which the law allows interest, and contends that the revival of the debt in the first case, after the termination of the war, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle, which suspends its running during war." If the Court did in fact direct a judgment for the amount of the bond — \$2400 — covering one year's interest on the original debt, which did not accrue in its entirety until May 29, 1861, more than a month after the 27th of April, 1861 (when all intercourse between the parties became illegal), the decision lacks the significance which is sometimes attributed to it.

From the brief report of *Hoare v. Allen*, 2 Dall. 102, it appears that the loan, to secure which a mortgage was given, on Dec. 4, 1773, was payable Dec. 4, 1774, although suit could not be brought on the mortgage before Dec. 4, 1775. The Court allowed interest until Sept. 10, 1775, when communications between the parties became suspended in consequence of the War of the Revolution. Thus the duty of the debtor to pay his debt arose before the outbreak of war, although the right of the creditor to bring suit on the mortgage did not accrue until after that event.

liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid, interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions, but here again what we regard as principle has prevailed in later days, *Miller v. Robertson*, 266 U.S. 243; *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie* [1918], A.C. 239, 245; s.c. [1917], 1 K.B. 842, 850. The case of *Brown v. Hiatts*, 15 Wall. 177, although criticized in the last cited decision, is consistent on its facts with the principle adopted here, since war existed at the time when the cause of action otherwise would have accrued, and it very possibly might be held that war excuses the performance of a contract although it does not impair or diminish a liability already fixed by law.”⁶

A belligerent may through appropriate action prevent payment by local debtors of any sums, whether interest or principal, to resident agents of alien enemy creditors themselves in enemy territory.⁷ Obviously such conduct sheds no light upon the question as to the effect of war upon the running of interest under the circumstances above noted.

e

§ 615. **Interference with Means of Communication.** In order to insure a general suspension of intercourse with enemy territory, a belligerent is justified in subjecting to its immediate control every agency for the communication of intelligence from places within its territory to those outside of it. The assertion of this right at the present time calls for the establishment of a rigid censorship of communications by mail, cable, radio or other means of transmission, from belligerent territory to that of any foreign State.¹ Vehicles of transportation, by land, by sea or through the air, likewise become reasonable objects of ‘closest scrutiny before their departure from the national domain. By no other process is it possible to prevent the enemy from securing important military or political information.²

⁶ *Hicks v. Guinness*, 269 U. S. 71, 81.

⁷ See, for example, § 3 (a), of the Trading with the Enemy Act of Oct. 6, 1917.

§ 615. ¹ The United States asserted this right when a belligerent in 1917. According to § 3 (d) of the Trading with the Enemy Act of Oct. 6, of that year: “Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country.”

See, also, Executive Order of Oct. 12, 1917; statement by Mr. Burleson, Postmaster General, Dec. 11, 1917, as to the inauguration of censorship of international mail, Official Bulletin, Dec. 13, 1917, 4.

² As neutral territory oftentimes affords a convenient and dangerous channel of communication, it is of highest importance that a belligerent scrutinize and censor the transmission of intelligence thereto.

It is not, therefore, unreasonable for a belligerent to require that no telegrams from private individuals and commercial houses, and which are detrimental to its interests, be sent over its cables and through the foreign office of a neutral State. Nor is there an abuse of power when a belligerent declines to permit the use of such cables for the purpose of facilitating any commercial transaction between neutral and enemy countries.³ Doubtless, as has been observed, messages passing between neutral diplomatic missions within belligerent territory and their respective governments, should be permitted to be in cipher at least in the absence of abuse of such diplomatic privilege. A requirement that all other messages emanating from such missions should be open rather than in cipher is not believed to be arbitrary.⁴

When the United States became a belligerent in 1917, such radio stations within its "jurisdiction" as were required for naval communications were taken over by the Government for exclusive use and control by it.⁵ On April 28, 1917, all companies or other persons, owning, controlling or operating telegraph and telephone lines or submarine cables, were prohibited from transmitting messages to points without the United States, and from delivering messages received from such points, except those permitted under rules and regulations to be established by the Secretary of War for telegraph and telephone lines, and by the Secretary of the Navy for submarine cables.⁶ On September 28, 1918, all such companies or persons were prohibited from transmitting messages to points without the United States or to points on or near the Mexican border through which messages might be despatched for the purpose of evading the censorship that was provided, and from delivering messages received from such points, except those permitted under rules and regulations to be established.⁷

³ Memorandum of the British Foreign Office, March 5, 1915, accompanying communication of Mr. W. H. Page, American Ambassador at London, to Mr. Bryan, Secy. of State, March 9, 1915, For. Rel. 1915, Supp., 710; also telegram of Mr. Bryan to Mr. Page, March 16, 1915, *id.*, 711; further British memorandum contained in communication of Mr. Page to Mr. Bryan, March 26, 1915, *id.*, 712. See, generally, correspondence with Great Britain, *id.*, 698-722.

⁴ Mr. W. H. Page, American Ambassador at London, to Mr. Bryan, Secy. of State, Aug. 27, 1914, to the effect that according to British censorship regulations only messages passing between diplomatic missions and the Government at Washington might go in cipher, and that all others should be open. For Rel. 1914, Supp., 506.

"During the war between the United States and Spain, a censorship was established under General A. W. Greely, Chief Signal Officer, of cable messages sent from the United States. No cipher messages were permitted to pass without special authority in each case, but such authority was given for the messages of diplomatic representatives officially addressed and signed. In this relation, however, it was observed that 'should the exigencies of war require, this Department could oppose no objection to the complete prohibition of all cipher messages, whether of foreign representatives or others.'" (Statement in Moore, Dig., VII, 256, citing Mr. Adee, Acting Secy. of State, to Secy. of War, April 27, 1898, 228 MS. Dom. Let. 62.)

See Diplomatic Intercourse of States, Right of Official Communication, In General, *supra*, § 428.

⁶ Executive Order No. 2585, April 6, 1917, pursuant to Act of Aug. 13, 1912, 37 Stat. 302. It was declared in this order that "all radio stations not necessary to the Government of the United States for naval communications, may be closed for radio communication."

See also executive order No. 2605 A, April 30, 1917, adverting to the authority vested in the President under the Joint Resolution of April 6, 1917, as well as under the Act of Aug. 13, 1912. See Control of Radio, *supra*, §§ 192-193F.

⁷ Executive Order No. 2604.

Executive Order No. 2967. The rules were to be established by the Secy. of War for telegraph and telephone lines, and by the Secy. of the Navy for submarine cables.

3

§ 616. **Control over the Persons of Resident Alien Enemies.** Upon the outbreak of war a belligerent acquires a broad right to control enemy persons within its domain for the accomplishment of various purposes relating to the conflict. These have a single aim — to prevent the enemy from gaining the benefit of the aid which such individuals may endeavor to afford it.¹ Such aid may take the form of depredations directed, for example, against the military, or naval, or industrial establishments of the State of residence, or of espionage with a view to communicating information to the enemy.² Again, it may manifest itself in the effort of the individual to depart from the State of residence and return to that of the enemy in response to a summons to military service. Thus, a belligerent may find it detrimental on the one hand to permit the departure from its domain of alien enemy persons capable of entering the public service, and on the other, a source of grave danger to allow such individuals to remain at large within its territory.

The law of nations does not prescribe the procedure to be followed. In that adopted a belligerent must doubtless respect those requirements of justice which forbid cruel, arbitrary or revengeful conduct. Women, children, and all persons who, through age or infirmity, are incapable of rendering military service, are entitled generally to special consideration.³ Apart from the obvious duty to re-

See also proclamation of President Wilson, July 22, 1918 (Official Bulletin, July 24, 1918, No. 368, p. 1), announcing his assumption of possession, control and supervision of every telephone and telegraph system in the United States, in pursuance of authority vested in him by the Joint Resolution of July 16, 1918, 65 Cong., 2 Sess., Chap. 154; proclamation of President Wilson of Nov. 2, 1918, taking over (pursuant to authority conferred by that law) the marine cable systems of the United States, Official Bulletin, Nov. 16, 1918, Vol. II, No. 465.

For the cable censorship regulations of the United States between April 28, 1917, and Nov. 29, 1918, see Naval War College, Int. Law Documents, 1918, 172-192.

§ 616.¹ "Every belligerent State possesses the inherent right to take such steps as it may deem necessary for the control of all persons whose conduct or presence appears dangerous to its safety. In strict law enemy subjects located or resident in hostile territory may be detained, interned in designated localities, or expelled from the country." (Rules of Land Warfare, U. S. Army, 1917, No. 25.) See also War Dept. Rules of Land Warfare, 1940, No. 20.

See Act of July 6, 1798, Rev. Stat. § 4067.

Declared Sir Edward Grey, British Foreign Secy., in a communication to Mr. W. H. Page, American Ambassador to Great Britain, Nov. 9, 1914, "In detaining persons who might, in certain eventualities, become a source of danger to the State, His Majesty's Government are only acting in accordance with the dictates of a legitimate and reasonable policy, and they would be clearly lacking in their duty to the country if they neglected to safeguard its interests by allowing the continuance of possible risks to the public safety.

"In proceeding as they have done they have only had this one consideration before them, and it has never been their intention to indulge in a domestic act of hostility towards German subjects as such or in any way to inflict hardship for hardship's sake on innocent civilians." (Misc. No. 8 [1915], Correspondence with the American Ambassador relating to the Release of Interned Civilians [Cd. 7857], p. 16.)

See James W. Garner, "Treatment of Enemy Aliens." *Am. J.*, XII, 27 and 744; XIII, 22.

² See, for example, preamble of proclamation of President Wilson, July 13, 1917, prohibiting marine and war risk insurance by branch establishments of German insurance companies, Official Bulletin, July 14, 1917, p. 2.

³ See proposal of the Pope in February, 1915, for the exchange of civilians medically unfit by Great Britain and Germany, and the acceptance of the proposal, Misc. No. 8 (1915), [Cd. 7857] 56-58; also agreement between those belligerents in December, 1916, for the release of male civilians over 45 years of age, Misc. No. 1 (1917), [Cd. 8437] 4-6.

spect the dictates of humanity, a belligerent is believed to be free to shape its policy according to the exigencies of the hour. It may, for example, require the registration of the alien enemy; ⁴ it may regulate his occupation as well as his place and mode of living; it may intern him; ⁵ it may expel him.⁶

Prior to World War I a practice had developed which permitted alien enemies, subject to good behavior, to remain unmolested in the State of residence, or for a certain length of time after the outbreak of war, within which they might return to their own country.⁷ It was doubtless the prevalence of such good behavior that led to the custom, and gave rise to treaties which fortified it.⁸ This

⁴ See President Wilson's proclamation of Nov. 16, 1917, requiring the registration of alien enemies, and otherwise limiting their freedom, Official Bulletin, Nov. 19, 1917, p. 1.

⁵ After the outbreak of war with Germany in 1917, the United States undertook to intern the sailors taken from German merchantmen in American ports and places under American control as those vessels were taken over by the Government. Such individuals, to the number of about five thousand, were held in custody by the Bureau of Immigration of the Department of Labor on the technical charge of having entered and being within the country without examination and permission. They were not charged with being alien enemies and were not confined pursuant to any proclamation of the President, but were simply held in detention by the immigration authorities pending deportation. Those authorities not being able under the Immigration Statute to deport the individuals so held in detention to the point of origin while the war was being waged, held them indefinitely in custody. Some of these persons were released on parole for the purpose of helping out industrial needs in the interior of the country. Very few dangerous alien enemies interned as such and placed in the custody of the War Department were released. Up to March 22, 1918, the number paroled was only a fraction of one per cent. of the total number interned. For the basis of the foregoing statement the author is indebted to a communication from Mr. John Lord O'Brian, Special Assistant to the Attorney General for War Work, March 22, 1918.

With respect to the internment of an alien enemy under § 4067 Rev. Stat., see *Minotto v. Bradley*, 252 Fed. 600; *De Lacey v. United States*, 249 Fed. 625.

See *Prisoners of War, Civilians*, *infra*, § 676.

⁶ War Dept. Rules of Land Warfare, 1940, No. 21.

The Regulations of the Institute of International Law respecting the Admission and Expulsion of Aliens announce in Art. XXVIII, paragraph 10, that "Aliens who, in time of war or when war is impending, endanger the safety of the State by their conduct" may be expelled. *Annuaire*, XII, 224, J. B. Scott, Resolutions, 109.

Concerning the expulsion from France of German subjects in 1870, from the Transvaal of British subjects during the Boer War, from Ottoman territory of Greeks in 1897, and of Italians in 1911-1912, see Bonfils, 8 ed., II, 65-69, and data there cited.

The United States has never resorted to the expulsion *en masse* of alien enemies resident in its territory.

See Expulsion as a War Measure, *supra*, § 64.

Concerning the expulsion of Germans by Portugal pursuant to a decree of April 20, 1916, see Clunet, XLIII, 1424, mentioned by J. W. Garner, in *Am. J.*, XII, 54.

⁷ Declares Hall: "Bynkershoek, in speaking of the right of a belligerent State to treat as prisoners enemy subjects found within its boundaries at the beginning of war, mentions that the right had seldom been exercised in recent times, and gives a list of treaties, which might easily be enlarged, stipulating for the reservation of a specified time during which the subjects of the contracting parties should be allowed to withdraw themselves and their property from the respective countries in the event of war between them. By the early part of the eighteenth century therefore a usage was in course of growth, under which enemy subjects were secured the opportunity of leaving in safety, and though the custom did not establish itself so firmly as to dispense altogether with the support of treaties, those which were made in the end of that century, and which have been made since then, may rather be looked upon as intended to secure a reasonable length of time for withdrawal and for the settlement of private affairs, than to guard against detention." (Higgins' 8 ed., 464-465.)

⁸ Certain treaties of the United States have made provision for such treatment of resident alien enemies. See, for example, Art. XII, treaty with the Argentine Confederation, July 27, 1853, Malloy's Treaties, I, 24; Art. XXV, that with Brazil, Dec. 12, 1828, *id.*, I, 141; Art. XXI, that with Italy, Feb. 26, 1871, *id.*, I, 975; Art. XXII, that with Mexico, Feb. 2, 1848, *id.*, I, 1117; Art. XXIII, that with Prussia, July 11, 1799, *id.*, II, 1494; Art. XXII, that with Sweden, April 3, 1783, *id.*, II, 1732. All of the foregoing agreements, save that with Argentina, allow a certain time for merchants to remain in the State of residence, close their

was due to the fact that slow means of transportation and communication had rendered it difficult for the alien enemy to aid his country while remaining within the territory of its foe.⁹ Thus he was deemed innocuous and his plight a pitiable one. No practice grew up, however, which sanctioned the theory that when, for any reason, such a person became a public menace as an obstacle in the prosecution of a war, the belligerent within whose territory he resided or was found lacked the right to deal with him accordingly.

Improved means of communication and transportation now give the resident alien enemy weapons of offense which, if not carefully withheld from his use, render him a public danger not contemplated in any earlier century. Hence a belligerent is burdened with a subtle task in reducing him to the relative degree of impotence which he once exhibited. The United States has not, however, when at war, deemed it expedient to deal severely with such individuals as a class. In the course of the War with Spain in 1898, they were treated with greatest leniency.¹⁰ In his proclamation of war with Germany, April 6, 1917, President Wilson enjoined all alien enemies to obey the laws, and to refrain from actual hostility and from giving information, aid or comfort to the enemies of the United States, and to comply with all regulations promulgated by the President. He declared that so long as such individuals conducted themselves in accordance with the law they would be "undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons," except so far as restrictions might be necessary for their own protection and for the safety of the United States.¹¹

affairs and return home, whereas, according to the treaties with Italy, Mexico and Prussia, other classes of individuals such as "women and children, scholars of every faculty, cultivators of the earth, artisans, mechanics, manufacturers, and fishermen, unarmed and inhabiting the unfortified towns, villages, or places, and, in general, all others whose occupations are for the common subsistence and benefit of mankind," are to be allowed to remain without molestation.

Such agreements are not responsive to the present requirements of opposing belligerents. The wisdom of reciprocal arrangements permitting able-bodied men, whether engaged in trade or not, to return to enemy territory may be greatly doubted.

⁹ At the present time, where the entire able-bodied male population of a State may be called upon to take up arms in its behalf, every man of military age is an asset reasonably to be withheld from the belligerent to whom he owes allegiance when he happens to be within the territory of its foe.

¹⁰ See, in this connection, *Rev. Gén.*, V, 677.

"The instructions issued to United States marshals with regard to alien enemies during the War of 1812 were of a general nature. The minor police regulations concerning such aliens were confided to the marshals, respectively, under those general instructions." (Moore, *Dig.*, VII, 192, note, *citing* Mr. Adams, Secy. of State, to Mr. Cuthbert, M. C., March 21, 1821, 18 MS. Dom. Let. 274.)

¹¹ For. Rel. 1918, Supp. 2, 165. In that proclamation (No. 1364) the President announced the establishment of twelve regulations for the public safety. These forbade an alien enemy to have in his possession certain specified articles such as an implement of war, or to use or operate certain things, such as an aircraft or wireless apparatus or cipher code. The alien enemy was also forbidden to approach within a specified distance of certain places such as an arsenal or navy yard. He was forbidden to give utterance to any attack or threats against the Government of the United States or against its measures or policies or persons in its service. He was enjoined not to commit or abet any hostile act against the United States, or give information, aid or comfort to its enemies. His presence was, moreover, forbidden in any locality which the President might from time to time designate by executive order as a prohibited area, save by permit from the President. An alien enemy whom the President should have reasonable cause to believe to be aiding or about to aid the enemy, or to be at large to the danger of the public peace or safety of the United States, or to have vio-

§ 617. **The Same.** It has been observed that the United States in March, 1917, declined to accept an arrangement with Germany, interpreting and supplementing Article XXIII of the treaty with Prussia of July 11, 1799, renewed by the treaty of 1828,¹ and proposing, in the event of war, to accord resident alien enemies the same treatment in many respects as that enjoyed by neutrals, and to forbid a transfer of the former to concentration camps.² Without asserting, when it became a belligerent in 1917, the right to terminate those provisions of its treaty with Germany which pertained to the treatment to be accorded the nationals of the contracting parties in the event of war, the United States offered German residents within its domain strong inducement to put no obstacle in

lated or to be about to violate these regulations, was to be removed to a location designated by the President. The departure from the United States of an alien enemy was forbidden, save under specified conditions. Except under such restrictions and at such places as the President might prescribe, no alien enemy was permitted to land in or enter the United States. The obligation of all alien enemies to register, if necessary to prevent violations of the regulations, was announced. The alien enemy whom there might be reasonable cause to believe to be aiding or about to aid the enemy, or who might be at large to the danger of the public peace or safety, or who violated or attempted to violate, or of whom there was reasonable ground to believe that he was about to violate, any regulation duly promulgated by the President, or any criminal law of the United States, or of the States, or Territories thereof, was declared to be subject to summary arrest, and to confinement in such place of detention as the President might direct.

See, also, President Wilson's proclamation of Nov. 16, 1917 (No. 1408), containing further regulations governing the conduct of alien enemies, Official Bulletin, Nov. 19, 1917, p. 1; proclamation of President Wilson, Dec. 11, 1917 (No. 1417), announcing a state of war between the United States and Austria-Hungary, Official Bulletin, Dec. 13, 1917, p. 1, For. Rel. 1918, Supp., 2, 185. See statement issued by Mr. Gregory, Atty. Gen., Dec. 12, 1917, to the effect that "This proclamation differs from the preceding proclamation relating to the subjects of the German Empire in that, while it authorizes the arrest and internment of any subjects of the Dual Empire whose conduct may be a menace to the safety of the country, the only restrictions which it contains are prohibitions against either entering or leaving the United States without first obtaining permission." (Official Bulletin, Dec. 13, 1917, p. 1.)

See also Proclamation No. 1443, April 19, 1918, Extending Regulations Prescribing Conduct toward Alien Enemies to Include Women, For. Rel. 1918, Supp. 2, 192.

See Supplemental Brief of the United States in support of the Plenary Power of Congress over Alien Enemies and the Constitutionality of the Alien Enemy Act (Revised Statutes, Sections 4067-4070), by Charles Warren, Assist. Attorney General, and containing as Appendix B, extract from Report No. 1, House of Representatives, 65 Cong., 1 Sess., concerning improper activities of German officials in the United States.

See *Ex parte* Graber, 247 Fed. 882.

§ 617.¹ See Agreements between States, Denunciation by One Party, *supra*, § 546; Stipulations Applicable to a State of War, *supra*, § 548.

² Mr. Lansing, Secy. of State, to Dr. Ritter, Swiss Minister in charge of German interests in America, March 20, 1917, For. Rel. 1918, Supp., 2, 162. Secretary Lansing said in part: "Moreover, since the severance of relations between the United States and Germany, certain American citizens in Germany have been prevented from removing freely from the country. While this is not a violation of the terms of the treaties mentioned, it is a disregard of the reciprocal liberty of intercourse between the two countries in time of peace, and cannot be taken otherwise than as an indication of a purpose on the part of the German Government to disregard in the event of war the similar liberty of action provided for in article 23 of the Treaty of 1799—the very article which it is now proposed to interpret and supplement almost wholly in the interest of the large number of German subjects residing in the United States and enjoying in their persons or property the protection of the United States Government. This article provides in effect that merchants of either country residing in the other shall be allowed a stated time in which to remain to settle their affairs and to 'depart freely, carrying off all their effects without molestation or hindrance,' and women and children, artisans and certain others, may continue their respective employments and shall not be molested in their persons or property. It is now proposed by the Imperial German Government to enlarge the scope of this article so as to grant to German subjects and German property remaining in the United States in time of war the same treatment in many respects as that enjoyed by neutral subjects and neutral property in the United States."

its way, and made ready to exert its broad power of legitimate repression should the safety of the State so demand.³

In the Trading with the Enemy Act of October 6, 1917, while the normal operation of the rigid prohibitions against communications or dealings with an "enemy" was rendered inapplicable to the alien enemy resident in the territories of the United States, the President was authorized to include, by proclamation, such persons within the scope of the law, in case he should find that the safety of the United States or the successful termination of the war should so require.⁴ By proclamation of February 5, 1918, the President, availing himself of that right, included under the term "enemy," all alien enemies who had been previously, or might thereafter be transferred after arrest, into the custody of the War Department for detention during the war.⁵ Again, by a proclamation of May 31, 1918, he declared to be within the same term "all citizens or subjects of any nation with which the United States is at war (other than citizens of the United States) who have been or shall hereafter be detained as prisoners of war, or who have been or shall hereafter be interned by any nation which is at war with any nation with which the United States is also at war."⁶

It may be observed that on October 11, 1917, the Secretary of State informed the Minister of Switzerland at Washington, that with the exception of crews of certain armed naval vessels then held as prisoners of war, active members of or reservists in the military establishment of the German Empire then in the territorial limits of the United States would be treated as regards internment "on the same grounds as civilian enemy aliens residing within the same limits and only subjected to internment when their acts are in conflict with the rules of conduct laid down for alien enemies in the President's proclamation of April 6, 1917, unless the national safety and public welfare shall require the Government to follow another course."⁷ Again, that Minister was informed on December 11, 1918, that no general policy had been adopted by the Government of the United States calling for the internment of any considerable number of German women, that no extensive measures had been taken for their internment, and that the internment of such women had not in any instance "been ordered as a matter of reprisal."⁸

³ On May 11, 1917, the Attorney General announced that the number of alien enemies at that time taken into custody had been small, only one hundred and twenty-five persons having been placed under arrest. Official Bulletin, May 11, 1917, p. 2.

⁴ Compare with the action of the United States in this regard the policy of wholesale internments followed by the various European belligerents as described by J. W. Garner in *Am. J.*, XII, 27-55.

⁵ Chap. 106, § 2 (c), 40 Stat. 411, 50 U. S. C. A., Appendix.

⁶ Official Bulletin, No. 227, Feb. 6, 1918, p. 1. Also statement by the Alien Property Custodian as to this proclamation, *id.*

⁷ It should be observed that by this proclamation, the President saw fit to embrace within the term "enemy," numerous classes of persons resident outside of the United States.

By an executive order of Nov. 26, 1918, No. 3008, the President excepted certain persons from the classification of "alien enemy" for the purpose of permitting them to apply for naturalization pursuant to the Act of May 9, 1918, amending the naturalization laws of the United States, Chap. 69, 40 Stat. 542, 545.

⁸ Memorandum, For. Rel. 1918, Supp., 2, 179.

⁹ *Id.*, 203, where it was said: "Down to the present time, only 15 German women have

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CONTROL OF ENEMY PROPERTY WITHIN THE
NATIONAL DOMAIN

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§ 618. **In General.** In dealing with foreign property found within the national domain the problems confronting a belligerent concern the nature of the control which may lawfully be exerted as much as the national character of what may be seized.¹ The inquiry constantly arises whether belligerent acts manifest an abuse of power through a failure to respect some legal obligation towards the enemy. Examination is here made of what, according to American opinion, may be lawfully done in relation to property of an admittedly hostile character; and that examination supplants to a certain degree the inquiry as to the nature of property fairly to be deemed of such a kind.

Upon the outbreak of hostilities a belligerent may find large amounts of enemy property within its territory, and that remote from a field of military operations.² It seems to be acknowledged that the bare existence of war does not serve in such case to effect any change of ownership. Confiscation, whether rightful or wrongful, requires affirmative legislative action. According to Chief Justice Marshall, the terms of the Constitution of the United States forbid the inference that a declaration of war operates by its own force to transfer title to property within the national domain.³

been actually interned, although others have been temporarily detained and then released, and the Government of the United States does not contemplate any general measure of internment affecting German women or that there will be any great increase in the number of women interned."

On September 17, 1918, the Secretary of State informed the Swedish Minister at Washington in charge of Austro-Hungarian interests in the United States, that Austrian and Hungarian nationals had not, at any time, been interned by the Government of the United States "without good cause." *Id.*, 199.

Concerning the special treatment of Alsatians and Lorrainers, Czechoslovaks, and Poles, see For. Rel. 1918, Supp., 2, 204-215.

In relation to persons of German birth naturalized in countries other than the United States, see For. Rel. 1918, Supp., 2, 215-222.

§ 618.¹ The danger of mistaking in fact neutral property on land for that belonging to the enemy and to be dealt with as such, apart from any question of legal principle, is not so great as in the case where seizure is an incident of maritime warfare.

² It is the treatment of property so circumstanced, rather than that encountered by an army in the field or by a belligerent occupant of hostile territory, which is here observed. Thus it is not what may be done as an incident peculiar to some form of land warfare, but rather the scope of the broad belligerent right in consequence of the existence of war, with respect to enemy property found within the territorial limits of a State, which is the subject of discussion.

³ *Brown v. United States*, 8 Cranch, 110, 126-127, where the learned Chief Justice observed that "the proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy, within the territory of the belligerent, is believed to be entirely free from doubt. . . . That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that in the declaration of war the nation has expressed its will to that effect." See, also, dissenting opinion of Story, J., *id.*, 129, 150.

Concerning the treatment of enemy merchant vessels within territorial waters at the outbreak of war, see Maritime War, Days of Grace, *infra*, §§ 763-765.

In examining the efforts of a belligerent to control in various ways property within its domain that has such a connection with nationals of the enemy that it may be fairly regarded as enemy property, it is important to enquire whether the attempt is made to appropriate property without compensation, divesting him not only of title, but also of any right or interest in what is taken, without prospect of reimbursement, or whether those efforts constitute an assumption of control which, regardless of any transfer of title, is not designed to produce such a deprivation. The character of the belligerent acts in the two situations is not identical. To refer to both as confiscatory is not productive of clearness of thought, unless a loose and broad signification be attached to the term "confiscation."⁴ The point to be noted is that a belligerent may in fact deprive an alien enemy owner of property by processes that are not essentially confiscatory, even though the taking and retention may cause him severe loss and hardship. Recourse to such non-confiscatory retentions or deprivations has marked the conduct of belligerents since the beginning of the World War in 1914. They may perhaps be appropriately referred to as sequestrations. The propriety of what they have involved is, therefore, hardly discernible by reference to objections directed against confiscatory action as such, and must be tested by other means or standards.⁵

A belligerent may fairly endeavor to prevent enemy property of any kind within its territory (or elsewhere within its reach) from being so employed as to afford direct military aid to its foe. Measures of prevention may, in a particular case, assume a confiscatory aspect. In such a situation the question may arise whether those measures are, nevertheless, excusable. It is believed that they may be, and that they are not invariably unlawful despite the absence of efforts to compensate the owners.

It should be obvious that measures of prevention should never degenerate to unnecessary acts of destruction or of impairment of the value of the property concerned. That they may, however, do so, and exemplify capricious or arbitrary conduct is illustrative of the difficulty in holding in leash a belligerent that is resentful of the restraints of law when dealing with enemy property within its grip.

Preventive measures may be designed with special reference to the nature or location of the owner, and may be formulated so as to minimize unnecessary

⁴ See Robert L. Hale, "What is a 'Confiscatory' Rate?" *Columbia Law Review*, XXXV, 1045; Charles Warren, "What is Confiscation?" *Atlantic Monthly*, CXL, 246.

⁵ This analysis differs sharply from that of those who would regard almost all uncompensated deprivations of property as essentially confiscatory, and as, therefore, internationally illegal because of the further assumption or conclusion that confiscatory action must inevitably be so regarded. Belligerent States have not, however, generally acted on such a theory. They have in fact proceeded, especially since 1914, to exercise varying degrees of control over vast amounts of enemy private property by strictly non-confiscatory processes from which they have felt no sense of legal obligation to abstain. In so doing they have been creative of relatively fresh practices which logic has ordained and war-terminating treaties have sanctioned. Thus it happens that proper estimation of the place of confiscation of enemy private property in the law of nations has become of less importance than formerly, because both of the reluctance of States—and notably of the United States to have recourse to it, and of their preference for non-confiscatory measures exemplified in sequestrations as a desirable and sufficient means of utilizing such property.

interference with the latter in the enjoyment of his property. Thus in case he is an alien enemy residing in the national domain, and permitted there to remain without molestation, subject to good behavior, the belligerent may defer the assertion of control over his possessions until, through abuse of his privileges, he compels the State to intern him and deal with his belongings as if he were a non-resident.⁶ Prior to such event the belligerent may be disposed to deter by other means the enemy from gaining any benefit from what he owns and is permitted to retain.⁷ Where, however, the owner is the enemy itself, and the property public, or where, in case of private ownership, the owner is an enemy person, outside of the national domain, and a resident of either hostile or neutral territory, the belligerent may reasonably exert direct and exclusive control over the property. The belligerent may, moreover, proceed to do so, not merely with the design of withholding it from the enemy, but also with that of utilizing an available asset for an economic or military end.

To accomplish this twofold purpose it is reasonable to compel all persons within the national domain having custody of enemy property sought to be controlled, or owing money to an enemy person (of the class whose property the State seeks to control), to disclose the fact and report all particulars. It is not, moreover, an abuse of power so to assert control over a debt due by a local debtor to a non-resident alien enemy creditor as to require payment to the belligerent, as the representative of or trustee for the creditor. The compelling of payment to the belligerent does not imply confiscation of the debt.

§ 619. The Conduct of the United States during World War I. Shortly before the United States became a participant in World War I the Department of State issued to the Press the following announcement:

It having been reported to him that there is anxiety in some quarters on the part of persons residing in this country who are the subjects of foreign States lest their bank deposits or other property should be seized in the event of war between the United States and a foreign nation, the President authorizes the statement that all such fears are entirely unfounded. The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states.¹

On October 6, 1917, just six months after the United States had become a belligerent, there was enacted the Trading with the Enemy Act,² which as

⁶ In his Report of Feb. 22, 1919, the Alien Property Custodian set out in Appendix 10, a list of interned enemies upon whom reports had been routed to the Bureau of Trusts, with their respective trust numbers and the approximate amount of property reported as belonging to each. The total value of the property reported was \$5,868,749.94.

⁷ See Proclamation of President Wilson, No. 1364, April 6, 1917, announcing the existence of a state of war between the United States and Germany; also proclamation of President Wilson, No. 1417, December 11, 1917, announcing the existence of a state of war between the United States and Austria-Hungary.

§ 619. ¹ Statement of Feb. 8, 1917, For. Rel. 1918, Supp. 2, 256. See, also, President Wilson's proclamation of war with Germany, April 6, 1917, Naval War College, Int. Law Documents, 1917, 226, 227.

² 40 Stat. 411.

amended and supplemented both before and after the termination of the conflict, registered the will of the Congress respecting the treatment to be accorded enemy or ally of enemy property.³ By virtue of the Act,⁴ there was appointed a so-called Alien Property Custodian empowered to accept transfer to himself of all money and property in the United States due or belonging to "an enemy or ally of enemy," and which might be transferred to him according to the law. By means of a series of executive orders issued by the President under this and supplementary acts,⁵ there was established an organization for the management and administration, sale or other disposition of "enemy" property.⁶ Thus moneys and other forms of property were received, businesses were conducted of corporations, partnerships and individuals, and property sold as well as concerns liquidated.⁷

³ For the text of the Act with amendments, see 50 U.S.C.A., Appendix; also Joint Resolution of June 27, 1934, to amend the Settlement of War Claims Act of 1928, as amended, 48 Stat. 1267.

⁴ § 6, Chap. 106, 40 Stat. 411, 415.

⁵ Chap. 28, Act of March 28, 1918, 40 Stat. 459; Chap. 201, Act of Nov. 4, 1918, 40 Stat. 1020. Also 50 U.S.C.A., Appendix.

See, also, Bulletin of Information, issued by Alien Property Custodian, June 8, 1918, Washington, Government Printing Office, 1918.

⁶ Broad powers of administration were conferred upon the Alien Property Custodian by the Act of Oct. 6, 1917 (§ 12).

It was provided that moneys received by him should be deposited in the Treasury of the United States, for investment and reinvestment by the Secretary of the Treasury in United States bonds or certificates of indebtedness. *Id.* The President was empowered to require any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding an executive license, and which the President after investigation should determine was so owing or so belonging or so held, to be conveyed, transferred, assigned, delivered or paid over to the alien property custodian. § 7 c. Even though not required to make such transfer, any person not an enemy or ally of enemy owing to, or holding for or on account of or on behalf of, or for the benefit of an enemy or ally of enemy (not holding a license granted by the President), any money or other property, or to whom any obligation or form of liability to such enemy or ally of enemy was presented for payment, was empowered at his option, with the consent of the President, to make transfer to the Alien Property Custodian. § 7 d. Provision was made for the discharge and full acquittance of transferors. § 7 e. The rights of holders of various forms of liens upon enemy or ally of enemy property, to dispose of the same in case of default were safeguarded (§ 8 a), likewise those of persons claiming any interest in property transferred to the Alien Property Custodian, or to whom any debt might be due from an enemy or ally of enemy whose property was transferred to the custodian. § 9. Careful provision was made for the reporting by the holder of property of, or in behalf of an enemy or ally of enemy, of such fact to the Alien Property Custodian, likewise of the beneficial interests of an enemy or ally of enemy in American corporations, unincorporated associations or companies, or trusts. § 7 a.

See statement of Alien Property Custodian respecting property of interned enemies to be taken over pursuant to the President's proclamation of Feb. 5, 1918, Official Bulletin, Feb. 6, 1918, No. 227, 1; also statement by Alien Property Custodian as to seizure by the Government of a German-owned ship's valve plant engaged in work for the Government, Official Bulletin, Feb. 18, 1918, No. 237, 2.

⁷ See especially executive order of Oct. 12, 1917, No. 2729A; that of Oct. 29, 1917, No. 2744; that of Feb. 5, 1918, No. 2801; that of Feb. 26, 1918, No. 2813; that of April 2, 1918, No. 2832; that of April 11, 1918, No. 2837; that of July 16, 1918, No. 2916; that of Nov. 12, 1918, No. 2991; that of Dec. 3, 1918, No. 3016.

The executive order of Oct. 12, 1917, No. 2729A, provided for the establishment of the War Trade Board, in which was vested the power and authority "to issue to every enemy or ally of enemy, other than enemy or ally of enemy insurance or reinsurance companies, doing business within the United States through an agency or branch office, or otherwise," applying therefor within a specified period, "licenses temporary or otherwise to continue to do business, or said board may withhold or refuse the same."

The executive order of Nov. 12, 1918, No. 2991, conferred upon the Alien Property Custodian broad powers of management and administration, including sale or other disposition with respect to the business and property of enemy insurance companies doing business in

As interpreted and applied by the Alien Property Custodian, the general power of sale conferred upon him by the amended statutory law "was with the purpose in mind that the German industrial army on American soil should be captured and destroyed." Accordingly, he declared that instead of permitting himself to become a mere conservator of enemy property, he had "tried to make the trading-with-the-enemy act a fighting force in the war."⁸ It was perhaps in an international sense unimportant whether the policy so enunciated and acted upon was in harmony with the thinking of Congress.⁹ No rule of international law demanded abstinence from such a course. Nor did that law necessarily demand that compensation for property sold by that officer should be commensurate with its actual value so long as the extent of the ultimate duty to yield any compensation to the owner (or to some person or thing in his behalf) were not necessarily measured by the proceeds of any sale that might be shown to be grossly inadequate.¹⁰ Technically, therefore, the scope of any duty on the part of the United States was not to be tested by the propriety or impropriety under the local law of the conduct of the Alien Property Custodian as trustee or as vendor. It depended solely upon whether in the final adjustment it could be shown that the owner was duly compensated for losses sustained by the taking of what was his and the requirements of good faith scrupulously met. Yet a treaty might, and one did, seemingly deprive the owner of raising that question, and from benefiting from the correct answer to it;¹¹ and he found himself also bereft of any right to complain that he was or might be a victim of confiscation when his property or the proceeds of it were held as security for the satisfaction of claims against his country by its enemy.¹²

In the exercise of the power to sell enemy property, the Alien Property Custodian was given large authority under executive sanction. In enlarging his authority for such purposes,¹³ the Congress was, in the opinion of the Supreme Court of the United States announced in 1926, "untrammelled."¹⁴ Somewhat

the United States. The power of liquidation, reinsurance and retrocession was expressly conferred upon him.

See, also, in this connection, *American Exchange National Bank v. Palmer*, 256 Fed. 680; *Spiegelberg v. Garvan*, 260 Fed. 302; *Kohn v. Jacob & Josef Kohn*, 264 Fed. 253.

See Historical Note in relation to Section 9 of the Trading with The Enemy Act of Oct. 6, 1917, and amendments thereof, in U.S.C.A. 50, Appendix.

⁸ Report of Alien Property Custodian as of Feb. 22, 1919, 14.

⁹ See critical comment in James A. Gathings' *International Law and American Treatment of Alien Enemy Property*, 1940, Chap. VI.

¹⁰ See *United States v. Chemical Foundation*, 272 U. S. 1, 11.

¹¹ See Art. 297 and Annex (following Art. 298) paragraphs 1 and 3, Treaty of Versailles, between Germany and the Principal Allied Powers of June 28, 1919, U. S. Treaty Vol. III, 3462-3466, incorporated in Art. II (1) of treaty between the United States and Germany, of Aug. 25, 1921, *id.*, 2598.

¹² Concerning, however, the merits of such a claim see *infra*, § 622.

¹³ See § 12 of Trading with the Enemy Act as amended by Act of March 28, 1918, 40 Stat. 460.

¹⁴ *United States v. Chemical Foundation*, 272 U. S. 1, 11, where it was declared through Mr. Justice Butler: "And the Act makes no provision for compensation. The former enemy owners have no claim against the patents or the proceeds derived from the sales. It makes no difference to them whether the consideration paid by the Foundation was adequate or inadequate. The provision that, after the war, enemy claims shall be settled as Congress shall direct conferred no rights upon such owners. Moreover, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its na-

later that tribunal found occasion to make the following statement through Mr. Justice Butler:

Public Resolution No. 53 is not repugnant to the Fifth Amendment. By exertion of the war power, and untrammelled by the due process or just compensation clause, Congress enacted laws directing seizure, use and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian under the Trading with the Enemy Act. *United States v. Chemical Foundation*, 272 U. S. 1, 9-11. *Woodson v. Deutsche, etc. Vormals*, 292 U. S. 449, 454. The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or in part, to ameliorate hardships falling upon them as a result of the seizure of their property. But that intention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct. As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit.¹⁵

It should be observed that in the case in which the foregoing words were uttered, the precise question was whether through the so-called Settlement of War Claims Act of 1928, the Congress had granted to former enemy owners of property any right or title to, or interest in, money or property taken by the Alien Property Custodian, so as to render unconstitutional the provisions of a Joint Resolution of June 27, 1934,¹⁶ providing for the postponement of the return of the money and property to them as had been contemplated in the 1928 enactment. In reaching a negative conclusion the Court was far from intimating that the Congress through that resolution was embarking upon a confiscatory policy, or that its action constituted the breach of any obligation to Germany under the customary or conventional law.¹⁷ It is not understood that the Court had occasion to pass upon that question.

tions on account of the seizures and sales in question" (*citing* Part X, Section IV, Article 297, and Annex paragraphs 1 and 3, Treaty of Versailles, adopted by Article II (1), Treaty of Berlin, 42 Stat. 1939, 1943).

¹⁵ *Cummings v. Deutsche Bank*, 300 U. S. 115, 120-121.

In reference to the legislative history and terms of the relevant enactments of the Congress, the Court cited Sen. Rep. No. 113, 65th Cong., 1st Sess. Trading with the Enemy Act of October 6, 1917, § 12, 40 Stat. 423. Public Resolution No. 8, July 2, 1921, § 5, 42 Stat. 106. *Cong. Rec.*, Vol. 61, Part 4, p. 3249. Winslow Act of March 4, 1923, § 2, 42 Stat. 1516, adding § 23 to Trading with the Enemy Act. Sen. Rep. No. 273, 70th Cong., 1st Sess., pp. 12-13. Settlement of War Claims Act of March 10, 1928, 45 Stat. 254. ¹⁶ 48 Stat. 1267.

¹⁷ *Cf.* Edwin Borchard, "Confiscations Extraterritorial and Domestic," *Am. J. XXI*, 675, 681.

b

Confiscation¹

(1)

§ 620. **Public Property.** The right of a belligerent to confiscate public property within its territory and belonging to the enemy is believed to exist and to be limited by few rules which expediency and custom have developed. The confiscation, for example, of the archives and other property appurtenant to the embassy or legation of the enemy would doubtless be deemed an abuse of power.² Works of art and treasures of historical and literary value ought to be exempt.³ If seized by a belligerent during the conflict, the ultimate treaty of peace should provide for restoration.⁴ Again, the indebtedness of a belligerent State to the Government of its adversary, if admitted to survive the shock of war and to be an asset within the territory of the debtor, would not be subject to cancellation, although the debtor might fairly assert the right to suspend payment of principal and interest during the conflict.⁵

The general right of confiscation is incidental to that broader right of a belligerent to endeavor to weaken the enemy by striking at its economic as well as purely military resources, and that irrespective of their actual availability to either contestant in the prosecution of the war. The reasonable expectation entertained by a belligerent of obtaining, upon the termination thereof, its own public property preserved intact by the enemy within its territory, or of utilizing such property to offset the demands of the latter, might be a source of strength before as well as in the course of negotiations for peace. That asset seems to be, therefore, capable of confiscation. The public property of either belligerent

§ 620. ¹ The term confiscation is used in this work to refer to an act whereby effort is made to appropriate property to the use of a State with the design of divesting the owner of all right and interest therein without compensation. See *supra*, § 618.

² It is highly improbable that the United States would resort to such procedure. Concerning the seizure by Italy of the "*Palais de Venise*" at Rome, occupied by the Austro-Hungarian Embassy to the Vatican, and owned by the Austro-Hungarian Government, pursuant to a decree of Aug. 29, 1916, see communications by "J. V.," and "E. L." in *Clunet*, XLIV, 139-142; also J. W. Garner, in *Am. J.*, XII, 769.

Cf. the privileges of the belligerent occupant of hostile territory as laid down in War Dept. Rules of Land Warfare, 1940, Nos. 315-322. See also *infra*, §§ 695-696.

³ See Art. LVI of rules annexed to The Hague Convention of 1907, respecting the laws and customs of war on land, and concerning the rights of a military occupant, Malloy's Treaties, II, 2290.

⁴ See Arts. 245-247 of Treaty of Versailles, of June 28, 1919, U. S. Treaty Vol. III, 3438-3439.

⁵ The debtor State might, however, not unreasonably assert the right to utilize such an asset by way of full or partial satisfaction of a solid pecuniary claim against the enemy, its creditor, and which the latter was otherwise incapable of paying. Such action would not be confiscatory in character, provided the debtor State could establish the validity of its claim and the extent of its loss.

The indebtedness by way of indemnity assumed by Spain in the claims convention with the United States, Feb. 17, 1834 (Malloy's Treaties, II, 1659), was not affected by the war between the contracting parties in 1898, save for the postponement of moneys due during the course of that conflict. The payment by the Spanish Government in Dec., 1899, of installments suspended during the war, in the light of the correspondence between the two Governments, manifested a careful regard for an existing legal obligation. Moore, Dig., V, 376-380, and documents there cited, especially communication of Duke of Arcos, Spanish Minister, to Mr. Hay, Secy. of State, Dec. 20, 1899, For. Rel. 1899, 712.

within the territory of the enemy may, however, possess too slight value to encourage such procedure. Grounds of public policy may thus check the exercise of the full belligerent right and even destroy its existence.⁶

(2)

PRIVATE PROPERTY

(a)

§ 621. **Tangible Property.** It would be difficult to maintain that in earliest days of the Republic American official opinion concluded that, in the absence of treaty, a belligerent State was under a legal obligation to its enemy to refrain from confiscating tangible property belonging to the nationals of that enemy and found within the national domain. A mass of evidence points the other way.¹ The Supreme Court of the United States appeared, moreover, to be far from acknowledging the existence of such an obligation,² and found no occasion

⁶ The Trading with the Enemy Act of Oct. 6, 1917, made no provision respecting the ultimate fate of public enemy property of which the United States might acquire possession. According to § 12, any claim of "any enemy or of an ally of enemy" to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury was to be settled, subject to certain provisos, as Congress might direct. No distinction was made in this regard between public and private enemy property.

§ 621.¹ Declared Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister at Washington, May 29, 1792: "It cannot be denied that the state of war strictly permits a nation to seize the property of its enemies found within its own limits, or taken in war, and in whatever form it exists, whether in action or possession." (*Am. State Pap. For. Rel.*, I, 201.)

Declared Messrs. Pinckney, Marshall and Gerry, to the French Foreign Minister, Jan. 27, 1798: "It is a general rule, that war gives to a belligerent Power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of this principle, there is, perhaps, no one to which man has more universally assented, or to which jurists have more uniformly agreed. Its theory and its practice have unhappily been maintained in all ages." (*Id.*, II, 169, 171.)

See also resolution of the Congress of Nov. 27, 1777, IX Journals of Congress, 971; resolution of the Congress of Sept. 10, 1782, 3 Secret Journals of Congress, 206.

In his note of May 29, 1792, Mr. Jefferson adverted in detail to the character of the numerous confiscatory enactments of the several States. Declares Mr. Edgar Turlington in this connection: "Mr. Jefferson's list shows 52 general confiscatory measures adopted in twelve of the thirteen States, applying to property of every kind, including in one case debts due to British subjects. Senator Sumner's list [of a later period] shows general confiscatory measures adopted in each of the thirteen States, to the total number of 88." (*Am. J.*, XXII, 271.)

² Declared Mr. Justice Chase in the case of *Ware v. Hylton*, 3 Dall. 199, 226: "It appears to me that every nation at war with another is justifiable by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever) wherever found, whether within its territory, or not."

See *Brown v. United States*, 8 Cranch, 110, 122-123, and comment thereon in Moore, Dig., VII, 288. Also Story, J. in *The Cargo of the Ship Emulous*, 1 Gall. 580-581; *Wilcox v. Henry*, 1 Dall. 69.

Referring to the case of *Brown v. United States*, 8 Cranch, 110, which involved the question of the confiscability of private enemy property on land, by judicial proceedings in the absence of congressional authority, Prof. Moore has said: "On the theory that war renders all property of the enemy liable to confiscation, Mr. Justice Story, with the concurrence of one other member of the court, maintained that the Act of Congress declaring war of itself gave ample authority for the purpose. The majority held otherwise, and Marshall delivered the opinion. Referring to the practice of nations and the writings of publicists, he declared that, according to 'the modern rule,' 'tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated'; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and, consequently, that the declaration of war did not authorize the

to do so as the years went on.³ It is not lightly to be assumed that these early conclusions were unsound. They were, however, to undergo modification. In 1833, Chief Justice Marshall in interpreting the treaty with Spain of February 22, 1819, made the following statement: "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."⁴ This testimony speaks for itself both through its deference for the significance of usage and as a token of a possible change in the law which usage was in fact producing.⁵

In proceeding to conclude numerous treaties which were designed to restrict confiscatory action,⁶ the executive department of the Government increasingly pursued a course which revealed a strong sense of the undesirability of such conduct and which may even have reflected the growth of a conclusion that it was at variance with the requirements of international law. Any differences of thought in this regard between the judicial and political departments of the Government during the progress of the nineteenth century and until the initiation of the World War in 1914,⁷ were, however, of less moment than the circumstance that during the long interval following the revolutionary war, the United States had not, as a belligerent in any foreign war, attempted to confiscate enemy private property.⁸

confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found,' and that the 'mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice,' though they 'will more or less affect the exercise of this right,' 'cannot impair the right itself.' Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory. Between the effect of usage on rights and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the *dictum* in question to the influence of preconceptions, and turn for the true theory of the law to an opinion of the same great judge, delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate 'the modern usage of nations, which has become law.' *United States v. Percheman*, 7 Peters, 51." (Extract from address on "John Marshall," *Pol. Sc. Q.*, XVI, 400, quoted in Moore, Dig., VII, 312-313.)

³ See Edgar Turlington in *Am. J.*, XXII, 289. Declared Mr. Justice Butler in 1926, in his opinion in behalf of the Court in the case of the *United States v. Chemical Foundation*, 272 U. S. 1, 11: "There is no constitutional prohibition against confiscation of enemy properties."

⁴ *United States v. Percheman*, 7 Peters 51, 86-87.

⁵ Cf. statement of Mr. Justice Cardozo in reference to the growth of deference for the doctrine of *thalweg*, in *New Jersey v. Delaware*, 291 U. S. 361, 382-384. See *supra*, § 138.

⁶ See for example Art. XXII, of treaty with Mexico of Feb. 2, 1848, Malloy's Treaties, I, 1117; Art. XXI, of treaty with Italy of Feb. 26, 1871, *id.*, 975; Art. XXVIII, of treaty with Peru of Aug. 31, 1887, *id.*, II, 1439.

See also Art. X of the Jay Treaty with Great Britain of Nov. 19, 1794, Malloy's Treaties, I, 597.

⁷ See *Miller v. United States*, 11 Wall. 268.

⁸ "The last case of confiscation of private property was that of 1793, at the outbreak of war between France and Great Britain. No case of confiscation occurred during the nineteenth century." (Lauterpacht's 6 ed. of Oppenheim, II, 261, to which is appended in a footnote the statement: "See, however, the action of the Confederate Government in the American Civil

In the course of the Civil War, the United States, in its endeavor to suppress the insurrection, and by way of punishment for disloyalty and treason on the part of the owners, undertook by an Act of Congress of July 17, 1862, to confiscate property found within the Union lines.⁹ The principle acted upon differed essentially from that involved in confiscating property of alien enemies, and gives no support by way of precedent to such procedure. On August 6, 1861, the Congress enacted a law for the confiscation of property purchased or acquired, sold or given with intent to aid or abet or promote the insurrection or resistance to the laws, or in case the owner of property should knowingly use or employ it, or consent to the use or employment of it, for such purpose.¹⁰ It was thus the nature of the use of property rather than the character of the owner which was made the ground of confiscation. It is not believed that this law, in view of the nature of the conflict then existing, indicates legislative approval of the confiscation in a foreign war of the property of alien enemies within the national domain. In 1928, Professor Borchard found it possible to declare that "the practice of the United States, as evidenced in Acts of Congress, treaties of the United States, Executive declarations and the uniform abstention from confiscation, notwithstanding occasional dicta of the courts as to the supposed privilege conferred by international law, sustains the view that there was in the United States, prior to 1914, an 'established usage of exempting the property of non-resident enemies from confiscation.'"¹¹

§ 622. **The Same.** It is felt that on principle the privilege of confiscation should be denied a belligerent when the property is privately owned and not in fact connected with a military operation or employed for a hostile purpose, and provided seizure is not resisted. Under such circumstances the power of the bel-

War, which can hardly be called an example of confiscation in international war; see Lawrence, § 172, and Halleck, i. p. 589 (n).")

⁹ 12 Stat. 589. Concerning the Act, see *Conrad v. Waples*, 96 U. S. 279, 283-284, Moore, Dig., VII, 290; *Oakes v. United States*, 174 U. S. 778, 790-791, Moore, Dig., VII, 291.

¹⁰ 12 Stat. 319. Concerning the operation of the confiscation acts of 1861 and 1862, see Moore, Dig., VII, 290-295, and cases there cited and quoted.

Declared Waite, C. J., with reference to the Act of 1861, in the course of the opinion of the Court in *Kirk v. Lynd*, 106 U. S. 315, 316: "All private property used, or intended to be used, in aid of an insurrection, with the knowledge or consent of the owner, is made the lawful subject of capture and judicial condemnation; and this, not to punish the owner for any crime, but to weaken the insurrection. The offense for which the condemnation may be decreed is one that inheres in the property itself and grows out of the fact that the property has become, or is intended to become, with the approval of its owner, an instrument for the promotion of the ends of the insurrection. . . . The property is the offending thing and condemnation is decreed because its owner has voluntarily allowed it to become involved in the offense."

"The Acts of 1861 and 1862 were directed to the punishment of citizens who had taken up arms against the United States, and to the forfeiture of property actually used against the United States, and were not general confiscatory measures affecting enemy private property as such, in spite of the fact that some persons and even the Supreme Court in one case seemed to believe that they could be justified as such measures." (Edwin M. Borchard, "Treatment of Enemy Private Property in the United States Before the World War," *Am. J.*, XXII, 636, 637.)

¹¹ *Id.*, 641. See also same writer, in his Introduction to James A. Gathings' *International Law and American Treatment of Alien Enemy Property*, Washington, 1940, vi.

Mr. Edgar Turlington, however, reached a different conclusion in his article entitled "Treatment of Enemy Private Property in the United States before the World War," *Am. J.*, XXII, 270, 291.

ligerent to control or utilize it without interference should impose the duty, in case of appropriation, ultimately to compensate the owner. It is unlikely that the United States would at the present time pursue a different course.¹

The question presents itself, however, whether acknowledgment of a legal duty to refrain from confiscation implies an obligation also not to retain, at the close of a war, private property or proceeds of the sale thereof then held in custody, as a means of satisfying a claim for indemnity preferred against the opposing Government. Certain objections against such action at once suggest themselves, even if the procedure be not designed to constitute a form of reprisal. If the indemnity demanded is of a general character, in order, for example, merely to recompense the victor for the expenses of his campaigns, though the enemy may have waged war with scrupulous regard for the law of nations, the obtaining of satisfaction from private property would be inconsistent with the duty to respect it. The successful belligerent may in fact, however, contend that its foe did not respect that law, and exact as a penalty for alleged violations, reparation derived from property belonging to the nationals of that foe and lodged within the grip of the victor. Moreover, the final treaty of peace may be utilized as a setting for the forced acquiescence of the vanquished in such an arrangement. Through it the latter may accept responsibility for the consequences of particular acts (regardless of proof of their illegal quality, if any), and simultaneously agree to the retention of the property of its nationals until final settlement has been made or as a means of satisfying its own undertakings.² It is doubtless true that even in such a case the utilization of enemy private property places the burden of reparation without discrimination upon the property of persons who may or may not have been in fact responsible for any wrongs committed, and upon that of many who may not be resident within

§ 622.¹ See Action of the United States after World War I, *infra*, § 623A.

At a hearing on May 31, 1917, before the House Committee on Interstate and Foreign Commerce, on the Trading with the Enemy bill (H. R. 4704), Mr. Charles Warren, Asst. Atty. Gen., declared: "Of course the power of the United States over property in this country of an alien enemy is plenary. There is no qualification upon the power of Congress. It may absolutely confiscate property. It may confiscate portions of the property. It may take any action whatever with regard to the property located in this country of an alien enemy." (Trading with the Enemy hearings before House Committee on Interstate and Foreign Commerce, 65 Cong., 1 Sess., 33.)

In an explanatory statement by Mr. A. Mitchell Palmer, Alien Property Custodian, respecting the Trading with the Enemy Act, and published in the Official Bulletin, Nov. 14, 1917, p. 1, it was said: "The broad purpose of Congress as expressed in the Trading with the Enemy Act is, first, to preserve enemy-owned property situated in the United States from loss and, secondly, to prevent every use of it which may be hostile or detrimental to the United States. . . . The property of every person under legal disability, is in every civilized country protected by the appointment of trustees or conservators, whose duty it is to administer and care for the property while the disability exists. This is the duty of the Alien Property Custodian. He is charged by law with the duty of protecting the property of all owners who are under legal disability to act for themselves while a state of war continues. . . . Thus the probable waste and loss of a great deal of valuable property and property rights which could not, while the war continues, be conserved by the enemy owner is avoided, and a trustee, appointed and paid by the United States, is charged with the duty of protecting and caring for such property until the end of the war. This is his function. There is, of course, no thought of the confiscation or dissipation of the property thus held in trust."

² The arrangement may contemplate an adjudication before an international tribunal as a subsidiary means of ascertaining and fixing the amounts that should be regarded as due in certain categories of claims, and of thus protecting the respondent from the danger of being obliged to respond to exorbitant demands.

enemy territory. Nevertheless, it will not do for the owner of the property concerned to complain that his country should not, despite the straits in which it found itself, have accepted the broad responsibility that it did accept, and incidentally agree that his property in the enemy's hands be utilized, and if need be exhausted, for the purpose of satisfying the fiscal burdens that were assumed. In the process of accepting responsibility and of agreeing how it should be met, the unsuccessful belligerent must be deemed to have been free to maintain that there was such a bond between it and its nationals as would excuse it in utilizing their property in order to satisfy its own undertakings or to make reimbursement for its own shortcomings.

Such utilization of enemy private property is not confiscatory when it serves to release the enemy from the payment of claims against it. The enemy owners must be regarded as benefited by such an accomplishment, and that regardless of whether it is made productive of an undertaking by their own State to reimburse them on account of their loss. If such a scheme of reimbursement be incorporated in the treaty providing for the terms of settlement, it matters not in legal contemplation whether the undertaking be of substantial value to the owners concerned. If they suffer from the laches or poverty of their own contracting country, they are victims of what is unavoidable, and exemplify the helplessness of alien enemy persons under the present condition of the law.³ The Treaty Restoring Friendly Relations between the United States and Germany, of August 25, 1921, contained provisions for the treatment of alien enemy property which are discussed elsewhere.⁴ It has been observed that the Treaty of Versailles of June 28, 1919, permitted the utilization of the property of German nationals within the territory of any of the Allied and Associated Powers for the purpose of satisfying war claims against the German Government.⁵

The sale for a reasonable price of private enemy property of every kind, embracing the various assets of any going concern, and of which the possession

³ The tragedy is that the owners of property within the territory of what proves to be the enemy find themselves seemingly forsaken by their own country when it is unable by force of arms to maintain its cause against its foe and embarks under such conditions upon treaty-making with it. This is illustrated in a variety of ways, and notably in the failure to apply fair tests of the value of actual deprivations and in schemes that transfer burdens of compensation to the shoulders of the defeated and impoverished sovereign. It is of inestimable importance to the several members of the international society that the property of nationals of States embarked upon war should, regardless of the enemy character of the owners or of the residence or domicile of such individuals, enjoy a fresh protection that has never yet been accorded. The treaties which marked the conclusion of the World War in 1919 and 1920 and 1921, offer little guidance for the future.

In the final settlement marking the termination of World War II, it may be difficult for the victors to avoid the temptation to treat enemy private property according to the pattern fashioned by those responsible for the terms of settlement applied after the earlier conflict. Nevertheless, avoidance of that pattern is indispensable, if post-war investors are to be expected to gain sufficient confidence to invest abroad. General expansion and stability of international trade leave no alternative. It remains to be seen whether appreciation of these factors will suffice to influence the final decision.

⁴ U. S. Treaty Vol. III, 2596; also agreement for a Mixed Claims Commission, concluded by the same parties, Aug. 10, 1922, *id.*, 2601.

See also American Claims Against Germany Arising out of World War I, *supra*, § 295A; American Participation in German Reparation Payments, *supra*, § 299A; Action by the United States after World War I, *infra*, § 623A.

⁵ See War Claims Against Germany under the Treaty of Versailles, *supra*, §§ 298-299A.

has been taken by a belligerent State, does not savor of confiscation. This appears to be true whether the purpose of the sale is merely to prevent the accumulation of property during a war for the ultimate benefit of the existing enemy owners, or to deprive them of the opportunity, upon the termination of the conflict, to resume operations under as favorable conditions as had previously been enjoyed. The law of nations does not forbid a State to suspend or cut off the privilege of transacting business within its territory for the ultimate benefit of alien enemies, or to convert properties belonging to them into cash assets to be held in trust for the owners.⁶

(b)

§ 623. **Intangible Property — Debts.** In the case of intangible property, such as the indebtedness of a State as well as of the inhabitants of its territory to enemy persons outside of the national domain, practice seems clearer. The indebtedness of a State possesses a special quality of indestructibility due to the circumstance that cancellation by the debtor would amount to a breach of good faith, and hence a stain upon its own national honor. In loaning his money to such a public debtor, the creditor may be said to rely upon the assumption that the State is incapable of bad faith, and upon the implied understanding that cancellation of the debt would constitute such conduct.¹ It is highly improbable that the United States would resort to confiscation.

Where the debtor is a private individual, there appears to be no reason why the belligerent within whose territory he resides and belongs should not endeavor to control the debt as though it were tangible property despite the absence of the alien enemy creditor.² The general privilege of control does not, however, imply the existence also of one of confiscation. The duty to abstain therefrom is seemingly recognized in the United States.³ Declared a careful observer of American practice, in 1928:

⁶ The United States exercised such a right in 1918, in the sale by the Alien Property Custodian of properties within the national domain, belonging to enemy concerns. See executive order No. 2916, of July 16, 1918.

See *The Conduct of The United States During World War I*, *supra*, § 619.

§ 623. ¹ "In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a State is not confiscated, and the interest payable upon it is not sequestrated. Whether this habit has been dictated by self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honour, because a prince can not be compelled like other men in an adverse way by a court of justice,' it is now so confirmed that in the absence of an express reservation of the right to sequester the sums placed in its hands on going to war a State in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances." (Hall, Higgins' 8 ed., 521.)

Declares Prof. Moore: "By the testimony of publicists and the practice of nations, the principle is established that the obligation of a State for the payment of its debts is not affected by war even though such debts be held by citizens or subjects of the enemy. . . . The act of the King of Prussia, in 1752, in stopping, as an act of reprisal, the payment of interest due by him to English creditors on the Silesian loan is conspicuous not more by reason of its solitariness than by reason of the unanimity with which publicists have disapproved it." (Dig., VII, 306, 307.) See, also, Opinion of Mr. Stanbery, Atty. Gen., Oct. 15, 1866, 12 Ops. Attys. Gen., 72, 74.

² See *Blackstone v. Miller*, 188 U. S. 189.

³ Concerning the effect of Article IV of the definitive treaty with Great Britain of September 3, 1783, providing that creditors on either side should "meet with no lawful impediment" to the recovery of *bona fide* debts previously contracted (Malloy's Treaties, I, 588), upon the right of a British creditor to recover on a debt due to him by an American

The policy of the United States, as reflected chiefly in legislation and in treaties, has been very consistent in regard to debts and shares of moneys in the public funds or in banks, irrespective of the residence of the owner. Although debts were generally sequestrated during the Revolutionary War and actually confiscated in one of the States, the practice of confiscation was declared in a permanent treaty between the United States and Great Britain in 1794 to be unjust and impolitic, and although this declaration was not repeated in subsequent treaties, the provision against confiscation of debts has been embodied in the treaties of the United States with such regularity that, with due reservation in regard to the possibility that the usage may not have fully developed into a rule of customary international law binding upon all nations, it may safely be said that it has been the consistent policy as well as practice of the United States to refrain from the confiscation of debts and shares or moneys in the public funds or debts.⁴

The withholding by a belligerent State of interest on its own indebtedness, or the acquisition of any interest due by the inhabitants of its territory to alien enemies, during the course of war, does not involve the confiscation of property, unless upon the termination thereof the State fails to pay to the creditor what it has withheld from him or received in his behalf.⁵

(c)

§ 623A. **Action by the United States after World War I.** As has been observed elsewhere, the United States closely entwined the termination of its participation in World War I as a belligerent with the assertions and arrangements, which were incorporated in treaties with its former enemies, contemplating the retention by itself of enemy property until suitable provision was made by the Governments of those enemies for the satisfaction of all claims against them within a broad field.¹ There was, accordingly, initiated a legislative policy of sequestrating various forms of enemy private property as a means of inducing or securing payment by Germany of certain claims against it embodied in part in sums awarded American nationals by the Mixed Claims Commission, United States and Germany, under agreement of August 10, 1922.²

Yet there were also relaxations. Thus, in 1923, under the so-called Winslow Act, substantial releases to former alien enemy owners were yielded;³ and

debtor, and which the State of Virginia had endeavored to confiscate during the War of the Revolution, see *Ware v. Hylton*, 3 Dall. 199. It should be observed that the case did not concern the right of confiscation, but rather the operation of the treaty in the light of the Constitution of the United States. It is not surprising that in 1796, when the case was decided, the justices were not agreed as to whether such a right existed. It is of greater significance that Wilson, J., should have declared that: "By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable" (281), and that Paterson, J., should have likewise denounced such conduct (255).

See, also, in this connection, *Williams v. Bruffy*, 96 U. S. 176, 186-189; *Moore*, Dig., VII, 313-315.

⁴ *Edgar Turlington*, in *Am. J.*, XXII, 270, 289-290.

⁵ See § 7 (c) and (d) of Trading with the Enemy Act, 50 U.S.C.A., Appendix.

§ 623A.¹ See American Claims Against Germany Arising Out of World War I, *supra*, § 295A; American Participation in German Reparation Payments, *supra*, § 299A.

² See Trading with the Enemy Act of Oct. 6, 1917, as amended, 50 U.S.C.A., Appendix.

³ § 2, 42 Stat. 1511, 1516, adding § 23 to the Trading with the Enemy Act.

again, in larger degree under the War Claims Settlement Act of 1928, as amended.⁴ In consequence, however, of the failure of Germany to perform its undertakings under the Debt-Funding Agreement of June 23, 1930, whereby it had agreed to make specified payments for particular categories of American claims,⁵ the Congress, by Joint Resolution of June 27, 1934, postponed further payments and transfers to German nationals from a special deposit account while Germany remained so in arrears.⁶ In the opinion of the Supreme Court of the United States the Congress did not, by its previous legislation, lose the privilege of making this postponement.⁷ Nor did it by such action, indicate a design of ultimate confiscation of such property as remained within its control. Nevertheless, a serious blow to the interests of former alien owners of property was at times manifested in the fact that during the course of the war the proceeds of sales lawfully made by the Alien Property Custodian, and which fixed the limits of final reimbursement were not commensurate with the value of what was sold, at least when not tested by prices attainable at forced sales.

5

§ 624. **Prohibition of Exports.** A belligerent State may not unreasonably assert the right to prohibit the exportation from its territory of commodities deemed indispensable for its own use, for the sake primarily of conserving its own stock, and with a view also of providing for the needs of other States, if any, with which it may be in alliance. The United States has not infrequently acted upon this principle.¹ By an Act of Congress approved June 15, 1917, it

⁴ 45 Stat. 254. This Act, with amendments, constituted an amendment of the Trading with the Enemy Act. See 50 U.S.C.A., Appendix, § 9.

Professor Borchard writing in 1936 declared: "Thereupon a compromise was effected among all parties concerned, incorporated in the Settlement of War Claims Act, 1928, by which the American claimants were to receive up to \$100,000 on each award plus 80% of any excess above \$100,000, the German owners of the sequestered property were to receive 80% of their property outright, with a "temporary" withholding of the remaining 20%, and the German owners of property requisitioned by the United States, ship and patent owners mainly, were to receive 50% of such awards as might be made to them by a War Claims Arbitrator. Unpaid balances were to draw 5% interest. The 20% withheld from the owners of sequestered property and the 50% withheld from the ship and patent awards were turned over to the American claimants, leaving those sums, approximately \$80,000,000, excluding the unallocated interest fund of some \$22,000,000, to be paid by Germany in future instalments into a Special Deposit Account, or appropriated later by the United States Government." (*Am. J.*, XXX, 110.)

⁵ *Am. J.*, XXV, *Official Documents*, 1.

⁶ 48 Stat. 1267.

⁷ See *Cummings v. Deutsche Bank*, 300 U. S. 115, 121, where it was declared: "The Settlement of War Claims Act was not a conveyance and did not grant former owners any right or title to, or interest in, the money or property taken by the Custodian."

§ 624. ¹ See *United States v. La Vengeance*, 3 Dall. 297, 301, in relation to the Act of May 22, 1793, enacted in contemplation of war.

See Order of Secy. of Treasury, May 23, 1862, under Act of May 20, 1862, given in communication of Mr. Seward, Secy. of State, to Mr. Stuart, British Chargé d'Affaires, Oct. 3, 1862, *Dip. Cor.* 1862, 296, 300, 302-303, *Moore, Dig.*, VII, 193.

See Joint Resolution of Congress of April 22, 1898, and practice of Treasury Dept., following its circular of April 27, 1898, and as described in *Moore, Dig.*, VII, 194-195, and documents there cited.

"The Department knows of no principle of international law which required this Government to supply foreign ships with cargoes or ships' stores, or to allow such ships to remove from the United States products of this country. The right to control the resources of the country is but an incident of sovereignty, the non-recognition of which in international

was provided that whenever during the then existing war the President should find that the public safety so required, and should make proclamation thereof, it should be unlawful to export from or ship from or take out of the United States to any country named in such proclamation, except at such times, and under such regulations and orders, and subject to such limitations and exceptions as the President might prescribe, any article or articles named in such proclamation.² On July 9, following, the President, declaring that the public safety required that succor be prevented from reaching the enemy, issued a proclamation providing that except at such times and subject to such limitations and exceptions, and under such regulations and orders as he might prescribe, "coal, coke, fuel, oils, kerosene and gasoline, including bunkers; food grains, flour and meal therefrom, fodder and feeds, meat and fats; pig iron, steel billets, ship plates and structural shapes, scrap iron and scrap steel; ferromanganese; fertilizers; arms, ammunition, and explosives" should not, on and after July 15, 1917, be carried out of or exported from the United States or its territorial possessions to specified countries.³

Again, on February 14, 1918, the President, by an imports and exports proc-

practice might conceivably, in a given case, deprive the country of its only means of self-preservation. There is no indication that these [Finnish] ships or any of them ever applied for permission to leave port without American products. Their whole purpose was to take out of the country goods the exportation of which it was the purpose of the government to control. It is not, therefore, perceived upon what theory or principle of international law it can be contended that these vessels were deprived of any right under the established practice of nations." (Mr. Castle, Under Secy. of State, to the Minister of Finland, Feb. 18, 1932, Hackworth, Dig., II, 8-9.)

² Title VII, of Act approved June 15, 1917, "to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." (§ 1, 40 Stat. 225.)

³ For. Rel. 1917, Supp., 2, Vol. II, 903.

Immediately following the issuance of the embargo proclamation President Wilson made the following statement: "In controlling by license the export of certain indispensable commodities from the United States, the Government has first and chiefly in view the amelioration of the food conditions which have arisen or are likely to arise in our own country before new crops are harvested. Not only is the conservation of our prime food and fodder supplies a matter which vitally concerns our own people, but the retention of an adequate supply of raw materials is essential to our program of military and naval construction and the continuance of our necessary domestic activities. We shall, therefore, similarly safeguard all our fundamental supplies.

"It is obviously the duty of the United States in liberating any surplus products over and above our own domestic needs, to consider first the necessities of all the nations engaged in war against the Central Empires. As to neutral nations, however, we also recognize our duty. The Government does not wish to hamper them. On the contrary, it wishes and intends by all fair and equitable means, to cooperate with them in their difficult task of adding from our available surpluses to their own domestic supply and of meeting their pressing necessities or deficits. In considering the deficits of food supplies, the Government means only to fulfill its obvious obligation to assure itself that neutrals are husbanding their own resources and that our supplies will not become available, either directly or indirectly, to feed the enemy." (Official Bulletin, July 9, 1917, 3.)

The Secretary of Commerce forthwith issued an announcement with reference to the procedure to be followed by exporters in applying to the Government for export licenses. *Id.*, 3.

See, also, proclamation of President Wilson (No. 1391), Aug. 27, 1917, forbidding the exportation from the United States or its territorial possessions to specified countries of all kinds of arms, guns, ammunition and explosives, and other articles, For. Rel. 1917, Supp., 2, Vol. II, 933; also supplementary proclamation of President Wilson (No. 1410), Nov. 28, 1917, *Id.*, 989.

lamation, subjected to control by license the entire foreign commerce of the United States, from and after February 16. His purpose in so doing was to place the full force of the industrial strength of the country behind the offensive being undertaken against the enemy.⁴ The propriety of this action was beyond question. Broad powers over foreign trade were delegated to the War Trade Board.⁵

The basis of the policy by which the United States undertook to control war trade in order to defeat the Central Powers was as follows: "(1) Conservation of domestic supplies for use of the United States and of the allied nations; (2) Prevention of trade, directly or indirectly, by persons in the United States with, for the benefit of, or on behalf of the enemy or its agents; (3) Conservation of tonnage for the transportation of military necessities for the United States and the Allies."⁶ Pursuant to the general policies thus established and made effective under powers granted by the Congress and delegated by the President to the War Trade Board, that body directed its efforts to the attainment of four great purposes: "(1) Commercial isolation of the enemy: By control over United States exports to the border neutral countries in accordance with the general policy established; (2) Financial isolation of the enemy: By control of enemy stocks in the United States and of enemy credit established through trading with United States citizens; (3) Obtaining essential supplies: By conservation of domestic supplies through export restrictions and by obtaining essential imports from the Allies and from neutrals; (4) Conservation of ocean tonnage: By acquisition of shipping bunker control, import restrictions, and by priority in export shipments."⁷

The commercial isolation of the enemy demanded that the Central Powers should not, through their chief points of foreign contact, such as the northern neutral countries and Switzerland, gain desired sustenance. Those countries were, accordingly, warned that pending a mutual agreement on a specified basis, exports of food supplies of any nature from any of those countries to Germany would reduce the amount of foodstuffs which would be supplied them by the United States.⁸ "Thus began the policy of embargo on all exports to the northern

⁴ Official Bulletin, Feb. 15, 1918, No. 235, 2; also statement issued by the War Trade Board, *id.*, 1; statement of the Bureau of Imports of the War Trade Board, Official Bulletin, Feb. 18, 1918, No. 237, 1. It may be observed that the President's imports proclamation was in pursuance of powers conferred upon him by the Trading with the Enemy Act of Oct. 6, 1917.

⁵ Concerning the establishment of the War Trade Board and delegation of powers to it, see Report of the War Trade Board, June 30, 1919, Washington, Govt. Printing Office, 1920, 2-8.

⁶ *Id.*, 12, where it was added: "In other words, the sovereign right of the Government to control exports was to be exercised first in the interest of maintaining an adequate supply of essential materials for itself and its allies; and any surplus after the satisfaction of these requirements was to be made available for domestic consumption in neutral countries, with due safeguards against their being used for the benefit of the enemy. The United States was prepared to limit trading of her citizens with persons of enemy nationality or association in neutral countries in so far as such transactions amounted to trading with, for the benefit of, or on behalf of Germany. Furthermore, the Government was prepared to exercise control over bunker fuel and ship stores to the extent demanded by the necessity of transporting an army to France and furnishing it and the Allies with supplies and munitions."

⁷ *Id.*, 13.

⁸ See Memorandum from the American Exports Council, of July 24, 1917, addressed to

neutrals, a policy that continued until, in coöperation with the Allies and these neutral countries, a coördinated system had been worked out that furnished these neutrals with necessary supplies and yet protected vital interests of the United States. . . . The control established by the coöperation of the United States and the European Allies for exports to the northern neutrals was vested in three types of agencies — an export control organization in each allied country (for example, the War Trade Board in the United States), a central interallied organization in London for the purpose of coördinating the policies of the United States and the Allied Governments of Great Britain, France, and Italy, and local joint committees of allied and associated representatives in each of the several neutral countries.”⁹ Subsequently, agreements with the several neutral countries, embracing guaranties by them against reëxportation to the Central Powers, were concluded. Those with Switzerland,¹⁰ Norway,¹¹ and Denmark¹² were concluded by the War Trade Board alone, and recognized existing agreements between those countries and the Governments associated with the United States. Those with Sweden¹³ and the Netherlands¹⁴ were consummated by the major Allies and adhered to by the War Trade Board.¹⁵

It must be obvious that a State may, at any season, regardless of the existence or absence of armed conflict in or between foreign States, assert the right to restrict the exportation of particular commodities as a means of protecting and preserving its domestic resources.¹⁶ It may, moreover, do so in the interest of national defense which may become acute during the existence of a war to which it is not a party.¹⁷

the Danish, Netherland, Norwegian, and Swedish Legations, For. Rel. 1917, Supp., 2, Vol. II, 908.

⁹ Report of the War Trade Board, June 30, 1919, 17 and 18.

¹⁰ Agreements with Switzerland were concluded Dec. 5, 1917, and Jan. 22, 1919, For. Rel. 1917, Supp., 2, Vol. II, 1185.

¹¹ See agreement of April 30, 1918, For. Rel. 1918, Supp., 1, Vol. II, 1170.

¹² See agreement of Sept. 18, 1918, *id.*, 1339.

¹³ See agreement between Sweden and the Allied Powers of May 29, 1918, with Memorandum of Adherence by the War Trade Board, *id.*, 1240 and 1263.

¹⁴ See agreement between the Netherland Government and the Associated Governments of Nov. 25, 1918, together with Letter of Adherence by the War Trade Board, Dec. 30, 1918, *id.*, 1574, and 1591, respectively.

See also Commercial Agreement between the Allied Powers and Iceland of May 23, 1918, together with Memorandum of Concurrence by the War Trade Board of Sept. 11, 1918, *id.*, 1363, and 1377, respectively.

¹⁵ See Report of the War Trade Board, June 30, 1919, 20.

Concerning the coöperation of the United States with the Allied Powers in the supply and distribution of food, of industrial raw materials and products, and of oil and oil-well equipment, see documents in For. Rel. 1918, Supp., 1, Vol. I, 535-558; 559-617; and 617-624, respectively.

¹⁶ See, for example, Sec. 4, Act of September 1, 1937, 50 Stat. 885, 887, restricting the exportation of helium gas from the United States and its territories and possessions.

¹⁷ See proclamations and executive orders in reference to the control of the export of certain articles and materials under date of Feb. 25, 1941, pursuant to an Act of Congress approved July 2, 1940, as set forth in Dept. of State Bulletin, March 1, 1941, 219-220.

6

NEUTRAL PERSONS AND PROPERTY WITHIN
BELLIGERENT TERRITORY

a

Persons

(1)

EXACTION OF MILITARY SERVICE

(a)

§ 625. **Theory of the Belligerent Right.** The right of a belligerent to exact military service of any individual within its control is due not merely to his presence within its territory, but also to the existence of such a relationship between the State and the man as to burden the latter with an obligation towards the former which it may fairly deem to be incapable of satisfaction save by performance of the task assigned. When the individual is a national of the belligerent, the existence of the debt is acknowledged, and the mode of satisfaction regarded as a matter of domestic concern. When he is an alien, the State of his allegiance, if it be a neutral, may fairly scrutinize and inquire into both the validity of the obligation and the method by which fulfillment is demanded.

The neutral national by indefinitely prolonged or permanent residence within the territory of the belligerent State, notwithstanding the possible retention of a legal home in his own country, may have become an active participant in the commercial or economic life of the former, and have reaped the full benefits thereof. He may have even acquired a domicile therein. Again, he may have formally declared an intention to become a citizen of the belligerent; and still again, especially after having made such a declaration, he may have taken part in its political activities by exercising the privilege of franchise or by holding office. By each of these processes there is formed with respect to the territorial sovereign a special relationship which gives rise to a distinct obligation. The question presents itself whether, in determining the mode of satisfaction, that relationship is to be deemed more important than the connection between the individual and the State of which he is a national.¹

It has been contended in Germany and elsewhere that an alien from whom are withheld political rights incurs, by mere length of residence or the establishment of a domicile within the territory of a State which has become a belligerent, no obligation to bear arms against its enemies, on the ground that military service in time of war involves the performance of an essentially political duty.² Without admitting that a State is obliged to confer a particular

¹ § 625. ¹ T. Baty, "The Interconnection of Nationality and Domicile," *Illinois Law Rev.*, XIII, 187.

² Bluntschli, *Droit International Codifié*, 5 ed., French translation by Lardy, § 391; E. M.

political privilege in order to justify the exaction of military service even if it is to be regarded as constituting a political duty,³ it may be observed that such a service does not necessarily possess such a character. It may, therefore, well be doubted whether such a premise should be accepted as disclosing the true basis of a broad and invariable limitation of the belligerent right involved.⁴ The debt which the neutral national incurs through prolonged residence within belligerent territory is a heavy one on account of the solid advantages derived from participation in the economic life of the State. To demand that satisfaction take the form of personal defense of the place or country in which they have been and continue to be enjoyed is not unreasonable. That burden is a natural incident of continuing to reside and belong there. The territorial sovereign may, moreover, fairly contend that the price of continued domicile (or even residence) within its domain is subjectivity to military service by the neutral dweller. Approached from such an angle, the question concerning the right of the belligerent State to exact that service from such an individual is over-shadowed by its simple assertion of the right to condition prolonged sojourn within its limits upon willingness to yield that service.

It should be observed also that any exemption of neutral *bona fide* residents not only increases inequitably the task confronting the remaining inhabitants who are nationals of the belligerent, but also creates a distinction which serves directly to hamper the latter in recruiting necessary forces. This difficulty has been acknowledged. In America and England it has been perceived that prolonged residence or domicile begets a duty to render military service for the national defense when the need is dire, and even for a broader purpose when the

Borchard, *Diplomatic Protection*, § 35; Coleman Phillipson, in *The Law Times*, April 20, 1918, Vol. CXLIV, 445.

The following proposition respecting the treatment of neutral persons in belligerent territory was offered by the German delegation at the Second Hague Peace Conference of 1907: "Belligerent parties shall not ask neutral persons to render them war services, even though voluntary.

"The following shall be considered as war services: Any assistance by a neutral person in the armed forces of one of the belligerent parties, in the character of combatant or adviser, and, so far as he is placed under the laws, regulations or orders in effect by the said armed force, of other classes also, for example, secretary, servant, cook. Services of an ecclesiastical and sanitary character are excepted." (J. B. Scott, *Reports to Hague Conferences*, 568, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 273.)

See speech of Brig.-Gen. Davis, of the American Delegation, in support of the German proposal, *id.*, III, 193-194; J. B. Scott, *Hague Peace Conferences*, I, 550; also *id.*, 541-555.

³ In dealing with its own nationals a belligerent State does not deem the equities of able-bodied male persons of suitable age, who on account of their youth or for other reasons are denied political privileges, to afford the basis of an exemption from military service.

⁴ It is urged with force that by exacting military service from an alien, he may be required to fight against the forces of his own country. When the alien is a neutral as distinct from an enemy national, that danger rests upon a contingency which may be more or less remote according to the circumstances of the particular case. To save him from becoming a participant in operations against the State of his allegiance is not, however, beyond the power of the belligerent which impresses him into its service. That may be accomplished either by the cumbersome and difficult process of removing him from operations in the field when his State becomes a belligerent, or by inducting him into an auxiliary force to which are assigned duties remote from the area of hostilities and of an essentially non-hostile character. The bare existence of a contingency which does not necessarily give rise to a situation which the belligerent is unable to cope with, fails to offer a convincing reason why the neutral national should be exempt from the military service of the State within whose territory he has long resided, and from which he is not disposed to depart.

individual concerned fails to avail himself of reasonable opportunity to abandon his residence and depart from the country.

By declaring an intention to adopt the nationality of the State of residence, the alien declarant makes formal announcement of a design to fit himself for the privileges of its citizenship, and in fulfillment of a requirement thereof, to reside permanently within its domain. He thereby purports to throw his lot in with the State of his choice, and avers in substance that he expects to belong there until he is clothed with its nationality. By such action the declarant announces the establishment of a certain relationship of dependence upon the State and seems to incur simultaneously a corresponding obligation towards it. The chief significance, however, of his declaration is the evidence which it affords of his general plan to associate himself with and ultimately belong to the State; and when that plan has developed uninterruptedly and consistently up to the hour when he is called upon to undergo military service, his declaration is an act which sheds light on the bearing of his subsequent conduct. The claims of such an individual to exemption are regarded as of even less weight than those of the resident neutral person who has not taken such a step. It is not unreasonable to exact of the former any service short of one opposed to the State of his allegiance, provided he elects to remain within a place subject to the control of the belligerent, and especially, if he be unwilling to cancel his declaration of intention and relinquish the benefits thereof.⁵ Here, again, however, the territorial sovereign may, without pushing its claim of legal right to draft the neutral declarant, elect to deprive him forever of the privilege of attaining its nationality, in case he demands immunity from service; and he may, in such case, prove to be willing enough to pay the price exacted for the acquisition of that nationality.

Statesmen have sometimes announced that if the necessity were extreme, as in the case, for example, of resistance to an invasion, or the suppression of a rebellion, military service might be fairly exacted of a neutral national. This would imply that if its needs were at the moment sufficiently grave, a belligerent might justly demand such service, and forbid departure from its territory as an alternative. There seems to be no reason for giving proof of a further necessity when, in view of the gravity of its requirements, a State has recourse to a draft of able-bodied persons within its domain, and permanent neutral residents,

⁵ The "*vœu*" expressed in the Final Act of the Second Hague Peace Conference merely declared that "the Powers may regulate, by special treaties, the position, as regards military charges, of foreigners residing within their territories." *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 700, J. B. Scott, Reports to Hague Conferences, 216. Compare the language of the "*vœu*" contained in the proposals of the Second Commission respecting the treatment of neutral persons in territory of belligerent parties, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 179, J. B. Scott, Reports to Hague Conferences, 578.

See First Report to the Conference by Col. Borel from the Second Commission, upon an arrangement on neutral persons in the territory of belligerents, J. B. Scott, Reports to Hague Conferences, 556; also Supplemental Report to the Conference by Col. Borel, *id.*, 576.

See, in this connection, Georges Ferrand, *Des Réquisitions en Matière de Droit International Public*, Paris, 1917, 306-311; Westlake, 2 ed., II, 133-134; A. S. de Bustamante, "The Hague Convention concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare," *Am. J.*, II, 95, 109-115.

whether or not declarants of an intention to become citizens, are afforded a reasonable opportunity to withdraw therefrom.⁶ The contention in behalf of such individuals that the length of their residence renders departure an unjust alternative, emphasizes the reality of their association with the territorial sovereign and so fortifies the basis of its claim.

Notwithstanding the declarations of foreign offices, belligerent States have generally, for reasons of policy, exercised moderation. Practical difficulties necessarily associated with the conscription of neutral persons have, moreover, served as a deterrent. Numerous conventions have imposed restraint. The attitude of the United States deserves attention.

(b)

§ 626. **Attitude of the United States.** Mr. Madison, as Secretary of State, declared in 1804, that the citizen of one State residing within territory of another, although bound by temporary allegiance to many common duties, could never be rightfully forced into military service, "particularly external service," nor be restrained from leaving his residence when he might please. The law of nations was said to protect him against both.¹ In 1813, Mr. Monroe, as Secretary of State, in response to a complaint of the French minister, informed the latter that he would call the attention of the governors of Ohio and Missouri to the fact that French subjects within those States had been enrolled in the militia and called upon to perform military duty in defense of the country.²

In the course of the Civil War the conscription of military forces by the United States and also by the Confederate States was a matter of concern to Great Britain. Instructions and communications from the latter, in connection with the position taken by the United States in legislative enactment and otherwise, still have their significance. On April 4, 1861, Lord Lyons, British Minister at Washington, was informed by his Government that in England the question whether an alien could be compelled to serve in the militia had never been authoritatively decided.³ On October 7, following, he was advised that it was not

⁶ "Since compulsory military service to a foreign country can always be avoided by timely departure from it, there appears to be no reason why, in itself, it should necessarily form any exception to the general rule that a Government may, if it chooses, require the same support, whether personal or pecuniary, of aliens whom it permits to reside within its borders, as it requires of its own citizens. Discrimination against aliens is doubtless contrary to the trend of modern civilization, but there is no foundation in international law for requiring discrimination in their favor." (Howard Thayer Kingsbury, *Proceedings*, Am. Soc. Int. Law, V, 218, 223.)

§ 625. ¹ Communication to Mr. Monroe, Minister to Great Britain, Jan. 5, 1804, Am. State Pap., For. Rel., III, 81, 87, Moore, Dig., IV, 52. It may be observed that this statement had reference to Art. II of a proposed convention between the United States and Great Britain, forbidding the compulsory service on board ships of the one party, of the subjects or citizens of the other, or of persons resorting to, or residing in, the dominions of the other. This circumstance may account for the special objection against impressment for external service.

² Communication to Mr. Serurier, French minister, July 30, 1813, MS. Notes to For. Leg. II, 13, Moore, Dig., IV, 52.

³ Appendix to Report of the Royal Commissioners on Laws of Naturalization and Allegiance, House of Commons, Sessional Papers, 1868-1869, XXV, Commissioners, (14), 42. It may be observed that the quotation from the instruction to Lord Lyons, quoted by Mr. Davis, Assist. Secy. of State, in a communication to Mr. Faxon, American Consul at

reasonable to expect that Her Majesty's Government should passively allow British subjects to be compelled to serve in the armies in a civil war where, besides the ordinary incidents of battle, they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern.⁴ An Act of Congress of July 17, 1862, for the purpose of calling forth the militia, provided for the enrollment of all able-bodied male "citizens" between specified ages.⁵ Shortly afterwards Mr. Seward, Secretary of State, informed the British Chargé d'Affaires at Washington that "none but citizens" were "liable to militia duty," and that the Department of State had never regarded an alien who had merely declared his intention to become a citizen as entitled to an American passport.⁶ On October 24, 1862, he declared, however, that aliens who had exercised the right of suffrage were "considered as citizens of the States" where they resided, and as such were within the purview of the law.⁷

Almost simultaneously the British Government was concerned with the effect of bare domicile of British subjects within the Confederate States upon the right of conscription. On October 11, 1862, Lord Russell, British Foreign Secretary, expressed the opinion that while British subjects domiciled only by residence therein could not be forcibly enlisted in the military service of those States by virtue of an *ex post facto* law "when no municipal law existed at the time of the establishment of their domicile, rendering them liable to such service," it might, nevertheless, be competent for the belligerent State in which a domiciled foreigner resided to pass such a law, if at the same time option was offered to such an individual to depart from the territory after a reasonable period.⁸ Shortly afterwards Lord Lyons was informed that his Government deemed it competent for the Confederate Government "to include in the conscription British subjects permanently resident in those States, if they refuse the option duly tendered to them of leaving the country within a reasonable

Curaçao, No. 46, Feb. 17, 1870, 58 MS. Desp. to Consuls, 26, Moore, Dig., IV, 57, omits the portion referred to in the text. Lord Lyons was advised, however, that if "the militia were to be embodied for active service, and no alternative of providing substitutes were permitted, the position of British subjects would appear to deserve very favorable consideration and to call for every exertion being made in their favour on the part of Her Majesty's Government."

⁴ Communication to Lord Lyons, No. 349, appendix to Report above cited, 42. The instruction added that "if such enforced enlistment were persisted in, Her Majesty's Government would be obliged to concert with other neutral Powers for the protection of their respective subjects."

Lord Lyons reported July 29, 1861 (No. 379), "that in no case, either in the Northern or Southern States, had the discharge of a British subject, enlisted against his will, been refused or delayed on proper representation being made." (*Id.*, 42.)

⁵ 12 Stat. 597.

⁶ Communication of Mr. Seward, Secy. of State, to Mr. Stuart, British Chargé d'Affaires at Washington, Aug. 20, 1862, Dip. Cor. 1862, I, 283.

⁷ Communication to Mr. Stuart, British Chargé d'Affaires at Washington, Dip. Cor. 1863, I, 397.

See, also, Mr. Seward to Gov. Morton, Sept. 5, 1862, 58 MS. Dom. Let. 169, Moore, Dig., IV, 53.

⁸ Parl. Papers, "North America," No. 13, 1864, 34, Appendix to Report of Royal Commissioners on Laws of Naturalization and Allegiance, above cited, 43. Lord Russell added: "But without this option such a law would violate the principles of international law; and, even with such an option, the comity hitherto observed between independent States would not be very scrupulously observed."

time, and with reasonable opportunity of compliance, but not otherwise.”⁹

An Act of Congress of March 3, 1863, rendered liable to military service all able-bodied male citizens of the United States and “persons of foreign birth who shall have declared on oath their intention to become citizens,” between specified ages.¹⁰ In order to avoid misapprehension concerning the liability of persons embraced within the scope of the act, a proclamation by President Lincoln of May 8, 1863, announced that no plea of alienage would be received or allowed to exempt from the operation of the act any person of foreign birth who should have declared his intention to become a citizen and who should be found within the United States at any time during the existing conflict at or after the expiration of sixty-five days from the date of the proclamation, and that no plea of alienage would be allowed in favor of any declarant who should have exercised at any time the right of suffrage or any other political franchise within the United States under its laws or those of any of the several States.¹¹ The British Government regarded this position as reasonable.¹² Thus the importance of the statement of Mr. Bayard, Secretary of State, of February 15, 1888, to the effect that there was no single instance in the Civil War where an alien was held to

⁹ Instructions to Lord Lyons, No. 293, Nov. 27, 1862, Appendix to Report of Royal Commissioners on Laws of Naturalization and Allegiance, above cited, 44.

¹⁰ 12 Stat. 731.

Prof. Moore adverts to the fact that Mr. Seward, Secy. of State, in a communication to Mr. Dayton, Minister to France, July 20, 1863, Dip. Cor. 1863, I, 684, Moore, Dig., III, 871, “argued that the provision of the Act of 1863, subjecting to military duty persons who had declared their intention to become citizens, operated, in connection with another provision of the same Act, directing the issuance to such persons of passports, as a process of naturalization, which the proclamation gave them the option of accepting, by staying in the United States, or of declining, by going away.” (Dig., IV, 56, note.)

Declared Mr. Seward in a communication to Mr. Williams, Nov. 24, 1863: “No alien-born person is liable to render military service unless either he has been naturalized on his own application or has made a voluntary declaration, on oath, of his intention to become a citizen by naturalization, according to law, or has claimed and actually exercised the political right of voting as a citizen of the United States.” (62 MS. Dom. Let. 333, 502, Moore, Dig., IV, 54.)

¹¹ 13 Stat. 732.

¹² According to the Appendix to the Report of Royal Commissioners on Laws of Naturalization and Allegiance, above cited: “This proclamation was considered to afford a reasonable period to allow for the departure of ‘intended’ citizens, and the question of their liability to military service was thus practically set at rest; and Her Majesty’s Government subsequently refused to interfere on behalf of those ‘intended’ citizens who had not taken advantage of the opportunity thus afforded to them of leaving the country.” (45.)

In 1876 the law officers of the Crown were of opinion that a law of the Transvaal Government imposing upon all able-bodied residents the duty of compulsory service in a “commando,” whether called out against the uncivilized tribes inhabiting the surrounding country, or for whatever purpose, was not contrary to international comity and usage even when applied to a foreigner. The Earl of Carnarvon, to Governor Sir H. Barkly, May 22, 1876, Accounts and Papers: Colonies and British Possessions—Africa, 1877, Vol. LX, Cd. 1748, 27. See, also, the Marquis of Ripon, to Sir H. B. Loch, No. 6, June 8, 1894, Accounts and Papers: Colonies and British Possessions, Africa, Cont. 1896, Vol. LIX, Cd. 8159, 3.

In the course of a communication from Mr. Bayard, American Ambassador at London, to Mr. Gresham, Secy. of State, July 19, 1894, in relation to American citizens residing in the South African Republic, it was reported that “the question of the exemption of British subjects, resident in other countries, from compulsory military service had been submitted to the law officers of the Crown, whose reply was to the effect that, by the general rule of law, such exemption was not held to exist, and that it was not claimed as a legal right by Great Britain, but that, by conventional agreement, based upon mutuality between Governments, such an exemption could be established.” (For. Rel. 1894, 253.)

With respect to the foregoing documents, see MS. Memorandum by A. P. C. Griffin, Chief Assistant Librarian of Congress, entitled “Aliens: Military Service,” 1918.

military duty when his Government called for his release,¹³ is perhaps lessened by the circumstance that the British Government was not disposed to interpose in behalf of British subjects who failed to comply with the terms of the President's proclamation.

In the decade following the Civil War American Secretaries of State not infrequently expressed opinion respecting the right to exact military service of resident aliens. Such utterances usually, however, concerned the exemptions of transient sojourners, or conditions arising in time of peace, and when, therefore, the necessities of the particular case did not call for a precise statement relative to the extent of the belligerent right. Nevertheless, certain utterances revealed the influence of the experience of the Civil War. Thus in 1868, Mr. Seward stated that the Government was "not disposed to draw in question the right of a nation in a case of extreme necessity to enroll in the military forces all persons within its territories, whether citizens or domiciled foreigners."¹⁴ In 1869, Secretary Fish said that, although waiving the exercise of the right to require military service from all residents, the Government had never surrendered that right, and could not object if other Governments insisted upon it.¹⁵ In 1874, he declared that while the United States had not claimed the right to impress aliens into its services during the Civil War, it was understood that "in one instance at least, in the case of a siege, we sought to justify such an impressment."¹⁶

In 1917, Secretary Lansing stated in substance, that while there might be a

¹³ Communication to Mr. McLane, American Minister at Paris, For. Rel. 1888, I, 510, 512, Moore, Dig., IV, 55, note.

¹⁴ Mr. Seward, Secy. of State, to Mr. White, July 10, 1868, 79 MS. Dom. Let. 73, Moore, Dig., IV, 57.

It should be observed, however, that Mr. Seward had, on Aug. 14, 1862, declared: "I can hardly suppose that there exists, anywhere in the world, the erroneous belief that aliens are liable here to military duty. If you think otherwise, there will be no objection to your giving any publication you please to this communication." (Moore, Dig., IV, 52.)

¹⁵ Mr. Fish, Secy. of State, to Mr. Redmond, April 3, 1869, 80 MS. Dom. Let. 530, Moore, Dig., IV, 57.

¹⁶ Mr. Fish, Secy. of State, to Mr. Williamson, Minister to Central America, No. 98, July 24, 1874, MS. Inst. Costa Rica, XVII, 191, Moore, Dig., IV, 58.

On Feb. 3, 1888, Mr. Bayard, Secy. of State, declared it to be well settled by international law that foreigners "temporarily resident in a country can not be compelled to enter into its permanent military service." He added, however, that in times of social disturbance or invasion their services in police or home guards might be exacted, and that they might be required to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. He said that the test in each case, as to whether a foreigner could properly be enrolled against his will, was that of necessity. "Unless social order and immunity from attack by uncivilized tribes can not be secured except through the enrollment of such a force, a nation has," he declared, "no right to call upon foreigners for assistance against their will." (Communication to Mr. Bell, Minister to the Netherlands, No. 113, Feb. 3, 1888, For. Rel. 1888, II, 1324, Moore, Dig., IV, 61-62.) It may be observed that this statement had reference to the case of an American citizen residing at Batavia, who in time of peace was subjected to compulsory drills which greatly interfered with his business duties.

See, also, Mr. Wilson, Acting Secy. of State, to Mr. Hibben, American Chargé d'Affaires at Bogotá, May 19, 1909, For. Rel. 1909, 222.

According to an Act of Congress of April 22, 1898, "All able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of 18 and 45, are hereby declared to constitute the national forces, and, with such exceptions, and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States." (30 Stat. 361.)

"measurable conflict" of opinion as to the law, the position of the United States in exempting neutrals from military service had been uniform. Although appearing to doubt the right of a belligerent under normal circumstances to draft neutral residents, he declared that much would depend upon the particular case, and that "there might be a different rule in regard to enforced service if the nation is called upon to resist an invasion."¹⁷

§ 627. **The Same.** When the United States became a belligerent in 1917, and undertook to increase its military establishment by a selective draft of able-bodied male persons, there resided within its territory large numbers of aliens physically eligible for service. These were, however, for the most part, nationals either of other belligerents at war with Germany, or of the enemy itself. A relatively small number were the nationals of neutral States,¹ and of such persons a large proportion owed allegiance to States with which treaties had been concluded exempting from military service the nationals of the contracting parties.² The actual number of alien neutrals not entitled to the benefits of such agreements was relatively small.³

The selective draft law of May 18, 1917, was based upon liability to military

¹⁷ See statement of Mr. Lansing, Secy. of State, Hearings before Committee on Military Affairs, House of Representatives, 65 Cong., 1 Sess., on S. J. Res. 84, Sept. 26, 1917, 10.

According to Art. IV of the treaty of commerce and navigation between Germany and Sweden, May 8, 1906, "They (that is to say, the nationals of the one contracting party who sojourn or have taken up their domicile within the territory of the other party) shall not be subject to any other military services and requisitions in peace times and in war times than those to which the inlanders are subject, and the nationals of the two parties shall be mutually entitled to damages such as are determined in favor of the inlanders of the two countries according to the laws therein in force." (*Nouv. Rec. Gén.*, 2 sér., XXXV, 217; translation by Henckels and Crocker in Authorities on the Law of Angary, Department of State, Confidential Document, 1918, 13.)

§ 627. ¹ Prior to the declaration of war by the United States against Austria-Hungary, the nationals of that State residing in American territory constituted a substantial group of persons technically to be regarded as neutrals, yet connected by allegiance with a State in alliance with the enemy.

² Art. X, treaty with the Argentine Republic, July 27, 1853, Malloy's Treaties, I, 23; Art. III, treaty with the King of the Belgians, as sovereign of the independent State of the Congo, Jan. 24, 1891, *id.*, 329; Art. IX, treaty with Costa Rica, July 10, 1851, *id.*, 344; Art. IX, treaty with Tonga (Great Britain), Oct. 2, 1886, *id.*, II, 1783; Art. IX, treaty with Honduras, July 4, 1864, *id.*, I, 955; Art. III, treaty with Italy, Feb. 26, 1871, *id.*, 970; Art. I, treaty with Japan, Feb. 21, 1911, U. S. Treaty Vol. III, 2712; Art. XI, treaty with Paraguay, Feb. 4, 1859, Malloy's Treaties, II, 1367; Art. IV, treaty with Serbia, Oct. 14, 1881, *id.*, 1615; Art. V, treaty with Spain, July 3, 1902, *id.*, 1703; Art. II, convention with Switzerland, Nov. 25, 1850, *id.*, 1764.

See, in this connection, Mr. Polk, Acting Secy. of State, to the Attorney General, Aug. 9, 1918, Hackworth, Dig., III, 599, footnote.

³ In a statement in the course of Hearings before the Committee on Military Affairs, House of Representatives, 65 Cong., 1 Sess., on S. J. Res. 84, Sept. 26, 1917, Mr. Lansing, Secy. of State, declared: "So far as the drafting of neutral aliens is concerned, it would involve us in the greatest difficulties. It has never been done, to my knowledge, in this country; not even during the Civil War. Mr. Bayard states that very frankly in reviewing the question when we were protesting against an effort to compel some of our people, who we claimed were citizens, to do service in foreign armies. . . . As a question of policy, I think it would be most unwise at the present time, when our relations with many neutrals are — I will not say precarious, but of an irritating character. It is even conceivable that it might result in driving some of them into the war against us, or at least taking a very hostile attitude towards us, which would be most unfortunate at this time" (4). The Secretary also adverted to the numerous controversies which had arisen, particularly with Austria and Italy, in regard to the service of naturalized American citizens of Austrian or Italian origin, and who had returned to their country of origin, and had been forced into the army to do military service, and against whose impressment the United States had always made complaint.

service of male citizens, "or male persons not alien enemies who have declared their intention to become citizens," within specified ages.⁴ The Department of State received numerous and insistent requests from the diplomatic representatives of neutral countries for the discharge of their nationals who had been conscripted, on the ground either that a treaty opposed a barrier to the service demanded, or that the practice of nations required an exemption. Without prejudice to any claims which the United States might have to the services of persons within its jurisdiction who had endeavored to absolve their ties of former allegiance and had indicated their intention to take up permanent residence within its territory, the President found it expedient in the conduct of foreign relations to indicate a willingness to discharge neutral aliens in certain circumstances after they had been inducted into the military service. The Department sought amendment of the law.⁵ An Act of Congress of July 9, 1918, provided

⁴ See Chap. 15, § 2, 40 Stat. 77. According to Section 4 of same paragraph, local boards were clothed with power within their respective jurisdictions to hear and determine, subject to review as thereafter provided, all questions of exemption under the act.

In construing the act the Federal courts were of opinion that aliens not liable to military service were not automatically exempted, and were obliged to claim their exemptions before their local draft boards and obtain recognition of the validity of their claims by those boards. The decisions of the boards were deemed final where they proceeded in due form and in case it did not appear that the individuals concerned were denied a fair hearing. The necessity that they be given such a hearing was emphasized. *Ex parte* Hutfliis, 245 Fed. 798; *United States v. Finley*, 245 Fed. 871; *United States v. Heyburn*, 245 Fed. 360; *Angelus v. Sullivan*, 246 Fed. 54; *Ex parte* Blazekovic, 248 Fed. 327; *United States v. Bell*, 248 Fed. 1002; *Halpern v. Commanding Officer*, 248 Fed. 1003; *United States v. Kinkead*, 248 Fed. 141; *United States v. Mitchell*, 248 Fed. 997; *Gazzola v. Commanding Officer*, 248 Fed. 1001; *Summertime v. Local Board*, 248 Fed. 832; *United States v. Bell*, 248 Fed. 995; *Ex parte* Larrucea, 249 Fed. 981; *United States v. Kinkead*, 250 Fed. 692; *Ex parte* Lamachia, 250 Fed. 814; *Ex parte* Romano, 251 Fed. 762; *Lehto v. Scott*, 251 Fed. 767; *United States v. Local Exemption Board*, 252 Fed. 245; *Ex parte* Platt, 253 Fed. 413. Compare *Ex parte* Beck, 245 Fed. 967. See Opinions Judge Advocate Gen., U. S. A., II, 1918, 346-352.

⁵ Communication of Mr. Lansing, Secy. of State, to Mr. Dent, chairman, Committee on Military Affairs, House of Representatives, Feb. 14, 1918, Cong. Rec., 65 Cong., 2 Sess., Vol. LVI, April 9, 1918, p. 5246, in which it was also stated that the Act of May 18, 1917, as it then stood, had given rise to the report abroad that the United States was impressing neutrals into its armed forces, a report which had apparently been seized upon and advertised by enemy propagandists with a view to irritate the sensitive feelings of certain foreign Governments. He added, "Finally, I inclose for your information a memorandum containing estimates of the number of persons who would be affected by the proposed bill. From these estimates you will observe that, counting out citizens or subjects of treaty countries, who it is assumed should be exempted, the proposed amendment would exclude about 30,000 men, of whom not more than 50 per cent, and probably not more than 30 per cent, would be found eligible for military service. Of the 30,000 it is estimated that one-half are citizens of our neighboring Republic, Mexico, and about 40 per cent are subjects of Scandinavian countries. It seems highly probable that the actual loss of man power would be still further reduced through the waiver of some of the aliens in question of their right to claim exemption, as is understood to be the case at the present time with respect to non-declarant aliens. The loss of man power involved seems to me inconsequential in view of the other considerations at stake in our foreign relations."

The absence of any mention in the Act of exemptions accorded by treaties to which the United States was a party is believed to have been unfortunate. The situation was productive of necessarily unsuccessful attempts to obtain relief through the courts; and these gave rise to judicial utterances indicating the unfortunate situation where an act of Congress is in conflict with an existing treaty. See, for example, *Ex parte* Blazekovic, 248 Fed. 327; *Ex parte* Larrucea, 249 Fed. 981. It is believed that the maintenance of judicial respect for the treaties of the United States as the supreme law of the land capable of invocation by all for whose benefit they are concluded, is impaired by legislation which, for constitutional reasons, compels the courts to disregard the terms of those agreements, and tempts them to utter dicta which fail to make clear the grounds on which a contracting State may justly terminate a solemn compact.

that a citizen or subject of a country which was neutral in the existing war, and who had declared his intention to become a citizen of the United States, should be relieved from liability from military service upon his making a declaration, pursuant to executive regulations, withdrawing his intention to become a citizen of the United States, which should operate and be held to cancel his declaration of intention to become an American citizen, and should cause him to be forever debarred from becoming one.⁶ A similar provision was embodied in the amended selective draft Act of August 31, 1918.⁷

The United States thus exacted a just price for the privilege of eligibility for its citizenship from neutral nationals who had formally acknowledged a design to attain it, and who with such an end in view were dwelling within American territory. The employment of this indirect although efficacious means to cause such individuals to undergo military service violated no obligation, contractual or otherwise, towards any State with which they may have been connected by ties of nationality. Nor did this procedure impair the strength of the traditional American contention denying the right of a foreign State in time of peace or war to exact such service from former nationals, who, being naturalized citizens of the United States and domiciled within its territory, were transient sojourners within that of the State of origin.

In concluding with Germany a treaty of Friendship, Commerce, and Consular Rights that was signed at Washington, December 8, 1923, the United States persuaded that country to accept a provision which, as expressed in Article VI, was as follows:

In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war.⁸

A like provision will be found in certain later treaties of the United States. They also reflect foreign appreciation of the reasonableness of it.⁹ In the Pres-

See also Hackworth, *Dig.*, III, 603-607, and documents there quoted or cited.

See the position of certain foreign States in 1917, as set forth in documents in Hackworth, *Dig.*, III, footnotes, 608-611.

⁶ 40 Stat. 885. According to an Act of Feb. 11, 1931, it was declared that "no alien shall be debarred from becoming a citizen of the United States on the ground that he withdrew his intention to become a citizen of the United States in order to secure discharge from the military service, if such withdrawal (and the application therefor) and discharge took place after November 11, 1918." (46 Stat. 1087.)

⁷ 40 Stat. 955. See Second Report of the Provost Marshal General to the Secretary of War, Dec. 20, 1918, 86-108.

"On November 14, 1918, telegraphic instructions were issued by the War Department to the camp commanders in this country directing the discharge of neutral alien non-declarants upon their application to their respective unit commanders." (Mr. Lansing, Secy. of State, to the Ambassador of Argentina, Nov. 21, 1918, Hackworth, *Dig.*, III, 607, footnote.)

Concerning cases of voluntary enlistment by neutral nationals, see documents in Hackworth, *Dig.*, III, 600-601.

⁸ U. S. Treaty Vol. IV, 4191.

⁹ See, for example, Art. VI, treaty with Esthonia, Dec. 23, 1925, U. S. Treaty, Vol. IV, 4107; Art. VI, treaty with Hungary, June 24, 1925, U. S. Treaty Vol. IV, 4320; Art. VI,

ident's proclamation of June 6, 1930, with respect to the ratification by the United States of the Habana Convention on the Status of Aliens, of February 20, 1928, it was declared that articles 3 and 4 were excepted from ratification.¹⁰

It should be observed that the Selective Training and Service Act approved September 16, 1940, declared that except as otherwise provided therein: "Every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for service in the land or naval forces of the United States."¹¹ Here was a definite assertion of a right to subject to military service neutral aliens within the category specified.

In April 1941, the Department of State suggested an amendment to the Act which would provide that an alien might become exempt from selective military service by withdrawing his declaration of intention to become a citizen, and that such action would permanently bar such alien from citizenship.¹² [After the

treaty with Honduras, Dec. 7, 1927, U. S. Treaty Vol. IV, 4308; Art. VI, treaty with Latvia, April 20, 1928, U. S. Treaty Vol. IV, 4402; Art. VI, treaty with El Salvador, Feb. 22, 1926, U. S. Treaty Vol. IV, 4617; Art. VI, treaty with Austria, June 19, 1928, and Jan. 20, 1931, U. S. Treaty Vol. IV, 3932, and 3952; Art. VI, treaty with Norway, June 5, 1928, and Feb. 25, 1929, U. S. Treaty Vol. IV, 4529.

The treaty with Norway contained also the following paragraph:

"It is agreed, however, that such right to depart shall not apply to natives of the country drafting for compulsory military service who, being nationals of the other Party, have declared an intention to adopt the nationality of their nativity. Such natives shall nevertheless be entitled in respect of this matter to treatment no less favorable than that accorded the nationals of any other country who are similarly situated." See also Art. VI of Convention with Liberia, of Aug. 8, 1938, U. S. Treaty Series No. 956.

See, in this connection, Conventions Restricting Exactions of Military Service, *supra*, § 381A.

According to Art. 1, of the treaty with Siam, concluded November 13, 1937, the nationals of each of the contracting parties "shall be exempt in the territories of the other from compulsory military service on land, on seas, or in the air, in the regular forces, or in the national guard, or in the militia; from all contributions in money or in kind, imposed in lieu of personal military service, and from all forced loans or military contributions; they shall not be subjected, in time of peace or in time of war, to military requisitions except as imposed upon nationals." (U. S. Treaty Series, No. 940.)

¹⁰ According to Art. 3: "Foreigners may not be obliged to perform military service; but those foreigners who are domiciled, unless they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the protection of the place of their domicile against natural catastrophes or dangers not resulting from war." (U. S. Treaty Vol. IV, 4723.)

According to Art. 4: "Foreigners are obliged to make ordinary or extraordinary contributions, as well as forced loans, always provided that such measures apply to the population generally." (*Id.*)

On Dec. 10, 1932, the Department of State found occasion to declare that "this Government cannot admit the right of any foreign government to impress American aviators into military service, regardless of any provisions which may be found in contracts between such government and the aviation companies by which those aviators may be employed." (Communication of Dec. 10, 1932, to the Ambassador at Lima, Hackworth, Dig., III, 607.)

¹¹ 54 Stat. 885. See also documents in Hackworth, Dig., III, 612.

¹² In a communication to the Speaker of the House of Representatives, of April 15, 1941, Secretary Hull declared: "The Department has received communications from a number of foreign diplomatic missions complaining that nationals of their countries are being drafted for training and service. Some of these complaints are based on treaty provisions and the Mexican Embassy has taken the position that the drafting of its nationals for military service is contrary to the principles of international law. The Department is desirous of honoring the treaty obligations of this Government and after conferences with the other interested agencies of the Government it has concluded that the appropriate way to solve the problem is by the amendment of the Selective Training and Service Act. It is therefore suggested that the pro-

United States became a belligerent in 1941, the Act was amended in harmony with this important suggestion.]

It should be obvious that the exaction of military service as the price of the privilege of prolonged residence within the territory of a belligerent State, or the exaction of that service as the price of permitted acquisition of its nationality, is not unreasonable, and differs sharply in character from the claim of right to subject to military service the neutral alien found to be abiding within its domain. Examination of the practice of the United States discloses it as an exacter of a price for those privileges, rather than as an asserter of such a claim of right from which the recent suggestion from the Secretary of State appears to have saved it.¹⁸

(2)

§ 628. **Military Tax. Other Services.** It appears to be acknowledged by the United States that a neutral national may be subjected to such pecuniary or material contribution as may be required, by way of compensation, from nationals of the belligerent within whose territory he resides, who are exempted from personal military service. A provision to such effect was embodied in the convention with Switzerland of November 25, 1850.¹

There seems to be no objection to the exaction from a neutral national of various civic duties of a quasi-military character such as service in a temporary civic guard which all residents are by law required to join.² The nationals of neutral States may also be called upon to serve upon juries, or in the ordinary municipal arrangements for the prevention and extinguishment of fires, or in the local police, provided in every case that the persons upon whom the demand is made are permanent or domiciled residents of the territory of the belligerent, as distinct from transient sojourners therein.³ The exigencies of war may cause the service demanded to be more onerous than in time of peace. The obligation to respond is due to the fact of residence, and one from which the neutral nationality of the individual affords no basis for a claim of exemption. Unless the belligerent discriminates against the neutral person by exacting a service not demanded of its own nationals, or otherwise by harsh treatment manifests abuse of power, there is no ground for foreign complaint.

posed amendment, a copy of which is enclosed, be enacted into law." (Dept. of State Bulletin, April 19, 1941, 478.)

¹⁸ In reaching this conclusion the author acknowledges his indebtedness to the work of, and discussions with, William W. Fitzhugh, Jr., Esq., an instructor in Columbia University.

§ 628. ¹ Art. II, Malloy's Treaties, II, 1764. Concerning difficulties respecting the application of the principle embodied in this article, see For. Rel. 1894, 678-682; Moore, Dig., IV, 65-66, and documents there cited; Borchard, Diplomatic Protection, 67-68.

² Mr. Fish, Secy. of State, to Mr. Williamson, No. 140, June 13, 1876, MS. Inst. Chile, XVI, 181, Moore, Dig., IV, 59.

³ Mr. Davis, Assist. Secy. of State, to Mr. Faxon, consul at Curaçao, No. 46, Feb. 17, 1870, 58 MS. Desp. to Consuls, 26, Moore, Dig., IV, 57; Mr. Fish, Secy. of State, to Mr. Wing, April 6, 1871, MS. Inst. Ecuador, I, 263, Moore, Dig., IV, 58; Mr. Bayard, Secy. of State, to Mr. Bell, Minister to the Netherlands, No. 113, Feb. 3, 1888, For. Rel. 1888, II, 1324, Moore, Dig., IV, 61.

"Services rendered in matters of police or civil administration" are, moreover, according to Art. XVIII of The Hague Convention of 1907, Respecting the Rights and Duties of Neutral Powers and Persons in War on Land, not deemed to compromise the neutral status of the individual who renders them. Malloy's Treaties, II, 2300.

(3)

§ 629. **Place of Residence and Occupation.** There is apparently no reason why the neutral resident within belligerent territory should not be subjected to such restraint with respect to place of residence or occupation as is applied to the inhabitants generally of the national domain. The fact of war may account for exceptional measures which are justifiable although unrelated to any military operation, and enforced outside of a zone of hostilities.¹ The belligerent right is necessarily broad, and, unless exercised by a method manifesting disregard of the dictates of humanity, may be utilized as occasion requires with respect to neutral as well as other residents.² In general, no obligation rests upon a State engaged in war towards another which is neutral to the conflict to permit the nationals of the latter to remain in particular places or to continue to engage in particular occupations within the domain of the former, when it conceives that its interests as a belligerent are weakened or interfered with by the continued enjoyment of such privileges by such individuals.

b

Property

(1)

§ 630. **Taxation.** The principle which justifies a State in taxing property or the income derived from it on the ground that it belongs within the national domain, or is owned by an individual there belonging or residing and so constitutes the means of satisfying a personal tax levied against him, is as applicable to aliens and their property in time of war as in time of peace.¹ The neutral nationality of the owner affords in itself no ground for an exemption, for the privilege of taxation does not necessarily require the existence of a bond of allegiance between him and the taxing State.² That privilege depends rather upon the relation of the property itself therewith, or upon the residence of the owner within the national domain.³ Doubtless a belligerent State may abuse its power by tax-

§ 629. ¹ Hall, Higgins' 8 ed., § 278.

It may be observed that the discussion of the belligerent right usually assumes the form of an inquiry respecting measures which may be lawfully applied in the case of the invasion or occupation of hostile territory, or as an incident of the operations of an army in the field.

² The complaint of the United States arising from the concentration by Spanish military authorities in Cuba in 1897, of the inhabitants of the rural districts in Cuba within certain towns, was a protest against harsh features of an essentially belligerent measure. Mr. Sherman, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister at Washington, June 26, 1897, For. Rel. 1897, 507, Moore, Dig., VII, 212.

§ 630. ¹ Mr. J. C. B. Davis, Assist. Secy. of State, to Mr. Ulrich, American consul at Monterey, March 21, 1870, 57 MS. Inst. Consuls, 242, Moore, Dig., II, 62; Mr. Fish, Secy. of State, to Mr. Bachiller de Toscano, Oct. 28, 1874, 105 MS. Dom. Let. 22, Moore, Dig., II, 63; Same to Mr. Cushing, American Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, Moore, Dig., II, 63.

See Taxation, *supra*, §§ 205-206.

² It is not intimated that it is unreasonable for a State as a matter of domestic policy to tax its own nationals irrespective of their residence abroad. For the retention of its nationality their sovereign may exact its own price.

³ This circumstance is believed to have justified the opposition inspired by the German proposal at the Second Hague Peace Conference, that "no war tax (*contribution de guerre*)

ing property not belonging within its territory, or by levying a personal tax upon an alien who is a transient sojourner rather than an actual resident therein. Such impropriety of conduct is not necessarily attributable to the fact of war; it may be seen also in time of peace.⁴ In either event interposition is justified in behalf of the aggrieved owner, if no sufficient local remedies are available to him.

The mere circumstance that a so-called war tax imposes an onerous burden upon the inhabitants generally of belligerent territory does not necessarily indicate that the resident neutral is subjected to treatment which disregards any rule of international law which his own State may fairly invoke.

(2)

§ 631. **Forced Loans.** A forced loan has been defined as "an extraordinary governmental exaction of money or supplies taken without the consent of the owner, but with a declared intention of repayment."¹ Should a belligerent have recourse to such a measure, it might be difficult to maintain that, in the absence of treaty, neutral residents should enjoy exemption, provided the loan was distributed fairly, without preference to the nationals of the belligerent, and exaction not effected by means of personal violence or illegal force.² Inasmuch,

shall be levied on neutral persons." See *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 269; First Report of Col. Borel from the Second Commission upon an arrangement on neutral persons in the territory of belligerents, *id.*, I, 150, 154-156. The foregoing documents are contained in J. B. Scott, Reports to Hague Conferences, 570 and 556, respectively.

Brig. Gen. Davis, of the American Delegation, expressed approval of the German plan. *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 193-194.

The French proposal at the Second Hague Peace Conference that the property of neutrals within belligerent territory should be treated as the private property of the nationals of the belligerent is believed to have been in harmony with the existing law. *Id.*, III, 285. See, in this connection, Westlake, 2 ed., II, 133-134.

⁴ See Mr. Root, Secy. of State, to Mr. Leishman, American Minister at Constantinople, Feb. 27, 1906, No. 1023, respecting the alleged taxation of property in the United States by the Turkish Government, For. Rel. 1906, II, 1408.

§ 631. ¹ H. T. Kingsbury, *Proceedings*, Am. Soc. Int. Law, V, 214, 218, where it is added: "As a war measure, it is recognized as legitimate and frequently necessary, but as a civil process it does not enter into the usual scheme of modern civilized government. Inherently, it may be regarded as one form of the exercise of the power of eminent domain, subject to which all property is held by aliens and citizens alike. If a Government has the right and power to take over the absolute ownership of property, subject only to the limitations of its own law as to the payment of compensation, it would apparently have an equal right to take over the temporary use of property subject to a corresponding duty to pay proper compensation for such use. Where such a course is followed under due forms of law, in good faith, without violation of treaty provisions, without discrimination against aliens, and with some reasonable provision for repayment, there would seem to be no cause for international complaint; but where, under the guise of a forced loan, an alien's property is, in effect, confiscated, or the so-called 'loan' is exacted by violence or illegal force, then the country so offending is properly subject to international pressure to enforce reparation."

² See decision of Sir Edward Thornton, umpire, in *Francis Rose v. Mexico*, No. 344, under convention with Mexico of July 4, 1868, Moore, *Arbitrations*, IV, 3421; also decision of same umpire in *McManus v. Mexico*, No. 348, under same convention, *id.*, 3415. See other cases in Moore, *Arbitrations*, IV, 3409-3424, and the discussion of them in Borchard, *Diplomatic Protection*, 269-270.

See, also, Mr. Seward, Secy. of State, to Mr. Marsh, American Minister to Italy, No. 187, Feb. 26, 1868, MS. Inst. Italy, I, 261, Moore, *Dig.*, VI, 916; Mr. Cadwalader, Acting Secy. of State, to Mr. Foster, Minister to Mexico, No. 141, Sept. 22, 1874, MS. Inst. Mexico, XIX, 121, Moore, *Dig.*, VI, 917.

It must be clear that an alien who was not a resident, but "was merely passing through"

however, as the raising of money by such a process has in practice oftentimes been characterized by acts of violence or by circumstances indicating arbitrary and unequal treatment of alien owners or lenders, this mode of action has frequently given rise to complaint. The common failure of the territorial sovereign to impose its demands with the orderly and uniform processes which characterize the levying of taxes, has been productive of conventional arrangements expressly exempting the nationals of the contracting parties from forced loans.³ In the recent treaty of friendship, commerce and navigation, concluded with Siam on November 13, 1937, it was provided that the nationals of "each" of the parties in the territories of the other should be exempt from "all contributions in money or in kind, imposed in lieu of personal military service, and from all forced loans or military contributions"; and that they should not be subjected, in time of peace or in time of war, "to military requisitions except as imposed upon nationals."⁴

It may be observed that difficulties thus sought to be avoided are not peculiar to the existence of war, and that those causing the most frequent complaint on the part of the United States have been occasioned by the conduct of non-belligerent States confronted with conditions of domestic disorder.⁵

The United States has itself never exacted forced loans. It is not understood that while it remained a neutral in the course of World War I it had occasion to complain that they were exacted by any belligerent from American citizens residing within its territory.

(3)

§ 632. Requisition of Property. The relation of a belligerent to property incorporated in the mass of that which really belongs within its territory, or to property therein which is owned by persons domiciled or permanently residing within the national domain, is such as to justify, if occasion arises, any public use deemed necessary in the prosecution of a war. The nature of this connection between the property and the State justifies the demand that the former should be available for the needs of the latter. This claim is regarded as superior to any opposing claim of exemption based on the neutral nationality of the owner. Thus, his personal relationship with the State of his allegiance affords no reason why his property should not be requisitioned by the belligerent according to its requirements and on such terms as it may apply to other similar property

the national domain could not be justly subjected to the burden of a forced loan. See Sir Edward Thornton, umpire in *Lewis Weil v. Mexico*, No. 792, under convention with Mexico of July 4, 1868, Moore, *Arbitrations*, IV, 3424.

Also case of *Beckman & Co.*, German-Venezuelan Commission under convention of 1903, Ralston's Report, 598; Opinion of Ralston, umpire in *De Caro Case*, Italian-Venezuelan Commission under convention of 1903, *id.*, 810, 818.

³ The United States is a party to numerous treaties containing such provision. See, for example, Art. X, of treaty with the Argentine Republic (Confederation), July 27, 1853, Malloy's Treaties, I, 23; Art. V, treaty with Haiti, Nov. 3, 1864, *id.*, 922; Art. IX, treaty with Honduras, July 4, 1864, *id.*, 955; Art. IV, treaty with Serbia, Oct. 14, 1881, *id.*, II, 1615; Art. I, treaty with Japan, Feb. 21, 1911, U. S. Treaty Vol. III, 2712.

⁴ Art. I, U. S. Treaty Series, No. 940.

⁵ Mr. Moore, Third Assist. Secy. of State, to Mr. Robinson, June 29, 1889, 173 MS. Dom. Let. 487, Moore, Dig., II, 66; Mr. Evarts, Secy. of State, to Mr. Foster, American Minister to Mexico, Feb. 20, 1880, For. Rel. 1880, 734, Moore, Dig., IV, 21.

owned by its nationals. Any procedure applied uniformly and without discrimination to the property of nationals and aliens alike, and offering to all owners the same terms of reparation or reimbursement, would appear to suffice. As Secretary Hughes declared on February 26, 1923:

It is the view of this Government that private property having its situs within the territory of a State (and the property here concerned is wholly that of private individual claimants on whose behalf the kingdom of Norway is merely the international representative), including as in the present case property produced or created therein and never removed therefrom, is from the standpoint of international law subject to the belligerent needs of the territorial sovereign quite regardless of the nationality of the owners, provided that in case of its requisition just compensation be made. Due process of law applied uniformly, and without discrimination to nationals and aliens alike and offering to all just terms of reparation or reimbursement suffices to meet the requirements of international law; and thus the requisitioning state is free to determine the extent and duration of its own emergency.¹

In apparently maintaining a somewhat different principle in its award of October 13, 1922, in the Norwegian Claims Case between Norway and the United States, involving the claims of numerous Norwegian nationals growing out of the requisition by the United States in 1917, of shipbuilding contracts, materials, and ships under construction, the tribunal at the Hague was believed by Secretary Hughes "to have proposed and applied an unwarranted rule against which the Government of the United States feels obliged to protest and under which it must deny any obligation hereafter to be bound."²

§ 632. ¹ For. Rel. 1923, Vol. II, 626, 627.

² In the course of his stricture, Secretary Hughes declared: "The award deals with the principle governing the requisitioning power of a belligerent State and the maintenance of correct principle in this matter, quite apart from its application in the present case, is of no little importance. The award recognizes the requisitioning power of a belligerent but would seem to apply a limitation on its exercise, where the property concerned is that of neutral aliens, by defining the extent of the emergency and its termination, and by enhancing damages accordingly, thus subjecting the Government to a different test and a heavier burden where the property is owned by neutral nationals than in the case where it is owned by nationals of the requisitioning state. No such duty to discriminate in favor of neutral aliens is believed to be imposed upon a state by international law, with respect to property such as is concerned in the present case. . . . It is also to be regretted that the award fails to give a satisfactory explanation of the manner in which the tribunal has arrived at the amounts awarded. While purporting to award compensation on the basis of the fair market value of the property taken, the tribunal has seen fit to omit discussion of the particular circumstances of the different claims or of the methods of calculation applied, or of the reasons for determining upon the amounts awarded in each case. Indeed, any definite disclosure or specification of the particular grounds of the awards to the respective claimants is so entirely lacking that the award gives to one who examines it no clue to the method of determining why one amount was awarded rather than another. Again, although holding that claimants were entitled to interest and that some claimants were entitled to higher rates of interest than others, the tribunal does not reveal the rates of interest which were allowed on the various claims or the period of time for which interest was calculated or the amounts which were awarded as principal and the amounts awarded as interest. The inadequacy of the award in these respects is particularly regretted in view of the requirements of Article 79 of the Hague Convention of October 18, 1907, pursuant to which the Norwegian claims were submitted to arbitration, that the award must give the reasons on which it is based." (*Id.*, 626-627.)

See Recourse to Arbitration by the United States, Certain Differences, Other than Territorial, of Great International Significance, *supra*, § 565.

See Whiteman, Damages, II, 1064-1078.

A belligerent State may in fact abuse its powers and resort indiscriminately to practical confiscation of property within its control. Such action is not to be confused with the exercise of the privilege of requisition. When neutral nationals are the victims of a confiscatory policy, the States to which they belong will not be disposed to admit that absence of discrimination against them offers a solid ground of defense.

When it embarks on a course of requisitioning property within its domain the belligerent State finds that it is the nature of the relationship³ or connection of such property with itself or its territory that yields to such State the broad privilege of not only satisfying its essential needs, but also of making compensation on terms such as were outlined by Secretary Hughes in his note to the Norwegian Minister, quoted above.

In requisitioning property belonging within its own domain a belligerent does not appear to be restricted by the circumstance that its territory is remote from the zone of hostilities.⁴ The fact of such remoteness therefrom may, however, in case of belligerent seizure or destruction, rob the actor of the defense that the loss sustained by the owner was attributable to a mere hazard of war, and hence to be regarded as an incident of a normal risk assumed by him. The United States took such a position in 1925, in demanding compensation for an American claimant which had been the owner of property destroyed by British and Roumanian forces in Roumania in 1916.⁵

(4)

NEUTRAL PROPERTY TEMPORARILY WITHIN THE STATE. THE RIGHT OF ANGARY.

(a)

§ 633. **In General.** Neutral Property brought voluntarily and temporarily within, and not belonging to, or associated with, the national domain, and owned by persons not there residing, such as a neutral ship that enters a belligerent port, may, nevertheless, be subjected to a large measure of control by the territorial sovereign. Such a relationship does not, however, exist between that sovereign and such property as is obvious in the case of property which may be fairly said to belong within its territory, or which is owned by its nationals or by aliens who are there domiciled. There may be absent a condition which simplifies the task of a State when it relies upon the special relationship to itself of (even movable) property or of the owners thereof, in having recourse to the requisition of something found within its domain. The matter of temporary sojourn, as of a neutral ship within territorial waters, thus points to a logical and practical distinction which statesmen and jurists have not failed to per-

³ This relationship, as has been observed above, is due to the fact that the property belongs within the State, or is owned by an individual fairly deemed to belong there, notwithstanding his foreign nationality.

⁴ The relationship of neutral property to the territory of the State within which it is requisitioned doubtless loses much of its significance as a test of the propriety of the mode and terms of seizure and use, where such conduct is incidental to a military operation in the field within hostile territory or elsewhere, or is an incident of belligerent occupation.

⁵ See memorandum indicating the American view, in *For. Rel.* 1926, II, 316.

ceive,¹ and which accentuates the terms which the belligerent sovereign should satisfy when it proceeds to take over unto itself the neutral ship or cargo which happens to be temporarily within a place under its control such as its territory.² So long as those terms are correctly appraised and duly met it may be unnecessary to consider the extent to which they exceed other less onerous conditions under which a belligerent may properly possess itself of, or even acquire title to, other property more intimately associated with itself through a situs within its domain or ownership in a national. Inasmuch as neutral ships and their cargoes within belligerent ports are almost invariably making merely a temporary sojourn therein, the requisitioning of either of them may, in the particular case, appear to call for no discussion of that fact or of the significance of it.³

Both in America and England the prevailing opinion sanctions seizure and use, provided the belligerent be confronted with a vital need, and ample compensation be assured the owners.⁴ In both countries it is felt that in the absence

§ 633.¹ Declared Dr. Erich Albrecht in 1912: "Such [neutral] ships have, more or less, through chance and only temporarily, come under the actual power of the belligerent, and important reasons of fairness demand that they be better treated and better safeguarded than the property of such neutrals which through their continued sojourn within the territory of the belligerent State is internally bound up with its national economy, and which through the taxes paid on such property contributes to strengthen its auxiliary forces.

"It cannot, however, be proved that this tendency which has manifested itself in international law has already been realized and become accepted law." (*Requisitionen von neutralem Privateigentum*, § 13, 57, translation by Theodore Henckels and Henry G. Crocker, in *Authorities on the Law of Angary*, Department of State, Confidential Document, 1918, 51.)

It is believed that the conduct of the United States and Great Britain in 1918 served to emphasize the distinction here made.

² See statement by the Norwegian representative in the case before the Permanent Court of International Arbitration between the United States and Norway concerning the requisitioning of certain Norwegian vessels being constructed in American territory, and quoted by Professor Wilson in *Am. J.*, XXIV, 698, and also in the Comment on Art. 21 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War.

³ The Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War permits the requisitioning of neutral ships and their cargoes provided there be (a) an urgent necessity, (b) voluntary presence of the vessel or cargo within the territory of the belligerent, and (c) payment of compensation. Art. 21, *Am. J.*, XXXIII, *Supplement Section 2*, 178, and Comment, 361.

⁴ According to Art. VI of Stockton's Naval War Code of 1900: "If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters." (Naval War College, *Int. Law Discussions*, 1903, 104.) See, also, Naval War College, *Int. Law Situations*, 1902, 55; Naval War College, *Int. Law Discussions*, 1903, 36.

The United States has concluded numerous conventions providing in substance that the nationals of the contracting parties shall not be liable to any embargo, nor be detained with their vessels, cargoes, or merchandise or effects, for any military expedition, or for any public or private enterprise whatever, without allowing to those interested a sufficient indemnification. See, for example, Art. V, treaty with Colombia, Oct. 3, 1824, Malloy's *Treaties*, I, 294. Art. IV of the treaty with Italy of Feb. 26, 1871, provided that there should be no liability "without allowing to those interested a sufficient indemnification previously agreed upon when possible." (*Id.*, I, 970.) Art. V of the treaty with Spain of July 3, 1902, declared that the vessels or effects of the nationals of the contracting parties "shall not be liable to any seizure or detention for any public use without a sufficient compensation, which, if practicable, shall be agreed upon in advance." (*Id.*, II, 1703.) Compare Art. XVI of the treaty with Prussia of Sept. 10, 1785, which exempted the vessels and effects of the nationals of the contracting parties from liability to any embargo or detention for any purpose whatsoever. (*Id.*, II, 1482.) See Art. XXVIII, treaty with China of July 3, 1844, *id.*, I, 204. See, also,

of these two conditions such action would manifest an abuse of power. It is thus a question respecting the terms on which a belligerent may justly resort to such procedure, rather than one concerning the existence of the right to do so, which has become a matter of something more than academic discussion. It is not without significance that when, in 1918, the United States and Great Britain requisitioned the Dutch tonnage within their respective territorial waters, both belligerents were confronted with a real necessity which they took pains to emphasize, and both gave assurance of ample compensation to the owners concerned.

§ 634. **The Same.** According to a very old practice commonly described as the exercise of the right of angary, a belligerent was deemed to be permitted to seize, in case of need, private vessels within its ports for the transportation of troops and war material.¹ The tendency to restrict or regulate such conduct by conventional arrangement, the prolonged interval within which no belligerent had recourse thereto, together with the circumstance that the more modern text-writers witnessed in their time no instance of the commission of acts of this precise character, may have accounted for the suggestion in certain quarters that the right involved was to be regarded as obsolete. The early practice was,

special arrangement in Art. XVI of treaty with Prussia of July 11, 1799, *id.*, II, 1492.

"The treaty material the analysis of which has been attempted above, apparently indicates that military requisitions from neutrals, including requisitions of vessels, their cargoes, and other transient property, are not regarded as internationally illegal if properly compensated. The various restrictions and exemptions contained in many treaties should be considered as limitations on a recognized right rather than as limited grants of otherwise non-existent rights. It is, perhaps, significant to note in this connection that practically no treaty states in affirmative terms that the parties *may requisition*; rather, they usually state that the parties *may not requisition unless compensation is given*. It is also to be noted that necessity as a prerequisite of requisition is mentioned in some, but not in all, treaties. No treaty conceded a right of requisition without compensation." (Comment on Art. 21 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 368.)

See The Control of Belligerent and Other Foreign Merchantmen in Neutral Ports, *infra*, § 888D.

§ 634. ¹ In his monograph entitled *Requisitionen von neutralem Privateigentum*, in tracing the historical bases of the so-called *Jus Angariae*, Dr. Erich Albrecht adverts to the early Roman practice whereby "all owners of ships, in case of necessity, were subject to the obligation to place their ships at the disposal of the public authority to facilitate the importation of grain." He adds that "services accepted from private ships . . . were not called *angariae* by the Romans." He declares that that word in the *Corpus juris* referred rather to "statute labor with teams and persons in affairs of the State," and he proceeds to show that *angariae* in the Roman law did not belong to maritime law, but to that which might be called the law of postal administration. His further comments are enlightening: "When examined from the viewpoint of its origin, the word *angaria* denotes an ordinance relating to the ancient postal service. Herodotus reports (VIII, 98) that the Persians used the word ἀγγαῖον to denote the function of their royal post couriers. But subsequently, the meaning of the verb *angariare* seems to have been widened in its meaning to 'force, to seize for compulsory service' In this sense it is also used with regard to the service of ships. . . . At all events in medieval Latin *angariae* referred likewise to statute labor and impressing of teams, etc., especially for postal purposes. On the other hand, the seizure and use of ships for transportation purposes was called *navium praestationes*. It may, therefore, be said that Roman law did not know a *jus angariae* or a *jus angariarum*. In the Roman law we meet, to be sure, with legal principles referring to the performance of transport service by ships. But they refer only to transports intended for the supply of the necessities of life, and especially of Rome. Furthermore, these legal principles are not of an international nature." (§ 7. The translation is that by Theodore Henckels and Henry G. Crocker, in *Authorities on the Law of Angary*, Department of State, Confidential Document, 1918, 25-28.)

however, based on a principle which events of World War I have shown to be still applicable, and which was also invoked during the last century in analogous cases.²

If the need of ships to a belligerent be imperative for purposes of transportation of men and supplies to a zone of warfare, its equities may outweigh those of the neutral whose tonnage is seized, provided the latter be assured of complete reparation for pecuniary losses sustained, and be saved harmless from injuries necessarily incidental to the deprivation of such means of conveying needed supplies to its territory. On the other hand, conditions giving rise to such action may so grievously distress the neutral whose vessels are seized as to cause its claims to continue to outweigh those of belligerents unless its imperative requirements for transportation are met, the property rights of its nationals safeguarded, and perhaps, above all, its own status of neutrality not destroyed.³

² "The right [of angary] is certainly an ancient one, and its existence has been recognized, though admittedly in some cases with reluctance, by nearly all writers on international law, from Grotius downward. It is sufficient to refer to Bluntschli, Massé, Vinnius (*ad Peckium*), Bonfils, Calvo, Halleck, Rivier, Heffter (especially note by Geffcken in the fourth French edition), Hall, Phillimore, Westlake, and Oppenheim. But if it is suggested that the right had fallen into disuse and is obsolete, it is fair (without quoting extensively from the many modern writers on international law who recognize the right as still existing) to point out that it was asserted by the German Government and acquiesced in by His Majesty's Government in 1871; and it is especially mentioned in the United States Naval War Code of 1900; and that during the discussions at the Naval War College in 1903, which resulted in the withdrawal of the code, it was not suggested that the Article in question required any modification. Further, the right was fully recognized during the present war, before any cases had arisen of the requisitioning of neutral ships which were not the subjects of prize court proceedings, by the Judicial Committee of the Privy Council in the well-known case of the *Zamora*.

"It is also relevant to point out that the existence is recognized in a series of treaties entered into by the German Empire during the second half of the nineteenth century. The treaties in question are those with Colombia (1892), Portugal (1872), Mexico (1882), Honduras (1887), Guatemala (1887), Nicaragua (1896), Costa Rica (1875), San Domingo (1885), Spain (1883), and Hawaii (1879). These treaties as a rule provide, not that the right of requisitioning ships is not to be exercised in the case of ships belonging to nationals of the contracting parties, but that if it is exercised compensation is to be paid." (Memorandum from British Foreign Office, accompanying note of Mr Balfour, to the Netherlands Minister, April 25, 1918, Misc. No. 11 [1918], Cd. 9025, 9; For. Rel. 1918, Supp. 1, Vol. II, 1469, 1475.)

The conduct of the German Government referred to in this note concerned the action of Prussian troops in destroying, in December, 1870, British colliers in the Seine, near Rouen. The vessels were destroyed in enemy territory. According to Count Bismarck, "a pressing danger was at hand, and every other means of averting it was wanting." He invoked the *jus angariae*, and cited Phillimore. The report from the 1st Army Corps which Count Bismarck forwarded for the information of the British Government showed that the vessels were sunk for a military purpose as a means of blocking up the channel of the river. An indemnity was paid to the British Government. See Brit. and For. Stat. Pap., LXI, 575, 580, 581-582, 611; also Moore, Dig., VI, 904-905.

According to Art. XXXIX of the Regulations concerning The Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law in 1898: "The right of angary shall be abolished, both in time of peace and in time of war, where neutral ships are concerned." (*Annuaire*, XVII, 273, 284, J. B. Scott, Resolutions, 143, 154.) Cf. *Annuaire*, XXI, 406-409.

³ Statement of Mr. Lansing, Secy. of State, Official Bulletin, April 13, 1918, II, No. 283.

The argument in favor of the right to requisition neutral ships in belligerent ports does not seem to be strengthened by the suggestion that neutral persons and property are generally subject to the jurisdiction of the territorial sovereign. The right to exercise jurisdiction, or, as it may be termed, the right to do justice, marks the attempt of that sovereign, because of its supremacy within its own domain, to determine the lawfulness or unlawfulness of acts committed therein. That assertion of power must of necessity be normally applied to all individuals regardless of their nationality or the length of their sojourn within the territory

It is believed to be impossible to define the necessity which justifies requisition or to limit the uses to which neutral vessels may be put.⁴ Doubtless the judgment of the belligerent as to the gravity of its own needs must be deemed to suffice, provided the reasonableness of its conclusion is established by conditions of which the existence is beyond dispute.

It may be observed that while according to the old practice it was permissible not only to requisition neutral shipping, but also to compel the masters and crews, even against their will, to work the ships during their employment in actual military operations, such compulsion does not accord with modern ideas and would no longer be approved.⁵

The studies of the United States Naval War College in 1926, concerning what the law of nations permits, led it to declare: "Early and late practice has shown resort to the exercise of the right of angary. Treaties have implied the right to take over vessels upon payment of indemnity. Proclamations and diplomatic papers have given the right full recognition; as the French Minister of Marine declared on November 18, 1917, angary is lawful 'in presence of imperative and urgent need for the national defense and in absence of contrary treaty stipulations.'"⁶

(b)

§ 635. **The Requisitioning of Dutch Ships in 1918.** In 1917, and at the beginning of 1918, a considerable amount of Netherlands tonnage lay idle in

of the State. Exemptions are infrequent and exceptional, and always explained on precise grounds. In exercising the right of jurisdiction the State inquires into the propriety of the conduct of the individual according to tests of its own devising, and does not restrain his person or take his property unless he has disobeyed its commands, and thus violated the law, or unless such action is essential for a fair adjudication. The exercise of control manifested in the requisitioning of ships is not the assertion of a right of jurisdiction, for it is unrelated to any question as to the propriety of the conduct of those responsible for them. It is attributable to the needs of the territorial sovereign which, by reason of their urgency, are relied upon to excuse the belligerent from the operation of restrictions habitually imposed upon itself in the exercise of jurisdiction. For that reason, such action with respect to neutral ships requires convincing proof that, under the circumstances of the particular case, it is not the manifestation of an abuse of power. *Compare* Misc. No. 11 (1918), Cd. 9025, 11.

⁴The Netherlands Government contended in 1918 that the belligerent right was confined to the privilege of appropriating, as an exception, a neutral ship for some strategical end of immediate necessity, as, for example, to close the entrance of a seaport so as to hinder the attack of an enemy fleet. See correspondence with the Netherlands Government respecting the requisitioning of Dutch ships by the Associated Governments, Misc. No. 11 (1918), Cd. 9025, 10.

⁵See memorandum of the British Foreign Office, accompanying communication of Mr. Balfour, British Foreign Secretary, to the Netherlands Minister at London, April 25, 1918, *id.*, 6, 11.

See, also, proclamation of President Wilson, March 20, 1918, No. 1436, Official Bulletin, March 21, 1918, II, No. 263, *Am. J.*, XII, Supp., 259.

⁶Naval War College, *Int. Law Situations*, 1926, 87.

According to Art. 21 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A belligerent may, within its territory or within territory held in military occupation, in case of urgent necessity, requisition a neutral vessel privately owned and operated, or cargo owned by nationals of a neutral State, if the vessel or the cargo was brought into such territory voluntarily and not as the result of compulsion or pressure exercised by the belligerent or by an allied belligerent; provided that this privilege may be exercised by a belligerent only if it pays the fair market value, under prevailing conditions, of the vessel or cargo requisitioned." (*Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 178, and Comment thereon, *id.*, 360)

American and British ports where coal necessary for bunkering and export licenses were withheld. The United States and England were in utmost need of tonnage for the transportation of men and supplies to France, and incidentally required all available fuel, of which the amount on hand was insufficient. The extremity of this necessity was notorious; upon the response to it hung the issues of the war. Holland was in dire need of foodstuffs from North and South America and desired also fodder and fertilizers therefrom. For the transportation of these articles the Dutch tonnage in the trans-Atlantic service was needed. Holland was in want also of certain "indispensable" articles from Germany, such as coal. Germany deemed it of highest interest to restrict the amount of tonnage under any flag available to its enemies, and was unscrupulous in the measures employed to destroy vessels utilized by them. Moreover, it was determined to exact, as the price of its own exports to Holland, free exportation therefrom of products through the Dutch supply of fodder and fertilizers, such as butter, cheese, cattle, horses, poultry, and eggs, and hence to sanction no arrangement between the Netherlands and the Allied and Associated Governments placing any restriction upon this trade. Holland, while not indisposed to conclude an agreement with the latter, placing at their disposal much needed tonnage in return for a reasonable allowance of foodstuffs with transportation therefor, encountered German opposition to any arrangement with those Governments restricting Dutch exportations to Germany, and unwillingness also on the part of the owners of Netherlands ships to permit their vessels to be used for belligerent purposes; and it was also confronted with the certainty that any ship so employed would be subjected to attack by German submarines whenever possible. Under such conditions negotiations between Holland and the Associated Governments were naturally unfruitful of any general arrangement, or of even a *modus vivendi* which the Dutch Government found itself capable of observing.¹

The natural result followed. The President, by a proclamation of March 20, 1918, announced that "the law and practice of nations accords to a belligerent power the right in times of military exigency and for purposes essential to the prosecution of war, to take over and utilize vessels lying within its jurisdiction."² He declared that by virtue of an Act of Congress of June 15, 1917,³ having found

§ 635. ¹ Report of negotiations by the Netherlands Minister of Foreign Affairs to the States-General, March 12, 1918, Official Bulletin, March 16, 1918, II, No. 259; statement by President Wilson, March 20, 1918, *id.*, March 21, 1918, II, No. 263; declaration by the Netherlands Government, March 30, 1918, *id.*, April 13, 1918, II, No. 283; statement by Mr. Lansing, Secy. of State, March 30, 1918, *id.*, Apr. 13, 1918, II, No. 283; documents concerning the taking over of Dutch ships, in For. Rel. 1918, Supp., I, Vol. II, 1377-1500.

See, also, British Correspondence with the Netherlands Government respecting the requisitioning of Dutch ships by the Associated Governments, Misc. No. 11 (1918), Cd. 9025.

From the foregoing documents it appears that Holland was unwilling to admit that German compulsion rendered the Netherlands powerless to fulfill a provisional arrangement which it had entered into.

² President Wilson, proclamation No. 1436, Official Bulletin, March 21, 1918, II, No. 263, *Am. J.*, XII, Supp., 259.

See, also, Executive Order No. 2825 A, March 28, 1918, taking possession of equipment on board of Netherlands vessels, Official Bulletin, April 2, 1918, II, No. 273, *Am. J.*, XII, Supp., 260, For. Rel. 1918, Supp., I, Vol. II, 1416.

³ 65 Cong., 1 Sess., Chap. 29, "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other

and proclaimed that the imperative military needs of the United States required the immediate utilization of vessels of Netherlands registry then lying within its territorial waters, the Secretary of the Navy was empowered and authorized to take over on behalf of the United States the possession of, and to employ all such vessels of such registry as might be necessary for essential purposes in connection with the prosecution of the war against the German Government. Simultaneously it was stated by the President that the action taken by the United States, and which was being taken also by Governments associated with it, left to Holland ample tonnage for her domestic and colonial needs, that she might at once send ships to secure the bread cereals which her people required, that those ships would be freely bunkered and immune from detention on the part of the United States, that ample compensation would be paid to the Dutch owners of the ships put into the American service, and suitable provision made to meet the possibility of ships being lost through enemy action. He added that "by exercising in this crisis our admitted right to control all property within our territory, we do no wrong to Holland."⁴

If the prolonged interval between the latest instance where a belligerent by virtue of the right of angary requisitioned neutral ships within its waters and the outbreak of World War I seemingly marked unconcern as to the continuance of that right, the frequent recognition of it in modern treaties and by contempo-

purposes." This act authorized and empowered the President "to purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship." (§ 1, 40 Stat. 182.) See, also, amendments of April 22, 1918, Chap. 62, 40 Stat. 535.

According to Title II of the so-called Espionage Act of June 15, 1917, 65 Cong., 1 Sess., Chap. 30, it was provided that whenever the President should, by proclamation or executive order, declare a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury might make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, might inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessel from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, might take, by and with the consent of the President, for such purposes, full possession and control of such vessel, and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof. § 1, 40 Stat. 220.

⁴Statement by President Wilson, March 20, 1918, Official Bulletin, March 21, 1918, II, No. 263, For. Rel. 1918, Supp., 1, Vol. II, 1417. Also Mr. Lansing, Secy. of State, to the American Minister in the Netherlands, March 29, 1918, *id.*, 1434.

"The action taken leaves available to the Netherlands Government by far the greater part of their merchant marine and tonnage, which, according to estimates of their own officials, is ample for the domestic and colonial needs of the Netherlands. Shipping required for these needs will be free from detention on our part and will be facilitated by the supplying of bunkers. The balance is being put into a highly lucrative service, the owners receiving the remuneration and the associated Governments assuming the risks involved. In order to insure to the Netherlands the future enjoyment of her merchant marine intact, not only will ships be returned at the termination of the existing war emergency, but the associated Governments have offered to replace in kind rather than in money any vessels which may be lost by war or marine risk; 100,000 tons of bread cereal, which the German Government when appealed to refused to supply, have been offered to the Netherlands by the associated Governments out of their own inadequate supplies, and arrangements are being perfected to tender to the Netherlands Government other commodities which they desire to promote their national welfare and for which they may freely send their ships." (Statement of Mr. Lansing, Secy. of State, March 30, 1918, Official Bulletin, April 13, 1918, II, No. 283.)

aneous writers bore testimony as to the worth of the principle on which it rested, and to the likelihood of its invocation should occasion arise.⁵ This circumstance fortified the contention of the United States and Great Britain that their action, in view of the extraordinary circumstances confronting both, and by reason of the provision made for Holland and its interested nationals, was not at variance with the requirements of international law. As Judge Parker, Umpire of the Mixed Claims Commission, United States and Germany, declared on March 25, 1924, the requisitioning of 87 vessels of Netherlands registry by the United States, in virtue of the President's proclamation, was "in accordance with international law and practice."⁶

(c)

§ 636. Cargoes and Ships in the Custody of a Prize Court Pending Adjudication. Any right of a belligerent to requisition neutral ships and cargoes captured at sea and brought into the custody of a prize court, pending adjudication, must be due in part to the fact that the capture purported to be based on solid grounds indicative of unneutral conduct on the part of persons responsible for the property involved, rather than to the mere power of the belligerent to effect capture or to compel foreign ships to enter its ports.¹ An Act of Congress of March 3, 1863, authorized the Secretary of the Navy or the Secretary of War, or either of them, "to take any captured vessel, any arms or munitions of war, or other material, for the use of the Government"; and when the same should have been taken, before being sent in for adjudication, or afterwards, the department for whose use it was taken was required to deposit the value of the property in the Treasury of the United States, subject to the order of the prize court in which proceedings should be had.² The British Government made complaint of this enactment, and Mr. Bates, Attorney General of the United States, appearing to believe that its operation contemplated something that might

⁵ See Theodore Henckels and Henry G. Crocker, *Authorities on the Law of Angary*, Department of State, Confidential Document, 1918; Georges Ferrand, *Des Réquisitions en matière de droit international public*, Paris, 1917, 344-354; Lauterpacht's 6 ed. of Oppenheim, II, 620-626; Erich Albrecht, *Requisitionen von neutralem Privateigentum*, Breslau, 1912 (published as supplement to *Zeit. Völk.*, VI); Coleman Phillipson, in *The Law Times*, April 13, 1918; Higgins' 8 ed. of Hall, 902, note 1; Sir Frederick Smith, *Int. Law*, Coleman Phillipson's 5 ed., 317-319; J. W. Garner, *Int. Law and the World War*, 1920, I, §§ 118-119.

See, also, Edouard Clunet, "*De la réquisition des navires en temps de guerre. L'incident des navires hollandais et de l'Entente*," *Clunet*, XLV, 594; C. D. Allin, "Right of Angary," *Minnesota Law Rev.*, II, 415; J. B. Scott, "Requisitioning of Dutch Ships by the United States," *Am. J.*, XII, 340; J. E. Harley, "The Law of Angary," *id.*, XIII, 267; Albéric Rolin, "*Le droit d'angarie*," *Rev. Droit Int.*, 3 sér., I, 19 (1920); George Grafton Wilson, "Taking Over and Return of Dutch Vessels 1918-1919," *Am. J.*, XXIV, 694; Naval War College, *Int. Law Situations*, 1926, 65-87; C. Ll. Bullock, "Angary," *Brit. Y.B.*, 1922-1923, 99.

⁶ Case of Steamship *Merak*, Consolidated Edition of Decisions and Opinions, 1925, 92.

Concerning the obtaining of tonnage for American military needs by negotiations through the War Trade Board resulting in agreements with Norway, Sweden, Denmark and Japan, see Report of the War Trade Board, June 30, 1919, 109-119.

§ 636. ¹ The *Zamora* [1916], 2 A. C. 77.

² § 2, 12 Stat. 759.

See, also, The *Memphis*, *Blatchf. Prize Cases*, 202; The *Ella Warley*, *id.*, 204; The *Ella Warley*, *id.*, 207; The *Stephen Hart*, *id.*, 379; The *Stephen Hart*, *id.*, 387; The *Peterhoff*, *id.*, 381. In these cases the prize court (Betts, J.) allowed the Government of the United States to requisition goods in the custody of the court and deemed necessary for use in the prosecution of the war.

be difficult to reconcile with international law, declared it to be fortunate that that law was not "imperative."³

In 1916 the Judicial Committee of the Privy Council declared that a belligerent power has by international law —

the right to requisition vessels or goods in the custody of its prize courts pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. *First*, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. *Secondly*, there must be a real question to be tried, so that it would be improper to order an immediate release. And, *thirdly*, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.⁴

This statement is believed to be important not merely because it sustains the right of requisition, but rather on account of the second and third limitations announced. That a belligerent should not be permitted to requisition a neutral ship not in fact charged with the commission of illegal conduct and brought into port for purposes of inquiry rather than of condemnation, is a just requirement and accords with American theory.⁵ The stress laid upon the necessity of a

³ 10 Ops. Attys. Gen., 519, 521–522, where Mr. Bates said: "I am not aware of any settled doctrine of the law of nations, to the effect that a belligerent nation whose cruiser has captured a vessel, as prize of war, has the right, at its own pleasure and convenience to appropriate the prize to its own use, *before condemnation*. . . . The rule is that the prize must be sent in, *for adjudication*, not necessarily for the benefit of the captor nation, for it cannot be certainly known that the captor has any beneficial interest in the prize, until that fact is ascertained by legal adjudication."

See, also, criticism of the Act of Congress in the judgment by Lord Parker in the case of *The Zamora* [1916], 2 A. C., 77, 104.

In harmony with the Act of March 3, 1863, see § 29 of Act of June 30, 1864, 13 Stat. 314, which developed into Rev. Stat. § 4624, as amended, 34 U.S.C.A. § 1140. Declared U. S. Instructions of 1917. "While any prize may thus be legally converted to immediate public use, and would be under compelling circumstances, it is inadvisable so to convert neutral property taken as prize, because if the prize court fails to condemn the property indemnification for the conversion to public use may be the subject of a claim." (U. S. Naval War College, Int. Law Documents, 1925, 69.)

⁴ *The Zamora* [1916], 2 A. C., 77. The court cited the case of *The Curlew*, *The Magnet* (1812), Stewart's Vice-Admiralty Reports (Nova Scotia), 312, where in the course of the War of 1812, a prize court had permitted the requisition of a vessel and certain articles on board, of which there was a great need, and which had been seized by the British authorities.

Order XXIX of the British Prize Court Rules, expressed in an order in council of April 29, 1915, provided by rule 1, that where it was made to appear to the judge, on the application of the proper officer of the Crown, that it was desired to requisition a ship (or cargo) in respect of which no final decree of condemnation had been made, he should order it to be appraised and, upon an undertaking being given in accordance with rule 5, to be released and delivered to the Crown. In the case of *The Zamora*, it was decided by the Judicial Committee of the Privy Council that an order of the prize court for the delivery of copper on board a Swedish vessel which had been seized and brought into a British port on suspicion that the copper had an enemy destination, was wrong, because there was no satisfactory evidence before the court that the copper was urgently required for national purposes.

It was also decided that as the copper had been handed over to the War Department and could no longer be identified, no order for its restoration could be made; and that, therefore, the proper order should be to declare that on the evidence before the President of the prize court, he was not justified in making the order appealed from, and to give the appellants leave, in the event of their ultimately succeeding in the proceedings, to apply to the court for such damages as they might have sustained by reason of the order.

⁵ Declared Lord Parker of Waddington in the course of the judgment of the Court: "It was

judicial determination of the question whether the right of requisition should be exercisable, marks the wise reluctance of a great tribunal to sanction procedure calculated to facilitate an abuse of power. The requisitioning of captured neutral vessels under the conditions thus prescribed would not seem to be unlawful provided ample grounds for condemnation are existent.⁶ This condition would call for more than lawfulness of seizure, as the seizer may not unlawfully have gained control by force on the high seas over a neutral ship or cargo neither of which proves to be subject to condemnation when an adjudication is had. Accordingly, one must doubt whether mere lawfulness of possession thus acquired for the purpose of initiating a proceeding to effect condemnation, and valuable merely as a preliminary step towards such an achievement, clothes the possessor with the right to requisition what it has brought in by force. As the divesting of the neutral owner of its title must await the decision of a prize court that is essentially condemnatory of its action and penalizes the owner for cause, it may be felt desirable to challenge the belligerent assertion of the privilege of requisitioning the property concerned prior to such event. Moreover, it may prove to be a salutary rule worthy of general adoption that denies to the belligerent the right to requisition what it forcibly brings into its domain, at least prior to a condemnation by its prize court.⁷

(d)

§ 637. **Railway Material from Neutral Territory.** According to Article XIX of The Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land —

Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.¹

suggested in argument that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a court administering municipal law, but from the point of view of international law, it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search — a practice which is justifiable because search at sea is impossible under the conditions of modern warfare — were held to give rise to rights which could not arise if the search took place at sea." ([1916], 2 A. C. 77, 108.)

See, also, in this connection, Mr. Lansing, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador at Washington, May 24, 1916, complaining of the treatment applied to mails on neutral ships compelled to enter British ports, or induced to do so through some form of duress applied to the owners of the vessels. For. Rel. 1916, Supp., 604.

⁶ See *The Canton* [1917], A. C. 102.

⁷ See Art. 27 (a), Appendix III to Report of British Maritime Law Committee, Proceedings, Int. Law Association, 29th Conference, 1920, 200, 204.

See Art. 21 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J., XXXIII, Supplement Section 2*, 178; also Comment, *id.*, 380-385.

§ 637. ¹ Malloy's Treaties, II, 2300.

This Article, affording another application of the principle of angary, is not unreasonable in its terms. No test of the requisite necessity can well be laid down. The opportunity accorded the neutral State to protect itself by the mode prescribed might, under certain circumstances, serve to check the abuse of belligerent power.²

(e)

§ 637A. Unlawful Detention of Neutral Shipping. In opening its ports to neutral ships a belligerent State holds out to them the assurance that upon compliance with the applicable local laws they will be duly permitted to depart and that by no act in contravention of those laws will they be detained. The owners of a neutral ship entering a belligerent port, acting upon the assumption that the sovereign thereof will exercise the best of faith, have cause of umbrage when that sovereign for reasons of domestic policy is heedless of its assurance and proceeds to detain the vessel in contravention of the local law. For such action, the State to which the ship belongs may fairly claim that the conduct of the belligerent constitutes a violation of international law.

The case of the *Zeelandia* is illustrative.¹ That vessel was registered under the flag of the Netherlands, a foreign friendly power, when she voluntarily put into the port of New York on October 16, 1917, at a time when the United States was at war.² Notwithstanding the submission of manifests and papers to the customs officials in New York, and a request for clearance on October 22, 1917, and at various times thereafter, clearance was persistently refused at all times from that date until March 21, 1918, when the vessel was formally seized and requisitioned by the United States. Clearance was sought for the vessel with her

² See, in this connection, Report of Col. Borel to the Second Hague Peace Conference, in behalf of the Second Commission, on an arrangement on neutral persons in the territory of belligerents, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 150, 156-158; proposal of Luxemburg, *id.*, III, 279. These documents are contained in J. B. Scott, Reports to Hague Conferences, 556, 562-564, and 573, respectively; J. B. Scott, Hague Peace Conferences, I, 554-555; Georges Ferrand, *Des Réquisitions en matière de droit international public*, 338-339; Erich Albrecht, *Requisitionen von neutralem Privateigentum*, § 6.

¹ § 637A. ¹ Royal Holland Lloyd v. United States, 73 C. Cls. 722.

² "Prior to October 16, 1917, the *Zeelandia* had called at various ports in South America and taken on a cargo of coffee, cocoa, wool, tallow, and other commodities, some mails destined to the United States and some fifty-five passengers, part of whom were United States naval officers who had booked passage from various South American ports to New York. The cargo of the *Zeelandia* was consigned to the Netherlands Oversea Trust Company, an organization created before the entry of the United States into the war, for the purpose of guaranteeing to the Netherlands and to the powers allied against Germany, that goods consigned to the corporation were for consumption in the Netherlands, rather than for reconsignment to Germany. The *Zeelandia* had on board a full supply of provisions, stores, and coal sufficient to enable her to complete her voyage to Holland, if no additional passengers were taken on, without taking on additional supplies. On October 16, 1917, she put into the port of New York." (*Id.*, 730.)

Declares Miss Marjorie M. Whiteman, Assistant to the Legal Adviser of the Dept. of State, in her work on Damages in International Law, II, 1120: "The vessel could have discharged the passengers destined for New York by tugs beyond the waters of the United States and could have proceeded on her journey. However, relying on a statement of the customs officials in New York that an export license would not be necessary so long as the vessel did not take on additional cargo, stores, or provisions in the United States and that the vessel might come in and be cleared without hindrance from the United States, the *Zeelandia* went into the harbor of New York on October 16, 1917."

original cargo, stores, and bunkers for the removal of which no export license was required under any law of the United States. It was declared by the Court of Claims (to which recourse was had under a special act of Congress of March 3, 1927, to determine the propriety of the conduct of the United States) "that the *Zeelandia* was entitled to clearance under the laws of the United States as well as under the law of nations, that her detention was not justified by the provisions of the Espionage Act or the Trading with the Enemy Act; that damage was caused to the plaintiff by the detention, for which the United States, under clear principles of international law, must assume responsibility."³ The reasoning of the court appears to have been that the failure of the United States to observe its assurance given by necessary implication when the *Zeelandia* was permitted to enter the port of New York that she would be permitted to depart on compliance with the applicable statutory laws, constituted a violation of international law.⁴ This course of thought resembled that of Chief Justice Marshall expressed in the case of *The Schooner Exchange v. McFaddon* where he declared that the implied assurance given a foreign public vessel when entering the territorial waters of the United States that she would not be subjected to the local jurisdiction imposed upon it an obligation to yield immunity therefrom, as an opposing course would be at variance with the good faith ever to be imputed to his country, according to the requirements of which the propriety of its conduct was to be tested.⁵ On December 7, 1931, a judgment was rendered in favor of the plaintiff for the sum of \$446,826.22 with interest thereon from March 20, 1918, to the date of rendition, at the rate of five per centum per annum.⁶

³ 73 C. Cls. 744-745.

⁴ Declared the Court in this connection: "When the *Zeelandia* voluntarily put into the port of New York on October 16, 1917, she did so upon the implied invitation of the United States. The owner of the vessel thereby submitted her to the proper and applicable laws of the United States having to do with the arrival and departure of vessels. Upon the other hand, the owner of the vessel had the right to rely upon an assumption that upon compliance with the applicable laws of the United States, she would be granted clearance and permitted to leave the port. *Cunard S.S. Company v. Mellon*, 262 U.S. 100." (*Id.*, 738.)

⁵ 7 Cranch, 116, 144, 146

See Foreign Vessels of War, Exemption from Local Process, *supra*, § 252.

See comment on the *Zeelandia* case by Dr. Borel, Arbitrator, in the case of the "*Kronprins Gustaf Adolf*" and the "*Pacific*," under special agreement of December 17, 1930, United States and Sweden, Dept. of State, Arbitration Series No. 5 (6), 59-60. In this case the arbitrator decided "that the Government of the United States did not detain the Swedish motor ship '*Kronprins Gustaf Adolf*' between June 23, 1917, and July 12, 1918, and the Swedish motor ship '*Pacific*' between July 1, 1917, and July 19, 1918, in contravention of the Swedish-American Treaties of April 3rd, 1783, and July 4th, 1827." (*Id.*, 100) See Anna A. O'Neill, "United States-Sweden Arbitration," *Am. J.*, XXVI, 720.

⁶ The following statement, doubtless reflecting the views of the Dept. of State, is made by Miss Whiteman, in relation to the matter of damages: "By failing to exhaust whatever remedies might have been available, the settlement of the claim was delayed for a period of nearly thirteen years, and the United States, under the decision of the Court of Claims, was burdened with the payment of interest during that period. On this ground the claim might appropriately have been appealed to the Supreme Court of the United States. These considerations were brought to the attention of the Government of the Netherlands, and as a consequence it was agreed in February 1932 by officials of the Department of State and counsel for the plaintiff, that, in lieu of an appeal in the case, the amount of the indemnity to be paid by the United States should be reduced by the amount allowed as interest for the period from the date of the requisitioning of the vessel to the date of bringing suit.

"Accordingly, on March 7, 1932, on motion of the defendant, consent thereto having been filed by the plaintiff by remittitur on March 2, 1932, the Court of Claims vacated the judgment of December 7, 1931 and entered a new judgment on that date, allowing the plaintiff

It should be obvious that in opening its ports to neutral ships a belligerent State holds out no assurance that it will permit such vessels to obtain therein additional cargoes or stores, or to depart therefrom when so laden save as licensed by the belligerent, even though the withholding of licenses may serve to prevent departure.⁷

\$446,826.22, with interest at five per cent from June 15, 1927, the date of filing of the petition by the claimant with the Court of Claims, to March 7, 1932.

"By this settlement the Government of the United States was relieved of the necessity of paying interest for more than nine years, from March 20, 1918, the date of requisition, to June 15, 1927, the date of bringing suit." (*Op. cit.*, I, 201.)

⁷ See Mr. Castle, Under Secy. of State, to the Minister of Finland, Feb. 18, 1932, Hackworth, Dig., II, 8.

TITLE F

PACIFIC INTERCOURSE OF BELLIGERENTS

1

§ 638. **In General.** Opposing belligerents, notwithstanding the severance of diplomatic relations between them, are not prevented from holding intercourse with each other. The fact of war serves, however, to restrict the mode, and doubtless also in practice, the subjects of communication.¹ A belligerent government, prior to the final effort to negotiate a treaty of peace, deals with the enemy through the medium of neutral diplomatic agents. By means of their good offices, protests are lodged with it,² proposals made to it,³ and agreements concluded with it.⁴

During the course of World War I, there assembled at Berne from September 24, to November 11, 1918, an American-German Conference on Prisoners of War composed of representatives of the opposing belligerents who found it possible to reach an agreement which was signed on the date of the Armistice.⁵ The negotiations, held under the presidency of the Swiss Minister of Foreign Affairs, M. Paul Dinichert, revealed the capacity of the States concerned to deal with each other with respect to a matter of common interest despite the conflict being waged between them.⁶

§ 638. ¹ Declares Davis: "Such intercourse, to be lawful, must have some direct connection with the existing state of war, or must be carried on with a view to the reestablishment of friendly relations." (Int. Law, 3 ed., 336.) It may be doubted whether any principle of law prevents opposing belligerents from contracting lawfully with respect to any matter however unrelated to either of these subjects.

² See, for example, Sir Edward Grey, British For. Secy., to Mr. Page, American Ambassador at London, July 20, 1915, protesting against the punishment of a British prisoner at Zerst by tying him to a stake, Misc. No. 19 (1915), Cd. 8108, 22.

³ See, for example, the proposal of the United States, during the course of the war with Spain in 1898, to allow sixteen hundred Spanish sailors, held at Portsmouth, N. H., as prisoners of war, to return in parole if the Spanish Government would send a ship for them. For. Rel. 1898, 996-998, Moore, Dig., VII, 371; also proposal of the United States to Germany and Great Britain, Feb. 20, 1915, suggesting agreement between those belligerents respecting the mode of conducting hostilities and the responses elicited. American White Book, European War, I, 59, 60, and 64.

⁴ See, for example, protocol signed by Mr. Day, Secy. of State, and Mr. Cambon, French Ambassador at Washington, in behalf of the Spanish Government, Aug. 12, 1898, paving the way for the negotiation of a treaty of peace between the United States and Spain, Malloy's Treaties, II, 1688.

In 1916, Germany and Great Britain, through the medium of the American diplomatic representatives at Berlin and London, entered into agreement for the transfer to Switzerland of British and German sick and wounded combatant prisoners of war. Misc. No. 17 (1916), Cd. 8236.

⁵ See documents in For. Rel., 1918, *Supp.*, 2, 61-159, embracing text of the agreement which "having been superseded in effect by the terms of the Armistice, signed on the same day, was never ratified."

⁶ See Commander Raymond Stone, "The American-German Conference on Prisoners of War," *Am. J.*, XIII, 406.

Opposing military or naval commanders oftentimes hold direct communication with each other. They are clothed, moreover, with sufficient representative capacity to conclude certain agreements concerning the forces under their respective commands. Such intercourse and the technical mode of conducting it are natural incidents of belligerent operations.

It is said to be absolutely essential in all non-hostile relations between belligerent forces that the most scrupulous good faith be observed by both parties, and that no advantage not intended to be given by the adversary shall be taken. These non-hostile relations are usually comprised under the headings of parlementaires, and flags of truce, armistices, capitulations, passports, and safe-conducts, safeguards, and cartels.⁷

2

MILITARY AND NAVAL COMMUNICATIONS AND AGREEMENTS

a

§ 639. **Flags of Truce.** A military commander is entitled to ascertain whether the enemy will enter into communication with him. The privilege of ascertainment is exercised by means of a flag of truce. The propriety of a "general notification that a flag of truce will not be recognized during a prescribed period" is to be doubted,¹ and does not appear to meet with the approval of the United States.²

Concerning the use of a flag of truce the Regulations annexed to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, made certain provision. It was there declared that a person is regarded as bearing a flag of truce who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right, it was said, to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.³

The commander to whom a flag of truce is sent is not in all cases obliged to receive it.⁴ The attempt to ascertain whether he will receive it is fraught with

⁷ The paragraph in the text reproduces in substance Nos. 217 and 219 of War Dept. Rules of Land Warfare, 1940.

§ 639. ¹ J. M. Spaight, *War Rights on Land*, London, 1911, 223, where it is added that "the practice is not expressly forbidden and is still stated to be legitimate in some of the official manuals on war rights."

² "The present rule is that a belligerent may not declare beforehand, even for a specified period — except in case of reprisal for abuses of the flag of truce — that he will not receive parlementaires. *An unnecessary repetition of visits need not be allowed.*" War Dept. Rules of Land Warfare, 1940, No. 229.

³ Art. XXXII. The Articles which deal with the matter (XXXII-XXXIV) are contained in Malloy's *Treaties*, II, 2287. See, in this connection, J. M. Spaight, *War Rights on Land*, Chap. VII.

"Parlementaires are agents employed by commanders of belligerent forces in the field, to go in person within the enemy lines, for the purpose of communicating or negotiating openly and directly with the enemy commander." (War Dept. Rules of Land Warfare, 1940, No. 220.)

⁴ Art. XXXIII of the Hague Rules.

See Oppenheim, *Lauterpacht's* 6 ed., II, § 220.

special danger to the *parlementaire* and his staff if the bearer presents himself during an engagement,⁵ and is highly dangerous and uncertain if made at night.⁶ It is believed that the commander with whom communication is sought should normally endeavor to render as safe as circumstances may permit the enemy persons burdened with the task of learning his will.⁷ It is said, however, to be the duty of the *parlementaire* to select a propitious moment for displaying his flag, such as during the intervals of active operations, and to avoid the dangerous zone by making a detour.⁸ Doubtless a commander to whom a *parlementaire* is sent may fairly prescribe the formalities and conditions on which the latter will be received, and fix the hour and place at which he must appear.⁹ It is believed that the bearer of a flag of truce should if possible be duly notified and warned away, in case of a declination to receive him.¹⁰

The right to prevent a *parlementaire* once received from taking advantage of his admission to obtain information is generally acknowledged. His abuse of his privileges is said to justify his temporary detention.¹¹

Such an abuse may assume various forms. It is seen whenever the *parlementaire* utilizes his mission in order to accomplish an end other than that of holding communication with the enemy, and one adverse to it.¹² Familiar instances are those when, under pretense of seeking to enter into communication, a flag of truce is in fact employed to enable the bearer to pass into the enemy's lines for

⁵ "If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

"If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever." (§§ 112 and 113, Instructions for the Government of Armies of the United States in the Field, Gen. Orders, No. 100, April 24, 1863, Moore, Dig., VII, 318.)

See, also, War Dept. Rules of Land Warfare, 1940, Nos. 224 and 225.

⁶ War Dept. Rules of Land Warfare, 1940, No. 227.

⁷ *Id.*, No. 225, where it is said: "The fire should not be intentionally directed on the person carrying the flag or upon those with him."

⁸ *Id.*

⁹ *Id.*, No. 229. The War Dept. Rules of Land Warfare make elaborate provision for the formalities to be observed in the reception of *parlementaires*. See No. 231.

¹⁰ Davis, Int. Law, 3 ed., 337.

¹¹ Art. XXXIII of the Hague Rules.

The War Dept. Rules of Land Warfare, of 1940, announce that "In addition to right of detention for abuse of his position, a *parlementaire* may be detained in case he has seen anything, or obtained knowledge which may be detrimental to the enemy, or if his departure should reveal information of the movement of troops." It is added that "He should be detained only so long as circumstances imperatively demand, and information should be sent at once to his commander as to such detention, as well as of any other action taken against him or against his party." (No. 232.)

¹² Mr. Seward, Secy. of State, to Mr. Tassara, Dec. 17, 1864, MS. Notes to Spanish Legation, VIII, 23, Moore, Dig., VII, 319, with reference to the delivery of a communication from the Spanish Consul at Charleston intended for the Spanish Minister at Washington, by the Confederate authorities in 1864, to the military authorities of the United States, under a flag of truce.

"It constitutes an abuse of the flag of truce, forbidden as an improper use under Hague Rule XXIII (*f*), for an enemy not to halt and cease firing while the *parlementaire* sent by him is advancing and being received by the other party; likewise, if the flag of truce is made use of for the purpose of inducing the enemy to believe that a *parlementaire* is going to be sent when no such intention exists. It is also an abuse of a flag of truce to carry out operations under the protection accorded by the enemy to it and those accompanying it. An abuse of a flag of truce may authorize a resort to reprisals." (War Dept. Rules of Land Warfare, 1940, No. 234.)

the purpose of obtaining information or with any other treacherous design. The Rules annexed to the Hague Convention declare that if it is proved in a clear and incontestable manner that the envoy has taken advantage of his privileged position "to provoke or commit an act of treachery," his right of inviolability is lost.¹³ It is believed that to enter the enemy's lines under false pretenses constitutes an act of treachery, and justifies, when clearly proven, the imposition of the most severe penalty, even though the *parlementaire* makes in fact no further attempt to accomplish his design.

The hoisting of a white flag by troops has no signification in international law other than one indicating a desire to communicate with the enemy. "If hoisted in action by an individual soldier or a small party, it may signify merely the surrender of that soldier or party."¹⁴ Such an act is essentially treacherous in character when committed for the purpose of luring an enemy force to a dangerous place.¹⁵

§ 639A. **The Same.** The attempt to enter into communication with the enemy by means of a flag of truce through the instrumentality of a *parlementaire* and his staff involves a procedure that may be quite inapplicable when one or both of the opposing forces are engaged in offensive operations by air.¹ In such situations the mode of entering into communication with the enemy for the purpose of making known to him facts which he might be expected to heed, such as those indicative of a desire to surrender, is complicated. This is due partly to the circumstance that there are no effective or accepted methods of signaling between opposing aircraft when in flight, or between ground forces and opposing aircraft when in flight, and also to the circumstance that the control of offensive operations of aircraft is lodged in a commander on the ground, possibly far distant from those operations, whose decision must be had as a means of causing cessations of attack. Thus, the commander of an army in the field, or of portions of one, seeking to make known a desire to surrender, or to enter into terms for surrender, may find utmost difficulty in communicating the fact to or through the medium of enemy aircraft operating against him.² Even if he succeeds in

¹³ Art. XXXIV.

An interesting contrast is apparent between the so-called inviolability of a bearer of a flag of truce, and that of a diplomatic officer. Both individuals may be prevented from committing acts hostile to the welfare of the foreign power to which they are sent, and both may doubtless also under certain conditions be detained. By acts of treachery, however, the bearer forfeits his inviolability and becomes amenable to the local military jurisdiction. Although guilty of like conduct, the minister, unless he waives his privilege, remains immune from punishment at the hands of any local authority.

¹⁴ War Dept. Rules of Land Warfare, 1940, No. 223, where it is added: "It is essential, therefore, to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important action upon that assumption."

¹⁵ "After the white flag had been hoisted on an Austrian redoubt [June 15, 1915] a rapid and heavy fire from machine guns was opened on an Italian alpine detachment which was advancing towards the redoubt.

"The same stratagem was made use of at another point [June 16, 1915] in order to lure the Italians on to a mined area." (Report of Commission on Responsibilities, Conference of Paris, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, Violation of Laws and Customs of War, Oxford, 1919, 57.)

§ 639A. ¹ See excellent discussion in Spaight, *Air Power and War Rights*, 2 ed., Chap. XV.

² "Thus, because an offer by ground troops to surrender to low flying enemy aircraft can-

making known such desire to such aircraft the latter may acknowledge no obligation to cease attacking, or to communicate that desire to the commander on the ground in control of the offensive operation. Hence, it behooves the commander of the opposing force, desiring to surrender, to endeavor by his own effort to enter into direct communication, possibly by radio, with the enemy commander on the ground who directs the air operation. Such considerations illustrate the futility of the exhibition by a ground force of white flags as a means of informing a hostile air force of a desire to surrender, notwithstanding the fact that there are instances where such conduct has served to convince the commanders of aircraft of an undoubted desire to relinquish fighting by a small force that had become impotent to attack and was itself defenseless, and where such exhibition has happily operated as a deterrent of further attack.³ It remains for military men to devise a method and initiate a rule whereby communications between ground and opposing air forces may be facilitated and respected, as a means of preventing the slaughter of a force that is endeavoring to surrender.

The commander of an air force is confronted with a relatively simple task when seeking to enter into communications with the subjacent enemy. He may drop leaflets expressing his desires and setting forth terms of his demands. Thus, on January 10, 1938, leaflets addressed to the occupants, both Chinese and foreign, of Tsingtao were dropped by Japanese aircraft, demanding the surrender of the place and requiring that specified buildings or organs fly a white flag.⁴ The procedure thus designated was followed, the requisite evidence of submission duly given, and surrender effected without further loss of life.⁵

As between opposing naval forces, the endeavor to enter into communications and reach agreement is simplified by the use of accepted signals, through visible signs or by radio. The hauling down of his flag is the traditional token of readiness by the commander of a ship to surrender the same to the enemy.⁶

not be effectively accepted and result in capture, there does not appear to be any obligation on the part of aviators to cease firing at such troops; but humanity will suggest that the aviators should hold their fire if they can communicate the proposed surrender to their own troops, and the law probably requires the same course if it is obvious that such troops are in a position to accept the proposed surrender." (Nokes and Bridges, *The Law of Aviation*, London, 1930, 162.)

³ See Spaight, *Air Power and War Rights*, 2 ed., 356.

Declares the same writer: "Suppose, for instance, that a body of troops display a white flag, suspend their retreat, and show unmistakably as a whole body that they are genuinely ready to give in. To continue to attack them in such circumstances might be held to approach the cold-blooded slaughter of defenceless men" (*Id.*, 357.)

⁴ According to an Associated Press despatch of January 10, 1938, as given in the *New York Sun* of that date, p. 1, the leaflets addressed to Chinese persons declared. "All important organs (Government buildings) must fly a white flag. All police and military parties are to assemble within the main harbor area and elect representatives to negotiate with the Japanese. Citizens wishing to co-operate with Japanese also should elect representatives to be sent to the Japanese shrine to negotiate. All those who surrender will not be persecuted. Those not surrendering will be killed, Japanese are taking over today."

⁵ See *id.*, for the text of leaflets addressed to foreigners, which declared: "Advice to people of friendly neutral Powers — I hereby announce that his Imperial Japanese Majesty's forces are doing their best and making greatest efforts to protect the rights and interests of third Powers in the area of operations. However, this city is in fear of falling into confusion by battle and the people of neutral and friendly Powers are advised not to approach dangerous areas and to take means of safety for themselves — for example, taking refuge in Edgewater Mansions."

⁶ See, for example, British instructions for the conduct of armed merchantmen, Oct. 20,

b

§ 640. **Passports. Safe-conducts. Safeguards.** Notwithstanding the general cessation of intercourse between places occupied or controlled by opposing belligerents, it oftentimes becomes advantageous to one party to permit persons, vessels or other property of the enemy to enter, leave, or enjoy special exemptions within places controlled by itself, or when encountering its naval vessels on the high seas. The requisite permission may be granted by various processes. It may be expressed in a bilateral contract between the belligerents, or in a unilateral agreement addressed directly to a particular individual. It may emanate from the highest authority of the State or from one greatly inferior to it. Diplomatic, consular, civil, military or naval officers may be the agents utilized for such purpose. The various expressions of consent are described according to the scope and purport of what is granted. It may be doubted, however, whether in practice belligerent powers attempt to observe with care the distinctions of nomenclature which the publicists employ.

A document permitting an enemy subject to travel generally and without restriction within places under the control of a belligerent, and incidentally to enjoy special protection while on the high seas may be fairly described as a passport. It should be issued by the highest authority of the State, or with its express consent.¹

The War Department Rules of Land Warfare of 1940, make reference to a "military passport" which is defined as "a document issued by order of a commander of belligerent forces, authorizing a person or persons named therein, *residing or sojourning within territory occupied by such forces*, to travel unmolested within such territory, with or without permission to pass, or to pass and return, by designated routes, through the lines, subject to such further conditions and limitations as the commander may prescribe."²

§ 641. **The Same.** Of narrower scope is a safe-conduct. That term is used to describe a document furnished with the consent of the highest authority, and possibly through the medium of a diplomatic or consular officer, permitting the grantee to pass through the territories of the grantor or through its military or naval lines, and to enjoy special protection if encountered on the high seas, provided specified conditions be complied with in respect to route, time or mode of transit.¹

1915, in which it was declared "Fire must not be opened or continued from a vessel which has stopped, hauled down her flag, or otherwise indicated her intention to surrender." (Naval War College, Int. Law Documents, 1917, 154)

§ 640.¹ Hall, Higgins 8 ed., § 191. It may be observed that the document which upon the outbreak of war a belligerent power gives to the retiring diplomatic representative of the enemy in order to assure him of the protection due him, is generally described as a passport.

² No. 235.

§ 641.¹ See, for example, Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador, Dec. 15, 1915, announcing receipt of information from the British and French Ambassadors that "safe-conducts" would be furnished to Captains Boy-Ed and von Papen (German naval and military attachés, respectively, at Washington, recalled by their Government, at the request of the United States), with the understanding that they would take the

The same term is employed to describe also a document issued by a military or naval commander, and limiting the permission given to places under his control, or to protection from vessels under his command. The War Department Rules of Land Warfare of 1940, make reference to "Safe-Conducts for Persons" which are defined as "documents like passports, issued by the same authority and for similar purposes, to persons residing or sojourning outside of the occupied areas, who desire to enter and remain within or pass through such areas."² It is declared that "similar documents, issued by the same authority, to persons residing within or without the occupied areas, to permit them to carry specified goods to or from designated places within those areas, and to engage in trade otherwise forbidden by the general rule of non-intercourse, are also called safe-conducts."³

It is perhaps unfortunate that the relevant nomenclature of the English language permits the attachment to particular terms of differing significations that have reference to permissive acts both on the part of the highest authorities of a belligerent State and on that of its military and naval agencies.

While utilizing the protection accorded by a passport or safe-conduct, it is the obvious duty of the grantee to refrain from action hostile or detrimental to the grantor. Conversely, the latter assumes an obligation not to render nugatory the protection it has promised to accord, by unreasonable interference with the person or property of the grantee. His abuse, however, of his privileges would appear to justify not only the curtailment of them, by his removal from the territories of the grantor, but also the detention and internment, if not the punishment of the grantee.⁴

"southern route" to Holland, and "perform no unneutral act, such as carrying dispatches to the German Government," For. Rel., 1915, Supp., 952; Same to Same, Dec. 18, 1915, *id.*

"Safe-conducts were issued during the Spanish-American War to the Spanish merchant vessels engaged in transporting Spanish prisoners from Santiago de Cuba to Spain by the United States Consuls, under instruction of the Department of State." (Stockton, Outlines, 350) See, also, For. Rel. 1898, 992.

² No. 236.

³ No. 237.

According to No. 238: "The difference between military passports and safe-conducts as to persons has not heretofore been clearly defined, the two terms having been employed more or less indiscriminately. The distinctions above indicated are based upon analogous customs with relation to civil passports and are adopted in the present text to avoid further confusion in this respect. . . . Passports and safe-conducts as to persons are individual and non-transferable. A safe-conduct for goods, although restricted to the articles therein designated, may be carried by any agent of the person or firm to which it is issued, who is designated by that person or firm by written endorsement upon the document to accompany the goods, unless the person to accompany the goods is named in the document. In the latter event the document will be honored only in the hands of the person so named. When passports and safe-conducts are granted by arrangement with the enemy, or with a neutral power, they must be issued and honored precisely according to the terms of the arrangement."

⁴ It is believed that a diplomatic officer recalled from a neutral State, even if the lawful possessor of a safe-conduct to enable him to pass through the territory of the enemy of his country, might well be prevented from utilizing the occasion to carry to his government papers relating to the prosecution of the war, and that upon reasonable grounds of suspicion, his belongings might be examined by the grantor with a view to ascertaining the contents thereof and the removal or detention of objectionable matter.

See Selection from Papers found in the possession of Capt. von Papen, former German Military Attaché at Washington, at Falmouth, Jan. 2 and 3, 1916, Misc. No. 6 (1916), Cd. 8174.

A safe-conduct may be issued for the protection of both persons and things; an enemy vessel may be the grantee.⁵

§ 642. **The Same.** Of narrower scope than a safe-conduct and oftentimes of different purport is a so-called safeguard. It may be described as a form of protection granted by an officer, military or naval, for persons or property within the limits of forces under his command against the operations thereof. According to the late General Halleck, safeguards are sometimes delivered to the parties whose persons or property are to be protected, while at others, they are posted upon the property itself, as upon a church, museum, library, public office or private dwelling.¹

The War Department Rules of Land Warfare of 1940, refer to a safeguard as "a detachment of soldiers posted or detailed by a commander of troops for the purpose of protecting some person or persons, or a particular village, building, or other property."² It is said that the term "safeguard" is also used to designate a written order by a commander of belligerent forces for the protection of an enemy subject or enemy property; and that it is usually directed to the succeeding commander requesting the grant of protection for such individuals or property.³ The violation of a safeguard is declared to be "a grave offense against the laws of war."⁴

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§ 643. **Capitulations.** A capitulation is defined as "an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress, or other defended locality, or of a district of the theatre of operations."¹ It is said that "capitulations agreed upon between the contracting parties must take into account the rules of military honor. Once settled, they must be scrupulously observed by both parties."² A capitulation commonly specifies or provides for the details of the surrender, and should contain in concise terms every condition to be imposed. The time, manner and execution should be established unequivocally.³

The subjects usually regulated by such an arrangement are said to be (a) cessation of hostilities; (b) the fate of the garrison, including those persons who may have assisted them; (c) the disarming of the place and of the defenders; (d) the

⁵ On Dec. 5, 1914, Count von Bernstorff, the German Ambassador at Washington, in a communication to the Secretary of State declared: "I have instructed the German Consuls concerned to issue, upon production of American testimony, safe-conducts to unneutral ships carrying victuals to Belgium." (For. Rel., 1914, Supp., 820.)

See, also, Maritime War, Safe-conducts, *infra*, § 760.

§ 642. ¹ Sir S. Baker's 3 ed., of Halleck's Int. Law, II, 325-326, quoted in Moore, Dig., VII, 321. According to Gen. Halleck: Safeguards "are particularly useful in the assault of a place, or immediately after its capture, or after the termination of a battle, to protect persons and property of friends from destruction by an excited soldiery."

² No. 241.

³ *Id.*

⁴ *Id.*

§ 643. ¹ War Dept. Rules of Land Warfare, 1940, No. 244.

² Art. XXXV, Hague Regulations respecting the Laws and Customs of War on Land, Malloy's Treaties, II, 2287.

³ War Dept. Rules of Land Warfare, 1940, No. 247.

turning over of the arms and matériel, and, in a proper case, the locating of the mine defenses, etc.; (e) the evacuation of and taking possession of the surrendered place; (f) provisions relative to the medical personnel, sick and wounded; (g) provisions for taking over the civil government and property of the place, with regard to the peaceable population; and (h) stipulations with regard to the immediate handing over to the victor of certain forts or places, or other similar provisions, as a pledge for the fulfillment of the capitulation.⁴

The War Department Rules of Land Warfare of 1940, declare that subject to limitations indicated therein the commander of a fort or place, or the commander in chief of an army, is presumed to be duly authorized to enter into capitulations; that if he capitulates unnecessarily and shamefully, or in violation of orders from higher authority, he is liable to trial and punishment by his own government, although the "validity of the capitulation remains unimpaired"; that the powers of the commander are not presumed to extend beyond the forces and territory under his own command, that he is not presumed to possess power "to bind his government to a permanent cession of the place or places under his command, or to any surrender of sovereignty over territory, or to any cessation of hostilities in a district beyond his command, or generally to make or agree to terms of a political nature, or such as will take effect after the termination of hostilities."⁵ It is said that "from the moment of the signing of a capitulation, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in same";⁶ and also that "a capitulation can be denounced and hostilities immediately resumed for failure to execute any clause which has been agreed upon or in case it was obtained through a breach of faith."⁷

It may be observed that whether the validity of a capitulation is impaired by a prior agreement between the belligerents, such as an armistice, providing for a general suspension of hostilities, depends upon the terms of such arrangement. If the armistice contemplates and arranges for the notification of the commanders of opposing forces, the signature and execution of a capitulation prior to such notification, however promptly given, would remain unaffected by the antecedent date of the armistice.⁸

⁴ *Id.*, No. 248.

See, also, J. M. Spaight, *War Rights on Land*, Chap. IX; compilation of *Laws of Land Warfare*, by Joseph R. Baker and Henry G. Crocker, November, 1918, Dept. of State, 1919, 246-255; Sir S. Baker's 3 ed. of Halleck, II, 319-321, Moore, Dig., VII, 321-322, where are also given the terms proposed by Gen. Grant, in 1865, to Gen. Lee, for the surrender of the army of Northern Virginia.

Respecting the Capitulation of Santiago, Cuba, July 15, 1898, see President McKinley, Annual Message, Dec. 5, 1898, For. Rel. 1898, LXI.

For the texts of the capitulations of Santiago, 1898, of Manila, 1898, of Port Arthur, 1904, as well as of Metz, 1870, see U. S. Army, *Rules of Land Warfare*, 1917, 83, 84, 85 and 80, respectively.

⁵ No. 246.

⁶ No. 249; also § 144, *Instructions for the Government of Armies of the United States in the Field*, Gen. Orders No. 100, April 24, 1863, Moore, Dig., VII, 326.

⁷ War Dept. *Rules of Land Warfare*, 1940, No. 250.

⁸ Thus the Department of State was unable to concur in the opinion of the Spanish Government that the capitulation of Manila on Aug. 14, 1898, was null and void because it oc-

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§ 644. **Cartels.** "In the customary military sense" a cartel is said to be an agreement entered into by belligerents for the exchange of prisoners of war. In a broader sense it is declared to be "a convention concluded between belligerents for the purpose of arranging or regulating certain kinds of non-hostile intercourse otherwise prohibited by reason of the existence of war."¹ The parties to a cartel are obviously bound to observe its provisions with the "most scrupulous care."² It is said, however, to be "voidable by either party upon definite proof that it has been intentionally violated in an important particular by the other party."³

The term "cartel ships" is employed to refer to "vessels of belligerents which are commissioned for the carriage by sea of exchanged prisoners from the enemy country to their own country, or for the carriage of official communications to and from the enemy."⁴ A cartel ship is said to be "neutralized by her office and is unarmed."⁵

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§ 645. **Suspensions of Arms.** Among agreements between opposing belligerents or their respective commanders, concerning a discontinuance of hostilities, there are contracts which contemplate a brief suspension of operations, for the purpose, for example, of giving opportunity for removal of the wounded or burial of the dead. They are, moreover, likely to be confined to particular forces or places, and are in fact concluded by military or naval commanders in control thereof. Such agreements may be technically described as suspensions of arms.¹ It is by no means certain, however, that the State whose forces are thus temporarily held in check will so refer to the compact producing that result.² Lack of

current two days subsequent to the signature of the protocol signed at Washington, providing in Art. VI for the suspension of hostilities. Declared Mr. Day, Secy. of State, in a communication to the French Ambassador, Sept. 16, 1898: "It was expressly provided in the protocol that notice should be given of the suspension of hostilities, and it is the opinion of this Government that the suspension is to be considered as having taken effect at the date of the receipt of notice, which was immediately given by this Government." (For. Rel. 1898, 814, Moore, Dig., VII, 324.) See generally, the correspondence, in For. Rel. 1898, 813-819.

§ 644.¹ War Dept. Rules of Land Warfare, 1940, No. 243. See, also, § 109, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, April 24, 1863, Moore, Dig., VII, 227; also Davis, 3 ed., 339; Sir S. Baker's 3 ed. of Halleck, II, 326-330, cited in Moore, Dig., VII, 226.

See views of publicists quoted by Joseph R. Baker and Louis W. McKernan, in *Selected Topics connected with The Laws of Land Warfare*, Dept. of State, 1919, 521-528.

See also Hall, Higgins 3 ed., § 193; Oppenheim, Lauterpacht's 6 ed., II, § 224.

² War Dept. Rules of Land Warfare, 1940, No. 243.

³ *Id.*

⁴ Oppenheim, Lauterpacht's 6 ed., II, § 225.

⁵ See Rear-Admiral Chas. H. Stockton, *Manual of Int. Law for Naval Officers*, revised ed., 1917, § 243.

Concerning the exemption from capture of cartel ships, see *Vessels Exempt by Occupation or Service, Cartel Ships*, *infra*, § 770.

§ 645.¹ See Sir S. Baker's 3 ed. of Halleck, II, 311, Moore, Dig., VII, 327; also Hall, Higgins' 8 ed., § 192; Oppenheim, Lauterpacht's 6 ed., II, § 232.

See War Dept. Rules of Land Warfare, 1940, No. 261.

² President McKinley, in his Annual Message of Dec. 5, 1898, referred to an agreement between opposing military forces in Cuba, and to which General Shafter was a party, as "a truce to allow the removal of non-combatants." (For. Rel. 1898, lxi.)

uniformity of description is, however, unimportant. Of greater significance is the fact that such agreements, howsoever limited in point of time, or place, or purpose, impose actual restraints upon the contracting parties.⁸

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Truces or Armistices

(1)

§ 646. **General Requirements.** The term "armistice" appears to be used to refer both to an agreement between belligerents and to the condition of affairs that prevails during the life of the compact.¹ The War Department Rules of Land Warfare, of 1940, define it as "the cessation of active hostilities for a period agreed on between belligerents."² The Hague Regulations employ it to designate a class of agreements purporting to suspend military operations, and of an importance such as to require general understanding with respect to use and effect.³ It is there declared that an armistice may be general or local, the former suspending the operations of belligerent forces everywhere, the latter only between certain fractions of such forces and within a fixed radius.⁴ An armistice, according

"A *special truce* may be entered into by officers, of any grade, who command armies or separate detachments. They are always of a temporary character, and are made for the purpose of arranging the details of surrender of a defeated army or besieged place; for burying the dead or removing the wounded after a battle or assault; or for conveying a message to the enemy, and receiving his reply, in some matter of necessary intercourse. These truces may be verbal or written. In general the agreement consists in the letter of one general proposing a truce for a certain purpose, and in the reply of his adversary accepting the proposed arrangement. The duration of the truce, in point of time, is precisely stated in the arrangement; and the truce expires without notice, at the hour fixed for its termination." (Davis, *Int. Law*, 3 ed., 339-340)

"The continental writers still make use of the terms *armistice* and *suspension of arms*. As a matter of fact, there is no essential difference between *truces*, *suspensions of arms*, and *armistices*." (U. S. Army, *Rules of Land Warfare*, 1917, note following No. 263.)

³"As neither belligerent can be supposed in making such agreements to be willing to prejudice his own military position, it is implied in them that all things shall remain within the space and between the forces affected as nearly as possible in the condition in which they were at the moment when the compact was made, except in so far as causes may operate which are independent of the state of things brought about by the previous operations; the effect of truces and like agreements is therefore not only to put a stop to all directly offensive acts, but to interdict all acts tending to strengthen a belligerent which his enemy apart from the agreement would have been in a position to hinder." (Hall, *Higgins'* 8 ed., § 192, 658.)

§ 646 ¹See War Dept. *Rules of Land Warfare*, 1940, Nos. 251-270; Joseph R. Baker and Henry G. Crocker, *Laws of Land Warfare*, Dept. of State, 1919; J. M. Spaight, *War Rights on Land*, Chap. VIII; Moore, *Dig.*, VII, 327-335, and documents there cited (embracing a compilation of the views of publicists).

²No. 251.

³Arts. XXXVI-XLI of Regulations annexed to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, Malloy's *Treaties*, II, 2287.

⁴Art. XXXVII.

"General armistices are of a combined political and military character. They usually precede the negotiations for peace, but may be concluded for other purposes. Due to its political importance, a general armistice is concluded by the Governments concerned or by their commanders in chief, and is subject to ratification by the Governments in every case. General armistices are frequently arranged by diplomatic representatives." (War Dept. *Rules of Land Warfare*, 1940, No. 259.)

The armistice of Nov. 11, 1918, was signed in behalf of the Allied and Associated Powers by Marshal Foch and Admiral Wemyss, First Sea Lord of the British Admiralty.

"A local armistice suspends operations between certain portions of the belligerent forces, or within a designated district of the theater of operations. A local armistice may be con-

to American opinion, should, if possible, be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.⁶

Experience has shown that in the conclusion of armistices there is need of a distinct understanding between the opposing belligerents with respect to the following matters: first, the time for the commencement and termination of the operation of the agreement; secondly, the nature of permissible conduct during the period while the arrangement is in force; thirdly, the notification of the belligerent forces; and fourthly, the treatment of violations of the agreement.

The War Department Rules of Land Warfare of 1940, declare that it is of utmost importance that the exact moment for the commencement and for the termination of the arrangement be fixed in the terms thereof "beyond any possibility of mistake or misconception."⁷

Again, those rules announce that an armistice need not in terms prohibit actual hostilities, and that anything else may be done during an armistice that is not in express terms prohibited by the agreement.⁸ Such a conclusion, especially in view of the diversity of opinions expressed by the publicists, is believed to be sound, and to give ample warning to those burdened with the task of concluding such arrangements.⁹

It is the duty of each belligerent to notify officially and in good time its own military and naval forces of the conclusion of an armistice. The agreement takes effect with respect to them, unless the date is otherwise fixed, immediately upon their receipt of notification.⁹

It is believed that a commanding officer, notified by the enemy of the conclusion of an armistice, is thereby put on his guard, and burdened with the immediate duty to ascertain the truth as to the fact asserted. The validity of

cluded by the military forces only, or by the naval forces only, or between a less number than all of the belligerents at war." (War Dept. Rules of Land Warfare, 1940, No. 260.)

⁶ War Dept. Rules of Land Warfare, 1940, No. 251.

Thus the armistice which effected the cessation of hostilities preliminary to the conclusion of peace between the United States and Spain, in 1898, was embraced in a protocol signed on Aug. 12 of that year, in behalf of the former by the Secretary of State, and in behalf of the latter by the French Ambassador at Washington, specially authorized by the Spanish Government to execute the agreement. Malloy's Treaties, II, 1688-1689; also For. Rel. 1898, 819-825.

⁷ No. 255. See, also, in this connection, J. M. Spaight, War Rights on Land, 234-235, adverting to the consequences of the indefinite period arranged for in the armistice between Generals Sherman and J. E. Johnston, in April, 1865.

According to Art. XXXVI of the Hague Rules: "If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice."

⁸ No. 256.

⁹ See J. M. Spaight, War Rights on Land, 235-239; also publicists quoted in Joseph R. Baker and Henry G. Crocker, Laws of Land Warfare, Dept. of State, 1919, 256-267.

⁹ Art. XXXVIII of Hague Regulations, Malloy's Treaties, II, 2288; Dana's Wheaton, § 402; Moore, Dig., VII, 330.

"An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence." (§ 139, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, April 24, 1863, Moore, Dig., VII, 331.) Such is the language also of No. 259, of the Rules of Land Warfare of 1917.

See President McKinley, Annual Message, Dec. 5, 1898, respecting the notification of American forces of the armistice embraced in the protocol concluded with Spain, Aug. 12, 1898, For. Rel. 1898, LXV, Moore, Dig., VII, 333.

hostile acts which he may thereafter commit would thus appear to depend upon the inaccuracy or untruthfulness of the statement made by his adversary.

The negotiation and signature of a treaty of peace do not necessarily imply the existence also of an armistice. Thus the treaty of Guadalupe Hidalgo, concluded February 2, 1848, contemplated a further convention to be concluded by representatives of both parties to cover a provisional suspension of hostilities, and such procedure was duly followed.¹⁰

The Hague Regulations do not purport to indicate what acts may be fairly regarded as a substantial breach of an armistice, but rather imply that if one party deems the other to have committed a "serious violation," the former is entitled to denounce the agreement, and in case of urgency, to "recommence" hostilities immediately.¹¹

As an armistice, "like other formal agreements between belligerents, engages the honor of both parties for the exact and complete fulfillment of every obligation thereby imposed," the War Department Rules of Land Warfare of 1940, declare that "it would be an outrageous act of perfidy for either party, without warning, to resume hostilities during the period of an armistice, with or without a formal denunciation thereof, except in case of urgency and upon convincing proof of intentional and serious violation of its terms by the other party."¹² It is said, however, that under article XL of the Hague Regulations, "upon definite proof of such a violation of the armistice, if the delay incident to formal denunciation and warning seems likely to give the violator a substantial advantage of any kind, the other party is free to resume hostilities without warning and with or without a formal denunciation."¹³

¹⁰ Art. II, Malloy's Treaties, I, 1108. Respecting the convention concluded pursuant to the provision of the treaty, see statement in Moore, Dig., VII, 332. See S. Takahashi, *International Law Applied to the Russo-Japanese War*, 219-224, and documents there quoted, concerning armistices of the Russo-Japanese War.

¹¹ Art. XL, Malloy's Treaties, II, 2288.

Shortly after the protocol of August 12, 1898, providing for a suspension of hostilities in the Spanish-American War, it was represented to the Department of State in behalf of Spain, that inasmuch as the insurrection in the Philippines was, according to information received at Madrid, spreading and becoming more active, the situation might be remedied by placing at the disposal of Spain for use against the insurgents, the Spanish troops whom the capitulation at Manila had reduced to inaction, or if the United States objected to that course, by the despatch of troops directly from the Peninsula to the archipelago. The United States declined to consider the first alternative inasmuch as Manila had been, some time before its surrender, besieged by the insurgents by land while it was blockaded by forces of the United States by sea. As to the second alternative, while intimating doubt as to the correctness of the information received at Madrid, and while declaring that the United States would, through its military and naval commanders in the Philippines, exert influence to restrain insurgent hostilities during the suspension of hostilities between the United States and Spain, the Department of State said: "It would be unfortunate if any act should be done by either Government which might, in certain aspects, be inconsistent with the suspension of hostilities between the two nations, and which might necessitate the adoption of corresponding measures of precaution by the other Government." (Mr. Moore, Acting Secy. of State, to Mr. Thiébaud, French Chargé, Sept. 5, 1898, For. Rel. 1898, 810, 811, as paraphrased in Moore, Dig., VII, 334.)

"Many neutral powers treated the armistice between the United States and Spain, concluded at Washington, August 12, 1898, as a practical end of the war, and permitted American public ships freely to enter their ports for the purpose of docking and taking in supplies." (Statement in Moore, Dig., VII, 335, citing Mr. Hay, Secy. of State, to Mr. Newel, Minister to the Netherlands, No. 195, Feb. 8, 1899, MS. Inst. Netherlands, XVI, 401.)

¹² No. 267.

¹³ *Id.*

The Hague Regulations rightly seek to minimize the significance of the violation of the terms of an armistice by private persons acting on their own initiative. Such conduct on their part is said to produce merely the effect of conferring upon the injured party the right to demand punishment of the wrongdoers, or, if necessary, compensation for the losses sustained.¹⁴

It may be desirable that a general armistice concluded in contemplation of a treaty of peace relax in some measure the inhibition of intercourse between the populations of the territories occupied by the opposing belligerents and necessarily resulting from war. Article XXXIX of the Hague Regulations of 1907 adverts to the matter, declaring that it rests with the contracting parties to settle in the terms of the armistice "what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other."¹⁵ If nothing is stipulated, the intercourse, according to the War Department Rules of Land Warfare of 1940, remains suspended, as during actual hostilities.¹⁶

It may be observed that in the autumn of 1918, Bulgaria, Germany, Austria-Hungary and Turkey requested President Wilson, in the light and on the basis of his public utterances in relation to peace, to take appropriate steps for the conclusion of an armistice.¹⁷

¹⁴ Art. XLI, Malloy's Treaties, II, 2288.

¹⁵ The words quoted in the text are those contained in Malloy's Treaties, II, 2288, being a translation from the French version "*avec les populations et entre elles.*" Declares Spaight: "Of course, what is intended to be regulated is the intercourse of the population of the occupied territory with the population of the country still held by the enemy (in both cases nationals of the enemy State); and also between each belligerent force and the inhabitants of the localities held by the other." (War Rights on Land, 232, Note 1.) This statement is published in the comment appended to No. 268 of U. S. Army, Rules of Land Warfare, 1917. See, also, War Dept. Rules of Land Warfare, 1940, No. 269.

Five days after the conclusion of the protocol embodying terms of a basis for peace between the United States and Spain in 1898, the Department of State, in response to inquiries "made on behalf of the Spanish Government," declared "(1) that no obstacle would be interposed to the reestablishment of the postal service by Spanish steamers between Spain on the one side and Cuba, Porto Rico, and the Philippines on the other; (2) that no objection would be made to the importation of supplies in Spanish bottoms to Cuba and the Philippines, but that it had been decided to reserve the importation of supplies from the United States to Porto Rico to American vessels; and (3) that a Spanish steamer, chartered by French merchants and then lying at Havre, would be permitted to proceed to Philadelphia and to take mineral oil for industrial purposes, provided it was not to be transported to Porto Rico. These answers, it was added, were given with the understanding that American vessels would not for the time being be excluded from Spanish ports, as well as upon the understanding that, if hostilities should at any time be renewed, American vessels that might happen to be in Spanish ports would be allowed thirty days in which to load and depart with non-contraband cargo, and that any American vessel which, prior to the renewal of hostilities, should have sailed for a Spanish port would be permitted to enter such port and discharge her cargo, and afterwards forthwith to depart without molestation, and, if met at sea by a Spanish ship, to continue her voyage to any port not blockaded. These conditions were accepted by the Spanish Government, and commercial intercourse was accordingly restored." (Moore, Dig., VII, 332-333, citing Mr. Moore, Acting Secy. of State, to Mr. Cambon, French Ambassador, Aug. 17, 1898, For. Rel. 1898, 802; Mr. Cambon, to Mr. Moore, Sept. 6, 1898, *id.*, 811.)

Concerning the willingness of the United States, after the conclusion of the protocol, to permit officers of the Spanish army to return singly from Cuba to Spain via the United States, see For. Rel. 1898, 808 and 809, Moore, Dig., VII, 333.

Concerning relaxation of enemy trade restrictions by the United States following the signing of the Armistice, November 11, 1918, see Report of the War Trade Board, June 30, 1919, Washington, Govt. Printing Office, 1920, 170-179.

¹⁶ No. 264.

¹⁷ See Mr. Bliss, American Chargé in the Netherlands, to the Secy. of State, Sept. 27, 1918,

It is believed that a belligerent State defeated in the course of a war may, by acceptance of the terms of an armistice proffered by its adversary, gain a legal right to decline to yield more than is therein exacted, and that if the former remains unbending in that regard it does no injustice to its enemy. This conclusion obviously has no bearing upon the legal consequence of the surrender of that right as by acquiescence in the demand of the victor that its foe sacrifice more than the terms of the armistice required. So long as the fact of compulsion is not acknowledged to impair the validity of a treaty, no other view is possible.¹⁸ Nevertheless, such action by the victor, however successfully manifested in the terms of the treaty of peace, is likely to inspire the defeated State to pursue a like course whenever opportunity presents itself, and to deal as lightly with the fresh concessions wrung from it as did its adversary with the limitations laid down in the armistice.

(2)

§ 647. **The Armistice with Germany of November 11, 1918.** The armistices concluded in November, 1918, by the Principal Allied and Associated Powers with certain of their enemies were designed to safeguard what had been won by the sword through the immediate removal of any military or other obstacle which could remain to challenge the position of the former as victors or oppose by force their demands.¹ The armistice with Germany of November 11, 1918,

in relation to Bulgaria, For. Rel. 1918, Supp., I, Vol. I, 323; the German Imperial Chancellor (Max of Baden), to President Wilson, Oct. 6, 1918, in relation to Germany, *id.*, 338; the Swedish Minister at Washington, to the Secy. of State, Oct. 7, 1918, and Oct. 30, 1918, in relation to Austria-Hungary, *id.*, 341 and 429, respectively; the Turkish Chargé in Spain, to the Spanish Minister of Foreign Affairs, Oct. 12, 1918, in relation to Turkey, *id.*, 360.

See The Pre-Armistice Agreement with Germany in 1918, *infra*, § 912A.

For the text of the Armistice between France and Germany of June 22, 1940, see *Am. J.*, XXXIV, *Official Documents*, 173. For the text of the Armistice between France and Italy, of June 24, 1940, see *id.*, 178.

¹⁸ See Agreements Between States, Manifestation of Assent, Compulsion, *supra*, § 493.

Declares Dr. Lauterpacht: "The legal relation of the terms of an armistice to those of the ensuing treaty of peace, once signed, when they differ, is not clear; but it would seem that the latter entirely supersede the former, and that if the latter exceed or otherwise conflict with the former, there may be a political or moral question but there cannot be a legal one." (Oppenheim, 6 ed., II, 438, footnote 1.)

§ 647.¹ Concerning armistice negotiations with Germany in 1918, see documents in For. Rel. 1918, Supp., I, Vol. I, 481-498.

Concerning armistice negotiations with Austria-Hungary, in 1918, see documents, *id.*, 341, 368, 404, 429, 441, 444-447.

The procedure agreed upon by the Allied Powers for the handling of the armistice negotiations with Germany, and the actual management thereof are worthy of attention.

Germany was notified to send a *parlementaire* to Marshal Foch who had been advised of the views of the Allied and United States Governments respecting the terms of the armistice to be offered Germany. (For. Rel. 1918, Supp., I, Vol. I, 463.) Early on Nov. 7, 1918, Marshal Foch was informed by the German Government by radio that, having been advised by the President of the United States of the receipt by Marshal Foch of full power to receive and communicate to accredited representatives of the German Government the terms of an armistice, certain German plenipotentiaries were ready to proceed at once to a place "agreed upon." It was added that the German Government would be happy if in the interest of humanity the arrival of the German delegation on the Allied front would bring about a provisional suspension of arms. (*Id.*, 481.) Marshal Foch replied that if those plenipotentiaries desired to meet him "to ask for an armistice," they should present themselves to the French advanced posts by the Chimay-Fourmies-La Capelle-Guise road, and that orders had been given to receive them and to conduct them to the place fixed for the meeting. (*Id.*) Marshal Foch was further advised on the same day that the German plenipotentiaries were leaving Spa for the place prescribed; and also that to permit their passage through

not only provided for the cessation of hostilities for a specified period, but also imposed upon that belligerent conditions which constituted a virtual military and naval surrender, and which its enemies deemed a necessary preliminary to negotiations for peace.² Thus Germany agreed among other things to evacuate invaded and certain other territories, without evacuation of the inhabitants or injury or detriment to their persons or property,³ to the repatriation of the inhabitants of invaded countries, to the surrender of specified war material, to the preservation from damage of roads and means of communication of every kind, as well as to the maintenance of their existing civil and military personnel, to the delivery of certain amounts of rolling stock and other equipment, to the handing over of certain railways and their appurtenances, to the leaving *in situ* of railway materials, stores of coal, and materials for the permanent up-keep of lines, to the repatriation without reciprocity of the Allied and American prisoners of war, to the specified treatment of certain sick and wounded, to the surrender of all existing submarines, as well as a certain number of surface vessels of war, to the repatriation without reciprocity of all interned civilians (including hostages, and persons under trial or convicted) who were nationals of the Allied or Associated States, to the principle of making reparation for damage done, to the immediate restitution of certain cash deposits and other assets affecting interests in the invaded countries, to the restitution of certain specified gold, to the obligation not to remove during the period of the armistice public securities which could serve as a guarantee to the Allies for the recovery of reparation for war losses, to the concentration and immobilization of all aircraft, to the leaving *in situ* and intact of various forms of vessel property and naval equipment in evacuated ports and coasts, as well as the evacuation of

the two lines, German orders had been given to stop firing "on that part of the front" from a specified hour until further orders, and that from the German advanced posts to the French advanced posts the German delegation would be accompanied by a company of road menders to permit automobiles to follow the La Capelle road which had been destroyed; and he was further advised that on account of a delay the German delegation could not cross the line of the advanced posts until between 8 and 10 o'clock in the evening, at Houdroy, 2 kilometers to the northwest of La Capelle. (*Id.*) On Nov. 8, Marshal Foch announced the arrival of the plenipotentiaries, their possession of full powers from the Chancellor, their formal request for an armistice, the reading and delivery to them of the text of conditions thereof, their appearance "in a state of consternation," their request that hostilities be stopped at once and his refusal to accede to it. (*Id.*, 482.) The German delegation, after a first preliminary conference, passed again through the French lines and attempted to pass the German lines so as to return to Spa; but the German artillery continued a heavy bombardment, destroying roads and bridges, so making it impossible for the delegation to pass through their own lines, and thus delaying their arrival at that point. (*Id.*, 485.) The German delegation finally returned to the French lines, and in the Compiègne forest near Rethondes, the armistice convention was duly signed at 5 A.M., Nov. 11, 1918, to become effective at 11 A.M., French time. (U. S. Treaty Vol. III, 3307.)

² For the texts of "Instruments by virtue of which the United States does or may claim rights, privileges, etc., under the treaty restoring friendly relations, signed at Berlin, August 25, 1921" (embracing the Armistice Convention with Germany), see U. S. Treaty Vol. III, 3307-3329.

See *Commercial Cable Co. v. Burselson*, 255 Fed. 99. See, also, speech in the Senate May 5, 1920, by Senator P. C. Knox, on the termination of the war with Germany, *Cong. Rec.*, May 5, 1920.

³ Careful provision was made for the protection of the persons and property of the inhabitants of the territory to be evacuated. Edouard Clunet, "*L'Armistice et la cessation des hostilités.*" *Clunet*, XLVI, 72.

particular ports, to the restoration without reciprocity of all merchant ships in German hands belonging to the Allied and Associated Powers, and to the obligation not to permit the destruction of ships or material before evacuation, surrender, or restoration, or the transfer to any neutral flag of any German shipping.⁴ Certain other undertakings were also imposed upon Germany such as to disclose, under penalty of reprisals, mines or delay-action apparatus or harmful measures that had been taken (such as the poisoning of wells), to cease at once requisitions, seizures or other coercive measures in certain countries (Russia and Roumania), to acknowledge the annulment of the treaties of Bucharest and Brest-Litovsk, to indicate the position of certain mine-fields and other marine obstructions, and to notify the Scandinavian countries and Holland and all other neutral States that all restrictions of every sort imposed on the trading of their vessels by the German Government or by private German interests were canceled.

To the Allied Powers and the United States was conceded, among other things, the right to occupy territories on the left bank of the Rhine, together with the principal crossings at specified places including bridgeheads of a specified radius,⁵ the right of requisition in occupied territories, access to territories evacuated by Germany on the Eastern Front, by way of Danzig or the Vistula,⁶ as well as freedom of access to and egress from the Baltic,⁷ the continuance of the existing blockade of Germany, and the right to capture German merchant ships at sea.⁸

Provision was made for the period of duration of the armistice,⁹ for its denunciation in case of non-execution,¹⁰ and for a Permanent International Armistice Commission to insure fulfillment of the agreement.

The foregoing provisions reveal an arrangement designed to accomplish far

⁴ Russian vessels of war of all descriptions seized by Germany in the Black Sea were to be handed over to the Allies and the United States; all neutral merchant ships were to be released; war and other material of all kinds seized in the Black Sea ports was to be returned. German material was to be abandoned.

⁵ It was here provided that "a neutral zone shall be reserved on the right bank of the Rhine between the river and a line drawn parallel to the bridgeheads and to the river, and at a distance of 10 kilometers therefrom, from the Dutch to the Swiss frontier." Section 5.

⁶ Such access was given in order to revictual the populations of those territories or to maintain order.

⁷ To that end the Allies and the United States were empowered to occupy all German forts, fortifications, batteries and defense works of all kinds in all the channels from the Cattagat into the Baltic, and to sweep and destroy all mines and obstructions within and without German territorial waters. Plans and positions were to be furnished by Germany, which was not to raise any question of neutrality. Section 25.

⁸ It was declared, however, that the Allies and the United States contemplated the provisioning of Germany during the armistice to such extent as should be found necessary. Section 26.

⁹ The duration of the armistice was to be thirty-six days, with option to extend. Section 34. See conventions prolonging the armistice, and which were concluded Dec. 13, 1918 (adding a clause due to non-execution of certain Articles), Jan. 16, 1919, and Feb. 16, 1919, U. S. Treaty Vol. III, 3323, and 3326, respectively.

¹⁰ Concerning the sinking by the Germans of their fleet at Scapa Flow, in June, 1919, in violation of the armistice, see letter from the Allied and Associated Powers to the German Peace Delegation, June 25, 1919, Senate Doc. No. 149, 66 Cong., 1 Sess., 167.

It is understood that the United States waived its claim to any part of the reparation (which assumed the form of the surrender of inland steamers, floating docks, etc.) which Germany was compelled to make on account of this action.

more than a mere cessation of hostilities, and serving in case of the observance of its terms, to render it practically impossible for Germany to resume formidable operations against its enemies.¹¹ This circumstance gave to the armistice a unique relation to the resumption of peace which ultimately ensued by virtue of the Treaty of Versailles of June 28, 1919, or otherwise.¹²

(3)

§ 647A. **Arrangements between Bolivia and Paraguay, 1933 and 1935.** In the course of the war between Bolivia and Paraguay growing out of their controversy in the Chaco Boreal, a truce came into force which was effective from midnight December 19/20, 1933, and continued until January 6, 1934. Upon its termination hostilities were resumed.¹

On June 12, 1935, representatives of the two Republics, together with those of the so-called mediating States (Argentina, Brazil, Chile, United States, Peru and Uruguay), signed a protocol contemplating the convening of a peace conference to be assembled for specified purposes.² Provision was made for the definite cessation of hostilities on the basis of the existing positions of the opposing belligerent armies. A 12 days' truce was agreed upon in order that a Neutral Military Commission, composed of representatives of the mediating States, might fix intermediate lines between the positions of the belligerent armies. The truce was to begin at 24 o'clock meridian of Cordoba, on the day on which the Commission, having arrived at the field of action, should consider itself ready to begin its mission. The Commission was to hear the belligerent commanders in order to determine the line of separation between the armies and was to decide cases of discrepancies. Once its mission was fulfilled it was so to inform the Peace Conference. On the expiration of the truce referred to, the Peace Conference was to extend it until the complete execution of the security measures provided for in Article III of the Protocol. The Neutral Military Commission was to decide as to the modifications which experience might show to be advisable in the line of separation between the armies, after hearing the military commanders of the belligerents. During the truce and its extension the lines of separation between the armies were to be maintained under the guarantees of the Peace Conference, for which purpose the Neutral Military Commission was to exercise vigilance and supervision over them.³

¹¹ See, also, protocol of the conditions of an armistice between the Allied and Associated Powers and Austria-Hungary, of Nov. 3, 1918, U. S. Treaty Vol. III, 3141, *Am. J.*, XIII, Supp., 80; supplement to that protocol, of same date, *id.*, 394; military convention between the Allies and Hungary, concluded at Belgrade, Nov. 13, 1918, *id.*, 399, also Senate Doc. No. 147, 66 Cong., 1 Sess.; military convention regulating the conditions of suspension of hostilities between the Allied Powers and Bulgaria, of Sept. 29, 1918, *Am. J.*, XIII, Supp., 402.

¹² See Lindsay Rogers, "The Relation of the Armistice and the Treaty of Versailles," *Proceedings*, Am. Soc. Int. Law, 1923, 90.

§ 647A. ¹ See Toynbee, *Survey of International Affairs*, 1933, 402, 425, where it is said: "On the 19th December, President Ayala of Paraguay responded to an urgent appeal from President Terra [of Uruguay] to both combatants to suspend hostilities immediately, by proposing an armistice which would begin at midnight on the 19-20th December and continue until midnight on the 30-31st December. The proposal was accepted by Bolivia, and for the first time for eighteen months peace reigned in the Chaco."

² Dept. of State, *Treaty Information Bulletin* No. 69, June 30, 1935, 31.

³ Art. II.

"In deference to the humane sentiments of the belligerents and mediators," firing was declared to be suspended from 12 o'clock June 14 (meridian of Cordoba).⁴ The American Chargé d'Affaires at Asunción reported at noon, June 14, 1935, his receipt of information from the Minister of National Defense that firing had ceased.⁵

The use of a neutral military commission in such relation to an armistice is of much significance. It points to the service which States not participating in a conflict may, without taking sides therein, effectively render in encouraging and making feasible a permanent cessation of hostilities.

Under Art. III the Neutral Military Commission was charged with the supervision of the execution of the security measures until they were carried out in their entirety. When these were carried out, the Peace Conference was to "declare the war to be terminated."

⁴ Art. V.

An additional Protocol of like date was as follows: "In order to give effect to the provisions of Article V of the protocol signed on this date, the High Contracting Parties request the Commission of Mediation to send the Neutral Military Commission to the scene of operations immediately. Upon the latter's arrival it shall arrange for the suspension of firing provided for in the said article V and shall begin the work of fixing the line of separation between the armies, stipulated in article II, paragraph *a*, of the principal protocol. Upon the ratification of the principal protocol by the Congresses of Paraguay and Bolivia within the period of 10 days provided therefor, the provisional suspension of firing to which the additional protocol refers shall be automatically transformed into the initial truce with a view to the definitive cessation of hostilities provided for in article II, paragraph *a*, of the principal protocol; if on the contrary such ratification does not result, the suspension of firing referred to in article V, mentioned above, shall *ipso facto* terminate."

⁵ Dept. of State Press Releases, June 15, 1935, 445.

See Technical Aspects of the Termination of War, Agreement, *infra*, § 908.

TITLE G

LAND WARFARE

1

BELLIGERENT FORCES

a

§ 648. **Belligerent Qualifications Generally.** War necessarily involves the exercise of force by large numbers of individual men. The very nature of extensive armed conflict encourages general resort to lawlessness by persons both unassociated and associated with the services of their country, who seek achievement of no public end, and utilize the occasion for the commission of wanton acts of violence. Hence, the existence of war calls for the establishment and observance of rules indicating clearly what persons are to be deemed members of the fighting force of a belligerent, and justly capable of prosecuting its cause by force of arms, and normally confining also that membership to definite groups of individuals readily known and accounted for, and indicating when their acts are to be regarded as possessing a public rather than a private character.

General agreement as to belligerent qualifications serves also to protect him who possesses them, when captured, from treatment as a bandit, and to place upon the State which he serves the responsibility for what he does in its behalf.¹

b

§ 649. **Regulations Annexed to The Hague Conventions.** *Levée en Masse.* Capacity for and actual subjection to military discipline, visibility at a distance by a distinctive emblem, the bearing of arms openly, and observance of the laws of war, are requirements with which armed forces must, at the present time, comply, in order to claim belligerent qualifications.

According to Article I of the Regulations annexed to the Hague Conventions of 1899 and 1907, respecting the Laws and Customs of War on Land, the laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

§ 648.¹ Wharton, Com. Am. Law, § 221, quoted in Moore, Dig., VII, 175.

"So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies." (§ 57, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863, Moore, Dig., VII, 173.)

See, also, War Dept. Rules of Land Warfare, 1940, Chap. 2.

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.¹

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."²

It is a wise provision, and one obviously favorable to States not possessing large standing armies, that belligerent qualifications should be deemed to be possessed by armed forces fulfilling the conditions thus prescribed, and not limited to bodies composed exclusively of professional soldiers.³

According to Article II of the Hague Regulations:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article I, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.⁴

Thus the circumstances when a so-called *levée en masse* enables participants therein to claim belligerent qualifications depends upon their taking up arms against an enemy which has not in fact occupied their territory.⁵ The Instruc-

§ 649. ¹ Malloy's Treaties, II, 2048 and 2281.

² *Id.* See, in this connection, Report of Mr. Rolin, to the Hague Peace Conference of 1899, from the Second Commission on the Laws and Customs of War on Land, J. B. Scott, Reports to Hague Conferences, 137, 140-142, where it is stated that the first two Articles of the Rules "were voted unanimously and are word for word the same as Articles 9 and 10 of the Brussels Declaration [of 1874] with the exception of a purely formal addition to the final paragraph of the first Article made on the second reading, in order to include *volunteer corps* as well as *militia* within the term *army*." It should be noted that the first three Articles of the Hague Rules of 1899, concerning belligerent qualifications, were accepted without change as the first three Articles of the Hague Rules of 1907.

See, also, Art. II of Manual on the Laws of War on Land, of the Institute of International Law, of 1880, *Annuaire*, V, 157, J. B. Scott, Resolutions, 28.

³ U. S. Army, Rules of Land Warfare, 1917, Nos. 32-35.

"This requirement [as to a distinctive sign] will be satisfied by the wearing of a uniform, or even less than a complete uniform. The distance that the sign must be visible is left vague and undetermined and the practice is not uniform. This requirement will be satisfied certainly if this sign is 'easily distinguishable by the naked eye of ordinary people' at a distance at which the form of an individual can be determined. Every nation making use of these troops should adopt, before hostilities commence, either a uniform or a distinctive sign which will fulfill the required conditions and give notice of the same to the enemy, although this notification is not required." (*Id.*, No. 33.)

See views of publicists as to belligerent qualifications contained in Joseph R. Baker and Henry G. Crocker, Laws of Land Warfare, Dept. of State, 1919, 9-25 and 26-33.

⁴ Malloy's Treaties, II, 2281.

⁵ The preamble of the Convention of 1907, to which the Regulations are annexed, contains the following significant statement: "According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

"It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice;

"On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders

tions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, announced that while no belligerent has the right to declare that it will treat every captured man in arms of a *levée en masse* as a brigand or bandit, if the people of a country or any portion of the same already occupied by an army rise against it, they are violators of the laws of war and are not entitled to their protection.⁶ So much depends, therefore, upon the fact that the invader has not been transformed into an occupant, that further agreement is believed to be necessary with respect to circumstances when such a transformation may be fairly said to have taken place.⁷ Again, there is doubtless need of a more definite arrangement than is expressed in the Hague Rules concerning the conditions to be observed by a *levée en masse* in order to assure for its members the treatment due to belligerents.⁸ The force, however, of arguments made in support of the effort to confine within narrowest limits the opportunity for the legitimate operations of such a body is weakened by the suspicion which they sometimes arouse, that the advocates are merely seeking to rid an invader of any legal restraint serving to prevent him from crushing any form of opposition by a process of sheer terrorization. The relative impotence of a *levée en masse*, under existing conditions of land warfare, to stay the progress of an invading army, should not weaken the legal standing of those who, in spite of the odds against them, thus spring to the defense of their country.

c

§ 650. **Persons Incapable of Military Discipline.** Tested by the requirements of the Hague Regulations, no legal duty appears to forbid a State to

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

"They declare that it is in this sense especially that Articles I and II of the Regulations adopted must be understood" (Malloy's Treaties, II, 2271-2272.)

"A *Levée en Masse* is a general rising of the population of a state to resist an invader. Such risings usually take place with the consent, and by the direction, of the government of the invaded state, and there may or may not be time for the movement to be organized and regulated by the government" (Geo B Davis, 3 ed., 290)

"Levies *en masse* may be of two kinds: firstly, those organized, equipped and provided with uniforms or distinctive emblems; secondly, those arising spontaneously, or with the tacit approval of the Government, or in reply to the appeal from the authorities. The members of the second class, which may include the entire population rising on the approach of the enemy, are equally with those of the first to be treated as lawful combatants, if they carry their arms openly and observe the laws of war." (Coleman Phillipson, Int. Law and The Great War, 120.)

⁶ § 52, as contained in Moore, Dig., VII, 173.

The same announcement is made in Nos. 10 and 12 of the War Dept. Rules of Land Warfare of 1940. According to No 11 thereof, "certain classes of those forming part of a *levée en masse* cannot claim the privileges accorded in 9 b. Among these are deserters from, or subjects of, the invading belligerent, and persons who are known to have violated the laws and customs of war."

⁷ According to Art. XLII of the Regulations annexed to the Hague Convention, "Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation extends only to the territory where such authority has been established and can be exercised." (Malloy's Treaties, II, 2288.)

See, also, Oppenheim, Lauterpacht's 6 ed., II, §§ 81 and 167.

⁸ For an illuminating commentary on the difficulties inherent in the problem, and their discussion in international conferences, see J. M. Spaight, War Rights on Land, 41-58.

employ and confer belligerent qualifications upon persons of any race or color, who are capable of being subjected to military discipline, and who conform in fact to the conditions prescribed. The United States, when a belligerent, has not been deterred from raising troops composed of the native inhabitants of any of its possessions, through apprehension lest such soldiers might fail to comply with those requirements.¹

Persons of whatsoever race or civilization, who are unable or unwilling to fulfill the conditions expressed in the Hague Regulations, should never be employed; and if captured by the enemy, they would not be entitled to privileges of prisoners of war. This restriction doubtless prohibits, as the late General George B. Davis has pointed out, the use of bodies of troops composed of individuals of savage or semi-civilized races whose cruel instincts lead to the perpetration of all kinds of barbarities.²

While the vast differences in the culture and degree of civilization attained

§ 650. ¹ It should be observed that if engaged in war with one or more other States, all of which like itself had accepted the Hague Convention, the United States would subject itself to the liability contained in Art. III thereof, to pay compensation ("if the case demands") for violations of the Regulations, and would assume responsibility "for all acts committed by persons forming part of its armed forces." Malloy's Treaties, II, 2278.

"The law of nations knows no distinction of color, so that the enrolling of individuals belonging to civilized colored races and the employment of whole regiments of colored troops is duly authorized. The employment of savage tribes or barbarous races should not be resorted to in wars between civilized races." (U. S. Army, Rules of Land Warfare, 1917, No. 41.)

² 3 ed., 292-293, where it is added in a footnote: "To this class belong the Bashi-Bazouks, employed by Turkey, and some of the Cossack mounted forces in the service of Russia. See, also, Risley, pp. 110, 111; Bluntschli, § 559; III Phillimore, p. 164; Woolsey, § 133; Dana's Wheaton, § 343, note 166; Creasy, pp. 429-432; VI Pradier-Fodéré, § 2727; IV Calvo, §§ 2049, 2050, 2056, 2057; Field, Int. Code, § 739; I Guelle, pp. 99-101."

See For. Rel. 1905, 621-623, respecting complaints filed by Japan with the Dept. of State, Oct. 27, 1905, alleging the employment by Russia, during the Russo-Japanese War, of irregular combatants without uniform, and the use of released criminal prisoners on the island of Saghalien. See, also, Hershey, Int. Law and Diplomacy of Russo-Japanese War, 309-311; Takahashi, Int. Law Applied to the Russo-Japanese War, 178-184.

The American negotiators of the Treaty of Ghent, in a proposal to the British plenipotentiaries, Sept. 9, 1814, declared "The employment of savages whose known rule of warfare is the indiscriminate torture and butchery of women, children, and prisoners, is itself a departure from the principles of humanity observed between all civilized and Christian nations, even in war. The United States have constantly protested, and still protest, against it, as an unjustifiable aggravation of the calamities and horrors of war. Of the peculiar atrocities of Indian warfare, the allies of Great Britain, in whose behalf she now demands sacrifices of the United States, have during the present war shown many deplorable examples. Among them, the massacre in cold blood of wounded prisoners, and the refusal of the rites of burial to the dead, under the eyes of British officers, who could only plead their inability to control these savage auxiliaries, have been repeated, and are notorious to the world. The United States might at all times have employed the same kind of force against Great Britain, and to a greater extent than it was in her power to employ it against them; but, from their reluctance to resort to means so abhorrent to the natural feelings of humanity, they abstained from the use of them until compelled to the alternative of employing themselves Indians, who would otherwise have been drawn into the ranks of their enemies. The undersigned, suggesting to the British plenipotentiaries the propriety of an Article by which Great Britain and the United States should reciprocally stipulate never hereafter, if they should be again at war, to employ savages in it, believe that it would be infinitely more honorable to the humanity and Christian temper of both parties, more advantageous to the Indians themselves, and better adapted to secure their permanent peace, tranquillity, and progressive civilization, than the boundary proposed by the British plenipotentiaries." (Am. State Pap., For. Rel. III, 715, 717.) This proposal was rejected by the British plenipotentiaries, *id.*, 739 and 741, and the American negotiators did not insist upon its insertion in the treaty. *Id.*, 741. See, also, Frank A. Updike, The Diplomacy of the War of 1812, 248, 315-316, 322.

by the several members of the international society are manifested as truly in their armed forces as elsewhere, a political entity acknowledged to enjoy statehood in that society cannot well be deemed to lack a soldiery which is capable of conforming to the requirements laid down in the Hague Regulations. Yet the acknowledged possessor of statehood may have in its service some military forces which lack the requisite capacity; if it has, they should not be employed in the field against a foreign enemy.

A moral rather than a legal obligation may be said to impel observance of a like restriction when a State engages in war with a country not familiar with accepted standards of civilization and which lacks the power and disposition to respect the law of nations in so far as it may forbid the employment of armed forces that are incapable of military discipline and are otherwise indisposed to heed such restrictions as are enunciated in the Hague Regulations.⁸ No question concerning an international obligation necessarily arises when a State embarks upon hostile measures to suppress disorders occasioned by the insurrection of uncivilized or semi-barbarous peoples who are subject to its own sovereignty. Nevertheless, on such occasions, as a consequence of its very enlightenment, the State concerned should not as a matter of public and domestic policy employ against its own nationals, save in case of absolute necessity, such armed forces as the law of nations would appear to forbid it to utilize in a war against another member of the family of nations.

d

§ 651. **Aliens.** No requirement of international law forbids a belligerent to enroll aliens in its armed forces, even though enrollment may demand of them the taking of an oath of allegiance to the belligerent sovereign, and may be deemed to be productive of expatriation by the State previously claiming them as nationals. In the earlier stages of World War I when the United States remained a neutral, numerous American citizens entered the military services of certain belligerents.¹

A State engaged in war is not deemed to be free to compel nationals of the enemy to take part in military operations against their own country, even though they were in the service of the former before the outbreak of the conflict. This restriction found recognition in Article XXIII of the Hague Regulations.² The conditions under which a belligerent may not unreasonably draft

⁸ See excellent statement in Davis, *Int. Law*, 3 ed., 293; also J. W. Garner, *Int. Law and the World War*, I, §§ 191-194.

§ 651. ¹ See *Expatriation, Oath of Allegiance to a Foreign State*, *supra*, § 383.

See convention between the United States and Great Britain, relating to the service of citizens of the United States in Great Britain and of British subjects in the United States, of June 3, 1918, U. S. Treaty Vol. III, 2650; also convention of June 3, 1918, relating to the service of citizens of the United States in Canada and of Canadians in the United States, U. S. Treaty Vol. III, 2654. See, in this connection, Lester H. Woolsey, editorial comment, *Am. J.*, XII, 824.

² Malloy's *Treaties*, II, 2285. See, also, Bonfils, 8 ed., § 1074 (3), and literature there cited.

In the award of the Tribunal selected from members of the Permanent Court at the Hague, May 22, 1909, in the Casablanca Case, between France and Germany, it was declared that it did not pertain to the Tribunal to express an opinion on the organization of the French Foreign Legion, or on its use in Morocco. G. G. Wilson, *Hague Arbitration Cases*, 87, 95,

into its service aliens who are nationals of neutral States are discussed elsewhere.⁸

e

§ 652. **Guerrilla Bands. Armed Prowlers.** The law of nations, apart from the Hague Regulations above noted, denies belligerent qualifications to guerrilla bands. Such forces wage a warfare which is irregular in point of origin and authority, of discipline, of purpose and of procedure. They may be constituted at the beck of a single individual; they lack uniforms; they are given to pillage and destruction; they take few prisoners and are hence disposed to show slight quarter. According to the late Dr. Lieber, they may be described as

self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular payroll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (*guerrilla*) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will, therefore, generally give no quarter. They are peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands.¹

Should guerrilla bands join the main armies of a belligerent, they might, for the time being, conform partially to the requirements of the Hague Regulations, but would find difficulty in complete observance thereof, particularly with respect to the exhibition of a fixed distinctive emblem recognizable as a distance. Nevertheless, Dr. Lieber was of opinion that, if captured in fair fight and open warfare, such troops should be treated as regular partisans, until special crimes,

Am. J., III, 755, 758. Concerning the case see Gilbert Gidel, "*L'Arbitrage de Casablanca*," *Rev. Gén.*, XVII, 326-407.

³ See Neutral Persons and Property within Belligerent Territory, *supra*, §§ 625-627.

¹ Misc. Writings, II, 277, quoted by George B. Davis, in "Doctor Francis Lieber's Instructions," *Am. J.*, I, 13, 16-17. According also to Dr. Lieber: "The term *guerrilla* is the diminutive of the Spanish word *guerra*, war, and means petty war, that is, war carried on by detached parties; generally in the mountains. It means, further, the party of men united under one chief engaged in petty war, which, in the eastern portion of Europe and the whole Levant, is called a *capitanery*, a band under one *capitano*. The term *guerrilla*, however, is not applied in Spain to a single man of the party; such a person is called *guerrillero*, or more frequently *partida*, which means partisan. Thus, Napier, in speaking of the *guerrilla*, in his History of the Peninsular War, uses, with rare exception, the term *partidas* for the chiefs and men engaged in the petty war against the French. It is worthy of notice that the dictionary of the Spanish academy gives, as the first meaning of the word *guerrilla*: 'A party of light troops for reconnaissance, and opening the first skirmishes.' What, then, do we in the present time understand by the word *guerrilla*? In order to ascertain the law or to settle it according to elements already existing, it will be necessary ultimately to give a distinct definition; but it may be stated here that whatever may be our final definition, it is universally understood in this country, at the present time, that a *guerrilla* party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a *guerrilla* party, to carry on what the law terms a *regular* war. The irregularity of the *guerrilla* party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering; it consists in its disconnection with the army, as to its pay, provision, and movements, and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time." (*Id.*, 15-16.)

such as murder, or the killing of prisoners, or the sacking of open places were proved upon them; "leaving the question of self-constitution unexamined."²

Differing slightly in point of occupation, if not in legal contemplation, are so-called armed prowlers who have been described as "persons of the enemy territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires."³ Such persons, regardless of any connection with the services of the belligerents from whose lines they emanate, are not entitled, if captured, to the privileges of prisoners of war.

f

Divisions of Belligerent Forces

(1)

§ 653. **Combatants.** According to Article III of the Hague Regulations, the armed forces of belligerent parties are said to consist of combatants and non-combatants. In case of capture by the enemy, both have a right to be treated as prisoners of war.¹ The combatant forces, which possess the requisite belligerent qualifications, embrace not only forces attached to the main armies, but also so-called "partisans" which have been described as "soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy." If captured they are said to be entitled to all the privileges of the prisoner of war.² Within the same category may be fairly included any detachable force, however small, operating on land or through the air.

(2)

§ 654. **Non-combatants.** Article III of the Hague Regulations does not purport to signify that non-combatants are armed forces of a belligerent, but rather that belonging to its armed forces are individuals or groups thereof which are essentially non-combatant. Such persons who are attached to a belligerent force are in special need of protection in case of capture by the enemy. The non-

² *Am. J.*, I, 13, 16-17.

"Men and bodies of men, who, without being lawful belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper." (War Dept. Rules of Land Warfare, 1940, No. 351.) Compare No. 356, *id.*, 1934.

³ *Id.*, 1940, No. 352.

"*Marauders.* Marauders are individuals, either civilians or soldiers who have left their corps, who follow armies on the march or appear on battlefields, either singly or in bands, in quest of booty, and who rob, maltreat, or murder stragglers or wounded, or pillage the dead. Their acts are considered atrocities, and the severest punishment is imposed after trial and conviction." (*Id.*, 1940, No. 353.)

§ 653. ¹ Malloy's Treaties, II, 2282.

² § 81, Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, Moore, Dig., VII, 174.

See, also, War Dept. Rules of Land Warfare, 1940, Chap. 2.

combatant in general, when not a member of a belligerent force, as his name indicates, bases his claim to protection, in the event of his capture, upon his not being a participant. Respect for his claim is proportional to the truth of his assertion. If he takes part in the contest and is captured, he loses the benefit of his former status, and finds himself incapable of securing treatment accorded a prisoner of war.¹ The so-called non-combatant member of an armed force is in a sense a direct participant, even though he commits no essentially hostile act towards the enemy. By reason of his connection with that force, he becomes entitled to protection as a prisoner of war in case he is captured. It may be unfortunate that the term non-combatant is applied to him. The purpose of the appellation is, however, clear — namely, to signify that every individual really belonging to and a part of a legitimate fighting force is entitled to quarter; and also that such a force necessarily consists of fighters and non-fighters.

The Hague Regulations do not specify what persons may be fairly deemed to be non-combatant members of an armed force of a belligerent, and hence entitled to treatment as such. It is believed that persons forming any part of a corps or staff ministering directly to the needs of such a force and clearly belonging to it, should be included within this class. They would embrace, for example, the personnel of the medical, veterinary, legal, commissary and pay corps, as well as chaplains, and civil servants.² Such individuals are to be contrasted with persons who follow an army without belonging to it. The latter are essentially non-combatant, and, if possessed of satisfactory certificates from the military authorities of the army which they accompany, enjoy a status which their relation towards that army does not vitiate. If detained by the enemy into whose hands they fall, they are entitled to treatment as prisoners of war. Within this category are newspaper correspondents and reporters, sutlers and contractors. According to Article XIII of the Hague Regulations, they are, if detained by the enemy in whose hands they fall, "entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying."³

§ 654.¹ Baty and Morgan, *War, Its Conduct and Legal Results*, 172.

"The word 'non-combatant' is used in two different senses in war law. (1) It is used of the non-military inhabitants of a country which is the seat of war, who take no part in the conflict, and who, if they feel the effect of the backwash of the war, only do so because of the ample sea-room which belligerents require. (2) It is used as in this Article [III of the Hague Regulations], of the troops, commissioned and enlisted, forming part of the regular, militia, or volunteer organisation whose function is ancillary to that of the fighting men and who do not themselves oppose the enemy arms in hand." (J. M. Spaight, *War Rights on Land*, 58.)

² Declaring the American Red Cross and the Young Men's Christian Association to be a part of the military and naval forces of the United States, see *United States v. Nagler*, 252 Fed. 217.

³ Malloy's *Treaties*, II, 2283.

See views of publicists in Joseph R. Baker and Henry G. Crocker, *Laws of Land Warfare*, 83-88.

According to War Dept. Rules of Land Warfare, 1940, No. 76 g: "*Inhabitants*. — Persons whose services are of particular use to the hostile army or its government, such as the higher civil officials, diplomatic agents, couriers, guides, etc., also all persons who may be harmful to the opposing state while at liberty, such as prominent and influential political leaders, journalists, local authorities, clergymen, and teachers, in case they incite the people to resistance, may be made prisoners of war."

"It is obvious that the terms 'civilian population' and 'civilian' as used in the reparation

The armed forces of a belligerent are likely to embrace women who may be active participants in a variety of ways. Whether a female member of those forces is to be deemed a combatant or non-combatant, must depend upon the character of the service which she renders, rather than upon the matter of her sex. Yet if when captured by the enemy she is engaged either in preparing soup or shooting at the hearts of men with darts that are not of cupid's making, she is entitled to be dealt with as a prisoner of war, and is to be treated with the regard due to her sex.⁴

The International Society is today less concerned with the distinction between the combatant and non-combatant status of members of belligerent forces than with the solution of the question concerning the extent to which persons who have no direct connection with such forces, and who in a variety of ways endeavor to assist the belligerent to whom they owe allegiance or within whose territory they dwell, are entitled to treatment as favorable as that accorded prisoners of war, in case they fall into the hands of the enemy.

At the present time, the civilian population of a belligerent may in fact participate actively in the conflict by conduct that is directly or indirectly associated with military activities. The individual members of that population may, nevertheless, be regarded as strictly non-combatant, so long as they refrain from the commission of affirmative hostile acts directed against enemy forces. In case, however, they are guilty of such conduct as, for example, by attacking enemy parachutists, the individual actors doubtless subject themselves to summary penalization if captured by the enemy. A different situation seemingly presents itself when the individual has recourse to some forms of defensive conduct which, although designed to thwart the enemy, offer no violence to the persons of members of his forces. Thus, a fisherman off the coast, after sighting enemy aircraft approaching the same, may, in fact communicate a warning to his country that serves to frustrate aerial attack; or some so-called "air-spotters" from an elevated position on land may render a like service. It may be greatly doubted whether such acts afford the enemy grounds for penalizing the actors, if captured, by treating them less favorably than prisoners of war. Although the character and form of their participation justifies the distinction suggested, none can doubt the wisdom of incorporating in governmental organizations and of furnishing with appropriate credentials and visible markings, individuals who are expected to fulfill such defensive functions in behalf of their country when at war. The desirable governmental connection and authorization would not entail the making of such individuals non-combatant members of military forces. They could, however, by the process suggested, be transformed into public serv-

provisions of the Treaty of Versailles were intended to describe a class of nationals common to all of the Allied and Associated Powers. The true test in determining what nationals of each power belong to this class is to be found in the object and purpose of their pursuits and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them." (Parker, *Umpire*, in case of *Christian Damson v. Germany*, Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions, 1925, 258, 261-262.)

⁴ See Art. 1 of Geneva Convention of July 27, 1929, concerning Prisoners of War, U. S. Treaty Vol. IV, 5229. Also, in this connection, *infra*, § 675.

ants, empowered and organized to safeguard the State through the rendition of an essentially public service.

2

BELLIGERENT MEASURES AND INSTRUMENTALITIES

a

§ 655. **Permissible Violence Generally. Military Necessity.** Military necessity, as understood by the United States, justifies a resort to all measures which are indispensable to bring about the complete submission of the enemy as soon as possible, by means of regulated violence and which are not forbidden by the modern laws and customs of war.¹ It becomes important, therefore, to observe what those laws and customs are deemed to forbid, and conversely, what they are believed to permit.

According to the War Department Rules of Land Warfare of 1940, which in relation to the matter reproduced in substance those of 1917, military necessity admits of —

a. All direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war.

b. The capturing of every armed enemy, and of every enemy of importance to the hostile government, or of peculiar danger to the captor.

c. The destruction of property, and obstruction of ways and channels of traffic, travel, or communication, and withholding of sustenance or means of life from the enemy.

d. The appropriation of whatever the enemy's country affords that is necessary for the subsistence and safety of the army.

e. Such deception as does not involve the breaking of good faith, either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist.²

Military necessity does not, it is said, admit of cruelty — that is, the infliction of suffering merely for spite or revenge; nor of maiming or wounding except in combat; nor of torture to extort confessions. It does not admit of the use of poison in any way nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy.³

From the foregoing statement it is apparent that military necessity is in theory based upon the needs of a belligerent force and at the same time takes

§ 655. ¹ War Dept. Rules of Land Warfare, 1940, Nos. 22 and 23. See, also, *id.*, No. 4.

Observe the contrasting phraseology of Section XIV, Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863 (Moore, Dig., VII, 178), in which it is stated that military necessity "consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."

² No. 24.

³ *Id.*, No. 25, where it is added, "the practice of recent years has been to regard the prohibition against the use of poison as not applicable to the use of toxic gases."

cognizance of the equities of those whom it may oppose. In estimating their relative values it heeds the requirements of the commander of an army in securing the objects of war and in protecting the safety of his own troops. In this respect it appears to open broad and convenient avenues of procedure, the use of which implies no wrongfulness of conduct. On the other hand, as an instrument of justice in a scheme of justice it necessarily pays respect to the equities of those, both combatant and non-combatant, belligerent and neutral, against whom force is employed. For that reason it never overrides any solid claim to protection from injustice.

In a word, military necessity, as understood by the United States, does not purport to indicate circumstances when a belligerent commander or State is free from a duty to observe the law of nations.⁴ It does not embody a formulation of excuses for lawlessness. It does not signify the use of force in opposition to law. It betokens rather the extent and mode of violence which, in accordance with law, and therefore with propriety, may, under varying circumstances, be employed in the prosecution of war. If the term military necessity implies great latitude, and is invoked by way of excuse in justification of harsh measures, it is because the law of nations itself permits recourse thereto in case of great need, and allows a belligerent commander to be the judge of the existence and sufficiency of the need.

An impressive although unfortunate aspect of international arrangements respecting land warfare is the tendency to cause the operation of restrictions of acts regarded as normally improper, to be dependent upon the judgment of the individuals whom they purport to restrain. This tendency breeds confusion of thought, inasmuch as it serves to give an appearance of lawlessness to acts which in reality conform to what is required. It allows too much to rest upon the character, temperament, and training of a commanding officer, and permits, in consequence, opposing armies, under similar circumstances, to resort to widely differing practices without exposing either to just charges of misconduct.⁵

b

§ 656. Sieges and Bombardments. A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of iso-

⁴ It thus differs sharply from the German theory of *Notrecht* which has been described as a "negation of law" superimposed by the strategic interest of a belligerent. See Ch de Visscher, *Belgium's Case: A Juridical Inquiry*, London, 1916, Chap. II. The German Chancellor, Herr von Bethmann-Hollweg, made grim avowal of the practical application of this principle when he declared, Aug. 4, 1914 "Necessity knows no law. Our troops have occupied Luxemburg, and perhaps have already entered Belgian territory. Gentlemen, that is a breach of international law. . . . We have been obliged to refuse to pay attention to the justifiable protests of Belgium and Luxemburg. The wrong — I speak openly — the wrong we are thereby committing we will try to make good as soon as our military aims have been attained. He who is menaced, as we are, and is fighting for his all can only consider how he is to hack his way through." (Report of Commission of Responsibilities, Paris Conference, 1919, citing *Stenographische Berichte über die Verhandlungen des Reichstags, Diens-tag*, 4 August, 1914, *Am. J.*, XIV, 95, 111.)

⁵ See, for example, Art. XXIII (g), Hague Regulations annexed to the convention of 1907, concerning the Laws and Customs of War on Land, Malloy's Treaties, II. 2285.

lation to cause its surrender.¹ The propriety of attempting to reduce it by starvation is not questioned.² Hence the cutting off of every source of sustenance from without is deemed legitimate.³ It is said that if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender.⁴

At the present time a siege is commonly supplemented by bombardment.⁵ There is no rule of law which compels the commander of an investing force to permit the population, including women, children, aged, sick, wounded, subjects of neutral powers, or temporary residents, to leave the besieged locality, even when a bombardment is about to commence. It is entirely within the discretion of the besieging commander whether he will permit them to leave and under what conditions.⁶

According to the Regulations annexed to The Hague Convention of 1907, Respecting the Laws and Customs of War on Land, it is forbidden to attack or bombard, by any means whatever, towns, villages, dwellings or buildings, which are undefended.⁷ Obviously, a town may be in fact defended by instrumentali-

§ 656.¹ "Assault is the rush of an armed force upon enemy forces in the battlefield, or upon intrenchments, fortifications, habitations, villages, or towns, such rushing force committing every violence against opposing persons and destroying all impediments. Siege is the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication for the purpose of starving them into surrender or for the purpose of attacking the invested locality and taking it by assault. Bombardment is the throwing by artillery of shot and shell upon persons and things. Siege can be accompanied by bombardment and assault, but this is not necessary, since a siege can be carried out by mere investment and starvation caused thereby. Assault, siege, and bombardment are severally and jointly perfectly legitimate means of warfare." (Oppenheim, 2 ed., II, § 155.)

See, also, J. M. Spaight, *War Rights on Land*, Chap. V; *Laws of Land Warfare*, prepared by Joseph R. Baker, and Henry G. Crocker, Dept. of State, 1919, 198-213.

² "War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjugation of the enemy." (§ XVII General Orders, No. 100, of 1863, quoted in No. 173, note I, *Rules of Land Warfare*, 1917.)

³ According to War Dept. *Rules of Land Warfare*, 1940, No. 57, "The commander of the investing force has the absolute right to forbid all communication between the besieged place and the outside. The application of this rule to diplomatic envoys of neutral powers is unsettled."

No. 5 a of the same Rules provides that "Diplomatic agents of a neutral power should not be prevented from leaving a besieged place before hostilities commence. This privilege cannot be claimed while hostilities are in progress. The same privileges should properly be accorded to a consular officer of a neutral power. Should they voluntarily decide to remain, they must undergo the same treatment as other inhabitants."

⁴ See *id.*, No. 55.

⁵ See, for example, the siege of Port Arthur by Gen. Baron Nogi, in 1904, Takahashi, *Int. Law Applied to the Russo-Japanese War*, 195-208.

⁶ The language of the text is that of No. 51, War Dept. *Rules of Land Warfare*, 1940. See, also, No. 218, *Rules of Land Warfare*, 1917, *citing* action of Gen. Scott in refusing further truce to consuls at Vera Cruz, Moore, *Dig.*, VII, 180, Scott, *Autobiography*, II, 426-428, and *quoting* communication of Gen. Baron Nogi, to the commander of the Russian forces at Port Arthur, Aug 16, 1904.

"Persons dwelling in the zone between the opposing forces in the first stages of siege are treated as inhabitants of the invaded locality." (War Dept. *Rules of Land Warfare*, 1940, 1934, No. 53.)

⁷ Art. XXV, Malloy's *Treaties*, II, 2286. See, also, Report of Mr. Rolin, to the First Hague Peace Conference of 1899, from the Second Commission of the Laws and Customs of War on Land, J. B. Scott, *Reports to Hague Conferences*, 137, 146.

"The addition of the words 'by whatever means' was for the purpose of making it clear that the bombardment of these undefended localities from balloons or airplanes is prohibited." (War Dept. *Rules of Land Warfare*, 1940, No. 46.)

ties well outside of the limits thereof, and despite the absence of fortifications in close proximity to it.⁸ Again, an unfortified place possessing a military force or a population rising in armed resistance may fairly be regarded as though it were defended. According to Westlake: "A place cannot be said to be undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open for the enemy to enter."⁹ France appeared to pay that price for the immunity of Paris from bombardment in June, 1940.¹⁰

A place open to or for the enemy may, nevertheless, contain plants for the manufacture of munitions, military stores, arsenals or other buildings of a like nature. The right of the enemy to destroy them seems to be obvious, and the mode of so doing, whether by bombardment or otherwise, to depend upon whether serious effort is made to safeguard them from attack. On the other hand, it is not believed that the mere presence of such works, if not sought to be protected, would transform an open town into a defended place, and expose it to treatment as such.¹¹

The Hague Regulations do not appear to forbid the bombardment of places which are unfortified or otherwise unable to oppose attack, if they are in fact by any process defended.¹² This would be true in the case of a town itself

"Individuals who attempt to leave or enter a besieged place without obtaining the necessary permission are liable to be fired on and may be sent back into the besieged place or detained and put on trial." (*Id.*, No. 54.)

"It is not necessary to cease or relax fire because the enemy sends women and children out of his lines in order to get them to a place of safety, but fire must not be intentionally opened in their direction." (*Id.*, No. 56.)

⁸ Those instrumentalities may be of various kinds, embracing land batteries, submarine mines sown in adjacent waters, or air bases established at a considerable distance from the town concerned.

⁹ Int. Law, 2 ed., II, 182, in relation to naval warfare.

See instances of the deliberate bombardment of undefended places by German forces in the course of World War I, contained in Annex to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, 46.

Also J. W. Garner, Int. Law and The World War, I, §§ 269-272.

¹⁰ On June 13, 1940, the American Ambassador to France transmitted the following message to the American Embassy in Berlin (through the American Legation at Bern) for immediate communication to the German Government: "Paris has been declared an open city. General Hering, military commander of Paris district, is withdrawing his army which has been defending Paris. All possible measures are being taken to assure the security of life and property in the city. The *gendarmérie* and police are remaining and the firemen also remaining to prevent fires. General Dentz is remaining as commander of the Paris area but without any troops simply with the *gendarmérie* and the police." (Dept. of State Bulletin, June 15, 1940, 646.)

¹¹ According to No. 47 of the War Dept. Rules of Land Warfare, 1940, defended places include the following:

"(a) A fort or fortified place.

"(b) A town surrounded by detached forts, which is considered jointly with such forts as an indivisible whole.

"(c) A place that is occupied by a combatant military force or through which such a force is passing. The occupation of such a place by sanitary troops alone is not sufficient to make it a defended place."

See Hague Convention of 1907, Respecting Bombardment by Naval Forces in Time of War, Malloy's Treaties, II, 2314.

¹² "There is no prohibition of general application among the great powers against the discharge of authorized projectiles from aircraft against combatant troops or defended places." (War Dept. Rules of Land Warfare, 1940, No. 48.)

incapable of offering any resistance, if actually defended by guns mounted outside of its limits and not in close proximity thereto. It is believed that a place itself incapable of resistance should in general be immune from bombardment, and that the validity of the claim should depend upon the impotence of the inhabitants to do harm to the enemy, rather than upon the absence of benefits sought to be derived by them from instruments of defense wheresoever located.¹³ In a word, attack and bombardment should, on principle, be confined so far as possible to places possessing means of resistance, or strategic advantages utilized as such by the possessors of them.¹⁴

Before undertaking a bombardment, the commander of the attacking force is obliged, according to The Hague Regulations, except in case of open assault, to do all that lies in his power to give warning to the authorities.¹⁵ "This rule is understood to refer only to bombardments of places where parts of the civil population remain."¹⁶ The War Department Rules of Land Warfare of 1940, announce as an "American rule," that while it is no infraction "of the written law of war" to omit thus to inform the enemy, when belligerents are not subject to the treaty embracing the Hague Regulations, the commanders of American forces "when admissible, will inform the enemy of their intention to bombard a place, so that the noncombatants, especially the women and children, may be removed before the bombardment commences."¹⁷

It is declared in the Hague Regulations that in sieges and bombardments every precaution is to be taken to spare, as much as possible, buildings devoted to religious worship, to the arts and sciences, to charity, and to hospitals and places where the sick and wounded are collected, and to historical monuments, provided that they are not used at the same time for military purposes. The besieged are enjoined to indicate these edifices or places by some particular and visible signs, which should previously be notified to the assailants.¹⁸

To bombard deliberately a hospital,¹⁹ or church or other building within the same category which serves no strategic purpose to the enemy, and is put to no military use by it, is an offense which, however flagrant, was frequently committed by the forces of Germany and her allies in the course of World War I.²⁰

¹³ Obviously, however, such a claim would lack merit if the place were in such proximity to a legitimate object of attack as to be in danger of injury when that object was bombed.

¹⁴ Thus a high tower or lofty spire in an undefended place, if utilized as a means of observing the movements of an approaching hostile force, might be fairly destroyed by the latter.

¹⁵ Art. XXVI, Malloy's Treaties, II, 2286.

See Coenca Brothers v. Germany, Greco-German Mixed Arbitral Tribunal, 1927, T.A.M., VII, 683, McNair and Lauterpacht, *Annual Dig.*, 1927-1928, Case No. 389, where this article was applied in testing the propriety of the bombardment of Salonica by German air forces in January, 1916.

¹⁶ War Dept. Rules of Land Warfare, 1940, No. 49.

¹⁷ *Id.*, No. 50. Cf. No. 217, Rules of Land Warfare, 1917.

¹⁸ Art. XXVII.

¹⁹ See J. M. Spaight, *War Rights on Land*, 184.

²⁰ See instances of the deliberate bombardment of hospitals, in Appendix I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, 51; also Report of the Commission (of which Messrs. Robert Lansing and James Brown Scott were the American members), *id.*, 17.

Concerning the bombardment of Rheims Cathedral, Sept. 17-19, 1914, see memorandum by the Vicar-General, document No. 105, on Germany's Violations of the Laws of War, 1914-1915, compiled under the auspices of the French Ministry of Foreign Affairs, translated by J. O. P. Bland, New York, 1915.

It is believed that the sense of outrage inspired by such acts served not merely to add to the burden imposed upon Germany in the treaty of peace of Versailles, but also establish the conviction throughout the States which were not its allies, that the German mind accepted generally as flawless the theory that the caprice or malice of a commanding officer called for no restraint, in the course of the bombardment of any place which was technically defended.²¹

An attacking force may be unable to detect, or if detecting them, to spare buildings or monuments normally entitled to special protection.²² Obviously, their use for military purposes destroys the foundation of any just claim to immunity.²³ No duty is imposed upon the occupant of a bombarded place to give assurance to an attacking force that structures adapted for military use by reason of their height or location are not and will not be so employed.²⁴

As applied to aerial warfare the Hague Regulations must be regarded as singularly inept. They might be interpreted as permitting an attack by air upon what were not legitimate military objectives, and of people or things incapable of offering resistance, on the ground that the latter were in fact defended by instrumentalities perhaps remote therefrom, and even though those instrumentalities could offer no impediment to the operations of aircraft when superjacent to what was bombed. To allow aircraft to attack at will an area known to be bereft of means of opposing the attackers, as by anti-aircraft devices, and containing no military objectives, is repugnant to justice, and can find no place in a system designed to promote it. No license should ever be yielded to the use of a particular instrumentality as a means of terrorizing or slaughtering a helpless populace not endeavoring to oppose it. The term "undefended places" no longer chiefly betokens a condition of belligerent restraint; it has become rather the cloak for unbridled excesses by those seeking an excuse therefor.²⁵

C

§ 657. Seizure, Destruction and Devastation of Enemy Property. The right of a belligerent State through a military commander to destroy or seize property of the enemy is of vast importance and yet capable of grave abuse. Its exercise is forbidden by The Hague Regulations of 1907, except when destruction or seizure is "imperatively demanded by the necessities of the war."¹ As

²¹ Admiral Sims expressed the interesting opinion that German submarine attacks on enemy hospital ships marked a deliberate attempt to arouse the sensibilities of the Allies, so as to impel them to protect those vessels by means of destroyers and thus diminish the number of the latter available for the protection of transports conveying men and supplies.

²² See, for example, correspondence in December, 1904, between Gen. Baron Nogi, besieging Port Arthur, and Gen. Stoessel, commanding the besieged place, contained in Takahashi, *Int. Law Applied to the Russo-Japanese War*, 195-200. See, also, the account given by Gen. Scott of the siege of Vera Cruz, in March, 1847, Scott, *Autobiography*, II, 426-428, Moore, *Dig.*, VII, 180.

²³ "The besieging forces are not required to observe the signs indicating inviolability of buildings that are known to be used for military purposes, such as quarters for officers and men, observatories, or signaling stations" (War Dept. Rules of Land Warfare, 1940, No. 60.)

²⁴ Practical difficulties in the way of giving such an assurance and of convincing the enemy of its value are not to be underestimated. Nevertheless, such an achievement appears to offer the only means of making really safe buildings or places of the type described in the text.

²⁵ See Aspects of Aerial Bombardment, *infra*, § 663.

§ 657. ¹ Article XXIII (g).

such an officer is the judge of the existence of the requisite necessity, it is doubtless important to endeavor to observe the circumstances when he may be regarded as reasonably rather than arbitrarily resorting to either form of action. This task presents, however, an insurmountable difficulty because of the sharply divergent views of military men of differing races, traditions, and training. It is highly improbable, for example, that the judgment of a Japanese officer would coincide with that of an American commander in questioning the propriety of a particular act of destruction, or that the former would share the reluctance of the latter to seize property within his reach. Rules of an international convention are for the guidance of armies of all of the contracting parties, and hence become abortive when failing to impose upon the forces of each equal restraint from what is sought to be forbidden. Provisions which, therefore, extend in terms wide latitude to commanding officers, are bound, in the stress of war, to receive a variety of interpretations, and so to be productive of acts which, however savoring of injustice, are not regarded by the actors or their Governments as an infringement of any contractual duty. The Hague Regulations with respect to the seizure and destruction of enemy property appear to be insufficient.²

It seems to be acknowledged that a commanding officer may seize or destroy enemy property which, unless seized or destroyed, presents an obstacle to a military operation or jeopardizes the safety of his troops. This principle may be fairly invoked in offensive or defensive movements. It is applicable to a variety of situations less obvious to the civilian than the soldier. It finds expression in the Instructions for the Government of the Armies of the United States in the Field, of 1863,³ and again in the Rules of Land Warfare of 1917,⁴ as well as in those issued by the War Department in 1940,⁵ and will be invoked by American officers as occasion arises. Hence it is not unreasonable to refer to the privilege as one of which the normal user is not exceptional. It is, nevertheless, important to bring home to a belligerent commander a sense of the wrongfulness of seizure or destruction when there is no imperative demand therefor. Possibly this might be accomplished by the specification of certain acts rarely to be deemed capable of removing a military obstacle or of preserving the safety of a force, and of others never to be held to possess such a quality.⁶

² If greater and more uniform restraint is to obtain hereafter among belligerent States, it will be due in part to forms of general agreement which, on the one hand, advert to the reasons justifying seizure or destruction of enemy property, and on the other, state with precision the limits of the right, and prohibit definitely certain conduct never to be deemed a reasonable exercise of it.

See War Dept. Rules of Land Warfare, 1940, No. 24 (c).

³ Section XV, General Orders, No. 100, April 24, 1863, Moore, Dig., VII, 178.

⁴ No. 332.

⁵ No. 314, where it is declared: "The rule is that in war a belligerent may destroy or seize all property of whatever nature, public or private, hostile or neutral, unless such property is specifically protected by some definitive law of war, provided such destruction or seizure is imperatively demanded by the necessities of war."

See, also, *Ford v. Surget*, 97 U. S. 594, 606; *Juragua Iron Company v. United States*, 212 U. S. 297, 305-307; *Herrara v. United States*, 222 U. S. 558.

⁶ The task of specification is a military rather than a legal one, the function of the lawyer being merely to point out the general principle which the soldier should endeavor to observe. For the civilian without military training or experience to lay down hard and fast rules for the guidance of armies in the field is to assume a rôle as impressive as that of the clergyman who ventures to prescribe the diet of his parishioners.

The Hague Regulations of 1907 declare that the pillage of a town or place, even when taken by assault, is prohibited; and the military occupant is subjected to a like prohibition.⁷

According to the War Department Rules of Land Warfare of 1940, all destruction of property not commanded by the authorized officer, all pillage or sacking, even after taking a town or place by assault, are prohibited under the penalty of death, or such other severe punishment as may seem adequate to the gravity of the offense.⁸ The wanton destruction of property must ever be regarded as contrary to international law.⁹ That, for example, of the City of Washington by British forces in the course of the War of 1812, was an instance which it is believed that all enlightened Englishmen must now condemn as vigorously as did Sir James Mackintosh in the House of Commons, on April 11, 1815.¹⁰

One form of destruction — the general devastation of an area within enemy territory — deserves consideration. It is believed that the necessity adequate to justify recourse to such procedure must be one connected with some immediate military operation.¹¹ Recourse thereto would not be justified at the present time, according to American or British opinion, apart from the requirements of the Hague Regulations, as a general measure to terrorize the enemy or weaken his economic position.¹² It remains for expert military opinion to indicate the circumstances when devastation may be fairly regarded as a necessary adjunct of an existing operation. Even when it possesses such a character, devastation should never be permitted to constitute a deliberate effort to cast a permanent or long-enduring blight on the land. To render its fields sterile, its waters poisonous and the area long incapable of sustaining human life must be deemed in-

⁷ Art. XXVIII, Malloy's Treaties, II, 2286; also Art. XLVII, *id.*, 2289. Also, War Dept. Rules of Land Warfare, of 1940, No. 61.

⁸ No. 330.

⁹ See Borchard, Diplomatic Protection, 261, note 2, for list of cases where awards have been made by arbitral tribunals for acts of wanton destruction and pillage.

¹⁰ Wharton, Dig., III, 335, citing Hansard, Parl. Debates, 526, and quoted in Moore, Dig., VII, 200. See President Madison, proclamation, Sept. 1, 1814, Richardson's Messages, I, 545, Moore, Dig., VII, 200.

See, also, Retaliation, *infra*, § 667.

¹¹ It is well said in No. 324 of the War Dept. Rules of Land Warfare of 1940: "As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army."

¹² *Id.*

German opinion appears to be otherwise. Thus Prof. Lueder declared: "That ravage, burning, and devastation, even on a large scale, as of whole neighborhoods and tracts of country, may be practiced where it is not a question of any particular determinate result or strategic operation, but only of more general measures, as in order to make the further advance of the enemy impossible, or even to show him what is war in earnest when he persists in carrying it on without serious hope, and so compel him to make peace — this cannot be denied in cases of real necessity, as of a well-grounded *kriegsraison*. But it is only in such cases that it cannot be denied, and if measures of that kind are taken otherwise than under the most extreme compulsion, they are great and inhuman offenses against international law." (In Holtzendorff's *Handbuch des Völkerrechts*, IV, Sec. 114, p. 484, as quoted in Westlake, Collected Papers, 246.) Prof. Westlake added by way of comment that "it need not be greatly feared that Prof. Lueder's own Government will ever give effect to his doctrine by ordering the devastation of a whole region as an act of terrorism." (*Id.*, 247.) What German forces were ordered to do in France in 1917 was not anticipated.

tolerable, because of the entire absence of any connection between such an achievement and the military operations of the devastator.¹³

An army operating in the field, whether or not in enemy territory, is obviously entitled to a freedom of action with respect to seizure and destruction that is not enjoyed during the belligerent occupancy of a hostile region over which complete control has been gained by force. It is not until such a place is invaded or there occurs an uprising of the inhabitants, that the occupant finds himself in the position of a participant in an offensive or defensive operation. Thus it is that the varied and numerous restrictions imposed upon him with respect to the treatment of enemy property are not necessarily applicable to the conduct of a mobile force actively participating in a hostile movement.¹⁴

d

§ 658. **Measures of Concentration.** As a measure of war and for the purpose of cutting off supplies from the enemy, a belligerent would appear to have the right to cause the agricultural inhabitants within its own domain to be concentrated within specified places. Regardless of their military efficacy, such measures fail to possess international significance, except in so far as the persons or property of neutrals are thereby affected.

In 1897, Spanish authority had recourse to such procedure in Cuba. "The productive districts controlled by the Spanish armies were depopulated. The agricultural inhabitants were herded in and about the garrison towns, their lands laid waste and their dwellings destroyed."¹ Against this policy of devastation the United States made vigorous protest because the interference with the elementary rights of human existence tended to inflict suffering on innocent non-combatants, to destroy the value of legitimate investments, and to extinguish the natural resources of the country in the apparent hope of crippling the in-

¹³ The devastation by a German army of a wide area of French territory in the spring of 1917 is understood to have been designed not merely to safeguard the retreat of a large force, or to interfere with the operations of the enemy, but also, as a distinct war measure, to render the land as uninhabitable for man as it lay within the power of the devastator to make it.

See instances of wanton devastation and destruction of property by German, Austrian and Bulgarian forces in World War I, contained in Appendix I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, 44.

See also Garner, *Int. Law and The World War*, I, §§ 206-213, and documents there cited.

¹⁴ The chief function of an army in the field is to fight, while that of the belligerent occupant is to administer what has been won. Hence the restrictions imposed upon the former differ sharply in design and operation from those applicable to the latter. The reason for the distinction is simply the fact that such an occupant does not need to make use of the same amount or kind of force that an army in the field may be obliged at any moment to exercise. Thus it is that The Hague Regulations of 1907 confine to Section III, Arts. XLII-LVI, entitled "Military Authority over the Territory of the Hostile State," the several injunctions respecting the treatment of property, save the prohibition of pillage, which is also set forth in an earlier section (Art. XXVIII), and the appeal for restraint in Article XXIII (g). Practically the same theory prevailed in the plan of the Instructions for Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, a code which, notwithstanding its title, made provision for the duties of the belligerent occupant, and also in that of the subsequent Rules of Land Warfare.

§ 658. ¹ President McKinley, Annual Message, Dec. 6, 1897, *For. Rel.* 1897, xii, Moore, *Dig.*, VII, 212.

surgents. Hundreds of American citizens were among the thousands of *reconcentrados* whose death from starvation or pestilence was saved only by relief furnished by American agencies.² Even this aid failed to prevent great loss of life. The helplessness of the authorities of towns, themselves virtually bankrupt, to give relief to the thousands forced upon them, produced inevitable hardship, to which was superadded extermination by starvation.³ This cruel and arbitrary mode of applying severe measures not purporting to be related to the operations of military forces, but rather to be employed as a substitute therefor, accounted for the protests of a foreign State whose nationals were among the victims of oppression.⁴

The foregoing case illustrates the abuse of a belligerent right which in theory might be exercised in suppressing insurrection or in a foreign war without impropriety. It is conceivable that in aid of a military operation of an army in the field, the concentration of the inhabitants of the territory for the time being under military control, might be reasonably effected, provided adequate steps were taken to safeguard the non-combatants involved from hunger and pestilence.⁵

e

§ 659. **Stratagems.** "Absolute good faith with the enemy must be observed as a rule of conduct; but this does not prevent measures such as using spies, or inducing the enemy's soldiers to desert, surrender, or rebel. In general, a belligerent may resort to those measures for mystifying or misleading the enemy, against which the enemy ought to take measures to protect himself."¹ Thus "the

² Mr. Sherman, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister to the United States, June 26, 1897, For. Rel. 1897, 507, Moore, Dig., VII, 213, in which it was also said: "Against these phases of the conflict, against this deliberate infliction of suffering on innocent noncombatants, against such resort to instrumentalities condemned by the voice of humane civilization, against the cruel employment of fire and famine to accomplish by uncertain indirection what the military arm seems powerless to directly accomplish, the President is constrained to protest in the name of the American people and in the name of common humanity. The inclusion of a thousand or more of our own citizens among the victims of this policy, the wanton destruction of the legitimate investments of Americans to the amount of millions of dollars, and the stoppage of avenues of normal trade—all these give the President the right of specific remonstrance, but in the just fulfillment of his duty he cannot limit himself to these formal grounds of complaint. He is bound by the higher obligations of his representative office to protest against the uncivilized and inhumane conduct of the campaign in the island of Cuba. He conceives that he has a right to demand that a war, conducted almost within sight of our shores and grievously affecting American citizens and their interests throughout the length and breadth of the land, shall at least be conducted according to the military codes of civilization."

³ See Same to Same, Nov. 6, 1897, For. Rel. 1897, 509, Moore, Dig., VII, 214.

⁴ For. Rel. 1897, 510, Moore, Dig., VII, 215, indicating the adoption by Gen. Blanco, the successor of Gen. Weyler as Governor General of Cuba, of measures for the organization of extensive zones of cultivation, for furnishing work and food, and otherwise improving the lot of the *reconcentrados*.

⁵ Such a right would not excuse the internment of enemy civilians under inhumane conditions, a practice to which Austrian, Bulgarian and German authorities had recourse during World War I. See instances contained in Appendix I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, p. 36.

Concerning the concentration camps established by Great Britain during the South African War, see Oppenheim, 2 ed., II, 191, note 1, and authorities there cited.

§ 659.¹ War Dept. Rules of Land Warfare, 1940, No. 38.

According to Art. XXIV of the Regulations annexed to the Hague Convention of 1907

ruses of war are legitimate so long as they do not involve perfidy or treachery on the part of the belligerent resorting to them. They are, however, forbidden if they contravene any generally accepted rule.”²

It is said that among legitimate ruses may be counted “surprises, ambushes, feigning attacks, retreats or fights, simulating quiet and inactivity, giving large outposts or a strong advance guard to a small force, constructing works, bridges, etc., which it is not intended to use, transmitting false or misleading signals and telegraph messages, and sending false dispatches and newspapers, with a view to their being intercepted by the enemy, lighting campfires where there are no troops, making use of the enemy’s signals, bugle and trumpet calls, watch words, and words of command, pretending to communicate with troops or reinforcements which have no existence, moving landmarks, putting up dummy guns or laying dummy mines, removing badges from uniforms, clothing the men of a single unit in the uniform of several different units so that prisoners and dead may give the idea of a large force.”³

The law of nations, as understood by the United States, admits of deception but disclaims perfidy or treachery.⁴ As between enemies, there is on principle required fidelity to an undertaking or representation given for the purpose of causing an adversary to refrain from the use of force which it would otherwise surely exercise.⁵ Such a purpose is always implied when a flag of truce or the Red Cross of the Geneva Convention is displayed, because of the representation that the emblem betokens the presence of persons or things which, for the time being, are harmless, and hence entitled to immunity from attack. The abuse of either is, therefore, perfidious.⁶

The question presents itself whether the use of the national flag, or military insignia, or uniform of the enemy is to be similarly regarded. The instructions for the Government of the Armies of the United States in the Field of 1863, expressly denounced “the use of the enemy’s national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle,” as “an act of perfidy by which they lose all claim to the protection of the laws of war.”⁷

concerning the Laws and Customs of War on Land: “Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.” (Malloy’s Treaties, II, 2286.)

² War Dept. Rules of Land Warfare, 1940, No. 39, where it is added: “The line of demarcation between legitimate ruses and forbidden acts of treachery and perfidy is sometimes rather indistinct, but the following examples will indicate the correct principles. It would be an improper practice to secure an advantage of the enemy by deliberate lying which involves a breach of faith, or when there is a moral obligation to speak the truth, such as declaring that an armistice had been agreed upon when such is not the case. On the other hand, it is a perfectly proper ruse to summon a force to surrender on the ground that it is surrounded and thereby induce such surrender with a small force.”

³ *Id.*, No. 40.

⁴ No. 192, Rules of Land Warfare, 1917; also Section XVI, General Orders, 100, 1863, Moore, Dig., VII, 178.

⁵ “Deceit against an enemy is, as a rule, permitted; but it is clearly understood that this does not embrace the abuse of signs which are employed in special cases to prevent the exercise of force or to secure immunity from it.” (Moore, Dig., VII, 191, *quoting* Hall, 5 ed., 535–537.)

⁶ Viscount Bryce, Report of Committee on Alleged German Outrages, Appendix, 206–215, embracing impressive evidence of the abuse of the Red Cross and of the white flag on numerous occasions by German forces in Belgium.

⁷ § LXV, General Orders, No. 100, of 1863. See, also, Rules of Land Warfare of 1917,

The Hague Regulations of 1907 forbid any "improper use" of such articles.⁸ As those regulations also require a military force to have a "fixed distinctive emblem recognizable at a distance" in order to claim belligerent qualifications, the adoption of that of the enemy, although prior to an engagement, would seem to be rendered "improper."⁹ Adverting to the fact that the Hague Regulations prohibit not the use, but rather the *improper use*, of national flags, insignia and uniforms, the War Department Rules of Land Warfare of 1940, declare that "it is certainly forbidden to make use of them during combat; before opening fire upon the enemy they must be discarded."¹⁰ If to battle with the enemy under his own flag is an act of perfidy, it is difficult in theory to regard in a different light such employment of his emblem before an engagement as enables the employer to gain a position where he may fight to advantage.¹¹ In both cases the enemy refrains from attack because of a deception which amounts to an assurance that the emblem employed is his own, and that those who bear it will not fire upon him. Hence it is suggested that in a general recodification of the regulations of war, both forms of conduct be expressly prohibited. Those charged with the task of codification, and those entrusted with the discipline of armies, should unite in denouncing as invariably illegal every form of deception which savors of bad faith.¹²

No. 196, where it is said. "Whether the enemy flag can be displayed and his uniform worn to effect an advance or to withdraw is not settled."

⁸ Art. XXIII (f), Malloy's Treaties, II, 2285.

⁹ Art. I, *id.*, II, 2281.

"When members of armed forces wear the uniforms of prisoners or of the enemy dead, not for deceit but through shortage of clothing — and they always will if necessary — such distinct alterations in the uniform ought to be made as will make it apparent to which side the soldiers concerned belong (see *Land Warfare*, § 154). Moreover, if soldiers are, through lack of clothing, obliged to wear civilian greatcoats, hats, and the like, care must be taken that they wear a fixed distinctive emblem which marks them as soldiers, since otherwise they lose the privileges of members of armed forces. (See Article 1 of the Hague Regulations.) During the Russo-Japanese War each belligerent repeatedly accused the other of using Chinese clothing for members of their armed forces; their soldiers apparently were obliged through lack of proper clothing temporarily to use Chinese garments. See, however, Takahashi, pp. 174-178." (Lauterpacht's 6 ed. of Oppenheim, II, 335, footnote 3.)

¹⁰ No. 43; also Rules of Land Warfare, 1917, No. 196, with notes thereto.

¹¹ Declares Hall: "A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own before firing with shot and shell." (5 ed., 537, 538, quoted in Moore, Dig., VII, 191.)

¹² American practice is believed to have been singularly free from criticism. "In this country it has always been authorized to utilize uniforms captured from the enemy, provided some striking mark or sign is attached to distinguish the American soldier from the enemy. All distinctive badges or marks of the enemy should be removed before making use of them. It is believed that such uniforms should not be used except in case of absolute necessity." (No. 197, Rules of Land Warfare, 1917.) The last sentence quoted is omitted from the corresponding paragraph, No. 44, of the War Dept. Rules of Land Warfare, 1934. The entire paragraph is omitted from the War Dept. Rules of Land Warfare, 1940.

f

Certain Implements of Destruction

(1)

§ 660. **In General.** Whatever be regarded as the end of war, that of any implement of destruction such as a projectile is to disable the greatest possible number of men. The Declaration of St. Petersburg of 1868 announced that "that object would be exceeded by the employment of arms which would needlessly aggravate the sufferings of disabled men, or render their death inevitable," and that the use of such arms would, therefore, be contrary to the laws of humanity.¹ In the same spirit The Hague Regulations of both 1899 and 1907 declare that the right of belligerents to adopt means of injuring the enemy is not unlimited, and that it is "especially prohibited to employ arms, projectiles, or materials of a nature to cause superfluous injury."² The value of approval of this principle depends upon the agreement of military authorities as to what implements or materials possess such a character. Unhappily such authorities have not been of one mind. Those representing the United States at the First Hague Peace Conference in 1899, found it impossible to acquiesce in views prevailing among a majority of the delegates there assembled.³ The Second Hague Peace Conference devoted slight attention to the matter. At the outbreak of World War I in 1914, the participants therein were by no means in agreement.⁴ From the ex-

§ 660.¹ *Nouv. Rec. Gén.*, XVIII, 474, also published in Oppenheim, 2 ed., II, Appendix 2, 584; Hershey, 389; A. P. Higgins, Hague Peace Conferences, 5. See, also, Bonfils-Fauchille, 7 ed., §§ 1066-1067; Percy Bordwell, Law of War, 278-279.

² Arts. XXII and XXIII (e), Malloy's Treaties, II, 2052 and 2285, respectively. In that compilation the words "*des maux superflus*" of the original text are translated as "superfluous injury," in the Regulations of 1899, and as "unnecessary suffering" in those of 1907.

According to No. 34, War Dept Rules of Land Warfare, 1940, the prohibition of the Regulations "is not intended to apply to the use of explosives contained in artillery projectiles, mines, aerial torpedoes, or hand grenades, but it does apply to the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, to the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and to the scoring of the surface or filing off the ends of the hard cases of bullets."

According to No. 35, *id.*: "Train wrecking and burning of camps or military depots are legitimate means of injuring the enemy when carried out by the members of the armed forces. Wrecking of trains should be limited strictly to cases which tend directly to weaken the enemy's military forces."

³ See Report of the American delegates to the First Hague Peace Conference to the Secretary of State July 31, 1899, For. Rel. 1899, 513, 515, Moore, Dig., VII, 206, in which it was said: "The American commission approached the subject of the limitation of invention with much doubt. They had been justly reminded in their instructions of the fact that by the progress of invention, as applied to the agencies of war, the frequency, and, indeed, the exhausting character of war had been, as a rule, diminished rather than increased. As to details regarding missiles and methods, technical and other difficulties arose which obliged us eventually, as will be seen, to put ourselves on record in opposition to the large majority of our colleagues from other nations on sundry points. While agreeing with them most earnestly as to the end to be attained, the difference in regard to some details was irreconcilable. We feared falling into evils worse than those from which we sought to escape."

See, also, instructions to the American delegates, For. Rel. 1899, 511, 512, Moore, Dig., VII, 205.

⁴ See protest of the German Government in September, 1918, against the use of shotguns by the American Army, as in contravention of Art. 23 (e) of the Hague Regulations annexed to the Convention Respecting the Laws and Customs of War on Land, and response of the United States of Sept. 28, 1918, denying that the use of such a weapon was forbidden by

perience of that conflict the several belligerents, including the United States, have doubtless drawn conclusions serving possibly to unite rather than divide military opinion concerning the relative efficacy of instrumentalities necessarily productive of great suffering, and respecting the employment of those of which the use is bound to cause injuries which States should deem superfluous. The insufficiency of existing arrangements, notwithstanding their recognition of the underlying legal principle, emphasizes the need of general agreement indicating what instrumentalities are to be forbidden as well as the theory on which the prohibition rests. The task of specification is primarily a military rather than a legal one, calling for technical opinion whether the blows to be inflicted by new instrumentalities such as those designed and employed in the course of World War I possess a military value which outweighs in significance the severity and magnitude of the suffering caused by their use and likely to be incidentally felt by non-combatants. If foreign offices continue, as heretofore, to accept the counsel of military advisers, it may well be doubted whether the abolishment of the use of any weapons deemed to be of large offensive value is to be anticipated.⁵ The experience of World War I has not encouraged responsible officers of any Power to advise the relinquishment of instruments on which it may advantageously rely when a belligerent. Even some which Germany prodded its enemies to utilize and develop by way of retaliation, appear to be no longer regarded with entire disapproval by their military experts. Such conditions afford slight prospect that land warfare is to be hereafter conducted with weapons that are less efficacious than those which the science of the time places within the reach of the opposing belligerents. The State that anticipates recourse to the sword as a method of adjusting its differences of gravest kind must anticipate also participation in conflicts characterized by the use of hideously cruel instrumentalities, and in which the victory may be denied that belligerent which hesitates long to adopt them.⁶

Any improvement in practice must depend upon general realization of the fact that a departure from the principle laid down in the Declaration of St. Petersburg of 1868, will be oftentimes and perhaps increasingly excused as not at variance with a positive requirement of international law. The family of nations needs to perceive how unwilling its several members have been to sub-

that agreement, and declaring that "the shotgun now in use by the American Army cannot be the subject of legitimate or reasonable protest." (For. Rel. 1918, Supp., 2, 785-786.)

⁵ "The proceedings of the Hague Conference demonstrate rather that a weapon will be restricted in inverse proportion, more or less, to its effectiveness; that the more efficient a weapon or method of warfare the less likelihood there is of its being restricted by rules of war." (Royse, *Aerial Bombardment*, 131-132.)

⁶ "The Abyssinians were without all but the most elementary and inadequate forms of protection against these methods [manifested in spraying and bombing with mustard-gas] and without any means of retaliation, and the repeated appeals which they addressed to the League of Nations for the exercise of restraint upon Italy brought them no practical help. The action, such as it was, which was taken at Geneva in April 1936, in connexion with the use of poison gas and other atrocities had not the slightest influence upon the course of events; and within three weeks of the adoption by the Committee of Thirteen of a report dealing with the mutual allegations of atrocities Italian methods had finally broken down Abyssinian organized resistance, and Marshal Badoglio had entered Addis Ababa at the head of his victorious army." (Toynbee, *Survey of International Affairs*, 1935, II, 414.)

ordinate their freedom of action to the matter of human suffering. Even such a perception, however clear, must be accompanied also by appreciation of the fact that a State which anticipates the possibility of becoming a belligerent must be expected to be unwilling to relinquish the use of any implement of destruction of which the retention appears to give to it a relative military advantage over a prospective foe.⁷ There may, however, be a wide and acknowledged interest in regulating the methods of use of particular instrumentalities; and the extent of that interest may suffice to produce agreement that is responsive to it, as by prohibiting what is deemed to be detrimental to it.

The gravity of the problem that cries for solution is enlarged by the fact that through the continuing development of instruments of destruction there are placed within the reach of the possessor the means of causing vast harm to persons and property unrelated to the conflict, and of which the legitimate use demands the exercise of utmost care in order to prevent such consequences. This circumstance, coupled with an indifference manifested at times by the user whether such results ensue, and a disposition to regard them as merely regrettable yet normal incidents of legitimate action that is not to be frustrated or checked by the likelihood of their occurrence, serve to enhance belligerent pretensions and to ignore legal restraint. In order to prevent such pretensions from modifying the law, as by permitting States engaged in war to enjoy a freedom not heretofore conceded to them, the members of the international society are put to it to make clear and effectual their adverse decision. If wars are to be recurrent, notwithstanding the effort to effect the adjustment of international controversies by amicable means, that society must consecrate itself to the task of vindicating its common interests by resolving how particular instruments of destruction are to be employed.⁸ Yet the larger task involved in the general endeavor to prevent that recurrence, is likely to become the preponderant interest of the international society, diverting attention from efforts to improve methods of belligerent action through limitations upon the uses of particular instrumentalities to be employed therein.

⁷ A State may be quite unwilling to disclose in diplomatic correspondence or negotiations the precise reasons that inspire its reluctance to agree to give up a particular implement of warfare. Discussions at the Washington Conference on the Limitation of Armament, 1921-1922, respecting submarines are illustrative. See Conference on the Limitation of Armament, Senate Doc. No. 126, 67th Cong., Sess. 2, 266-285.

⁸ Any realistic approach to the problem must be made in the light of the fact that the mere possession of the most modern and effective implements of war by some entities acknowledged to be members of the international society may be inherently dangerous to their neighbors because of the readiness of the former to employ them to best advantage and with little restraint in seasons of peace or war as a means of achieving desired ends, such as the advancement of political ambitions, or the obtaining of satisfaction on account of alleged grievances. Countries which by training and thinking have become accustomed to regard lightly the taking of human life must be expected to be prone to apply a minimum of restraint in availing themselves of any implements of warfare which are found convenient and adaptable for the purpose of removing or overcoming physical opposition, whether foreign or domestic, to what is sought to be accomplished. Thus, the vast cleavage of thought between States which make up the international society and that is accentuated in the conduct of a few whose thinking appears to be sharply at variance with that of the great majority of members, brings into being a situation which is highly perplexing to that majority. It resembles a family where children of tender years, possessing themselves of shot-guns, proceed to maintain control over the household, and to shoot those who defy their authority.

(2)

§ 661. **Expansive, Explosive and Other Bullets.** At the First Hague Peace Conference of 1899, Captain Crozier of the American delegation proposed that "the use of bullets which inflict wounds of useless cruelty, such as explosive bullets and in general every kind of bullet which exceeds the limit necessary for placing a man immediately *hors de combat*, should be forbidden."¹ The Conference did not, however, accept the proposal, and adopted in its stead a declaration announcing that the contracting parties agreed to abstain from the use of bullets "which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."² The American delegation did not sign the declaration, nor did the United States adhere to it.³ The declaration was, however, signed by delegations representing sixteen States, and was formally accepted by numerous powers.⁴ In earlier stages of World War I every belligerent was a party to the agreement. Charges were frequently made, however, that the compact was not respected.⁵ Subsequently, in the war between Ethiopia and Italy in 1936, both belligerents accused the enemy of the use of explosive or dum-dum bullets.⁶

The preferring of such charges implies that the conduct protested against is regarded as violative of an international obligation towards the protester.⁷ Such

§ 661. ¹ *Conférence Internationale de la Paix*, 75; Holls, 511-514.

By the Declaration of St. Petersburg of 1868 (to which the United States was not a party), the contracting parties agreed to renounce mutually, in case of war among themselves, by their forces on land or sea, any projectile weighing less than 400 grams, which was either explosive or charged with fulminating or inflammable matter. *Nouv. Rec. Gén.*, XVIII, 474; Hershey, revised ed., 593; Oppenheim, 2 ed., II, Appendix, 584.

² *Conférence Internationale de la Paix*, 250; Holls, 98-117.

See, also, A. P. Higgins, Hague Peace Conferences, 495-497; Geo. B. Davis, in *Am. J.*, II, 74 and 528; Hershey, revised ed., bibliography in note 35, p. 595.

³ The following criticism of the declaration was made by Capt. Crozier before The Hague Conference: "First, that it forbade the use of expanding bullets, notwithstanding the possibility that they might be made to expand in such regular manner as to assume simply the form of a larger caliber, which property it might be necessary to take advantage of, if it should in the future be found desirable to adopt a musket of very much smaller caliber than any now actually in use. Second, that by thus prohibiting what might be the most humane method of increasing the shocking power of a bullet and limiting the prohibition to expanding and flattening bullets, it might lead to the adoption of one of much more cruel character than that prohibited. Third, that it condemned by designed implication, without even the introduction of any evidence against it, the use of a bullet actually employed by the army of a civilized nation." (Holls, 513; Bordwell, *Law of War*, 133.)

See in this connection, the Hague Declaration of Oct. 18, 1907, Prohibiting the Discharge of Projectiles and Explosives from Balloons, Malloy's *Treaties*, II, 2366; also War Dept. *Rules of Land Warfare*, 1940, No. 27.

⁴ Report of Mr. van Karnebeek from the First Commission to the Conference, *Conférence Internationale de la Paix*, Part I, 83. See also Oppenheim, 2 ed., II, § 112.

Concerning uses of expanding bullets in the course of the South African and Russo-Japanese wars, see bibliographical notes in Fauchille, 8 ed., § 1082, and in Hershey, revised ed., 595. See, also, J. M. Spaight, *War Rights on Land*, 79-81.

⁵ See, for example, Reports of British officers in October and November, 1914, respecting German uses of expanding bullets in East Africa, Papers Relating to German Atrocities and Breaches of the Rules of War, in Africa [Cd. 8306], 5 and 17.

See, also, Mr. Bryan, Secy. of State, to Mr. Stone, chairman of the Senate Committee on Foreign Relations, Jan. 20, 1915, in response to an inquiry whether the United States had suppressed the alleged sale of dum-dum bullets to Great Britain. *American White Book*, European War, II, 58, 60.

⁶ See analysis by a Committee of Jurists of documents concerning the conduct of war in Ethiopia submitted to the Secretary-General of the League of Nations down to April 16, 1936, *League of Nations, Official Journal*, April, 1936, 364.

⁷ See *id.*, where it was said: "Both belligerents have formulated their protests on a broader

happenings illustrate, moreover, the difficulty involved in determining not only what the law of nations prescribes in relation to the instrument employed, but also in reaching an authoritative conclusion whether the evidence establishes that a particular belligerent has in its use of a particular implement violated a conventional or other obligation towards its enemy. The power of a belligerent to do so is likely to be vast. Hence its disposition to refrain from being a transgressor must depend in part upon the clearness of the injunction imposed upon it, and also upon the absence of evidence that could be utilized to excuse its action on grounds of retaliation.

It should be observed that according to Article XXIII (*e*) of the Hague Regulations of 1907, Respecting the Laws and Customs of War on Land, it was "especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering."⁸

It is not without significance that article 18 of the Rules of Aerial Warfare constituting Part II of the work of the Commission of Jurists assembled at the Hague in 1923, to consider and report upon the revision of the Rules of Warfare, announced that "the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited."⁹

A variety of considerations point to the difficulty to be anticipated in producing general agreement denying to a belligerent the right to use particular types of bullets. Constant fear lest such action deprive a particular belligerent of a needed instrument of defense or of a relative military advantage may thwart the growth of a common denunciatory disposition. Nevertheless, the experience of States which have embarked upon war during the present century should at least enable them to perceive the basis underlying any rule designed to be generally restrictive of belligerent action, and worthy of acceptance by all. It ought to be clear that it is not the magnitude of the injury that may be wrought by a projectile which points to or reveals the test of restriction. Thus, an explosive bullet or shell is less and less regarded, notwithstanding its potentialities as an instrument of destruction, as an implement which should be relinquished by a belligerent.¹⁰ On the other

basis than that of observance of the Conventions concerning the conduct of war which are in force between them. Thus, the Italian Government's first protest (alleged use of dum-dum bullets) denounces 'this violation . . . of a high humanitarian principle universally recognised and forming part of the moral heritage of all civilized States.' Similarly, that Government's letter of February 28th, 1936, complains of 'violation . . . of the rules of the Geneva Convention and of other international rules and principles.'

"The Ethiopian Government refers in general terms to the 'laws and usages of war' and protests against 'inhuman practices' and 'violation of the laws of war and of international Conventions.'

"The present analysis, therefore, deals with all the allegations made from either side, irrespective of whether a convention forbidding the alleged practices is in force between the two belligerents or not."

⁸ Malloy's Treaties, II, 2285. See comment in War Dept. Rules of Land Warfare, 1934, No. 34.

⁹ There was added the statement: "This provision applies equally to States which are parties to the Declaration of St. Petersburg, 1868, and to those which are not."

For the text of the General Report of the Commission of Jurists, embracing that of the Rules of Aerial Warfare, see Misc. No. 14 (1924), Cmd. 2201.

See in this connection, Royce, Aerial Bombardment, 144, footnote 63.

¹⁰ Declares J. M. Spaight: "It is really by its fruits that the engine of war is judged. The test of the lawfulness of any weapon or projectile is practically the answer one can give to the question: What is its 'bag'? Does it disable so many of the enemy that the military end thus

hand, it is equally apparent that bullets designed primarily to inflict wounds productive of peculiar suffering to the victims, such as expansive bullets, and which offer no distinctive military advantage to the user that can fairly be regarded as commensurate with the character of the harm produced by them, should be looked upon with greatest disapproval.¹¹ Civilization must recoil from the suggestion and resent the intimation that entities claiming membership in the international society can reasonably withhold their disapproval.

It is believed that the American proposal at the First Hague Peace Conference was sound in principle and manifested the nature of what should be avoided, even though the reference to explosive bullets may not have been an apt illustration. Explosive projectiles, whether in the form of bullets or shells or hand grenades, are now doubtless deemed to possess a military value such as to retard general opposition to their use.¹² The employment of mines and torpedoes in land warfare is likely to be similarly regarded. It cannot be said that at the present time States are generally of opinion that any legal duty forbids reliance upon such instruments of warfare.

(3)

§ 662. Asphyxiating or Deleterious Gases. By a declaration of the First Hague Peace Conference the contracting parties agreed to forbid the employment

gained condones the suffering it causes? To-day, a commander has an acknowledged war right to use any weapon or explosive which, however terrible and ghastly its effects, is capable of putting out of action such a number of the enemy as to justify the incidental mutilation of individuals." (War Rights on Land, 76 and 77.)

¹¹ For instances of the use of expanding bullets by German forces in Belgium and France in 1914, see Report of Commission of Responsibilities, Paris Conference, 1919, Annex I, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, p. 53. See, also, Germany's Violations of the Laws of War, compiled under auspices of the French Ministry of Foreign Affairs, translated by J. O. P. Bland, New York, 1915, documents Nos. 90-98.

¹² "Practically all of the belligerents on each side accused those on the other side of using bullets forbidden either by the Hague Convention or the usages of civilized warfare and each emphatically denounced the charges as false. The evidence at hand, however, does not indicate that any general use of the type of bullet forbidden by the Hague Convention was authorized by any belligerent, or that it was in fact used except perhaps in occasional instances." (Garner, Int. Law and The World War, I, § 178.)

¹² See War Dept. Rules of Land Warfare, 1940, No. 34.

Concerning the use of explosive bullets by the Confederates at Vicksburg in 1863, see U. S. Grant Memoirs, 316, quoted in J. M. Spaight, War Rights on Land, 78-79.

Poison. § LXX of Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, Apr. 24, 1863, declares that "The use of poison in any manner, be it to poison wells or food or arms is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war." (Moore, Dig., VII, 179.) "To employ poison or poisoned weapons" is forbidden by Article XXIII (a) of the Hague Regulations. Malloy's Treaties, II, 2285. According to the War Dept. Rules of Land Warfare, 1940, No. 28. "This prohibition extends to the use of means calculated to spread contagious diseases; but does not prohibit measures being taken to dry up springs, to divert waters and aqueducts from their courses, or to contaminate sources of water by placing dead animals therein or otherwise, provided such contamination is evident or the enemy is informed thereof."

See Mr. Andrews, American Chargé d'Affaires in Roumania, to Mr. Lansing, Secy. of State, Feb. 9, 1917, with documents disclosing discovery of phials containing cultivations of the microbes of anthrax and glanders buried in the garden of the German Legation at Bucharest, Official Bulletin, Sept. 29, 1917, No. 120, p. 9.

See correspondence between General Louis Botha and German military authorities in German Southwest Africa in 1915, relative to the poisoning of wells by the latter. Papers Relating to Atrocities and Breaches of the Rules of War [Cd. 8306], 74-80.

of projectiles having for their sole purpose the diffusion of asphyxiating or deleterious gases.¹ The American delegation opposed the declaration.² The United States has not acceded to it.

Such gases were used offensively in the course of World War I. Among the devices employed in releasing them were fires lighted in front of the enemy's trenches, receptacles hurled either by hand or by mechanical means, tubes emitting gases, as well as shells containing them.³ They produced a deleterious effect upon all persons within a wide area who were not equipped with apparatus specially designed to afford protection from the fumes. The fact is significant that Germany was not deterred by the declaration of 1899 from resorting to noxious gases at an early stage of the conflict. When that belligerent proved the efficacy of such instrumentalities, its enemies felt obliged to follow in its lead, although the sufferings of disabled men were thereby aggravated.⁴

The United States, as a belligerent, established in 1917 a Chemical Warfare Service, and the following year "American gas troops took a most active part in the great military operations that developed between June and the armistice," employing both bombs and cylinders.⁵

The development of toxic gases and liquids for offensive uses has already been

§ 662. ¹ *Conférence Internationale de la Paix*, 254.

² The reasons for opposing the declaration were expressed by Capt. Mahan, of the American delegation, as follows "1. That no shell emitting such gases is as yet in practical use, or has undergone adequate experiment, consequently a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character, or whether injuries in excess of that necessary to attain the end of warfare, the immediate disabling of the enemy, would be inflicted. 2. The reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple. Until we knew the effects of such asphyxiating shells there was no saying whether they would be more or less merciful than missiles now permitted. 3. That it was illogical, and not demonstrably humane, to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred men into the sea, to be choked by water, with scarcely the remotest chance of escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject." (Holls, 494-495; Percy Bordwell, *Law of War*, 134-135.)

³ Official Commission of the Belgian Government, *Reports of the Violation of the Rights of Nations and of the Laws and Customs of War*, II, 18-20, Fourteenth Report, on the Use of Asphyxiating Gas, April 24, 1915.

"The Germans first used this [asphyxiating gas] on the Belgian front on April 22, 1915. Their soldiers were provided with respirators, whereas the Allies were taken completely by surprise." (Annex I to Report of Commission of Responsibilities, Paris Conference, 1919.)

See in this connection, Garner, *Int. Law and The World War*, I, § 180-188.

⁴ While this procedure on the part of the enemies of Germany may have been attributable, at the outset, to a design of retaliation, the employment of gases perfected in England and America proved of so great offensive value as to convince military opinion in those countries that such instrumentalities were generally desirable for use in land warfare.

The war correspondent of the *London Times*, under date of June 8, 1917, describing the British offensive at the Battle of Messines declared: "We did not use gas in the attack, but every other known form of offensive weapon, I think, we did employ, including a new horror known in the Army as 'oil cans' or 'boiling oil,' of which it is not permissible to give a description beyond saying that it throws to a considerable distance projectiles which are, in fact, containers of highly inflammable stuff bursting on concussion and scattering conflagration over a wide area. We know from prisoners taken that they caused terror, and did an immense amount of harm, both in actual casualties and by starting innumerable minor fires." (*London Times Weekly*, June 15, 1917, 492.)

⁵ Colonel De Chambrun and Captain De Marenches, *The American Army in the European Conflict*, New York, 1919, 239-241; also, James Thayer Addison, *The Story of the First Gas Regiment*, Boston, 1919.

such as to place a weapon of immense value within the reach of the belligerent which has made due preparation to employ it.⁶ American military opinion appears to doubt the wisdom of reliance upon assurances of restraint emanating from a possible or prospective enemy bent on aggression. For that reason the Chemical Warfare Service of the United States counsels such preparedness in the matter of research and development of the science as to give the country an actual and technical advantage over any enemy making use of gases.⁷ It is not understood, however, that the United States would be disposed to take the initiative in the employment offensively of highly deleterious gases, reserving recourse thereto for occasions demanding retaliation. On the other hand, there might be slight reluctance to employ offensively asphyxiating but not highly deleterious gases as a normal operation. Unless the Government were heedless of the views of the Army, it would be unlikely in the near future to bind the United States not to employ toxic gases in such form and manner as the exigencies of the hour might be deemed to justify or demand.

§ 662A. The Same. Recent Developments. In 1935, the United States Naval War College found it possible to conclude that "the use of poisonous gases and those that cause unnecessary suffering is in general prohibited; the use of smoke screens and of tear gas has not been included in the category of prohibited acts, but the use of bacteriological warfare has been prohibited."¹ This statement calls for the examination of certain prior happenings.

In treaties marking the conclusion of World War I, and also in subsequent ar-

⁶ "A single airplane with a couple of men may sail over a warship at an unassailable height and besprinkle its decks with a liquid so corrosive that three drops of it touching a man's skin at any part will kill him, and so persistent that such little of it as may be caught in the crevices will render the ship uninhabitable for days." (Edwin E. Slosson, "An Exhibit under the auspices of National Research Council prepared by the Chemical Warfare Service to show the American People What the Chemist has done and may do for them in War and Peace," Washington, 1921.)

⁷ See Annual Report of the Chief of the Chemical Warfare Service (Brig. Gen. Amos A. Fries, U. S. A.) for the fiscal year ending June 30, 1920, 41-42.

¹ § 662A. ¹ Int. Law Situations, 1935, 106. See *id.*, 102, where it is declared "if a gas causes unnecessary suffering, its use would be considered contrary to international law." This was in harmony with a report of the General Board of the United States Navy to which the Secretary of State, as Chairman of the Washington Conference on the Limitation of Armament called attention in 1922, and which declared: "The two principles in warfare, (1) that unnecessary suffering in the destruction of combatants should be avoided, (2) that innocent noncombatants should not be destroyed, have been accepted by the civilized world for more than one hundred years. The use of gases in warfare in so far as they violate these two principles is almost universally condemned to-day, despite its practice for a certain period during the world war." It was added: "The General Board foresees great difficulty in clearly limiting gases so as to avoid unnecessary suffering in gas warfare and in enforcing rules which will avert suffering or the possible destruction of innocent lives of noncombatants, including women and children. Gas warfare threatens to become so efficient as to endanger the very existence of civilization. The General Board believes it to be sound policy to prohibit gas warfare in every form and against every objective, and so recommends." (*Id.*, 99-100, citing Conference on the Limitation of Armaments, Washington, November 12, 1921-February 6, 1922, 734.)

The Advisory Board of the American delegation at the Washington Conference on the Limitation of Armament submitted a report from a sub-committee which stated: "Resolved, That chemical warfare, including the use of gases, whether toxic or nontoxic, should be prohibited by international agreement, and should be classed with such unfair methods of warfare as poisoning wells, introducing germs of disease, and other methods that are abhorrent in modern warfare." (Proceedings of Conference, 732.)

rangements or declarations a vigorous effort was apparently made to restrict or regulate the use of gases and of chemicals in warfare. Thus, it was declared in article 171 of the Treaty of Versailles with Germany, of June 28, 1919, that "the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany."² This article was, moreover, one of those which found a place in the Treaty Restoring Friendly Relations Between the United States and Germany, of August 25, 1921.³ According to Article V of a treaty signed at the Washington Conference on the Limitation of Armament on February 6, 1922, and which failed to be consummated: "The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties, the Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto."⁴

A Protocol prohibiting the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, opened for signature at Geneva on June 17, 1925, came into force on February 8, 1928, and was duly accepted by numerous powers.⁵ It was not, however, ratified by the United States. Stating that the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, had been justly condemned by the general opinion of the civilized world, and that the prohibition of such use had been declared in treaties to which the majority of Powers of the world were parties, and to the end that such prohibition should be universally accepted "as a part of International Law, binding alike the conscience and the practice of nations," the protocol announced: "That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration."⁶

² U. S. Treaty Vol. III, 3402. Declared the Naval War College in 1935 in relation to this article: "While the accuracy of the translation of the article may be open to question, the English form does not seem to conform to international law because there are some gases other than asphyxiating and poisonous, the use of which is not prohibited in war." (Int. Law Situations, 1935, 102.)

³ Art II, U. S. Treaty Vol. III, 2598. Nevertheless, in War Dept. Rules of Land Warfare of 1940, No. 29, it was said that "The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, or of smoke or incendiary materials."

⁴ U. S. Treaty Vol. III, 3118.

⁵ Hudson, Int. Legislation, No. 143.

⁶ "It must be noted that Article 39 of the Draft Convention of the Preparatory Commission on Disarmament of 1930 affirmed the prohibition of gas warfare, and that the prohibition of gas, bacteriological and incendiary warfare formed part of the resolution of the General Commission in 1932." (Lauterpacht's 6 ed. of Oppenheim, II, § 113, p. 275.)

See resolution adopted by the General Commission, July 23, 1932, League of Nations Document, IX. Disarmament 1932. IX. 63. p. 268.

See bibliography in Lauterpacht's 6 ed. of Oppenheim, II, 276, footnote, and embraced

Of greater significance than the foregoing commitments and declarations is the fact that in a recent conflict where the opposing belligerents were parties to the Geneva Protocol of 1925, one of them, regardless of the terms of its undertakings, found excuse to employ noxious gases against its adversary. By so doing Italy was victorious over Ethiopia in 1936.⁷ The character of that excuse is of less concern to civilization than the fact that a relatively powerful State was unable to resist the temptation to unleash against a defenseless foe an instrument of war which, regardless of what its use entailed, sufficed to give the possessor and user a decisive triumph.⁸

It is to be expected that a belligerent power will endeavor to make the best possible use of a relative military advantage and to be contemptuous of the dictates of humanity when they appear to frustrate a means of attaining an early and decisive victory. It may be greatly doubted, therefore, whether conventions purporting to restrict or regulate or prohibit recourse to particular forms of chemical warfare are to be relied upon to prevent a belligerent from employing them against the enemy when a relative advantage from so doing is sufficiently clear.⁹ Whether the conduct of Italy in using noxious gases against Ethiopia looms larger in the mind of the international society as a violation of a treaty than as an illustration of a practical mode of attaining a military end remains to be seen. There can be no doubt, however, as to its influence as an impairer of confidence in conventions designed to obstruct the use of an implement that may be of vast and special benefit to the possessor.¹⁰ If the severest and most cruel features of chemical warfare are to be eliminated from wars yet to be fought, it will probably be attributable to the power of the individual States participating therein, through the possession of adequate equipment, to make dangerous the use by the enemy of what is happily shocking to the sensibilities of mankind.

(4)

§ 663. **Aspects of Aerial Bombardment.** According to a declaration of the First Hague Peace Conference, the contracting parties agreed to prohibit, for a

therein, Jonkheer W. J. M. van Eysinga, "*La Guerre Chimique*," *Recueil des Cours*, 1927, I, 324; J. E. Mills, "Chemical Warfare," *Foreign Affairs*, X, 444.

⁷ See Ethiopian allegations against Italy set forth in Report by Committee of Jurists to the Committee of Thirteen of the League of Nations, April 18, 1936, *League of Nations Official Journal*, April, 1936, 370; also letter from the Chairman of that Committee to the Italian Minister for Foreign Affairs, April 18, 1936, *id.*, 372.

⁸ See in this connection, Toynbee, *Survey of International Affairs*, 1935, 219, 413-414.

⁹ To the impartial mind belligerent excuses for recourse to conduct definitely forbidden by convention are not impressive or convincing, especially when they are based upon allegations charging the commission of illegal acts by the enemy that are unrelated to the particular convention of which the terms are ignored. It is a profitless task to weigh allegation against allegation, and to attempt by such process to reach a conclusion that excuses disregard of the conventional prohibition.

¹⁰ Such an advantage may not always be apparent. A variety of considerations, both military and non-military, may thus deter a belligerent from having recourse to a chemical warfare which it is equipped to prosecute. This circumstance may serve to delay an accumulation of precedents sufficient to indicate the existence of a practice portraying general acknowledgment of the propriety of such conduct.

¹¹ Such agreements may ultimately be regarded as tragic instances where the achievement of a high purpose has been impeded by the failure of the contracting parties to take cognizance of the fact that fear of the consequences of its own action is oftentimes the only practical and efficient deterrent of some forms of conduct to which otherwise a belligerent may surely be expected to have recourse.

period of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature.¹ A declaration of the Second Hague Peace Conference of 1907 extended the prohibition until the close of the Third Peace Conference yet to convene.² To both declarations the United States was a party. The smallness of the number of the adherents to the declaration of the second Conference made it evident that the weight of opinion was opposed to the broad restraint expressed therein.³ The action of the first Conference was founded upon the opinion that balloons, as they then existed, could not be used with accuracy, and that the persons or objects injured by the dropping of explosives might be entirely disconnected with any conflict which might be in progress, and such that their injury or destruction would be of no practical advantage to the party making use of the "machines."⁴

World War I revealed the use of aircraft as an effective aid to a belligerent in directing the operations of an army or a fleet,⁵ and also as a weapon of offense. When employed in the latter capacity, difficulties in regard to accuracy in launching projectiles, which were anticipated in 1899, remain in part unsolved, and are even enhanced by the tendency to conduct operations from a high elevation as a means of avoiding attacks from anti-aircraft weapons. It has been, however, the abuse of the power committed to aircraft rather than difficulties inherent in their use, of which complaint is chiefly and justly made. Germany frequently employed such weapons for the purpose of making raids over enemy territory with the apparent design of terrorizing the civil population, and with indifference as to the occupation, sex or age of those to be the victims of its ruthlessness. The lack of any connection between such operations and the endeavor to attain a legitimate objective in which the harm inflicted upon non-combatants was an unavoidable if deplorable incident, aroused indignation and inspired retaliation.⁶ The Allied Powers vigorously responded with like for like.⁷

§ 663. ¹ Malloy's Treaties, II, 2032.

Concerning early uses of balloons in warfare, see Stockton, *Outlines*, 355; Bonfils, 8 ed., § 1440⁴⁸; W. E. Ellis, "Aërial Land and Aërial Maritime Warfare," *Am. J.*, VIII, 261.

² Malloy's Treaties, II, 2366.

³ As the declaration was "only binding on the contracting powers in case of war between two or more of them," its technical and actual operation as a deterrent proved to be negligible in a conflict in which several belligerents had not placed themselves under the restrictions of the convention.

⁴ Report of Capt. Crozier, of the American delegation, F. W. Holls, *Peace Conference at The Hague*, 509; Percy Bordwell, *Law of War*, 130. Concerning the work of the Hague Conferences of 1899 and 1907, see Royse, *Aerial Bombardment*, Chapters II and III.

⁵ The British army, for example, profited much from the directions obtained from aircraft in connection with the battle of Messines in June, 1917. *London Times Weekly*, June 15, 1917.

⁶ The attacks upon London, May 31, 1915, upon Hull, March 5, 1916, and upon Edinburgh, April 2-3, 1916, appear to have been of such a character. See Annex I to Report of Commission of Responsibilities, Paris Conference of 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, pp. 46-47.

The German air raid over London in June, 1917, caused the destruction of numerous children at school, as well as other non-combatants, and appeared to be designed for the accomplishment of no military object as such.

The Institute of International Law in 1911 adopted an Article to the effect that aerial war is allowed, but on the condition that it does not present for the persons or property of the peaceful population greater dangers than land or sea warfare. *Annuaire*, XXIV, 346, J. B. Scott, *Resolutions*, 171.

⁷ See instances cited in Royse, *Aerial Bombardment*, 189-191.

Declared the German Foreign Office in a communication for the Government of the United States, communicated to it by the Swiss Legation, Nov. 2, 1918: "The German aerial

It is suggested that Article XXV, of The Hague Regulations annexed to the convention of 1907, respecting the Laws and Customs of War on Land, forbidding the bombardment "by whatever means" of undefended towns, villages, houses, or dwellings,⁸ is applicable to operations of belligerent aircraft.⁹ Even if this be true, the Article appears, nevertheless, to respond inadequately to existing conditions, because of the difficulty in determining what constitutes an undefended place in aerial warfare, and because of the absence of any provision acknowledging the right to direct attack, in places regarded as either defended or undefended, upon structures or things which by reason of their military importance the enemy may reasonably endeavor to destroy.¹⁰ Doubtless, on principle, it may be urged that both in land and naval warfare bombardment by aircraft should be generally forbidden "unless in each case a compensating advantage can be shown."¹¹ Inasmuch as a bombarding State will invariably claim the existence of the requisite advantage to itself from what it achieves by air, such a prohibition is likely to be a frail deterrent of undesirable action.

The right of a belligerent to employ aircraft for the purpose of attacking military, naval or aerial establishments or implements of any kind must be admitted.¹² There is no objective which is immune from aerial bombardment as such which the enemy is privileged to attack or destroy by other processes. In exercising that privilege there appears to be no commonly acknowledged sense of obligation to give warning to the inhabitants of the area subjected to attack. As Dr. Spaight well says: "It would be impracticable to insist upon warning in

forces have been under orders, since the beginning of October of this year, only to make bomb attacks which are directed solely against important hostile military objects, within the immediate area of operations of war. Those orders were issued on the assumption that the enemy aerial forces were to receive similar instructions.

"In assuming this the German people find themselves disappointed. A short time ago the enemy made bomb attacks on the German towns of Wetzlar, Kaiserslautern, Mannheim, Ludwigshafen, Freiburg, Forbach and Wiesbaden, claiming numerous victims among the civilian population. Nor has occupied territory been spared. It is evident that Germany can refrain from aerial attacks on enemy territory behind the area of operations only if, on their side, the enemy, from now on, will reciprocate and also refrain from making aerial attacks outside the area of operations." (For. Rel. 1918, Supp., 2, 789.)

⁸ Malloy's Treaties, II, 2286. See, also, Sieges and Bombardments, *supra*, § 656.

⁹ See Royse, Aerial Bombardment, 114, 156-158.

In a telegram of April 4, 1936, from the Ethiopian Minister of Foreign Affairs to the Secretary-General of the League of Nations, protest was made of an attack on Addis Ababa by Italian military aircraft on that date, in which it was asserted that as the town was completely devoid of troops and of means of defense, enabling enemy aircraft to fly over it at a very low height with impunity, the hostile acts complained of constituted "an act of aggression against an open town and affords incontestable proof of the enemy's intention to bombard it in flagrant violation of Article 25 of the regulations laid down in the Hague Convention No. IV of 1907." (League of Nations Official Journal, April, 1936, 458.)

¹⁰ See interesting discussion by J. W. Garner, in *Am. J.*, IX, 93, 98-101; also generally, the same author, in his *Int. Law and the World War*, I, §§ 291-312.

See Sieges and Bombardments, *supra*, § 656.

"The old broad rule that a defended city may, and that an undefended city may not, be bombarded, is no longer of any practical value. It has never been a satisfactory rule, it is more unsatisfactory than ever when applied to air bombardment." (Spaight, *Air Power and War Rights*, 2 ed., 197.)

¹¹ See George G. Wilson, suggested code of Aerial Warfare, Naval War College, April 6, 1920, Art. 28.

See, also, Art. 24 (4) of 1923 Rules of Aerial Warfare.

¹² See War Dept. Rules of Land Warfare, 1940, No. 48.

the conditions in which air attack is usually undertaken.”¹³ It will be recalled, however, that Japanese Naval authorities informed the American Consul General at Shanghai on September 19, 1937, of a projected attack by a Naval air force in and around the city of Nanking on September 21, 1937, warning the officials and nationals of third powers living there to take adequate measures for voluntary moving into areas of greater safety.¹⁴ The response of the American Government will be noted later.

The chief question pertaining to the matter of aerial bombardment is whether the law of nations as such forbids the launching of an attack by air upon an objective of which the destruction or injury is of distinct military advantage to the attacker save under conditions when noncombatant life and property will not be subjected to harm. In a word, are the equities of the latter regarded in practice sufficient to render illegal belligerent acts which place them in a subordinate position? It would be impossible to establish that such a condition has in fact been generally accepted as a test of the propriety of bombardment through other instruments of war. Dangers of error involving dispersions within a wide field have not been deemed to render illegal distant bombardments by land or sea when the objectives were regarded as legitimate. The matter of legitimacy has not been made dependent upon what an attack might entail.¹⁵ Referring to aerial bombardments in World War I, Dr. Royse has observed:

The doctrine of the military objective, defined as the right to bombard objects of a military character wherever such objects were to be found, became the official basis for air attack, although, as already pointed out, the mechanical deficiencies of aerial bombing resulted in practically indiscriminate bombardment. Towns and cities far beyond the immediate zone of operations were attacked on the grounds that they contained military objectives against which the attacks were directed. . . . In general one principle seems to have been followed in the war: that military objectives could be bombed wherever found, regardless of their location, and, it seems, regardless of the injury to non-combatants and private property.¹⁶

It may be greatly doubted whether since World War I it has been, or now is, generally acknowledged that the law of nations imposes an obligation upon a belligerent to abstain from aerial bombardment because of the proximity of what is sought to be attacked to non-combatant life or property, when it can be shown that the injury or destruction of the objective is of distinct military advantage

¹³ Air Power and War Rights, 2 ed., 236, where he adverts to the fact that the 1923 Rules of Aerial Warfare were silent on the subject.

Compare *Coenca Brothers v. Germany*, Greco-German Mixed Arbitral Tribunal, 1927, T.A.M. VII, 683, *McNair and Lauterpacht*, Annual Dig., 1927-1928, Case No. 389, where Art. XXVI of the Hague Regulations concerning the Laws and Customs of War on Land were applied in testing the propriety of the bombardment of Salonica by German air forces in January, 1916.

¹⁴ See Dept. of State Press Releases, Sept. 25, 1937, 255.

It must be borne in mind that the Japanese warning was issued in behalf of a State which did not profess to be at war.

¹⁵ See Royse, *Aerial Bombardment*, 170-172.

See, also, William Campbell Chambliss, "Air Bombardment Regulation," U. S. Naval Institute, Proceedings, Nov., 1934, Vol. LX, 1577.

¹⁶ *Aerial Bombardment*, 192 and 193.

to the attacker.¹⁷ It needs constantly be borne in mind that the development of common respect for the equities of the non-combatant as such in seasons of war has been due to his non-participatory character with relation to the conflict. He would have made himself a participant therein had he taken a position where his physical presence would interfere with attacks upon a legitimate objective. No practice could have grown up that yielded to him immunity from incidental injury when he thrust himself as a barrier or screen before an offensive operation against such an objective. None did. Accordingly, if he enjoys solid privileges in conflicts waged around him, it is because he in no wise interferes with what the opposing belligerent attempts to accomplish. His equities vanish when he pursues a different course; for he cannot himself lessen the reasonableness or validity of its attempts, at least when they do not single him out for attack.¹⁸

A somewhat different view was expressed in the Rules of Aerial Warfare prepared by the Commission of Jurists who, representing the United States, the British Empire, France, Italy, Japan and the Netherlands, and pursuant to a resolution adopted at the Conference on the Limitation of Armament at Washington, February 4, 1922, met at the Hague, in 1922-1923, to consider and report upon the revision of the rules of warfare.¹⁹ Aerial bombardment was de-

¹⁷ It may be equally doubted whether it has been, or now is, generally acknowledged that the existence of a legitimate military objective excuses the bombardment of what is unrelated thereto and of what is not necessarily endangered by being in an area containing it when that objective is under attack. This does not imply that a particular area which is co-extensive with a zone of operations may not itself, as such, under some circumstances become a legitimate military objective. Obviously, in such an event, the area becomes essentially a danger zone wherein the safety of non-combatant life and property is greatly jeopardized.

¹⁸ Dr. Spaight, in his valuable work on Air Power and War Rights, declares that "the sentiment of humanity, if not strict logic, calls for a differentiation between the zone of operations and territories in the rear" (2 ed., 205), that in some cases where, outside of a zone of operations, a military objective is situated in a densely populated center of civilian industry, "the exercise by the attacking belligerent of his right would result in damage to the civilian population altogether disproportionate to the military results achieved," and that "in such cases, humanity demands that the belligerent should refrain from attack" (*Id.*, 208), that the humanitarian self-restraint of bombing airmen during World War I justifies a hope that is not illusory or "unwarranted by practice," that aircraft or those controlling them may "abstain from bombardment in certain cases" (*Id.*, 209), that "what can, and should be prohibited is the reckless bombing that shows a callous indifference to the wide repercussion of its effects and the sufferings of its innocent victims," that "the military advantage to be gained is clearly insufficient in some conceivable cases to condone the human holocaust that may be its price." (*Id.*, 210.) Accordingly, he announces as a formula "If a military objective is situated in such a densely populated neighbourhood, or if the circumstances of the case are otherwise such that any attack upon it from the air is likely to involve a disastrous loss of non-combatant life, aircraft are bound to abstain from bombardment." (*Id.*, 210.) It would, of course, be highly desirable if belligerent States could be persuaded to accept the obligation of abstention thus proposed. One may be permitted to doubt, however, whether such an obligation is acknowledged by interested States to be imposed at the present time by international law, and whether also the States possessed of the largest power to prosecute offensive operations by air would be disposed to unite in accepting it.

¹⁹ For the text of the General Report of the Commission embracing the Rules of Aerial Warfare, see Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, The Hague, December 11th, 1922-February 19th, 1923, The Hague, 1923, Part II; also *Am. J.*, XXXII, *Official Documents*, 1.

Judge John Bassett Moore, the First American Delegate, was Chairman of the Commission. See his comments on the Rules in chapter V of his *International Law and Some Current Illusions*.

See, also, J. W. Garner, "Proposed Rules for the Regulation of Aerial Warfare," *Am. J.*, XVIII, 56; Royse, *Aerial Bombardment*, Chap. VI; J. M. Spaight, *Air Power and War*

clared to be legitimate only when directed at specified military objectives; and was forbidden when they were so situated that they could not be bombarded "without the indiscriminate bombardment of the civilian population." There was, however, a relaxation of the prohibition of specified bombardments in the immediate neighborhood of the operations of land forces provided there existed a reasonable presumption that the military concentration sufficed to justify such action having regard to the danger thus caused to the civilian population.²⁰ The Rules have not been accepted or incorporated in a multi-partite agreement. It may be greatly doubted whether the attempt which they reveal thus to subordinate aerial bombardment to the equities of the civilian population will be generally accepted as constituting or reflecting a requirement of the law of nations.²¹ It is not to be expected that prospective belligerents possessed of equipment enabling them to prosecute offensive operations by air forces will readily agree to abstain from aerial bombardment of a military objective fairly to be regarded as such because of its remoteness from the neighborhood of land operations, or because it cannot be bombarded without jeopardizing the safety of the civilian population in the neighborhood thereof.²²

It is a reasonable requirement that in bombardment by aircraft, all necessary steps be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hos-

Rights, 2 ed., 1933, Chap. IX; W. C. Chambliss, "Air Bombardment Regulation," U. S. Naval Institute Proceedings, Nov. 1934, 1577; Frank E. Quindry, "Aerial Bombardment of Civilian and Military Objectives," *Journal of Air Law*, II, 474.

See *La Protection des Populations Civiles contre les Bombardements: Consultations Juridiques de A. Hammerskjöld*, Sir George Macdonogh, W. M. Royse, Vittorio Scialoja, Marcel Sibert, Walter Simons, Jonkheer van Eysinga, A. Zublin, *au Siège du Comité International de la Croix-Rouge*, Genève, 1930; Brig. Gen. O. L. Spaulding, *Ahriman: A Study in Air Bombardment*, Washington, 1939.

²⁰ See Art 24 of which the text is as follows: "1. Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent. 2. Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works, military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes. 3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment. 4. In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population. 5. A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article."

²¹ The Government of the United States, approving of the Rules, proposed to the Governments of the other States whose representatives on the Commission had signed them, that the Rules be incorporated in a convention for common acceptance.

²² Declares Royse, in his *Aerial Bombardment*, at page 241: "It cannot reasonably be affirmed to-day that it is wrongful or illegal to bombard a military objective, fairly regarded as such, by all available means of attack; nor does a military objective lose that character merely because it is situated in the midst of a crowded city remote from the immediate zone of land operations. Military objectives are likely to be hunted down and attacked, and the fact that incidental harm may fall upon non-combatants and that the incidental destruction of property may at times approximate devastation probably will be accepted, as heretofore, as an unavoidable incident of warfare."

pital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the same time used for military purposes; and also, conversely, to demand that such objects are, at least by day, duly indicated by marks visible to aircraft.²³ There is, however, evidence that this requirement has at times been sadly ignored even in conflicts that have occurred since World War I.²⁴

The burden rests upon the commander of an air force to ascertain the identity of what he singles out for attack and proceeds to bombard, such as a particular ship, or automobile, or group of individuals, when neither their conduct nor position marks them as participators in the conflict, and when their identity is capable of ascertainment. Thus, in the course of the Sino-Japanese conflict in 1937, alleged mistakes on the part of air forces as to the identity of particular objectives and which were productive of deliberate attacks upon quasi-neutral persons or things provoked a sense of outrage in the countries to which they belonged. The bombing of the American ship *President Hoover* by Chinese planes on August 30th, 1937,²⁵ the attack by Japanese aircraft upon the British Ambassador to China near Kiating on August 26, 1937,²⁶ and the bombing of the U.S.S. *Panay* and other American vessels by a Japanese air force on December 12, 1937,²⁷ were instances of internationally illegal action for which the governments of the attackers made apology and accepted responsibility.²⁸

²³ See Art. 25 of 1923 Rules of Aerial Warfare.

According to the second paragraph thereof: "A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible."

See Spaight, *Air Power and War Rights*, 2 ed., Chap. XI.

²⁴ See the British Ambassador at Rome, to the Italian Minister for Foreign Affairs, April 10, 1936, protesting against attacks by Italian airmen on a British Red Cross ambulance operating in Ethiopia, in March, 1936, Ethiopia No. 4 (1936), Cmd. 5160, 4.

See, also, Ethiopian allegations against Italy, charging deliberate bombing of Red Cross hospitals, with summary of cases, set forth in League of Nations Official Journal, April, 1936, 368, 369.

²⁵ Dept. of State Press Releases, Sept. 4, 1937, 187.

²⁶ See *Boston Evening Transcript*, Aug. 27, 1937.

See note from the Japanese Minister of Foreign Affairs, to the British Ambassador at Tokyo, Sept. 22, 1937, *New York Times*, Sept. 23, 1937.

²⁷ See Memorandum handed to the Secretary of State by the President, Dec. 13, 1937, Dept. of State Press Releases, Dec. 18, 1937, 447.

²⁸ Declared Secretary Hull in a communication for the Japanese Minister of Foreign Affairs, Dec. 14, 1937: "The essential facts are that these American vessels were in the Yangtze River by uncontested and incontestable right; that they were flying the American flag; that they were engaged in their legitimate and appropriate business; that they were at the moment conveying American official and private personnel away from points where danger had developed; that they had several times changed their position, moving upriver, in order to avoid danger; and that they were attacked by Japanese bombing planes. . . . On several occasions, however, acts of Japanese armed forces have violated the rights of the United States, have seriously endangered the lives of American nationals, and have destroyed American property. In several instances, the Japanese government has admitted the facts, has expressed regrets, and has given assurance that every precaution will be taken against recurrence of such incidents.

"In the present case, acts of Japanese armed forces have taken place in complete disregard of American rights, have taken American life, and have destroyed American property, both public and private.

"In these circumstances, the Government of the United States requests and expects of the Japanese Government a formally recorded expression of regret, an understanding to make complete and comprehensive indemnifications, and an assurance that definite and specific steps have been taken which will ensure that hereafter American nationals, interests and

The situation in the foregoing cases differed from that where a person or thing not reasonably to be deemed a legitimate military objective suffers injury by reason of its proximity to what is attacked as such an objective.²⁹ In general the warning to the airman both of what he must not deliberately attack, and of what he must take pains to spare in the course of a normal offensive operation needs to be clear. It is important that he not only be apprised of the legal consequences of his neglect to respect either of these obligations, but also be afforded reasonable opportunity for visual apprehension of the physical things which he should avoid attacking.³⁰ As such apprehension is doubtless impossible when his plane attains a very high elevation which the requirements of his own safety may impel him to seek, it is reasonable to contend that if he proceeds to initiate a bombardment at such an elevation, his sovereign is not in a position to deny responsibility for injuries sustained by persons or property which the airman should not have deliberately attacked or should have taken pains to avoid attacking. In a word, if the airman, when bombarding, places himself beyond the range of appropriate warnings, his sovereign is estopped from denying that they were wantonly disregarded. Otherwise, indiscriminate bombardment by air would become legitimate, and the mere possibility of the existence of a reasonable objective within a particular area would open the door to, and be made the excuse for, attacks upon anything that happened to be therein.³¹

It cannot be admitted that aerial bombardment for the purpose of terrorizing the civilian population of the enemy, or of destroying or damaging private prop-

erty in China will not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever." (Dept. of State Press Releases, Dec. 18, 1937, 448. See, also, other documents, *id.*, 444-452.)

For the text of the Japanese reply of Dec. 24, 1937, declaring that the Japanese attack was "entirely unintentional," see Dept. of State Press Releases, Dec. 25, 1937, 497.

See Mr. Grew, American Ambassador to Japan, to the Japanese Minister for Foreign Affairs, Dec. 25, 1937, *id.*, 498, in which it was declared that the Government of the United States relied on the report of findings of the Court of Inquiry of the United States Navy, *id.*, 505, whereas the conclusions of the Japanese Government were those arrived at as a result of its own investigation. From the report of findings of the American Naval Court of Inquiry, and from the report from the commanding officer of the USS *Panay*, *id.*, 499, American opinion failed to be convinced that the attack was "entirely unintentional." Nor did the motion pictures of the attack which were exhibited in the United States produce a different impression.

See, also, case of erroneous attack by Japanese air forces on American nationals in Shanghai, on October 24, 1937, referred to in Dept. of State Press Releases, Oct. 30, 1937, 341.

²⁹ The explosion on the U.S.S. *Augusta*, August 20, 1937, and of a shell fired from an aircraft by a participant in the Sino-Japanese conflict, and which was productive of loss of life and injuries to persons on board, might have been an instance, had China and Japan then been at war with each other, where the damage sustained was a normal if unfortunate instance of a legitimate aerial bombardment. See *New York Herald-Tribune*, Aug. 21, 1937, p. 1.

³⁰ Opinions may differ as to the sufficiency of markings of objects on the surface of the land or sea such as to cause them to be reasonably visible to aircraft. There is doubtless need of general agreement concerning the character of markings which shall be deemed to suffice as requisite warnings to superadjacent aircraft, preventing the commanders thereof from claiming the benefits of a convenient myopia.

³¹ It must be acknowledged, however, that thus far in the course of World War II, attacking aircraft seeking whenever possible an elevation that safeguarded them from anti-aircraft devices, have generally been impervious to any obligation to spare what should and could have been spared if visually apprehended at a lower level. Ignorance and safety have been deemed preferable to knowledge and danger.

erty not of military character, or of producing harm to non-combatants as by producing injury to their persons is lawful.³²

On September 22, 1937, by way of response to an announcement³³ of a prospective Japanese bombardment of Nanking by air, the Government of the United States declared:

This Government holds the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to principles of law and of humanity. Moreover, in the present instance the period allowed for withdrawal is inadequate, and, in view of the wide area over which Japanese bombing operations have prevailed, there can be no assurance that even in areas to which American nationals and noncombatants might withdraw they would be secure.

Notwithstanding the reiterated assurance that 'the safety of the lives and property of nationals of friendly powers will be taken into full consideration during the projected offensive,' this Government is constrained to observe that experience has shown that, when and where aerial bombing operations are engaged in, no amount of solicitude on the part of the authorities responsible therefor is effective toward insuring the safety of any persons or any property within the area of such operations.

Reports of bombing operations by Japanese planes at and around Nanking both before and since the issuance of the announcement under reference indicate that these operations almost invariably result in extensive destruction of noncombatant life and nonmilitary establishments.

In view of the fact that Nanking is the seat of government in China and that there the American Ambassador and other agencies of the American Government carry on their essential functions, the American Government strongly objects to the creation of a situation in consequence of which the American Ambassador and other agencies of this Government are confronted with the alternative of abandoning their establishments or being exposed to grave hazards.

In the light of assurances repeatedly given by the Japanese Government that the objectives of Japanese military operations are limited strictly to Chinese military agencies and establishments and that the Japanese Government has no intention of making nonmilitary property and noncombatants the direct objects of attack, and of the Japanese Government's expression of its desire to respect the Embassies, warships, and merchant vessels of the powers at Nanking, the American Government cannot believe that the intimation that the whole Nanking area may be subjected to bombing operations represents the considered intent of the Japanese Government.

³² See Art. 22, 1923 Rules of Aerial Warfare.

See, also, Oppenheim, Lauterpacht's 5 ed., II, § 214 *ea*.

³³ It was said in this connection: "The American Government refers to the statement by the commander in chief of the Japanese Third Fleet which was handed to the American consul general at Shanghai on September 19, announcing the project of the Japanese Naval Air Force, after 12 o'clock noon of September 21, 1937, to resort to bombing and other measures of offense in and around the city of Nanking and warning the officials and nationals of third powers living there 'to take adequate measures for voluntary moving into areas of greater safety.'"

The American Government, therefore, reserving all rights on its own behalf and on behalf of American nationals in respect to damages which might result from Japanese military operations in the Nanking area, expresses the earnest hope that further bombing in and around the city of Nanking will be avoided.³⁴

It will be observed that this note did not intimate that the rights of Japan to resort to aerial bombardment in Chinese territory were less or other than those which it might invoke were it admittedly engaged in war, and conducting an offensive belligerent operation on or in relation to the territory of its enemy. Nor was there discussion of what Japan as a belligerent might properly deem to be a military objective. In so far as the objection to "any general bombing of an extensive area" constituting a residential area had reference to the impropriety of attacking an open place that had no necessary connection with an offensive operation and could not well be regarded as itself constituting a legitimate military objective, there was a basis for the American contention.³⁵ Moreover, the objection to the Japanese creation of a situation demanding that the American diplomatic establishment at the seat of Government in China be abandoned if the American Ambassador were to be safeguarded from grave danger was reasonable, especially in view of the circumstance that the prospective bombarder did not purport to be at war with China. In its rejoinder, September 29, 1937, the Japanese Government declared:

As Your Excellency's Government is well aware, Nanking is exceptionally strongly fortified and it is the most important strategic base of military operations for the Chinese forces. The bombing of the military facilities and equipment located in and around the said city is a necessary and unavoidable measure for the attainment of the military objectives of the Japanese forces. It goes without saying that bombing operations by Japanese forces will be strictly confined to such scope and will not be aimed at noncombatants, as evidenced by the fact that warning was given even to Chinese noncombatants.

The frequently stated policy of the Imperial Japanese Government to respect as far as possible the rights and interests of third countries and the safety of the lives and property of the nationals thereof remains unaltered in the present bombing operations. The recent proposal of the Imperial Japanese Government that the officials, citizens, and vessels of Your Excellency's country take refuge was the result of the desire to avoid if possible the occurrence of injury to nationals of third countries, which might be unavoidable notwithstanding the greatest precautions which may be taken by the Japanese forces.

It is hoped that Your Excellency's Government will understand that the Imperial Japanese Government has desired the safety of the nationals of third countries in spite of the fact that the Japanese forces are restricted

³⁴ See Dept. of State Press Releases, Sept. 25, 1937, 255.

³⁵ Declares Spaight: "The doctrine of the military objective, that is, that air bombardment must be limited to individual targets of military importance, should be applied in principle even within a zone of operations and should not be regarded as modified except to the limited extent that is necessitated by the battle conditions prevailing in such a zone." (Air Power and War Rights, 2 ed., 207.)

in their strategic movements by reason of the giving of advance warnings, and it is earnestly hoped that Your Excellency's Government, with full appreciation of the circumstances, will co-operate with the measures taken by the Imperial Japanese Government. Furthermore, the view of the Imperial Japanese Government with regard to damages sustained by nationals of third countries as a result of the present hostilities in China is as stated in my note of August 31.³⁶

The reader will judge for himself as to the sufficiency of this note.

The sufferings sustained by civilian populations from aerial bombardments in the course of hostilities in Spain and China in 1938, inspired the Department of State to express itself on more than one occasion in vigorous terms. Thus it was declared by Mr. Welles, Acting Secretary of State, on June 3, 1938:

Both in the Far East and in Europe there have been going on hostilities every aspect of which the American people and this Government have deplored. When the methods used in the conduct of these hostilities take the form of ruthless bombing of unfortified localities with the resultant slaughter of civilian populations and in particular of women and children, public opinion in the United States regards such methods as barbarous. Several times during the past year, especially on September 28, 1937, and on March 21, 1938, the Secretary of State has expressed the views of this country to the effect that any general bombing of an extensive area wherein there resided a large population engaged in peaceful pursuits is contrary to every principle of law and of humanity. During the past few days there have taken place in China and in Spain aerial bombings which have resulted in the death of many hundreds of the civilian population. This Government, while scrupulously adhering to the policy of nonintervention, reiterates this nation's emphatic reprobation of such methods and of such acts, which are in violation of the most elementary principles of those standards of humane conduct which have been developed as an essential part of modern civilization.³⁷

³⁶ Dept. of State Press Release, Oct. 2, 1937, 268.

Declared the Far Eastern Committee in a resolution adopted by the League Assembly on September 28, 1937: "The Advisory Committee, taking into urgent consideration the question of the aerial bombardment by the Japanese aircraft of open towns in China, expresses its profound distress at the loss of life caused to innocent civilians, including great numbers of women and children, as a result of such bombardment, and declares that no excuse can be made for such acts, which have aroused horror and indignation throughout the world, and solemnly condemns them." (*Manchester Guardian Weekly*, October 1, 1937, 264.)

See in this connection summary of Japanese naval operations during September, 1937, as set forth by Publicity Bureau, Japanese Navy Dept., *Tokyo Gazette*, Oct., 1937, 39-46.

Declared Dr. Thomas Baty, associated with the Japanese Foreign Office, in a letter to the Editor of the *New York Times*, under date of Nov. 12, 1937, and published in that newspaper on Nov. 30, 1937: "His [Dr. Garner's] idea appears to be that the Japanese Air Force has gone in for a campaign of frightfulness, laying defenseless cities in ruins in order to terrorize the civil population. Such is not the case. They have simply sought military objectives. The inevitable damage to civilian life and property has been minimized. The aviators have exposed themselves by flying low and by giving warning."

See resolutions and recommendation adopted by the Assembly of the League of Nations, Sept. 30, 1938, *League of Nations Official Journal*, Special Supplement No. 182, Oct., 1938, p. 16.

³⁷ Dept. of State Press Releases, June 4, 1938, 642. See, also, brief statement by Mr. Hull, Secy. of State, March 21, 1938, *id.*, March 26, 1938, 396.

On September 1, 1939, President Roosevelt addressed an "urgent appeal to every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents."³⁸ An immediate reply was requested. The French Government forthwith affirmed its firm intention to conduct hostilities, if war should be imposed upon it as a result of the German aggression, "in strict accord with the laws of war," and to do everything in its power to spare civilian populations the sufferings which modern war might entail. It announced, moreover, that orders had already been given to the Commander-in-Chief of all the French forces excluding in particular the bombardment of civilian populations, and limiting bombardment from the air to "strictly military objectives."³⁹ The British response announced that it was already the settled policy of His Majesty's Government, should they become involved in hostilities, to refrain from the bombardment from the air of civilian populations or of unfortified cities, and "to confine bombardment to strictly military objectives upon the understanding that those same rules will be scrupulously observed by all their opponents."⁴⁰ The Polish Government responded that its supreme military authorities had issued formal orders to refrain in the event of war "from the bombardment of open towns and from such similar action as would be of direct danger to the civilian population."⁴¹ Chancellor Hitler declared that the humanitarian principle expressed by President Roosevelt corresponded completely with his own point of view and had previously been advocated by him; and he announced that he had already given notice in a speech uttered in the Reichstag on the same day that "the German air force had received the order to restrict its operations to military objectives," adding that it was a self-understood prerequisite for the maintenance of that order that opposing air forces adhere to the same rule.⁴²

³⁸ Dept. of State Bulletin, Sept. 2, 1939, 181. The appeal was addressed to the Governments of Great Britain, France, Italy, Germany, and Poland. Declaring that Italy would not take any initiative in military operations, the Government of that country responded that the possibility which formed the object of the message from the President was "to be excluded as far as concerns Italy." (*Id.*, 182.)

³⁹ *Id.*, 181. It was added: "It goes without saying that the French Government reserves the right to have recourse to any action which it might consider appropriate, if the adversary should not observe the restrictions to which the French Government itself has subjected the operations of its air forces."

⁴⁰ *Id.*, 182.

⁴¹ *Id.*, 182. It was added: "Unfortunately Poland whose territory has been since this early morning the object of unprovoked aggression by German forces has already been the victim of several attacks by air. The reported losses in civilian population render it doubtful as to whether the opposing side is respecting the rules to which the President refers. These rules which are the outcome of natural human feelings remain in force on condition and on the understanding that they will be also scrupulously observed by the opposing party."

⁴² *Id.*, 183.

On September 2, 1939, the Governments of the United Kingdom and France issued a joint declaration in the course of which it was said: "They [the Governments] did, indeed, some time ago, send explicit instruction to the commanders of the armed forces prohibiting the bombardment, whether from the air or the sea, or by artillery on land, of any except strictly military objectives in the narrowest sense of the word." (*Manchester Guardian Weekly*, Sept. 8, 1939, 192.)

The foregoing correspondence did not indicate what the Governments of France, Great Britain and Germany might deem to be a legitimate military objective. Their seemingly common thought that civilian populations should not be made the direct object of attack did not reveal a conclusion or agreement that the proximity of those populations to an objective which it was thought reasonable to destroy on account of its military value to an enemy would diminish the belligerent privilege of bombarding it. Thus there was hardly a favorable response to the broad suggestion from the President that in no event and under no circumstances would there be undertaken the bombardment from the air of such populations. On the other hand, the several notes from the prospective belligerents did reveal a sense of the impropriety of deliberately attacking and hunting down civilian populations by aerial operations. In so far as the President may have sought reciprocal assurances of abstention from recourse to such action his appeal was successful.⁴³

In attempting to appraise existing requirements of international law pertaining to aerial bombardment, there is special danger of imputing to interested States a sense of obligation to be governed by considerations which in practice are not shown to be influential upon their conduct. There stands out the striking fact that there is a lack of evidence of a common understanding that a belligerent is not free to bombard an object of which the destruction or injury would in its estimation constitute a distinct military advantage to itself, or that that freedom is impaired by the physical relationship or proximity of such object to life or property which should be regarded as normally either immune from attack, or as far as possible safeguarded therefrom. There is also evidence of a common understanding reflected in the official utterances of States that condemns aerial bombardment for the purpose of terrorizing the inhabitants of hostile territory, or of attacking objectives of which the destruction or injury affords no distinct military advantage to itself, and that also demands that in the course of an otherwise reasonable offensive operation, pains should be taken

⁴³ Declared Mr. Biddle, American Ambassador to Poland, in a report to the Secretary of State, Sept. 8, 1939: "Although they [the Germans] are ostensibly appearing to follow the principle of limiting bombardments from the air to objectives of a military character, in my opinion the German forces are taking advantage of every opportunity, without regard to the danger to the civilian population which may be involved. It is also evident that the German bombers are releasing the bombs they carry even when they are in doubt as to the identity of their objectives.

"There may also be cited the attacks made on my villa and that of my neighbor; a heavy attack on modern apartment buildings in the suburbs of Warsaw, situated one kilometer from military barracks; the destruction of a sanatorium, involving the death of ten children, in the woods near Otwock; the bombing of a refugee train on its way from Kutno; damage done to a hospital train carrying a party of wounded soldiers, which was plainly marked with a Red Cross on the roof and drawn up at the uncovered East Station of Warsaw, and the destruction of a Girl Guide hut in which 12 girls were killed.

"According to the best available information to date, the fortifications, factories, and bridges surrounding the cities of Lublin and Lwow are being subjected to increasing bombardment from the air, although there has been no bombing of the centers of the cities named." (Dept. of State Press Releases, Sept. 16, 1939, 249.) See, also, telegram from Ambassador Biddle, received by the Department of State, Sept. 13, 1939, *id.*, 250.

See, also, Dept. of State Bulletin, Oct. 7, 1939, adverting to a report from the American Chargé in Berlin, referring to his receipt of information to the effect that the American Ambassador's residence at Warsaw, as well as the American Consulate General in that city, had been destroyed by aerial bombardment.

to spare as far as possible particular entities such as hospitals, at least when appropriate effort is made to make clear their identity. Herein is seen the extent to which the equities of so-called non-combatant life and property find recognition. Belligerent action is, however, oftentimes contemptuous of it.

The World War initiated in 1939, has revealed the futility of conventional arrangements, or of deductions from previous practices, as curbs upon the use of some instrumentalities of greatest potentiality in the prosecution of war. Whether goaded by a sense of need of retaliation, or simply by military advantages to be gained by the relatively unbridled employment of particular agencies, belligerent powers have been heedless of the restraints of law. That heedlessness has already been so vast and continuous as to occasion surprise that within the last decade interested statesmen could have failed to anticipate it, and have proceeded blithely to conclude treaties which forbade conduct to which both Germany and her enemies have since had recourse.⁴⁴ Future generations may look back with derision upon efforts following the present war to restrain uses of aircraft or of submarines in prospective conflicts according to the dictates of humanity, or the requirements of logic, or even the demands of justice, unless full cognizance be taken of some considerations that heretofore have been ignored. The chief one is the common propensity of warring powers to use some weapons within reach to best advantage, with resulting inability to resist the temptation to do so, when any substantial military benefit is at stake.⁴⁵ Already, since 1939, society has observed (and perhaps learned) that no nice regard for theoretical or logical checks that hinder such action can be expected. Aircraft operating either from land bases or carriers at sea, will bomb wherever they can best achieve their end; submarines will strike at any desired objective. The equities of unoffending non-combatants, even where they are strongest, will be swept aside as inconsequential if they balk success.

Deviations from what are supposedly at the present time the requirements of the law will be increasingly appalling. The extent of them can only be duly appreciated by careful appraisal of what the law supposedly enjoins — a circumstance which perhaps justifies the effort that has been made to portray American opinion as to the scope of the injunction in various situations. With the endeavor to anticipate how belligerent States are to be expected to employ aircraft and submarines (and possibly certain other instrumentalities) in wars to come, and with bases for reasonable anticipations drawn from the present conflict, the international society may still be able to safeguard itself against a repetition of the blight upon its interests which its own ineptitude within recent years has permitted. This calls for an entirely fresh approach.

It must be perceived that if prospective belligerents can not be trusted or expected to employ military aircraft or submarines with the moderation which the

⁴⁴ See Submarine Craft — Conventional Arrangements since World War I, *infra*, § 749A; Collective Measures Against Attacks in the Mediterranean by Submarines in 1937, *infra*, § 751A; Attack by Aircraft, *infra*, § 751B.

⁴⁵ The propensity is of course an old one. It has not, however, in relation to uses of some instrumentalities of war betokened the existence of irresistible impulses that proved to be beyond practicable constraint through international agreement. Some of the Hague Conventions of 1907 are illustrative.

law enjoins, individual States should be denied the privilege of possessing them. That privilege should be exclusively lodged in some international entity designed to preserve the general peace, for the good of all. Such an alternative or desideratum can obviously only make its appeal to the several interested States of greatest influence and power when each is aware of the advantage to itself derivable from such an arrangement. Such awareness may not be a remote possibility; and with it may be seen the norm of a new law that forbids the individual State to possess itself of what in its hands is inherently dangerous to all others.⁴⁶ Such a common concession is believed to be the inexorable price that civilization must pay for the abolishment of the worst features of both aerial and submarine warfare, and for the existence of a law that shall mirror its decision. Otherwise the international society must be prepared to admit that when war ensues almost unlimited uses of the most powerful weapons within the reach of a belligerent are unrestrained by rules that can be fairly deemed to have a place in the law of nations.⁴⁷

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§ 664. **Prohibition of Certain Measures Respecting the Treatment of an Enemy Person. Denial of Quarter.** According to the Instructions for the Government of the Armies of the United States in the Field, of 1863, and the Rules of Land Warfare of 1917, the law of war disclaims all cruelty, as well as all acts of private revenge, or connivance at such acts, and all extortions.¹ Nor does it allow proclaiming either an individual belonging to the hostile army, or a citizen or a subject of the hostile Government, an outlaw, who may be slain without trial by any captor, "any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage."² Civilized nations, it is said, look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.³ The War Department Rules of Land Warfare of 1940 declare, as has been noted,⁴ that military necessity does not

⁴⁶ Doubtless it will be urged by the victors in the present war, that they must retain for reasons of defense unfettered and exclusive control of both aerial and submarine weapons, and that as possessors thereof they, and they alone, must be free to determine how those instrumentalities shall be employed, and that with their decision society must content itself. Such may prove to be in fact the course that is followed for at least a protracted period of time. It will, however, leave unarrested, and perhaps inspire the vanquished to nourish the resolution to break down the settlement and never relinquish the struggle to regain by force the weapons of which they have been deprived. (The settlements of World War I are grimly illustrative.) Banishment of such a resolution, which must never be overlooked as an insidious enemy of lasting peace, is only to be expected when the victors ultimately find the factual situation to be one where they can entrust the use of weapons such as military aircraft and submarines to the possession of an international entity for the common weal. It, and not they, must be the judge of beneficent protection to be derived from that use. In a word, ultimate retention of exclusive power by the victors needs to be accompanied by uses or delegations of it that shall not arouse the vanquished to fury and so frustrate the permanence of peace.

⁴⁷ See International Organization for Peace, *infra*, § 923.

§ 664. ¹ General Orders, No. 100, Apr. 24, 1863, Sec. XI, Moore, Dig., VII, 197; also No 18, Rules of Land Warfare.

² Section CXLVIII, General Orders, No. 100, of 1863, Moore, Dig., VII, 198.

³ No. 179, Rules of Land Warfare.

⁴ See Military Necessity, *supra*, § 655.

admit of cruelty — that is, the infliction of suffering merely for spite or revenge; nor of maiming or wounding except in combat; nor of torture to extort confessions.⁵

The Hague Regulations expressly forbid a belligerent to “kill or wound treacherously individuals belonging to the hostile nation or army;”⁶ to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion; to declare that no quarter will be given.”⁷ It is believed that these prohibitions may be regarded as fairly declaratory of the law of nations. To make this statement without comment would, however, be token unconcern as to the instances arising even since World War I, where the Hague Regulations have been ignored.⁸ The lapses have been sufficient not only to arouse the sensibilities of the international society, but also to warn it as to what may be anticipated when certain of its members are locked in embittered armed conflict with others, unless the way of the transgressor be made hard. Otherwise it must be acknowledged that ruthless States are to be expected to break down restraints designed to safeguard the defenseless, and gradually transform what are supposed to be legal obligations of international aspect into mere matters of choice to be determined according to the taste and impulse of the particular victor in arms.⁹

According to article III of the Hague Convention of 1907, respecting the Laws and Customs of War on Land, a belligerent party which violates the provisions of the Regulations shall, if the case demands, be liable to pay compensation.

⁵ No. 25.

⁶ “The above article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive.’ Offenders have no claim to be treated as combatants, but should be tried as criminals.” (War Dept. Rules of Land Warfare, 1940, No. 31.)

⁷ Art. XXIII (b), (c), and (d), Malloy’s Treaties, II, 2285.

The Hague Regulations were deemed to supersede contrasting instructions set forth in those for the Government of Armies of the United States in the Field, of 1863. See Rules of Land Warfare, 1917, No. 183, note 1.

⁸ See account of the capture or battle of Nanking in December, 1937, by F. Tillman Durdin, *New York Times*, Jan. 9, 1938.

One Brig. Gen. S. of the United States Army, in 1901, gave the following oral instructions to a subordinate officer engaged in a punitive movement rendered necessary by the treacherous massacre of an American force at Balangiga, in Samar, in September, 1901: “I want no prisoners. I wish you to kill and burn; the more you kill and burn the better you will please me.” Concerning the court-martial and retirement of Gen. S., and the comments of President Roosevelt and Mr. Root, Secretary of War, see Senate Document No. 213, 57 Cong., 2 Sess., 2, 3, 5, Moore, Dig., VII, 187–190.

⁹ World War I presented no more impressive fact and scarcely one more influential in arousing a sense of outrage throughout the United States than the complete failure of any law, conventional or otherwise, to deter German forces in Belgium, in 1914, from killing and injuring disabled and helpless enemy persons, combatant and non-combatant. Reports of the Official Commission of the Belgian Government on the Violation of the Rights of Nations and of the Laws and Customs of War, Vol. II, 20–69, and the Report of the Bryce Committee on Alleged German Outrages, Appendix, 187–201, revealed a spirit in the German Army utterly opposed to the theory on which States have developed their practice and formulated their agreements.

See instances of denial of quarter, and of ill-treatment of prisoners of war and wounded, in Annex I to Report of the Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, pp. 54–56; text of Report, *id.*, p. 17; also Germany’s Violations of the Laws of War, compiled under auspices of the French Ministry of Foreign Affairs, and translated by J. O. P. Bland, Chap. III, documents Nos. 7–26.

Moreover it is said to be "responsible for all acts committed by persons forming part of its armed forces."¹⁰ The War Department Rules of Land Warfare of 1940, announce that:

In the event of clearly established violation of the laws of war, the injured party may legally resort to such remedial action as may be deemed appropriate and necessary within the following classes, to wit:

- a. Publication of the facts, with a view to influencing public opinion against the offending belligerent;
- b. Protest and demand for punishment of individual offenders, sent to the offending belligerent through neutral diplomatic channels, or by parlementaire direct to the commander of the offending forces;
- c. Punishment of captured individual offenders; and
- d. Reprisals.¹¹

Inasmuch as denial of quarter is at best a measure of self-defense or retaliation, the omission from regulations of warfare of reference to such conduct as a form of legitimate procedure, might diminish the number of cases where recourse thereto was had. Silence as to the existence of a possible excuse, rarely if ever to be utilized, might serve to minimize the occasions when it would be in fact invoked.

h

§ 665. Inciting Enemy Troops to Desertion, Treason and Insurrection.

According to Professor Westlake it is considered unlawful to incite the enemy's troops to treason or desertion—a rule which he declares was "probably introduced for the mutual convenience of commanders and by a kind of chivalry between them, and which should carry with it the unlawfulness of enrolling deserters as recruits."¹ It may be doubted whether any belligerent in World War I felt itself restricted by a legal duty not to pursue such a course, even though it might endeavor to constrain its adversary to refrain from such conduct.² The

¹⁰ Malloy's Treaties, II, 2278.

¹¹ No. 346. In No. 347 the principal offenses likely to be chargeable to armed forces are specified.

In an impressive decision by the German *Reichsgericht* in 1921, in the case of the *Llandovery Castle*, the court declared: "The firing on the boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed (*compare* the Hague regulations as to war on land, para. 23 (c)), similarly, in war at sea, the killing of shipwrecked people, who have taken refuge in life-boats, is forbidden. It is certainly possible to imagine exceptions to this rule, as, for example, if the inmates of the life-boats take part in the fight. But there was no such state of affairs in the present case." (Williams and Lauterpacht, Annual Dig., 1923–1924, case No. 235.)

§ 665. ¹ Int. Law, 2 ed., II, 83.

² On October 4, 1918, Secretary Lansing, in a communication to the American Ambassador in France announced the receipt of information from the French Ambassador at Washington that the military commander at Innsbruck had decided that the death penalty would be inflicted upon Allied aviators who should drop manifestoes or even should be found bearing such documents, and that the French Government considered that in order to prevent such action the Austrian authorities should be informed by radiogram that "if measures so contrary to international law and to humanity were carried into effect, retaliation would have unavoidably to be practiced on Austrian officers in Allied hands, the number to be double and the punishment the same"; that the President of the United States was of opinion that however abhorrent and indefensible the announced practice might be, he could not consent that his Government "should unite in a threat to retaliate by executing twice

War Department Rules of Land Warfare of 1940, announce that the requirements of good faith do not prevent efforts to induce the enemy's soldiers to desert, surrender, or rebel.³

The attempt to weaken the power of the enemy in the field by fomenting discord of any kind among his troops seems to be as legitimate as the endeavor to accomplish the same end by placing them *hors de combat*. Moreover, when it is believed by one belligerent that the opposing forces are compelled by military authority to battle for the preservation of a dynasty, and the maintenance and extension of autocratic government as such, rather than for the aspirations of a people, it is not, from an American point of view, unreasonable or unwise to bring home to the soldiers as well as the civilians of the enemy an understanding of what the success of their own arms may have in store for those who bear them.

To incite insurrection in the territory of the enemy is not deemed to be contrary to the law of nations.⁴

i

§ 666. **Services Not to Be Exacted from an Enemy Person.** A belligerent whether as an invader or occupant of hostile territory is not free to exact any form of service from an enemy person. According to Article XXIII of the Hague Regulations of 1907, it is forbidden, as has been observed, "to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."¹ The language of the Article has been declared to be ambiguous, "since it is uncertain whether it is unlawful to compel inhabitants of occupied territory to work on certain works that may be urgently required, such as roads and bridges which may be of ultimate military service, or whether these inhabitants can be compelled to act as guides by the enemy."²

Heretofore it has not been deemed to be unjust to compel enemy persons to perform numerous forms of service falling short of actual participation in hostilities. The impressment of them as guides has been supported by American military opinion, because they are said to be "absolutely essential to success in practically all military operations in the field in unknown enemy country."³

as many captured Austrian officers as aviators put to death under the reported military order"; that the Government of the United States would, nevertheless, unite in announcing to the Austrian authorities, by such means as were available, that it denounced the proposed treatment of captured aviators, who were found bearing or to have dropped documents within the lines of the enemy, "as utterly indefensible and violative of every principle of humanity and every rule of civilized warfare," and that, if the proposed practice were put into operation, the Austrian Government would have to realize that such barbarous and inhuman treatment of prisoners of war would invite "extreme measures to prevent its continuance," deeply as the American Government would deplore the consequences which would result. (For. Rel. 1918, Supp., 2, 786.)

³ No. 38.

⁴ See Art. 21 of Hague Rules of Aerial Warfare of 1923, *Am. J.*, XXXII, *Official Documents*, 22.

§ 666. ¹ Malloy's Treaties, II, 2285. See Belligerent Forces, Aliens, *supra*, § 651.

² No. 188, War Dept. Rules of Land Warfare, 1917. See, in this connection, A. P. Higgins, Hague Peace Conferences, 265-269; Hershey, *Int. Law*, revised ed., 600, note; Percy Bordwell, *Law of War*, 285; J. M. Spaight, *War Rights on Land*, 140-142.

See, also, War Dept. Rules of Land Warfare, 1940, Nos. 303-305.

³ War Dept. Rules of Land Warfare, 1917, No. 323.

It should be observed, however, that Art. XLIV of the Hague Regulations of 1907, declares that "a belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense."⁴ The article is generally construed as prohibiting the impressment of guides from the inhabitants in an occupied territory. "This is the construction placed upon it by the United States."⁵

In the course of World War I, Germany and certain of its allies compelled enemy civilians not only to labor in connection with military operations,⁶ but also to act as screens before advancing troops as a means of checking attacks upon them.⁷ Moreover, conditions of labor enforced upon children and women, as well as men, were frequently inhumane.⁸ Such occurrences proved the vital need not merely of a more definite understanding among the members of the international society as to the precise nature of services not to be exacted of enemy persons of every class, but also of the establishment of a means whereby the States charged with the commission of such outrages should be in fact prevented from again committing them. Elsewhere is noted the extent to which the Geneva Convention of 1929, Relating to the Treatment of Prisoners of War lays down restrictions concerning the character of work to be exacted of enemy persons in captivity.⁹

j

§ 667. **Retaliation.** Retaliation in land warfare refers to a single form of that grave procedure whereby a State endeavors to check the illegal conduct of the enemy by recourse to measures supposedly similar in kind.¹ It refers in one sense

⁴ Malloy's Treaties, II, 2288.

⁵ War Department Rules of Land Warfare, 1940, No. 308, where it is declared that "in a war against any power reserving the article the impressment of guides is not prohibited." It is noted in No. 307 that "this article was reserved by Germany, Austria, Japan, Montenegro, and Russia, because it was believed that it would contravene the pre-existing general rule and practice of the nations permitting impressment of guides."

In the earlier edition of this work (II, 326, footnote 3) the author did not hesitate to criticize the statement in No. 323 of the Rules of Land Warfare of 1917, that "whenever, therefore, guides are in fact essential to success, and, for that reason, a military necessity, the foregoing rule must give way to and be interpreted as subordinate to such military necessity." He is happy to note that this statement is not repeated in the War Department Rules of Land Warfare of 1934, or of 1940.

See Belligerent Occupation, Measures Relating to the Persons of the Inhabitants, *infra*, § 699.

⁶ Annex I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, pp. 37-38.

⁷ Concerning the use for such purposes of enemy civilians, including women and children, in Belgium in 1914, see Report of Bryce Committee on Alleged German Outrages, Appendix, 175-177.

⁸ See, for example, Annex I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, p. 37. See, in this connection, the restrictions contained in Arts. XLII-XLVIII of proposed agreement between the United States and Germany, signed by representatives of those belligerents at Berne, Nov. 11, 1918, For. Rel. 1918, Supp., 2, 112-113.

⁹ See Prisoners of War, the Geneva Convention of 1929, *infra*, § 670.

§ 667. ¹ See Retaliation, *supra*, § 588. The Regulations annexed to The Hague Convention of 1907, respecting the Laws and Customs of War on Land, contain no provisions concerning retaliation.

According to Art. 2 of the Geneva Convention Relating to the Treatment of Prisoners of War: "Measures of Reprisal against them are prohibited."

See, also, Reprisals, *supra*, § 587.

to the return of lawlessness for lawlessness. Excuses rest upon the claim that by reason of the character of the conduct of its adversary the retaliator is not bound by the law and may go outside of the realm thereof without necessarily violating a legal duty towards its foe. Conduct not violative of such an obligation is not inherently wrongful even though it involves acts which are normally forbidden by international law. The character, in legal contemplation, of what the retaliator does is thus dependent upon the validity of the excuse offered in support of it. A belligerent which is contemptuous of conventional or customary prohibitions is not in a position to claim that its adversary when responding with like for like lacks the requisite excuse. Approaching the matter in more realistic fashion, it may be urged with force that a State which puts itself outside of or beyond the law in its conduct as a belligerent loses the benefit of the law, and that when opposing belligerents reciprocate in dealing with each other as the law forbids, their conduct is extra-legal and finds no proper place in a system of law purporting to govern the conduct of States at war. Dread of retaliation may, and is likely to deter a belligerent State from recourse to illegal acts of warfare. Moreover, the possession of means of retaliation, especially as an appropriate safeguard against uses of particular instrumentalities such as noxious or deleterious gases, may be deemed indispensable for the safety of an armed force engaged in operations against an enemy otherwise, and perhaps notoriously, inclined to permit no legal obstacle to thwart its success.²

In land warfare the opportunity for a commanding officer to exercise discretion in resorting to retaliation is narrow, because such procedure is commonly determined by the highest authorities of the State, and when decided upon, leaves the commander in the field no alternative.³ He may be expected, therefore, by his own superiors, and enjoined by their instructions, not to embark upon a course of retaliation as a means of causing the abatement by the enemy of illegal conduct when any other effective deterrent is available.⁴

² "The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage." (Rules of Land Warfare, 1917, No. 380.)

See Asphyxiating or Deleterious Gases, Recent Developments, *supra*, § 662A.

³ See, for example, the retaliatory treatment of British prisoners in the United States in the War of 1812, as indicated in Wharton, Dig., III, 330, *citing* Am State Pap., For. Rel., III, 630, and quoted in Moore, Dig., VII, 182.

See, also, Correspondence between Vice Admiral Cochrane of the British Navy, and Mr. Monroe, Secy. of State, in August and September, 1814, respecting the destruction of American coast towns by the former pursuant to the request of the Governor General of the Canadas "to aid him in carrying into effect measures of retaliation against the inhabitants of the United States for the wanton destruction committed by their army in Upper Canada." Am. State Pap., For. Rel., III, 693, 694, Moore, Dig., VII, 183-186.

⁴ Thus where the enemy disclaims intentional violation of the laws of war, or indicates a readiness to grant reparation for injuries committed in consequence of so doing, or a willingness to enter into a reciprocal arrangement to prevent a recurrence of acts complained of, the reason for retaliation disappears. See in this connection the communication of Mr. Monroe, Secy. of State, to Vice Admiral Cochrane, Sept. 6, 1814, Am. State Pap., For. Rel., III, 693, Moore, Dig., VII, 184.

Declares Davis: "A general who suffers a wrong at the hands of an enemy, or who finds that his enemy has violated any of the accepted usages of war, addresses him a communication setting forth the facts which constitute his ground of complaint. If no explanation or apology is attempted, or if the enemy assumes the responsibility of the act, he is justified in resorting to measures of retaliation. In choosing a means of retaliation, revenge

In the War Department Rules of Land Warfare of 1940, the matter of retaliation is dealt with under the topic of "Reprisals." In that connection it is said:

a. Reprisals are acts of retaliation resorted to by one belligerent against the enemy individuals or property, for illegal acts of warfare committed by the other belligerent, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.

b. Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices. They should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded as a matter of military necessity, but in the latter event a subordinate commander may order appropriate reprisals upon his own initiative. Hasty or ill-considered action may subsequently be found to have been wholly unjustified, subject the responsible officer himself to punishment as for a violation of the laws of war, and seriously damage his cause. On the other hand, commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of barbarous outrages.

c. Illegal acts of warfare justifying reprisals may be committed by a government, by its military commanders, or by a community or individuals thereof, whom it is impossible to apprehend, try, and punish.

d. The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed. Reprisals against prisoners of war are expressly forbidden by the Geneva convention of 1929. (See par. 73.)

e. The acts resorted to by way of reprisal need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the enemy. Villages or houses, etc., may be burned for acts of hostility committed from them, where the guilty individuals cannot be identified, tried, and punished. Collective punishments may be inflicted either in the form of fines or otherwise.

f. The rule requiring careful inquiry into the real occurrence will always be followed unless the safety of the troops requires immediate drastic action and the persons who actually committed the offense cannot be ascertained.⁵

The foregoing statement illustrates the breadth of the latitude which the military arm of the United States deems to be the possession of a belligerent when obliged to defend itself against the lawless acts of the enemy. The statement

cannot enter into the consideration or decision of the question. His sole purpose must be to constrain his adversary to discontinue the irregular acts complained of. Unless the enemy's act be in gross violation of the dictates of humanity, he must retaliate by resorting to the same or similar acts in his military operations" *Int. Law*, 3 ed., 326, *citing* Woolsey, § 132, *Risley*, p. 126, *Field*, *International Code*, §§ 758-759.

See J. M. Spaight, *War Rights on Land*, Chap. XIV.

⁵No. 358.

refers to more than retaliatory conduct as such; it explores the field roughly and loosely described as that of "Reprisals." It points to conditions under which the armies of the United States may be expected to regard themselves free to commit acts that are normally proscribed as internationally illegal, and under circumstances when they are not of strictly retaliatory aspect. The statement quoted may serve to convince the reader — as it does the author — that if war ensues to which the United States is a party, there may at times be anticipated contempt by its foes for rules of warfare supposedly declaratory of international law, as against which American forces may be obliged to protect themselves as best they may.

The punishment of captured enemy persons for having violated the laws of war may suffice to deter the commission of reprehensible acts and so remove the necessity of retaliation. It should be observed that retaliation does not purport to be the imposition of a penalty as such,⁶ but merely a preventive which may, of necessity, demand the application of severe measures against persons themselves guilty of no wrongful conduct.⁷ This circumstance emphasizes the great caution with which commanding officers should permit themselves to return lawlessness for lawlessness, and the zeal with which, despite grave provocation, they should endeavor to restrain their subordinates from the commission of retaliatory acts of cruelty.⁸

In dealing with uncivilized tribes or the military forces of countries whose backward civilization permits and encourages them to commit acts which are contemptuous of the laws of humanity and morality and defiant of what the law of nations forbids, no mild response may serve to check atrocities. When, however, the army of a State, in the course of retaliation, resorts to acts of barbarity which its enemies do not hesitate to commit, it not only sinks to the level of its foes, but also establishes a precedent which sullies the profession of arms and weakens the efforts of other forces under the same flag to pursue a finer course. For that reason it seems important, especially in view of reported occurrences of World War I, that the highest military authorities of every belligerent State should, upon the outbreak of hostilities, make known to all subordinates certain forms of conduct which acts of retaliation should never be permitted to assume.⁹

⁶ See Stockton, *Outlines*, 330.

⁷ See War Dept. *Rules of Land Warfare*, 1940, Nos. 346c and 347.

⁸ "I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands, and of the well-nigh intolerable provocation it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve the employment of the sternest measures necessary to put a stop to such atrocities and to bring this war to a close. It would be culpable to show weakness in dealing with such foes or to fail to use all legitimate and honorable methods to overcome them. But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates." President Roosevelt, approving the findings and sentence of the court-martial in the case of one Brig. Gen. S., Senate Doc. No. 213, 57 Cong., 2 Sess., 3, Moore, *Dig.*, VII, 188.

⁹ According to Art. LXXXVI of the Manual of the Institute of International Law of 1880, on the Laws of War on Land: "In grave cases in which reprisals [signifying acts of

3

PRISONERS OF WAR

a

Treatment

(1)

§ 668. **In General.** The treatment accorded enemy persons, who, being unable to resist, have been captured on the field of battle or elsewhere, has undergone slow and definite transformation since earliest recorded times. Widespread consciousness that a prisoner of war is a public rather than a private foe, and one not necessarily chargeable with reprehensible conduct, has served to mitigate the fate that once surely awaited children and women as well as men who fell into the clutches of an enemy.¹

While modern society points with scorn to the torture, the crucifixion and burial alive of victims of ancient warriors in darkest ages, it is of vastly greater consequence that nineteen² and even twenty centuries after the birth of Christ, and in spite of the civilization that bears His name, prisoners of war have oftentimes been massacred, or held in a captivity that served to wreck both mind and body.

retaliation] appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy

"They can only be resorted to with the authorization of the commander in chief.

"They must conform in all cases to the laws of humanity and morality." *Annuaire*, V, 157, 174, J. B. Scott, Resolutions, 42.

§ 668. ¹ See T. A. Walker, *Hist. Law of Nations*, I, 42, 56, 57, 61, 72, 75, and documents there cited; Coleman Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, II, 251; Francis Abell, *Prisoners of War in Britain, 1756 to 1815*, Oxford, 1914; Armand Du Payrat, *Le Prisonnier de Guerre dans la Guerre Continentale*, Paris, 1910; E. Romberg, *Des Beligérants et des Prisonniers de Guerre*, Brussels, 1894.

See also Lauterpacht's 6 ed. of *Oppenheim*, II, §§ 125-132, with bibliography; H. C. Fooks, *Prisoners of War, Federalburg, Maryland, 1924*; E. M. McDougall, *Report on Maltreatment of Prisoners of War (Canadian Royal Commission on Illegal Warfare Claims)*, Ottawa, 1932; Gustav Rasmussen, *Code des Prisonniers de Guerre*, Copenhagen, 1931; Georges Werner, *Les Prisonniers de Guerre, Recueil des Cours*, 1928, I, 1.

See Agreement between the United States and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, signed at Geneva Nov. 11, 1918, which, having been superseded in effect by the terms of the Armistice, signed on the same day, was never ratified, *For. Rel.* 1918, Supp., 2, 103; and in this connection, Commander Raymond Stone, "The American-German Conference on Prisoners of War," *Am. J.*, XIII, 406.

See especially, War Dept. Rules of Land Warfare, 1940, Chap. 4.

² Concerning conditions at Andersonville Prison in 1864, see J. Holt, Judge-Advocate Gen., U. S. A., communication to the President, October, 1865, respecting trial of Henry Wirz, *The War of the Rebellion, Official Records of the Union and Confederate Armies*, ser. II, Vol. VII, 775-781; also H. A. Braun, *Andersonville, An Object Lesson on Protection*, Milwaukee, 1892; A. C. Hamlin, *Martyria, or Andersonville Prison*, Boston, 1866; Ambrose Spencer, *A Narrative of Andersonville*, New York, 1866; R. R. Stevenson, *The Southern Side, or Andersonville Prison*, Baltimore, 1876.

See Takahashi, *Int. Law Applied to the Russo-Japanese War*, 94-131, concerning the treatment by Japan of Russian prisoners of war in 1904-1905.

Referring to the war with Spain of 1898, President McKinley declared in his Annual Message of Dec. 5, 1898: "In the entire campaign by land and sea we did not lose a gun or a flag or a transport or a ship, and with the exception of the crew of the *Merrimac* not a soldier or sailor was taken prisoner." *For. Rel.* 1898, lxiii. Concerning the treatment accorded Constructor Hobson and seven seamen of the *Merrimac*, as prisoners of war at Santiago de Cuba, see *For. Rel.* 1898, 981, Moore, Dig., VII, 223.

The conduct of Germany and her allies in the course of World War I, as well as of participants in some subsequent conflicts, has served to emphasize the fact that prisoners of war may still be subjected to the caprice and malice of a captor whose passions differ in no wise from those of the Carthaginian or Goth, and from the violence of which no regulations are likely to assure adequate protection.³

(2)

§ 669. **The Hague Regulations of 1907. The Geneva Convention of 1929.** Dr. Lieber's Code of 1863,¹ the project of the Brussels Conference of 1874,² and the regulations adopted by the Institute of International Law, at Oxford in 1880,³ were the antecedents of the Regulations annexed to the Hague Convention of 1899, respecting the Laws and Customs of War on Land.⁴ These were reestablished in somewhat amended form as the Regulations annexed to the Hague Convention of 1907, concerning the same subject.⁵

On July 27, 1929, there was concluded at Geneva a Convention Relating to the Treatment of Prisoners of War, which went into force June 19, 1931,⁶ and which was accepted by the United States and numerous other countries. While purporting to "complete" Chapter II of the Regulations annexed to the Hague Conventions,⁷ it served in fact to supersede, by substantial re-incorporation, the provisions of that chapter other than those comprised in articles X, XI, and XII.⁸

Declaring that prisoners of war "are in the power of the hostile Power, but not of the individuals or corps who have captured them," the convention pre-

³ R. A. Reiss of Lausanne, How Austria-Hungary waged war in Serbia, and depositions there cited, Paris, 1915; Report of Committee on Alleged German Outrages (Viscount Bryce, Chairman), session of 1914-1915, Cd. 7894, and Appendix, Cd. 7895; German Atrocities in France, translated from official Report of the French Commission, as contained in *Journal Officiel de la République Française*, Jan. 8, 1915.

See, also, instances cited in Annex to Report of Commission of Responsibilities, Paris Conference of 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, pp. 55-57.

§ 669. ¹ §§ 49-80, Instructions for Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, contained in Davis, *Int. Law*, 3 ed., Appendix A, also given in part in Moore, *Dig.*, VII, 219-221.

² For Rel. 1875, II, 1017, 1018-1019.

³ §§ 20, 21, 61-78, *Annuaire*, V, 157, 170-172, J. B. Scott, *Resolutions*, 21, 38-40.

⁴ Arts. IV-XX, Malloy's *Treaties*, II, 2049-2051.

⁵ Arts. IV-XX, *id.*, II, 2282-2285. Art. XXI of the Regulations declared that the obligation of the belligerents towards the sick and wounded should be governed by the Geneva Convention of 1906, for the Amelioration of the Condition of the Wounded of Armies in the Field. See Art. II of the latter, *id.*, II, 2187.

Concerning the Hague Regulations of 1907, with respect to prisoners of war, as expressive of amendments to the corresponding Regulations of 1899, see *Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, I, 96-99; also George B. Davis, "The Amelioration of the Rules of War on Land," *Am. J.*, II, 63, 67-70; A. P. Higgins, *Hague Peace Conferences*, 261-263; J. B. Scott, *Hague Peace Conferences*, I, 532-535; J. M. Spaight, *War Rights on Land*, Chap. X.

See, also, Joseph R. Baker, and Henry G. Crocker, *Laws of Land Warfare* (as existing Aug. 1, 1914), Dept. of State, 1919, 38-110.

⁶ U. S. Treaty Vol. IV, 5224, League of Nations Treaty Series, No. 2734, *Am. J.*, XXVII, *Official Documents*, 59.

⁷ Art. 89.

⁸ See War Dept. *Rules of Land Warfare*, 1940, No. 71.

scribes that they must at all times "be humanely treated and protected, particularly against acts of violence, insults and public curiosity." Measures of reprisal against them are prohibited.⁹ Prisoners of war are accorded the "right to have their person and their honor respected"; women are to be treated with all the regard due to their sex. Prisoners are said to retain their full civil status.¹⁰

The Power detaining prisoners of war is subjected to the obligation to provide for their maintenance.¹¹ The wisdom of imposing such a burden upon the captor may be doubted. A State so burdened will, in proportion to the magnitude of its obligation, be inclined to incur the least possible expenditure, and, notwithstanding its conventional duties, to seek to accomplish that end by the exaction of the maximum of labor from prisoners and the issuance of cheapest rations, thereby placing upon such individuals the burden of maintaining by their own excessive labor the plain necessities of life.¹² Such was the case during World War I. The starvation of American, British, French and other prisoners by their captors was notorious.¹³ The system which has proved highly injurious to such individuals deserves reconsideration. The departure from the old practice which found expression in Article XXIV of the treaty between the United States and

⁹ Art. 2.

According to Art. 1 the Convention is to apply, without prejudice to the stipulations of Title VII. "(1) To all persons mentioned in Articles 1, 2 and 3 of the Regulations annexed to the Hague Convention respecting the laws and customs of war on land, of October 18, 1907, and captured by the enemy. (2) To all persons belonging to the armed forces of belligerent parties, captured by the enemy in the course of military operations at sea or in the air, except for such derogations as might be rendered inevitable by the conditions of capture. However, such derogations shall not infringe upon the fundamental principles of the present Convention; they shall cease from the moment when the persons captured have rejoined a prisoners-of-war camp."

¹⁰ Art. 3.

¹¹ Art. 4. It is added: "Difference in treatment among prisoners is lawful only when it is based on the military rank, state of physical or mental health, professional qualifications or sex of those who profit thereby."

See André Charpentier, *La Convention de Genève du 27 Juillet 1929, et le nouveau droit des prisonniers de guerre*, University of Rennes, 1936. Declared Sir Edward Grey, British Foreign Secy. to Mr. Page, American Ambassador at London, Oct. 1, 1916: "His Majesty's Government consider that all prisoners of war, other than officers on full pay at time of capture, are entitled to be treated only as soldiers, that is, to be fed, clothed, and housed on a scale similar to that provided for British soldiers."

"In view of the social position of many of the prisoners, His Majesty's Government have, however, decided that prisoners approved by the local military authorities who are able and willing to pay for a superior diet, may be given diet and accommodation on a scale somewhat similar to that provided for officers as defined above, subject to the necessary accommodation being available, and to repayment of the cost of food and clothing by the prisoners concerned." (Misc. No. 7, 1915, Cd. 7817, p. 6)

¹² See Arts. 27-32 in relation to the labor of prisoners of war.

See American Report to Mr. Gerard, American Ambassador to Germany, Oct. 8, 1915, respecting the work assigned to prisoners belonging to the camp at Amberg, Misc. No. 19 (1915), Cd. 8108, p. 49.

¹³ "It has been frequently stated, and in our estimation has been wholly confirmed by the direct reports of neutral inspecting delegates or by other information of reliable character, that but for the food and clothing parcels sent to them by their home people or governments through the agency of the authorized relief societies (principally the National Red Cross) the prisoners of war belonging to the Entente Allies and the associated United States would literally have starved or frozen to death in captivity. While admitting in theory the obligation of the captor government to feed and clothe adequately all prisoners of war in its hands, the German Government, resting on the excuse that the blockade precluded the fulfillment of this obligation on the part of that Government, deliberately or negligently, but in either case utterly, failed to provide any except the barest of nourishment and covering garments." Commander Raymond Stone, in *Am. J.*, XIII, 432-433.

Prussia, of September 10, 1785, placing the burden of maintenance of both officers and men who might be taken prisoners on the State to which they belonged, is not believed to have been a step forward.¹⁴

The treaties terminating World War I, contained reciprocal waivers of "all repayment of sums due for the maintenance of prisoners in their respective territories."¹⁵

In a memorandum of December 1, 1914, Mr. Chandler P. Anderson declared: "It may be that the governments will find that the best solution is to arrange for a common basis of treatment on a more liberal scale than they have at present adopted, with the understanding that each government will ultimately bear some portion of the expense of the maintenance of its soldiers who are prisoners of the enemy, on an adjustment of accounts at the close of the war, or at stated intervals during the war, or it may be that some other solution will be found."¹⁶

Certain incidents of capture are dealt with in the Geneva Convention, such as the obligation of every prisoner of war to give, if he is questioned on the subject, his true name and rank or else his regimental number.¹⁷ All effects and objects of personal use, except arms, horses, military equipment and military papers are to remain in the possession of prisoners of war as well as metal helmets and gas masks. Money in the possession of such individuals is not to be taken away from them except by order of an officer and after the amount is determined. Receipts are to be given. Money thus taken away is to be entered to the account of the prisoner. Identification documents, insignia of rank, decorations and objects of value are not to be taken away.¹⁸

Events of World War I indicated that from the moment of capture until placed in an internment camp, as much as at any subsequent period of captivity, a prisoner is likely to be subjected to brutal treatment.¹⁹ His helplessness is then oftentimes utilized by his captors to subject him to personal violence or even to deny him quarter, or torture him with abuse. In the course of transporting a prisoner to a place of internment there still survives a tendency to endeavor to render him despicable in the eyes of the civil population of the captor.²⁰

The Geneva Convention calls for the evacuation of prisoners of war within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger; it makes special allowance for the treatment of the sick or wounded; it forbids the needless ex-

¹⁴ Malloy's Treaties, II, 1484.

¹⁵ Art. 224 Treaty of Versailles, June 28, 1919, U. S. Treaty Vol. III, 3417. See also Arts. 214-223.

¹⁶ For. Rel. 1915, Supp. 997, 1001.

¹⁷ Art. 5.

¹⁸ Art. 6.

¹⁹ Report of Major C. B. Vandeleur, of the British Army, taken prisoner in France by the Prussian Guard Cavalry, Oct. 13, 1914, enclosed in a communication of Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Dec. 26, 1914, Misc. No. 7 (1915), Cd. 7817, No. 44; also statement of German Military Authorities in response, enclosed in memorandum of Mr. Page, American Ambassador at London, for the British Foreign Office, July 17, 1915, Misc. No. 19 (1915), Cd. 8108, No. 13; also Mr. Page, American Ambassador at London, to the Secy. of State, Dec. 28, 1914, For. Rel. 1915, Supp., 1003.

²⁰ Such practical considerations render imperative common understandings looking to the special protection of prisoners of war prior to internment and during the period of evacuation.

posure to danger of prisoners while awaiting evacuation from the combat zone; it declares that the evacuation of prisoners on foot may normally be effected only by stages of 20 kilometers a day, unless the necessity of reaching water and food depots requires longer stages.²¹ Prisoners in unhealthy regions or where the climate is injurious for persons coming from temperate regions are to be transported to a more favorable climate.²²

§ 670. **The Same.** The Geneva Convention in providing for prisoners-of-war camps lays down elaborate rules pertaining to the matter of internment, installation of camps, food and clothing of prisoners of war, sanitary service in camps, intellectual and moral needs of prisoners of war, internal discipline of camps, the treatment of officers and persons of equivalent status, the financial resources of prisoners of war, and their transfer.¹

As a prisoner of war is not necessarily a delinquent, the obligation not to subject him to confinement or imprisonment except as an indispensable measure of safety or sanitation, and only while the circumstances which necessitate the measure continue to exist, is recognized.² He may, however, be interned in a town, fortress, or other place, and bound not to go beyond certain fixed limits.³

The test of the obligation of the captor in the food rationing of prisoners of war has not been dealt with in a satisfactory manner in the texts of multi-partite

²¹ Art. 7.

According to Art. 8 belligerents are bound mutually to notify each other of their capture of prisoners within the shortest period possible, through the intermediary of the information bureaus, such as are organized according to Art. 77; they are also bound to inform each other of the official addresses to which the correspondence of their families may be sent to prisoners of war. Stress is laid upon the obligation to enable every prisoner "to correspond with his family himself, under the conditions provided in Articles 36 *et seq.*" As regards prisoners captured at sea, the provisions of the Article are to be observed as soon as possible after arrival at port.

²² Art. 9.

According to Art. XXIV of the treaty between the United States and Prussia, of September 10, 1785, elaborate provision was made to prevent the destruction of prisoners likely to result from sending them to distant and inclement places, such as the East Indies, Asia or Africa, or by crowding them into close and noxious places, such as dungeons or prison-ships. The paroling of officers, the quartering of both officers and men, and matters of subsistence and discipline, were subjects of arrangement. Interpretative of these provisions which were reproduced in Art. XXIV of the treaty with Prussia of July 11, 1799, and revived through Art. XII of the treaty with that country of May 1, 1828, see Mr. Lansing, Secy. of State, to the Secy. of War, April 17, 1918, For. Rel. 1918, Supp. 2, 55; same to same, June 21, 1918, *id.*, 57, where it was said: "Aside from the provisions of this article, the question of the retention *in Europe* of German prisoners of war captured by our forces, would appear to be largely one of expediency."

§ 670. ¹ Arts. 9-26.

² Art. 9.

According to the same article: "Belligerents shall, so far as possible, avoid assembling in a single camp prisoners of different races or nationalities. No prisoner may, at any time, be sent into a region where he might be exposed to the fire of the combat zone, nor used to give protection from bombardment to certain points or certain regions by his presence."

³ *Id.*

According to Art. 10: "Prisoners of war shall be lodged in buildings or in barracks affording all possible guarantees of hygiene and healthfulness. The quarters must be fully protected from dampness, sufficiently heated and lighted. All precautions must be taken against danger of fire. With regard to dormitories—the total surface, minimum cubic amount of air, arrangement and material of bedding—the conditions shall be the same as for the troops at base camps of the detaining Power."

See Mr. Webster, Secy. of State, to Mr. Ellis, Feb. 26, 1842, MS. Inst. Mexico, XV, 151, Moore, Dig., VII, 218.

arrangements, and is not likely to be duly respected so long as interested States remain content to place the burden of maintenance upon the captor. According to the Hague Regulations of 1907, prisoners of war, in the absence of a special agreement between the belligerents, were to be "treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them."⁴ According to the Geneva Convention, the food ration of prisoners of war is to be equal in quantity and quality to that of troops at base camps; prisoners are to receive facilities for preparing, themselves, additional food which they may have. A sufficiency of potable water is to be furnished, the use of tobacco is to be permitted, and prisoners may be employed in the kitchens. All collective disciplinary measures "affecting the food" are prohibited. These provisions, although an improvement upon those of 1907, fail to encourage a captor to issue to its prisoners a ration that is better adapted to their needs, and perhaps more plentiful, than that which is issued to its own forces. Such encouragement may be greatly needed; yet it is lacking if the captor has no reason to believe that its expenditures for such purpose will be reimbursed upon the termination of the conflict.⁵

It should be noted that Art. 52 of the American-German agreement of Nov. 11, 1918, specified the rations to be furnished.⁶

The Geneva Convention imposes upon the detaining Power the duty to furnish prisoners of war with outer clothing, underwear and footwear, to replace and repair such articles, and to give to laborers "work clothes" wherever the nature of the work demands it; also to install canteens in all camps where prisoners may obtain, at the local market price, food products and ordinary articles. Moreover, profits made by the canteens for camp administration are to be used for the benefit of prisoners.⁷

⁴ Art. VII, Malloy's Treaties, II, 2282.

⁵ Both the Hague Regulations of 1907 and the provisions of the Geneva Convention fail to take cognizance of the fact that the habitual diets of opposing armies frequently differ as radically as the races or nationalities to which they respectively belong, and that, under such circumstances, for a captor to feed its prisoners on the same scale or according to the same form of diet as is applied to its own troops may cause great hardship and physical injury to those held in captivity. The health, discipline and general welfare of prisoners of war depend largely upon the ability and disposition of the captor to give them food not unlike that to which they have been accustomed. Thus, apart from the matter of expense or quantity of the rations issued, it is of highest importance, when possible, to afford the prisoner the same kind of diet as that on which he has previously been maintained and one not offensive, moreover, to his religious scruples.

⁶ For. Rel., 1918, Supp. 2, 103, 114, where it was said: "It is the obligation of the Captor State to provide prisoners of war under its charge with such quantity and quality of wholesome food, especially of meat and vegetables, as is necessary to maintain unimpaired their normal physical health and working capacity. In general the ration served to prisoners of war shall be equal in amount, quality and nutritive value to that served to the armed forces of the Captor State when in barracks or in cantonments.

"The food value of their daily ration shall not fall below a minimum of

2,000 calories for non-workers,
2,500 calories for ordinary workers,
2,850 calories for heavy workers."

⁷ Art. 12. See complaint of Mr. Lansing, Secy. of State, in communication of July 12, 1918, to the Minister in Switzerland, on account of the despoilment of American prisoners, For. Rel. 1918, Supp. 2, p. 31.

Arts. 13-15 make appropriate provision for sanitary service in camps. Art. 16 provides

The matter of the employment of prisoners of war presents great practical difficulties which the general provisions of rules with vague injunctions forbidding merely the impositions of excessive tasks wholly fail to meet. In view of the theory, which must always prevail in the United States, that the enlisted forces of a belligerent, whether drafted or otherwise recruited, represent the best life of the State whose flag they defend, there is strongest reason to endeavor to protect the soldier of humblest rank from being treated when a captive as though he were a convict. Adequate protection cannot be assured unless the captor State is rid of the military or economic incentive, which may otherwise prove irresistible, to abuse its power. Such an incentive may never possibly be wholly removed; but its force may be greatly lessened, and to a degree sufficient to affect the action of a captor, if certain principles win the definite approval of statesmen. If, as has been observed, the entire cost of maintenance is definitely impressed upon the State to which the prisoner belongs, the inducement to exact from him labor at least equal to the cost of his support during captivity disappears. If the nature, amount and conditions of work at which he may be lawfully employed are rigidly defined, with special consideration for the adaptability of the individual for the particular task to be assigned him, there is an additional preventive.⁸

In relation to the matter of labor, the Geneva Convention reveals an endeavor primarily to permit the captor to utilize the physical and other powers of prisoners of war, to forbid particular utilizations, and to deal with the matter of fiscal compensation. Thus, it is acknowledged that "belligerents may utilize the labor of able prisoners of war, according to their rank and aptitude, officers and persons of equivalent status excepted."⁹ No prisoner of war may, however, be

for the exercise of privileges of worship and religious freedom, and Art. 17 for the encouragement of intellectual diversions and organized sports. Appropriate provisions for the internal discipline of camps are set forth in Arts. 18-20.

Art. 21 declares that: "Upon the beginning of hostilities, belligerents shall be bound to communicate to one another the titles and ranks in use in their respective armies, with a view to assuring equality of treatment between corresponding ranks of officers and persons of equivalent status. Officers and persons of equivalent status who are prisoners of war shall be treated with the regard due their rank and age." See also Art. 22 in relation to service in officers' camps by soldiers of the same army who are prisoners of war.

The provisions of Art. 23 pertaining to the matter of the pay of prisoners of war contain the important requirement that "all payments made to prisoners of war as pay must be reimbursed, at the end of hostilities, by the Power which they have served." Art. 24 deals with other aspects of the financial resources and requirements of prisoners of war. The matter of the transfer of such individuals is dealt with in Arts. 25 and 26.

⁸On Nov. 5, 1918, the Department of State instructed the American Minister in Switzerland to request the Spanish Embassy at Berlin to protest vigorously to the German Government against:

- "(1) Forcing any American prisoners of war to work in mines;
- (2) Compelling any American prisoners of war to work while ill or not physically fit to do so;
- (3) Compelling any American civilian prisoners to work at all except in connection with their own care and upkeep and the care and upkeep of their own quarters." (For. Rel. 1918, Supp. 2, 38.)

See also Mr. Barclay (for the British Ambassador at Washington), to Mr. Polk, Counselor for the Dept. of State, Dec. 29, 1917, relative to the employment of Russian prisoners in Germany in the manufacture of munitions, For. Rel. 1918, Supp. 2, 643, 644.

⁹Art. 27, where it is added that if officers or persons of equivalent status request suitable work, it shall be secured for them so far as is possible; and that noncommissioned officers

employed at labors for which he is physically unfit.¹⁰ The length of the day's work of prisoners of war, including therein "the trip going and returning" shall not be excessive, and is not, in any case, to exceed that allowed for the civil workers in the region employed at the same work. Every prisoner is to be allowed a rest of twenty-four consecutive hours every week, preferably on Sunday.¹¹ There is the important declaration that "labor furnished by prisoners of war shall have no direct relation with war operations"; and it is "especially prohibited to use prisoners for manufacturing and transporting arms or munitions of any kind, or for transporting material intended for combatant units."¹² As Dr. Lauterpacht has suggested, these prohibitions are "not altogether free of ambiguity."¹³ They would probably not be deemed to forbid the employment of prisoners of war for a variety of purposes designed directly to aid the captor in the prosecution of war, enabling it to release potential fighters from non-military tasks of which the proper performance might be, nevertheless, a military necessity. The Convention forbids the use of prisoners of war "at unhealthful or dangerous work." Moreover, any aggravation of the conditions of labor by disciplinary measures is forbidden.¹⁴

"For work connected with the administration, management and maintenance of the camps" prisoners of war are not to receive wages; but prisoners utilized for other work are declared to be entitled to wages to be fixed by agreements between the belligerents. Such agreements are to specify the part which the camp administration may retain, the amount which shall belong to the prisoner of war and the manner in which that amount is to be put at his disposal during

who are prisoners of war shall only be required to do supervisory work unless they expressly request a remunerative occupation.

In the same Article it is declared: "belligerents shall be bound, during the whole period of captivity, to allow to prisoners of war who are victims of accidents in connection with their work the enjoyment of the benefit of the provisions applicable to laborers of the same class according to the legislation of the detaining Power. With regard to prisoners of war to whom these legal provisions might not be applied by reason of the legislation of that Power, the latter undertakes to recommend to its legislative body all proper measures equitably to indemnify the victims."

Art. 28 provides that the detaining Power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons.

¹⁰ Art. 29.

¹¹ *Id.* 30. These provisions still yield great latitude to the captor whose legislation imposes little or no restraint in fixing the length of a day's work.

¹² Art. 31, where it is added that "in case of violation of the provisions of the preceding paragraph, prisoners, after executing or beginning to execute the order, shall be free to have their protests presented through the mediation of the agents whose functions are set forth in Articles 43 and 44, or, in the absence of an agent, through the mediation of representatives of the protecting Power."

¹³ 6 ed. of Oppenheim, II, 298. He observes in a footnote on p. 298 that "Article 31 probably does not exclude the manufacture of war material other than arms and munitions, provided again that it has no direct connection with military operations. The question whether prisoners of war can be compelled to construct fortifications and the like is just as much controverted as the question whether enemy civilians can be forced to do such work."

¹⁴ Art. 32.

According to Article 33: "The system of labor detachments must be similar to that of prisoners-of-war camps, particularly with regard to sanitary conditions, food, attention in case of accident or sickness, correspondence and the receipt of packages. Every labor detachment shall be dependent on a prisoners' camp. The commander of this camp shall be responsible for the observation, in the labor detachment, of the provisions of the present Convention."

the period of his captivity.¹⁵ There is thus yielded to the prisoner opportunity, under certain conditions, to minister to his needs by means of the fruits of his own labor, and thereby to provide against deficiencies of the captor with respect to maintenance. There is obviously no obligation on the part of the captor to employ him in remunerative tasks. If it elects, however, so to employ him, it is not desirable that he should be encouraged or obliged to work for the captor as a means of providing for, or improving or supplementing the food ration issued to him. Thus it may be greatly doubted whether the privilege of remunerative labor that is accorded the prisoner of war outweighs the detriment suffered by him in imposing the duty of his maintenance upon the captor.

In making elaborate provisions for penalties applicable to prisoners of war the Geneva Convention announces certain general provisions,¹⁶ adverts to so-called "disciplinary punishments,"¹⁷ and then makes reference to the treatment of "judicial suits."¹⁸ In observing certain of these provisions it must be borne in mind that the prisoner of war is the enemy of the captor, and must be expected to be alert at all times to make utmost effort so far as may be compatible with his own safety, not only to escape from its custody, but also to break down its authority and weaken its military power; and also that in so doing the prisoner is not likely to be possessed of a sense of moral delinquency. Notwithstanding this fact, his embarking upon such a course may involve the commission of acts which are not only forbidden by the captor as contemptuous of its authority, but which also by reason of their nature are fairly to be regarded by the captor as sheer crimes. Again, the prisoner may commit acts which, unrelated to any political design, are manifestations of moral delinquency, and are violative of the normal criminal law of the captor, and on account of the commission of which the actor is by the provisions thereof regularly subjected to punishment. Thus, in applying penalties to prisoners of war the captor is obliged to take cognizance of the foregoing considerations, and to adjust its penal measures accordingly. The Geneva Convention imposes obligations upon the captor to do so. Prisoners of war are said to be subject to the laws, regulations, and orders in force in the armies of the detaining Power; and an act of insubordination is said to justify the adoption towards prisoners of the measures provided by such laws, regulations and orders.¹⁹ Conversely, punishments other than those provided for the same acts for soldiers of the "national armies" are not to be imposed upon prisoners of war; nor are prisoners to be subject to less favorable treatment than that provided in the armies of the detaining Power with regard

¹⁵ Art. 34, where rules are provided for the payment for labor of prisoners while awaiting the conclusion of such agreements.

The external relations of prisoners of war, concerning in particular their communications with their families, is dealt with in Articles 35-41, which make wise provision for the easy transmission of postal matter.

Opportunity for complaints of prisoners of war because of the conditions of captivity is provided for in Article 42.

Arts. 43 and 44 make provision for the appointment, recognition and use of representatives of prisoners of war.

¹⁶ Arts. 45-53.

¹⁷ Arts. 54-59.

¹⁸ Arts. 60-67.

¹⁹ Art. 45.

to the same punishment. It is declared that "any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty, is forbidden"; and also that "collective punishment for individual acts is also forbidden."²⁰

Prisoners of war are not to be treated differently from other prisoners after having suffered judicial or disciplinary punishment;²¹ and no prisoner is to be deprived of his rank by the detaining Power.²² Prisoners who attempt to escape, or who having escaped are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them, are rendered liable merely to "disciplinary punishment" of which the most severe form is arrest and confinement not to exceed thirty days.²³ Relatively mild treatment is prescribed for prisoners subjected to disciplinary punishment. Their privileges during the period of such punishment are specified.²⁴ The Convention contemplates, however, as distinct from disciplinary punishments, the institution of judicial proceedings against a prisoner of war with a view to his criminal prosecution, and makes appropriate provision for the defense of the accused as by the assistance of qualified counsel of his choice, and through the aid, if necessary, of a competent interpreter.²⁵ While representatives of the "protecting Power" are said to be entitled to attend the trial of a case, that privilege may be withheld where such trial "must be secret in the interest of the safety of the State."²⁶ To every prisoner of war is accorded the right of appeal against any sentence rendered with regard to him, in the same way as individuals belonging to the armed forces of the detaining Power.²⁷ The representative of the protecting Power is to be notified upon the opening of a judicial proceeding against a pris-

²⁰ Art. 46.

Thus, as against a standard of treatment that might prove to be an unsafe one in exposing the prisoner to harsh treatment if guilty of slight and technical offenses against a captor eager for excuse to impose a severe penalty, and habitually severe in disciplining its own forces, Art. 46 establishes a measure of protection in forbidding the captor to have recourse to the conduct that is proscribed. Arts. 45 and 46 are an improvement upon Art. VIII of the Hague Regulations of 1907, of which criticism was made in the earlier edition of this work (II, 337).

²¹ Art. 48, where it is provided, however, that prisoners punished as a result of attempted escape may be subjected to special surveillance which is not to entail the suppression of guarantees granted to prisoners by the Convention.

See also Art. 47

²² Art. 49.

²³ Arts. 50 and 54.

According to Art. 50, prisoners who, after having succeeded in rejoining their army or in leaving the territory occupied by the army which captured them, may again be taken prisoners, and are not liable to any punishment on account of their previous flight.

See also Arts. 51-52.

The effect of disciplinary punishments as well as of threatened penal prosecutions upon repatriations is dealt with in Art. 53.

²⁴ Arts. 54-59.

²⁵ Arts. 60-67.

²⁶ Art. 62.

According to Art. 61: "No prisoner may be sentenced without having had an opportunity to defend himself. No prisoner may be obliged to admit himself guilty of the act of which he is accused."

²⁷ Art. 64.

According to Art. 63: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

oner of war, and always before the date set for the opening of the trial,²⁸ and also of the pronouncement of sentences against prisoners.²⁹ There is no statement in the convention indicating a line of demarcation between offenses to be deemed to subject the actors to disciplinary punishments, and those justifying "judicial suits" against them. The captor seemingly possesses latitude in determining under which plan or theory prosecution may be made, and thus to be enabled to initiate "judicial suits" on account of relatively trivial offenses.

§ 671. **The Same.** According to the unsuperseded articles of the Hague Regulations of 1907 (X–XII), prisoners of war may be set at liberty on parole if the laws of their own country allow; and in such cases they are bound "on their personal honour" scrupulously to fulfill, both towards their own government and that of the captor, the engagements thus contracted.¹ It is wisely declared that a prisoner of war cannot be compelled to accept his liberty on parole; and that similarly the government holding him captive is not obliged to accede to the request of the prisoner to set him at liberty on parole.²

For the relief and information concerning prisoners of war the Geneva Convention contemplates the use of both belligerent and neutral agencies.³ Thus, upon the outbreak of hostilities each of the belligerent Powers, as well as the neutral Powers which have received belligerents, are to institute an official information bureau for prisoners of war who are within their territories.⁴ Within the shortest possible period, each of the belligerent Powers is to inform its information bureau of every capture of prisoners effected by its armies, giving it all the information regarding identity which it has, allowing such bureau "quickly to

²⁸ Art. 60, which specifies the information to be contained in the communication of advice.

²⁹ Arts. 65 and 66, according to the latter of which: "If the death penalty is pronounced against a prisoner of war, a communication setting forth in detail the nature and circumstances of the offense shall be sent as soon as possible to the representative of the protecting Power, for transmission to the Power in whose armies the prisoner served; the sentence shall not be executed before the expiration of a period of at last three months after this communication."

§ 671. ¹ Art. X, Malloy's Treaties, II, 2283.

² Art. XI.

According to Art. XII, prisoners who are liberated on parole and recaptured bearing arms against the government to which they have pledged their honor, or against its allies, forfeit the right to be treated as prisoners of war, and may be brought before the courts.

The War Dept. Rules of Land Warfare, 1940, contain the following statements:

"149. The parole should be in writing and signed by the prisoner. It should state in clear and unequivocal language exactly what acts the prisoner is obligated not to do, particularly as to whether he is bound to refrain from all acts against the captor or only from taking part directly in military operations

"150. No noncommissioned officer or private can give his parole except through an officer of his own army. The only admissible exception is where an individual properly separated from his command has suffered long confinement without the possibility of being paroled through an officer.

"151. Commissioned officers can give their paroles only with the permission of a military superior as long as such superior is accessible.

"152. No paroling on the battlefield, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted or of any value.

"153. A belligerent may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy."

³ Arts. 77–80.

⁴ Art. 77.

advise the families concerned," and informing that entity of the official addresses to which families may write to prisoners.⁵ The information bureau, being charged with replying to all inquiries about prisoners of war, is to receive from the various services concerned full information respecting internments and transfers, releases on parole, repatriations, escapes, stays in hospitals, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The bureau is further bound to receive all objects of personal use, valuables, letters, pay vouchers, identification marks, etc., which are left by prisoners of war who have been repatriated, released on parole, escaped or died, and to transmit them to the countries interested.⁶

Relief societies properly constituted in accordance with the laws of their country and designed to serve as a channel for charitable effort, are said to be entitled to receive from the belligerents every facility for the efficient performance of their humane task within the bounds imposed by military necessities. Thus provision is made for the admission of agents of such societies to the camps for the purpose of distributing relief.⁷ Such agents are to be admitted also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.⁸ The Convention contains the important provision that a central information agency for prisoners of war is to be created in a neutral country. The function of that agency is to centralize all information respecting prisoners, which it may obtain through official or private channels, and also to transmit that information as quickly as possible to the country of origin of the prisoners or to the Power which they have served.⁹

(3)

§ 672. Neutral Inspection and Supervision of Relief. Assurance of observance of international regulations during long periods of internment requires more than the protestations of the captor State that it is fulfilling its legal obligations. In the course of World War I both Germany and Great Britain acquiesced in a plan permitting the inspection and supervision of relief of prisoners

⁵ *Id.*, where it is added "The information bureau shall immediately forward all this information to the interested Powers, through the intervention, on the one hand, of the protecting Powers and, on the other, of the central agency provided for in Article 79."

⁶ Art. 77. In the same Article it is declared: "The bureau shall state in this return, in so far as is possible and subject to the provisions of Article 5: the regimental number, given names and surname, date and place of birth, rank and unit of the interested party, the given name of the father and the name of the mother, the address of the person to be advised in case of accident, wounds, date and place of capture, internment, wounding and death, as well as any other important information. Weekly lists containing all new information likely to facilitate the identification of each prisoner shall be transmitted to the interested Powers. At the conclusion of peace the individual return of the prisoner of war shall be delivered to the Power which he served."

⁷ Art. 78.

⁸ *Id.*

⁹ Art. 79, where it is announced that "the International Committee of the Red Cross shall propose the organization of such an agency to the interested Powers, if it considers it necessary." In the same Article it is said that "these provisions must not be interpreted as restricting the humanitarian activity of the International Committee of the Red Cross."

According to Art. 80: "Information bureaux shall enjoy the privilege of free postage on postal matter, as well as all exemptions provided in Article 38."

held by either belligerent, and that by appropriate American diplomatic and consular officers.¹ In consequence, rigid inspections of prison camps were regularly made, and full reports communicated to the interested governments.² The effect was to cause an improvement where conditions were found to be unsatisfactory, and to bring to the knowledge of the opposing belligerents reliable information pertaining to their respective nationals held in captivity.³

The pressing need of inspection and relief, through neutral agencies, emphasizes the importance of general international agreement contemplating their use in the event of war, and establishing the right of a belligerent to avail itself thereof. By no other process can inhumane treatment in any form on the part of a captor be so readily detected, or so fairly estimated. From no other source can there emanate criticisms or suggestions better calculated to ameliorate the condition of prisoners, or to abate just causes of complaint.⁴

The Geneva Convention of 1929 contains important provisions in relation to the matter of neutral inspection and supervision. The High Contracting Parties are said to recognize that the regular application of the Convention will find a guaranty in the possibility of collaboration of the protecting Powers charged with safe-guarding the interests of belligerents; that such Powers may, besides their diplomatic personnel, appoint delegates from their own nationals or those of other neutral Powers; that such delegates must be subject to the approval of the belligerent Power near which they exercise their mission; that the representatives of the protecting Power or its accepted delegates are to be permitted to go to any place, without exception, where prisoners of war are interned, and to have access to all places occupied by them, and to be enabled to interview them, "as a general rule without witnesses, personally or through interpreters." Belligerents are as far as possible to facilitate the task of representatives or accepted delegates of the protecting Power; the military authorities are to be in-

§ 672. ¹ Misc. No. 7 (1915), Cd. 7817, Nos. 44, 57, 62, 75, 89, 90, 91, 106, 111-120.

Concerning activities of the United States in 1914 and 1915, in regard to prisoners of war and interned civilians, and the American general plan for inspection and relief (embracing proposals set forth in a memorandum by Mr. Chandler P. Anderson, Dec. 1, 1914), see For. Rel. 1915, Supp., 997-1023.

Concerning the exercise of good offices by the American Consul at Pretoria in behalf of British prisoners in South Africa during the Boer War, see For. Rel. 1900, 619-623, Moore, Dig., VII, 223-225.

² These reports dealt with matters of sanitation, food, clothing, medical treatment, confinement, discipline, exercise, amusement, occupation, enforced labor, postal and other communications, camp organization, and religious worship, as well as complaints from prisoners. Misc. No. 11 (1915), Cd. 7861; also Reports contained in Misc. No. 15 (1915), Cd. 7961, and in Misc. No. 19 (1915), Cd. 8108.

³ The supervision and administration of relief of destitute prisoners, especially by the American Embassy at Berlin, was undertaken on a large scale, involving the expenditure of substantial sums placed at its disposal by the British Government. Misc. No. 7 (1915), Cd. 7817.

When the United States broke off diplomatic relations with Germany in 1917, it obviously relinquished simultaneously the privilege of protecting thereafter any prisoners held by that State.

⁴ See, for example, Reports of Mr. Osborne of the American Embassy at Berlin, and of Mr. Gerard, Ambassador to Germany, of visits made by them in October and November, 1915, to the detention camp at Wittenberg, Misc. No. 16 (1916), Cd. 8235, pp. 4 and 9.

The principle of neutral oversight found complete recognition in the Berne agreement of Nov. 11, 1918. See Arts. 121-123, concerning visits of inspection by delegates of the protecting Power. See, in this connection, Commander Raymond Stone, in *Am. J.*, XIII, 433-434.

formed of their visits.⁵ In case of disagreement between the belligerents as to the application of the provisions of the Convention, the protecting Powers are obliged, in so far as possible, to lend their good offices for the purpose of settling the difference.⁶

b

Termination of Captivity

(1)

§ 673. **Exchange of Prisoners.** Captivity may be terminated by an exchange of prisoners. Such an exchange is accomplished pursuant to agreement between the opposing belligerents. The agreement is usually described as a cartel.¹

"The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers have been taken. Exchanges of prisoners take place, number for number, rank for rank, disability for disability, with added condition for added condition — such, for instance, as not to serve for a certain period."²

⁵ Art. 86, where it is added that belligerents may come to an agreement to allow persons of the same nationality as the prisoners to be permitted to take part in inspection trips.

⁶ Art. 87, where it is added: "For this purpose, each of the protecting Powers may, in particular, suggest to the interested belligerents a meeting of representatives thereof, possibly upon a neutral territory suitably chosen. Belligerents shall be bound to accede to proposals in this sense which are made to them. The protecting Power may, if occasion arises, submit for the approval of the Powers concerned a person belonging to a neutral Power or a person delegated by the International Committee of the Red Cross, who shall be summoned to take part in this meeting."

It is declared in Art. 88 that "the foregoing provisions are not an obstacle to the humanitarian activity which the International Committee of the Red Cross may use for the protection of prisoners of war, with the consent of the interested belligerents."

§ 673.¹ Declares Hall. "Exchange consists in the simple release of prisoners by each of two belligerents in consideration of the release of prisoners captured by the other, and takes place under an agreement between the respective governments, expressed in a special form of convention called a Cartel." Higgins' 8 ed., p. 493.

See, also, Davis, *Int. Law*, 3 ed., 316; Halleck, Baker's 3 ed., II, 326-330, cited in Moore, *Dig.*, VII, 226; Dana's *Wheaton*, § 344.

Belligerent vessels employed to carry prisoners of war to their own country pursuant to a cartel are known and described as cartel ships. Respecting the treatment to be accorded them, see *Cartel Ships*, *infra*, § 770; also *Cartels*, *supra*, § 644.

² The language of the paragraph of the text is that of War Dept. Rules of Land Warfare, 1940, Nos. 156-158. According to No. 159, "In exchanging prisoners of war such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel which requires the sanction of the government or of the commander of the army in the field."

Captivity is obviously terminated by release of the prisoner without parole, or by his successful escape, or by his death "in camp of detention or when released on parole." Davis, *Int. Law*, 3 ed., 315.

RANSOM. The release of prisoners of war for the payment of money furnished privately has long since fallen into desuetude. It is, moreover, the bandit, rather than the State, that in these times seizes an individual for the purpose of exacting gold. See, for example, Case of Ion Perdicaris in Morocco, in 1904, *For. Rel.* 1904, 496-505; and also more recent instances in Mexico. When, however, a complete exchange of prisoners is otherwise impossible, it may be doubted whether a belligerent should refrain from making a public pecuniary sacrifice in order to obtain the release of prisoners belonging to its service.

"When a hostage is accepted he is treated as a prisoner of war." (War Dept. Rules of Land Warfare, 1940, No. 359.) See *Belligerent Occupation, Hostages*, *infra*, § 700.

(2)

§ 674. **Repatriation.** Repatriation may be described as the restoration of persons held in captivity to the State to which they belong. Repatriation accomplishes release. The former is a natural if not an immediate consequence of the conclusion of peace. As quickly as possible thereafter the repatriation should be carried out.¹ The treaty of peace commonly specifies the time.² Prisoners may, however, be repatriated prior to the termination of the conflict.³

The Geneva Convention of 1929 announces that "when belligerents conclude a convention of armistice, they must, in principle, have appear therein stipulations regarding the repatriation of prisoners of war"; that if it has not been possible to insert stipulations in this regard in such convention, the belligerents are, nevertheless, to come to an agreement as soon as possible; that in any case, repatriation is to be effected with the least possible delay after the conclusion of peace.⁴ The Geneva Convention makes wise provision for the direct repatriation

§ 674. ¹ See Art. XX of the Regulations annexed to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, Malloy's Treaties, II, 2285.

² Art. VII of the treaty of peace with Great Britain of Sept. 3, 1783, simply declared that "all prisoners on both sides shall be set at liberty." Malloy's Treaties, I, 589. Art. III of the Treaty of Ghent of Dec. 24, 1814, provided that "all prisoners of war taken on either side, as well by land as by sea, shall be restored as soon as practicable after the ratifications of this treaty, as hereinafter mentioned, on their paying the debts which they have contracted during their captivity." *Id.*, I, 614. According to Art. IV of the Treaty of Guadalupe Hidalgo, of Feb. 2, 1848, all prisoners of war taken on either side were to be restored "as soon as practicable" after the exchange of ratifications. It was also agreed that if any Mexicans should be then held as captives by any savage tribe within the limits of the United States as about to be established by the following Article of the same treaty, the Government of the United States would exact their release, and cause them to be restored to their country. *Id.*, I, 1109. By Art. VI of the treaty of peace with Spain of Dec. 10, 1898, that State undertook "upon the signature of the present treaty" to release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States. Reciprocally, the United States agreed to release all persons made prisoners of war by the American forces and to undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and in the Philippines. It was also declared that, "The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this Article" *Id.*, II, 1692. With respect to the interpretation of the treaty, see Opinion of Mr. Griggs, Atty. Gen., Jan. 6, 1900, 23 Ops. Atty. Gen., 9, Moore, Dig., V, 859.

The German treaty of peace of Versailles, of June 28, 1919, provided in Art. 214 that the repatriation of prisoners of war and interned civilians should take place as soon as possible after the coming into force of the treaty and should be carried out with the greatest rapidity. See, also, Arts. 215-224.

³ See For. Rel. 1898, 989-998, Moore, Dig., VII, 230-231, concerning the return of Spanish prisoners to Spain in 1898.

See, also, Article X of armistice with Germany of Nov. 11, 1918, concerning the immediate repatriation without reciprocity of all Allied and United States prisoners of war, U. S. Treaty Vol. III, 3309. See The Armistice with Germany of November 11, 1918, *supra*, § 647.

Compare provisions relating to repatriation and internment in a neutral country, embraced in the Berne agreement of Nov. 11, 1918, *Am. J.*, XIII, Supp., I. The American Delegation at Berne proposed "the internment in a neutral country of all officers, whether valid or invalid, as soon as practicable after their capture." Commander Raymond Stone, in *Am. J.*, XIII, 414.

Art. 16 of the Berne agreement contained the significant provision that valid submarine personnel who had been in captivity for a period of not less than twelve months and who might otherwise be entitled to repatriation under the agreement, should, in lieu of repatriation, be interned in a neutral country until the conclusion of peace.

⁴ Art. 75, where it is added that prisoners of war against whom a penal prosecution may

and also the hospitalization in a neutral country of sick and wounded prisoners of war. Thus, belligerents are bound to send back to their own country, regardless of rank or number, seriously sick and seriously injured prisoners of war, after having brought them to a condition where they can be transported. Agreements between belligerents are to settle as soon as possible the cases of invalidity or of sickness, entailing direct repatriation, as well as those calling for hospitalization in a neutral country.⁵ Upon the outbreak of hostilities, belligerents are to come to an agreement to name mixed medical commissions who are to make examination of sick or wounded prisoners and all due decisions regarding them.⁶ The Convention also provides that throughout the duration of hostilities and for humane considerations, belligerents may conclude agreements with a view to the direct repatriation or hospitalization in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.⁷

When a belligerent State, after subjugating its enemy, annexes its territory and terminates the war without the conclusion of a treaty of peace, the release of prisoners of war held by the conqueror becomes a matter of domestic rather than international concern. It may be doubted whether, under these circumstances, any mode of releasing or restoring such individuals should be described as repatriation.⁸

c

Grounds on Which Individuals Are Treated as Prisoners of War

(1)

§ 675. **Persons Belonging to or Following the Armed Forces of a Belligerent.** As has been observed, both the combatant and non-combatant members of the armed forces of belligerent States, if possessed of the requisite belligerent qualifications, are, when captured, entitled to treatment as prisoners of war; likewise also, under specified circumstances, certain other categories of in-

be pending for a crime or an offense of municipal law may be detained until the end of the proceedings and, if necessary, until the expiration of the punishment; and that the same shall be true of prisoners sentenced for a crime or offense of municipal law. In the same Article it is said that "on agreement between the belligerents, commissions may be established for the purpose of searching for dispersed prisoners and assuring their repatriation."

See Art. 76 in relation to matters pertaining to the deaths of prisoners of war.

⁵ Art. 68, in which it is also provided that while awaiting the conclusion of such agreements, belligerents may have reference to the model agreement annexed, for documentary purposes, to the Convention.

⁶ Art. 69. See also Arts. 70 and 71. According to the latter of which "prisoners of war who are victims of accidents in connection with work, except those voluntarily injured, shall enjoy the benefit of the same provisions, as far as repatriation or possible hospitalization in a neutral country are concerned."

⁷ Art. 72.

According to Art. 73: "The expenses of repatriation or of transportation to a neutral country of prisoners of war shall be borne, from the frontiers of the detaining Power, by the Power in whose armies the prisoners have served."

⁸ According to Art. XIII of the Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers and Persons in War on Land: "A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence." Malloy's Treaties II, 2299. See in this connection, Lauterpacht's 6 ed. of Oppenheim, II, § 337.

dividuals.¹ The Geneva Convention of 1929 announces that, without prejudice to the stipulations of Title VII, it shall apply:

(1) To all persons mentioned in Articles 1, 2 and 3 of the Regulations annexed to the Hague Convention respecting the laws and customs of war on land, of October 18, 1907, and captured by the enemy.

(2) To all persons belonging to the armed forces of belligerent parties, captured by the enemy in the course of military operations at sea or in the air, except for such derogations as might be rendered inevitable by the conditions of capture. However, such derogations shall not infringe upon the fundamental principles of the present Convention; they shall cease from the moment when the persons captured have rejoined a prisoners-of-war camp.²

According to the War Department Rules of Land Warfare of 1940: "Except as otherwise hereinafter indicated, every person captured or interned by a belligerent power because of the war is, during the period of such captivity or internment, a prisoner of war, and is entitled to be recognized and treated as such under the laws of war."³ This statement or definition embraces individuals within a broader field than appear to be within the purview of the article quoted from the Geneva Convention. The former seems to take cognizance of the importance to the civilian of claiming the privilege of treatment of a prisoner of war under some circumstances to which the Hague Regulations do not advert, and also of the fact that there may be conditions when, as war is now conducted, that claim should be respected. On the other hand, the War Department Rules of Land Warfare do not fail to refer to particular forms of conduct which are deemed to deprive the actors (regardless of their civil status) of the privileges of prisoners of war.⁴ It is the irregular and nefarious aspect of their conduct

§ 675.¹ See Divisions of Belligerent Forces, Combatants, and Non-combatants, *supra*, §§ 653-654; also Belligerent Qualifications, Generally, *supra*, § 648.

² Art. 1, U. S. Treaty Vol. IV, 5229. The Articles of the Hague Regulations to which reference is made dealt with persons deemed to possess belligerent qualifications. See Malloy's Treaties, II, 2281-2282.

According to Article 81 of the Geneva Convention: "Individuals who follow armed forces without directly belonging thereto, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, shall be entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the armed forces which they were accompanying."

³ No. 70.

⁴ Thus it is said in No. 351: "Men and bodies of men, who, without being lawful belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper."

According to No. 352: "Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war."

According to No. 348: "Persons who take up arms and commit hostilities without having complied with the conditions prescribed by the laws of war for recognition as belligerents, are, when captured by the injured party, liable to punishment as war criminals."

which produces such deprivation. The guilty persons may be civilians as well as soldiers, and have no connection with the armed forces of the enemy. In American military opinion loss of the privilege of treatment as a prisoner of war does not, however, justify the captor in dealing arbitrarily with the individual concerned, who appears to be regarded as entitled to trial on account of the offense charged against him.⁵

Doubtless there are numerous instances where impropriety of conduct, attributable particularly to armed combatants prior to their capture, and manifested in acts which are in violation of the laws of war, are not regarded by the captor as depriving the actors of the privilege of treatment as prisoners of war. In such cases its conclusion is, however, not likely to be due to a sense of legal obligation not to pursue a different course.⁶

(2)

§ 676. **Civilians.** The theory on which a State exercises its right as a belligerent to assert control over, and if need be, intern enemy civilians found within its territory is discussed elsewhere.¹ It should be borne in mind that an army in the field in the course of any operation in any locality, or a belligerent occupant of hostile territory may also avail itself of the right to make civilians prisoners of war. The War Department Rules of Land Warfare of 1940, emphasize the fact.²

See, also, No. 347 concerning offenses by armed forces; No. 349 concerning war rebels; No. 350 concerning war treason; No. 353 concerning marauders, and No. 354 concerning other crimes.

⁵ According to No. 356: "No individual should be punished for an offense against the laws of war unless pursuant to a sentence imposed after trial and conviction by a military court or commission or some other tribunal of competent jurisdiction designated by the belligerent." See, also, No. 353 in relation to marauders, where it is said that "their acts are considered atrocities, and the severest punishment is imposed after trial and conviction."

See, also, *supra*, §§ 653-654.

⁶ In the earlier edition of this work the author declared (II, 344) that the enunciation of a rule announcing under certain circumstances the right of a captor to deny to armed combatants of the enemy treatment accorded to prisoners of war would encourage pretext for summary and inhumane conduct; that innumerable excuses would be offered to justify acts of retaliation and revenge; that innocent and guilty alike would suffer increasingly from the caprice of the captor. This statement may need qualification, at least when applied to a captor whose laws or regulations do not permit the punishment of an offender, even though not deemed to be entitled to the privileges of a prisoner of war, without trial and conviction.

§ 676. ¹ See Control over the Persons of Resident Alien Enemies, *supra*, §§ 616-617.

² See No. 70.

According to No. 76: "The citizens who rise *en masse* to defend their territory or district from invasion by the enemy, if captured, are entitled to be treated as prisoners of war.

"High civil functionaries such as the sovereign and members of the royal family, the president or head of a republican state, and the ministers who direct the policy of a state are liable to be made prisoners of war whether accompanying an army or not.

"Civil officials and diplomatic agents attached to the army may be made prisoners of war.

"Persons whose services are of particular use to the hostile army or its government, such as the higher civil officials, diplomatic agents, couriers, guides, etc., also all persons who may be harmful to the opposing state while at liberty, such as prominent and influential political leaders, journalists, local authorities, clergymen, and teachers, in case they incite the people to resistance, may be made prisoners of war.

"When a hostage is accepted he is treated as a prisoner of war."

According to No. 77: "Military attachés and diplomatic agents of neutral powers, accompanying an army in the field or found within a captured fortress, are not ordinarily

If recourse is had to internment, the individuals taken into custody, until convicted of offenses against the local law, are believed to be entitled to treatment as favorable as that accorded prisoners of war. In the case of civilians without military rank, it may prove, however, to be a difficult and elusive task to differentiate justly between persons to be accorded privileges equivalent to those which may be fairly claimed by captured commissioned officers, and those to be treated less favorably.³

The Berne agreement signed in behalf of the United States and Germany on November 11, 1918, contained the important provision that "civil prisoners" should not be called on to undertake any form of compulsory work, except that directly connected with the maintenance and sanitation of the camp or other place in which they might be detained. Moreover, in apportioning such work, it was declared that consideration should be given to the education and profession of the prisoners; and that no force, threats, menaces, deprivation of privileges, nor other means should be employed for the purpose of inducing civil prisoners to undertake any form of work other than was specified in the agreement.⁴ The presence at that time in the United States of about eighteen hundred thousand German subjects, as against about twenty-one hundred American citizens in German territory, accounted for the vigorous effort of the German delegation at Berne to secure agreement to forbid thereafter the internment of civilians, and their alertness to consent to accord such individuals when interned advantages not yielded to persons defined by the agreement as prisoners of war.⁵

(3)

§ 677. Spies. According to the Hague Regulations of 1907:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies:

held as prisoners, provided they have proper papers of identification in their possession and take no part in the hostilities. They may, however, be ordered out of the theater of war, and if necessary, handed over by the captor to the ministers of their respective countries."

³ See Memorandum on the Treatment of Interned Civilians and Prisoners of War in the United Kingdom, enclosed in communication of Sir E. Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Dec. 14, 1914, Misc. No. 7 (1915), Cd. 7817, p. 23; *Schaffenius v. Goldberg*, 113 L. T. 949; also comment on the decision in *Yale L.J.*, XXV, 510.

⁴ Art. 170, For. Rel. 1918, Supp., 2, 137. It was there also provided, however, that civil prisoners might, upon their written request, but not otherwise, be allowed to perform work of a character similar to that performed by prisoners of war and under no less favorable terms. See, also, Art. 171.

According to Art. 172, officers of merchant ships were to be lodged apart from the remainder of the crews of such vessels and were to be treated according to their rank.

⁵ See views expressed by the heads of the American and German Delegations, and quoted by Commander Raymond Stone, in *Am. J.*, XIII, 438-439.

It may be noted that the Berne agreement, in Arts. 140-150, made extended provision for the repatriation and treatment of sanitary personnel.

Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.¹

It is action under false pretenses as well as under disguise that taints the seeker of information with the character of a spy.²

It should be observed that the eighty-second article of war set forth in an Act of Congress of June 4, 1920, declares that "any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."³ The War Department Rules of Land War-

§ 677.¹ Art. XXIX of the Regulations, annexed to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, Malloy's Treaties, II, 2286.

"88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy." Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, Moore, Dig., VII, 231.

See Mr. Webster, Secy. of State, to Mr. Hülsemann, Dec. 21, 1850, MS. Notes German States, VI, 265, Moore, Dig., VII, 234; also correspondence between the Department of State and the Russian Embassy at Washington, in April, 1904, respecting the proposed treatment as spies by Russia in the course of its war against Japan, of war correspondents on board neutral vessels communicating war news to the enemy by wireless telegraphy, and who should be arrested in certain specified places, For. Rel. 1904, 729, Moore, Dig., VII, 233.

"The fact of being in the enemy's lines dressed as a civilian or wearing the enemy's uniform, is presumed to constitute a spy, but it is possible to rebut this presumption by proof of no intention to obtain military information. On the other hand, the fact that a person charged with being a spy is in the uniform of his State does not render it impossible for him to be a spy in fact, since he may have gained admission into the enemy's lines under the privileges of the Red Cross and have taken advantage of the opportunity afforded him for obtaining information." Rules of Land Warfare, 1917, No. 199, note 2.

² Concerning the case of Major André of the British Army who was executed by American military authorities as a spy in 1780, see "Military Espionage," by late Major General H. W. Halleck, U. S. A., *Am. J.*, V, 590, in which it is said (598): "It cannot be disputed that he entered our lines *under an assumed name, his uniform concealed by an overcoat, and afterwards changed for a citizen's dress*, and that the object of his visit and disguise was *to obtain and convey information to the enemy*. These facts made him a military spy. Superficial writers are sometimes disposed to attach undue importance to a change of dress, forgetting that *disguise* does not consist in dress alone, and that any *false pretense*, coupled with other circumstances, may make a man a spy. It mattered not whether André entered our lines in his uniform or with his uniform concealed by his overcoat, or when or where he changed his uniform; the question is, was he within our lines, either as to name or dress, *in disguise or under false pretenses* as to character or business, and was he captured before he had escaped to his own lines and within the protection of his own government. Suppose André had entered our lines under a flag of truce and in the full uniform of a British officer, with the insignia of his rank displayed, under the pretense of negotiating a cartel or some other legitimate object of *commercii belli*; but the evidence proved that this pretense was false, and that his real object was to bribe our officers to treason, or by clandestine and unlawful means to obtain plans of our fortifications, returns of our garrisons, etc.; no one can deny that he would have been guilty of the offense of military espionage, because he was guilty of the very thing which constitutes the criminality of the offense of military treachery." Compare Oppenheim, 2 ed., II, 198. See, also, Winthrop Sargent, *Life of Major John André*, 2 ed., New York, 1871.

See Oppenheim, Lauterpacht's 6 ed., II, § 160.

³ 41 Stat. 804. The War Department Rules of Land Warfare of 1940, state (No. 202 b) that the first paragraph of the Hague Regulation "has been in effect somewhat modified, as far as American practice is concerned" by the article of war quoted in the text; that in so far as the two instruments are not in conflict with each other, they will be construed and

fare of 1940, state that both the definition embodied in the Hague Regulation and that contained in the article of war include persons of all classes, whether military or civilian, without regard to citizenship or sex; that both likewise apply only where the acts are committed in time of war; that the Hague definition applies only where the information is obtained or sought "in the zone of operations," while the statutory definition is not so limited; that the latter includes, however, only persons "found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere"; and that the phrase "or elsewhere," as there employed, has been held not to justify trial by military tribunals of "persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers" (citing Ops. Attys. Gen. U. S., vol. 31, pp. 356, 361); that persons charged with espionage committed in the United States, outside of military jurisdiction, are, nevertheless, liable to trial and punishment by the civil courts under the espionage laws (citing United States Code, title 50, chap. IV).⁴ It may be greatly doubted whether international law as such forbids a belligerent to treat as a spy one who, clothed with the character of such an individual, pursues his efforts to gain information in places that are outside of "the zone of operations of a belligerent," if these words be literally or narrowly construed. It is not known whether as employed in the Hague Regulations of 1899 and 1907, it was the design of the parties that they should be so construed.⁵

The definition of a spy in the Hague Regulations does not purport to include cases in which a person merely makes or endeavors to make unauthorized or secret communications to the enemy; such cases are to be dealt with under laws relating to treason and espionage.⁶ According to those Regulations, a spy taken in the act is not to be punished without previous trial.⁷ Moreover, a spy who, after rejoining the army to which he belongs, is subsequently captured by the

applied together, but that "otherwise the article of war governs American practice." (No. 202 c.)

⁴ No. 204.

In the opinion of the Attorney General, Mr. Gregory, of Nov. 25, 1918, to which reference was made in the War Department Rules of Land Warfare of 1940, it was concluded that "in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers." Reliance was placed upon the case of *Ex Parte Milligan*, 4 Wall. 2. The question did not arise concerning the conditions under which the United States might, under the Hague Regulations, prosecute an alien as a spy.

⁵ The author is not prepared to express an opinion concerning what that design actually was. It is not impossible that the contracting parties may have sought chiefly to refer to places where belligerent forces existed or were to be found.

⁶ See Rules of Land Warfare, 1917, No. 201.

⁷ Art. XXX. In case of conviction, the severity of the punishment is determined by the captor. See Mr. Gresham, Secy. of State, to Mr. Denby, Minister to China, No. 1033, March 21, 1895, MS. Inst. China, V, 162, Moore, Dig., VII, 232.

According to the War Dept. Rules of Land Warfare, 1940, No. 209: "The spy is punishable with death whether or not he succeeds in obtaining the information or in conveying it to the enemy."

enemy, is to be treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.⁸

The War Department Rules of Land Warfare of 1940, declare that the Hague Regulations "tacitly recognize the well-established right of belligerents to employ spies and other secret agents for obtaining information of the enemy." Resort to that practice is said to involve no offense against international law. It is added that spies are punished, "not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible for the enemy."⁹ If such were the case one not guilty of internationally illegal conduct, and a member of a belligerent force might, nevertheless, find himself when captured, denied the privileges of a prisoner of war, and subjected to punishment by death if found guilty of the particular acts complained of while a participant in the conflict. It is believed that a more satisfactory explanation is within reach. It is found in the fact that the conduct of a spy is in reality at variance with the laws of war which are a part of the law of nations, and by implication also a part of the local law of the individual State. As a violator of both he forfeits the privileges of a prisoner of war.¹⁰ The circumstance that his own or other countries may frequently employ spies merely signifies that in so doing they are far from dissuading the actors from having recourse to indefensible conduct.

(4)

§ 678. **Treason. War Traitors.** By virtue of its domestic law, a belligerent State enjoys the right to inflict punishment upon one of its nationals who betrays to the enemy anything concerning its military or naval operations, or who otherwise holds forbidden intercourse with it. By virtue of international law, such a State may lawfully endeavor to prevent persons of whatsoever nationality, within places under its control, from holding secret or unauthorized communication with the enemy and may deal with such conduct as treasonable. From the operation of this belligerent right foreign residents in an invaded or occupied district can claim no immunity.

According to the eighty-first article of war set forth in an Act of Congress of June 4, 1920:

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such punishment as a court-martial or military commission may direct.¹

This provision is said to be an American statutory definition of treason.² The War Department Rules of Land Warfare of 1940, declare that violators of the

⁸ Art. XXXI.

⁹ No. 203.

¹⁰ [Such a view was seemingly to obtain in the Supreme Court of the United States in 1942.]

§ 678. ¹ 41 Stat. 804.

² War Dept. Rules of Land Warfare, 1940, No. 205. According to No. 205 c: "Although the eighty-first article of war, as an enactment of the Congress, technically applies of its own force only within territory of the United States and to persons subject to American mili-

foregoing rule are called "war traitors";³ that if the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war traitor;⁴ that if a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war traitor.⁵ It is said that the war traitor is always severely punished; that if his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.⁶ The immunity from punishment accorded by the Hague Regulations to a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is said not to extend to persons guilty of treason "who may be arrested at any place or any time within the jurisdiction." Nor is it necessary for traitors to be caught in the act in order that they may be punished.⁷ "Assisting or favoring espionage or treason and knowingly concealing a spy may be made the subject of charges; and such acts are by the customary laws of war equally punishable."⁸

(5)

§ 679. **Deserters.** No requirement of international law forbids a belligerent to punish by death a deserter from its forces who later falls into its hands. In the Instructions for the Government of the Armies of the United States in the Field, of April 24, 1863, it was declared that if a deserter from the enemy, having taken service in the American Army, were captured by the enemy and punished by death or otherwise, it did not constitute a breach against the laws and usages of war, requiring redress or retaliation.¹

The War Department Rules of Land Warfare of 1940, announce that among those who are not to enjoy the immunity accorded by the Hague Regulations to persons forming a part of a *levée en masse* are "deserters from, or subjects of, the invading belligerent, and persons who are known to have violated the laws and customs of war."² It is added that "the officers' duty is to hold the persons of those captured and leave the question of their being regulars, irregulars, deserters, etc., to the determination of competent authority."³

tary law elsewhere, it substantially embodies principles of the unwritten laws of war applicable to occupied enemy territory, and will be enforced by American troops occupying such territory."

³ No. 206.

⁴ No. 207.

⁵ No. 208.

⁶ No. 210.

⁷ No. 213.

⁸ No. 214.

§ 679. ¹ § 48, Moore, Dig., VII, 234, and quoted in Rules of Land Warfare, 1917, No. 38, Note 1.

² No. 11.

³ No. 13. It is here said that the determination of the status of captured troops is to be left to higher military authority or to military tribunals, and that summary executions are no longer contemplated under the laws of war.

THE SICK AND WOUNDED

a

§ 680. **The Geneva Convention of 1864.** Belligerent States have long felt themselves burdened with the duty to give succor to the wounded and to endeavor to mitigate the sufferings of enemy combatants disabled in battle.

On August 22, 1864, there was concluded at Geneva the first international Convention for the Amelioration of the Condition of the Wounded in time of war, and to which the United States announced its adherence in 1882.¹ That convention is said to have fairly represented the best existing practice among continental armies in respect to the management and control of the sick and wounded, and in the immunities which were habitually accorded to the personnel of the medical and sanitary services who were charged with their care and treatment. The principle of neutrality was sought to be applied to the disabled and to the personnel and matériel of the sanitary establishments which habitually accompanied the operations of armies in the field.² The forty years following the conclusion of the convention wrought changes both in the technical treatment of the sick and wounded, and in the mode and extent of military operations, which served to render nugatory certain provisions that had been agreed upon. The convention had contemplated, for example, the delivery, when circumstances permitted, of soldiers who had been wounded in an engagement, to the outposts of the enemy.³ It provided also for the caring for such persons in the

§ 680.¹ For the text of the Convention, see Malloy's *Treaties*, II, 1903.

Art. XXXI of the Geneva Convention of 1906, provided that "The present Convention, when duly ratified, shall supersede the Convention of August 22, 1864, in the relations between the contracting states.

"The convention of 1864 remains in force in the relations between the parties who signed it but who may not also ratify the present convention." *Id.*, II, 2193.

See Report of Charles P. S. Bowles, as an American semi-official observer at the Geneva Conference of 1864, as set forth in Martin Gumpert's *Dunant—The Story of the Red Cross*, New York, 1938, 159–170.

² The language of the text is substantially that of the report of the American delegation to the Second Geneva Conference, to the Secretary of State, July 10, 1906, *For. Rel.* 1906, II, 1548, 1555.

³ "With the artillery and small arms now in use, the distance between firing lines has been very greatly increased. The zone fought over by the combatants, as each advances or retreats in conformity to the varying fortunes of the battle, is filled with hasty intrenchments for the use of infantry and artillery, and is so crossed with wire entanglements and other obstacles that communication across it is practically impossible. The impracticability of attempting to send the wounded across this zone to their own lines, in ambulances or other vehicles, is so absurd and impossible as to require no demonstration.

"There is great uniformity in the practice of modern armies in respect to the administration of their medical and sanitary services and as to treatment of the wounded. . . . They are collected from the battle-field and passed through the first-dressing stations, ambulance stations, field hospitals, etc., to the base hospitals at the rear with as little delay as possible.

"All the administrative arrangements are organized with a view to such rapid passage of the wounded and disabled from front to rear. If it be attempted to reverse this and to deliver them at the enemy's outposts, it will involve an impairment of efficiency and will bring a very serious strain upon machinery for handling them, tending to its disorganization." Memorandum of Geo. B. Davis, Judge-Advocate-General, U. S. A., appended to *Instructions of Mr. Root, Secy. of State, to the American Delegation to the Second Geneva Conference*, May 16, 1906, *For. Rel.* 1906, II, 1544–1547.

houses of the inhabitants, and deemed the entertainment of wounded men as ground for exemption from the burden of quartering troops.⁴ The convention lacked, however, a definition as to the status of the sick and wounded, who fell into the hands of the enemy.⁵

b

The Geneva Convention of 1906

§ 681. **In General.** In order to improve and supplement the Convention of 1864, there assembled at Geneva in 1906, in response to the invitation of the Swiss Federal Council, a second international Conference which, on July 6 of that year, concluded a fresh convention for the Amelioration of the Condition of the Wounded of the Armies in the Field.¹

The convention comprised eight chapters or parts concerning first, the sick and wounded; secondly, sanitary formations and establishments; thirdly, personnel; fourthly, matériel; fifthly, convoys of evacuation; sixthly, distinctive emblem; seventhly, application and execution of the convention; eighthly, repression of abuses and infractions; and also certain general provisions. In the opinion of the American delegation, much of the inexactness of expression which had characterized the old convention was eliminated from the new. Descriptive words and phrases were said to have been brought into close and exact relation with the conditions of modern war.²

⁴ "Since the general adoption of the modern antiseptic practice of surgery in the treatment of wounds, the disposition has been to hold the wounded under constant professional observation in suitable field or general hospitals with a view to secure the enforcement of correct sanitation in their treatment. To that end the places where they are treated are constantly disinfected, and no competent surgeon would now allow his wounded to be received and treated in private dwellings, save in a case of extreme emergency." *Id.*

⁵ See Report of the American Delegation to the Second Geneva Conference, July 10, 1906, For. Rel. 1906, II, 1548, 1555.

§ 681. ¹ For the text of the Convention, see Malloy's Treaties, II, 2183. The Convention was signed by delegates in behalf of the United States, and duly ratified by the President.

Concerning the invitation to the Geneva Conference of 1906, the program suggested by the Swiss Federal Council, Instructions to and Report of the American Delegation (comprising Hon. Wm. Cary Sanger, formerly Assist. Secy. of War, Brig. Gen. George B. Davis, Judge-Advocate-General of the Army, Brig. Gen. Robert M. O'Reilly, Surgeon-General of the Army, and Rear-Admiral Charles S. Sperry, U. S. Navy), see For. Rel. 1906, II, 1528-1565. See also bibliographical note in Hershey, *Int. Law*, revised ed., 592, for commentaries on the Convention.

Art. XXI of the Regulations annexed to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, announced that "The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention." Malloy's Treaties, II, 2285.

Art. XV of the Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land declared that "The Geneva Convention applies to sick and wounded interned in neutral territory." *Id.*, II, 2299.

² Report of the American Delegation, For. Rel. 1906, II, 1548, 1555, where it is also said: "The terms used to describe the status of the sick and wounded and the personnel and matériel of the sanitary establishments in which they are entertained and cared for have a clear and unmistakable meaning; they are calculated to conduce to efficiency and certainty of execution, and it is difficult to see how they can give occasion for variance in interpretation."

Contempt for the general obligation to respect and care for the sick and wounded of the enemy was repeatedly shown by the forces of Germany, Austria and Bulgaria in the course

c

The Geneva Convention of 1929

(1)

§ 681A. **In General.** Professing a desire to diminish, so far as lay within their power, the evils inseparable from war, and wishing "to perfect and complete" for that purpose the provisions of the conventions of 1864 and 1906, numerous States concluded at Geneva on July 27, 1929, a fresh convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field,¹ which as among the contracting parties was designed to supplant the earlier contractual arrangements.² It seems important to note what, after the experience of World War I, the contracting parties deemed it expedient to undertake.³

(2)

§ 682. **The Sick and Wounded.** The duty to respect and protect in all circumstances officers, soldiers and other persons attached to the armies, without distinction of nationality, by the belligerent in whose power they are, is acknowledged.¹ Even the belligerent who is compelled to abandon his wounded or sick in the hands of his adversary, is obliged, so far as military exigencies permit, to leave with them a portion of the personnel and matériel to assist in caring for them.² It is declared that subject to the care thus required to be taken of them, the wounded and sick of an army who fall into the power of the other belligerent are to become prisoners of war, and that the general rules of international law in respect to prisoners of war are to become applicable to them.³

After every engagement, the belligerent who remains in possession of the field of battle is to take measures to search for the wounded and the dead and to protect them from robbery and ill treatment. A local armistice or cessation of fire to

of World War I. See instances contained in Annex I to Report of Commission of Responsibilities, Paris Conference of 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, pp. 52-53, especially the wanton massacre of medical personnel and wounded at Etne (Belgium), Aug. 22, 1914.

See, also, Germany's Violations of the Laws of War, 1914-1915, compiled under auspices of the French Ministry of Foreign Affairs, translated by J. O. P. Bland, New York, 1916, documents Nos. 85-89; also Garner, Int. Law and the World War, I, § 316, with respect to the bombing of hospitals.

See Lauterpacht's 6 ed. of Oppenheim, II, 281.

§ 681A.¹ U. S. Treaty Vol. IV, 5209; League of Nations Treaty Series, No. 2733.

² Art. 34.

³ See Paul Des Gouttes, *La Convention de Genève du 27 Juillet 1929: Commentaire*, with preface by Max Huber, Geneva, 1930. Also *Recueil de Textes relatifs à l'application de la Convention de Genève et à l'action des Sociétés nationales dans les États parties à cette Convention*, preface by Paul Des Gouttes, Geneva, 1934; Frédérique Noailly, *La Croix-Rouge au Point de Vue National et International, Son Histoire, Son Organisation*, Lyon, 1935.

See, also, War Dept. Rules of Land Warfare, 1940, Chap. V.

§ 682.¹ Art. 1, where it is added that such individuals "shall be humanely treated and cared for."

² *Id.*

³ Art. 2, where it is added that "the belligerents shall remain free, however, to agree upon such clauses to the benefit of the wounded and sick prisoners as they may deem of value over and above already existing obligations."

See, in this connection, Arts. 68 and 69 of the Geneva Convention of 1929, Relating to the Treatment of Prisoners of War.

enable the removal of wounded left between the lines is to be arranged whenever circumstances permit.⁴ Belligerents are to forward to each other as soon as possible the names of the wounded, sick and dead taken in charge or discovered by them, as well as all indications which may serve for their identification.⁵ The exigencies of modern warfare are oftentimes such as to render impossible the performance of such services, however desirable, in relation to the enemy's dead.

It is wisely provided that the military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision, to care for, the wounded or sick of the armies, granting to persons responding to such appeals, special protection and certain facilities.⁶

(3)

§ 683. **Sanitary Formations and Establishments.** Mobile sanitary formations, i.e., those which are intended to accompany armies in the field, and the fixed establishments belonging to the sanitary service are to be protected and respected by the belligerents,¹ subject to the condition that such formations and establishments are not used "to commit acts injurious to the enemy."² They are not, however, to be deprived of the protection normally to be accorded them by the fact "(1) that the personnel of the formation or establishment is armed and uses its arms in self-defense or in defense of its wounded and sick; (2) that in the absence of armed hospital attendants the formation is guarded by an armed detachment or by sentinels; (3) that hand firearms or ammunition taken from the wounded and sick and not yet turned over to the proper authorities are found in the formation or establishment; (4) that there is found in the formation or establishment personnel or matériel of the veterinary service which does not integrally belong to it."³

⁴ Art. 3.

According to the War Dept. Rules of Land Warfare of 1940, No. 176 b: "Robbery and maltreatment of the wounded or dead on a battlefield are outrageous offenses against the laws of war. It is the duty of the commanders to see that such offenders, whether members of the armed forces or civilians, are promptly apprehended and brought to trial before competent military tribunals. Like other serious offenders against the laws of war they may be sentenced to death or such other punishment as the trial tribunal may be legally authorized to impose."

⁵ Art. 4, where it is declared: "They shall draw up and forward to each other death certificates.

"They shall collect and likewise forward to each other all objects of personal use found on the field of battle or on the dead, especially one-half of their identity plaque, the other half remaining attached to the body.

"They shall see that a careful examination, if possible, medical, is made of the bodies of the dead prior to their internment or cremation, with a view to verifying their death, establishing their identity, and in order to be able to furnish a report thereon.

"They shall further see that they are honorably buried and that the graves are treated with respect and may always be found again.

"For this purpose, and at the outbreak of hostilities, they shall officially organize a service of graves in order to render any later exhumation possible and to make certain of the identity of bodies even though they may have been moved from grave to grave.

"Upon termination of hostilities, they shall exchange lists of graves and of dead buried in their cemeteries and elsewhere."

⁶ Art. 5.

§ 683. ¹ Art. 6.

² Art. 7.

³ Art. 8. The War Dept. Rules of Land Warfare of 1940, declare in this connection: "Although the sanitary personnel may carry arms for self-defense, they shall not employ such

The right of an unoffending sanitary formation or establishment to demand protection from the enemy is not believed to be absolute. The former cannot justly claim immunity when its presence offers an obstacle to military operations.⁴ Its safety during an engagement must ever be proportional to its remoteness from the scene of conflict. This fact emphasizes the practical necessity for the early removal of the seriously wounded from dressing-stations and field ambulances to base hospitals at the rear.⁵

(4)

§ 684. **Personnel.** The personnel charged exclusively with the removal, transportation, and treatment of the wounded and sick, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, are to be respected and protected under all circumstances. If they fall into the hands of the enemy they are not to be treated as prisoners of war.¹ The War Department Rules of Land Warfare of 1940, interpreting the obligation to respect and accord protection to the personnel of certain categories (as set forth in articles 6 and 9 of the Convention), declare that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions; that the accidental killing or wounding of such personnel, "due to their presence among or proximity to combatant elements actually engaged, by fire directed at the latter, affords no just cause for complaint."² The personnel of volunteer aid societies, duly recognized and authorized by their government, who are employed in the same functions as the personnel contemplated in Article 9, paragraph 1, are assimilated to that personnel upon condition that such societies are subject to military laws and regulations.³ It is provided that a recog-

arms against the legitimate enemy forces. These arms are for their personal defense and for protection of the wounded and sick under their charge against marauders and the like." (No. 181 b.) It is believed that the injunction as thus laid down is too sweeping. See the British Ambassador at Rome, to the Italian Minister for Foreign Affairs, April 10, 1936, protesting against attacks by Italian airmen on a British Red Cross ambulance operating in Ethiopia, March, 1936, Ethiopia No. 4 (1936), Cmd. 5160, 4.

⁴ On the other hand, the civilian if not the soldier will never cease to believe that the earnest desire and serious effort of a commanding general to spare the enemy's sanitary formations or establishments, even within the line of fire, will always prove a boon to the wounded out of all proportion to any detriment to their foe. No rule of conduct should find expression in a general agreement encouraging by its provisions a military commander to make excuse for unconcern as to the fate of the enemy's wounded within the range of his guns.

⁵ "From what has been said of the length and depth of the battle line and the increased range of the small arm and artillery-fire, it will be apparent that the flag and the insignia of the convention [that of 1864] confers a minimum of protection at the establishments for the relief of the wounded which are located in the vicinity of the lines of battle. For the same reason the protection afforded by the flag and insignia is at its maximum at the base hospitals and at the rest stations in their immediate vicinity." Memorandum of Geo. B. Davis, Judge-Advocate-General, U. S. A., appended to Instructions of Mr. Root, Secy. of State, to the American Delegation to the Second Geneva Conference, May 16, 1906, For. Rel. 1906, II, 1544, 1545.

§ 684. ¹ Art. 9, where it is added: "Military personnel which has received special instructions to be used when necessary as auxiliary attendants or litter bearers in the removal, transportation and treatment of the wounded and sick, and bearing an identification document, shall benefit by the same conditions as the permanent sanitary personnel if they are captured at the moment when they are fulfilling these functions."

² No. 182 b

³ Art. 10 where it is also provided that each party shall make known to the other, either in time of peace or at the opening or during the progress of hostilities, and in any case be-

nized society of a neutral country may only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own Government and the authority of such belligerent. The belligerent accepting such assistance is required to notify the enemy before making use thereof.⁴ The persons described as belonging to or associated with personnel in Articles 9, 10 and 11 are not to be detained after having fallen into the power of the adversary. In the absence of agreement to the contrary they are to be sent back to the belligerent to whose service they are attached as soon as a way is opened for their return "and military exigencies permit." While waiting to be returned, they are to continue in the exercise of their functions under the direction of the adversary, and are to be assigned preferably to the care of the wounded and sick of the belligerent to whose service they are attached.⁵

(5)

§ 685. **Buildings and Matériel. Sanitary Transports. Aircraft.** While mobile sanitary formations, of whatever nature, falling into the power of the adversary, are to retain their matériel, their means of transportation and their conducting personnel, the competent military authority is given the right to employ them in caring for the wounded and sick. Restitution is, however, to take place in accordance with the conditions prescribed for the sanitary personnel and as far as possible at the same time.¹ Buildings and matériel of the fixed sanitary establishments of the army are to remain subject to the laws of war, but may not be diverted from their use so long as they are necessary for the wounded and

fore actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies. According to No. 184 of the War Dept. Rules of Land Warfare, 1940: "The American National Red Cross is, under the proclamation of the President, the only such volunteer society now authorized by this Government to render aid to its land and naval forces in time of war, and any other society desiring to render similar assistance can do so only through the American National Red Cross. Such portion of the society as may render aid to the land and naval forces will constitute a part of the sanitary service thereof. Their employment must be under the responsibility of the Government and they must be assigned to duties in localities designated by competent military authority."

The American National Red Cross was reincorporated by the Act of Jan. 5, 1905, Chap. 23, 33 Stat. 599.

See *Vowinkel v. First Federal Trust Co.*, 10 F. (2d) 19, where it was held that in virtue of provisions of the Geneva Convention of 1906, a person in the service of the German army during World War I as a Red Cross surgeon was not to be deemed "an enemy" of the United States under the Trading with the Enemy Act.

⁴ Art. 11.

⁵ Art. 12, where it also provided that at the time of their departure they may carry with them such effects, instruments, arms and means of transport as belong to them.

According to No. 186 *b*, War Dept. Rules of Land Warfare, 1940: "Nothing in the foregoing article [12] precludes reasonable measures to prevent such personnel, upon their return to their own army, from carrying information of strategic or tactical value. Their movements and activities may be restricted as far as reasonably necessary to prevent their acquisition of such information, and if they should become possessed thereof, their return to their own army may be delayed until the information has ceased to be of substantial value."

Article 13 provides that "while they remain in their power, belligerents shall secure to the personnel mentioned in Articles 9, 10 and 11, the same maintenance and quarters, pay and allowances, as to persons of corresponding rank in their own armies; at the outbreak of hostilities the belligerents shall reach an understanding on the corresponding ranks of their sanitary personnel."

§ 685. ¹ Art. 14.

sick, although commanders of troops engaged in operations are permitted to use them in case of urgent military necessity if, before such use, the wounded and sick treated there have been provided for.²

It is declared that vehicles equipped for sanitary evacuation traveling singly or in convoy are to be treated as mobile sanitary formations subject to the following special provisions: "A belligerent intercepting sanitary transportation vehicles, traveling either singly or in convoy, may, if required by military necessity, stop them and break up the convoy, charging himself in all cases with the care of the wounded and sick whom it contains; he may only utilize such vehicles in the sector wherein they were intercepted and exclusively for sanitary needs; when their local mission is at an end, those vehicles must be returned under the conditions stipulated in Article 14."³ It is declared that military means of transportation and their teams, other than those belonging to the sanitary service, may be captured; and also that the civil personnel and all means of transportation obtained by requisition are to be "subject to the general rules of International Law."⁴

Aircraft used as a means of sanitary transportation are to enjoy the protection of the Convention during such time as they are exclusively reserved for the evacuation of wounded and sick and for the transportation of sanitary personnel and matériel.⁵ They are to be painted in white and are to bear clearly visible the distinctive sign mentioned in Article 19 alongside of the national colors on their upper and lower surfaces.⁶ Except with special and express permission, a flight over the firing-line, as well as over the zone situated in front of the major medical dressing stations, and in general over any territory under the control of or occupied by the enemy is forbidden. Sanitary aircraft are to comply with all summons to land.⁷ The pilot, mechanics, and wireless operators who have been captured are to be returned on condition of only being utilized in the sanitary service until the termination of hostilities.⁸

(6)

§ 686. **Distinctive Emblem. The Red Cross on a White Ground.** Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the Federal colors, is continued as the emblem and

² Art. 15.

According to Art. 16, the buildings of aid societies admitted to the benefits of the Convention are to be regarded as private property; and the matériel of such societies, irrespective of its location, is likewise to be regarded as private property. It is added that: "The right of requisition recognized to belligerents by the laws and customs of war shall be exercised only in case of urgent necessity and after the wounded and sick have been provided for."

³ Art. 17, where it is also declared: "Military personnel assigned by competent orders for sanitary transportation purposes shall be returned under the conditions stipulated in Article 12 for sanitary personnel, and subject to the provisions of the last paragraph of Article 18; all means of transportation especially organized for evacuation purposes, as well as their appurtenances attached to the sanitary service, shall be returned in conformity with the provisions of Chapter IV."

⁴ Art. 17.

⁵ Art. 18.

⁶ Art. 18.

⁷ *Id.*, where it is further provided that in the case of a landing thus required or made accidentally upon territory occupied by the enemy, the wounded and sick, as well as the sanitary personnel and matériel, including the aircraft, are to benefit by the provisions of the Convention.

⁸ *Id.*

distinctive sign of the sanitary service of armies.¹ This emblem appears on flags and brassards, as well as upon all matériel appertaining to the sanitary service, with the permission of competent military authority.² The protected personnel is obliged to wear on the left arm a brassard bearing the emblem, duly issued and stamped by competent military authority.³

The distinctive flag of the Convention is only to be displayed over the sanitary formations and establishments which the Convention provides shall be respected, and with the consent of the military authorities. In fixed establishments it is to be, and in mobile formations it may be, accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.⁴ It is declared that sanitary formations which have fallen into the power of the enemy are, however, to fly no other flag than that of the Convention as long as they continue in that situation.⁵ The belligerents, in so far as the military exigencies allow, are to take such measures as may be necessary to render the distinctive emblems marking sanitary formations and establishments plainly visible to the land, air and sea forces of the enemy, with a view to preventing the possibility of any aggressive action.⁶

Sanitary formations of neutral countries which, under the conditions set forth in Article 11, have been authorized to render their services, are to fly, with the flag of the Convention, the national flag of the belligerent to which they are attached; and they are to enjoy the right during the time they are rendering service to a belligerent to fly their own national flag also.⁷ The provisions of the

§ 686. ¹ Art. 19.

In the same article it is declared that "for countries which already use, as a distinctive sign, in place of the red cross, the red crescent or the red lion and sun on a white field, these emblems shall likewise be recognized within the meaning of the present Convention."

² Art. 20.

³ Art. 21. According to the same article: "The personnel mentioned in Article 9, paragraphs 1 and 2, shall be furnished with an identification document consisting either of an inscription in their military booklet or a special document.

"Persons mentioned in Articles 10 and 11 who do not wear military uniform shall be furnished by competent military authority with a certificate of identity containing their photograph and attesting to their sanitary status.

"Identification documents must be uniform and of the same type in each army.

"The sanitary personnel may in no case be deprived of their insignia nor of their own identification papers.

"In case of loss they shall have the right to obtain duplicates."

⁴ Art. 22.

⁵ *Id.*

⁶ *Id.*

⁷ Art. 23, where it is added that "the provisions of the second paragraph of the preceding article are applicable to them."

According to art. 24. "The emblem of the red cross on a white ground and the words *Red Cross* or *Geneva Cross* may be used, whether in time of peace or war, only to protect or designate sanitary formations and establishments, the personnel and matériel protected by the Convention.

"The same shall apply with respect to the emblems mentioned in the second paragraph of Article 19 for such countries as use them.

"Moreover, the volunteer aid societies provided for under Article 10 may, in conformity with their national legislation, employ the distinctive emblem for their humanitarian activities in time of peace.

"As an exceptional measure and with the specific authorization of one of the national Red Cross Societies (Red Crescent, Red Lion and Sun), the use of the emblem of the Convention may be allowed in peace time to designate the location of relief stations reserved exclusively to giving free assistance to wounded or sick."

Convention are to be respected by the parties under all circumstances. If, in time of war, a belligerent is not a party thereto, its provisions are, nevertheless, to remain in force as between all of the belligerents which are parties to the Convention.⁸ It is made the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective Governments, and conformably to the general principles of the Convention.⁹ The parties are to take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of the Convention, and to make them known to the people at large.¹⁰

(7)

§ 687. **Repression of Abuses and Infractions.** The Governments of the parties "whose legislation may not now be adequate" are to take or to recommend to their legislatures such measures as may be necessary at all times:

(a) to prevent the use by private persons or by societies other than those upon which this Convention confers the right thereto, of the emblem or of the name of the *Red Cross* or *Geneva Cross*, as well as any other sign or designation constituting an imitation thereof, whether for commercial or other purposes;

(b) by reason of the homage rendered to Switzerland as a result of the adoption of the inverted Federal colors, to prevent the use, by private persons or by organizations, of the arms of the Swiss Confederation or of signs constituting an imitation thereof, whether as trade-marks, commercial labels, or portions thereof, or in any way contrary to commercial ethics, or under conditions wounding Swiss national pride.¹

The Governments of the parties "whose penal laws may not be adequate" are likewise to take or to recommend to their legislatures the necessary measures to repress in time of war all acts in contravention of the Convention; and also to communicate to one another through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the date of the ratification of the Convention.² At the request of a belligerent, it is declared that an investigation must be held, in such manner as may be agreed upon by the interested parties, concerning any alleged violation of the Convention; and that whenever such a violation is proved, the belligerents are to put an end to it and to repress it as promptly as possible.³

⁸ Art. 25. See Lauterpacht's 6 ed. of Oppenheim, II, § 124 a.

⁹ Art. 26.

¹⁰ Art. 27.

§ 687.¹ Art. 28, where it is added: "The prohibition mentioned in subparagraph (a) of the use of signs or designations constituting an imitation of the emblem or designation of the *Red Cross* or *Geneva Cross*, as well as the prohibition mentioned in subparagraph (b) of the use of the arms of the Swiss Confederation or signs constituting an imitation thereof, shall take effect from the time set in each act of legislation and at the latest five years after this Convention goes into effect. After such going into effect it shall be unlawful to take out a trade-mark or commercial label contrary to such prohibitions."

² Art. 29.

³ Art. 30.

Arts. 31-39 are concerned with so-called "Final Provisions." According to Art. 37 "a

5

BELLIGERENT OCCUPATION¹

a

§ 688. **Nature and Effect.** In a broad sense any occupation and control of foreign territory by the armed forces of a State engaged in war constitutes a belligerent occupation. It may follow on the heels, and be the direct consequence,

state of war shall give immediate effect to ratifications deposited or adhesions notified by belligerent Powers prior to or after the outbreak of hostilities. The communication of ratifications or adhesions received from Powers at war shall be made by the Swiss Federal Council by the most rapid method." According to Article 38, the right of denunciation, which is accorded the parties, is not to take effect until one year after notification has been made in writing to the Swiss Federal Council, which is to communicate such notification to the Governments of all of the parties. The denunciation is to have effect only with respect to the party giving notification of it, and is not to take effect during a war in which a denouncing Power is involved. In that case, the Convention is to continue in effect beyond the period of one year, until the conclusion of peace.

§ 688.¹ See, generally, documents in Moore, Dig., VII, 257-315; Instructions for the Government of Armies of the United States in the Field, Gen. Orders, No. 100, Apr. 24, 1863; Rules of Land Warfare, U. S. Army, 1917, Chap. VIII; War Department Rules of Land Warfare, 1940, Chap. X; Charles E. Magoon, Reports on the Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States, Washington, 1903.

See, especially, Section III, Arts. XLII-LVI of Regulations in Annex to the Hague Convention of Oct. 18, 1907, Respecting the Laws and Customs of War on Land, Malloy's Treaties, II, 2288-2290.

Attention is called to Dr. Ernst H. Feilchenfeld's valuable study on The International Economic Law of Occupation, to appear as Monograph No. 6 of the Division of International Law, Carnegie Endowment for International Peace, and of which the galley proofs have been shown to the author through the kindness of Prof. Philip C. Jessup, Director of that Division. To Prof. Jessup the author acknowledges his indebtedness also for placing within his reach a mimeographed copy of Vol. I of the Report of the Officer in Charge of Civil Affairs (Col. I. L. Hunt), of March 4, 1920, on American Military Government of Occupied Germany, 1918-1920.

See, also, Joseph R. Baker and Henry G. Crocker, Compilation of Laws of Land Warfare (as existing Aug. 1, 1914), Dept. of State, 1919, 292-420; Sir G. S. Baker's 4 ed. of Halleck, Int. Law, 465-500; W. E. Birkhimer, Military Government and Martial Law, 2 ed., Kansas City, 1904; Percy Bordwell, The Law of War between Belligerents, Chicago, 1908; Fauchille, 8 ed., §§ 1155-1193; J. E. Conner, The Development of Belligerent Occupation, Bulletin of State University of Iowa, Apr. 6, 1912; Alessandro Corsi, *L'Occupazione Militare in Tempo di Guerra*, Florence, 1886; G. B. Davis, Int. Law, Sherman's 4 ed., 327-336; J. Depambour, *Des Effets de L'Occupation en Temps de Guerre*, Paris, 1900; J. E. Edmonds and L. Oppenheim, Land Warfare, London, 1912, Nos. 340-404; G. Ferrand, *Des Réquisitions en Matière de Droit International Public*, with prefaces by L. Renault and Intendant Gen. Thoumazou, including bibliography, Paris, 1917; Hall, Int. Law, Higgins' 8 ed., §§ 153-162; T. E. Holland, Laws of War on Land, London, 1908, Nos. 102-116; Robert Jacomet, *Les Lois de la Guerre Continentale*, with preface by L. Renault, Paris, 1913; Arthur Lorriot, *De la Nature de L'Occupation de Guerre*, Paris, 1903; A. Mérignhac, *Les Lois et Coutumes de la Guerre sur Terre*, Paris, 1903, 241-322; J. H. Morgan, The German War Book (*Kriegsbrauch im Landkriege*), London, 1915, 113-142; Marcel Nast, "L'occupation des territoires rhénans par les troupes des Alliés et des États-Unis pendant l'armistice," *Rev. Gén.*, XXVIII, 139; E. Nys, *Droit International*, III, 463-472; A. Pillet, *Les Lois Actuelles de la Guerre*, 2 ed., Paris, 1901, 237-272; J. B. Porter, Int. Law, 2 ed., Army Service Schools, Fort Leavenworth, 1914, 185-195; Raymond Robin, *Des Occupations Militaires en dehors des Occupations de Guerre*, with preface by L. Renault, Paris, 1913; J. M. Spaight, War Rights on Land, London, 1911, Chap. XI; Karl Strupp, *Das Internationale Landkriegsrecht*, Frankfurt am Main, 1914, 93-126, with bibliography; Hannis Taylor, Int. Law, §§ 568-579; Platon de Waxel, *L'Armée d'Invasion et la Population*, Leipzig, 1874; Westlake, Int. Law, 2 ed., II, 93-116; C. Phillipson's Wheaton, London, 1915, 519-545; G. G. Wilson, Int. Law, 2 ed., 287-295; A. Zorn, *Das Kriegsrecht zu Lande*, Berlin, 1906, 207-315; M. Marinoni, "Della Natura Giuridica Dell'

of invasion, or it may be the result of agreement. The territory affected may be hostile, in that it belongs to the enemy, or be dealt with by the occupant as though it were hostile, although the territorial sovereign be neutral to the conflict. Again, that sovereign, however neutral, may offer no objection, and, moreover, be not regarded by the occupant as opposing its cause or as having territory that is to be regarded as hostile. Still again, the occupied territory may belong to a State allied to the occupant, and which willingly confides its domain to the protection of it.

The privileges of the occupant are not identical in these several situations. If what is occupied belongs to the enemy or is fairly to be regarded as hostile, the method by which occupation is attained probably has little bearing on the rights of the occupant. Again, it may be noted that in various situations where a friendly neutral not unwillingly permits or consents to the occupation of its territory, the occupant may have little need to claim or assert privileges which it might normally be expected to exercise were the territory that of the enemy. In the case where the domain of an ally is occupied, the absence of local opposition or interference may be expected to eliminate reasons for action that would frequently arise where the occupied area was to be regarded as hostile.

The most common form of belligerent occupation is that stage of military operations which is instituted by one invading force in any part of an enemy's territory, when that force has overcome unsuccessful resistance and established its own military authority therein.² It is to this general situation that the Regu-

Occupazione Bellica" with bibliography, *Riv. Dir. Int.*, V, 181-268, 373-476; L. Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," *Law Quar. Rev.*, XXXIII, 363; R. Ruze, "*La Jurisdiction des Armées d'Occupation*," *Rev. Gén.* XVI, 131-161; J. W. Garner, in *Am. J.*, XI, 74 and 511.

See, also, Gr. Antipa, *L'Occupation Ennemie de la Roumanie, Histoire Économique et Sociale de la Guerre Mondiale (Série Roumanie)*, Publication of Carnegie Endowment for International Peace, Paris, 1929; Thomas Baty, "The Relations of Invaders to Insurgents," *Yale Law J.*, XXXVI, 966; Elbridge Colby, "Occupation Under the Laws of War," *Columbia Law Rev.*, XXV, 904, XXVI, 146; Lauterpacht's 6 ed. of Oppenheim, II, §§ 166-172, with bibliography; H. Pirenne, *La Belgique et la Guerre Mondiale, Histoire Économique et Sociale de la Guerre Mondiale (Série Belge)*, Publication of Carnegie Endowment for International Peace, Paris, 1915-1928, 6 and 7; Ch. Sarolea, *L'Occupation Allemande de la Pologne pendant la Guerre*, Brussels, 1922; Col. H. A. Smith, *Military Government*, Fort Leavenworth, Kansas, 1920; Adolf Solansky, *German Administration in Belgium*, New York, 1928; Graf Stauffenberg, "*Vertragliche Beziehungen des Okkupanten zu den Landeseinwohnern*," *Zeit. ausländ. Volk.*, II, part 1, 86; Paul Tirard, *La France Sur le Rhin*, Paris, 1930; Sir Arnold Wilson, "The Laws of War in Occupied Territory," *Grotius Society*, XVIII, 17.

² This statement or definition of belligerent occupation is substantially that given by J. E. Conner in *The Development of Belligerent Occupation* (Bulletin of State University of Iowa, Apr. 6, 1912, p. 3). That writer is believed to employ wisely the term "belligerent occupation" rather than "military occupation" or "hostile occupation" to describe the stage of military operations referred to in the text. He adverts to the fact that the occupation by a military force after a treaty of peace is essentially a military occupation, yet one differing vitally from that existing while war ensues.

On June 28, 1919, the day on which was signed at Versailles the treaty of peace with Germany, there was also signed an agreement in behalf of the United States, Belgium, The British Empire, and France, on the one part, and Germany, on the other, with regard to the "Military Occupation of the Territories of The Rhine." Senate Doc. No. 81, 66 Cong., 1 Sess. This agreement was not ratified by the United States. The agreement was in pursuance of Art. 428 of the treaty of peace, declaring that as a guarantee for the execution of that treaty by Germany, German territory situated to the west of the Rhine, together with the bridge-heads, should be occupied by the Allied and Associated troops for a period of fifteen years from the coming into force of the treaty. The agreement contemplated a military rather than

lations (Articles XLII–LVI) Annexed to the Hague Convention of 1907 Respecting the Laws and Customs of War on Land are addressed.³

According to the War Department Rules of Land Warfare of 1940, belligerent or so-called military occupation is a question of fact. It presupposes a hostile invasion as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader is in position to substitute and has substituted his own authority for that of the legitimate government of the territory invaded.⁴ It is said that invasion is not necessarily occupation, although preceding it and frequently coinciding with it; and that an invader may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation. He may, it is declared, send small raiding parties or flying columns, reconnoitering detachments, etc., into or through a district where they may be temporarily located, and exercise control, yet when they pass on, it cannot be said that such district is under his military occupation.⁵

Belligerent occupation, being “essentially provisional,” does not serve to transfer sovereignty over the territory controlled, although the *de jure* sovereign is, during the period of occupancy, deprived of power to exercise its rights as such.⁶ This deprivation of power and the relinquishment of it to the occupant are a

a belligerent occupation, because it was designed to remain operative long after peace was restored.

³ These are embraced in Section III, Malloy's Treaties, II, 2288–2290.

⁴ The language of the text is that contained in War Dept. Rules of Land Warfare, 1940, No. 272.

According to Article XLII of the Regulations annexed to The Hague Convention of 1907, concerning the Laws and Customs of War on Land “Territory is considered occupied when it is actually placed under the authority of the hostile army.

“The occupation extends only to the territory where such authority has been established and can be exercised.” Malloy's Treaties, II, 2288

“Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least (2 Oppenheim, § 167).” Day, J., in *MacLeod v. United States*, 229 U. S. 416, 425.

⁵ War Dept. Rules of Land Warfare, 1940, No. 274. According to No. 277, *id.*: “The existence of a fort or defended area within the occupied district, provided such place is invested, does not render the occupation of the remainder of the district ineffective, nor is the consent of the inhabitants in any manner essential”

See also Sir A. Wilson, “The Laws of War in Occupied Territory,” *Grotius Society*, XVIII, 1932, 17, 18–19.

⁶ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, *United States v. Rice*, 4 Wheat. 246; *Fleming v. Page*, 9 How. 603.

See also War Dept. Rules of Land Warfare, 1940, No. 275.

See *Galban & Co. v. United States*, 40 Ct. Cl. 495, Hackworth, Dig., I, 156–157.

“Down to the middle of the eighteenth century the authority of an invader was not distinguished from conquest. The doctrine had not been established that the sovereignty over a territory and its population is not transferred till the end of a war, when it may pass by cession in the treaty of peace, or by conquest if all contest ceases and the war comes to an end without such a treaty, as happens when one of the belligerent states is extinguished. . . . Frederick the Great taught that the business of an invader in winter quarters was to raise recruits from the country by compulsion, and that was his practice as well as that of other commanders in the war of the Austrian Succession and in the Seven Years' War. But now that the distinction between conquest and military occupation is firmly drawn, the source of an invader's authority cannot be looked for in a transfer of that of the territorial sovereign. It is a new authority, based on the necessities of war and on the duty which the invader owes to the population of the occupied districts.” Westlake, 2 ed., II, 95, 96.

See also Borel, *Arbitrator*, in *Ottoman Debt Arbitration*, 1925, McNair and Lauterpacht, *Annual Dig.*, 1925–1926, Case No. 360; *Del Vecchio v. Conno*, Court of Appeal of Milan, 1920, Williams and Lauterpacht, *Annual Dig.*, 1919–1922, Case No. 320.

direct effect of his achievement. The law of nations accepts the result as a fact to be reckoned with, regardless of the merits of his cause. There has developed, accordingly, a body of law indicating the scope of the rights of the occupant over the hostile territory and limiting his freedom of action. The Hague Regulations of 1907 have exemplified it. It indicates the test of the propriety of his conduct with respect to what is under his sway. While this law is essentially international in character and origin, it is also local, because it prevails in principle where the occupant asserts his control. It must be observed, however, that this law has of late been frequently defied by belligerent occupants that were able with seeming impunity to ignore its precepts.

With reference to the broad rights of a belligerent occupant, Mr. Hackworth, the Legal Adviser of the Department of State, declared in the course of an opinion on May 7, 1936:

A military occupant, especially one who has conquered and subjugated a country, has supreme power over the territory occupied, and, to all intents and purposes, is the sovereign during the period of occupation. The belligerent military occupant, for example, possesses an unquestioned right to regulate all intercourse between the territory under his control and the outside world. The situation . . . is different in some respects from that obtaining in Belgium during the World War. In that case Germany was in the position of a military invader, as distinguished from a conqueror . . . yet, in the case of Belgium, the German Government announced in November, 1914, that exequaturs of neutral consular officers in Belgium would be regarded as having expired. Minister Whitlock, however, remained in Brussels and continued to enjoy diplomatic privileges and immunities until the severance of diplomatic relations between the United States and Germany (February 3, 1917) when the German authorities withdrew his diplomatic privileges. Nevertheless, Mr. Whitlock remained in Brussels until the end of March 1917, when he and other American officials in Belgium were ordered by this Government to withdraw.⁷

The rights of a belligerent occupant as such, during the period of control exercised over the hostile territory concerned are measured by the circumstance that he is to be regarded as a temporary possessor of what he controls rather than as a conqueror bent on the acquisition of the occupied area. A different situation arises, however, when the belligerent occupant takes a further step and by appropriate affirmative action undertakes to acquire the right of sovereignty for himself. Without discussing the question when he may properly take that step,⁸ it suffices here to note that prior to the time when it is taken, the occupant is likely to regard himself as clothed with freedom to endeavor to impregnate the people who inhabit the area concerned with his own political ideology, and to make that endeavor successful by various forms of pressure exerted upon enemy officials who are permitted to retain the exercise of normal governmental functions.⁹

⁷ Hackworth, *Dig.*, I, 156.

⁸ See Oppenheim, *Lauterpacht's 6 ed.*, II, § 169.

⁹ This point was emphasized by Mr. Emil Agostini, Jr., in a report on Belligerent Occupa-

In consequence of belligerent occupation, the inhabitants of the district find themselves subjected to a new and peculiar relationship to an alien ruler to whom obedience is due.¹⁰ If he imposes penalties for disobedience, the law of nations is unconcerned so long as he does not violate those restrictions which it has established. Doubtless he enjoys the right to displace all forms of preëxisting authority, and to assume at will, to such extent as he may deem proper, all of the functions of government.¹¹ The exercise of these broad privileges may give rise to controversy whether there has been an abuse of power; and this question is of more frequent occurrence than any inquiry as to the precise effect of belligerent occupation as such. If the occupant is guilty of such abuse, and resorts to internationally illegal conduct in his treatment of the persons or property within the district under his control, the *de jure* sovereign is believed to possess a solid right to demand full reparation upon the restoration of peace.¹² Otherwise a belligerent occupant would be a law unto himself, unconstrained by any restriction opposing his will; and any international system of law purporting to limit his freedom of action would have no significance save as a mere appeal to his beneficence.¹³

The occupation of hostile territory by American military forces has at times resulted in judicial inquiry whether the President or a commanding officer has violated restraints imposed by the Constitution and laws of his country.¹⁴ The question in such cases has been obviously of a domestic nature, and its solution not necessarily dependent upon the extent of the right of a belligerent occupant under the law of nations. Nevertheless, in construing and applying limitations imposed upon executive authority, the Supreme Court of the United States has not hesitated to declare, when such was in its opinion the case, that they arose "from general rules of international law and from fundamental principles known wherever the American flag flies."¹⁵ That Tribunal has, however, been scrupulous, when construing executive orders and statutory ratification thereof, to respect manifestations of purpose by the President and the Congress to act within the limitations believed to be prescribed by that law.¹⁶

tion, prepared at Columbia University in 1941, where he adverts to the efforts of the German Government, openly and admittedly to impregnate the peoples of other nations whose territories were under German occupation, with German political and social ideology.

¹⁰ "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power." Order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, Correspondence Relating to War with Spain, I, 159, Moore, Dig., VII, 261.

See, also, *United States v. Rice*, 4 Wheat. 246, 254.

¹¹ *New Orleans v. Steamship Co.*, 20 Wall. 387, 393, 394, quoted in *Dooley v. United States*, 182 U. S. 222, 231. See, also, *MacLeod v. United States*, 229 U. S. 416, 425; *Ho Tung & Co. v. The United States*, 42 Ct. Cl. 213.

¹² See instances of abuse in World War I, in the form of usurpation of sovereignty, and in attempts to denationalize the inhabitants of the territory occupied, in Annex I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, 38-39.

¹³ See Some Conclusions, *infra*, § 702A.

¹⁴ *The Grapeshot*, 9 Wall. 129, 133; *Dooley v. United States*, 182 U. S. 222, 234-236.

See, also, *Ochoa v. Hernandez*, 230 U. S. 139.

¹⁵ Opinion of Mr. Justice Pitney in *Ochoa v. Hernandez*, 230 U. S. 139, 164, 165.

¹⁶ Opinion of Mr. Justice Day in *MacLeod v. United States*, 229 U. S. 416, 434.

Belligerent occupation must be both actual and effective. Organized resistance must be overcome and the forces in possession must have taken measures to establish law and order. It doubtless suffices if the occupying army can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. Nor is it material by what methods such authority is exercised, "whether by fixed garrisons or flying columns, small or large forces."¹⁷

It is not believed that a proclamation of military occupation is a legal necessity. The expediency, however, of such a proclamation must be obvious, and the practice of the United States is to issue one.¹⁸ The War Department Rules of Land Warfare of 1940, advert to the fact that in the absence of a proclamation or similar notice, the exact time of commencement of occupation may be difficult to fix. The presence of a sufficient force to disarm the inhabitants or enforce submission and the cessation of local resistance, due to the defeat of the enemy's forces, is said to determine the commencement.¹⁹

§ 689. **The Same.** Occupation once acquired must be maintained. In case the occupant evacuates the district or is driven out of the same by the enemy, or by a *levée en masse*, and the legitimate government actually resumes its functions, the occupation ceases. It does not cease, however, if the occupant, after establishing his authority, moves forward against the enemy, leaving a smaller force to administer the affairs of the district. Nor does the existence of a rebellion or the operations of guerrilla bands cause it to cease, unless the legitimate government is reestablished or the occupant fails promptly to suppress such rebellion or guerrilla operations.¹ If upon the restoration of peace territory which has been under belligerent occupation is transferred, as by treaty, to the sovereign of the occupant, there may be a continuance in fact of military government therein.² From that circumstance it is not to be inferred, however, that belligerent occupation as such survives the final transfer of sovereignty.³

¹⁷ War Dept. Rules of Land Warfare, 1940, No. 276.

The military occupation by the United States, during and after the war with Spain, of the Philippine Islands, and the conduct of the military government thereof, did not extend to places which were not in actual possession of the United States, until they were reduced to such possession. Thus executive orders regarding the collection of duties on goods imported into the Philippine Islands during the military occupation thereof did not apply to any ports, such as Cebu, during the time when they were not in the possession and under the control of the United States. *MacLeod v. United States*, 229 U. S. 416.

¹⁸ War Dept. Rules of Land Warfare, 1940, No. 278.

To the Rules of Land Warfare, 1917, No. 292, is appended the statement: "For practice in this country *vide* the proclamations of Gen. Kearney on Aug. 22, 1846; Gen. Taylor in Mexico, H. R. Executive Doc. No. 119, pp. 13-17; Gen. Scott in Mexico at Vera Cruz, Apr. 11, 1847; at Tampico, Feb. 19, 1847; G. O. No. 20, Feb. 19, 1847; and G. O. 287, Army Mex., Sept. 17, 1847; G. O. 101, W. D., July 18, 1898; Proc. Gen. Miles, July 28, 1898, as to Porto Rico; Proc. Gen. Merritt, Aug. 14, 1898, in Philippines."

¹⁹ No. 279.

§ 689. ¹ War Dept. Rules of Land Warfare, 1940, No. 280.

According to the Rules of Land Warfare of 1917, No. 294: "Hostile military occupation ceases on the conclusion of peace."

² See *Santiago v. Noguera*, 214 U. S. 260; also *Cross v. Harrison*, 16 How. 164; *Dooley v. United States*, 182 U. S. 222, 234.

³ After the change the relation of the new sovereign towards the territory concerned and the inhabitants thereof differs sharply from that existing when that territory, although occupied by the same forces, belonged to the enemy and was inhabited by its nationals.

§ 689A. **Maintenance of Control through Air Forces.** No rule of international law prescribes the arm of the service through which a belligerent occupant is to exercise its rights as such or perform the special duties that rest upon it in consequence of its achievement. Thus, that law does not deny to the occupant the privilege of maintaining its position through its air forces which possibly, in some situations, may become a convenient instrumentality for the purpose.¹ By means of aircraft a belligerent may in fact be enabled to exercise the requisite control over an area which as a consequence of invasion it has completely subjected to its dominion, even though there be no occupation other than is wrought by meagre lodgements at air bases in no close proximity to each other. Such control by air may, moreover, prove to be efficacious in protecting the occupant from active opposition on the part of the enemy within the area of which it has possessed itself.²

It must be borne in mind, however, that apart from its penal aspects revealed in the need of applying appropriate disciplinary measures to an enemy population whose resistance has been overcome, the chief function of the occupant is that of an administrator, making laws, administering justice, collecting revenue, and generally maintaining a régime not dissimilar to that exercised by a colonial government maintaining its supremacy over a subject people, rather than that of a military contestant embarked on an offensive operation and bent on an active endeavor to destroy the enemy. Inasmuch as the work of administration calls for the commission of numerous activities which can be more advantageously undertaken on the earth than in the air, and by agencies that need make no ascents, it still remains doubtful whether belligerent occupants of hostile territory will deem it advantageous to rely chiefly upon aircraft in order to maintain their ascendancy over, and duly administer, what they have won by the sword, during the interval between that achievement and the consummation of the final treaty of peace. Hence, the accepted rules that have grown out of practices applied by land forces, and such as are exemplified, for example, by the Hague Regulations of 1907, do not appear as yet to have become unresponsive to the needs of invaders whose successes have, by any process, placed within their grip, complete control over hostile territory.

b

The Administration of Occupied Territory

(1)

§ 690. **Legislative and Judicial Functions.** In consequence of his acquisition of the power to control the territory concerned, the occupant enjoys the right and is burdened with the duty to take all the measures within his power to restore and insure public order and safety.¹ In so doing he is given great lati-

§ 689A.¹ See interesting discussion in Spaight, *Air Power and War Rights*, 2 ed., 367-371.

² See analogous problem involved in the matter concerning the Acquisition of Sovereignty over Polar Areas, *supra*, § 104A.

§ 690.¹ Art. XLIII of Regulations Annexed to The Hague Convention of 1907, concerning the Laws and Customs of War on Land, Malloy's Treaties, II, 2288.

See also War Dept. Rules of Land Warfare, 1940, No. 281.

tude with respect to choice of means and mode of procedure. This freedom may be partly due to the circumstance that the occupant is obliged to consider as a principal object the security, support, efficiency and success of his own force in a hostile land inhabited by nationals of the enemy.² Possessed of exclusive power to enact laws and administer them, the occupant must regard the exercise by the hostile government of legislative or judicial functions (as well as those of an executive or administrative character) as in defiance of his authority, except in so far as it is undertaken with his sanction or coöperation.³ In an international sense it matters not how the government of the occupant exercises the law-making function. For most purposes it is likely to do so through decrees or regulations emanating from a military source; and these become as effective in operation as though they were expressed in statutory enactments. As a matter of practical expediency the occupant may be disposed to utilize certain existing agencies of that government and to suspend the operation of others. Thus, according to the practice of the United States, he will rely upon the existing tribunals, so far as may be possible, to administer the ordinary civil and criminal laws.⁴ He will not, however, extend to such tribunals jurisdiction of crimes of a military nature and which affect the safety of the invading army.⁵

It must not be inferred, however, that the occupant is deterred by any rule of international law from pursuing a different course if the conduct of the inhabitants, or any other consideration, should render such a step indispensable to the maintenance of law and order. In such case he may replace or expel native officials in part or altogether, or he may substitute new courts of his own constitution for the existing ones, or create such new or supplementary tribunals as may be necessary. "In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice."⁶

The rights of the occupant as a law-giver have broad scope. He may not unlawfully suspend existing laws and promulgate new ones when the exigencies of the military service demand such action.⁷ According to the War Department Rules of Land Warfare of 1940, he will naturally alter or suspend all laws of a

² War Dept. Rules of Land Warfare, 1940, No. 285.

³ *Id.*, No. 283.

According to Edmonds and Oppenheim, *Exposition of Land Warfare for Guidance of Officers of the British Army*, No. 359: "The legislative, executive, and administrative functions of the national government, whether of a general, provincial, or local character, cease on occupation. The civil servants and other officials of the local government may, if the occupant tacitly or expressly consent, continue to perform their ordinary routine duties, but except in case of military necessity they cannot be compelled by force to do so."

⁴ See order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, *Correspondence Relating to War with Spain*, I, 159, Moore, Dig., VII, 261.

See, also, Justin H. Smith, "American Rule in Mexico," *Am. Hist. Rev.*, XXIII, 287, 298, and documents there cited.

⁵ "In restoring public order and safety he [the occupant] will continue in force the ordinary civil and criminal laws of the occupied territory which do not conflict with this object. These laws will be administered by the local officials as far as practicable. All crimes not of a military nature and which do not affect the safety of the invading army are left to the jurisdiction of the local courts." (War Dept. Rules of Land Warfare, 1940, No. 285.)

⁶ President McKinley, order to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, *Correspondence Relating to War with Spain*, I, 159, Moore, Dig., VII, 261.

See also, War Dept. Rules of Land Warfare, 1940, Nos. 309-312.

⁷ *Id.*, No. 286. See also, Magoon's Reports, 14.

political nature as well as political privileges, and all laws which affect the welfare and safety of his command. Of this class are said to be those relating to recruitment in occupied territory, the right of assembly, the right to bear arms, the right of suffrage, the freedom of the press and the right to quit or travel freely in the territory.⁸ It is declared that the occupant may create new laws for the government of a country where none exist, and that he will promulgate such new laws and regulations as military necessity demands. In this class are said to be included those laws which come into being as a result of military rule — that is, those which establish new crimes and offenses incident to a state of war, and are necessary for the control of the country and the protection of the army.⁹

According to the Hague Regulations of 1907: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."¹⁰ Thus, in fulfilling his obligation to restore public order and safety, he is subjected also to a duty to respect, under certain conditions, the local laws. There is, however, seemingly yielded to the occupant, as the War Department Rules of Land Warfare of 1940, indicate, a degree of latitude which frees him from an obligation to respect those laws whenever, in his judgment, they are in conflict with his effort to provide for the security of his army and to contribute to its support and sufficiency, and to the success of its operations. It is declared that "in restoring public order and safety he will continue in force the ordinary civil and criminal laws of the occupied territory which do not conflict with this object."¹¹ The Supreme Court of the United States has declared, by way of dictum, that the conduct of an American military governor in Porto Rico, in making an order, judicial in its nature, depriving any person of his

⁸ War Dept. Rules of Land Warfare, 1940, No. 287, where it is added that "such suspensions should be made known to the inhabitants."

⁹ *Id.*, No. 288.

¹⁰ Article XLIII, Malloy's Treaties, II, 2288.

See notes of the Belgian Government of Apr. 9, 1915, protesting against certain German modifications of Belgian laws, Stowell and Munro's International Cases, II, 150.

¹¹ No. 285. See *Philippine Sugar Estates Development Co. v. United States*, 39 Ct. Cl. 225, 247, Hackworth, Dig., I, 156.

According to the War Dept. Rules of Land Warfare, 1940, No. 284: "It is immaterial whether the government established over an enemy's territory be called a military or civil government. Its character is the same. It is a government imposed by force, and the legality of its acts is determined by the laws of war. During the military occupation it may exercise all the powers given by the laws of war."

"Though the powers of the military occupant are absolutely supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion." President McKinley, order to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, Correspondence Relating to War with Spain, I, 159, Moore Dig., VII, 261, 262.

For a discussion of German practices in Belgium, 1915-1918, see J. W. Garner, *Int. Law and The World War*, II, 373-378; also Adolf Solansky, *German Administration in Belgium*, Chap. IV.

property without due process of law, was not only without executive sanction, but also contrary to limitations arising from general rules of international law.¹² The Hague Regulations of 1907 expressly forbid a belligerent to declare abolished, suspended or inadmissible in a court of law, the rights and actions of the nationals of the hostile party.¹³

It may be observed that what the occupant enacts or decrees in the exercise of its legislative power must be deemed to be the law of the place under occupation, notwithstanding the fact that it contradicts and is defiant of the will of the territorial sovereign as exemplified in its then existing legislation. Upon the resumption of control by that sovereign over the area concerned, the local courts as enunciators of its public policy, may be unwilling to give effect to natural consequences derivable from the conflicting decrees of the occupant, and in so doing may be inclined to deny their legal quality or nature as laws because of the source from which they emanated.¹⁴ After the cessation of the hostile occupation, the territorial sovereign in declining through the courts thereafter to heed what the occupant decreed is in reality merely asserting that with the automatic operation of its own system of laws which was coincident with its own resumption of control, no legal duty rests upon it to be bound by what the temporary usurper of control enacted, if respect for its action produces results that are regarded as contrary to public policy. This is a dangerous doctrine which if consistently and broadly applied must be defiant of legal principle.

If by any process the occupant is ousted from a possession and control which is resumed by the territorial sovereign, it is highly undesirable to permit the latter to ignore the consequences of what the occupant lawfully did while it remained in power. This does not imply that under the theory of *jus postliminii*¹⁵ that sovereign should not regain as its own public property within the area which the occupant itself held, but merely that lawful acts or transactions by the occupant, such as were in harmony with the requirements of the Hague Regulations of 1907, should be respected for the benefit of all concerned.¹⁶ It is sug-

¹² *Ochoa v. Hernandez*, 230 U. S. 139, 164, 165.

¹³ Article XXIII (h), Malloy's Treaties, II, 2285. See, also, in this connection, Opinion of Lord Reading in *Porter v. Freudenberg* [1915], 1 K. B. 857, 876-880; A. P. Higgins, *Hague Peace Conferences*, 263-265.

See Secretary Hughes' telegram to Ambassador Herrick, of March 5, 1923, with reference to the French occupation of the Ruhr, pertaining to a situation arising in time of peace. See, *For. Rel.* 1923, II, 194.

¹⁴ See *Mathot v. Longué*, Belgium, Court of Appeal of Liège, 1921, Williams and Lauterpacht, *Annual Dig.*, 1919-1922, Case No. 329, and editorial note; *Cambier v. Lebrun*, Belgium, Court of Cassation, 1919, *id.*, Case No. 325, and note.

¹⁵ See *infra*, § 922.

Declared Mr. Justice Gray in his opinion for the Court interpretative of an early Act of Congress, in *Oakes v. United States*: "The *jus postliminii* attaches to property taken by the enemy with the strong hand against the will of its owner or custodian, and not to property obtained by the enemy by negotiation or purchase." (174 U. S. 778, 793.) It may be observed that the Court had no occasion to pass upon the scope of the application of the doctrine of *jus postliminii* to a situation where, by force or otherwise, a belligerent occupant not unlawfully asserted its legislative power with respect to property within the occupied area.

¹⁶ See penetrating discussion by Dr. E. H. Feilchenfeld in his *International Economic Law of Occupation*, Sections 488-502. In Section 492, he declares: "There is no doubt that the returning sovereign may re seize all property formerly belonging to the occupied State and taken or occupied by the occupant, and, it may be added, may take all other property of the occupant as booty."

gested, moreover, in the final treaty to be concluded in termination of the present war, appropriate provision be made to such an end, and that it embrace, moreover, a plan for adjudication upon the question, as it may arise in particular cases, as to the lawfulness of acts of the occupant.

The possession by the belligerent occupant of the right to control, maintain or modify the laws that are to obtain within the occupied area is an exclusive one.¹⁷ The territorial sovereign driven therefrom, can not compete with it on an even plane.¹⁸ Thus, if the latter attempts interference, its action is a mere manifestation of belligerent effort to weaken the enemy. It has no bearing upon the legal quality of what the occupant exacts, while it retains control. Thus if the absent territorial sovereign, through some quasi-legislative decree, forbids its nationals to comply with what the occupant has ordained, obedience to such command within the occupied territory would not safeguard the individual from prosecution by the occupant.¹⁹

How far the acts of the occupant, as they operate upon foreign private or public interests, and become the subject of adjudication before foreign tribunals are to be recognized by the latter is believed to be governed in large degree by the principles of conflict of laws as applied in the State of the forum rather than by principles of international law. Accordingly decisions that fail to give effect to decrees of the occupant with respect to events within the occupied area are not likely to betoken violations of that law.²⁰

(2)

FISCAL AND OTHER MEASURES RESPECTING PROPERTY

(a)

§ 691. **Taxes and Duties.** The military occupant enjoys large freedom in the mode of raising revenues to defray expenses of administration, as well as in the application of funds acquired for that purpose. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he is obliged, by Article XLVIII of the Hague Regulations of 1907, to do so "as far as possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound."¹ If, due to the flight or unwillingness of the local officials, it is im-

¹⁷ It must ever be borne in mind that the law is single. See Rights of Jurisdiction, *supra*, § 218.

¹⁸ See Occupation of Cavalla Case, Lauterpacht, *Annual Dig.*, 1929-1930, Case No. 292.

¹⁹ Conversely, however, the occupant may in fact punish the national for disobedience to its command upon resumption of control over its own domain.

²⁰ Nevertheless, there may be circumstances where a foreign State, regardless of the attitude of its courts, may not be free to ignore the legislative or decretal action of the occupant, and may find itself obliged to look to it for the test of the legal aspect of claims growing out of its achievement.

§ 691. ¹ Malloy's Treaties, II, 2289. "The words 'for the benefit of the State' were inserted in the Article to exclude local dues collected by local authorities. The occupant will supervise the expenditure of such revenue and prevent its hostile use." Rules of Land Warfare, 1917, No. 311, *citing* Holland, *Laws of War on Land*, par. 108; Spaight, *War Rights on Land*, p. 378.

practicable to follow the rules of incidence and assessment in force, the total amount of the taxes to be paid may be allotted by the occupant among the districts, towns, etc., and the local authorities be required to collect it as a capitulation tax or otherwise.² The War Department Rules of Land Warfare of 1934 declared that the imposition of taxes being an attribute of sovereignty, no new taxes should be imposed by the occupant, which might, however, requisition property and levy contributions.³ This statement was not repeated in the edition of 1940. Article XLIX of The Hague Regulations of 1907 declares that if, in addition to the taxes mentioned in the previous Article, the occupant levies other money contributions in the occupied territory, it shall be only for the needs of the army or for the administration of the territory.⁴

Doubtless the occupant may lay duties on imports, and thereby obtain a convenient source of revenue otherwise difficult to collect. American military occupants have resorted to such procedure.⁵

(b)

§ 692. **Contributions.** By a method other than the imposition of taxes or the collection of customs duties, a belligerent occupant may in fact proceed to in-

"The first charge upon the State taxes is for the cost of local maintenance. The balance may be used for the purposes of the occupant." War Dept. Rules of Land Warfare, 1940, No. 295. According to No. 325, *id.*, "This rule (respect for private property, etc.) does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, boats or ships, and lands, for temporary and military use."

See documents in Moore, Dig., VII, 282-285, concerning the experience of the United States in the course of the occupation by its forces of Mexican territory, 1846-1848; also Justin H. Smith, "American Rule in Mexico," *Am. Hist. Rev.*, XXIII, 287.

"In 1921 the American High Commissioner at Constantinople (Istanbul) informed the Department of State that the Greek authorities in Smyrna had demanded the payment of consumption taxes claimed to be in arrears. The United States took the position that it could not recognize the Greek administration in Turkey in any other light than as a military occupant executing the terms of the armistice with Turkey and that it did not recognize the right of the Greek administration to levy taxes other than those provided for by the capitulations or to appropriate those to their own use." (Hackworth, Dig., I, 159, *citing* documents in For. Rel. 1921, Vol. II, 154-163.)

² War Dept. Rules of Land Warfare, 1940, No. 294.

³ *Id.*, 1934, No. 295; also *id.*, 1940, Nos. 335-342.

⁴ Malloy's Treaties, II, 2289.

See Official Communication on the Economic Exploitation of Serbia, issued by the Serbian Minister at Washington, Aug. 28, 1917.

⁵ "Upon the occupation of the country by the military forces of the United States the authority of the Spanish Government was superseded, but the necessity for a revenue did not cease. The Government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method, Gen. Miles was fully justified by the laws of war." Brown, J., in *Dooley v. United States*, 182 U. S. 222, 230.

See, also, President Polk, special message, Feb. 10, 1848, Richardson's Messages, IV, 571. Moore, Dig., VII, 269; *Cross v. Harrison*, 16 How. 164, 190; *New Orleans v. Steamship Co.*, 20 Wall. 387, 394; President McKinley, executive order, July 12, 1898, respecting the tariff of duties and taxes to be levied upon the occupation and possession of any ports and places in the Philippine Islands by American forces. Magoon's Reports, 217.

"It would therefore seem that the payment of customs duties, if considered as taxes levied by a Government resulting from military occupation of hostile territory, or as military contributions required from hostile territory, or as a condition imposed upon the right of trade with hostile territory, are each and all legitimate and lawful requirements imposed by exercise of belligerent right." Magoon's Reports, 227.

crease his revenues from the territory under his control. He may levy contributions. Contributions have been defined as "such payments in money as exceed the produce of the taxes."¹ The design of the occupant in levying contributions may be primarily to defray expenses of administration, or to inflict punishment collectively upon a community on account of the commission of an offense for which it is held responsible, or merely to enrich the collector. Because of the helplessness of those from whom the funds are exacted, as well as the possible hostility and greed of the occupant, this procedure is capable of easy abuse. The difficulty in restraining an unscrupulous belligerent from yielding to motives of revenge or cupidity is a real one, especially when the territory occupied is inhabited by a population whose conduct affords technical pretext for the excesses of the occupant. For that reason there is needed close observation of, and general agreement respecting, restrictions of the belligerent privilege.

It does not appear to be unreasonable for an occupant to levy contributions to defray any necessary expense confronting him, whether for the needs of his army or for the administration of the territory.² The Hague Regulations of 1907 acknowledge the lawfulness of such action³ and specify certain procedure to be followed in the collection of funds.⁴ They imply, however, that a contribution is not to be levied for the purpose of enriching the occupant. It is believed that this implication should take the form of a definite prohibition. There is needed general agreement declaring with precision what kinds of contribution are to be deemed in legal contemplation as enriching the occupant rather than as merely supporting his army or defraying costs of administration.⁵ He ought not to be

§ 692. ¹ Hall, Higgins' 8 ed., § 140; also J. M. Spaight, *War Rights on Land*, Chap. XII.

² "No principle is better established than that a nation at war has the right of shifting the burden off itself and imposing it on the enemy by exacting military contributions. The mode of making such exactions must be left to the discretion of the conqueror, but it should be exercised in a manner conformable to the rules of civilized warfare.

"The right to levy these contributions is essential to the successful prosecution of war in an enemy's country, and the practice of nations has been in accordance with this principle. It is as clearly necessary as the right to fight battles, and its exercise is often essential to the subsistence of the army." President Polk, a special message, Feb. 10, 1848, Richardson's Messages, IV, 571, Moore, Dig., VII, 285.

³ Article XLIX, which declares that if contributions are levied, "this shall only be for the needs of the army or of the administration of the territory in question." Malloy's Treaties, II, 2289.

Holland declares with reason that "It may sometimes be justifiable to levy a money contribution on one place, in order to spend it on the purchase of requisitions in kind at another place. The burden of the war may thus be more equitably distributed, falling on the inhabitants generally, rather than upon individual owners of the property which may be required." *War on Land*, 55.

⁴ According to Article LI, "No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

"The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

"For every contribution a receipt shall be given to the contributor." Malloy's Treaties, II, 2289.

It may be observed that Article LIII acknowledges the right of the occupant to "take possession of cash, funds, and realizable securities which are strictly the property of the State." *Id.* This taking of possession is an act differing sharply in character from the levying of taxes or contributions. In the former case the occupant merely avails himself of the privilege of subjecting to control public funds already collected and at the disposal of the *de jure* sovereign when it was deprived of its power.

⁵ Declares Holland: "The occupant is not to levy contributions for the mere purpose of enriching himself." *War on Land*, 55. See, also, in Edmonds and Oppenheim, *Land Warfare*, No. 423.

permitted to excuse by charging to either of such accounts contributions levied for the purpose of enabling him to minimize generally the financial burdens of his sovereign occasioned by the war, and still less to meet the expense of operations undertaken outside of the occupied district. No requirements attributable to military necessity, however acutely felt by an impoverished belligerent, should be allowed to justify defiance of this principle.⁶ In proof of his good faith, the occupant should be obliged at the close of the war to make a reasonable accounting for sums acquired by contribution, and purporting to have been raised for purposes acknowledged to be lawful.⁷

The Hague Regulations of 1907 declare that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."⁸ It is here implied that collective punishments may be inflicted for such offenses as the community has committed or has permitted to be committed. The War Department Rules of Land Warfare of 1940, declare that this Article does not prohibit "reprisals by the occupant for violations of the laws of war or breach of the occupant's proclamations or regulations by enemy individuals not belonging to the armed forces."⁹

It may be observed that the levying of collective contributions of a penal nature, however effective as a deterrent of acts jeopardizing the safety of the invader, is a weapon which an unscrupulous occupant may be quick to seize for a lawless purpose and to employ without restraint. As yet there is no accepted or uniform method of determining under what circumstances the act of the individual is to be regarded as one for the commission of which a community should be deemed collectively responsible. If responsibility may be imposed at the will of a commander regardless of the evidence or without a hearing, his caprice or anger may beget robbery, and fines may be levied in mockery of justice. Events of World War I, and also of subsequent conflicts, have afforded convincing proof that no rule of law merely acknowledging the privilege of a military officer to apply repressive fiscal or other measures against a population that is helpless under his control suffices to check wanton abuse of power.¹⁰

⁶ Even the German War Book (*Kriegsbrauch im Landkriege*) declares that "the conqueror is, in particular, not justified in recouping himself for the cost of the war by inroads upon the property of private persons, even though the war was forced upon him." Translation by J. H. Morgan, 135. This statement is cited in a note in Edmonds and Oppenheim, *Land Warfare*, appended to No. 424.

⁷ The abuse by Germany of the right of contribution during the occupation of Belgium 1914 and thereafter was notorious. It must ever be regarded as an exercise of sheer power in contempt of the spirit of the Hague Regulations and of the requirements of international law, and as marking a bald attempt to appropriate what lay within the reach of the conqueror because of the impotence of those from whom funds could be exacted. See, in this connection, J. W. Garner, "Contributions, Requisitions, and Compulsory Service in Occupied Territory," *Am. J.*, XI, 74, and documents there cited; also same author, *Int. Law and The World War*, II, §§ 388-392; Adolf Solansky, *German Administration in Belgium*, New York, 1928, 117-120.

⁸ Art. L, Malloy's Treaties, II, 2289.

⁹ No. 344.

While those Rules set forth elsewhere examples of numerous acts which when committed by inhabitants of territory under hostile military occupation, are said to be punishable by the occupant "as treasonable under laws of war," it is not announced in terms that the commission thereof authorizes the imposition of collective punishments. See No. 350. Compare No. 354 of 1917 Rules of Land Warfare.

¹⁰ See Jean Massart, vice director of the class of sciences in the Royal Academy of Belgium,

There needs to be definite legal restraint that is applicable to the intemperate and unscrupulous commander, and which is brought home to him in vigorous fashion by the authorities of his own State. In order to hold in leash such an officer, definite rules need to be laid down, and generally accepted and widely proclaimed.¹¹ These, it is believed, should indicate some judicial process designed to permit the presentation of defensive testimony. Reasonable opportunity for its presentation should be made a condition precedent to the validity of any collective fine. Moreover, it is submitted that the belligerent levying it should be compelled at the close of the war to exhibit to its former adversary, on demand, a record of the proceedings embracing all of the evidence presented.¹²

It may be greatly doubted, however, whether the States now participating in World War II, would be disposed to endeavor to reach an accord on such matters, either during or after the close of the present conflict. It is not to be anticipated, therefore, that belligerent excesses will be minimized, or that States which may seek to avoid them will be able to resist the temptation to resort to retaliation as a possible deterrent of objectionable conduct.

(c)

§ 693. **Requisitions.** It is accepted doctrine that a belligerent occupant may not unlawfully requisition whatever is necessary for the maintenance of his army, whether of direct or indirect military use to it. Article LII of The Hague Regulations of 1907, acknowledging this right, applies certain limitations in its exercise. Thus it is declared that requisitions in kind and services are not to be demanded from municipalities or inhabitants "except for the needs of the army of occupation." Such requisitions must, moreover, "be in proportion to the resources of the country, and of such a nature as not to involve the in-

Belgians under the German Eagle, London, 1916, 143-150, 156-158. See, also, notice of the German commander-in-chief, Sept. 3, 1914, imposing a fine on Luneville, German Atrocities in France (translation of Official Report of the French Commission), 18; Stowell and Munro's International Cases, II, 161.

See instances of the exaction of illegitimate or of exorbitant contributions and requisitions, contained in Annex I to Report of Commission of Responsibilities, Paris Conference, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, p. 42.

See J. W. Garner, "Community Fines and Collective Responsibility," *Am. J.*, XI, 511; same author, *Int. Law and The World War*, II, §§ 403-412.

See also Adolf Solanský, *German Administration in Belgium*, New York, 1928, 35-36, in special reference to German decrees in Belgium, of Jan. 26, 1915, and July 20, 1915; J. Pirenne and M. Vauthier, *La Législation et L'Administration Allemandes en Belgique, Histoire Économique et Sociale de la Guerre Mondiale (Série Belge)*, Publication of Carnegie Endowment for International Peace, Paris, 1925, 29-30.

¹¹ The same need is apparent with respect to the imposition of collective punishments where the penalty inflicted is other than pecuniary.

¹² Declares Prof. Garner: "What appears to have been an innovation in the practice of levying pecuniary exactions on the people of occupied territory was the imposition by the Germans [during World War I] of special contributions on particular individuals of wealth. Such a procedure would seem to be nothing more than a form of confiscation in violation of the principle of immunity of private property from capture and there is no sanction for it either in the laws of war or in the practice of the past. The regulations of the Hague convention as well as the discussions of the subject by the text writers assume that communities and not individuals may be made the object of contributions. The French manual of the laws of war expressly states that contributions may be imposed on communities and districts and not on individuals, and this has always been the view held and acted on in practice." (*Int. Law and World War*, II, 115.)

habitants in the obligation of taking part in military operations against their own country." Such requisitions and services are only to be demanded on the authority of the commander in the locality occupied; contributions in kind are as far as possible to be paid for in cash; and if not, a receipt is to be given and the payment of the amount due is to be made as soon as possible.¹ The obligation to pay at some time the requisition certificate seems clear.²

The War Department Rules of Land Warfare of 1940, declare that under the Hague Regulations practically everything may be requisitioned that is necessary for the maintenance of the army, "such as fuel, food, forage, clothing, tobacco, printing presses, type, leather, cloth, etc."; and that the billeting of troops for quarters and subsistence is also authorized;³ that requisitions must be made under the authority of the commander in the locality; that while no prescribed method is fixed, requisitions if practicable, should be accomplished through the local authorities by systematic collection in bulk, and that they may be made direct by detachments if local authorities for any reason fail;⁴ that the expression "needs of the army" was adopted rather than "necessities of war" in the Hague Regulations as more favorable to the inhabitants, but that the commander is not thereby limited to the absolute needs of the troops actually present, the object having been to avoid reducing the population to starvation;⁵ that the prices of articles requisitioned will be fixed by agreement if possible, otherwise by military authority; that the prices of commodities on sale may also be regulated and limits placed on the hours and places of trading; that all authorities agree that it is good policy to pay cash if possible and to take up receipts as soon as possible;⁶ that if cash is paid, coercion will seldom be necessary, and that the coercive measures adopted will be limited to the amount and kind necessary to secure the articles requisitioned.⁷ "The needs of the army" for

§ 693. ¹ Malloy's Treaties, II, 2289. See also G. Ferrand, *Des Réquisitions*, Paris, 1917, 209-219, 427-429.

See in this connection, *Karmatzucas v. Germany*, Germano-Greek Mixed Arbitral Tribunal, 1926, *McNair and Lauterpacht*, Annual Dig., 1925-1926, Case No. 365, T.A.M. VII, 17; *Gros Roman et Cie v. German State*, Franco-German Mixed Arbitral Tribunal, 1924, *Williams and Lauterpacht*, Annual Dig., 1923-1924, Case No. 245, T.A.M. IV, 753.

² See in this connection, *Portugal v. Germany*, Portuguese-German Mixed Tribunal, 1930, *Lauterpacht's*, Annual Dig., 1929-1930, Case No. 92.

³ No. 336.

⁴ No. 337.

⁵ No. 338.

⁶ No. 339.

The right to fix the prices of articles requisitioned would not appear to give the occupant the right also to place an artificial valuation on the currency of his country circulated in the occupied territory. According to a German proclamation posted at Liège, Aug. 25, 1914, the value of a mark was fixed at 130 centimes, and announcement was made that all German paper money should be accepted in financial transactions at the same rate as German coin. This action is criticized in *Jean Massart*, *Belgians under the German Eagle*, 155, on the ground that an intentional fraud was committed by fixing an artificial and excessive valuation. Concerning the abuse of the right of requisition by Germany as the occupant of Belgian territory, see *J. W. Garner*, in *Am. J.*, XI, 74, 85-92; Same author, *Int. Law and The World War*, II, §§ 393-397. See *infra*, § 696A.

⁷ No. 340.

See protest communicated by the Belgian Legation at Washington to Department of State, June 30, 1915, against the requisitions of goods by the German authorities in Belgium. Also "German Treatment of Conquered Territory," Red, White, and Blue Series, No. 8, March, 1918, issued by Committee on Public Information, and edited by Dana C. Munro, George C. Sellery and August C. Krey.

The success of the endeavor of the United States while a neutral in the course of World War I to supply foodstuffs to inhabitants of Belgium, in order to avert famine and relieve a

which the occupant is authorized to provide are not believed to be co-extensive with the general requirements of the belligerent to whose service he is attached. The latter are not to be supplied from stores within the occupied district. Thus the removal of food supplies therefrom for the maintenance of other forces or populations in foreign places, appears by implication to be contrary to the Hague Regulations and should be expressly forbidden. Disregard of this requirement by Germany in the course of World War I⁸ was a portent of what might be expected were that country again to become a belligerent occupant. It reveals, moreover, the fantastic aspect of suppositions that a strong and ruthless belligerent will at the present time be deterred by regulations emanating from the Hague in 1907, from utilizing as it may desire any greatly needed military advantage derivable from its attainment or position as a belligerent occupant. Fear of the consequences of retaliation is likely to be a much more influential restraint. It still remains difficult if not impossible to establish the existence of any general understanding or agreement concerning the nature or extent of legitimate coercive measures to which the requisitioner may have recourse. There is need of such an understanding, and likewise of one indicative of appropriate means of checking abuses of power by the occupant when the inhabitants of the area concerned prove to be reluctant or unwilling to furnish articles which it is sought to requisition. None, however, is soon to be anticipated.

(d)

§ 694. **Special Restrictions in Relation to Private Property.** A belligerent occupant by reason of his very achievement in having gained the mastery over the district under his control, finds himself in a somewhat different relation to property within his grasp than does the commander of an army in the field. The common demands of the latter chargeable to military necessity and for the purpose of protecting a force against attack, or to enable it to engage in offensive operations, are not likely to be felt to the same degree by the invader who has once established himself in hostile territory. He has much less frequent occasion to resort to the destruction of enemy property.¹ Nor is he

people otherwise threatened with starvation, obviously depended upon the full coöperation of the German occupant, as exemplified particularly by its respect for its own assurances that foodstuffs received from America for distribution through an accredited organization on Belgian soil would be exempt from requisition. Concerning those assurances, the extent to which they were respected, as well as the character of the American achievement, see documents in *For. Rel. 1915, Supp.*, 1023-1040; *id.*, 1916, *Supp.*, 871-885; H. Pirenne, *La Belgique et la Guerre Mondiale, Histoire Économique et Sociale de la Guerre Mondiale (Série Belge)*, Carnegie Endowment for International Peace, Paris, 1928, VI, Chap. 6; George I. Gay and H. H. Fisher, *Public Relations of the Commission for Relief in Belgium, Documents*, Stanford University, California, 1929; A. Henry, *Le Ravitaillement de la Belgique, Histoire Économique et Sociale de la Guerre Mondiale (Série Belge)*, Carnegie Endowment for International Peace, Paris, 1927, I.

⁸ See Garner, *World War, II*, 125. Also *Ralli Brothers v. German Government*, Williams and Lauterpacht, *Annual Dig.*, 1923-1924, Case No. 244.

¹ § 694. It may be observed that the provisions of The Hague regulations relative to the destruction and seizure of enemy property are contained in an article (XXIII) prior to and outside of the section (Arts. XLII-LVI) devoted to "Military Authority over the Territory of the Hostile State."

likely to have just grounds for its devastation. The War Department Rules of Land Warfare of 1940, contain the following statement:

The measure of permissible devastation is found in the strict necessities of war. As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. Thus the rule requiring respect for private property is not violated through damage resulting from operations, movements, or combats of the army; that is, real estate may be utilized for marches, camp sites, construction of trenches, etc. Buildings may be used for shelter for troops, the sick and wounded, for animals, for reconnaissance, cover defense, etc. Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire, to construct bridges, to furnish fuel if imperatively needed for the army.²

During the Civil War the practice of the United States indicated no sharp line of distinction between the rights of a belligerent occupant and those of an army operating in the field in hostile territory. Nor was there such a distinction laid down in the cases arising from seizures made by Union forces during that conflict. While utterances of the Supreme Court of the United States appeared to acknowledge a broad right of seizure if dictated by necessary operations of war, and to deny generally the propriety of "the seizure of the private property of pacific persons for the sake of gain,"³ it was frequently declared that private property specially beneficial to the Confederacy as a basis of securing credit, such as cotton, was subject to seizure and confiscation.⁴ The courts were also necessarily bound by such acts of Congress as were applicable. These were based partly upon the theory that the conflict was an insurrection against the lawful Government of the United States, and that property belonging to persons giving aid or comfort to the rebellion, or used in aid of it, was justly subject to seizure and confiscation.⁵ It may be doubted whether the decisions inter-

See *Belligerent Measures and Instrumentalities, Seizure, Destruction, and Devastation of Enemy Property*, *supra*, § 657.

See *Case of William Hardman, American and British Claims Commission*, June 18, 1913, *American and British Pecuniary Claims Arbitration*, special agreement of Aug. 18, 1910, *Nielsen's Report*, p. 495-498; *Stowell and Munro's International Cases*, II, 536.

² No. 324.

³ *Opinion of Chief Justice Chase in Mrs. Alexander's Cotton*, 2 Wall. 404, 419, *quoting* 1 Kent, 93; also *Briggs v. United States*, 143 U. S. 346, 358.

⁴ *Mrs. Alexander's Cotton*, 2 Wall. 404, 419; *Lamar v. Browne*, 92 U. S. 187; *Young v. United States*, 97 U. S. 39, 59-61. See, also, *Mr. Seward, Secy. of State, to Mr. Adams, Minister to England*, Apr. 10, 1863, *Dip. Cor.* 1863, I, 210, 211, *Moore, Dig.*, VII, 303; *Mr. Bayard, Secy. of State, to Mr. de Muruaga, Spanish Minister*, June 28, 1886, *For. Rel.* 1887, 1006, *Moore, Dig.*, VII, 303; *Same to Same*, Dec. 3, 1886, *For. Rel.* 1887, 1015, *Moore, Dig.*, VII, 304.

⁵ *Act of Aug. 6, 1861*, "to confiscate property used for insurrectionary purposes," 12 Stat. 319; *Act of July 17, 1862*, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," 12 Stat. 589; *Act of Mar. 12, 1863*, "to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," 12 Stat. 820.

See, also, *letter of Mr. Shaw, Secy. of Treasury, to Chief Justice Nott, of the Court of Claims*, Feb. 18, 1902, *Moore, Dig.*, VII, 298.

Concerning the sequestration Act of the Confederate States, 1861, see *Parl. Papers, Cor-*

preting the acts of Congress serve as useful precedents respecting the extent of the rights of a belligerent occupant under the law of nations.⁶

The Hague Regulations of 1907 announce that private property "must be respected,"⁷ that such property "cannot be confiscated,"⁸ also that "pillage is formally forbidden,"⁹ an injunction seemingly applicable to public as well as private property, and possessed of wide implications. The prohibition of confiscation is perhaps self-explanatory. It does not mean that the occupant may not assert control over private property in a variety of ways, when confronted with a necessity occasioned by actual and immediate requirements,¹⁰ but merely that if there be a taking that serves to deprive the owner of all right and title he is to be duly compensated for his loss, unless of course that deprivation assumes the form of a penalty properly applied in consequence of his wrongful conduct.¹¹

The Hague Regulations of 1907 register acknowledgment of the fact that some forms of property belonging to private individuals are peculiarly adapted for belligerent uses, and that seizure by the occupant should be permitted provided there be restoration and compensation when peace is made. "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things exclusive of cases governed by naval law, dépôts of arms, and, generally, all kinds of ammunition of war," are said to fall within such a category.¹² The Hague Regulations thus place great stress

respondence Relative to the Civil War in the United States of North America, North America, No. 1 [1862], 108-109, Stowell and Munro's International Cases, II, 133.

⁶ Cases in Moore, Dig., VII, 290-292.

⁷ Art. XLVI, Malloy's Treaties, II, 2289. See War Dept. Rules of Land Warfare, 1940, No. 325.

⁸ Art. XLVI, Malloy's Treaties, II, 2289.

⁹ Art. XLVII. "Pillage, as an untechnical term, means indiscriminate plundering, such as under the old rule of *courir sus* was habitually practised against the enemy. As a term of modern law it may be defined as the unauthorised taking away of property, public or private." Westlake, 2 ed., II, 103.

In the order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, it was stated that "Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause." Correspondence Relating to War with Spain, I, 159, Moore, Dig., VII, 261, 263.

For specific instances of pillage during World War I, committed by belligerent occupants as well as armies in the field, see Annex I to Report of Commission of Responsibilities, Paris Conference of 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, 40-41. See also Garner, Int. Law and The World War, II, § 399, concerning the seizure by German authorities of funds of private banks in Belgium.

¹⁰ See War Dept. Rules of Land Warfare, 1940, No. 330, in which it is said: "Private property can be seized only by way of military necessity for the support or other benefit of the army or of the occupant. All destruction of property not commanded by the authorized officer, all pillage or sacking, even after taking a town or place by assault, are prohibited under the penalty of death, or such other severe punishment as may seem adequate to the gravity of the offense."

See *supra*, §§ 618-623A.

¹¹ See Georges Ferrand, *Des Réquisitions en matière de Droit International Public*, Paris, 1917, 209-219. See, also, Manual of the Institute of International Law on the Laws of War on Land, 1880, Art. LX, *Annuaire*, V, 170, J. B. Scott, Resolutions, 38.

¹² Article LIII, Malloy's Treaties, II, 2290.

According to the War Dept. Rules of Land Warfare, 1940, No. 332: "The foregoing rule includes everything susceptible of direct military use, such as cables, telephone, and telegraph plants, horses, and other draft and riding animals, motors, bicycles, motorcycles, carts, wagons,

upon the fact of private ownership as the basis of a claim for compensation in case of seizure, despite the character or adaptability of the thing seized. The equipment of a privately owned railroad is illustrative.

It is believed that no distinction should be made between tangible and intangible or incorporeal private property, such as debts due to the inhabitants of the occupied district, with respect to the duty of the belligerent to refrain from confiscation. Where the State of the occupant is itself the debtor, the reason for restraint is like that apparent when, for any reason, the debt is regarded as being within the territory of the belligerent, and subject to its jurisdiction. If the debtor is a private individual residing in that territory, and the creditor an inhabitant of the occupied district, no reason is apparent why the occupant should be entitled to cancel the debt.

(e)

CERTAIN PROVISIONS RESPECTING PUBLIC PROPERTY

(i)

§ 695. **Movable Property.** According to the Hague Regulations of 1907: "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."¹ The War Department Rules of Land Warfare of 1940, advert to the fact that while all movable property belonging to the State, and which is directly susceptible of military use, may be taken possession of "as booty and utilized for the benefit of the invader's government," other movable property, not directly susceptible of such use, "must be respected and cannot be appropriated."² It is declared that where the ownership of property is unknown — that is, where there is any doubt as to whether it is public or private, as frequently happens — it should be treated as public property until ownership is definitely settled.³

There is difficulty in laying down tests as to the public or private character of property which are likely to be respected by an occupant bent on seizure of whatever is regarded as useful to its cause. Still, a few suggestions are offered. In general it is believed that the public character of property is to be ascertained

carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, airplanes, depots of arms, whether military or sporting, and in general all kinds of war material."

According to *id.*, No. 333: "The destruction of the foregoing property and all damage to the same is justifiable if it is required by the exigencies of the war."

§ 695.¹ Art. LIII, Malloy's Treaties, II, 2289.

See Magoon's Reports, 261, *in re* order of Maj. Gen. Otis requiring a banking house at Manila to turn over to the American authorities \$100,000, held as the property of the insurgent forces in the Philippines; also Moore, Dig., VII, 278.

See Max Huber, "*La propriété publique en cas de guerre sur terre*," *Rev. Gén.*, XX, 657.

² No. 321.

³ *Id.*, No. 322.

According to Art. LIV of the Hague Regulations: "Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made." (Malloy's Treaties II, 2290.)

by reference to the following considerations: its ownership by the enemy State, or its actual use in behalf of that State. There may, however, be an exception where title, though possessed by that State, is held as trustee for essentially private interests. Even in these situations the occupant may be in fact disdainful of the significance of those interests, and not regard them as a necessary obstacle to seizure or confiscation.⁴

Difficulty is encountered in laying down a test which will be respected by the occupant as to the public or private character of a corporation or other entity functioning within the territory concerned. Despite the fact that the corporation may be regarded as private by the local law, by virtue of which it came into being, the ownership of its stock, or the actual control of its operations by, or the rendition of its principal services in behalf of, the territorial sovereign may suffice to cause the occupant to regard the entity as a public enemy concern, and to deal with it accordingly.⁵

(ii)

§ 696. **Immovable Property. Other Considerations.** The occupant is not deemed to possess "the absolute right of disposal or sale" of immovable property belonging to the hostile State.¹ He is regarded as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to it and within its domain. The Hague Regulations of 1907 declare that he must safeguard the capital of such properties and administer them in accordance with the rules of usufruct.² Thus he should not exercise his rights in such wasteful and negligent manner as to impair the value of the property enjoyed. The War Department Rules of Land Warfare of 1940, state that he may lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines.³ It is declared, however, that real property of a State, which is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, canals, bridges, piers and wharves, remain in the hands of the occupant until the close of the war, and may be destroyed or damaged, if deemed necessary, in military operations.⁴ It may be observed that public immovable property possessing normally a civil rather than a military character, such as buildings devoted to philanthropic uses, may under certain conditions become of direct military value; and when it does, it appears to be subject to such treatment as the occupant may find necessary to apply to any other property susceptible of direct military use.

⁴ See also *infra*, § 696A.

⁵ The Hague Regulations in references to "private property," Art. XLVI, and to "private individuals," Art. LIII, par. b, do not purport to indicate when a corporate entity should be deemed to be the owner of "private property," or when it should be assimilated to a private individual.

§ 696.¹ War Dept. Rules of Land Warfare, 1934, No. 316.

² Art. LV, Malloy's Treaties, II, 2290.

³ No. 316, where it is also said that "a lease or contract should not extend beyond the conclusion of the war." See, in this connection, *New Orleans v. Steamship Co.*, 20 Wall. 387; Opinion of Mr. Knox, Attorney General, Oct. 17, 1901, 23 Ops. Attys. Gen., 551, 561.

⁴ *Id.*, No. 317. See Garner, *Int. Law and World War*, II, § 398, concerning cutting of forests.

The property of municipalities and that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, must be treated, according to the Hague Regulations of 1907, as private property. It is declared that all seizure of, destruction or wilful damage done to, institutions of this character, historic monuments, works of art and science, is forbidden and should be made the subject of legal proceedings.⁵ Doubtless the property included within this rule may be utilized in case of necessity, as the War Department Rules of Land Warfare of 1940, indicate, for quartering the troops, the sick and wounded, horses, stores, etc., and generally as prescribed for private property. Such property must, however, it is said, be secured against all avoidable injury, even when located in fortified places which are subject to seizure or bombardment.⁶

(iii)

§ 696A. **Some Aspects of Financial Problems.** It is believed that the belligerent occupant may proceed to collect debts due to the territorial sovereign when they become due, and that the proceeds once received may be dealt with as "cash funds and realizable securities which are strictly the property of the State," as contemplated in Article LIII of the Hague Regulations.¹

It is not unreasonable for the occupant to endeavor to defray from available funds within its reach that belong to the territorial sovereign, debts due by it to foreign or domestic creditors.² In whatever it does, the occupant should be regarded as the temporary controller rather than as the sovereign of, or the successor to the sovereign of, the area concerned. The solution of fiscal or other problems confronting the occupant should be sought in the light of that basic idea. As such controller, it is highly unreasonable that the occupant should endeavor to enrich itself at the expense of the area concerned. It may in fact do so in a variety of ways, as for example, by placing an artificial value on the currency of its own country in circulation therein. It is not to be expected, however, that some belligerent occupants will be deterred by any considerations alien to their own military interests from yielding to such excesses.³

⁵ Art. LVI, Malloy's Treaties, II, 2290.

⁶ No. 319.

§ 696A.¹ The obligation imposed upon the occupant by Art. LV of the Hague Regulations, to "safeguard the capital" of specified types of public immovable property, suggests the existence of another kindred obligation to collect funds that are due to the territorial sovereign as an initial mode of safeguarding them.

One may well doubt whether the occupant as a potential and rightful collector of a debt due to the State whose domain is occupied may rightfully release the debtor and cancel the debt, save for a valuable consideration, as where the debtor is caused to utilize the funds due in order to release the territorial sovereign from a foreign liquidated governmental claim against it of equivalent value. It may be difficult in the particular case for the debtor to meet these requirements.

² See Art. XLVIII of the Hague Regulations of 1907, Malloy's Treaties, II, 2289. It is not sought to pass on the question whether this article imposes an obligation upon the occupant to do so.

³ In sections 277-288 of his forthcoming and illuminating work on *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Division of International Law, Monograph No. 6, Dr. E. H. Feilchenfeld gives a vivid and authoritative portrayal of German action pertaining to money and currency in Belgium, 1914-1917.

In the case of banks functioning within occupied territory the question is likely to arise, whether the particular fiscal organization bears such a relationship to the territorial sovereign as to justify the treatment of it as a public enemy concern, and its assets as public enemy property. A variety of factors may call for due appraisal in each case that presents itself. Thus, the institution may be strictly a private concern as tested by the local law, conducting its affairs, however, chiefly for the benefit, and possibly under the direction of, the territorial sovereign. Again, it may be wholly or for the most part owned by that sovereign. The depositors may be both private individuals and public agencies of the State within whose domain it operates. Such considerations inspire a few suggestions.

Banking is today regarded as a public function, and is controlled as never before by the State within whose territory that function is sought to be exercised. The belligerent occupant is, accordingly, believed to be justified in regulating the enjoyment of it, and on such terms as it may impose. Such is the case regardless of the character of the organization, or of the ownership or control of the particular fiscal entity concerned, or of the assets which it holds.

The right of the occupant to control the operations of a bank, and notably in a situation where it is a central or national bank, or if need be, to administer the same under its own auspices, would not, however, necessarily be decisive of its right to treat as public property all of the assets of the institution, embracing all deposits or securities held by it. Those shown to be held in trust for, or to belong to, private individuals, should be respected as private property, and their treatment governed by the Hague Regulations applicable to such property.⁴

(3)

§ 697. **Measures Relating to the Persons of the Inhabitants.** In exercising the right to demand and enforce from the inhabitants of the hostile territory such obedience as may be necessary for the security of his forces and for the maintenance of law and order, as well as for the proper administration of the country, the occupant possesses large discretion.¹ His rights are not, however, commensurate with his power. He is thus forbidden to take certain measures which he may be able to apply, and that irrespective of their efficacy. The restrictions imposed upon him are in theory designed to protect the individual in the enjoyment of some highly important privileges. These concern his allegiance to the *de jure* sovereign, his family honor and domestic relations, religious convictions, personal service, and connection with or residence in the occupied territory.

The Hague Regulations declare that the occupant is forbidden to compel the inhabitants to swear allegiance to the hostile power.² It is believed that notwith-

⁴ See Dr. E. H. Feilchenfeld's prospective work on *The International Economic Law of Belligerent Occupation* (referred to above), Sections 357-370, on the history of German treatment of central banks within occupied areas of France and Belgium.

See *supra*, § 695.

§ 697. ¹ War Dept. Rules of Land Warfare, 1940, No. 297.

² Article XLV, Malloy's Treaties, II, 2288.

Compare the harsh General Order No. 11, of Gen. Pope, commanding the Army of Virginia, July 26, 1862, and the criticism of it in J. M. Spaight, *War Rights on Land*, 332-333.

standing this requirement, the occupant may not unreasonably compel the inhabitants, in case of persistent and insidious attempts to resist his authority, to take oath not to oppose the lawful assertion of the same, and so facilitate his task of enforcing them to respect their legal duty of obedience.³

Clearly the occupant may punish severely persons guilty of what is known as war treason. Examples of acts which, when committed by inhabitants of territory under hostile military occupation, are said to be treasonable, are: "espionage; supplying information to the enemy; damage to railways, war material, telegraphs or other means of communication; aiding prisoners of war to escape; conspiracy against the occupying forces or members thereof; intentional misleading of troops while acting as guides; voluntary assistance to the enemy by giving money or acting as guides; inducing soldiers of the occupying forces to act as spies for the enemy, to desert, or to surrender; bribing soldiers in the interest of the enemy; damage or alteration to military notices and signposts in the interest of the enemy; fouling sources of water supply and concealing animals, vehicles, supplies, and fuel in the interest of the enemy; knowingly aiding the advance or retirement of the enemy; and circulating propaganda in the interests of the enemy."⁴ It ought to be clear that the relationship of the inhabitants of occupied territory to the occupant is such as to justify the latter in regarding as essentially illegal numerous acts on the part of the former which would not be unreasonable were they committed by the opponents of a hostile force engaged in an offensive operation in the field.

§ 698. **Respect for Family Honor.** There is believed to be a legal obligation on the part of the occupant towards the enemy not to disregard some domestic relationships and practices of its nationals within the occupied territory. These relationships and practices are of so great importance to those individuals that they are referred to in the Hague Regulations of 1907, as "family honour and rights" and as "religious convictions and practice." It is declared that they "must be respected."¹ Doubtless an occupant in applying penalties for resistance to his authority is not forbidden by this injunction from imposing severe punishments.² When, however, no question as to the imposition of a penalty arises, and no evidence of delinquency is apparent, the occupant is believed to be

³ The fact needs to be emphasized that to resist the assertion of authority by the occupant is essentially unlawful. In compelling the inhabitants to give assurance, as by an appropriate oath, that they will desist from acts of resistance, the occupant is merely requiring a pledge of obedience to the law, and one which is wholly unrelated to and consistent with the allegiance of the pledgors to their own sovereign. Such procedure resembles in principle that of compelling an individual by judicial process to give a bond to keep the peace. As such a bond is only exacted from one who by his sinister conduct has given proof of the danger to the State or some individuals within its territory, through his being at large, so in the case of an occupied district, the reasonableness of calling upon the inhabitants to make oath not to resist the occupant would appear to depend upon proof of a disposition and attempt on their part lawlessly to oppose his authority.

Compare L. Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," *Law Quar. Rev.*, XXXIII, 363.

⁴ War Dept. Rules of Land Warfare, 1940, No. 350.

See, also, *id.*, No. 207.

§ 698. ¹ Art. XLVI, Malloy's Treaties, II, 2289.

² See, in this connection, Westlake, 2 ed., II, 103.

bound rigidly to respect the principle which the Hague Regulations proclaim. In the Instructions for the Government of Armies of the United States in the Field, of 1863, it is said that the United States acknowledges and protects, in hostile countries occupied by its forces, "religion and morality; the persons of the inhabitants, especially those of women, and the sacredness of domestic relations." Offenses to the contrary are declared to be vigorously punished.³ It is believed that under no circumstances should the occupant be permitted to violate the requirements of morality or to ignore the sacredness of domestic relations. No belligerent occupant under the American flag will ever be disposed to disregard these requirements. Nevertheless, events of World War I, grimly brought home to the international society the need of an enunciation of prohibitions more explicit than the implications derivable from the Hague Regulations, and that also of causing by some process a belligerent State to impose definite restraint upon its forces when occupying hostile territory.

The clear duty to respect family honor and rights seems to deny the occupant freedom in most instances, save as incidental to the imposition of a penalty reasonably applied, to break up families by causing the separation of their members. Thus the deportation of individuals, through the disruption of family ties, apart from other objections, marks contempt for an obligation which the occupant owes to the unoffending inhabitants within the district under his control.⁴

§ 699. **Services of the Inhabitants.** Doubtless a belligerent occupant possesses a broad right to utilize the services of the inhabitants. He is restricted, however, with respect both to the kind of service exacted and the purpose for which it is sought. The Hague Regulations declare that services shall not be demanded from inhabitants except for the needs of the army of occupation,

³ Gen. Orders, No. 100, Apr. 24, 1863, § XXXVII, Moore, Dig., VII, 274. This is reproduced in Rules of Land Warfare, 1917, No. 315, and in War Dept. Rules of Land Warfare, 1934, No. 302, and in those of 1940, No. 300.

"It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will, therefore, be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights." President McKinley, order to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American forces, Correspondence Relating to the War with Spain, I, 159, Moore, Dig., VII, 261.

It is declared in War Dept. Rules of Land Warfare of 1940, No. 301, that "in return for such considerate treatment, it is the duty of the inhabitants to carry on their ordinary peaceful pursuits; to behave in an absolutely peaceful manner; to take no part whatever in the hostilities carried on; to refrain from all injurious acts toward the troops or in respect to their operations; and to render strict obedience to the officials of the occupant."

See American Military Government in Germany, 1918-1920, *infra*, § 701B.

⁴ See The Deportation of Women and Girls from Lille (translated textually from the note addressed by the French Government to the Governments of neutral Powers on the conduct of German authorities towards the population of the French departments in the occupation of the enemy), New York, 1917.

See, also, instances given in Appendix I to Report of Commission of Responsibilities, Paris Conference of 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, pp. 35-36.

See Mr. Herbert Hoover, Chairman of the Commission for Relief in Belgium, to Mr. Lansing, Secy. of State, Oct. 10, 1916, For. Rel. 1916, Supp., 860.

and that they shall be of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.¹ The two limitations thus laid down are important. By restricting the service to one responsive to the needs of the army of occupation there is forbidden, by implication, any requisition of services to be performed outside of the occupied district. Thus the occupant is on principle forbidden to deport the inhabitants to his own country for any work therein. His sovereign cannot, therefore, justly have recourse to such procedure for the purpose, for example, of releasing from industrial pursuits nationals or others engaged therein who are needed for military service. The occupant may not lawfully deport the male population of the district under his sway in order to increase proportionally the general fighting forces of his own country. Nor does the circumstance that the inhabitants of the district may be more easily maintained and fed at less sacrifice or inconvenience to the government of the occupant within territory other than that where they dwell, afford solid excuse for their deportation.²

Within the limits above prescribed the occupant may demand services within a wide field and for a variety of purposes.³ Thus he may reasonably requisition

§ 699.¹ See Article LII, Malloy's Treaties, II, 2289, where it is also said that such services shall only be demanded on the authority of the commander in the locality occupied.

See communication of Belgian Legation to Department of State, Sept. 22, 1915, respecting the treatment of Belgian workmen by German authorities at Luttre, Stowell and Munro's International Cases, II, 153.

² See Fernand Passelecq, *Les Déportations Belges à La Lumière des Documents Allemands* (Paris, 1917); Jules Destrée, *The Deportations of Belgian Workmen* (London, 1917); *The Deportations*, a statement by Mr. Brand Whitlock, American Minister to Belgium (London, 1917); J. Van den Heuvel, "*De la déportation des Belges en Allemagne*," *Rev. Gén.*, XXIV, 261; *The London Times*, Hist. and Encyc. of the War, part 156, Vol. XII, Aug. 14, 1917, "Belgium under German Rule: The Deportations"; Jules Basdevant, *Les Déportations du Nord de la France et de la Belgique*, Paris, 1917; Communication of Cardinal Mercier, Archbishop of Malines, to the German Governor General of Belgium, Nov. 10, 1916, Official Bulletin, Dec. 22, 1917, No. 191, p. 11.

Declared Mr. Lansing, Secretary of State, in a communication to Mr. Grew, American Chargé d'Affaires at Berlin, Nov. 29, 1916: "The Government of the United States has learned with the greatest concern and regret of the policy of the German Government to deport from Belgium a portion of the civilian population for the purpose of forcing them to labor in Germany, and is constrained to protest in a friendly spirit, but most solemnly, against this action, which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of non-combatants in conquered territory. Furthermore, the Government of the United States is convinced that the effect of this policy, if pursued, will in all probability be fatal to the Belgian relief work so humanely planned and so successfully carried out, a result which would be generally deplored and which, it is assumed, would seriously embarrass the German Government." *For. Rel.* 1916, Supp., 70; also documents, *id.*, 858-870.

See, also, memorandum of the Belgian Government on the Deportation or Forced Labour of the Belgian Civil Population Ordered by the German Government, Feb. 1, 1917; Arnold J. Toynbee, *The Belgian Deportations* (with a statement by Viscount Bryce), London, 1917.

See, also, *Rapports et Documents D'Enquête (Commission D'Enquête sur les Violations des Règles du Droit des Gens, des Loix et des Coutumes de la Guerre)*, Brussels, 1923, Vol. II; J. Van der Hoeven Léonhard, *Les Déportations Belges*, Harlem, 1931; Adolf Solansky, *German Administration in Belgium*, New York, 1928, 55-66, whose commentary discusses reports of the German Committee of Inquiry of 1927, entitled *Völkerrecht im Weltkrieg*.

³ The services which may be requisitioned include, according to the War Dept. Rules of Land Warfare of 1940, No. 303, those of: "professional men and tradesmen, such as surgeons, carpenters, butchers, bakers, etc.; employees of gas, electric light, and water works, and other public utilities; and of sanitary boards in connection with their ordinary functions. The officials and employees of railways, canals, river or coastwise steamship companies, telegraph, telephone, postal, and similar services, and drivers of transport, whether employed by the

labor to restore the general condition of the public works of the country to that of peace; that is, to repair roads, bridges, railways, as well as to bury the dead and collect the wounded. In short, under the rules of obedience, the inhabitants may be called upon to perform such work as may be necessary for the ordinary purposes of government, including police and sanitary work.⁴

The prohibition against forcing the inhabitants to take part in the operations of war against their own country precludes, however, according to the War Department Rules of Land Warfare of 1940, the requisitioning of their services upon works directly promoting the ends of war, such as the construction of forts, fortifications and entrenchments; but there is said to be no objection to their being employed voluntarily, for pay, on such class of work, except the military reason of preventing information concerning it from falling into the hands of the enemy.⁵

The Hague Regulations forbid the occupant to force the inhabitants of the territory occupied to furnish information about the army of the other belligerent, or about the means of defense.⁶ The impressment of guides appears to be forbidden under this rule.⁷ While this requirement may restrict the successes of an army in the field, the rule imposes a much less burdensome restraint upon the occupant because of the essential nature of his task.⁸

§ 700. **Hostages.** The taking of hostages has been a procedure which in recent wars a belligerent occupant as well as an army in the field has utilized. The Hague Regulations are silent as to the practice.¹ The War Department Rules of Land Warfare of 1940, advert to the fact that hostages have been taken in war for a variety of purposes,² and do not intimate that the practice is reprehensible. While the taking of hostages by the occupant may, under certain circumstances, operate as a reasonable mode of securing compliance by a restive population with a just demand designed to promote the maintenance of order, occurrences in the course of World War I encourage the conclusion that it is also a weapon likely to be employed by a despot to check interference of any

State or private companies, may be requisitioned to perform their professional duties so long as the duties required do not directly concern the operations of war against their own country."

⁴ *Id.*, No. 304.

⁵ No. 305.

See "*Du travail en vue des opérations de guerre imposé par l'Allemagne aux habitants en pays d'occupation*," Clunet, XLV, 123

⁶ Article XLIV, Malloy's Treaties, II, 2288.

⁷ See War Dept. Rules of Land Warfare of 1940, No. 308.

Also, Holland, Laws of War on Land, 53; Westlake, 2 ed., II, 101; A. P. Higgins, Hague Peace Conferences, 268, 269. See Services not to be Exacted from an Enemy Person, *supra*, § 666.

⁸ See J. M. Spaight, War Rights on Land, 368-371.

§ 700. ¹ See Oppenheim, Lauterpacht's 5 ed., II, 354, 461-464.

² No. 359, where it is said that hostages have been taken in war for the following purposes: "to insure proper treatment of wounded and sick when left behind in hostile localities; to protect the lives of prisoners who have fallen into hands of irregular troops or whose lives have been threatened; to protect lines of communication by placing them on engines of trains in occupied territory; and to secure compliance with requisitions, contributions, etc."

sort with ruthless and cruel acts inspired by caprice.³ It is believed, therefore, that by general agreement, a belligerent occupant should either be forbidden to resort to the practice, or that his sovereign should be compelled at the close of the war, to exhibit proof to its former enemy of the necessity which impelled its representative to resort to such measures, and of the manner in which they were carried out. In any event, so long as the right of the occupant to take hostages is acknowledged, it seems reasonable to demand that a belligerent be obliged to caution its officers in hostile territory, in a definite manner, and with precise directions as to the circumstances when hostages should be taken, and respecting the treatment to be accorded them while held as such.

After announcing that the offending forces or populations generally may be lawfully subjected to appropriate reprisals, the War Department Rules of Land Warfare of 1940, state that hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed. It is added that reprisals against prisoners of war are expressly forbidden by the Geneva convention of 1929.⁴ Again, it is added in a later section that "When a hostage is accepted he is treated as a prisoner of war."⁵ Possibly it is sought to be laid down that hostages taken for the special purpose announced are not to be treated as prisoners of war.⁶

(4)

§ 701. **Miscellaneous Measures — Neutral Consuls.** The belligerent occupant possesses an unquestioned right to regulate all intercourse between the territory under his control and the outside world. He may exclude commerce wholly from occupied ports, or permit it under such conditions as he may prescribe.¹ He may establish a censorship over various forms of publication and communication, and may himself take charge of agencies for the transmission of intelligence.² He may exercise full authority over all means of transportation.³

³ Coleman Phillipson's *Wheaton*, 519-545; Baty and Morgan, *War: Its Conduct and Legal Results*, 185-187.

See instances of the putting to death of hostages by Bulgarian forces, given in Annex I to Report of Commission of Responsibilities, Paris Conference of 1919, Carnegie Endowment for Int Peace, Div. of Int Law, Pamphlet No 32, p 31.

See discussion in Garner, *Int. Law and The World War*, I, §§ 195-201.

⁴ No. 358 (d).

⁵ No. 359.

⁶ As they stand, however, the announcements in the rules are believed to leave much to be desired and will doubtless be regarded by some as inconsistent.

§ 701.¹ See War Dept. Rules of Land Warfare, 1940, No. 290. Also Magoon's Reports, 210, 227.

See President Polk, special message, Feb. 10, 1848, Richardson's Messages, IV, 571, Moore, Dig., VII, 269; Mr. Adee, Acting Secy of State, to Count Quadt, German Chargé d'Affaires, No. 481, Oct. 19, 1900, MS. Notes to German Legation, XII, 500, Moore, Dig., VII, 272; Magoon's Reports, 302, respecting the case of the British vessel *Will O' The Wisp*; Magoon's Reports, 316, *in re* complaint of the German ambassador at Washington, July 31, 1900, respecting restrictions of trade with the inhabitants of the Sulu Islands, imposed by the military government of the Philippine Archipelago.

² War Dept. Rules of Land Warfare, 1940, No. 291, where it is said: "He may prohibit entirely the publication of newspapers or prescribe regulations for their publication and circulation especially in unoccupied portions of the territory and in neutral countries. He is not

He may determine the extent and kind of relief offered from abroad for the sustenance of the civil population, and may regulate the distribution of food-stuffs.⁴

The belligerent occupant is entitled to control the exercise of neutral consular functions within the district. Thus the German Government, in consequence of the occupation by its forces of certain portions of Belgium, announced in November, 1914, that the exequaturs of neutral consular officers formerly permitted to act therein were regarded as having expired.⁵ It was said that while the issuance of new exequaturs under imperial authority was deemed inadvisable, there would be granted to consular officers whose names were communicated to the Foreign Office, temporary recognition to enable them to act in their official capacity, under reserve of the usual investigations respecting their records. Acknowledging that such officers were commercial and not political representatives of a Government, and that permission for them to act within defined districts was dependent upon the authority actually in control thereof "irrespective of the question of legal right," the Department of State responded that it was not at the time inclined to question the right of the Imperial Government to suspend the exequaturs of American consuls within the districts occupied by the military forces of the German Empire and subject to its military jurisdiction.⁶ This response is believed to have been sound in theory.

(5)

§ 701A. **Concessions through an Armistice.** In virtue of an arrangement for an armistice, a belligerent occupation may be undertaken, continued, or terminated.¹ The agreement may reveal a design to concede more or less than the occupant might otherwise lawfully claim. The privilege of occupation may be granted to a belligerent that ultimately evacuates its troops from the occupied area, or to one that makes use of the concession as the preliminary step towards final acquisition of the sovereignty over that area. Again, the agreement may leave the occupant free to carry on its war in other areas, and so indicate

required to furnish facilities for postal service, but may take charge of them himself, especially if the officials of the occupied district fail to act or to obey his orders."

⁴ War Dept. Rules of Land Warfare, 1940, No. 292.

⁵ This obvious privilege of the occupant was acknowledged to be the possession of Germany as the occupant of Belgian territory during World War I. See *supra*, footnote 7, § 693.

⁶ See note verbale from the German Foreign Office, Nov. 30, 1914, enclosed in communication of Mr. Gerard, American Ambassador at Berlin, to Mr. Bryan, Secy. of State, Dec. 4, 1914, For. Rel. 1915, Supp., 916; also note verbale from the German Foreign Office, Jan. 3, 1915, enclosed in communication of Mr. Gerard to Mr. Bryan, Jan. 11, 1915, *id.*, 918.

⁶ Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador at Berlin, Jan. 21, 1915, For. Rel. 1915, Supp., 917; also Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador at Vienna, telegram, Nov. 23, 1915, *id.*, 922; telegram of Acting Secy. of State, to Mr. Gerard, July 12, 1916, For. Rel. 1916, Supp., 796.

See *contra*, Belgian protest communicated by the Spanish Government to the German Foreign Office, and discussed in communication therefrom to the Spanish Embassy at Berlin, Jan. 3, 1915, enclosed in communication of Mr. Havenith, Belgian Minister at Washington, to Mr. Bryan, Secy. of State, Feb. 13, 1915, For. Rel. 1915, Supp., 919.

§ 701A.¹ See Arts. V and XII of Armistice Convention with Germany of Nov. 11, 1918, U. S. Treaty Vol. III, 3308 and 3309, respectively.

no cessation of fighting in the general conflict.² Still again, the occupant may, without itself ceasing to be at war with its enemy, continue to exercise its functions as such, at a time when its former co-belligerents, having ended their war with a former common enemy, continue a like occupation that has ceased to be of belligerent aspect.³

Although the armistice that specifically yields the right of occupation may in fact mark a cessation of hostilities, as between the parties thereto, it does not in itself necessarily diminish the privileges which the occupant may normally claim as such.⁴ The Hague Rules of 1907 would seemingly be applicable. Nevertheless, the cessation of hostilities, together with the simultaneous weakening of the military power of the sovereign of the occupied area, through possible terms of the armistice, is likely greatly to diminish the need of the occupant to have recourse to some repressive measures which it might not hesitate to apply had there been no cessation of hostilities. On the other hand, as the armistice may fail to assure acceptance of terms of peace as registered in a final treaty designed to restore friendly relations, the occupant may still find it necessary

² See Armistice between France and Germany, of June 22, 1940, *Am. J.*, XXXIV, *Official Documents*, 173.

³ Declared Secy. Lansing in a communication to the American Ambassador to France, Jan. 9, 1920: "The Government of the United States can not acquiesce in decision of the Council that as soon as Treaty of Peace goes into force between Allied Governments and Germany, the jurisdiction of the Interallied Rhineland High Commission, to be created under the Rhineland Agreement signed June 28, 1919, will extend over all the territories on left bank of Rhine, including those occupied by American troops.

"The views of this Government are that while, upon the Treaty of Peace coming into force, the Armistice, except for provisions specifically continued in force, will terminate as between Germany and the Powers ratifying the Treaty, it nevertheless continues in force as to the United States.

"Until the Treaty of Peace with Germany and the Rhineland Agreement are ratified by the United States, the belligerent rights of this Government in the Rhenish territory occupied by its forces under the Armistice, can in no way be affected or limited by agreements between the Allied Governments and Germany, not ratified by, and therefore not binding upon the United States.

"This Government, therefore, can not agree that the jurisdiction of the Rhineland Commission to be created upon the coming into force of the Treaty, will extend at this time over American troops or the Rhenish territory occupied by them, but nevertheless it will be disposed, should the Allied Governments so desire, to have an American representative unofficially present at the meetings of the Commission to be created, and, in so far as practicable, cause to be put into effect concurrently in the American zone of occupation measures similar to those adopted by the Commission for the portions of the Rhenish territory occupied by the Allied Governments provided the measures do not conflict with or exceed the terms of the Armistice." (For. Rel. 1919, Vol. I, 33.)

⁴ "The armistice of November 11th, 1918, provided for the occupation of the left bank of the Rhine and the administration by the armies of occupation of the areas or bridge-heads to which they were separately assigned. It was provided in substance in Article 5 of the armistice that no person should be prosecuted for his participation in military measures previous to the signing of the armistice.

"International law places upon the commanding General the responsibility, broadly speaking, of preserving order, punishing crime and protecting lives and property within the territorial limits of his command. His power in the premises is as great as his responsibility. The armistice in no sense checked, or refused to the military forces, any of the powers usually and ordinarily exercised by an invading army, except as above noted. A reading of the armistice clearly shows that each army of occupation was to act as the representative of its respective government in the conduct of the military operations with which it was charged. There was nothing in the armistice removing from the Commanding General (with the exceptions noted), any of the authority expressly or by inference vested in him by international law or usage." (Hunt's Report, American Military Government of Occupied Germany, I, 315.)

to prepare for a resumption of hostilities and the special antagonisms and renewed dangers to be anticipated in such a contingency.

(6)

§ 701B. **American Military Government in Germany, 1918–1920.** After an advance across Luxemburg late in November, 1918, a portion of the American Expeditionary Forces began its march into Germany on December 1 of that year, and as an army of occupation made its headquarters at Treves.¹ In his proclamation to the people of Luxemburg, as well as to those of Germany, and in his general orders to his own forces General Pershing, the American Commander-in-Chief, gave utterance to statements pertaining to international law and to the respect due to it which are believed to be of much significance.²

In the proclamation to the people of Luxemburg it was declared:

The American troops are coming into the Grand Duchy of Luxemburg as friends and their conduct will be strictly in accordance with the dictates of international law. Their presence, which will not be prolonged more than is absolutely necessary, will not be a burden to you. The functioning of your government and institutions will not be interfered with in any manner. Your ways of life and occupations will not be disturbed. Your persons and goods will be respected. It will be necessary for the American Army to use various buildings, railways, telegraph and telephone lines, and perhaps other public buildings also for lodging and transport needs; such supplies as may be needed will be paid for in accordance with a just valuation.

It is presumed that no acts of violence will be committed by you against the American Army, and no information, aid or assistance given to its enemies. You will be expected to observe all instructions which the American command may consider necessary to ensure the safety of its troops and that of the inhabitants.³

It will be observed that there was expected of the Grand Duchy the performance of certain obligations towards the American Forces while within its territory and in the course of a passage which is not understood to have been opposed by the territorial sovereign.⁴

In his proclamation to the people of Germany, General Pershing announced that the American Army, operating with the Allied military authority, was taking possession of and occupying specified territory which, with its inhabitants,

§ 701B. ¹The Allied occupation of the Rhineland, in pursuance of the provisions of the Armistice with Germany, Nov. 11, 1918, was undertaken by the military forces of Belgium, France, Great Britain and the United States. "The territory assigned to the American Army was the historic Moselle Valley, from the borders of Luxemburg to the Rhine. It embraced the greater part of the districts of Trier and Coblenz and a thirty-kilometer bridgehead across the Rhine." Col. H. A. Smith, *Military Government, General Service Schools Press, Fort Leavenworth, Kansas, 1920, 29.*

²These statements are published as appendices in Col. H. A. Smith's work on *Military Government*. They are also contained in Hunt's Report, *American Military Government of Occupied Germany*, Vol. I

See, also, Marcel Nast, "*L'occupation des territoires rhénans par les troupes des Alliés et des États-Unis pendant l'armistice*," *Rev. Gén.*, XXVIII, 139.

³The date of this proclamation was Nov. 18, 1918.

⁴See, *Neutrality, Inviolability of Neutral Territory, infra*, § 887.

were "under the military rule and authority of the American Army." He declared:

This rule is strict, and implicit obedience to it is exacted of all. None the less, no law-abiding person need have any fear. The American Army has not come to make war on the civilian population. All persons, who with honest submission act peaceably and obey the rules laid down by the military authorities, will be protected in their persons, their homes, their religion and their property. All others will be brought within the rule with firmness, promptness and vigor.

The American Army will govern in strict accordance with international law and the rules and customs of war sanctioned by the civilized world. The inhabitants, on their part, must absolutely abstain, in word and deed, from every act of hostility or impediment, of any kind, toward the American forces.⁵

To this cheering announcement he added certain salutary intimations of obligations which the inhabitants of the territory were expected to observe.⁶

To the American Army of occupation General Pershing declared:

You have come not as despoilers or oppressors, but simply as the instruments of a strong, free government whose purposes towards the people of Germany are beneficent. During our occupation the civil population is under the special safeguard of the faith and honor of the American Army.

It is, therefore, the intention of this order to appeal directly to your pride in your position as representatives of a powerful but righteous nation, with the firm conviction that you will so conduct yourself in your relations with the inhabitants of Germany as will cause them to respect you and the country you have the honor to represent. While you appear among them as a conquering army, you will exhibit no ill will towards the inhabitants.

On the other hand you are warned against conduct unbecoming your position as instruments of military rule. So long as a state of war continues, Germany remains enemy territory, and there must be no intimate personal association with its inhabitants. A dignified and reserved attitude will be maintained on your part at all times.

⁵ It will be recalled that the period of American occupation continued for a protracted period after the restoration of peace between the United States and Germany. On January 10, 1923, there was a withdrawal of the American troops from Coblenz. See, in this connection, Toynbee's *Survey of International Affairs, 1920-1923*, 100-104.

⁶ He said in this connection: "It is your duty now to devote yourselves to the orderly and obedient conduct of your private lives and affairs, the re-establishment of normal conditions in your schools, churches, hospitals and charitable institutions, and the resumption of your local civil life. You will not be obstructed; but, on the contrary, you will be encouraged and protected in those pursuits. So far as your attitude and conduct make it possible, your local courts, governing bodies and institutions will be continued in operation under the supervision of the American authorities, and except where they affect the rights and security of the American Army, your present laws and regulations will remain undisturbed and in force.

"Every violation of the laws of war, every act or offer of hostility or violence and every disobedience of rules laid down by the military authority will be punished with the utmost vigor."

See documents in *For. Rel. 1922, II*, 211-218, concerning the decision of the United States to reduce its army of occupation in Germany to a force of one thousand men.

Concerning the reimbursement of the costs of the American army of occupation, see *American Participation in German Reparation Payments*, *supra*, § 299A.

It is not believed that any acts of pillage or violence will be committed by members of the American Forces, but, should any persons prove themselves unworthy of this confidence, their acts will be considered not only as crimes against the sufferers, but as dishonoring the American Army and as a direct insult to the flag of the United States. Such transgressions, should they occur, will be punished with the severest penalties known to our military law.⁷

Shortly thereafter an order from the Third Army announced that members of the forces of occupation should confine themselves to official relations with the Germans and should limit their personal relations to an attitude of "courteous tolerance." It became known as the "anti-fraternization order," and is said to have become "probably the most discussed regulation ever issued by the army of occupation."⁸ It was regarded as unfortunate in failing to reckon with the fact that the enlisted soldiers billeted in the homes of the German people could not well avoid having intimate personal associations with them, or well assume a detached or formal attitude towards them.⁹ It revealed, moreover, a failure to realize that deference for the order on the part of the soldiers would provoke a resentful spirit on the part of the German populace.

The American Army of occupation lacked training and special organization for the task confronting it as it crossed the Luxemburg-German frontier in December, 1918, and undertook to guide and control nearly a million enemy civilians.¹⁰ It was aided, however, by the terms of paragraph V of the Armistice agreement of November 11, 1918, which declared that the districts on the left bank of the Rhine should be "administered by the local authorities under the control of the Allied and United States armies of occupation."¹¹ Face to face with problems concerning requisitioning, billeting, rates of exchange, as well as essentially legal questions, the Army is believed to have met them with intelligence and skill.¹²

⁷ General Orders, No. 218, Nov. 28, 1918. See, also, Order No. 1, concerning Organization of Civil Affairs in Germany, issued at Treves, Dec. 13, 1918.

⁸ Hunt's Report, American Military Government of Occupied Germany, I.

⁹ *Id.*

¹⁰ *Id.*, I, 57.

¹¹ U. S. Treaty Vol. III, 3308.

¹² "This paragraph [of the armistice agreement] exercised an immense and far-reaching influence over the character of the succeeding military government of the Rhineland. History records very few instances of an invading army stabilizing its control under conditions so favorable to the task in hand. The surrender to the Allies by the German Government of the whole administrative, legislative and judicial machinery of the territories to be occupied, rendered the problems of civil control which confronted the Allied armies comparatively easy of solution. Supervision requires tact and judgment rather than the display of constructive genius. One is spared the necessity of erecting courts, appointing officials or providing intricate systems of education or finances." (Hunt's Report, American Military Government of Occupied Germany, I.)

¹³ Declares Col. Hunt: "In view of the constant allegations on both sides during the war of violations of international law (thus showing a great advance in international public opinion), great care was exercised to see that all our acts were justified either in international law, or by the terms of the armistice, and it is not believed that a single official act can be alleged which can be construed as in contravention of either." (*Id.*)

(7)

§ 701C. **Occupation of Territory of a Third State.** A State occupying territory of another with its consent, as in the course of a war in which the occupant is not a belligerent, finds itself technically a belligerent occupant if or when it enters the conflict as a belligerent. The territorial sovereign of the area concerned may then be also a belligerent and become the co-belligerent of the occupant. In such a situation the scheme of arrangement laid down in the Hague Rules of 1907 is inapplicable and becomes inept as a guide. The concession of privileges yielded to the occupant presupposes the absence of opposition between the States concerned, and is likely to be the consequence of a common aim. The agreements of the United States with Denmark for the defense of Greenland, of April 9, 1941,¹ and with Iceland, of July 1, 1941, for the defense of Iceland,² are illustrative, even though they were concluded when the United States had not become a belligerent in World War II.

A different situation arises when territory occupied by a belligerent belongs to a State which is not its enemy, and which, regardless of the relationship of that State to the war as a belligerent or neutral, is far from yielding consent to the occupation. In such case the occupant may be expected to claim that the area concerned is to be assimilated to enemy territory, and opposition on the part of the territorial sovereign to opposition by an enemy. Apart from the question concerning the propriety of the occupation, which must be dealt with as a case of intervention and tested according to the law applicable thereto, it is believed that the rights and obligations of the occupant as such may be generally tested by what the Hague Regulations of 1907 prescribe.³

A still different situation presents itself when occupation is the consequence of a military achievement whereby the occupant drove the enemy out of territory which it had invaded and perhaps succeeded in occupying, and which belongs to a third country itself the co-belligerent or ally of the new occupant. In such case that occupant, while it remains such, partly as a result of the mode by which it gained control, and until it surrenders possession to the sovereign, probably enjoys the normal rights accruing to an occupant under international law. The occasion for the full exercise of them may not, however, arise. Agreement between the occupant and the sovereign may appropriately register an understanding as to what the former while the deliverer and holder of the area concerned should be deemed to be privileged to do.⁴

§ 701C. ¹ U. S. Executive Agreement Series, No. 204.

² *Id.*, 232.

³ Arts. XLII-LVI, Malloy's Treaties, II, 2288-2290.

See Intervention, Archangel, 1918-1919, *supra*, § 82B; Siberia, 1918, *supra*, § 82C.

⁴ Were the area concerned a colonial possession perhaps remote from the chief domain of the sovereign, and mainly inhabited by a relatively backward people of alien race, the new occupant might be confronted with hard and delicate tasks calling for the exercise under some circumstances of numerous privileges closely akin to those habitually utilized where the occupied territory belonged to the enemy.

(8)

§ 702. **Martial Law.** The term "martial law," in so far as it is used to describe any fact in relation to belligerent occupation, does not refer to a particular code or system of law, or to a special agency entrusted with its administration. The term merely signifies that the body of law actually applied, having the sanction of military authority, is essentially martial.¹ All law, by whomsoever administered, in an occupied district is martial law; and it is none the less so when applied by the civil courts in matters devoid of special interest to the occupant. The words "martial law" are doubtless suggestive of the power of the occupant to shape the law as he sees fit; that is, to determine what shall be deemed lawful or unlawful acts, to establish tests for ascertaining the guilt of offenders, to fix penalties, and generally to administer justice through such agencies as are found expedient.

In a broad sense, therefore, martial law is, in international contemplation, that which must of necessity exist within any place controlled by a belligerent army, whether operating in the field or possessing the status of an occupant of hostile territory. That law is a direct and immediate consequence of the military achievement, rather than a special result of affirmative action by a military commander as lawgiver.² Martial law emphasizes what exists rather than what ought to be. Whether the law prevailing within an occupied district accords with the usages of war, depends upon the requirements of the law of nations.³ The restraints imposed by it are seen in what may be called the law of belligerent occupation. Hence the term "martial law" has no special significance in international law other than as a broadly descriptive phrase, for it does not serve to point out any limit or token of legitimate belligerent action.⁴

§ 702. ¹ According to the Rules of Land Warfare, 1917, No. 14 (following Gen. Orders No. 100, Apr. 24, 1863), "Martial law is simply military authority exercised in accordance with the laws and usages of war." According to No. 15, "Martial law extends to property and to all persons in the occupied territory, whether they are subjects of the enemy or aliens to that Government."

"The martial law of international jurists consists of the regulations which by convention or approved custom are agreed on as internationally binding for the relations between invaders and invaded, and, as such, is not peculiar to the cases in which invasion has ripened into occupation. It comes into play from the first moment of an invasion, but during an occupation its rules are increased in stringency in proportion to the greater security which the invader claims to enjoy in the midst of a population which he benefits by maintaining social order among them." Westlake, 2 ed., II, 99.

See, also, Davis, Int. Law, Sherman's 4 ed., 333; Opinion of Chief Justice Waite in *United States v. Dikelman*, 92 U. S. 520, 526.

² "A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest." Gen. Orders, No. 100, Apr. 24, 1863, § 1, Moore, Dig., VII, 275. See, also, *id.*, §§ 2-13.

³ Opinion of Mr. Cushing, Attorney General, Feb. 3, 1857, 8 Ops. Attys. Gen., 365, 369.

⁴ The War Department Rules of Land Warfare of 1940, refer to "martial law" as "the temporary government of the civil population through the military forces as necessity may require in domestic territory as distinguished from occupied territory of an enemy recognized as a belligerent," and to "military government" which is defined as "that form of government which is established and maintained by a belligerent by force of arms over occupied territory of the enemy and over the inhabitants thereof." (No. 6.) Neither phrase is believed to have special significance in the nomenclature of international law. Martial law, in a

A parallel situation presents itself when a State proceeds to occupy and control through its military or naval forces the territory of another without purporting to go to war with it. The law which the occupant undertakes to apply is likewise essentially a martial law. When the representative of the occupant announces the proclamation of martial law within the area concerned, it may signify little more than a decision on his part to exercise the judicial function in a particular class of cases, or other functions of government, through distinctively military agencies, and to refer in so doing to the latitude yielded by the law of nations.⁵ It is to be observed, however, that his own country, if it be the United States, may prove to be unwilling to clothe the military courts under its authority with a jurisdiction as broad as that which might be conferred and exercised were the occupied area that of an enemy and the administration of justice an incident of belligerent occupation.⁶

The practice of proclaiming the fact of occupancy and of announcing the policy to be followed respecting the inhabitants of the district, may have encouraged the conclusion that martial law is a body of rules which the occupant may affirmatively establish, and which do not come into being until he takes steps appropriate to that end. In the course of his task of administration he necessarily distinguishes between those who defy his authority by committing crimes affecting the safety of his army, and those whose conduct, however illegal, lacks such a character.⁷ Possibly the circumstance that individuals of the former class need to be tried before military tribunals while the local civil courts are permitted simultaneously to exercise jurisdiction in criminal cases of the latter class, may impel the inference that martial law (even in the case of belligerent occupation) is a special code applicable to offenses directed against military authority, and applied by military tribunals. If the occupant fixes the jurisdiction of a court, and adjusts the procedure and the penalty in case of guilt according to the nature of the offense, he merely manifests the effort to establish a flexible system adapted to the requirements peculiar to his needs. Such procedure fails, however, to indicate any limitation of power possessed by him. Nor does it warrant the conclusion that any law applied by any tribunal

generic sense, truly exists when a belligerent occupant of hostile territory proceeds to administer the same by military authority, even though its action while so doing be an instance of military government.

⁵ See proclamation of Rear Admiral W. B. Caperton, U.S.N., commanding the forces of the United States in Haiti and Haitian waters, Sept. 3, 1915, *For. Rel.* 1915, 484.

⁶ Declared Mr. Hughes, Secy. of State, to the High Commissioner in Haiti, Oct. 4, 1922: "The Department feels that provost courts should rarely, if ever, be employed for the punishment of offenses against Haitian officials or individuals except, possibly in cases where such offences, if allowed to go unpunished, would directly and unquestionably prevent the carrying out of the objects of the Treaty between the United States and Haiti. In cases of open rebellion, or of open incitement to commit attacks upon the constituted authorities, the punishment of offenders by provost courts would perhaps be justifiable, even if the forces of occupation were not directly involved. The Department does not, however, feel that newspaper attacks upon Haitian authorities, however unjust or violent, should be dealt with by provost courts, except in cases where the suppression of the newspaper propaganda is obviously necessary to maintain the peace." (*For. Rel.* 1922, II, 559.)

See Mr. Stimson, Secy. of State, to the Legation in Haiti, telegram 63, Dec. 6, 1929, *Hackworth*, Dig., II, 164.

⁷ Rules of Land Warfare, 1917, No. 299, and note 1 appended thereto; also War Dept. Rules of Land Warfare, 1940, No. 285.

in consequence of the commission by any individual of any act within the occupied territory is not a martial law. These two circumstances — the power of the occupant, and his actual supremacy attributable to it — are the pregnant facts which justify the attempt to describe the law prevailing in any place occupied by a hostile belligerent force as martial law. The legal value of that descriptive term is not, however, considerable; and its use in this connection is perhaps unfortunate in view of its employment elsewhere to signify "the justification by the common law of acts done by necessity for the defense of the Commonwealth when there is war within the realm."⁸

(9)

§ 702A. **Some Conclusions.** In the foregoing sections pertaining to the administration of occupied territory it is sought in part to reveal what American military opinion deems to be the character and extent of the privileges of a belligerent occupant, in the light, and under the restrictions of, the Hague Regulations. The mere statement of the theory of checks and balances that are set may, however, prove to be an unrealistic portrayal of the law and give a distorted view thereof unless cognizance be taken of some actual conditions which may be expected to recur whenever in the course of a war the territory of one belligerent is occupied by the enemy. The outstanding fact to be reckoned with is the sharp opposition between the inhabitants of the occupied area and the hostile military force exercising control over them. At heart they remain at war with each other. Fear for their own safety may not serve to deter the inhabitants from taking advantage of opportunities to interfere with the safety and success of the occupant, and in so doing they may arouse its passions and cause it to take vengeance in cruel fashion. Again, even when it is untaunted by such conduct, the occupant as a means of attaining ultimate success in its major conflict may, under plea of military necessity, and regardless of conventional or customary prohibitions, proceed to utilize the inhabitants within its grip as a convenient means of military achievement. The German deportations of Belgians in 1916, will never cease to be an illuminating instance.

The self-restraint and discipline of belligerent forces occupying enemy territory are variable qualities which must be expected greatly to differ in the various armies that are employed by the members of the international society to control and administer what has been won by the sword.¹ This circumstance must emphasize the insufficiency of checks or restrictions laid down in multi-partite conventions such as those concluded at the Hague in 1899 and 1907, unless the

⁸ Sir Frederick Pollock, "What is Martial Law?" *Law Quar. Rev.*, XVIII, 152, 156. See, also, W. S. Holdsworth, "Martial Law Historically Considered," *id.*, 117; H. Erle Richards, "Martial Law," *id.*, 133; Cyril Dodd, "The Case of Marais," *id.*, 143; Charles Fairman, *The Law of Martial Rule*, Chicago, 1930; Edward S. Corwin, "Martial Law, Yesterday and Today," *Pol. Sc. Quar.*, XLVII, 95.

See, also, in this connection, W. E. Birkhimer, *Military Government and Martial Law*, Part II, 371-580; dictum of Chase, Chief Justice, in *Ex parte Milligan*, 4 Wall. 2, 141, 142, and Comment thereon in *Rules of Land Warfare*, 1917, No. 14, note 1; *Johnson v. Jones*, 44 Ills. 142, 153-155; Lawrence B. Evans, *Leading Cases on Int. Law*, 110, note.

¹ Even Japan itself is reported to have been dismayed by the lack of discipline which was displayed by its forces as they gained control over Chinese soil at the close of 1937.

prohibitions be accentuated and excuses for ignoring them be greatly minimized or eliminated, and unless also, the forces of the occupant be definitely advised concerning what is enjoined. Even such safeguards may prove insufficient unless by some process there is brought home to the sovereign of the occupant a sense of the injury to itself, through loss of prestige, popular opposition to its cause in neutral countries, and the goading of the enemy to retaliation, that are to be anticipated from the lawless treatment of a defenseless people. As yet, the consolidation and applicability of such elements so as to make them a potent deterrent of belligerent conduct have not been effected. The resourcefulness of the members of the international society is, therefore, taxed, as in relation to other phases of armed conflicts, to devise and render effective practical measures that shall restrain belligerent offenders. Otherwise it must be expected that belligerent occupation will oftentimes be accompanied by lawlessness which the occupant may indulge in with relative impunity. With an international law which, especially in its conventional form, roughly and vaguely and inadequately proclaims restrictions, and with the propensities of particular entities as belligerents clearly visualized, there is reason enough for civilization to resolve that some States must never again be permitted to reach the point where they can safely occupy hostile territory, or even safely embark upon war. Yet such a resolution may not, however, completely remove the need of overhauling the law of belligerent occupation for the common good.

TITLE H

MARITIME WAR

1

BELLIGERENT FORCES

a

§ 703. **Private Non-commissioned Vessels.** At the time of the American Revolution it was accepted doctrine that the offensive operations in a maritime war should be undertaken solely by forces commissioned by the governments of the opposing belligerents.¹ This conclusion was the outgrowth of an experience of many centuries during which the conduct of hostilities had been left to private agencies not clothed with formal public authority and unfettered by restraint.² When, however, a non-commissioned private ship captured an enemy vessel which attacked it, the proceeding was regarded as lawful,³ although the absence of a commission was deemed to prevent the captor from claiming any interest in the prize.⁴ Even though the non-commissioned ship took the offensive and effected a capture, the impropriety of its conduct in the light of domestic regulations was not deemed by the court of the captor to be a circumstance upon which a claimant could rely as a means of preventing condemnation.⁵ This fact did not justify the conclusion that no principle of international law was violated

§ 703.¹ According to a resolution of the Continental Congress, Nov. 25, 1775, it was declared that "no Master or Commander of any vessel shall be entitled to cruize for or make prize of any vessel or cargo before he shall have obtained a commission from the Congress or from such person or persons as shall be for that purpose appointed in some one of the United Colonies." Journals of the Continental Congress, III, 373.

See, also, message of President Jefferson, Nov. 8, 1804, Richardson's Messages, I, 370, Moore, Dig., VII, 161; Iredell, J., in *Talbot v. Janson*, 3 Dall. 133, 160, Moore, Dig., VII, 161.

² See Sir Travers Twiss, *Law of Nations*, Part II, §§ 74-76, in which is given an account of the early voluntary associations of merchants acting as police of the high seas and the gradual assumption of control over such associations by sovereign princes. Also Ernest Nys, *La Guerre Maritime*, 22-25.

³ See Marshall, Chief Justice, in *The Nereide*, 9 Cranch, 388, 426, 428.

See, also, *Private Vessels Defensively Armed*, *infra*, § 709.

⁴ See *The Dos Hermanos*, 10 Wheat. 306, where the capture was made in 1814, by a purser of the Navy, in a barge armed and fitted out to cruise, but not regularly attached to the Navy, and in which case Chief Justice Marshall declared: "It is, then, the settled law of the United States, that all captures by noncommissioned captors, are made for the Government; and since the provisions in the prize acts, as to the distribution of prize proceeds, are confined to public and private armed vessels, cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present, must be in the nature of salvage for bringing in and preserving the property." 310.

See, also, *The Melomane*, 5 Ch. Rob. 41.

⁵ *Story*, J., in *The Dos Hermanos*, 2 Wheat. 76, 99; *The Amiable Isabella*, 6 Wheat. 1, 66.

when a private non-commissioned ship took the offensive against a vessel of the enemy,⁶ a view which the Supreme Court of the United States is not known to have sanctioned, and in which American statesmen of the present day would be reluctant to acquiesce.⁷

When the United States declared its independence, States were agreed that in the prosecution of a maritime war a sovereign might not unlawfully utilize private forces, provided they were duly clothed with public authority. Experience proved, however, that such forces, howsoever commissioned, wrought grievous harm so long as they remained unchecked by public control. The nineteenth century witnessed, therefore, a struggle among interested States to cause the abandonment of such procedure. The relation of the United States thereto deserves attention.

b

§ 704. **Privateers.** A privateer may be described as an armed vessel privately owned, controlled and officered, and commissioned by a belligerent State to commit hostile acts against enemy ships.¹ Thus the mere arming of a merchant vessel for defensive purposes in time of war does not suffice to convert it into such a craft.²

⁶ In his *dissenting* opinion in the case of *Brown v. the United States*, 8 Cranch, 110, at 133, Story, J., declared: "I am perfectly satisfied, that the position is well founded, that no subject can legally commit hostilities, or capture property of an enemy, when, either expressly or constructively, the sovereign has prohibited it. But suppose, he does, I would ask, if the sovereign may not ratify his proceedings; and thus, by a retroactive operation, give validity to them? Of this, there seems to me no legal doubt. The subject seizes at his peril, and the sovereign decides, in the last resort, whether he will approve or disapprove of the act. *Thorshaven*, 1 Edw. Adm. 102." See *dissenting* opinion of same Justice, in *The Nereide*, 9 Cranch, 388, 449.

See, also, Abdy's Kent, 2 ed., 225-227; Dana's Wheaton, § 357.

⁷ "A private vessel engaged in seeking enemy naval craft, without such a commission or orders from its government, stands in a relation to the enemy similar to that of a civilian who fires upon the organized military forces of a belligerent and is entitled to no more considerate treatment." Memorandum of Department of State on Status of Armed Merchant Vessels, Mar. 25, 1916, For. Rel. 1916, Supp., 244, 248.

§ 704. ¹ See, generally, Henry Brongniart, *Les Corsaires et la Guerre Maritime*, Paris, 1904; George Coggeshall, *History of American Privateers and Letters of Marque*, New York, 1861; Georges Leroy, *La Guerre Maritime, Les Armements en Course*, Paris, 1900; Edward Stanton Maclay, *History of American Privateers*, New York, 1899; G. F. de Martens, *Essay on Privateers, Captures and Recaptures*, translated from the French by T. H. Horne, London, 1801; Theodore Roosevelt, *History of the Naval War of 1812*, New York, 1882; E. P. Statham, *Privateers and Privateering*, London, 1910.

See, also, documents in Moore, Dig., VII, 535-583; Dana's Wheaton, Dana's Note No. 173; Francis H. Upton, *Law of Nations Affecting Commerce during War*, New York, 1863, 176-188; Sir Travers Twiss, *Law of Nations*, §§ 176-188.

Declares Prof. Moore: "The term 'letter of marque,' though originally indicating the commission issued to a privateer, came in the course of time to be applied almost exclusively to a trading vessel that was authorized to make reprisals, whether in peace or in war. The term 'privateer' was reserved for a vessel which, although privately fitted out, was employed solely as a cruiser. Hamilton, therefore, in his circular of Aug. 4, 1793, said. "The term privateer is understood not to extend to vessels armed for merchandise and war, commonly called with us *letters of marque*, nor, of course, to vessels of war in the immediate service of the government of either of the powers at war." Moore, Dig., VII, 536, *citing* Am. State Pap., For. Rel., I, 140.

² Mr. Jefferson, Secy. of State, to Mr. Morris, Aug. 16, 1793, Am. State Pap., For. Rel., I, 167, Moore, Dig., VII, 536.

The authority of a privateer depends altogether upon the extent of the commission issued to it. The Thomas Gibbons, 8 Cranch, 421.

In the War of the Revolution, and in that of 1812, the United States made vigorous and effective use of privateers. The utilization of the existing merchant marine as commerce destroyers served to minimize the weakness on the seas of a State relatively deficient in naval power, and to afford profitable employment for large numbers of seamen otherwise impoverished in consequence of war; for the privateer was allowed to share the fruits of its captures in return for its service to the State.³ Thus the right to resort to privateering, in spite of the evils necessarily attending it,⁴ was deemed of substantial defensive value. It was natural, therefore, that American statesmen, prior to the Civil War, were reluctant to acquiesce in foreign proposals to abandon the practice, unless assured that the American merchant marine would, in the event of war, be exempt from attack by belligerent naval vessels.⁵ The proposals emanating from England and

"The fact that the commander of a private armed vessel is an alien enemy does not invalidate a capture made by it." Moore, Dig., VII, 538, *citing* *The Mary and Susan*, 1 Wheat. 46.

Numerous early treaties of the United States made provision that nationals of the one contracting party should not apply for or take any commission or letters of marque from the enemy of the other contracting party, for the purpose of arming any ship as a privateer against that other party, and that any person who should take letters of marque would be treated as a pirate. See, for example, Art. XXI, treaty of amity and commerce with France, Feb. 6, 1778, Malloy's Treaties, I, 475; Art. XXIII, treaty with Sweden, April 3, 1783, *id.*, II, 1733; Art. XX, treaty with Prussia, Sept. 10, 1785, *id.*, II, 1483. A treaty with Peru as recent as Aug. 31, 1887, contained a similar prohibition. *Id.*, II, 1439.

In certain treaties provision was made limiting narrowly the privileges to be enjoyed in the ports of one contracting party by privateers operating against the other. See, for example, Art. XXIV, treaty with Venezuela, Aug. 27, 1860, *id.*, II, 1853; Art. XXII of the treaty of amity and commerce with France of Feb. 6, 1778, *id.*, I, 475; See, in this connection, Mr. Pickering, Secy. of State, to Mr. Pinckney, Jan. 16, 1797, Am. State Pap., For. Rel., I, 559, 565, Moore, Dig., VII, 546.

Art. XXV of the treaty of commerce with Salvador, Dec. 6, 1870, contained the interesting provision that in the event of war between the two contracting parties, "hostilities shall only be carried on by persons duly commissioned by the Government, and by those under their orders, except in repelling an attack or invasion, and in the defense of property." Malloy's Treaties, II, 1559.

³ See George Coggeshall, *History of American Privateers*, introduction, xliii, *quoting* statement of Mr. Jefferson, dated July 4, 1812, Moore, Dig., VII, 548.

See instructions issued by the Continental Congress to the commanders of private ships or vessels of war commissioned to make captures of British vessels and cargoes, Apr. 4, 1776, *Journals of the Continental Congress*, IV, 253; also instructions of President Madison to *Private Armed Vessels* in 1812, 2 Wheat., Appendix, 80, 81. Respecting the latter instructions, see *The Thomas Gibbons*, 8 Cranch, 421; *The Mary and Susan*, 1 Wheat. 46.

⁴ Declared Woolsey: "The system of privateering is attended with very great evils. (1) The motive is plunder. It is nearly impossible that the feeling of honor and regard for professional reputation should act upon the privateersman's mind. And when his occupation on the sea is ended, he returns with something of the spirit of a robber to infest society. Add to this that it is by no means certain that the motive of plunder or booty can be long endured in the international law of Christian nations. (2) The control over such crews is slight, while they need great control. They are made up of bold, lawless men, and are where no superior authority can watch or direct them. The responsibility at the best can only be remote. The officers will not be apt to be men of the same training with the commanders of public ships, and cannot govern their crews as easily as the masters of commercial vessels can govern theirs. (3) The evils are heightened when privateers are employed in the execution of belligerent rights against neutrals, where a high degree of character and forbearance in the commanding officer is of special importance." Int. Law, 6 ed., § 128, Moore, Dig., VII, 547.

⁵ See, for example, Mr. Buchanan, Minister to Great Britain, to Mr. Marcy, Secy. of State, March 24, 1854, H. Ex. Doc. 103, 33 Cong., 1 Sess., 10-11, Moore, Dig., VII, 550; President Pierce, Annual Message, Dec. 4, 1854, Richardson's Messages, V, 276, Moore, Dig., VII, 551; Mr. Marcy, Secy. of State, to Count Sartiges, French Minister, July 28, 1856, Brit. and For. State Pap., LV, 589, 591, Moore, Dig., VII, 552.

France in the course of the Crimean War were, moreover, attributable to self-interest.⁶

The United States was unwilling to accede to the Declaration of Paris of April 16, 1856, Article I of which declared that privateering was abolished,⁷ unless there was added the broader provision abolishing generally the right to capture on the high seas enemy private property, other than contraband articles.⁸ Diplomatic negotiations initiated by President Pierce to secure acceptance of the desired amendment were halted by his successor, President Buchanan. Upon the outbreak of the Civil War, Secretary Seward, fearing lest the Confederate Government might commission alien privateers to prey upon the commerce of the United States, undertook to obtain the acceptance by certain European States of treaties declaratory of the provisions of the Declaration of Paris, and without the Pierce amendment.⁹ Negotiations with France and Great Britain failed, owing to qualifying declarations sought to be attached by their respective Governments, disavowing an intention to undertake an engagement of a nature calculated to implicate them directly or indirectly in the "internal conflict" then existing in the United States.¹⁰

An Act of Congress of March 3, 1863, empowering the President to issue letters of marque and reprisal was, according to Secretary Seward, "a weapon of national defense," not to be employed unless the Confederates were successful in commissioning privateers in Europe.¹¹ That weapon was not, however, used during the Civil War.¹²

⁶ According to Sir Travers Twiss a main object of those two allied Powers, in their war against Russia in 1854, "was to put an end to the practice of belligerents issuing letters of marque and reprisals to the subjects of neutral States." He quotes a *mémoire* of M. Drouyn de Lhuys to the effect that "What influenced especially the English Government was the fear of America inclining against us, and lending to our enemies the coopération of her hardy volunteers. The maritime population of the United States, their enterprising marine, might furnish to Russia the elements of a fleet of privateers, which, attached to its service by letters of marque and covering the seas with a network, would harass and pursue our commerce even in the most remote waters. To prevent such a danger the cabinet of London held it of importance to conciliate the favorable disposition of the Federal Government." *Belligerent Rights*, etc., London, 1884, quoted in Moore, Dig., VII, 538, 539.

⁷ For the text of the declaration see Hertslet's Map of Europe by Treaty, II, 1282, Moore, Dig., VII, 561, 562.

See H. W. Malkin, "The Inner History of the Declaration of Paris," *Brit. Y.B.*, 1927, 1.

⁸ President Pierce, Annual Message, Dec. 2, 1856, Richardson's Messages, V, 412, Moore, Dig., VII, 563. The language of the amendment proposed by the United States was: "And that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent, except it be contraband." *Id.*, 565. See, also, statement in Moore, Dig., VII, 565, 566, and documents there cited.

⁹ Mr. Seward, Secy. of State, circular to the American Ministers in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy and Denmark, April 24, 1861, Dip. Cor. 1861, 18, Moore, Dig., VII, 570.

¹⁰ Dip. Cor. 1861, 215-239, Moore, Dig., VII, 574-579, respecting negotiations with France; Dip. Cor. 1861, 95-100, 108-110, 112-114, 120-123, 125-130, Moore, Dig., VII, 579-583, respecting negotiations with Great Britain.

¹¹ Mr. Seward, Secy. of State, to Mr. Adams, Minister to Great Britain, March 9, 1863, Dip. Cor. 1863, I, 141, Moore, Dig., VII, 556; Same to Mr. Dayton, Minister to France, April 24, 1863, Dip. Cor. 1863, I, 662, Moore, Dig., VII, 557.

¹² Dana's Wheaton, Dana's note No. 173, in which it is said: "The rebel government offered its letters of marque; but as nearly all the maritime powers had warned their subjects that if they served as privateers in the war, their Governments would not interfere to protect them, and as the United States had threatened to treat such persons as pirates, and the naval power of the United States was formidable, no avowedly foreign private armed

Neither the United States nor Spain (also not then an adherent to the first Article of the Declaration of Paris) resorted to privateering in the war of 1898.¹³

In the Oxford Manual of Naval War adopted by the Institute of International Law in 1913, it is declared that "privateering is forbidden."¹⁴ The United States is not disposed to challenge that statement as declaratory of international law, for the following reasons: (a) that it has itself become a formidable naval power contemplating reliance in time of war upon its public armed ships to maintain its rights on the seas; (b) that under existing conditions of maritime war the dangers attendant upon privateering are believed to be disproportional to the benefits obtainable therefrom; (c) that the evils characterizing the practice are more repulsive to society of the present day than to that of an earlier century; and (d) that the United States opposes generally the capture of enemy private property at sea, other than contraband of war.¹⁵

It is believed that the formal commissioning of private agencies to commit hostile offensive operations is essentially at variance with orderly procedure, and calculated even at the present time to produce flagrant and constant injustice. Public control is as necessary as public authority to render service by force and arms for a public cause honorable and just. The agencies on which a belligerent

vessels took letters of marque; and the ostensibly Confederate vessels were commissioned as of its regular navy. Mr. Seward instructed Mr. Adams to say to Lord Russell, that, if the United States made use of privateers under the Act [of Congress], it would be only to suppress the piracy of European gunboats fitted out and sent from their ports, in disregard of their obligations to the United States, to prey upon American commerce. Letter of July 12, 1862, U. S. Dip. Cor. 1862, p. 135. The provisions in the treaties of 1794 with Great Britain, and of 1778 with France, that the subjects of either, serving as privateers against the other, when the respective nations were at peace, might be treated as pirates, have expired, and they have not been renewed in the later treaties."

See "Insurgent Privateers in Foreign Ports," House Ex. Doc. No. 104, 37 Cong., 2 Sess.

See, also, Mr. Fish, Secy. of State, to Baron Gerolt, Prussian Minister, July 22, 1870, renewing the offer of the United States to accept the Declaration of Paris with the Pierce amendment, For. Rel. 1870, 217, Brit. and For. State Pap., LXV, 678. See, in this connection, statement in Moore, Dig., VII, 468-469, and documents there cited.

¹³ On April 23, 1898, Mr. Sherman, Secretary of State, telegraphed to Mr. Hay, Ambassador to Great Britain, that in the event of war with Spain the United States would not resort to privateering. For. Rel. 1898, 971.

See, also, Confidential Circulars to American Diplomatic and Consular Officers Abroad, April 15, 1898, For. Rel. 1898, 1169; Art. IV, of War Decree of Spain, April 23, 1898, taken from London *Gazette* of May 3, 1898, *id.*, 774, Moore, Dig., VII, 558.

Respecting the accession of Spain to the Declaration of Paris, Jan. 18, 1908, see Hertslet's Commercial Treaties, XXV, 1145.

It must be obvious that a belligerent commissioning a privateer assumes responsibility for illegal acts committed by the vessel to neutral States or their nationals. Such a belligerent, as a matter of domestic policy and for its own protection, may require a privateer to give bond as assurance of compliance with all domestic regulations, and may also revoke commissions fraudulently obtained or abused. Moore, Dig., VII, 543-544, and documents there cited; T. H. Horne, Compendium of Statute Laws and Regulations of the English Court of Admiralty Relative to Ships of War and Privateers, London, 1803, p. 10, note 3, *citing* 43 Geo. 3, c. 160, f. 12. See, also, resolution of the Continental Congress, April 3, 1776, Journals of Continental Congress, IV, 253.

¹⁴ Art. XII, *Annuaire*, XXVI, 612, J. B. Scott, Resolutions, 177.

"Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished." Mr. Lansing, Secy. of State, to the British and certain other Ambassadors and Ministers at Washington, Jan. 18, 1916, For. Rel. 1916, Supp. 146.

¹⁵ Report of the American Delegation to the Second Hague Peace Conference of 1907, For. Rel. 1907, II, 1160, 1161.

State relies to carry on its hostile operations it should never cease to direct as well as authorize, and to restrain as well as unloose.¹⁶

To quote the General Report of the Commission of Jurists to consider and report upon the revision of the rules of warfare, of February 19, 1923: "The use of Privateers in naval warfare was abolished by the Declaration of Paris, 1856. Belligerent rights at sea can now only be exercised by units under the direct authority, immediate control and responsibility of the State. This same principle should apply to aerial warfare. Belligerent rights should therefore only be exercised by military aircraft."¹⁷ Herein is authoritative intimation that what the Declaration of Paris declared to be abolished in 1856, is now generally acknowledged to have been relinquished as a belligerent right.

C

§ 705. **Vessels of War.** The vessel of war perfectly satisfies the requirement that public control should unite with public authorization to render legitimate the offensive use of a ship by a belligerent State. According to the Oxford Manual of Naval War, vessels of war, constituting part of the armed force of a belligerent State and, therefore, subject as such to the laws of naval warfare, are: (1) All ships belonging to the State, which, under the direction of a military commander and manned by a military crew, carry legally the ensign and the pennant of the national navy; (2) all ships converted by the State into vessels of war (in conformity with Articles 3-6).¹

In formulating a classification of public vessels, the Naval War College, in 1914, concluded that the term vessels of war should embrace "all vessels under public control for military or hostile purposes," to which was appended the statement "usually a public armed vessel under command of a duly commissioned officer having a crew under naval discipline."² This conclusion, like that of the Institute of International Law, placed in a single category the so-called fighting ships of a belligerent and those auxiliary thereto, and which participate also in the prosecution of war, such, for example, as colliers and transports.³

In the proclamation of the President, of May 23, 1917, embracing rules for the protection and maintenance of the neutrality of the Panama Canal, a "vessel of war" was, for the purposes thereof, defined as "a public armed vessel, under the command of an officer duly commissioned by the Government, whose name

¹⁶ See Naval War College, Int. Law Topics, 1906, 106.

¹⁷ Part II, Rules of Aerial Warfare, Chap. III, *Am. J.*, XXXII, *Official Documents*, 17.

§ 705. ¹ The language of the text is that of Article II, *Annuaire*, XXVI, 643, as translated in J. B. Scott, Resolutions of the Institute, 175, 176.

In the memorandum of the Department of State of Mar. 25, 1916, respecting armed merchantmen, a "belligerent warship" is defined as "any vessel which, under commission or orders of its government imposing penalties or entitling it to prize money, is armed for the purpose of seeking and capturing or destroying enemy property or hostile neutral property on the seas." For. Rel. 1916, Supp. 244. In a broad and untechnical sense any vessel engaging in hostile operations in behalf of a belligerent is a vessel of war. The definition fails, however, to make clear what the term vessel of war is supposed to signify in international law.

² Naval War College, Int. Law Topics and Discussions, 1914, 9-34.

³ See report of commission on the definition of the term "*Vaisseau Auxiliaire*," at the Second Hague Peace Conference, *id.*, 13-15, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 862-864.

appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy.”⁴ As distinct from a ship of such a character reference was made to an “auxiliary vessel,” which was defined as “any vessel, belligerent or neutral, armed or unarmed, which does not fall under the definition [of a vessel of war] which is employed as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea.”⁵

While in a broad sense any ship under the governmental control of a belligerent State and employed in its service may be fairly deemed to be a vessel of war, it will be seen that on principle not every ship within such a category should be treated in an identical manner when encountered by the enemy. Regardless of divergent practices, the public belligerent ship which is impotent to fight through lack of armament should not be dealt with as though it were a dreadnought. Hence there appears to be need of a fresh classification differentiating the fighting from the non-fighting public vessels of a belligerent, in case at least it be acknowledged that both are not to be treated alike by an enemy.⁶

d

Conversion of Volunteer, Auxiliary or Subsidized Vessels

(1)

§ 706. **In General.** Maritime States appear now to be agreed that a subsidized, auxiliary or volunteer vessel may be lawfully converted into a vessel of war without attaining the character commonly imputed to a privateer, provided formal control over the ship is retained by the belligerent which takes the vessel into its public service.¹ In 1898, during the war with Spain, the United States chartered and took possession of the S.S. *City of Paris*, which was armed and converted into the auxiliary cruiser *Yale*, and became a participant in the war. The vessel was commanded by a captain of the Navy, subordinate to whom were a lieutenant of the Navy, a marine guard of 25 enlisted men and some 269 other persons, “not commissioned by or regularly enlisted in the service of the United

⁴ Official Bulletin, Vol. I, No. 18, p. 5, Naval War College, Int. Law Documents, 1918, 243.

⁵ “A vessel fitted up and used exclusively as a hospital ship” was excepted from this definition.

⁶ See Public Unarmed Vessels, *infra*, § 740; also Public Armed Vessels, Certain Conclusions, *infra*, § 745.

The proclamation of May 23, 1917, failed to heed the important distinction between the armed and unarmed vessel by not excluding an armed ship from the auxiliary class. It should be observed, however, that that document was not designed to indicate the rights of opposing belligerents with respect to each other.

§ 706. ¹ See Naval War College, Int. Law Topics and Discussions, 1906, 105-124, in which it was stated by way of conclusion that “It is evident that the use, for all purposes of naval warfare, of auxiliary, subsidized, or volunteer vessels, regularly incorporated in the naval forces of a country, is in accord with general opinion and practice, and that this addition to their regular naval forces in time of war is contemplated by nearly all if not all the principal maritime nations. In fact auxiliaries have been so used in all recent naval wars.” (124.)

Concerning the plan proposed by Prussia in 1870, for the formation of a volunteer fleet, see Brit. and For. State Pap., LXI, 692-694; Hall, Higgins’ 8 ed., § 181; A. P. Higgins, War and the Private Citizen, 119-125.

States, but comprising the ship's company."² In 1906, the Naval War College declared that when a subsidized, auxiliary or volunteer vessel is used for military purposes it must be in command of a duly commissioned officer.³

The Hague Convention of 1907, relating to the conversion of merchant ships into warships, appeared to sanction the practice for which it made regulation. It was there provided that a merchant ship converted into a vessel of war cannot have the rights and duties accruing to such a vessel unless it is placed under the direct authority, immediate control and responsibility of the power whose flag it flies.⁴ The following requirements were also laid down: The converted ships must bear the external marks which distinguish the vessels of war of their nationality; the commander must be in the service of the State and duly commissioned by the competent authorities; his name must figure on the list of the officers of the fighting fleet; the crew must be subject to military discipline; every merchant ship converted into a vessel of war must observe in its operations the laws and customs of war; a belligerent which converts a merchant ship into a vessel of war must as soon as possible announce such conversion in the list of vessels of war.⁵ The Institute of International Law incorporated these provisions in its Oxford Manual of Naval War.⁶

The Naval War College found it possible to conclude in 1935, that "conversion of merchant vessels to warlike use is, therefore, now generally recognized by maritime States as lawful, and the only problem is one of degree of limitation on such conversion."⁷

(2)

§ 707. **Place of Conversion.** Because of disagreement among the signatory parties, neither the Hague Convention of 1907 nor the Declaration of London of 1909 purported to establish limitations as to the place where conversion should occur.¹ At the Second Hague Peace Conference of 1907, the United States offered

² See Moore, Dig., VII, 542-543; The Rita, 89 Fed. 763.

³ See Naval War College, Int. Law Topics and Discussions, 1906, 105-124, where it was said: "The objection to the continuance of privateering was largely due to the lack of government control over those engaged in the practice. This control is easily exercised over those aiding in military operations on land, because a representative of the government is usually at hand to direct the movements."

"An equal degree of control may be exercised in the case of auxiliary, volunteer, and subsidized vessels maintained by a government, officered and manned by the paid servants of that government, and operated under its direction." *Id.*, 106.

⁴ See For. Rel. 1907, II, 1250; *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 647.

Concerning the convention, see Report of H. Fromageot to the Conference, *id.*, I, 238-245; J. B. Scott, Reports to Hague Conferences, 592; G. G. Wilson, "Conversion of Merchant Ships into War Ships," *Am. J.*, II, 271; A. P. Higgins, War and the Private Citizen, 130-136; Naval War College, Int. Law Topics and Discussions, 1912, 165-170; Report of the American Delegation to the Second Hague Peace Conference, For. Rel. 1907, II, 1160-1161; J. B. Scott, Hague Peace Conferences, I, 568-576.

⁵ Articles I-VI. Art. VII provided that the provisions of the convention should not apply except between the contracting powers, and then only if all the belligerents were parties to the convention. The convention was neither signed nor adhered to in behalf of the United States.

⁶ See Arts. III-VIII, *Annuaire*, XXVI, 643, 644, J. B. Scott, Resolutions, 176.

⁷ Int. Law Situations, 1935, 22.

§ 707.¹ For a summary of the divergent views expressed at the Second Hague Peace Conference of 1907, and at the International Naval Conference of 1908-1909, see Naval War

a proposition that in time of war no merchant ship should be transformed into a vessel of war save in the territorial waters of the State owning the vessel or in those over which it exercised by its military forces an effective control.² This proposal was renewed by the American delegation at the London Naval Conference of 1908-1909.³ The Institute of International Law declared, in 1913, that conversion may be accomplished by a belligerent "only in its own waters, in those of an allied State also a belligerent, in those of the adversary, or, lastly, in those of a territory occupied by the troops of one of these States."⁴ In 1913, the Naval War College concluded that the conversion of a private ship into a vessel of war should not take place "except in the waters of its own State or of an ally or in the waters occupied by one of these."⁵

The reasons advanced in support of the prohibition of conversion on the high seas have been chiefly derived from the equities of neutral States. In order to enable it to fulfill its duties as such, a neutral is entitled to know the character of every foreign ship entering its waters.⁶ It finds its own conduct subjected to criticism if a belligerent merchantman, after enjoying unlimited sojourn and fullest opportunity for taking on board whatever is desired, is transformed into a vessel of war as soon as it puts to sea, and thereupon takes the offensive against the enemy.⁷ Again, the neutral merchantman in company with another of belligerent nationality and bent on apparently a similar voyage may suddenly be subjected to the assertion of belligerent rights by its companion and possibly captured by it.⁸ The exercise of the important right of visit and search to which

College, Int. Law Topics and Discussions, 1912, 162-190; A. P. Higgins, War and the Private Citizen, 136-159; Hague Peace Conferences, 312-321; Charles Dupuis, *Le Droit de la Guerre Maritime d'après les Conférences de la Haye et de Londres*, Paris, 1911.

See Report of American Delegates to Second Hague Peace Conference, For. Rel. 1907, II, 1160; J. B. Scott, Hague Peace Conferences, I, 568-576; Report of H. Fromageot to the Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 238-245, J. B. Scott, Reports to Hague Conferences, 592.

² *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 1137, Naval War College, Int. Law Topics and Discussions, 1912, 164; J. B. Scott, Reports to Hague Conferences, 614.

³ *Proceedings International Naval Conference*, Misc. No. 5, 1909, Cd. 4555, p. 268.

⁴ Art. IX, J. B. Scott, Resolutions, 176, *Annuaire*, XXVI, 612. For the discussion concerning this Article, *id.*, 511-514.

⁵ Naval War College, Int. Law Topics and Discussions, 1913, 148. It was also declared that "A vessel converted into a ship of war retains this character to the end of the war," and that "these provisions do not apply except between contracting powers, and then only if all the belligerents are parties."

⁶ *Reconversion*. — At The Hague Conference of 1907 it was proposed that a vessel converted from a private vessel into a public vessel should remain a public vessel during the war. This proposition was advanced by Austria-Hungary. Japan did not wish the right of reconversion to be denied, but was willing to propose that both conversion and reconversion be limited to ports under national jurisdiction. *Deuxième Conférence Internationale de la Paix*, III, pp. 745, 1014. The question of conversion and reconversion was again discussed at the International Naval Conference in 1908-1909, but no agreement could be reached." (*Id.*, 150.)

See, also, Art. X of the Oxford Manual, *Annuaire*, XXVI, 612, J. B. Scott, Resolutions, 176.

⁷ Summary of Naval War College, Int. Law Topics and Discussions, 1906, 123, 124.

⁸ See statement of Lord Reay, of the British delegation at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 822; Naval War College, Int. Law Topics and Discussions, 1912, 166.

⁹ "In the days of privateering merchant ships took into consideration the possibilities of being met by privateers, but under the modern claims they would be exposed to visit and search by ships known by the neutral to be actually engaged in a regular mercantile line, and such ships might have been sailing in company with neutral merchant ships till a favorable

the neutral ship is bound to submit should not, it is urged, be entrusted to any vessel not known to the neutral State to be a public ship of a belligerent. Any further limitation of the security of peaceful commerce, or of the freedom of neutral vessels to navigate the seas, is doubtless opposed (as Great Britain has declared) to the general interests of neutral States.⁹

Continental European States have, on the other hand, asserted with boldness and tenacity the right to effect conversion on the high seas. France, Germany and Russia have been the chief advocates. It is said that denial of the alleged right is an infringement of the supremacy or sovereignty of a State over its own ships.¹⁰ It is contended that if a belligerent may justly convert into its own naval service on the high seas a vessel there captured from the enemy, it may with equal logic convert its own merchantmen into vessels of war on those seas.¹¹ It is maintained that vessels thus converted do not become privateers, that they subject neutral ships to no hardships not capable of lawful imposition by a vessel of war, and that they oppose no interference with legitimate neutral commerce.¹² It is asserted, moreover, that the unfettered exercise of the right of conversion is a part of the law of nations.¹³

On August 4, 1914, the British Chargé d'Affaires at Washington informed the Secretary of State that Germany favored the policy of converting her merchant vessels into armed ships on the high seas, that it was probable, therefore, that attempts would be made to equip and despatch merchantmen for such conversion from the ports of the United States, and that His Majesty's Government would hold the United States Government responsible for any damages to trade

moment came for them to throw off their peaceful character and assume the guise of cruisers. Such ships also which left their own country with the intention of being ultimately converted might continue to pass from one neutral port to another halfway around the world, receiving everywhere the hospitality and treatment of a merchant ship, staying as long as they liked, running in to avoid capture by the enemy's cruisers, taking in unlimited supplies of fuel and food, and so passing on till they reached a favorable point where their belligerent character could be assumed, while using neutral ports as veritable bases of operations." A. P. Higgins, *War and the Private Citizen*, 142-143.

Concerning the commissioning of the *Smolensk* and *Peterburg* of the Russian volunteer fleet in the Red Sea, in 1904, after their passage through the Dardanelles as merchantmen, and the subsequent careers of those vessels, see Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 138-142; A. P. Higgins, *War and the Private Citizen*, 124-126; Smith and Sibley, *Int. Law as applied in the Russo-Japanese War*, 40-48; *Naval War College, Int. Law Topics and Discussions*, 1906, 119, 120; L. A. Atherley-Jones, *Commerce in War*, 541-543.

⁹ See preparatory memorandum of Great Britain on the points enumerated in program of London Naval Conference of 1908, *Correspondence and Documents, International Naval Conference*, Misc. No. 4, 1909, Cd. 4554, p. 10; *Naval War College, Int. Law Topics and Discussions*, 1912, 187, 188.

¹⁰ See view of Mr. Ernest Renault at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 824.

¹¹ Statement of Col. Ovtchinnikow, of the Russian Admiralty, at the Second Hague Peace Conference, *id.*, 822; *Naval War College, Int. Law Topics and Discussions*, 1912, 166. See, also, Statement of Baron Taube, representing Russia, at the London Naval Conference, *Proceedings International Naval Conference*, Misc. No. 5, 1909, Cd. 4555, p. 263; *Naval War College, Int. Law Topics and Discussions*, 1912, 178.

¹² See Exposition by Herr Kriege in behalf of Germany, at London Naval Conference, *Proceedings International Naval Conference*, Misc. No. 5, 1909, Cd. 4555, p. 264; *Naval War College, Int. Law Topics and Discussions*, 1912, 179. See, also, A. P. Higgins, *War and the Private Citizen*, 139.

¹³ Report of British delegates to London Naval Conference, *Correspondence and Documents, International Naval Conference*, Misc. No. 4, 1909, Cd. 4554, p. 101; *Naval War College, Int. Law Topics and Discussions*, 1912, 189, 190.

or shipping, or injury to British interests generally, which might be caused by such vessels having been equipped at, or departing from ports of the United States.¹⁴ In denying that the British communication was expressive of a correct statement of the responsibility of the United States, Secretary Bryan declared in the course of his response of August 19, 1914:

The question of the place where the belligerent right of conversion may be exercised, difficult in itself, is complicated by the fact that there has been a difference of opinion among the maritime States parties to the present war, and that at the conferences, to which reference has been made, the British delegation stated that there was no rule of international law on the question. Germany and Austria-Hungary insisted at the conferences upon the right to convert merchant vessels upon the high seas. France and Russia, allies of Great Britain in the present war, likewise insisted upon the right so to convert. Great Britain and Belgium, intimately associated with France and Russia in the prosecution of hostilities against Germany and Austria-Hungary, opposed the right of conversion on the high seas at the Second Hague Conference, where both these nations were represented; and at the London Naval Conference, to which Belgium was not invited and in which it did not participate, Great Britain maintained its previous attitude. It is thus seen that the right to convert merchant vessels upon the high seas was asserted in international conferences by four of the maritime countries now at war and that two of the maritime nations now at war opposed this contention. It is further seen that the maritime nations at war with Germany and Austria-Hungary are evenly divided on this question.¹⁵

It was added that the Department of State deemed it inexpedient to announce a policy as to what measures it would take in a contingency which had not arisen, and that it might well content itself, as far as concerned the instant matter, with an acknowledgment of the British note.

It may be noted that according to Article 9 of the Rules of Aerial Warfare prepared by the Commission of Jurists in 1923, "a belligerent non-military aircraft, whether public or private, may be converted into a military aircraft, provided that the conversion is effected within the jurisdiction of the belligerent State to which the aircraft belongs and not on the high seas."¹⁶

¹⁴ For. Rel. 1914, Supp., 593.

¹⁵ *Id.*, 599, 600, where it was added: "At the Second Hague Conference, the British delegation, opposing conversion on the high seas, stated that there was no rule of international law on the question; that in its carefully prepared memorandum presented to the powers invited to the London Naval Conference, the British Government held that 'no general practice of nations has prevailed in the past on this point from which any principles can be deduced and formulated as the established rules of international law. So far as can be ascertained there are no precedents on the subject.'"

¹⁶ *Am. J.*, XXXII, *Official Documents*, 15. In its General Report the Commission declared in this connection: "The subject of the article is one of some difficulty and one which has in times past been fruitful of discussions and disagreements in connection with warships, the Powers not having been able to agree whether the act of sovereignty involved in the commissioning of a warship might properly be exercised on the high seas (see the preamble to Convention VII of 1907)."

"The proposal received the support of a majority of the delegations only, the French Delegation being unable to accept it." (*Id.*)

§ 708. **The Same.** Doubtless certain maritime States have asserted the right to effect conversion on the high seas not merely because of devotion to legal theory, or on account primarily of a lack of coaling stations in regions remote from their main territorial possessions, but rather by reason of the desire to facilitate the capture or destruction, immediately upon the outbreak of war, of the merchant marine of the enemy. It is the possibility of gaining numerous commerce destroyers in localities favorable for their operations as such, rather than public vessels not designed for or capable of offensive action, that is believed to have been an influential consideration. Any plan confining, therefore, the conversion at sea of private ships to vessels of the latter type would be deemed in some circles to destroy the practical value of what has been asserted as of right.¹ The desire, on the other hand, of certain opposing States to protect their own merchant fleets from sudden dangers otherwise to be encountered from enemy cruisers, may have been in fact as potent an influence as any concern for neutral interests, in arousing advocacy of the abandonment of the belligerent claim.² Such abandonment may not, however, be yielded so long as the right to seize or destroy the enemy's commerce afloat is the recognized possession of every belligerent. A maritime State approving the doctrine of unrestricted conversion might, nevertheless, regard it inexpedient to resort to such procedure in the course of a particular war, if convinced that the enemy had so armed its merchant marine by way of defense, that engagements therewith by suddenly improvised and converted cruisers would be neither profitable nor safe.

It should be observed that a practice which permits a belligerent to make predatory attacks on the commerce of the enemy, encourages the former to resort to every means to render the exercise of that right efficacious as a means of humbling the latter, thus tending to cause the arming of merchant fleets to cope with forces which they may successfully resist, and, in consequence, is productive, as will be seen, of hostile offensive as well as defensive operations undertaken by private ships unrestrained at times by public control.³

§ 708. ¹ See, in this connection, proposal of Lord Reay, at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 862-864; A. P. Higgins, *War and the Private Citizen*, 142; Naval War College, *Int. Law Topics and Discussions*, 1912, 162, 163.

² See speech of Mr. Winston Churchill, First Lord of the British Admiralty, in the House of Commons, Mar. 26, 1913, Official Report, 3 Sess., 30 Parl., House of Commons, 1913, Bd. 1 S. 1774, bis 1775, published in American White Book, *European War*, III, 169.

³ As the author has observed elsewhere: A State which anticipates that its merchantmen will be subjected to predatory attacks by the private ships of its enemy converted on every sea into naval vessels commissioned to engage in offensive operations, is strongly encouraged on its part to arm its own merchant marine as against the contemplated action. There is thus apparent a cause for the arming of fleets of merchant vessels in anticipation of war, and a strong temptation to the possessor thereof, when war actually begins, to employ them in hostile offensive as well as defensive operations. The State which advocates unrestricted conversion goads its prospective enemy to have recourse to conduct which in turn directly causes some other State which fears possible participation in the conflict, to preserve every ounce of naval tonnage by which it can effectively oppose either the armed merchantman or the converted cruiser. Assertion of the right of unrestricted conversion, if there be one, thus directly encourages the retention of submarine or other auxiliary craft. (*Am. J.*, XX, 237, 246.)

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§ 709. **Private Vessels Defensively Armed.** According to the views of the Department of State expressed in 1914, the practice of a majority of nations and the consensus of opinion by the leading authorities on international law, including many German writers, support the proposition that merchant vessels may arm for defense without losing their private character, and that they may employ such armament against hostile attack without contravening the principles of international law.¹ This statement is sustained by a mass of evidence indicative of a custom older than the law of nations itself.² At the time of the American Revolution and that of the War of 1812, the defensive arming of private ships was for the purpose of affording protection primarily against privateers. The heavily

§ 709. ¹ Mr. Lansing, Acting Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, Nov. 7, 1914, For. Rel. 1914, Supp., 613; Mr. Fish, Secy. of State, to Mr. Morrill, Feb. 8, 1877, 117 MS. Dom. Let. 54, Moore, Dig., II, 1070.

In a memorandum on the Status of Armed Merchant Vessels prepared by the Department of State in March, 1916, it is said, "When a belligerent warship meets a merchantman on the high seas which is known to be enemy owned and attempts to capture the vessel, the latter may exercise its right of self-protection either by flight or by resistance." For. Rel. 1916, Supp., 244. See *The Nereide*, 9 Cranch, 388; also memorandum from the British Embassy at Washington, Sept. 9, 1914, For. Rel. 1914, Supp., 607.

See opposing view of the German Foreign Office contained in Memorandum on the Treatment of Armed Merchantmen, Oct. 14, 1914, and attached as Exhibit 3, to memorandum of Feb. 8, 1916, enclosed in a communication of Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, Feb. 14, 1916, in which it is said: "The equipment of British merchant vessels with artillery is for the purpose of making armed resistance against German cruisers. Resistance of this sort is contrary to international law, because in a military sense a merchant vessel is not permitted to defend itself against a war vessel, an act of resistance giving the warship the right to send the merchant ship to the bottom with crew and passengers." For. Rel. 1916, Supp., 187. This view accords with that of Dr. George Schramm, counselor of the German Navy, and expressed in his treatise "*Das Prisengericht in seiner neuesten Gestalt*," Berlin, 1913, pp. 308-310, translated by T. H. Thiesing of the Library of Congress, and incorporated in "Armed Merchantmen," Senate Doc. No. 332, 64 Cong., 1 Sess., pp. 39, 40.

If the practice of maritime States be the criterion of propriety of conduct, it can hardly be said that a duty of non-resistance has been imposed upon the merchantman which has fallen in with an enemy cruiser. The lawfulness of resistance, however dangerous, is not to be questioned. It is immaterial whether the merchantman be unarmed or armed. It is believed that such a craft may utilize any available means to escape capture. She may ram her assailant as well as fire upon her. In maritime war, no attempt has been made to subject a belligerent merchantman on the high seas to the obligations of non-resistance such as are applied to individuals lacking so-called belligerent qualifications in land warfare. If, however, any analogy is to be drawn from that warfare, the privileges of a merchantman when attacked would appear rather to resemble those of a *levée en masse*.

See extended editorial comment by J. B. Scott, on the Execution of Capt. Fryatt, of the British steamer *Brussels*, by German authorities in July, 1916, because of having attempted to ram a German submarine with which that vessel was in contact the previous year, *Am. J.*, X, 865, and documents there cited; also Garner, *Int. Law and The World War*, I, §§ 261-264, and documents there cited.

See Art. XII, of Oxford Manual of Naval War, *Annuaire*, XXVI, 641, 646, J. B. Scott, *Resolutions*, 174, 177.

² See A. P. Higgins, "Armed Merchantmen," *Am. J.*, VIII, 705; same author, *Defensively Armed Merchant Ships and Submarine Warfare*, London, 1917; same author, *Studies in International Law and Relations*, Cambridge, 1928, Chap. XIII; speeches of Messrs. Sterling and Lodge in the Senate Feb. 18, 1916, Cong. Record, LIII, 3181 and 3184, respectively; Oppenheim, "*Die Stellung der feindlichen Kauffahrtschiffe im Seekrieg*," *Zeit. Volk.*, VIII, 154; Abdy's Kent, 3 ed., 227-229; C. Van Bynkershoek, *Law of War*, translation by P. S. Du Ponceau, Philadelphia, 1810, 161, 162; J. P. Hall, *Law of Naval Warfare*, 24. Also J. B. Scott, *Survey of Int. Relations between United States and Germany*, New York, 1917, 216-229, and cases there cited; "Armed Merchantmen," *Encyclopaedia of the Social Sciences*, II (1931), 201.

armed merchantman was, however, oftentimes able to offer formidable resistance to any type of craft commissioned by the enemy to engage in offensive operations. Because the possession of armament served in fact to minimize the dangers of capture, it was doubtless true, as Chief Justice Marshall declared in 1815, that "a belligerent merchant vessel rarely sails unarmed."³ As those dangers, in so far as they were to be apprehended from privateering, gradually disappeared, one reason for the maintenance of defensive armaments became proportionally weaker. Another reason in opposition to the practice grew out of the development of the modern vessel of war, which acquired an offensive power and defensive strength so far superior to that of any merchantman, howsoever armed, that an encounter between ships of the two types meant the certain destruction of the private vessel.⁴

This fact, as is noted elsewhere, had a significant bearing on the claim that unarmed belligerent merchantmen should enjoy immunity from attack at sight.⁵ Notwithstanding the growth of the habit of not arming defensively the private vessels of a belligerent, maritime States do not appear to have abandoned the right to do so. Certain naval codes, among which was that of the United States of 1900, emphasized the existence of the right,⁶ while the Oxford Manual of Naval War gave it fresh recognition in 1913.⁷ At the beginning of the twentieth century there seems to have been a readiness on the part of certain maritime powers to arm merchantmen, as a means of protection against dangers to which they might otherwise be exposed. Thus Great Britain, some time prior to The World War, made preparation to arm defensively certain vessels of its merchant fleet because, as has been observed, of the fear of the conversion on the high seas of private ships into commerce destroyers by a continental enemy; and in the course of that conflict it placed substantial armament on merchantmen as a means of frustrating the purposes and methods of German naval submarines.⁸

³ The *Nereide*, 9 Cranch, 388, 426; also The *Panama*, 176 U. S. 535; *Cushing, Administrator, v. United States*, 22 Ct. Cl. 1; *Hooper, Administrator, v. United States*, 22 Ct. Cl. 408; The *Schooner Jane v. United States*, 37 Ct. Cl. 24; discussion of these cases in J. B. Scott, *Survey of Int. Relations between United States and Germany*, 217-229.

⁴ See informal and confidential circular letter of Mr. Lansing, Secretary of State, to the diplomatic representatives at Washington of certain belligerent powers, Jan. 18, 1916, *For. Rel.* 1916, Supp., 146.

⁵ See *Attack, Armed Vessels, Merchantmen, infra*, §§ 742-743.

⁶ Article 10 (p. 3), which declares that "The personnel of merchant vessels of an enemy who, in self-defense and in protection of the vessel placed in their charge, resist an attack, are entitled if captured, to the status of prisoners of war." For the text of the code, see *Naval War College, Int. Law Discussions*, 1903, Appendix I. It should be observed that the code was withdrawn by the Navy Department's General Order No. 150, Feb. 4, 1904.

See, also, Chapter 2, Article 15, *Russian Regulations as to Naval Prizes*, July 15, 1895, *Hurst and Bray's Russian and Japanese Prize Cases*, I, append. A. p. 314.

⁷ Article XII, in which it is declared that a private as well as a public vessel may use force to defend itself "against the attack of an enemy vessel." *Annuaire*, XXVI, 644, J. B. Scott, *Resolutions*, 177.

⁸ See *Place of Conversion, supra*, §§ 707-708.

The British plan provided that the Admiralty should lend the guns, furnish the ammunition and provide for the training of members of the ship's company to form the gun crews, while owners of the vessel should pay the cost of the necessary structural conversion. Mr. Churchill's declaration, above cited, *American White Book, European War*, III, 169, 170.

See, also, *British Instructions for the conduct of armed merchantmen*, Oct. 20, 1915, *Naval War College, Int. Law Documents*, 1917, 153.

The United States, when it became a belligerent in 1917, likewise armed its merchant marine and with a like purpose.⁹

The exercise by a belligerent of the right to arm defensively its merchant vessels is doubtless associated with evils which maritime States have heretofore sought to remove from naval warfare.¹⁰ One of these is the commission of offensive operations by private ships oftentimes under private control.¹¹ When, however, belligerent vessels of every type, public or private, armed or unarmed, are without discrimination subjected to attack at sight by the submarines of a ruthless enemy, the propriety of recourse to such defensive measures is not to be questioned. It is said to be "common prudence in such circumstances, grim necessity indeed," to endeavor to destroy such submarines before they have shown their own intention.¹²

Under normal circumstances, however, it is believed that a belligerent should refrain from arming its merchantmen as a means of defending them from lawful capture by legitimate processes, and against an enemy not failing to respect the rights of unarmed private ships. The merchantman when equipped with a gun of great destructive force and long range becomes itself a valuable weapon of offense. The master is encouraged to engage any public vessel of the enemy, of inferior defensive strength, and of whatsoever type, which comes within range, and that irrespective of whether the latter initiates hostilities. As the merchantman by reason of its armament may be deemed by the enemy to be justly subjected to attack without warning, the master may fairly regard himself as on the defensive, whenever his ship is pursued by an enemy vessel of war, or even sighted by one. Thus the armed merchantman, although its chief mission be the transportation of passengers and freight, becomes necessarily a participant in the conflict. Lacking a formal commission from its government, it fails to satisfy the conditions imposed upon a ship converted into a naval auxiliary.¹³

⁹ It may be observed that the United States in March, 1917, while a neutral, placed an armed guard on American merchant vessels sailing through areas sought to be barred by Germany. See statement of the Department of State, to Argentine Embassy at Washington, Mar. 12, 1917, *For. Rel.* 1917, Supp., 1, 171.

¹⁰ Jonkheer W. J. M. van Eysinga, of Leyden University, in "Armed Merchantmen," *Int. Law Assn. Reports*, 1913-1915, translated by C. C. Rice, of Library of Congress, and published in "Armed Merchantmen," Senate Doc. No. 332, 64 Cong., 1 Sess., pp. 41-44.

¹¹ Mr. Lansing, Secretary of State, in informal and confidential communication to the diplomatic representatives at Washington of certain belligerent Governments, Jan. 18, 1916, *For. Rel.* 1916, Supp., 146.

¹² President Wilson, Address to the Congress, April 2, 1917, where he added: "They must be dealt with upon sight, if dealt with at all." *For. Rel.* 1917, Supp., 1, 195.

¹³ "Indeed, the development of armed merchantmen as an institution may lead to sorry consequences. As Mr. Surie, a captain in the Dutch Navy, has well said, they are not given any official character like that which it has been thought necessary to confer upon auxiliary cruisers, as the government does not even assume any responsibility for their actions; and yet their essential character is that of warships, in that they are not only armed but armed by the government itself." W. J. M. van Eysinga, in *Int. Law Assn. Reports*, 1913-1915, translated by C. C. Rice, in "Armed Merchantmen," Senate Doc. No. 332, 64 Cong., 1 Sess., p. 42.

With respect to the fallacy of the theory of arming merchantmen for defense against submarine attack, see Rear-Admiral W. S. Sims, "The Victory at Sea," *The World's Work*, XXXVIII, 488, 504 (September, 1919); same author, *The Victory at Sea*, New York, 1920, 33.

The Advisory Committee in aid of the American Delegation at the Washington Conference on the Limitation of Armament, 1921-1922, declared that in the World War "the merchant ship sank the submarine if it came near enough; the submarine sought and destroyed the

Nevertheless, it may be contended with force that in the light of methods pursued since the beginning of World War II, a recurrence of normal circumstances to which reference has just been made is not to be anticipated, that the use of submarines by some belligerents may be expected to reveal little deference for the law, and that accordingly, the "common prudence" to which President Wilson adverted in 1917, may again be deemed to necessitate the arming of American merchantmen.

2

BELLIGERENT MEASURES AND INSTRUMENTALITIES

a

§ 710. **The Special Objects of Maritime War — General Limitations Respecting Their Accomplishment.** The special objects of maritime war are said to be: The capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks, and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property and sea-borne commerce.¹

As the attainment of these objects is usually sought by operations at sea rather than on land, and under circumstances when the safety of human life or property encountered depends upon the retention of a means of keeping afloat, there is a constant problem peculiar to maritime warfare concerning the right to destroy those means and to invoke the aid of the law of gravity. The solution of the problem is, moreover, oftentimes complicated by the presence of neutral persons and property on belligerent ships, and by the projection into it of the equities of foreign interests. Thus the belligerent finds itself burdened with the constant duty not unnecessarily to destroy or injure human life. This obligation imposes caution and restraint upon a naval commander. He should not, for example, sink an enemy ship which has surrendered before removing its occupants to a place of safety. He should not sanction the killing or wounding of an enemy person who, having laid down his arms or having no longer a means of defense, has

merchant ship without even a knowledge of nationality or guilt. . . . When merchant ships met a belligerent submarine, with a strong probability of being sunk by that submarine, the law of self-preservation operated, and the merchant ship resisted by every means in its power. Defensive armament was almost sure to be used offensively in an attempt to strike a first blow. The next step was for each to endeavor to sink the other on sight." (Conference on Limitation of Armament, Senate Doc. No. 126, 67 Cong., 2 Sess., 274.) The Advisory Committee recommended the enactment of laws prohibiting the offensive arming of merchant vessels as well as their use of false flags.

"The only sound position seems to be that a vessel entitled to be treated as a merchant vessel both by neutral and belligerent shall have an unequivocal status. This can be based only upon a prohibition of armament, and then aircraft, submarines or other vessels of war in dealing with merchant vessels can find no justification for failure to observe the laws of war." (George Grafton Wilson, "Armed Merchant Vessels and Submarines," *Am. J.*, XXIV, 337, 338.)

§ 710.¹ The language of the text is that of Art. I of Stockton's Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 103. This code was withdrawn in 1904.

surrendered to the discretion of the captor. He should not declare that no quarter will be given. Nor should he permit his own forces to indulge in pillage or devastation.²

It will be found that accepted practice is marred by inconsistencies. It does not appear to be deemed illegal, for example, to attack without warning an unarmed and defenseless ship of the enemy, if wholly given over to a public service directly connected with the prosecution of the war, such as the transportation of a military force.³

Doubtless there are certain methods, the use of which is regarded as improper in warfare on sea as on land, and which, therefore, no belligerent should ever attempt to justify. Thus, practices which involve treachery are forbidden.⁴ The employment of certain instrumentalities should likewise be regarded as reprehensible. According to the Oxford Manual of Naval War, the use of poison is forbidden.⁵

While there are certain weapons and also methods, the use of which is either generally prohibited or looked upon with disapproval, it is rather the abuse of an agency or of a mode of procedure not deemed essentially lawless, which commonly affords ground for complaint. This is true, for example, with respect to the use of submarine automatic contact mines.

In passing judgment upon belligerent measures and instrumentalities, and upon the technical procedure incidental to both, it becomes necessary to bear in mind the special objects of maritime war, the defensive as well as offensive needs of a participant in the light of the potentialities of existing means of communication, transportation, propulsion and armament, the equities of neutrals and, above all, the unchanging dictates of humanity. Old rules of general acceptance, resulting from long struggles among maritime powers, although developed under conditions differing sharply from those now prevailing, still have their significance; but their authoritative value at the present time must depend upon whether observance of them serves to enhance respect for the principles of justice to which their origin was due.⁶

The present century has witnessed acknowledgment of the use of aircraft as appropriate instruments of maritime warfare.⁷ It becomes necessary, therefore,

² Arts. XVII and XVIII, Oxford Manual of Naval War, *Annuaire*, XXVI, 645, 646, J. B. Scott, Resolutions, 178.

³ See Attack; Public Unarmed Enemy Ships, *infra*, § 740.

⁴ Article XV, Oxford Manual of Naval War, *Annuaire*, XXVI, 645, J. B. Scott, Resolutions, 177.

See, also, Article XXIII, paragraphs b and f, of the Regulations Annexed to The Hague Convention of 1907, Respecting the Laws and Customs of War on Land, Malloy's Treaties, II, 2285.

The Naval War College has concluded that "the use of false colors by public vessels in war is prohibited." See Int. Law Topics and Discussions, 1906, 7-20.

⁵ Article XVI, *Annuaire*, XXVI, 645, J. B. Scott, Resolutions, 177.

The Naval War Code of 1900 declared that not even military necessity would permit the use of poison or the doing of any hostile act which would make the return of peace unnecessarily difficult. Naval War College, Int. Law Discussions, 1903, 103.

⁶ It is believed that the attitude of the United States should be specially observed. Its relation, both as a belligerent and neutral, to existing practices, should be noted. Its peculiar defensive problems, when at war, should be carefully weighed in connection with the formulation of any rules proposed for general acceptance.

⁷ See Naval War College, Int. Law Situations, 1930, 98-115.

to observe to what extent the users of aircraft as such instruments are to be deemed to be subject to obligations or rules growing out of, and designed to be applicable to the uses of treatment of ships that were incapable of making ascents, and which were never subjected to attacks from the air. The air forces of the United States are attached to both its navy and army; they are not operated as independent instrumentalities unassociated with either of those arms of the service.

b

§ 711. **Bombardment of Undefended Places — The Hague Convention of 1907.** The high purpose that has impelled States to endeavor to safeguard from naval bombardment particular objects such as unoffending persons, or property of which the preservation seemed to be of special importance, has been strangely thwarted by confusion of thought revealed in conventional devices that have been impervious to the realities of such attacks, and which have laid down restrictions yielding broad and undesirable latitude to the attacker. Because the naval bombardment of places that were in fact undefended was seen to produce great harm to helpless non-participants, tending to render the restoration of peace increasingly difficult, maritime States endeavored to agree to accept some prohibitions designed to establish desired safeguards, at least under circumstances when the equities did not appear to favor the freedom of the attacker.¹ It will be seen, however, that the principal and generally accepted test of the propriety of bombardment was whether the hostile place or objective was defended. This test was inadequate for the reason that it left exposed to attack persons or property within the category sought to be safeguarded, even when they were remote from and had no physical connection with the particular instrumentality employed by way of defense. It did not, moreover, take cognizance of the possible right of the bombarder to attack particular objects of which the destruction was of military importance when they happened to be located in an undefended place, and that regardless of the proximity to those objects of unoffending life and property. In a word, it failed wholly to indicate

§ 711.¹ The bombardment of Valparaiso by a Spanish squadron, Mar. 31, 1866, illustrated both of these evils. Moore, Dig., VII, 354-360, especially Gen. Kilpatrick, American Minister to Chile, to Mr. Seward, Secy. of State, April 2, 1866, Dip. Cor. 1866, II, 386, and Lord Clarendon, British Foreign Secy., to Sir J. Crampton, May 16, 1866, Brit. and For. State Pap., LVI, 986, 987. See, also, Naval War College, Int. Law Situations, 1901, 5-37.

Respecting the coastal warfare participated in by John Paul Jones in 1776, see Moore, Dig., VII, 343.

Concerning incursions of British naval forces at points on the coast of Chesapeake Bay in the War of 1812, Moore, Dig., VII, 344-346, and documents there cited.

The bombardment of Greytown by the U.S.S. *Cyane*, July 13, 1854, was not in the course of a war — a fact which does not, however, serve to mitigate the harsh features of that action. Moore, Dig., VII, 346-354, and documents there cited. See *supra*, § 588.

Concerning British-French discussions, 1882-1888, see Moore, Dig., VII, 360, 361; Naval War College, Int. Law Topics and Discussions, 1914, 70-73.

Concerning naval bombardments during the Russo-Japanese War, see Takahashi, International Law Applied to the Russo-Japanese War, 406-415; Hershey, International Law and Diplomacy of the Russo-Japanese War, 312-316.

See case of bombardment in Turco-Italian war, 1911-1912, mentioned in Naval War College, Int. Law Topics and Discussions, 1914, 91, 92, citing *La Marine dans la Guerre Italo-Turque*, 1911, translated by Lieut. Col. Morier, p. 25.

whether, on the one hand, a defended place might under various circumstances be entitled to immunity from attack, and whether, on the other hand, the presence in an undefended place of certain physical things might not warrant the bombardment thereof. It was not until the matter of aerial bombardment engaged the attention of interested States, that a sounder test of the propriety of belligerent action was gradually perceived. It then became apparent, and seems now to be acknowledged, that the propriety of the bombardment of any place or thing by any belligerent instrumentality, from air or sea or land, is not necessarily dependent upon the fact that it is defended, but rather upon the fact that it is or contains something of which the injury or destruction is of distinct military advantage to the attacker.² The conventional law concerning naval bombardment, formulated as it was, before the outbreak of World War I, is naturally impervious to the newer test, and hence is already a grotesque illustration of the ineptness of multi-partite arrangements that are heedless of the realities of the international life in seasons of war.

The effort of the Institute of International Law to ascertain and declare what should be the basis of immunity from attack, resulted in the adoption of certain rules at Venice in 1896.³

The First Hague Peace Conference of 1899 expressed the wish that the problem be referred to a subsequent conference for consideration.⁴ The Second Hague Peace Conference of 1907 assumed the task and concluded a Convention concerning Bombardment by Naval Forces in Time of War.

After adverting in the preamble to the expediency of subjecting naval bombardment to rules of general application which would safeguard "the rights" of the inhabitants and assure the preservation of the more important buildings, by applying the principles of the Regulations Respecting the Laws and Customs of War on Land, it was announced in Article I that "the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is forbidden."⁵ This provision was followed by the declaration that "a place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour." The objections to automatic submarine contact mines so anchored are due in part to the fact that they constitute a hidden danger tending to increase rather than diminish the horrors of war, and that an approaching fleet may be unable to direct its attack upon such defensive weapons which jeopardize its own safety.⁶ It is urged that a coast town defending itself by such a process of con-

² See Aspects of Aerial Bombardment, *supra*, § 663; Sieges and Bombardments, *supra*, § 656.

³ *Annuaire*, XV, 313, Moore, Dig., VII, 363; J. B. Scott, Resolutions, 131-133. See, also, Holland, Studies in International Law, 96-111.

⁴ *Conférence Internationale de la Paix*, III, 27, 28; Report of American Delegation to the First Hague Conference, For. Rel. 1899, 513, 520, Moore, Dig., VII, 364.

⁵ Malloy's Treaties, II, 2314.

⁶ Concerning the convention, see Report to the Conference by Prof. G. Streit, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 111-118; J. B. Scott, Reports to Hague Conferences, 696; Report of American Delegation to Second Hague Peace Conference, For. Rel. 1907, 1144, 1162; Naval War College, Int. Law Topics and Discussions, 1914, 68, 69; Chas. Dupuis, *Le Droit de la Guerre Maritime*, §§ 42-47; A. P. Higgins, Hague Peace Conferences, 352, E. Lemonon, *La Seconde Conférence de la Paix*, 503-525; J. B. Scott, "Bombardment by Naval Forces," *Am. J.*, II, 285; Hague Peace Conferences, I, 587-598;

cealment forfeits the right to claim immunity from attack. Although the declaration has aroused criticism, and is deemed in its present form unacceptable to the War College,⁷ it serves at least to suggest that the fact of defense may not always be indicative of the right of bombardment, and that a place, itself incapable of offering resistance, may not be shorn of the right to demand immunity by reason of the existence of defensive works outside of, yet not remote from, its own boundaries.⁸

§ 712. **The Same.** The United States with its extensive coast line on two oceans possesses, in close proximity to the sea, some unfortified cities which are nevertheless defended by fortifications in the immediate vicinity. It is conceivable that an enemy's fleet if equipped with guns of longest range and largest caliber might be able to bombard places behind these fortifications even if it encountered difficulty in silencing their batteries. The question of law as well as of power presents itself. Would, for example, a hostile squadron have the right to bombard Portland, Maine, because of the defenses on Cushing's Island and along the seaward ledges of Cape Elizabeth?

Both the American and Netherlands delegations at the Second Hague Peace Conference made proposals extending the prohibition to "unfortified" as well as "undefended" places,¹ but failed to secure their acceptance by the commission which drafted the convention.² Gen. den Beer Poortugael of the Netherlands drew a particular distinction between the defense of a coast and that of a town situated near the coast. "The defense of the coast might," he said, "necessitate firing on the instruments themselves of such defense, but a right of bombarding

Naval War College, Int. Law Documents, (Regulation of Maritime Warfare), 1925, 186-189.

The convention is reproduced in Section XV of the Naval Instructions Governing Maritime Warfare, of June 30, 1917. No. 100 thereof declares that: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

⁷ Naval War College, Int. Law Topics and Discussions, 1914, 83.

⁸ *Id.*, 83, 84.

France, Germany, Great Britain and Japan made reservation of paragraph 2, Article I, at signature of the convention, and maintained it at ratification. J. B. Scott, Reports to Hague Conferences, 908, 909.

Declares Westlake, "A place cannot be deemed undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open to the enemy to enter." Int. Law, 2 ed., II, 182. Also A. P. Higgins, Hague Peace Conferences, 351.

§ 712. ¹ For the texts of these proposals see J. B. Scott, Reports to Hague Conferences, 703 and 704, respectively; *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 655 and 656, respectively.

See, also, Article IV, U. S. Naval War Code of 1900, where the prohibition is extended to unfortified as well as undefended towns, villages or buildings.

² "We did not think it best to specify, as did the original propositions of the United States and The Netherlands, that the prohibition relates to undefended 'and unfortified' towns, etc. In the first place, it could be shown that the existence of fortifications does not of itself suffice to permit the bombardment of the place fortified if the fortifications are not defended; and secondly, every legitimate anxiety seems to be swept away by the provision of Article 2, which, even in the case of undefended towns, etc., concedes the possibility of directing a bombardment against them for the purpose of destroying by cannon fire, under certain conditions, military works, or military or naval establishments, and consequently any fortifications." Report of Mr. Streit to The Hague Conference from the Third Commission, J. B. Scott, Reports to Hague Conferences, 696, 698, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 113.

the town which the defense of the coast might indirectly serve, unless the town itself were defended, should not be granted.”³ The third Commission saw no objection to this manner of viewing the subject. It may be doubted, however, whether the convention, notwithstanding the views of the Commission which drafted it, offers adequate immunity against the bombardment of an unfortified town as a means of compelling the surrender of the defensive works on the ocean side of it. Nor do the provisions of Article II suffice for that purpose. It is believed that as a matter of obvious precaution the United States should endeavor to obtain general and definite acknowledgment that the bombardment of unfortified places even though defended by coastal fortifications not in close proximity thereto may be reprehensible, and should be forbidden when the defended places contain no object of which the immediate destruction is of military advantage to the enemy. As has been indicated above, the test of immunity from bombardment should not be made dependent upon the defenselessness of the area concerned.⁴ The right of an approaching fleet to bombard the coast defenses should not, therefore, be permitted to embrace the privilege of attacking an unfortified place for the mere sake of inducing the surrender of a detached and possibly remote instrument of its defense.

The Hague Convention excludes from the prohibition pertaining to the bombardment of undefended places certain specified objectives. Thus military works, military or naval establishments, depots of arms or war matériel, workshops or plants which could be utilized for the needs of the hostile fleet or army, as well as ships of war in the harbor are not included in the prohibition.⁵ The commander

³ Mr. Streit's report, as translated in J. B. Scott, Reports to Hague Conferences, 698-699. See, also, Naval War College, Int. Law Topics and Discussions, 1914, 76, 77.

It may be observed that Art. IV of the rules adopted by the Institute of International Law at Venice in 1896, provided that "The bombardment by a naval force of an open town, that is to say, one which is not defended by fortifications or by other means of attack or of resistance for immediate defense, or by detached forts situated near by, for example, at a maximum distance of from four to ten kilometers, is inadmissible except, etc." *Annuaire*, XX, 372, 373, J. B. Scott, Resolutions, 131, 132.

⁴ Art. XXV of the Oxford Manual of Naval War, adopted by the Institute of International Law in 1913, prohibits the bombardment of ports, towns, etc., "which do not defend themselves" (*qui ne se défendent pas*). *Annuaire*, XXVI, 647. The Naval War College in discussing this provision declared: "The prohibition against the bombardment of an undefended place is based upon the generally accepted principle of exemption of noncombatants. The changed phraseology prohibits bombardment of places which do not defend themselves, or which do not exercise a power of defense which they may possess. In actual practice, such a regulation may put the approaching fleet at a great disadvantage in some instances, placing it perhaps at the mercy of the commander of the place which it approaches. A fleet may approach a defended place. The place may have guns of a less range than the fleet or may have mines at a certain distance. The commander of the fleet knows the place is defended. He could compel the surrender of the place by his longer range guns. By implication bombardment is forbidden because no defense is offered. When the fleet comes within range of the shore guns, however, there is no obligation upon the commander on shore to refrain from attack which may sink or disable the fleet which, but for this regulation, would control the coast. If the regulation should be drawn in such fashion as to prohibit bombardment of places which, whether or not defended, agree to offer no defense or to refrain from hostile action against the fleet, the fleet and the shore forces are placed upon a footing more nearly equal." Int. Law Topics and Discussions, 1914, 82, 83.

⁵ Art. II.

Concerning Art. II, see comment of Mr. G. Streit, reporter, of the subcommittee on bombardment, to the Third Commission of The Hague Conference, Aug. 8, 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 342.

The Naval War College was of opinion, in 1914, that under the existing rules in regard to

of a naval force may destroy them with artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed. He is said to incur no responsibility for any unavoidable damage caused by a bombardment under such circumstances.⁶ If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is said to be understood that "the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible."⁷

The convention recognizes a right of bombardment of undefended places, if the local authorities, notwithstanding a formal summons made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. Such requisitions must, however, be proportional to the resources of the place, must be demanded in the name of the commander of the naval force, and, as far as possible, paid for in cash; otherwise they are to be evidenced by receipts.⁸ It is believed that the transportation of needed supplies, if within the resources of the place, would fall within the limits of fair requisition.⁹ The Naval War College concluded in 1914, that unless the whole convention be revised, the Article in regard to requisitions by naval forces should be retained.¹⁰ Bombardment for the non-payment of money contributions is wisely forbidden.¹¹

According to certain general provisions of the convention, steps must be taken by the commander of a bombarding naval force to spare, as far as possible, buildings devoted to public worship, art, science, or charitable purposes, his-

conversion, the presence in a belligerent port of vessels suited for conversion into vessels of war, may afford sufficient ground for bombardment unless satisfactory arrangements are made to guarantee that such vessels be not used for war purposes. *Int. Law Topics and Discussions*, 1914, 68, 69.

⁶ Art. II. See Report of Third Commission to the Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 114, J. B. Scott, Reports to Hague Conferences, 699.

⁷ Art. II. See Lauterpacht's 5 ed. of Oppenheim, II, 408, footnote 2, in relation to the action of Admiral Faravelli in attacking certain Turkish vessels of war in the port of Beirut on Feb. 25, 1912, in the course of the Turco-Italian War, in the light of the provisions of the Hague Convention.

According to the Naval War College, military necessity within the meaning of the convention applies to actions immediately "indispensable for securing the ends of the war, and which are lawful according to modern law and usages of war" and not of a nature "to make the return to peace unnecessarily difficult." *Int. Law Topics and Discussions*, 1914, 69, 87-93.

⁸ Art. III. See report of Mr. Streit, to the Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 115, 116, J. B. Scott, Reports to Hague Conferences, 696, 700.

According to the Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 106, the notice to be given is to be "explicit."

⁹ Such is the opinion of the Naval War College, *Int. Topics and Discussions*, 1914, 96. See critical discussion of Article III, *id.*, 95-99.

¹⁰ *Id.*, 96-98, where attention is called to the discussion of the matter by the Institute of International Law at Oxford, in 1913, *citing Annuaire*, XXVI, 237. The Oxford Manual of Naval War contains no provision as to bombardment for supplies.

¹¹ See Art. IV.

The original proposition of the United States provided that "The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden." *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 655, J. B. Scott, Reports to Hague Peace Conferences, 703.

toric monuments, hospitals and places where the sick or wounded are collected, on condition that such places are not used at the same time for military purposes.¹² It is made the duty of the inhabitants to indicate such monuments, edifices or places by visible signs.¹³ If the military situation permits, the commander of an attacking naval force is obliged, before commencing bombardment, to do his utmost to warn the authorities.¹⁴ Even when taken by storm, a town or place may not be pillaged.¹⁵

Few conventions which purport to lay down rules restricting the character of belligerent activities and to which the United States is a party, appear to be in greater need of revision than that which emanated from the Second Hague Peace Conference of 1907 and registered agreement respecting Bombardment by Naval Forces in Time of War.

c

Submarine Mines

(1)

§ 713. **In General.** General use of submarine mines is a comparatively recent development of maritime warfare.¹ The Russo-Japanese War furnished distressing instances where reliance upon such weapons wrought vast harm and palpable injustice to neutral persons and property.² Discussions at the Second Hague Peace Conference of 1907, revealed great divergence of views respecting the extent of the right of a belligerent to employ mines. The Convention Relative to the Laying of Automatic Submarine Contact Mines, emanating from the Conference, recorded what is believed to be an insufficient basis of agreement.³ The

¹² Art. V. Compare Art. XXVII, of Regulations annexed to Hague Convention Respecting Laws and Customs of War on Land, Malloy's Treaties, II, 2286.

¹³ Art. V, where it is specified that the visible signs "shall consist of large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white."

¹⁴ Art. VI. Concerning this Article see A. P. Higgins, Hague Peace Conferences; 356, also Report to the Conference from the Third Commission, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 117, 118, J. B. Scott, Reports to Hague Peace Conferences, 703.

Compare Art. XXVI, Regulations annexed to Hague Convention Respecting Laws and Customs of War on Land, Malloy's Treaties, II, 2286.

¹⁵ Art. VII. Compare Art. XXVIII, Regulations annexed to Hague Convention Respecting Laws and Customs of War on Land, Malloy's Treaties, II, 2286.

§ 713.¹ The inventor of the form of attack upon ships by purely underwater weapons is said to have been David Bushnell, a graduate of Yale College of the class of 1775, who made diligent efforts to utilize his devices in submarine attacks on British vessels in American waters during the War of the Revolution. Commander Murray F. Sueter, R. N., *The Evolution of the Submarine Boat, Mine and Torpedo*, Portsmouth, England, 1907, 262-292.

Submarine mines and torpedoes were used extensively during the Civil War. Capt. A. T. Mahan, U. S. N., *The Navy in the Civil War*, III, *The Gulf and Inland Waters*, concerning, for example, the destruction of the *Cairo* (116-118), and that of the *Tecumseh* (231, 232).

² *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 663; J. B. Scott, Reports to Hague Conferences, 657, indicating the burden placed upon China, and the loss of life suffered by its nationals in consequence of the employment of submarine mines in that war.

³ As the provisions of the convention were declared to be only applicable between contracting powers, and only if all the belligerents were parties to the convention (Article VII), the failure of Russia to give its ratification rendered the agreement technically inapplicable to the participants in The World War.

"The inconclusive discussions at the Second Hague Conference yielded a Convention (the

subject may thus be approached as one concerning which complete accord among maritime States is still lacking, and in relation to which, therefore, the consideration of underlying principles seems necessary. At the present time, that need is accentuated by the ability of a belligerent to lay mines by means of aircraft, and to produce the explosion of mines by electro-magnetic devices which cause the physical contact of a mine with the object of destruction. These factors serve to facilitate the use of mines and to enhance their danger to the safety of ships passing in proximity to them.⁴

The sowing on the high seas of submarine mines, whether anchored or unanchored, must on principle be normally regarded as a mark of contempt for the right of the neutral to traverse freely those seas, as well as for the duty of the belligerent not to attack without warning unoffending private ships of the enemy in similar places. It ignores the special claims of non-combatants, and is indifferent as to their sex or age. The right, therefore, to employ such devices against the vessels of an opposing belligerent would appear to depend, in the case of anchored mines, upon the effective and lawful control over the area where they are sown, and upon the sufficiency of the warning given to innocent shipping otherwise exposed to destruction. It would depend, in the case of unanchored mines, upon the use of weapons of such brief life, and with such scrupulous care, as to render negligible any dangers to be anticipated by unoffending vessels.

The assertion by a belligerent that it may not unlawfully sow mines within a particular area of the high seas and thus render it dangerous for shipping involves necessarily a claim that the mine-sower is not, for the time being, burdened with an obligation to pursue a different course, because its equities are alleged to be superior to those of other States which seek continued enjoyment of the privilege of unmolested and safe navigation through the area concerned. The value of such a claim may be rendered obscure by the sheer power of a strong belligerent to pursue a mine-sowing policy with impunity, regardless of the merits of the opposing equities of a relatively weak State which is not a party to the conflict and is impotent to thwart the belligerent pretension. It will be seen, moreover, that in the course of World War I the determination of certain belligerents to utilize submarine automatic contact mines as instrumentali-

Eighth) which neither authorized nor forbade expressly the planting of automatic contact mines on the high seas." (Comment on Art. 70, Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement* 2, 698.)

Concerning the convention see Report of the Committee of Examination to the Third Commission and Report of the Third Commission to the Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 397, and I, 287, respectively; J. B. Scott, Reports to Hague Conferences, 656, and 648, respectively; Naval War College, *Int. Law Topics and Discussions*, 1914, 100-138; A. P. Higgins, *Hague Peace Conferences*, 323-345, with bibliography, 328; J. B. Scott, *Hague Peace Conferences*, I, 576-587; Coleman Phillipson's *Wheaton*, 623-627; Chas. H. Stockton, "Submarine Mines and Torpedoes in War," *Am. J.*, II, 276; James W. Garner, *id.*, IX, 86-93; editorial comment, *id.*, IX, 461; Westlake, 2 ed., II, 312-316. The text of the convention is contained in Malloy's *Treaties*, II, 2304.

See, also, Dr. von Martitz, "Mines in Naval War," *Int. Law Association 23d Report, Berlin Conference*, 1906, 47; Joseph Gosse, *Les Mines Sous-Marines*, Paris, 1914; W. F. Palmer, "Submarine Mining, Orphan Child of the Service," *United States Naval Institute Proceedings*, 1934, Vol. 60, 1582.

⁴ See *infra*, § 718A.

ties on the high seas was oftentimes uninfluenced or unrestrained by any acknowledged sense of obligation to abstain from such action when it offered a practical means of achieving a desired end. This fact renders difficult the task of determining what maritime States in that conflict deemed the law to forbid, and what in subsequent years they have felt that it permitted. In the discussion that follows, it is sought to emphasize the official opinion of the United States.

(2)

§ 714. **Anchored Mines.** The absence of any belligerent right to assert control over definite and substantial areas of the high seas, and to divert neutral ships therefrom, serves, on principle, to render generally unlawful the anchoring of mines in such places.¹

It is believed, however, that either as a limitation of the application of this principle, or in justification of failure strictly to observe it, a belligerent may, on grounds of self-defense, not unreasonably anchor mines in waters adjacent to its own coasts or appendages thereof, and beyond the accepted limit of territorial sovereignty,² provided sufficient regard be had for the safeguarding of innocent shipping and general access to neighboring neutral ports, and provided

§ 714.¹ The Hague Convention of 1907 Relative to the Laying of Automatic Submarine Contact Mines, prohibits the laying of anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings. Art. I, Malloy's Treaties, II, 2310.

Declared Sir E. Satow of the British delegation at the Second Hague Conference: "The Convention as adopted imposes upon the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defense, in the waters of the enemy as a means of attack, or finally on the high seas, so that neutral navigation will inevitably run great risks in time of naval war, and may be exposed to many a disaster." *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 281, J. B. Scott, Reports to Hague Conferences, 691.

In 1914, the Naval War College concluded that "When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping including —

"1. An advance notice to foreign Governments and to mariners specifying the general limits of the mined area.

"2. Provision for warning peaceful vessels approaching the mined area.

"3. Specification of the time during which the mines will be dangerous." Int. Law Topics and Discussions, 1914, 132.

According to Art. I of the Regulations of the Institute of International Law, respecting submarine mines, it is forbidden to place anchored as well as unanchored automatic contact mines in the open sea. *Annuaire*, XXIII, 127, 301, J. B. Scott, Resolutions, 167. The same prohibition occurs in Article XX of the Oxford Manual of Naval War, *Annuaire*, XXVI, 646, J. B. Scott, Resolutions, 178.

Art. III of The Hague Convention provides that "When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping."

² This assertion of right does not rest upon a claim of general appropriation of the waters in question, or upon sheer military advantage derivable from the creation of a zone of hostilities therein, but simply upon the geographical relation of the area sown with mines to the territory of the belligerent layer, a circumstance rendering its control over such waters for the time being indispensable to the safety of the land adjacent thereto.

See interesting statement of Rear Admiral Sperry, U.S.N., of the American delegation, in the Committee of Examination at the Second Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 408, 409. See, also, proposal of Mr. Perez Triana, of the Colombian delegation, at the Second Hague Conference, for the suppression of automatic contact mines, or the limitation of their use to those anchored for the defense of belligerent coasts, *id.*, III, 448; A. P. Higgins, Hague Peace Conferences, 338.

See A. Rapisardi-Mirabelli, "*La Guerre Italo-Turque et le Droit des Gens*," *Rev. Droit Int.*, 2 ser., XV, 83, 109-115. See War Zones and Areas of Hostilities, *infra*, §§ 720-721.

also that the mines employed be such as become harmless in case they break loose from their moorings.⁸ Again, it will be seen that such a plea may at times be fairly invoked in defense of the anchoring of mines over broad areas as a necessary means of obstructing the lawless operations of particular instrumentalities employed by the enemy. In each case, however, the merit of the excuse must be tested by the reasonableness of the claim of the belligerent to control, for the time being, the waters where the mines are sown. Such a claim is believed to lack merit when the anchoring of mines on the high seas adjacent to the territorial waters of the enemy is merely a normal incident of offensive operations,⁴ until at least those waters and the contiguous coasts have been subjected to military control, and the victor or occupant invokes the doctrine of self-defense, as in the case of waters in proximity to other territories over which its sovereignty in fact extends. In the latter situation the laying of mines can not be deemed an offensive operation.

That a belligerent may use anchored automatic contact mines within its own territorial waters, and is not obliged to rely in defense thereof upon controlled mines,⁵ seems to be generally acknowledged.⁶ That a belligerent may also not unlawfully anchor mines within the territorial waters of the enemy appears to be accepted doctrine.⁷ It is believed, however, that the right to take such action

⁸ That the use of anchored automatic contact mines should be invariably confined to that of those so constructed as to become harmless upon breaking loose from their moorings is widely acknowledged. Naval War College, Int. Law Topics and Discussions, 1914, 129.

See Russian notification of Nov. 5, 1914, concerning mined areas, Naval War College, Int. Law Documents, 1917, 210.

⁴ Art. II of The Hague Convention forbids the laying of automatic contact mines off the coasts and ports of the enemy, "with the sole object of intercepting commercial shipping." It may be observed that both France and Germany made reservations at signature respecting this Article, and maintained their reservations in their respective acts of ratification. Concerning the Article see Report of the Committee of Examination to the Third Commission of The Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 397, 400, J. B. Scott, Reports to Hague Conferences, 656.

In reference to Art. II of the Hague Convention, it is declared in War Dept. Rules of Land Warfare, 1940, No. 65: "It is not probable that a belligerent resorting to the use of these contact mines off the coast and ports of his enemy will hesitate to disavow the intention of intercepting commercial navigation. In its present form this rule permits the use of such mines so as to cause great risks to neutral navigation."

Art. XXII of the Oxford Manual of Naval War declares that "A belligerent may not lay mines along the coasts and harbors of his adversary except for naval and military ends. He is forbidden to lay them there in order to establish or to maintain a commercial blockade." *Annuaire*, XXVI, 646, J. B. Scott, Resolutions, 178.

⁵ "CONTROLLED ANCHORED MINES.—Naturally, there has been little objection to the use of controlled anchored mines. An anchored mine which can only be discharged at the will of an operator may differ little from a shell from a gun. The shell may be aimed to strike the vessel, while the mine may be placed so that it will be struck by a vessel, but will explode only when the operator in charge determines and at other times will be harmless. Such mines do not necessarily imperil neutral or innocent shipping. As these mines are under control of the operator, it is generally held that the State placing such mines is responsible for their use. The use of such mines has not met with much opposition, but has been generally approved." Naval War College, Int. Law Topics and Discussions, 1914, 107.

Concerning the use of controlled mines by the United States during the war with Spain in 1898, see President McKinley, Annual Message, Dec. 5, 1898, For. Rel. 1898, lvi, Moore, Dig., VII, 367.

⁶ See, in this connection, Westlake, 2 ed., II, 312-314.

⁷ Art. XXI of the Oxford Manual of Naval War declares that "Belligerents may lay mines in their territorial waters and in those of the enemy, but it is forbidden, even in territorial waters, (1) to lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

should not be dependent upon the mere power to lay mines in such waters, but rather upon the exercise of effective control therein when and after the mines are laid.⁸

(3)

§ 715. **Unanchored Mines.** The Hague Convention of 1907 forbids the laying of unanchored automatic contact mines, unless they are so constructed as to become harmless one hour at most after those who laid them have lost control of them.¹ The American delegation at the Second Hague Conference proposed that the use of unanchored mines be prohibited.² The Oxford Manual of Naval War prohibits the laying of unanchored (as well as anchored) mines in the open sea.³ The Naval War College has expressed opinion that the use of unanchored automatic contact mines should be prohibited or more definitely restricted; and as a further restriction it has suggested the prohibition of the use of such mines "except when they are so constructed as to become harmless one-half hour after those who laid them have lost control over them, and in every case before passing outside the area of belligerent activities."⁴ Doubtless the dropping of unanchored mines is a mode of defense whereby a vessel pursued by the enemy may retard and possibly destroy its foe. The limitation of the life of the mine to a short period of time, such as thirty minutes, minimizes the interval of danger to unoffending shipping. Nevertheless the possession of such an instrument of destruction encourages the naval commander in control thereof to employ the weapon whenever he deems it capable of effective operation, whether offensive or defensive. Acknowledgment, moreover, of the right to employ unanchored mines the lives of which remain existent for a substantial if brief period of time,

(2) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings." *Annuaire*, XXVI, 646, J. B. Scott, Resolutions, 178.

See French announcement of Oct. 6, 1914, respecting the laying of mines in Austrian territorial waters, subinclosure in communication of Mr. Herrick, American Ambassador to France, to Mr. Bryan, Secy. of State, Oct. 9, 1914, *For. Rel.* 1914, Supp., 462.

⁸ See proposal of Spain at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 665, J. B. Scott, Reports to Hague Conferences, 686.

It may be observed that the right of neutrals to lay automatic contact mines off their coasts, pursuant to the same rules and precautions as are imposed upon belligerents, is acknowledged by Art. IV of The Hague Convention, and is approved by the Naval War College. *Int. Law Topics and Discussions*, 1914, 132-134.

Concerning the endeavor by Great Britain and certain other powers to cause the mining by Norway of its territorial waters adjoining the North Sea barrage, in August and September 1918, see *For. Rel.* 1918, Supp., I, Vol. II, 1769-1789.

On April 8, 1940, the British and French Governments issued a statement announcing that they had laid minefields off the Norwegian coast, thereby rendering dangerous to navigation certain areas of Norwegian territorial waters. On that date the Norwegian Government announced its protest against this action, declaring it to be an "open breach of international law and violation by force of Norwegian sovereignty and neutrality." See "Statement by the Allied Governments on Their Action in Laying Minefields off the Norwegian Coast," *Bulletin of International News*, published by the Royal Institute of International Affairs, XVII, No. 8, April 20, 1940, 479-480.

§ 715.¹ Art. I. The convention does not prohibit the sowing of such mines on the high seas.

² *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 664, J. B. Scott, Reports to Hague Conferences, 684.

³ Art. XX, *Annuaire*, XXVI, 646, J. B. Scott, Resolutions, 178.

⁴ Naval War College, *Int. Law Topics and Discussions*, 1914, 111-116.

such as one-half hour, encourages a ruthless belligerent to equip its navy with those capable of longer life. It is believed, therefore, that prior to the construction of mines of appreciably shorter life than any yet suggested, the complete prohibition of such unanchored weapons is desirable.⁵

(4)

§ 716. **World War I—The Attitude of the United States.** Shortly after the outbreak of The World War in 1914, the British Admiralty warned neutrals of the danger of traversing the North Sea by reason of the alleged practice of Germany of laying mines indiscriminately upon the ordinary trade routes, and gave notice that the former might adopt similar measures in self-defense.¹ The Department of State thereupon expressed the earnest and confident hope that the British Government would not feel compelled to resort, as a defensive measure, to a method of naval warfare which, it was declared, "would appear to be contrary to the terms of the Hague Convention, and impose upon the ships and lives of neutrals a needless menace when peaceably navigating the high seas."² On October 2, 1914, the British Government announced that "the German policy of mine-laying, combined with their submarine activities" made it necessary on military grounds for the Admiralty to adopt countermeasures, that the British Government had therefore authorized a mine-laying policy in certain areas, and that a system of mine fields had been established and was being developed upon a considerable scale in a specified portion of the North Sea.³ On November 2, 1914, the Admiralty, charging the enemy with the indiscriminate scattering of mines in the open sea on the main trade route from America to Liverpool via the north of Ireland, and alleging that peaceful merchant ships had been blown up with loss of life, that the White Star liner *Olympic* had es-

⁵ According to Art. V of The Hague Convention, "the contracting Powers undertake to do their utmost, at the close of the war, to remove the mines which they have laid, each Power removing its own mines." It is further provided that the position of anchored automatic contact mines laid by one of the belligerents off the coast of the other must be notified to that other by the Power which laid them, and that each Power must proceed with the least possible delay to remove the mines in its own waters.

Art. XXIV of the Oxford Manual of Naval War declares that belligerent States upon whom rests the obligation of removing mines after the war is over shall, with as little delay as possible, make known the fact that, so far as is possible, the mines have been removed. *Annuaire*, XXVI, 647, J. B. Scott, Resolutions, 179.

According to Art. VI of The Hague Convention, "The contracting Powers which do not at present own perfected mines of the description contemplated in the present convention, and which, consequently, could not at present carry out the rules laid down in articles 1 and 3, undertake to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements."

The Naval War College has concluded that Art. VI should not be continued in force. *Int. Law Topics and Discussions*, 1914, 134-136.

¹ See memorandum from the British Embassy at Washington, Aug. 11, 1914, *For. Rel.* 1914, Supp., 455; memorandum from same, Aug. 19, 1914, *id.*, 457; memorandum from same, Aug. 23, 1914, *id.*, 458; memorandum from same, Aug. 30, 1914, *id.*, 459.

See, also, War Zones, and Areas of Hostilities, *infra*, §§ 720-721.

² Memorandum to the British Embassy at Washington, Aug. 13, 1914, *For. Rel.* 1914, Supp., 455.

³ Memorandum from the British Embassy at Washington, *id.*, 460; also protest of the British Government against the methods employed by the German Navy, enclosed in communication of Mr. W. H. Page, Ambassador to Great Britain, to Mr. Bryan, Secy. of State, Sept. 28, 1914, *id.*, 460.

See, also, reply of Germany to the British protest, Nov. 7, 1914, *id.*, 467.

caped disaster by pure good luck, and that the mines complained of could not have been laid by any German ship of war, but had been sown by some merchant vessels flying a neutral flag, made announcement that it was felt necessary to adopt exceptional measures appropriate to the novel conditions under which the war was being waged. Notice was given, therefore, that the whole of the North Sea must be considered a military area. Within that area, traders of all countries, fishing craft and all other vessels would, it was said, be exposed to the gravest dangers from mines which it had become necessary to lay.⁴

On February 4, 1915, the German Admiralty, denouncing the conduct of the enemy as contrary to international law, declared the waters around Great Britain and Ireland, including the whole English Channel, to be a war zone, and gave warning that on and after February 18 following, every enemy merchant ship found therein would be destroyed.⁵ On February 16, 1915, the German Foreign Office gave notice to the United States that Germany would "obstruct this area of maritime war by mines wherever possible." While disavowing any desire to destroy neutral lives or property, it frankly acknowledged the danger encountered by any ship approaching the mined area.⁶

On February 20, 1915, Secretary Bryan proposed that both Germany and Great Britain make certain reciprocal concessions as a basis of agreement, which would serve to relieve neutral commerce from dangers encountered on the high seas adjacent to the coasts of those belligerents. He suggested that, among other things, both States agree —

that neither will sow any floating mines, whether upon the high seas or in territorial waters; that neither will plant on the high seas anchored mines except within cannon range of harbors for defensive purposes only; and that all mines shall bear the stamp of the Government planting them, and be so constructed as to become harmless if separated from their moorings.⁷

The two opposing belligerents were unable to accept the general basis proposed. Germany, although professing willingness otherwise to yield to the American suggestion, declared that it did not appear to be feasible for the belligerents wholly to forego the use of anchored mines for offensive purposes.⁸

Somewhat later, Mr. Polk, the Counselor for the Department of State, found

⁴ Enclosure in communication of Sir C. Spring-Rice, British Ambassador at Washington, to Mr. Bryan, Secy. of State, Nov. 3, 1914, *id.*, 463. See British directions for navigation of mined areas, Nov. 30, 1914, *id.*, 470; also of May 15, 1915, *id.*, 1915, Supp., 671.

See, also, view of the Netherlands, Nov. 16, 1914, *Rev. Gén.*, XXII, *documents*, 136, and that of the Swedish, Danish and Norwegian Governments in identic notes of Nov. 12, 1914, *id.*, 360.

⁵ For. Rel. 1915, Supp., 94. The memorial of the German Government of Feb. 4, 1915, respecting the plan proposed, appeared to contemplate the accomplishment of the design by submarine vessels rather than mines. *Id.*, 96.

⁶ Herr von Jagow, German Foreign Secy., to Mr. Gerard, American Ambassador, *id.*, For. Rel. 1915, Supp., 112.

See objections to the German position in Secy. Bryan's note to Ambassador Gerard, Feb. 10, 1915, *id.*, 98.

⁷ Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Feb. 20, 1915, *id.*, 119.

⁸ Mr. Gerard, American Ambassador, to Mr. Bryan, Secy. of State, telegram, March 1, 1915, *id.*, 129. See, also, Mr. W. H. Page, to Mr. Bryan, telegram, March 15, 1915, *id.*, 140, communicating a memorandum from Sir Edward Grey, British Foreign Secretary, of March 13, 1915.

it possible to declare: "The illegal use of mines in the present war has not been confined to any one belligerent. Both sides have violated the rights of neutrals and have sown large areas of the high seas with mines, the result of which has been the destruction of a number of neutral vessels."⁹

§ 717. **The Same.** On January 24, 1917, the British Foreign Office announced that in view of the unrestricted warfare carried on by Germany at sea, by means of mines and submarines, not only against its enemies but also against neutral shipping, and the fact that merchant ships were constantly sunk without regard to the ultimate safety of their crews, on and after February 7, 1917, a specified and extended area in the North Sea outside of Danish and Netherland territorial waters would be rendered dangerous to all shipping by operations against the enemy, and should, therefore, be avoided. This area was of wide extent.¹ Shortly thereafter, the Department of State replied that as the question of appropriating certain portions of the high seas for military operations, to the exclusion of the use of the hostile area as a common highway of commerce, had not become a settled principle of international law assented to by the family of nations, it would be recognized that the Government of the United States "must, and hereby does, for the protection of American interests, reserve generally all of its rights in the premises, including the right not only to question the validity of these measures, but to present demands and claims in relation to any American interests which may be unlawfully affected, directly or indirectly, by virtue of the enforcement of these measures."²

⁹Memorandum accompanying Communication to Representative Fitzgerald, Aug. 18, 1916, For. Rel. 1916, Supp., 3, 5.

See Submarine Craft — the Controversy with Germany, *infra*, §§ 747-749.

§ 717. ¹Telegram of Mr. W. H. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, Jan. 25, 1917, For. Rel. 1917, Supp., 1, 518. See, also, Same to Same, Feb. 15, 1917, containing revised notice of Feb. 13, 1917, replacing the notice of Jan. 25, 1917, *id.*, 518. On March 23, 1917, Ambassador Page telegraphed to Secretary Lansing, announcing a further enlargement of the dangerous area to take effect April 1, 1917. That area was to comprise "all the waters except Danish and Netherland territorial waters lying to the southward and eastward of a line commencing three miles from the coast of Jutland on the parallel of latitude fifty-six degrees north and passing through the following positions:

"One. Latitude fifty-six degrees north, longitude six degrees east.

"Two. Latitude fifty-four degrees forty-five minutes north, longitude four degrees thirty minutes east.

"Three. Latitude fifty-three degrees twenty-three minutes north, longitude five degrees one minute east.

"Four. Latitude fifty-three degrees twenty-five minutes north, longitude five degrees five and half minutes east, and thence to the eastward following the limit of Netherland territorial waters." (*Id.*, 520.)

On April 26, 1917, a British Admiralty notice stated that on and after May 3, 1917, the dangerous area would be extended according to specifications there given. Mr. Skinner, American Consul General at London, to Mr. Lansing, Secy. of State, April 27, 1917, American White Book, European War, IV, 49.

For instances of the extensive use of mines by Russia as a belligerent in World War I, both outside of and within its territorial waters, see Naval War College, Int. Law Documents, 1918, 131-138.

It will be recalled that German submarines sowed anchored mines off the Atlantic coast of the United States in 1918, and that one of them is supposed to have caused the destruction of the U.S.S. *San Diego* off Fire Island in September of that year. See, in this connection, Rear-Admiral W. S. Sims, "The Victory at Sea," *The World's Work* (May, 1920), XL, 153.

²Mr. Lansing, Secy. of State, to Sir C. Spring-Rice, British Ambassador at Washington, Feb. 19, 1917, For. Rel. 1917, Supp., 1, 519.

It will be recalled that the notice given by Germany to the United States on January 31, 1917,³ respecting the establishment of a war zone around specified territories of opposing belligerents, announced that the former would continue to fight with the full employment of all the weapons at its disposal, a circumstance indicating that the use of mines might be embraced in the general plan.⁴

While the United States remained a neutral, American ships were destroyed through contact with belligerent automatic contact mines. In cases where American citizens in consequence suffered injury or loss, difficulty was experienced in fastening on a particular belligerent responsibility for what took place, a fact which pleads eloquently for a requirement compelling a State sowing mines by any process on the high seas to make known its own causal connection with any injuries to neutral vessels and their occupants resulting from its act.

§ 718. **The North Sea Barrage.** When the United States itself became a belligerent in the World War, American and British naval forces coöperated in the establishment in 1918, of the so-called North Sea barrage by means of a field of mines extending from a point near the Orkney Islands to another near the coast of Norway, with a view to preventing the passage of enemy submarines, and to limiting their access to the Atlantic through the southerly and more dangerous channel.¹ The nature of the service in which those vessels were then

³ See Submarine Craft — the Controversy with Germany, *infra*, § 749.

⁴ See Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secy. of State, Jan. 31, 1917, For. Rel. 1917, Supp., 1, 97.

See, also, notifications from the German Foreign Office, extending the zone, received by the American Government through the Swiss Legation at Washington, on March 23, 1917, *id.*, 183 and 187, and on March 4, 1918, For. Rel. 1918, Supp., 1, Vol. II, 1762.

"It thus appears that during the World War much uncertainty existed as to the lawfulness of planting anchored automatic contact mines on the high seas; the United States as a neutral refrained from any strong protest against such practice, and in fact resorted to it on a large scale as a belligerent. Germany defended the practice as legal, subject to certain conditions, while Great Britain was rather equivocal on the matter. The position of the European neutrals on this question was by no means as well defined as it was on some other belligerent pretensions. On the other hand, no State definitely upheld the legality of war zones or barred areas apart from retaliation; and the neutrals protested against the institution of such zones. It should be noted that the terms war zones, dangerous areas, or barred areas, were applied to regions on the high seas where neutral shipping was subjected to unusual dangers, but there was no uniformity of practice as to the actual treatment of neutral shipping found within such regions. Thus, it has been seen that although The Netherlands protested against the British declaration in 1914 of a dangerous area in the North Sea, it found apparently no cause for complaint in the actual treatment of Dutch shipping by the British Navy within that area. On the other hand, in the barred zone proclaimed by Germany in 1917, neutral shipping was subjected to destruction without warning. Nevertheless, the neutrals uniformly refused to admit the legality of any belligerent pretensions to declare large parts of the high seas subject to special restrictions or risks in so far as neutral shipping was concerned, aside from the immediate vicinity of actual naval operations, and it is not believed that the World War yielded any substantial evidence in favor of the legality of such belligerent pretensions." (Comment, on Art. 70, Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section* 2, 705.)

§ 718. ¹ Capt. R. R. Belknap, U.S.N., "The North Sea Mine Barrage," *National Geographic Magazine*, XXXV, No. 2, Feb., 1919, p. 85; also Rear-Admiral W. S. Sims, U.S.N., "The Victory at Sea: The American Mine Barrage in the North Sea," *The World's Work* (May, 1920), XL, 153.

According to figures given by Capt. Belknap, 56,571 mines were planted by the United States Navy in the North Sea between June 8, 1918, and Oct. 26, 1918, and 13,546 were there planted by the British Navy between June 8, 1918, and Oct. 11, 1918.

See, in this connection, For. Rel. 1918, Supp., 1, Vol. II, 1760-1765. Also The Northern

engaged, and the effect of their operations (if not so thwarted) upon the duration if not the outcome of the conflict, together with the insufficiency of other means of combatting them, may be acknowledged to have justified recourse to this extraordinary and efficacious measure, despite the restrictions which it necessarily imposed upon neutral shipping. Excuse for the belligerent achievement was seen in the fact that it proved to be a vital and necessary means of safeguarding the shipping of the Allied and Associated Powers from the dire consequences of illegal conduct of the enemy persistently exemplified in the methods employed in submarine attacks. The laying of the barrage constituted a direct mode of combatting a particular activity of the enemy, and called for no invocation of the theory of retaliation as a prop to support it in the face of neutral opposition.

(5)

§ 718A. **The War Begun in 1939.** The destruction of the Dutch ship *Simon Bolivar* through the operation of a submarine mine in the North Sea on November 18, 1939, productive of the loss of the lives of numerous persons, served anew to focus attention on the impropriety of sowing mines, anchored or unanchored, on the high seas.¹ In this particular case, as in others, the absence of warning as to the area where such an instrument of destruction was designed or permitted to be utilized, together with the unwillingness of the belligerent employing that instrument to acknowledge the fact, brought home to the international society a fresh sense of the wrongfulness of acts whereby a State embarked upon maritime war secretly jeopardizes the safety of unoffending neutral life and property in an area of the high seas where shipping generally may rightfully assume that navigation remains unmolested.²

On November 21, 1939, the Japanese liner *Terukuni Maru* was likewise destroyed by a mine when in one of the main sea lanes off the coast of England.³ During the days that followed a like fate attended other ships of various nationalities which sought transit through those waters.⁴ The readiness of a European belligerent to sow mines indiscriminately in such places, and simultaneously to deny the authorship of its acts as well as responsibility for the results of them, was shocking to the sensibilities of civilization and distinctly harmful to its interests.⁵ In legal contemplation, it was obviously unimportant

Barrage and Other Mining Activities; memoranda relating to the project and operations, comprised in The American Naval Planning Section in London, Publications No. 2 and No. 7, respectively, of the Navy Dept., Historical Section, Washington, Government Printing Office, 1920, 1923.

§ 718A. ¹ See *New York Times*, Nov. 19, 1939, Part 1, p. 1.

² On Nov. 19, 1939, the British Admiralty announced that other merchant vessels had been the victims of contact with what were alleged to be German mines in the North Sea. Among the victims were said to be the Lithuanian freighter *Kaunas*, the Yugoslav ship *Carica Milica*, as well as the Swedish steamer *B. O. Borjesson*, and the Italian ship *Grazia*. See *New York Tribune*, Nov. 20, 1939, p. 1.

³ See *New York Times*, Nov. 22, 1939, p. 1.

⁴ See *New York Times*, Nov. 24, 1939, p. 1. On Nov. 27, 1939, the Holland-America liner *Spaarndam* was destroyed by a mine off the Thames estuary. See *id.*, Nov. 28, 1939, p. 3.

⁵ See Aspects of Neutral Responses to Unlawful Treatment by a Belligerent, *infra*, §888C.

On Nov. 23, 1939, there appeared in the *New York Times* (p. 10) a reference to views attributed to semi-official German sources, in which there was seeming acknowledgment of

whether the sowing of these instruments of destruction was accomplished through the instrumentality of aircraft rather than by any other process; and it was likewise unimportant whether the work of destruction was caused by electromagnetic devices or any other.

Charging the enemy with the laying of mines which had been productive of dire consequences, and denouncing its conduct as at variance with the relevant Hague Convention, the British Prime Minister announced in the House of Commons on November 21, 1939, that the many violation of international law and the ruthless brutality of German methods had caused His Majesty's Government to decide upon retaliatory measures that would assume the form of subjecting exports of German origin or ownership to seizure on the high seas.⁶ Thus by reason of the lawlessness of one belligerent its enemies were led to have recourse to conduct that in different fashion, but no less directly, was heedless of the rights of unoffending neutral States. The conduct of the war initiated in 1939, in this way inspired a repetition of belligerent excesses which characterized the conflict begun in 1914.⁷

(6)

§ 719. Indication and Removal upon Termination of Hostilities. As a reasonable incident of the termination of hostilities as well as of the conclusion of peace, the opposing belligerents should make known to each other the location of mines that have been sown, and also agree as to arrangements for their removal.¹ The armistices of 1918 imposed a duty of disclosure upon Germany and her Allies.² The burden of removal was, however, only pressed upon those States

German mine-sowing activities in waters off the English coast, and an attempt to excuse them on the ground that they were not prohibited by the Hague convention. It was said in this connection: "The English themselves are responsible that on commercial lanes and off the coast of England the presence of British warships must constantly be reckoned with. Against them the use of mines is permitted and the announcement of the positions of the mine fields is not required by the Hague convention until their military goals have been achieved." Declares Mr. Edwin L. James: "The trouble with this reasoning is that it neglects entirely the provisions of Article I of the Hague Convention. In other words, if there was only Article II, the Germans would have a case, but that case falls down in front of Article I. The discussions at the Hague meeting of 1907, furthermore, make it plain that what the delegates sought to avoid was the sinking of passenger and freight boats without warning and without proper opportunity for the saving of passengers and crews. That point the Germans have not as yet answered. Most of the ships sunk by their new mines have been passenger and freight boats—practically all." (*New York Times*, Nov. 26, 1939, Part IV, p. 3.)

⁶ See *New York Times*, Nov. 22, 1939, p. 9.

⁷ See Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy, *infra*, § 888A. Also The British Blockade Policy Developed in 1939 and 1940, *infra*, § 832A.

¹ § 719. ¹ Art. XXIV of Oxford Manual of Naval War, *Annuaire*, XXVI, 648, J. B. Scott, Resolutions, 179.

See, also, Art. V of Hague Convention of 1907, relative to the Laying of Automatic Contact Mines, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 650, J. B. Scott, Reports to Hague Conferences, 646.

² Art. XXIV of German armistice of Nov. 11, 1918, Naval War College, Int. Law Documents, 1918, 65, where it was provided that "The Allies and the United States of America shall have the right to sweep up all mine fields and to destroy obstructions laid by Germany outside German territorial waters, the positions of which are to be indicated."

Art. IV of naval conditions of Austro-Hungarian armistice of Nov. 3, 1918, *id.*, 19; also Art. IV of naval clauses of appendix to the armistice, *id.*, 27.

Art. XIII of Hungarian armistice of Nov. 13, 1918, with reference to mines in the Danube, *id.*, 33; also Arts. II and III of Turkish armistice of Oct. 30, 1918, *id.*, 160.

according to the geographical relationship or proximity of their respective territories to mines or fields of mines which they had sown.³ The Principal Allied and Associated Powers assumed by the terms of the armistices no specific contractual burdens of removal or disclosure.⁴ United States naval forces undertook successfully the removal of mines which they had laid in the North Sea.⁵

According to the armistice treaties between France and Germany, of June 22, 1940,⁶ and France and Italy, of June 24, 1940,⁷ the French Government undertook not only to report to the enemy the location of mines which it had set out, but also, if so required by the enemy, to clear away such mines.

(7)

§ 719A. **Some Conclusions.** Belligerent uses of submarine mines in the two major wars of the present century produce and necessitate grim deductions. They are these: (a) the propensity of belligerents to sow submarine mines on the high seas for sake of military or strategic advantages and for essentially offensive purposes, regardless of the character of the conduct of the enemy or of the equities of unoffending neutrals; (b) the alertness of an enemy when mines are so employed to retaliate through kindred uses of such instrumentalities, regardless likewise of the equities of neutrals; (c) the failure of neutrals, through impotence or unconcern, to offer effective deterrents of what principle has seemingly proscribed. Accordingly, it may be less important to note the full extent of deviations from that proscription than to seek to ascertain whether there is to be found any basis of general accord strong and flexible enough to constitute an acceptable restraint upon belligerent conduct that is otherwise to be anticipated. If for any reason the international society is unable or unwilling to endeavor to curb abuses of belligerent power manifested in the employment of submarine mines, it must be acknowledged that such abuses, in so far as they are acquiesced in, ultimately themselves become or indicate fresh and lower standards of the propriety of conduct, and cease to be regarded as instances of departure from accepted injunctions. Awareness of the fact that the relevant law is susceptible to change in this way may serve to inspire stubborn opposition to the growth of belligerent pretensions. Were there a common willingness to concede to a belligerent the right to make dangerous by submarine mines particular types of localities or areas on the high seas, the char-

³ Thus Turkey was to assist in sweeping or to remove, as might be required, mines and other obstructions in Turkish waters. *Id.*, 160. Hungary undertook to stop the passage of all floating mines sown in the Danube upstream from the Hungarian and Austrian frontier, and to remove all those actually in Hungarian waters. *Id.*, 33.

According to Art. 193 of the German peace treaty of Versailles, of June 28, 1919, Germany undertook to sweep up the mines in specified areas in the easterly portion of the North Sea, to keep those areas free from mines, and to sweep and keep free from mines such areas in the Baltic as might ultimately be notified by the Principal Allied and Associated Powers. U. S. Treaty Vol. III, 3410.

⁴ They acquired a right rather than assumed a burden.

⁵ For an illuminating account of this task, see Lt. Com. Noel Davis, U.S.N., "The Removal of the North Sea Mine Barrage," *National Geographic Magazine*, XXXVII, 103 (Feb. 1920).

⁶ Art. IX, *Am. J.*, XXXIV, *Official Documents*, 173, 175.

⁷ Arts. XII and XIII, *id.*, 178, 181.

acter of the concession might encourage the relinquishment of the use of those weapons outside of permitted zones. It is not, however, to be anticipated that general agreement restrictive of belligerent action will be consummated. Nor will mere preachments denouncing wrongful action serve to dissuade strong belligerent powers from sowing mines where policy may dictate. It is only by preventing notoriously aggressive States from possessing themselves of such instrumentalities that the international society (or those purporting to act in its behalf) can thwart the lawless uses thereof.¹

d

§ 720. **War Zones and Areas of Hostilities.** A war zone in maritime operations may be said to comprise an area of water which a belligerent attempts to control, and within which it denies to foreign shipping generally the same measure of protection which the latter might elsewhere justly claim.¹ The term is not here employed to describe places within which a belligerent may attempt merely to regulate freedom of navigation otherwise permitted. Its use is confined to the designation of an area of definite limits which, pursuant to a formal declaration or announcement, is either closed or rendered dangerous to shipping, and that for a substantial interval of time.

As no State is acknowledged to possess rights of sovereignty over the high seas, the propriety of an attempt to establish an area therein from which neutral shipping may be completely excluded, must generally be challenged. That the right of a neutral to security of navigation on the high seas ought to take precedence over the transitory right of a belligerent to reserve a portion of those waters for the scene of future hostile operations was, prior to World War I, accepted doctrine.² Events of that conflict served, however, to inspire fresh inquiry with respect to the application of the underlying principle, and to raise the question whether circumstances may ever justify apparent disregard of what it commonly requires.

The burden assumed by the belligerent in attempting to justify the establishment of a war zone on the high seas is necessarily heavy because of the nature and extent of the resulting interference with the shipping of unoffending neutral States. The direct and indirect harm inflicted upon them, however substantial, is incapable of measurement or of nice adjustment. There may be no means in the particular case of judging fairly whether the injuries sustained by the neutral are of less significance to the family of nations than the benefits resulting to the belligerent from its disregard of law. It does not ordinarily suffice,

§ 719A.¹ See *infra*, § 923.

§ 720.¹ *Proceedings*, Am. Soc. Int. Law, 10th Annual Meeting (1916), 71-107; Naval War College, Int. Law Topics, 1914, 116-118; J. W. Garner, in *Am. J.*, IX, 594-599; Coleman Phillipson, Int. Law and the Great War, 381-383.

See, also, documents in American White Book, European War, IV, Part I.

² Sir E. Satow of the British delegation at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 281, J. B. Scott, Reports to Hague Conferences, 691; also A. P. Higgins, Hague Peace Conferences, 344.

Declared the Naval War College in 1914, "The right of innocent use of the high sea has long been recognized as paramount to any right of a belligerent to exclude innocent vessels from a given area, except for immediate military reasons." Int. Law Topics and Discussions, 117.

therefore, to show merely a military advantage derivable from the establishment of a zone. If, however, the belligerent can prove that its interference with the neutral is inconsequential in comparison with the advantage to itself necessarily connected with the defense of its territory, the safety of which is otherwise jeopardized, the excuse is entitled to respectful consideration.

The special relation of the safety of territory to the control of waters appertenant to it, and the range of modern ordnance capable of making such control effective, suggest the reasonableness of a defensive area adjacent to the national domain, and beyond the accepted limits of territorial sovereignty. It is believed that a maritime State may justly excuse the establishment of a war zone over those waters of the littoral seas from within which a formidable attack upon its own coasts may be made by a hostile fleet. The merit of the plea of self-defense thus becomes in such case capable both of fair appraisal and of easy recognition in an international code, when its validity is perceived to depend upon the extent of the burden of shielding territory from belligerent operations within certain proximity thereto.³ Such respect for the belligerent claim does not, however, afford justification also for the establishment of a war zone in waters remote from the national domain and for offensive purposes. Nevertheless, as has been noted in relation to the use of mines, a particular area or zone may be said to possess an essentially defensive character, regardless of its detachment from the territory of the belligerent maintaining it, if it serves, for example, as an indispensable means of frustrating the operations of submarine craft lawlessly undertaken and ruthlessly effective.⁴ In such case the defense of the national fleet of public and private vessels, rather than of territory, against illegal uses of a special instrumentality may, under the extraordinary circumstances arising, be deemed to excuse the measure. That such circumstances have arisen is not to be taken as indicative of a normal belligerent right to which the claims of neutrals must be regularly subordinated.

³ Declares Dr. Lauterpacht in his 6th edition of Oppenheim: "On the outbreak of the war in 1939 Great Britain laid a mine-field in the greater part of the Channel off Dover as well as in the part of the North Sea adjoining the German and Danish coasts. Germany did the same in order to bar the access to her North Sea coast. At the end of December 1939 the British Admiralty announced that as a protection against German indiscriminate mine-laying a mine barrage, between twenty and fifty miles wide, would be laid along the entire British East coast, leaving a narrow space between the barrage and the coast for navigation. On April 12, 1940, after the invasion of Denmark and Norway by Germany, the Admiralty announced that mines had been laid over a large area in the Skaggerak (in which a channel twenty miles wide was left open) and the Kattegat, and in the North Sea from a point near the Dutch coast to the Norwegian coast. On April 14 a further mine-field was announced to have been laid in the whole of the Kattegat and in the Southern Baltic coast up to Swedish territorial waters. Germany also laid mines in some of these areas. These developments tended in the direction of a successful assertion of the right of the belligerent to lay mine-fields on the high seas irrespective of reprisals but subject to the duty to ensure the relative safety of neutral traffic. On the other hand, the laying of mines by the Allies in some specified areas of Norwegian territorial waters on April 8, 1940, in so far as it could be legally justified, could be explained either on the ground of reprisals (as in fact it was justified by the Allies by reference to indiscriminate destruction of neutral shipping by Germany) or as an act of self-help calculated to put a stop to the abuse of Norwegian territorial waters for the purpose of passage differing from the ordinary commercial routes and intended as a means of avoiding capture." (Vol. II, 545, footnote 1.)

⁴ See *Anchored Mines, The World War, The Attitude of the United States*, *supra*, §§ 716-717; *The North Sea Barrage*, *supra*, § 718.

At the present time, the defense of its territory must commonly burden every belligerent maritime State with the task of safeguarding the water area adjacent to it and outside of its domain. The defense of its fleet can only abnormally necessitate the establishment of a war zone remote from that territory and having no strategic relation to it. Neutral powers are justified in pressing the distinction.⁵

The announcement by Great Britain on November 3, 1914, of its establishment of a "military area" in the North Sea, and that of Germany on February 4, 1915, concerning a war zone in the waters surrounding the territory of Great Britain and Ireland, appeared at the time to the United States as a neutral to be open to grave objection.⁶ Both belligerents asserted the right to render dangerous for neutral shipping definite areas on the high seas in waters remote from their respective territories, and as a part of offensive operations. Both contended in substance, that neutral vessels in such waters were not lawfully entitled to the same measure of protection from attack as might be justly claimed elsewhere on the high seas.⁷ Neither asserted that the zone sought to be established by itself was necessary for the protection of its own territory as such. Both, however, pleaded self-defense, and both invoked the right of retaliation.

In dealing with Germany, the establishment of whose war zone in waters surrounding Great Britain and Ireland was sought to be made effective in large part by submarine naval forces, the United States declared that to attack or destroy any vessel entering a proscribed area of the high sea without first certainly determining its belligerent nationality and the contraband character of its cargo, would be an act unprecedented in naval war.⁸ Discussions with that State concerned chiefly, however, the methods of submarine attack on vessels carrying American persons or property, rather than the establishment of zones wherein a belligerent might lay claim to a freedom of action not elsewhere permissible.⁹

⁵ It should be observed also that a belligerent may establish a defensive sea area outside of its territorial limits without purporting to transform it into a war zone, and merely prescribe or limit the methods by which foreign vessels shall approach its coasts or harbors through such waters. See, for example, Executive Orders, April 5, 1917 (the day before the United States became a belligerent), and June 29, 1918, establishing defensive sea areas, Official Bulletin, May 12, 1917, and July 2, 1918, respectively; Naval War College, Int. Law Documents, 1917, 233-240; *id.*, 1918, 164-165.

See Access to Ports, *supra*, § 187.

⁶ It will be recalled that in 1917, Great Britain extended broadly the dangerous area in the North Sea, and that Germany almost simultaneously announced to the United States the re-establishment of a danger zone within waters adjacent to the territories of its enemies.

See Submarine Automatic Contact Mines, The World War, The Attitude of the United States, *supra*, §§ 716-717. See German memorandum accompanying communication from the German Ambassador to Mr. Lansing, Secy. of State, Jan. 31, 1917, For. Rel. 1917, Supp., 1, 97, 100.

See, also, German war zone extension announcements of March 23, 1917, Nov. 22, 1917, and Jan. 5, 1918, Naval War College, Int. Law Documents, 1918, 115-116.

⁷ See, especially, Herr von Jagow, German Minister for Foreign Affairs, to Mr. Gerard, American Ambassador, Feb. 16, 1915, For. Rel. 1915, Supp., 112.

⁸ See Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, Feb. 10, 1915, *id.*, 98; also Mr. Lansing, Secy. of State, to Same, telegram, April 18, 1916, *id.*, 1916, Supp., 233.

⁹ Attack, Submarine Craft, The Controversy with Germany, *infra*, §§ 747-749.

See communication of the German Foreign Office, to Mr. Gerard, American Ambassador May 4, 1916, in relation to the case of the *Sussex*, For. Rel. 1916, Supp., 257.

The British plea of retaliation was based on the alleged misconduct of the enemy in sowing mines indiscriminately along certain trade routes of the high seas. The retort of its Admiralty was not a similar use of mines, but rather the establishment of a war zone through the agency of mines. The German response thereto took the form of an attempt to establish another zone, the maintenance of which was to be effected chiefly by a different means. Thus the British zones within the North Sea were the immediate response to the improper use of a particular weapon and by means of that weapon. The German zones around the British Isles were the response to the creation of other zones, yet largely by a different process. Technically neither belligerent sought to return like for like.

The United States resented keenly the dire effects of the German operations; it experienced no like sense of outrage on account of the mere diversion of American vessels from the North Sea.¹⁰ Nevertheless, as late as February 19, 1917, after having severed diplomatic relations with Germany, the United States, as has been observed, took pains to make full reservation of its rights affected by the enforcement of the British measure.¹¹ It seems important to note, however, that it was not until a later date, following American participation in the conflict, that the blockading of German submarines by a mine barrage extending across the North Sea was undertaken or accomplished. Prior to that time there was, therefore, less room for the argument that the military area established in that sea was an efficacious and indispensable means of safeguarding British or other vessels from the destructive and lawless uses of such craft.

As is noted elsewhere,¹² the German Government announced on August 17, 1940, that the waters around the British Isles had been made a danger zone, the entire area being infested with mines, and amounted to what was described as "the total blockade" of those Isles by German force. This description failed to transform the measure into a blockade in a technical sense. Nor did the retaliatory plea embodied in the announcement of it,¹³ strengthen, in neutral

¹⁰ This was due to the fact that German submarine operations manifested wanton disregard of human life in attempts to destroy vessels of every class within the proscribed areas, and that by agencies under naval control when alien ships were encountered.

Possibly the argument advanced by the Department of State in denouncing the retaliatory plea of Germany in excuse for its submarine activities, or that of Great Britain in justification of its mode of blockade of 1915, was applicable also to that of both belligerents in support of their respective war zones. See Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 8, 1916, For. Rel. 1916, Supp., 263; Same to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, *id.*, 1915, Supp., 578.

¹¹ *Id.*, 1917, Supp., 1, 519. See, also, in this connection, T. Baty, and J. A. Morgan, War, Its Conduct and Results, 221; J. B. Scott, Survey of Int. Relations between the United States and Germany, 205-215.

¹² See *infra*, § 825.

An English translation of the text was published in "Facts in Review," German Library of Information, New York, II, Sept. 2, 1940, 422.

¹³ The announcement stated: "As far as the seas around England are concerned, there is no longer any normal merchant traffic owing to the ever-increasing battle between the air and naval forces of both sides. Neutral ships now have their routes and their actions prescribed for them by means of mines, patrol boats, aerial patrols and British coastal batteries; other neutral ships, again, sail, for the greater part under compulsion, in convoys of English warships. There can, therefore, today no longer be any talk of free shipping on the high seas. The development of events, in fact, shows that neutral shipping, insofar as it goes to England at all, is subjected to all the perils of war and, according to the requirements of the situation, is directly or indirectly misused as an accomplice by England. England herself, therefore, has, by her measures which defy every principle of international law, made the

contemplation, the value of the belligerent claim. To the outside world, the significant fact was the fresh belligerent attempt to render dangerous an area on the high seas because of its proximity to enemy territory. The operation raised the question whether a belligerent could, without having recourse to blockade as visualized by the law of nations, lawfully render such an area dangerous to all shipping as a means of cutting off access to, or egress from, such territory.¹⁴ Inasmuch as the waters referred to in the German announcement appeared to be within the limits of a so-called combat area from which the President of the United States, by proclamation, had previously sought to exclude American shipping,¹⁵ the American Government seemed to find no occasion to protest against the operation of the German claim.¹⁶ It may be greatly doubted, however, whether the United States would at the present time be prepared to acknowledge that a belligerent could lawfully establish a danger zone on the high seas surrounding or in proximity to the territory of an enemy, as an offensive measure unassociated with the establishment of a blockade.¹⁷

§ 721. **The Same.** In contrast to a war zone, as the term is here employed, there is to be observed the attempt of a belligerent to restrict certain freedom of action of foreign shipping without necessarily thwarting the right of passage or the safety of navigation. Such restrictions, although limited in fact to certain areas deemed to possess strategic significance, are merely incidental to the exercise of acknowledged belligerent rights, such, for example, as that to establish a blockade, or to visit and search neutral ships, or to control the transmission of intelligence to the enemy, and hence may be appropriately considered in relation to those topics.

In the course of a maritime war there may exist on the high seas an area of

entire seas around her Islands a theatre of military operations, a circumstance which should suffice to prohibit every genuinely neutral ship from entering these waters. It should be a deterrent for neutral ships and seamen that under the daily-growing pressure of the German armed forces England has recently overstepped even the last bounds of decent warfare." (*Id.*, 422.)

¹⁴ The Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, declares in Art. 69 that "A belligerent may support the enforcement of a blockade by proclaiming a blockade zone," by way of compensation for the restriction of certain belligerent rights, and as a part of the general compromise embodied in the draft. Outside of such a zone, defined as an area of water extending fifty miles from a blockaded coast, proclaimed by a belligerent to be such a zone (Art. 1 e), it is declared in Art. 70 that a belligerent may not establish on the high seas "a barred zone or other area however described in which it seeks to impose special prohibition, restriction or regulation upon the passage of neutral vessels." (*Am. J.*, XXXIII, *Special Supplement* 2, 692-694.) It is thus apparent that the concession is yielded solely to a belligerent which has established a blockade and in support of that operation.

¹⁵ See Dept. of State Bulletin, Nov. 4, 1939, 455-456; also Aspects of The Neutrality Act of 1939, *infra*, § 868A.

¹⁶ See, however, note delivered on Aug. 17, 1940, to the German Foreign Office by the American Chargé d'Affaires in Berlin, concerning the course to be followed by the *American Legion* sailing from Petsamo to New York on Aug. 16, 1940, Dept. of State Bulletin, Aug. 24, 1940, 152.

¹⁷ See Secy. Bryan's protest of Feb. 10, 1915, in response to the announcement of the German Admiralty of Feb. 4, 1915, proclaiming that the waters surrounding Great Britain and Ireland, including the whole English Channel, were to be comprised within the seat of war, and that all enemy merchant vessels found in those waters after Feb. 18, 1915, would be destroyed. (*For. Rel.* 1915, Supp., 98.)

actual hostilities where great danger attends the presence or movements of any unoffending vessel, and which, therefore, such a ship may be said to enter at its peril. The creation of such an area is, however, merely attributable to the right of a naval force to attack or to defend itself without interference, and fails to justify a belligerent claim to reserve generally for future operations definite zones not in fact made the scene of hostilities, or to exclude therefrom neutral shipping because of a general strategic advantage derivable from the existence of a place rendered dangerous alike to friend and foe.¹

e

§ 722. **Torpedoes.** The torpedo is an instrument of naval warfare, the right to employ which against a belligerent is generally acknowledged. At the present time the term is commonly used to designate the so-called automobile torpedo, launched as a projectile, and capable of automatic propulsion.¹

The torpedo offers less danger to unoffending shipping than the automatic submarine contact mine, partly because of the control to which the former may be subjected after it has been launched, and by reason also of the ease with which it may be caused to sink within any desired interval of time, however brief.² Possession of the power to control, whether by automatic steering apparatus or otherwise,³ doubtless imposes upon the belligerent whose naval vessel fires a torpedo, a proportional duty to exercise great care to cause no injury to neutral vessels outside of the scene of immediate hostile operations.

The Hague Convention of 1907, concerning the laying of automatic contact mines, forbids the use of torpedoes which do not become harmless when they have missed their mark.⁴ The Institute of International Law has approved of the prohibition.⁵ The Naval War College, in 1914, did not hesitate to declare that

§ 721.¹ "It is of course possible that a battle may be waged in any part of the high sea; this contingency does not, however, give a belligerent the right to exclude innocent shipping from any area in which he is not actually operating or maintaining a force." Naval War College, Int. Law Topics, 1914, 117.

§ 722.¹ "The word '*torpille*' until recently appears to have meant any sort of receptacle containing an explosive intended to operate against the hull of a ship by contact either on or below the water-line." A. P. Higgins, Hague Peace Conferences, 328, note 2.

"During Fulton's time the word '*torpille*' began to be used in connection with submarine explosive charges, and in this country [England] the name 'torpedo' was subsequently adopted. The term 'torpedo' is derived from the electric rays, family *Torpedinidæ*. In common with the electric eel, the members of this family are characterized by their power of communicating galvanic shocks. . . . These fish are frequently spoken of as torpedoes, and are found in many estuaries of rivers, such as the Tay, etc." M. F. Sueter, Evolution of the Submarine Boat, Mine, and Torpedo, 264.

² Naval War College, Int. Law Topics and Discussions, 1914, 137.

³ The development of a system of control by wireless devices suggests also the broad responsibility assumed by the belligerent availing itself thereof.

⁴ Art. I, Malloy's Treaties, II, 2310. See Report of the Committee of Examination to the Third Commission of the Second Hague Conference with respect to the proposal of Russia, qualifying the absolute prohibition with the words "so far as possible." *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 404, J. B. Scott, Reports to Hague Conferences, 660, 661.

See, also, Art. 86, Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 193.

⁵ Art. XIX of the Oxford Manual of Naval War, *Annuaire*, XVI, 646, J. B. Scott, Resolutions, 178.

if any change were made in the Hague Convention, the use of torpedoes should be less rather than further regulated.⁶

It is not understood that the United States, while a neutral in the course of World War I, found it necessary to complain of any injuries sustained by American vessels on account of uncontrolled or improperly constructed torpedoes.⁷

f

§ 723. **The Cutting of Submarine Telegraphic Cables.** As an incident of maritime warfare a belligerent may not unlawfully interrupt submarine telegraphic cable communication of the enemy with any desired point.¹ Thus cables between points within territory of the enemy, or between territories of the opposing belligerents, may be cut, and within the territorial waters of either or upon the high seas.²

A belligerent is restricted, however, with respect to the interruption of the service of cables connecting territory of the enemy with that of a neutral. According to the Oxford Manual of Naval War, seizure or destruction should never take place except in case of absolute necessity, and under no circumstances in the waters under the power of a neutral State. On the high seas it is declared that such a cable should not be seized or destroyed unless there exists an effective blockade and within the limits of that blockade, in consideration of the restoration of the cable in the shortest possible time. Seizure or destruction on the ter-

⁶ Int. Law Topics and Situations, 1914, 136, 137.

⁷ The launching of a torpedo against any defenseless vessel is necessarily attended with greatest danger to its occupants. General agreement that such a weapon should never be directed against an unarmed ship would doubtless serve to minimize wanton disregard of the safety of human life. The question involved is, however, one which concerns primarily the right of a belligerent to attack or destroy, rather than one concerning the use of a particular means of so doing. Definite understanding among maritime States as to the extent of the former would necessarily check abuses of the latter.

§ 723. ¹ U. S. Naval War Code, 1900, Article V, Naval War College, Int. Law Discussions, 1903, 104; Naval War College, Int. Law Situations, 1902, 7-20; *id.*, 1929, 151-152; Resolutions of the Institute of International Law, 1879, *Annuaire*, I (3d and 4th year), 394; Resolutions of same, 1902, *id.*, XIX, 331; Article LIV, Oxford Manual of Naval War, *id.*, XXVI, 657; J. B. Scott, Resolutions, 188; Report and discussion by Frederic R. Coudert on submarine cables, also remarks by E. Lemonon, at session of Institute of International Law, 1927, *Annuaire*, XXXIII, Vol. I, 171-190.

See, also, Ch. Dupuis, in *Rev. Gén.*, X, 532; R. J. R. Goffin, "Submarine Cables in Time of War," *Law Quar. Rev.*, XV, 145; Pierre Jouhannaud, *Les cables sous-marins*, Paris, 1904; Moore, Dig., VII, 368, 369; Oppenheim, 2 ed., II, 271, 272, with bibliography; Victor Perdrix, *Les cables sous-marins et leur protection internationale*, Paris, 1902; L. Renault, in *Rev. Gén.*, VII, 270; Franz Scholz, *Krieg und Seekabel*, Berlin, 1904; Stockton, Outlines, 351-353; Westlake, 2 ed., II, 116-119; G. G. Wilson, Submarine Telegraphic Cables in their International Relations, Washington, 1901.

Art. XV of the International Convention of Paris, of Mar. 14, 1884, providing for the protection of submarine cables outside of territorial waters, declared that its provisions should in no wise affect the liberty of action of belligerents. Malloy's Treaties, II, 1954.

"Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made." Art. LIV of Regulations annexed to The Hague Convention of 1907, concerning the Laws and Customs of War on Land, Malloy's Treaties, II, 2290.

² Art. V, U. S. Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 104.

ritory of and in the waters belonging to territory of the enemy for a distance of three marine miles from low tide is said to be permitted.³

It is believed that the restriction thus placed upon a belligerent with respect to operations on the high seas is too severe. It may be observed that in the course of the war with Spain in 1898, submarine cables connecting territory of the enemy with that of a neutral were not infrequently cut by the naval forces of the United States, and at least on one occasion, at a point which might then have been fairly regarded as on the high seas.⁴

In the case of Eastern Extension, Australasia and China Telegraph Company, Limited, the American and British Pecuniary Claims Tribunal, in a decision of November 9, 1923, declared that "not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation."⁵ In the instant case the British Government, in behalf of a British corporation made claim for the cost of repairs of the Manila-Hong Kong and the Manila-Kapiz submarine telegraph cables which had been cut by the United States naval authorities during the Spanish-American War, in May, 1898. The cables were owned and operated by the corporation under concessions from the Spanish Government. Both cables were cut within the territorial waters of Spain, the enemy of the United States. Pursuant to orders from the Spanish Government, the corporation sealed the end of its cable in Hong Kong, after the cutting thereof, thereby preventing its use by the American forces. The action of the corporation was deemed by the Tribunal as depriving it of its neutral character, and as demanding the disallowance of the claim.⁶ The decision is not decisive

³ Art. LIV, *Annuaire*, XXVI, 657, J. B. Scott, Resolutions, 188.

There is believed to be no disagreement as to the impropriety of the cutting of a cable within the territorial waters of a neutral.

⁴ "On the outbreak of the war, the Government of the United States considered 'the advantage of declaring telegraph cables neutral,' and to that end directed its naval forces in Cuban waters to refrain from interfering with them till further orders. This inhibition evidently was soon revoked. Early in May, 1898, two out of three cables were cut near Cienfuegos, with a view to sever connection with Havana. On May 16, an unsuccessful effort was made to cut the Santiago de Cuba-Jamaica cables; and two days later one of them was severed 1.3 miles off Morro Castle. May 20, the cable connecting Cuba and Hayti was broken outside the marine league off Mole St. Nicholas. July 11, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos, and Havana, with Manzanillo and the east of Cuba, was cut; as was also, five days later, the line connecting Santa Cruz and Jucaro. All or nearly all the cables were the property of neutrals. The neutral (British) cable from Bolinao, in the Philippines, to Hong Kong was cut by Admiral Dewey. In all these cases the object of the interruption was to confuse and frustrate the military operations, whether offensive or defensive, of the enemy." Moore, Dig., VII, 369, *citing* Naval Operations of the War with Spain, 176, 186, 208-211, 244, 255.

⁵ Nielsen's Report, 73, 76.

⁶ Declared the Tribunal in this connection: "Finally, the order given to the Company to seal the terminal at Hong Kong and the mere fact that the Company considered itself legally bound to obey that order, notwithstanding the fact that this terminal was in a neutral country, the refusals of the Company and the Spanish Government, made respectively to the United States Government and to the British Government, to reopen the lines, appear to be conclusive evidence that the Company was in reality operating, not in the character of a private neutral commercial undertaking subject only to certain local regulations, but as an actual Spanish public service, as completely under the authority of the Spanish Government as would have been any State service. In such circumstances it does not seem possible to

of the question whether, in the absence of unneutral conduct by the neutral owner, the belligerent cutter of a cable connecting enemy territory with that of a neutral is obligated to reimburse the State of the owner for the cost of repairs.

In 1902 the Naval War College in discussing the case where an American commander in time of war finds a cable owned by a neutral connecting neutral with enemy territory, and employed for the transmission of hostile despatches, declared it to be not unreasonable for such officer to cut the cable on the high seas, in case, after protest,⁷ the neutral should still claim no responsibility for its use. It was said that practice, general principles and opinion alike support the position that a cable connecting the territory of one belligerent and a neutral territory, and rendering unneutral service is liable to interruption by the other belligerent at any point outside of neutral jurisdiction, and that war would often make such interruption a reasonable necessity.⁸

Inasmuch as submarine trans-oceanic cables are an agency for the transmission of intelligence throughout the world, their treatment in time of war is a matter of concern to the entire society of nations. The equities of a State having a cable connection with any other are, moreover, not necessarily measured by its relation to the conflict, whether as a participant or non-participant; nor are they to be tested according to the question of ownership. The requirements of justice demand a closer regard for the nature and extent of these equities than has heretofore been generally accorded. As the object of belligerent interference is to cut off a means of communication with hostile territory, it ought to be definitely acknowledged that the interruption of a cable connecting neutral with belligerent territory is unnecessary and unreasonable if the neutral State offers either to seal the cable or censor its use on terms that satisfy the demands of the belligerents concerned.⁹ In the absence of such an offer, interruption, wheresoever permitted, should not be allowed to embrace also any substantial diversion or removal of a cable, for the reason that such action would mark the achievement of something more than a legitimate military end.¹⁰ Again, upon the resumption

regard this Company as ignorant of, or as not having consented to, the use of the cable for military purposes by the Spanish military authorities, or as entitled to avail itself of neutral character in order to claim compensation for the cutting of its cables. The fact is that this Company could not act as a neutral, without violating its concession." (*Id.*, 78.)

See, also, decision of same Tribunal in the Case of Cuba Submarine Telegraph Company Limited, *id.*, 82.

⁷ "The propriety of the first act of the commanding officer in entering a protest against the use of the cable can be affirmed; the question of his obligation to do so must depend upon the policy of the United States and the urgency of cutting off the communication. It is sufficient to say that at the present time neither international law nor national policy makes such a protest obligatory." Naval War College, *Int. Law Situations*, 1902, 8.

⁸ *Id.*, 19. See Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 40. Also Naval War College, *Int. Law Situations*, 1929, 151-152.

⁹ For that purpose the coöperation of representatives of every belligerent concerned should doubtless be accepted; and each of them should be given every opportunity to satisfy itself that its peculiar interests are duly safeguarded.

See, also, Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 40.

¹⁰ At the time of the outbreak of World War I, two German cables ran from Emden, Germany, to the Azores, and thence to New York. The sections between Emden and the Azores were cut in the English Channel, and by British authorities, Aug. 4, 1914. "In March,

of peace, there should be a restoration of the cable with compensation to the neutral for its losses.

It is believed that in the absence of general agreement, a State whose territory has been cut off from its cable connection with any other by diversion or otherwise, and through the action of either co-belligerents or States which were not its enemies, may, upon the resumption of peace, demand a restoration of the agencies of service previously enjoyed. Such a claim rests upon the theory that the belligerent right to control by interruption or otherwise does not embrace also a right of confiscation, especially as against a State not an enemy; and that even the hostile ownership of a particular cable does not clothe the seizer with a right to deny restoration of service to a friendly State with whose shores a physical connection was formerly established. In a word, this claim to service, by means of a former channel of communication with the outside world, outweighs that of the seizer to appropriate for its own uses that which was subjected to its control as a belligerent, and ostensibly for a purpose incidental to the prosecution of war.¹¹ It is not understood that the United States was ever able

1917, they were cut at points 648 and 610 miles, respectively, from New York, and one of them was diverted by the British Government into Halifax, Nova Scotia, and since July 1, 1917, has been used by the British Government as part of its imperial telegraph and cable system." Cable-Landing Licenses; Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 66 Cong., 3 Sess., on S. 4301, Statement of Mr. Clarence H. Mackay, Jan. 10, 1921, 263, 271. In Nov. 1917, after the United States had become a belligerent, a French cable-ship cut both of the German cables approximately five miles from their landing place at Far Rockaway, N. Y., diverting one end into a French company's landing place at Coney Island, N. Y. *Id.* This diversion served to sever a connection with the plant of the Commercial Cable Company which had by contract operated the American ends of the German cables. It is understood that French authorities subsequently by various processes reestablished the cable which had not been diverted into Halifax, diverting, however, the Azores end of it into Brest.

According to Annex VII, Part VIII of the Treaty of Versailles, with Germany, of June 28, 1919, U. S. Treaty Vol. III, 3438, Germany renounced, on her own behalf and on behalf of her nationals, in favor of the Principal Allied and Associated Powers "all rights, titles or privileges of whatever nature" in the submarine cables that were thereafter specified. It was declared that the value of the cables, insofar as they were privately owned, calculated on the basis of the original cost less a suitable allowance for depreciation, should be credited to Germany in the reparation account. See in this connection, Lauterpacht's 5 ed. of *Oppenheim*, II, 410.

¹¹ Declared Secy. Colby to the British Chargé d'Affaires at Washington, Nov. 5, 1920: "This is not merely a question of disposal of ex-German cables. Our position is much broader. Our Government is compelled to insist that direct service by cable between United States and Germany be restored as a matter of principle. Our associates have temporarily deprived us of this service we enjoyed before the war. If we agreed with Japanese, French, and British position that these cables, upon the restoration of which we may rightfully insist but which they now operate to the disadvantage of the service, should be retained by them, it would injure our standing with our associates and antagonize public opinion in the United States. Thus, not only would our part in the war bring us nothing under the treaty, but we would be distinctly injured by the action of our associates. That the five Principal Allied and Associated Powers have title to the German cables acquired under the treaty is fully admitted. Unanimous consent is essential, not only to a division of ownership in this joint property, but also to the use of it by any one power." (For. Rel. 1920, I, 137.)

At the outbreak of World War I a German company partly supported by Dutch capital, and subsidized by the German and Dutch governments, owned cables running from Guam to the Island of Yap in the Carolines, there diverging, one line going south to the Dutch East Indies, and the other, north to Shanghai. Japan as a belligerent seized Yap, then a German possession, and also interrupted service to the United States through Yap, diverting, moreover, the Yap-Shanghai cable into one of the Japanese Islands. See Cable-Landing Licenses; Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 66 Cong., 3 Sess., on S. 4301, Statement of Mr. Clarence H. Mackay, Jan. 10, 1921, 263, 274. See in this connection, documents in For. Rel. 1920, I, 132-168.

to convince its co-belligerents in World War I, which in the course of that conflict cut, diverted and acquired (in consequence of the Treaty of Versailles of June 28, 1919) German owned cables connected with American territory, that there rested upon them any legal duty to the United States to restore physical connections therewith or to make compensation for pecuniary losses sustained in consequence of a failure to do so.

g

Visit and Search

(1)

§ 724. **Nature and Purpose.** Growing out of and ancillary to the greater right of capture is that of visit and search,¹ which is acknowledged to be the possession of every maritime State engaged in war.²

According to the United States Naval Instructions Governing Maritime Warfare of June 30, 1917, "the belligerent right of visit and search, subject to exemptions mentioned in Section VII, may be exercised outside of neutral jurisdiction upon private vessels after the beginning of war in order to determine their nationality, the port of destination and departure, the character of their cargo, the nature of their employment, or other facts which bear on their relation to the war."³ The Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War accentuates the point that the right of visit and search is not to be exercised by armed merchant vessels. It is also declared that "after a captured vessel is in port, or if a neutral vessel is voluntarily in port, the vessel may be searched by the public authorities of the belligerent; but a neutral vessel may not be diverted to port to facilitate search except as provided in Article 61 (3)."⁴

If a belligerent naval vessel learns otherwise of the enemy character of a

§ 724.¹ Declared Marshall, Chief Justice, in *The Nereide*, 9 Cranch, 388, 427: "What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character. . . . It has been truly denominated a right growing out of and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question." Moore, Dig., VII, 473, 474.

² Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781, Moore, Dig., VII, 474. Also *The Eleanor*, 2 Wheat. 345, 358; Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Dec. 26, 1914, For. Rel. 1914, Supp., 372; E. C. E. Duboc, *Le droit de visite et de la guerre de course*, Paris, 1902; Oppenheim, Lauterpacht's 5 ed., II, 705-719, with bibliography; H. R. Pyke, *The Law of Contraband of War*, London, 1915, 190-215; J. S. Risley, *Law of War*, London, 1897, 265-279; L. A. Atherley-Jones, *Commerce in War*, London, 1907, Chaps. 5 and 6; W. B. Lawrence, *Visitation and Search*, Boston, 1858.

See also A. Pearce Higgins, *Le Droit de Visite et de Capture dans la Guerre Maritime*, *Recueil des Cours*, 1926, I, 64; Jessup and Deák, *Neutrality (Origins)*, I, 1935; Jessup, *Neutrality (Today and Tomorrow)*, IV, 1936.

³ No. 42. Also G. G. Wilson, *Int. Law*, 397; Art. XXX, *Naval War Code of 1900*, *Naval War College, Int. Law Situations*, 1903, 109.

⁴ Art. 49, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 184, and Comment, *id.*, 532.

See also Art. 1 of Convention on Maritime Neutrality, concluded at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4745.

vessel encountered, visit and search become unnecessary with respect to the exercise of the right of capture,⁵ unless the ship is exempt therefrom, and that fact remains unknown. It will be found, however, that the mode of compelling submission of even an enemy ship may depend upon facts the existence of which are not to be revealed without visit and search, and that the propriety of conduct of the opposing naval commander may depend upon his apprising himself of those facts by that process. Thus with respect to an enemy ship, if it be an unarmed private vessel, the exercise of visit and search may become a duty. With respect to a neutral ship encountered, such action commonly manifests the assertion of a belligerent right; but its exercise may also be required as a condition precedent to the just employment of force against the ship.

Article 1 of the treaty *Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War*, signed at Washington, February 6, 1922, at the Conference on the Limitation of Armament, declared that the following rule was to be "deemed an established part of international law": "A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized."⁶ It may be greatly doubted whether the obligation as thus laid down was ever acknowledged to be an established part of that law; the proposed rule failed to heed the numerous situations where an enemy merchant vessel might be subjected to capture without recourse to such procedure.⁷ Nor did it appear to take cognizance of the sharp distinction between the reasons responsible for the creation of the right to exercise the privilege of visit and search, and those productive of the obligation under certain conditions to take such action. The treaty failed to become operative.

§ 724A. **The Same.** In theory, the object of visit and search is to place information, chiefly concerning neutral ships, within the reach of the belligerent whose warships encounter them, in order that it may exercise the full measure of its rights as such in the light of information that may thus be disclosed. In earlier days, long before those when communications by radio or telegraph were possible, there was reason enough why a belligerent vessel of war should be permitted to endeavor by its own efforts to scrutinize the character, service and contents of foreign ships encountered at sea. There was occasion for the growth

⁵ "A belligerent warship has, incidental to the right of seizure, the right to visit and search all vessels on the high seas for the purpose of determining the hostile or innocent character of the vessels and their cargoes. If the hostile character of the property is known, however, the belligerent warship may seize the property without exercising the right of visit and search, which is solely for the purpose of obtaining knowledge as to the character of the property." Memorandum of State Department, Mar. 25, 1916, *For. Rel.* 1916, Supp., 244, 247.

⁶ U. S. Treaty Vol. III, 3118.

⁷ Declared the Naval War College in 1930: "The statement that the following is an established part of international law, viz., 'A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized' is not in accord with the facts at present or prior to the war. Certainly this was not the rule in regard to enemy merchant vessels which might be seized as such without orders to submit to visit and search. The Japanese and other rules prescribe: 'All enemy vessels shall be captured.' Visit and search of enemy merchant vessels was to avoid violation of any neutral rights. A neutral merchant vessel might be seized at any time outside of neutral jurisdiction, but in such case the state making the seizure assumed all risk, and visit and search was to avoid risk. If a neutral merchant vessel was known to the belligerent to have violated blockade, carried contraband, or to have engaged in unneutral service, it could be seized without being ordered to submit to visit and search." (*Int. Law Situations*, 1930, 34.)

of rules designed to be applicable to the reasonable practice that developed, and which during the nineteenth century, and well before the outbreak of World War I, were fairly enunciated and widely accepted.

In the course of that conflict, however, the vast power of certain maritime States participating therein rendered feasible fresh abuses of the belligerent privilege, as against which neutral ships and the States to which they belonged became unable to make effective resistance. At a time when such abuses were flagrant, it might oftentimes have been possible for a belligerent, solicitous as to the facts pertaining to particular vessels, to gain the requisite information without delay by other processes; for it was frequently within the power of the neutral to which they belonged and from whose ports they had departed to furnish expeditiously such information to the belligerent which might seek it. Nevertheless, in the course of that conflict there was no common and vigorous effort on the part of neutral States to offer substitutes for visit and search even when the privilege was harshly exercised. It was none the less true that the reason which had justified recourse to such procedure as the natural and appropriate mode of apprising a belligerent as to the character, mission and cargo of a neutral vessel encountered on the high sea, ceased to have the same relative importance when the desired and necessary information was attainable by other and simpler processes, as through neutral governmental channels. This circumstance had, and continues to have, tremendous implications; for it reveals to non-participating States a solid and effective basis on which to propose that visit and search be given up.

At the present time, the outstanding fact for the consideration of statesmen is the power of the neutral to respond quickly and adequately to inquiries from the belligerent concerning substantially all relevant facts pertaining to the ships of the former and to the cargoes with which they are laden.¹ Appropriate responses by neutral States in faithful endeavors to impart requisite information to interested belligerents are capable of influencing the development of the law, as by encouraging a gradual relinquishment of both visit and search because or when an efficacious substitute therefor is within reach. The assumption by neutral States of such a burden may, moreover, be regarded as not disadvantageous to belligerent States. It is possible, therefore, that in the course of the years to come a common belligerent acceptance of neutral governmental assurances pertaining to ships and cargoes may cause the privilege of visit and search to sink into a much-desired desuetude.²

§ 724A.¹ By telegraphic or radio communications between neutral and belligerent States there is available a means through which a State to which a ship belongs is able to make quick and full response to inquiries from a belligerent which is concerned about the character, service or cargo of the vessel. By such process, moreover, the belligerent may be able to advise its own public ships as to such vessel long before it is encountered at sea. In a word, existing means of communication enable the interested belligerent to attain a fullness of information about a particular ship and its contents, whether before or shortly after visual or other contact therewith, which was quite beyond the reach of a belligerent in kindred situations in the days when such means of communication were non-existent, and which may serve to eliminate the desire or sense of need of searching or even accosting such ship.

² According to Art. 59 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "(1) If an unconvoyed vessel displays the distinctive color and markings required of a certified vessel under Article 44 and if sea conditions make the

Maritime States have not, however, as yet been disposed to make zealous effort to seek efficacious substitutes for visit and search, or to relinquish recourse to the old and familiar practice. It remains necessary, therefore, to observe with care what is involved in, and what, particularly in the estimation of the United States, are deemed to be abuses of it. In the course of so doing it must be borne in mind that the recurrence of abuses of the belligerent privilege by strong maritime States are bound, unless duly resisted, to beget modifications of the law and that these will surely enhance the scope of the belligerent privilege to the proportional detriment of neutral interests. The last three hundred years of maritime warfare point, moreover, unerringly to such recurrence.³ Inasmuch as the visit and search of neutral ships by States engaged in war will never cease to be anything other than the sheer exercise of belligerent force against non-belligerent and defenseless objectives, complete relinquishment of the practice is believed to be of utmost advantage to the several members of the international society.

(2)

MODE OF EXERCISE

(a)

§ 725. **Visit.** According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, the right of visit and search should be exercised with tact and consideration, in strict conformity with existing treaty provisions, and, subject thereto, in harmony with the following procedure:

Before summoning a vessel to lie to, a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (*coup de semonce*), by other international signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.¹

launching of a small boat impossible, the warship must allow the vessel to proceed on its voyage but may accompany it until the sea moderates and a visit becomes possible. The vessel may not be diverted to a belligerent port to facilitate search.

"(2) If the vessel is visited and is found to carry a certificate of neutrality, it shall be allowed to proceed immediately without further hindrance, but the officer of the warship shall endorse a memorandum of the visit upon the certificate." (*Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 187.)

³ The complaints of the Dutch in 1655 against the conduct of belligerent England were a portent of what the future was to bring. See Commissioners of the Admiralty of Amsterdam to the States General, Nov. 24, 1655, John A. Thurloe, Collection of State Papers, London, 1742, IV, 192-193, commented on in Jessup and Deák, *Neutrality (Origins)* I, 162-164.

§ 725.¹ No. 44. According to Article XXX of Stockton's Naval War Code of 1900, withdrawn in 1904, the exercise of the right of search during war "shall be confined to properly commissioned and authorized vessels of war." Naval War College, *Int. Law Discussions*, 1903, 109.

Compare Art. I, Turkish Temporary Law on Maritime Prizes, Jan. 31, 1912, *Brit. and For. State Pap.*, CV, 105.

See Art. XXXII, Oxford Manual of Naval War, *Annuaire*, XXVI, 649, J. B. Scott, *Resolutions*, 181; Instructions of Mr. Welles, Secy. of the Navy, Aug. 18, 1862, *For. Rel.* 1915, *Supp.*, 589-590.

Compare the situation in the case of *The Eleanor*, 2 Wheat. 345, where the exercise of the right by an American vessel of war in 1813 was in the guise of a friend of the British ship encountered.

When the summoned vessel has brought to, the ship of war shall send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. There may be arms in the boat, but the boat's crew shall not have any on their persons. The officer (or officers), wearing side arms, may be accompanied on board by not more than two unarmed men of the boat's crew.²

The method of signaling is unimportant so long as it be effective, and may obviously embrace communication by radio.³

During World War I there was much complaint by neutral ships of the failure of belligerent submarine naval vessels to give the customary signals to lie to, and to substitute therefor sudden attacks with solid shot.⁴ It is not believed that the limitations peculiar to any type of naval vessels, causing them either to misconceive the character or movements of foreign ships sighted, or rendering difficult the task of signaling, justify the employment of force to compel a ship to stop until it has failed to heed a reasonable warning to do so. In every case where the exercise of the right of visit may be fairly regarded as a condition precedent to a demand to surrender, the signal should conform to the requirements above set forth. Non-conformity must always signify that the vessel encountered, owing to its character or known service, is in fact lawfully subject to attack at sight. A neutral vessel is infrequently in such a plight.⁵

In lieu of actual visit on board the vessel caused to stop, commanders of submarine naval vessels in World War I oftentimes, if not commonly, compelled the former to send a boat with the ship's papers to the submarine for examination thereon.⁶ This practice is attended by hardship to the neutral, because of the

² No. 46.

In instructions of Mr. Welles, Secy. of the Navy, Aug. 18, 1862, it was declared: "While diligently exercising the right of visitation on all neutral vessels, you are in no case authorized to chase and fire at a foreign vessel without showing your colors and giving her the customary preliminary notice of a desire to speak and visit her." Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, *For. Rel.* 1915, Supp., 589-590.

See communication of Count von Bernstorff, German Ambassador to the United States, to Mr. Lansing, Secy. of State, May 12, 1916, respecting the alleged conduct of the Dutch steamer *Bandoeng* when signaled to stop by a German submarine, in January, 1916, *For. Rel.* 1916, Supp., 267; also Mr. Gerard, American Ambassador to Germany, to Same, telegram, Aug. 27, 1916, containing German note of complaint as to the conduct of the American steamer *Owego*, when signaled to stop by a German submarine, Aug. 3, 1916, *id.*, 285.

³ See Art. 53 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 185; also Comment, *id.*, 538.

⁴ Declared Mr. Lansing, Secy. of State, with respect to the treatment of the American steamer *Petrolite* by an Austrian submarine in 1916: "No shot was fired across the bow of the steamer as a signal to stop. When the first shot was fired the captain was under the impression that an explosion had taken place in the engine room. Not until the second shot was fired did the captain and crew sight the submarine, which was astern of the steamer and, therefore, they positively assert that neither the first nor the second shot was fired across the bow of the vessel." Telegram to Mr. Penfield, Ambassador to Austria-Hungary, June 21, 1916, *For. Rel.* 1916, Supp., 276.

⁵ "Any measures beyond the summoning shot, which the commander of an armed ship may take for the purpose of ascertaining the nationality of another vessel, must be at his peril; for the right of a ship to pass unmolested depends upon her actual character, and not upon that which was erroneously attributed to her, even though her own conduct may have caused the mistake. The latter may affect the amount of reparation, but not the lawfulness of the act." Mr. Black, *Atty. Gen.*, 9 *Ops. Attys. Gen.*, 455, 460; Moore, *Dig.*, VII, 476, 477.

⁶ See, for example, the treatment accorded the American steamer *Owego* by a German

difficulty of transferring quickly and by an open boat all of the documents which the commander of the vessel of war is entitled to examine. It obliges the former, moreover, to take affirmative steps to satisfy the belligerent inquiry as to the innocence of the vessel and its cargo. It serves on the other hand to minimize the dangers of delay to a belligerent vessel of war which, by reason of its defensive weakness, may, at a moment's notice, find it necessary to submerge in self-defense, and which would otherwise be deprived of the needed services of those who at such a time were visiting a neutral craft. Although certain treaties to which the United States has been a party provide that "the unarmed party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever,"⁷ it is not understood that the Department of State has deemed the opposite practice sufficiently objectionable to warrant protest. The Naval Instructions Governing Maritime Warfare of June 30, 1917, do not, however, appear to authorize American officers to have recourse to it.

(b)

§ 726. **Search.** It is said to be the duty of the boarding officer first to examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo and voyage, the vessel shall be released; if they furnish probable cause for capture, she shall be seized and sent in for adjudication.¹

If the papers do not furnish conclusive evidence of the innocent character of the vessel, the cargo and voyage, or probable cause for capture, the boarding officer shall continue the examination by questioning the personnel or by searching the vessel or by examining her cargo. If such further examination furnishes

submarine, Aug. 3, 1916, set forth in telegram of Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, Sept. 29, 1916, American White Book, European War, IV, 245.

See, also, the case of *The Eleanor*, 2 Wheat. 345.

⁷ See, for example, Art. XVIII, treaty with Italy, Feb. 26, 1871, Malloy's Treaties, I, 975; also Art. XXIV, treaty with Peru, Sept. 6, 1870, *id.*, II, 1422; Art. XXI, treaty with Venezuela, Jan. 20, 1836, *id.*, II, 1837.

Mr. Bayard, Secy. of State, to Mr. Preston, Haitian minister, Nov. 28, 1888, For. Rel. 1888, 1001, Moore, Dig., VII, 478, concerning the treatment accorded the American S.S. *Haitian Republic* in October, 1888.

"A study of the national regulations and international treaties [that were applicable in the middle of the seventeenth century] reveals that (1) there was general insistence that the captor must send his own boat and men to the arrested vessel for inspection rather than compel the latter to send a boat to him; (2) almost all regulations insisted that the visiting crew should consist of a few persons only; (3) there was an ever-recurring prohibition against violence to the crew or damage to the cargo of the arrested vessel; (4) the visit and search were confined to examining the arrested ship's papers and taking the testimony of persons on board—actual examination of the cargo was generally prohibited. The importance attached to this last point is shown by the number of treaties concluded after the middle of the seventeenth century which are very specific in stating this rule." (Jessup and Deák, *Neutrality (Origins)*, I, 165-166.)

See Art. 54 (2) of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 185, and Comment, *id.*, 549.

See also McNair's 4 ed. of Oppenheim, II, 690.

§ 726. ¹ Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 47.

satisfactory evidence of innocence, the vessel shall be released; otherwise she shall be seized and sent in for adjudication.²

The boarding officer must record the facts concerning the visit and search upon the log-book of the vessel visited, including the date when and the position where the visit occurred. This entry in the log must be made whether the vessel is held or not.³

In the award of the arbitral Tribunal at The Hague, May 6, 1913, in the case of the *Carthage*, between France and Italy, it was announced that "the legality of every act which goes beyond a mere search depends upon the existence either of a trade in contraband or of sufficient reasons to believe that such a trade exists; as in this respect the reasons must be of a juridical nature."⁴ The distinction thus suggested between making a search, and seizing a vessel by reason of suspicions aroused in consequence of facts ascertained by search, is believed to be vital. That the latter conduct may oftentimes prove to be justifiable does not warrant the inference that a neutral ship may be seized on suspicion, and taken to a more convenient place in order to ascertain by a later and more thorough search whether that suspicion is well grounded.

The right of search merely enables a belligerent to test its suspicions, and to determine whether there is reason to institute proceedings, in order to inflict punishment, in the case of a neutral ship, for the commission of illegal acts. The right of seizure is a concession permitting the initiation of such proceedings due to evidence of illegal conduct inferred from facts commonly ascertained by search. The former right relates to an inquiry, the latter to a prosecution. The process of mere investigation should never take the form of chastisement.

² The paragraph of the text reproduces No. 48 of Naval Instructions Governing Maritime Warfare of June 30, 1917. Compare comment of French Ministry of Marine, contained in note of Sir Cecil Spring-Rice, British Ambassador to the United States, to Mr. Lansing, Secy. of State, April 24, 1916, For. Rel. 1916, Supp., 368, 370.

It is believed that the following statement of a British naval officer, published in 1914, is declaratory of the practice then commonly followed: "If, however, for any reason the inspection of the papers still leaves the visiting officer in doubt as to the innocence of the vessel, he should then cause her to be searched. For this purpose he may then call his boat's crew on board, and help and information should be requested of the master and crew of the vessel; but this they are perfectly entitled to refuse, and they must be subjected to no coercion. The difficulty and delay which must ensue from an attempt to search a vessel of any size is obvious, but if it is deemed to be necessary it should be done as quickly and carefully as possible. The visiting officer should always give the master an opportunity of explaining anything of a suspicious character which the search discloses [citing the *Anna*, 5 C. Rob. 385]. If nothing which affords reasonable grounds for believing the vessel to be guilty is disclosed, the visiting officer should see that everything is replaced as before and withdraw with his men as quickly as possible." J. A. Hall, *The Law of Naval Warfare*, 117.

³ No. 49 of Naval Instructions Governing Maritime Warfare, June 30, 1917.

⁴ J. B. Scott, *Hague Court Reports*, 329, 334. In this case the *Carthage*, a French mail steamer in the course of a regular trip between Marseilles and Tunis, during the Turco-Italian war, was stopped on Jan. 16, 1912, on the high seas, by the Italian destroyer *Agordat*. The commander of the latter, ascertaining that the *Carthage* had on board an aeroplane belonging to one Duval, a French aviator, and consigned to his address at Tunis, declared the aeroplane to be contraband and caused the captain of the *Carthage* to follow the *Agordat* to Cagliari, where it was detained until Jan. 20, 1912. The information possessed by the Italian authorities was deemed to be of too general a nature and as having too little connection with the aeroplane to constitute sufficient "juridical reasons to believe in a hostile destination," and to justify the capture of the vessel transporting it.

(c)

§ 727. **Searches in Port. The Controversy with Great Britain.** In December, 1914, the Department of State, admitting readily the "full right of a belligerent to visit and search on the high seas the vessels of American citizens or other neutral vessels carrying American goods and to detain them, *when there is sufficient evidence to justify a belief that contraband articles are in their cargoes,*" protested against the British practice of taking American ships or cargoes into British ports, and there detaining them for the purpose of searching generally for evidence of contraband.¹ Great Britain responded that under modern conditions, where there was real ground for suspecting the presence of contraband, vessels should be brought into port for examination; that in no other way could the right of search be exercised, and that but for such practice it would have to be completely abandoned.² It was said that the growth in the size of steamships necessitated in many cases that the vessels should go into calm water, in order that the right of visit, apart from that of search, should be exercised. Attention was called to the impossibility of launching a boat and making a visit in a rough sea. It was declared that the right of visit and search "would become a nullity," if a belligerent were denied the right of taking a neutral merchantman, met with under such conditions, into calm water in order that a visiting officer might go aboard. It was asserted that during the Civil War the United States had found it necessary to take vessels into American ports in order to determine whether the circumstances justified their detention, that the same need arose during the Russo-Japanese War, as well as during the second Balkan War, and that sometimes British vessels had been made to deviate from their courses, and follow cruisers to some spot where the right of visit and search could be more conveniently carried out. It was affirmed that the only protection against the danger lest an apparently harmless merchantman, although a participant in the war, escape detection, was to visit and search thoroughly every vessel appearing in the zone of operations, and if circumstances were such as to render it impossible to carry it out at the spot where the vessel was met with, the only practical course was to take the ship to a locality more convenient for the purpose. To do so should not, it was said, be looked upon as a new belligerent right, but as an adaptation of the existing right to the modern conditions of commerce.³

The United States in October, 1915, made elaborate rejoinder.⁴ It declared that the instructions to naval commanders of the United States, Great Britain, Russia, Japan, Spain, Germany and France, from 1888 down to the beginning of the existing war, showed that search in port was not contemplated by the

§ 727. ¹ Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Dec. 26, 1914, For. Rel. 1914, Supp., 372.

² Sir Edward Grey, British Foreign Secy., to Same, Jan. 7, 1915, *id.*, 1915, Supp., 298, where it was added: "Information was received by us that special instructions had been given to ship rubber from the United States under another designation to escape notice, and such cases have occurred in several instances. Only by search in a port can such cases, when suspected, be discovered and proved."

³ Communication to Mr. W. H. Page, Feb. 10, 1915, *id.*, 324.

⁴ Mr. Lansing, Secy. of State, to Mr. W. H. Page, Oct. 21, 1915, *id.*, 578.

Government of any of those States.⁵ The British statement as to the practice of the United States during the Civil War was based, it was said, upon a misconception; and that, apart from irregularities which might have existed at the beginning of that war, a careful search of the records of the Government showed conclusively that there were no instances where vessels were brought into port for search prior to instituting prize court proceedings, or where captures had been made upon other grounds than evidence found on the ship under investigation and upon circumstances ascertained from external sources.⁶

The size and seaworthiness of modern carriers of commerce, and the difficulty of uncovering the real transaction in the intricate trade operations of the present day, relied upon as the basis of the British contention that modern conditions justified searches in port, were not deemed to offer an adequate excuse. The view was expressed that commercial transactions of the existing time, although hampered by belligerent censorship of telegraph and postal communication, were essentially no more complex and disguised than in previous recent wars, during which, it was said, the practice of obtaining evidence in port to determine whether a vessel should be held for prize proceedings had not been adopted. Expert naval opinion in the United States was quoted in support of these views.⁷ The United States, reiterating its position, contested the rightfulness of the British seizure of vessels at sea upon conjecture or suspicion, and the practice of bringing them into port for the purpose, by search or otherwise, of obtaining evidence in justification of prize proceedings.

In April, 1916, Great Britain restated its position in vigorous terms,⁸ declaring again that the confining of the right of search to an examination of a ship at the place where encountered would necessitate the surrender of a fundamental bel-

⁵ "On the contrary," it was said, "the context of the respective instructions shows that search at sea was the procedure expected to be followed by the commanders. All of these instructions impress upon the naval officers the necessity of acting with the utmost moderation — and in some cases commanders are specifically instructed — in exercising the right of visit and search, to avoid undue deviation of the vessel from her course.

"An examination of the opinions of the most eminent text writers on the laws of nations shows that they give practically no consideration to the question of search in port, outside of examination in the course of regular prize-court proceedings." (*Id.*, 579.)

See, also, British notification respecting stoppage, search or seizure of British merchant vessels by belligerents, Oct. 31, 1912, Brit. and For. State Pap., CV, 119.

⁶ Attached to Secretary Lansing's note, as Appendix I, were the instructions of the Secretary of the Navy, relative to the right of search, Aug. 18, 1862, and as Appendix II, a detailed statement regarding vessels detained by British authorities.

See discussions between Germany and Great Britain, respecting the search at Aden in 1900, of the German mail steamer *General*, Moore, Dig., VII, 739, 741-743, citing Blue Book, Africa, No. 1, 1900.

⁷ That opinion from a board of naval experts declared that "At no period in history has it been considered necessary to remove every package of a ship's cargo to establish the character and nature of her trade or the service on which she is bound, nor is such removal necessary. . . .

"The facilities for boarding and inspection of modern ships are in fact greater than in former times; and no difference, so far as the necessities of the case are concerned, can be seen between the search of a ship of 1,000 tons and one of 20,000 tons — except possibly a difference in time — for the purpose of establishing fully the character of her cargo and the nature of her service and destination. . . . This method would be a direct aid to the belligerents concerned in that it would release a belligerent vessel overhauling the neutral from its duty of visit and search and set it free for further belligerent operations." For. Rel. 1915, Supp., 580.

⁸ See memorandum accompanying note of Sir Cecil Spring-Rice, British Ambassador to the United States, to Mr. Lansing, Apr. 24, 1916, For. Rel. 1916, Supp., 368.

ligerent right. There were submitted the views of Admiral Sir John Jellicoe, and of the French Ministry of Marine, at variance with American naval opinion as to the effect of the size and seaworthiness of merchant vessels upon their search at sea.⁹ The question of the locality of the search was, however, said to be one of secondary importance. In the view of His Majesty's Government, the right of a belligerent to intercept contraband on its way to the enemy was fundamental and incontestable, and ought not to be restricted to interception which happened to be accompanied on board the ship by sufficient proof to condemn it. It was urged that the essential thing was to determine whether contraband goods were on the way to the enemy, and that if they were, a belligerent was entitled to detain them. It was announced that having regard to the nature of the struggle in which the Allies were engaged, they were compelled to take the most effectual steps to exercise that right of detention.

In resorting to a procedure regardless of precedent, Great Britain assumed the burden of showing that changed conditions freed it from restrictions previously acknowledged, and that its conduct was in any event but a reasonable if fresh application of a fundamental belligerent right.

§ 728. **The Same.** The attempts of vessels of war to visit and search neutral merchantmen of great tonnage and in rough waters have not been confined to wars of even the present century. The British task in World War I was rendered difficult and dangerous by the submarine operations of the enemy rather than by any absence of calm seas. Such operations oftentimes made it impracticable to conduct an extensive yet reasonably necessary search at the place where a suspected merchantman was encountered. In view of such circumstances, unlike

⁹ Sir John Jellicoe said: "It is undoubtedly the case that the size of modern vessels is one of the factors which render search at sea far more difficult than in the days of smaller vessels. So far as I know, it has never been contended that it is necessary to remove every package of a ship's cargo to establish the character and nature of her trade, etc.; but it must be obvious that the larger the vessel and the greater the amount of cargo, the more difficult does the examination at sea become, because more packages must be removed.

"This difficulty is much enhanced by the practice of concealing contraband in bales of hay and passengers' luggage, casks, etc., and this procedure, which has undoubtedly been carried out, necessitates the actual removal of a good deal of cargo for examination in suspected cases. This removal cannot be carried out at sea, except in the very finest weather.

"Further, in a large ship the greater bulk of the cargo renders it easier to conceal contraband, especially such valuable metals as nickel, quantities of which can easily be stowed in places other than the holds of a large ship.

"I entirely dispute the contention, therefore, advanced in the American note, that there is no difference between the search of a ship of 1,000 tons and one of 20,000 tons. I am sure that the fallacy of the statement must be apparent to anyone who has ever carried out such a search at sea.

"There are other facts, however, which render it necessary to bring vessels into port for search. The most important is the manner in which those in command of German submarines, in entire disregard of international law and of their own prize regulations, attack and sink merchant vessels on the high seas, neutral as well as British, without visiting the ship and therefore, without any examination of the cargo. This procedure renders it unsafe for a neutral vessel which is being examined by officers from a British ship to remain stopped on the high seas, and it is, therefore, in the interests of the neutrals themselves that the examination should be conducted in port.

"The German practice of misusing United States passports in order to procure a safe conduct for military persons and agents of enemy nationality makes it necessary to examine closely all suspect persons, and to do this effectively necessitates bringing the ship into harbour." (*Id.*, 369-370.)

those prevailing in any previous war, it may be admitted that searches in port were oftentimes the only searches by means of which the exercise of that right could become effective.

Another circumstance, however, requires consideration. The right of search, although of highest usefulness in the prevention of the carriage of contraband to the enemy, is not to be deemed an unrestricted means of interfering with such traffic. It has never been more than a concession to a belligerent itself capable of exercising it on the high seas. It has never afforded any remedy by way of substitute to the belligerent there incapable of utilizing it. If the weapons or devices of the enemy served to frustrate attempts to search thoroughly merchantmen where they happened to be encountered, no further hardship was undergone by such vessels. Through its own impotence the belligerent lost the benefit of that means of preventing neutral participation in the conflict. No broader concession could have been made without placing intolerable burdens upon neutral commerce, especially in a war in which the supremacy of the seas was fairly divided. For that reason it was withheld.¹

As long as the right of visit and search is accorded a belligerent, latitude should doubtless be yielded to it in its endeavors to check traffic in contraband, and to ascertain the existence thereof on the high seas. The procedure, however, whereby innocent ships are forced to deviate from their courses, put into belligerent ports and there submit to protracted searches as a means of indicating whether they or other vessels are participating in the war, or are about to do so, appears to be at variance with the demands of justice, and difficult to reconcile with what the law of nations was understood to permit when World War I broke out.²

The British argument and the facts which supported it indicate why the right of search as exercised in previous wars is inapplicable to modern conditions. They show, moreover, how the illegal procedure of a belligerent in a particular conflict, howsoever challenged by aggrieved neutrals, may serve as a convenient precedent for like conduct in a subsequent war. Such considerations indicate, therefore, as has been suggested above, the importance to States that endeavor to remain non-participants in the course of wars which may be waged by others,

§ 728. ¹ Such a concession would have implied that the mere possibility of participation in the war, and the commission of an internationally illegal offense, sufficed to impose upon every innocent ship a severe penalty by way of deviation and delay, simply as a means of enabling it to prove its abstinence from such unneutral conduct. The neutral obligation to submit to search, as applied during the wars of the nineteenth century, although doubtless regarded as vexatious and annoying to neutral shipping, involved no real hardship for innocent vessels, and hence was open to little objection. See Lord Russell, British For. Secy., to certain British merchants, July 5, 1862, with reference to American visits during the Civil War, Dip. Cor. 1862, 171, Moore, Dig., VII, 698, 699.

As a careful observer has recently declared: "According to international law in 1914, a belligerent had a right to search any neutral merchantman on the high seas and to capture her for carrying contraband of war, breaking blockade, or performing unneutral service. It had no right to send a vessel into port for a minute examination in the hope of finding evidence on which to condemn her." (Alice M. Morrissey, *American Defense of Neutral Rights, 1914-1918*, 41.)

² It is well said in Art. 61 (3) of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "In no case may a warship divert a vessel to port to facilitate search unless the vessel has been captured in accordance with the provisions of this article." (*Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 187.)

of an efficacious substitute for searches and visitations that shall satisfy every reasonable belligerent demand. There is room for difference of opinion as to the form which such a substitute should assume. In its essence, however, it would appear to call for informative action by the neutral manifested through official certifications offering reliable assurance as to relevant facts.³

On March 30, 1929, Mr. Adams, Secretary of the Navy, informed the Secretary of State, that the general policy of the United States Navy during the World War, as to visit and search was indicated by the Naval Instructions Governing Maritime Warfare of June 30, 1917, and by "Alnav No. 78, of 21 May 1918," in which it was declared that "commanders of all Naval vessels shall whenever possible take necessary steps to assure themselves of the character of all vessels sighted on the high seas in accordance with international law and usage."⁴ In response to three questions that had been raised by the Secretary of State he said, first, that the right of visit and search was exercised by the United States Navy constantly during the World War;⁵ secondly, that there was no record in the Navy Department of any neutral ship or cargoes being brought into port by vessels of the Navy during that conflict, for adjudication as prizes; and thirdly, that there was no record in that Department of any case of search and seizure by vessels of the United States Navy of the kind contested in the American note of October 21, 1915, in which, as has been observed, Secretary Lansing had made objection to British searches in port.⁶

(d)

§ 728A. **Renewal of British Claim, 1939.** It may be observed that shortly after the outbreak of war between Great Britain and Germany in September, 1939, His Majesty's Government announced that any neutral vessels bound for enemy territory or neutral ports affording convenient means of access thereto, and which did not "call voluntarily" at specified British ports for examination,

³ See theory of memorandum from the British Foreign Office, June 7, 1918, concerning the despatch of a Dutch convoy to the East Indies, Misc. No. 13 (1918), Cd. 9028, 8. Also T. J. Lawrence, *Int. Law*, 4 ed., 473, 474.

See Prof. A. Pearce Higgins, in *Recueil des Cours*, 1926, I, 140.

⁴ Secy. Adams' communication is contained in a footnote on p. 934 of *For. Rel.* 1918, Supp., 1, Vol. II, which was not published until 1933.

Declared Secy. Adams in this connection: "As an example, however, of the limitations upon visit and search which were recognized by United States naval officers during the war, the *Bainbridge* incident may be mentioned. On March 6, 1918, the U.S.S. *Bainbridge* was dispatched from Gibraltar by Senior Naval Officer (British) under secret orders to intercept the Spanish S.S. *Reina Victoria Regina*, search for a passenger named Otto David, alias David Grundland or Grunland, and to arrest him and bring him to Gibraltar if found. When the then Commander of the United States Patrol Squadrons based on Gibraltar, Rear Admiral A. P. Niblack, learned of these orders, he protested and requested that the orders be revoked, which was done. A few days later the British Senior Naval Officer at Gibraltar received instructions from the British Admiralty that United States vessels should not be employed in removing enemy or other persons from neutral vessels."

⁵ He cited as instances the following cases "Danish schooner *Salus*, boarded by U.S.S. *Rochester*, May 3, 1918, in mid-Atlantic; Holland-American S.S. *Maartensdyk*, boarded by the U.S.S. *Craven*, April 24, 1917, seven miles west of Nantucket; Mexican schooner *San Cosme*, searched by U.S.S. *Brutus*, February 15, 1918, en route from Acapulco to Manzanillo, Mexico; Spanish S.S. *Leon XIII*, searched by U.S.S. *Pittsburgh*, April 22, 1918, six miles off Santa Maria light, Uruguay."

⁶ *For. Rel.* 1915, Supp., 578-589.

would be liable to be diverted to a so-called Contraband Control base, if an adequate search by His Majesty's ships at sea was not practicable.¹ Here was a warning that non-compliance with the course suggested might cause neutral vessels under some conditions to be subjected to a search which was not to be at sea and which, in so far as it involved the diversion of a neutral vessel into a belligerent port for purposes of examination, called for conduct which had been regarded by the United States in the course of World War I as unsanctioned by the law of nations.²

On December 14, 1939, Secretary Hull objected to the course announced by the British Government, declaring that: "Since, pursuant to the Act of Congress approved November 4, 1939, and the President's Proclamation of the same date, it becomes illegal for American vessels to enter the so-called combat zone about the British Isles and the Northern coast of Europe, they are thereby precluded from voluntarily entering the 'contraband Control' bases within the combat zone, and Your Excellency's note is understood as undertaking to reserve a right of your Government to divert American vessels to such bases, by force if necessary, acting, in that respect, without regard to the municipal law of the United States or the rights, obligations, and liabilities of American vessels under that law."³

§ 728A.¹ See Notice issued through British Consulate General, New York, Sept. 11, 1939, C C H 1939, 65, 551.

See Charles Warren, "Lawless Maritime Warfare," *Foreign Affairs*, XVIII, 424, 432-433.

² See Searches in Port, the Controversy with Great Britain, *supra*, § 727.

See also Blockade, *infra*, § 831; The British Blockade Policy Developed in 1939 and 1940, *infra*, § 832A.

The British notice of Sept. 11, 1939, contained the statement that neutral vessels were urgently advised to call voluntarily at the appropriate base, in order that their papers might be examined, and that, when it should have been established that they were not carrying contraband of war destined for the enemy, they might be given a pass to facilitate the remainder of their voyage.

³ Note to the Marquess of Lothian, British Ambassador at Washington, Dept. of State Bulletin, Jan. 6, 1940, 4. Secretary Hull added: "It is my understanding that the American steamship companies operating vessels to European destinations, putting aside certain of their rights under accepted principles of international law, have voluntarily indicated a willingness to cooperate with the British authorities in every practicable manner intended best to serve the mutual interests of themselves and the British Government in those circumstances in which the respective rights of the two parties might be regarded by them as in some respects in conflict. It is my belief that such a spirit of liberality on the part of American shipping interests should be met by a corresponding degree of accommodation and flexibility on the part of the British Government, and that such mutual deferences should avoid giving rise to any occasion for the forcible diversion of such American vessels to those belligerent ports which they are by the law of the United States prohibited from entering.

"In view of these considerations, it is difficult for my Government to foresee, as a practical matter, any occasion necessitating the entry of American vessels into belligerent ports. If, despite these considerations the British authorities should feel it necessary to compel any American vessel to enter the combat area or any of those belligerent ports which by the provisions of the neutrality law they are prohibited from entering, the Government of the United States will feel it necessary to examine carefully into all of the facts of the case and to take such further action as the results of such examination appear to make necessary or expedient. Meanwhile, I feel that I should inform Your Excellency that this Government, for itself and its nationals, reserves all its and their rights in the matter and that it will be expected that compensation for losses and injuries resulting from the infraction of such rights will be made as a matter of course."

(e)

§ 728B. **Visit and Search by Aircraft.** It is not unreasonable to assert that a belligerent may employ any convenient instrument of naval warfare for purposes of visit and search, so long as there be compliance with what the law prescribes. That instrument may be an aircraft.¹ Unless, however, the right of visit and search of neutral vessels embraces the privilege of causing their diversion so that desired searches may be made in places that suit the convenience of the belligerent, it is not apparent how such procedure is applicable to, and may be justly utilized by, belligerent military aircraft. This is true despite the fact that there may be occasional circumstances when aircraft may visit and search a vessel *sur place*. Impressive discussions of the matter have, however, made it clear that the aircraft as a visitor and searcher of foreign ships must be expected normally to cause the same to proceed to waters where examinations may be made without practical danger to the former.² To demand, therefore, that aircraft be forbidden to exercise the privilege of visit and search save under conditions that are imposed upon belligerent surface vessels, is to render the concession nugatory (unless, of course, it is acknowledged to embrace or permit the causing of the diversion of the ships encountered). On the other hand, to permit aircraft to have recourse to visit and search in what on most occasions must be the only mode of rendering such procedure feasible and valuable, is to permit the belligerent instrumentality greatly to harass neutral shipping and to produce untold hardships to innocent vessels.³ It opens the way to grave abuses of belligerent power, which if tolerated must be calculated to amend the existing law at the expense of neutral interests.⁴ For these reasons it is believed to be a

§ 728B.¹ See Spaight, *Air Power and War Rights*, 2 ed., 456.

² "The aircraft in use today are light and fragile things. Except in favorable circumstances they would not be able to alight on the water and send a man on board a merchant vessel at the spot where the merchant vessel is first encountered (*visite sur place*). To make the right of visit and search by an aircraft effective it would usually be necessary to direct the merchant vessel to come to some convenient locality where the aircraft can alight and send men on board for the purpose. This would imply a right on the part of the belligerent military aircraft to compel the merchant vessel to deviate from her course before it was in possession of any proofs derived from an examination of the ship herself and her papers that there were circumstances of suspicion which justified such interference with neutral trade. If the deviation which the merchant vessel was obliged to make was prolonged, as might be the case if the aircraft was operating far from land, the losses and inconvenience imposed on neutral shipping would be very heavy." (General Report, Commission of Jurists on 1923 Rules of Aerial Warfare, *Am. J.*, XXXII, *Official Documents*, 40.)

³ "Diversion may become the normal practice, or, at all events, commoner than in ordinary maritime operations; and if it does, an impossible situation may result for neutral merchant shipping. Aircraft, with their superior speed and capacity for reconnaissance, will be able to control the busy sea routes in a way which warships cannot. They can subject neutral maritime commerce to an endless interference such as the strongest belligerent sea Power has never, in practice, claimed in the past. The practical objections which the American delegation raised at The Hague to allowing aircraft to substitute a mere signalled order for an actual boarding seem to the writer to be unanswerable. If the vessel cannot be visited *sur place*, she should be allowed to proceed unmolested." (Spaight, *Air Power and War Rights*, 2 ed., 472.)

⁴ "The American Delegation considered that a merchant vessel should be boarded when she is encountered, but maintained that, even if a departure from this rule might in exceptional circumstances be permitted in visit and search by surface ships, a similar concession to aircraft, with their limited means of boarding, would readily have the effect of converting the exception into the rule. They stated that they were not advised of anything in the record of the Washington Conference showing an intention to authorize surface ships or submarines to

fruitless task to endeavor to formulate rules designed both to permit belligerent aircraft to engage in visit and search of surface vessels, and to hold them in leash when they do so. The vast power of such instruments of maritime warfare to divert or otherwise interfere with neutral vessels wheresoever encountered, and the corresponding danger lest it be employed in unscrupulous fashion and without respect for what the existing law is believed to forbid, constitute a special reason why maritime States should make extraordinary effort to propose and accept reasonable substitutes for the exercise of visit and search. The potentialities of belligerent air forces seem to leave no alternative. While the 1923 Rules of Aerial Warfare declare in Article 50 that "belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible,"⁸ it contains no provision with reference to the treatment of surface craft.

(f)

MAIL STEAMERS AND MAIL

(i)

§ 729. Practice Prior to World War I. It is impossible to show that, prior to World War I, there was general understanding that mail steamers as such were exempt from visit and search. Neither Russia nor Japan acted upon that principle in the war of 1904–1905.¹ Long before that conflict the United States had, however, taken the stand that such vessels should not be interfered

divert merchant vessels, without boarding them, into port for examination; but that, were the case otherwise, the Washington Conference had decided that the subject of aircraft, which presented difficulties of its own and which might involve questions different from those pertaining even to submarines, should be dealt with separately; and that to permit aircraft, with their rapidity and range of flight, to control and direct by orders enforceable by bombing, and without visit and search, the movement of merchant vessels on the high seas would, in their opinion, give rise to an inadmissible situation.

"The American Delegation, therefore, proposed the following text; 'Aircraft are forbidden to visit and search surface or sub-surface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject. In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft cannot divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft cannot capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested.'" (General Report, Commission of Jurists on 1923 Rules of Aerial Warfare, *Am. J., Official Documents*, XXXII, 41.)

See in this connection J. B. Moore, *International Law and Some Current Illusions*, 1923, 204; also *Naval War College, Int. Law Documents*, 1936, 63–70.

Cf. privileges conferred upon belligerent commissioned military aircraft in Art. 109 of *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *Am. J., XXXIII, Supplement Section 2*, July, 1939, 197.

⁸ The same Article contains the further provision that "refusal, after warning, to obey such orders to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon." (*Am. J., XXXII, Official Documents*, 44.) See also *Naval War College, Int. Law Situations*, 1938, 15–17.

See *Aspects of Aerial Bombardment*, *supra*, § 663.

¹ T. J. Lawrence, *War and Neutrality in the Far East*, 185–198; also memorandum accompanying note of Sir Cecil Spring-Rice, to Mr. Lansing, Secy. of State, Oct. 12, 1916, *For. Rel.* 1916, Supp., 629. See, also, A. S. Hershey, "The So-called Inviolability of the Mails," *Am. J., X*, 580; C. D. Allin, "Belligerent Interference with Mails," *Minnesota Law Rev.*, April, 1917.

with except upon the clearest ground of suspicion of a violation of law in respect to contraband or blockade. Instructions in such a sense were issued at the beginning of the war with Spain in 1898.² The Hague Convention of 1907, relative to Restrictions of Capture in Naval War, declared that a neutral mail ship may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.³ The Oxford Manual of Naval War contained a similar provision.⁴ Both of these codes made, however, a distinction between the treatment to be accorded mail steamers and mails that might be found thereon. The latter were declared to be always inviolable.⁵

The United States, when itself a belligerent, was, as Lawrence has said, a pioneer in the matter of respecting the mails.⁶ This was manifest in its conduct in the Mexican War, in the Civil War, and in that with Spain.⁷ Its example may have done much to cause restraint on the part of other belligerents in subsequent wars. It is unlikely, however, that the United States would have felt itself guilty of illegal conduct in case it had examined mail on a neutral ship bound for an enemy port had there been reason for suspicion that such mail contained information of military value to the enemy.⁸ Apart from American practice, it is

² Proclamation of President McKinley, Apr. 26, 1898, Proclamations and Decrees during the War with Spain, 77, 78, Moore, Dig., VII, 480. See, also, Instructions of Mr. Welles, Secretary of the Navy, Aug. 18, 1862, attached as Appendix I to note of Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, For. Rel. 1915, Supp., 589.

See The Panama, 176 U. S. 535, respecting the capture, during the war with Spain in 1898, of an armed Spanish mail steamer on a voyage from New York to Habana. In the course of the opinion Mr. Justice Gray said: "The mere fact, therefore, that the *Panama* was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture." 543. Also *id.*, 541, 542.

According to Art. XX, of the Postal convention with Great Britain of Dec. 15, 1848, it was provided that "in case of war between the two nations, the mail packets of the two offices shall continue their navigation without impediment or molestation until six weeks after a notification shall have been made on the part of either of the two Governments, and delivered to the other, that the service is to be discontinued, in which case they shall be permitted to return freely, and under special protection, to their respective ports." 9 Stat. 969.

³ Art. II, Malloy's Treaties, II, 2347. Concerning this Article see Report of the Fourth Commission to The Hague Conference, Mr. Henri Fromageot, reporter. *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 266, J. B. Scott, Reports to Hague Conferences, 735.

⁴ Arts. XXXII and LIII, *Annuaire*, XXVI, 650 and 657, J. B. Scott, Resolutions, 181 and 188, respectively.

⁵ Arts. I and II of The Hague Convention; also Article LIII of the Oxford Manual of Naval War.

It may be observed that the provision of The Hague Convention, respecting the inviolability of the mails, was a German proposal, based on the theory that the advantage to be gained by belligerents from the control of the postal service was out of all proportion to the harm done to inoffensive commerce. Telegraphy and radiotelegraphy were said to offer more rapid and surer methods of communication than the mail. It does not appear from the Report of the Fourth Commission to The Hague Conference that the delegates believed the proposal to be declaratory of international law. The attempt was made to afford a new protection for the mails, inasmuch as "in the present state of international law the transportation of postal correspondence at sea is not effectively guaranteed in time of war." *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 266, J. B. Scott, Reports to Hague Conferences, 735. See, also, in this connection, Sir W. R. Kennedy, in *Law Quar. R.*, XXIV, 74-75.

⁶ War and Neutrality in the Far East, 189.

⁷ Documents in Moore, Dig., VII, 479-484; also Mr. Lansing, Secy. of State, to the French and British Ambassadors at Washington, May 24, 1916, For. Rel. 1916, Supp., 604. Also Naval War College, Int. Law Topics and Discussions, 1906, 88-95.

⁸ Mr. Seward, Secy. of State, to Mr. Welles, Secy. of the Navy, April 15, 1863, 60 Dom. Let. 234, Moore, Dig., VII, 482.

not believed that maritime States prior to the Second Hague Conference were generally agreed that the mails on neutral ships on the high seas were inviolable.⁹ Nor had the tendency favorable to immunity ripened into a general practice at the time of the outbreak of the World War in 1914.

(ii)

§ 730. **The Controversy with Great Britain during World War I.** In 1916, the United States protested vigorously against a British practice incidental to what was deemed to constitute the unlawful bringing in of ships for search in port. It was charged that the entire mails of neutral ships were removed therefrom and subjected to examination on land. It was declared that modern practice generally recognized that mails are not to be censored, confiscated or destroyed on the high seas, even when carried by belligerent mail ships, and that to attain the same end by bringing such mail ships within the British jurisdiction for purposes of search, and then subjecting them to local regulations, allowing of censorship of mails, could not be justified on the ground of national jurisdiction. It was added that in cases where a neutral ship merely touched at British ports, the Department of State believed that British authorities "had no international right to remove the sealed mails or to censor them on board ship."¹ In the discussion that ensued the United States laid stress upon the grievous injuries sustained by its nationals in consequence of delays and losses of mail matter attributable to the British procedure.² It denied the right of the Allied Governments to obtain jurisdiction over the mails by forcing or inducing vessels to visit their ports for the purpose of seizing the mails. It declared that there was no legal distinction between the seizure of mails at sea and their seizure from vessels voluntarily or involuntarily in port. The British practice was said

⁹ Memorandum from the French Embassy at Washington, Oct. 12, 1916, in relation to the prior conduct of Japan, Russia and France, For. Rel. 1916, Supp., 624.

Compare Mr. Lansing, Secy. of State, to the French and British Ambassadors at Washington, May 24, 1916, For. Rel. 1916, Supp., 604; also Mr. Hay, Secy. of State, to Mr. Eddy, American Chargé d'Affaires at St. Petersburg, Oct. 13, 1904, respecting the mails on the S.S. *Calchas*, For. Rel. 1904, 772.

§ 730. ¹ Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Jan. 4, 1916, For. Rel. 1916, Supp., 591.

It was said that the Department of State was inclined to regard parcel-post articles as subject to the same treatment as articles sent by express or freight in respect to belligerent search.

² It was declared that the Allied Governments "compel neutral ships without just cause to enter their own ports or they induce shipping lines, through some form of duress, to send their mail ships via British ports, or they detain all vessels merely calling at British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. Acting upon this enforced jurisdiction, the authorities remove all mails, genuine correspondence as well as post parcels, take them to London, where every piece, even though of neutral origin and destination, is opened and critically examined to determine the 'sincerity of their character,' in accordance with the interpretation given that undefined phrase by the British and French censors. Finally the expurgated remainder is forwarded, frequently after irreparable delay, to its destination. . . . The arbitrary methods employed by the British and French Governments have resulted most disastrously to citizens of the United States. Important papers which can never be duplicated, or can be duplicated only with great difficulty, such as United States patents for inventions, rare documents, legal papers relating to the settlement of estates, powers of attorney, fire insurance claims, income-tax returns, and similar matters have been lost. Delays in receiving shipping documents have caused great loss and inconvenience by preventing prompt delivery of goods." (Mr. Lansing, Secy. of State, to the French and British Ambassadors at Washington, May 24, 1916, For. Rel. 1916, Supp., 604, 605, 606.)

to be at variance with the spirit of the rule of the Hague Convention,³ and was denounced as a violation of the prior practice of nations which Great Britain and her Allies had previously assisted to establish and maintain, and to which the United States, when itself a belligerent, had adhered. The Department of State inclined to the opinion that certain classes of mail matter which included stocks, bonds, coupons and similiar securities might be regarded as of the nature of merchandise, and hence, subject as such to the same exercise of belligerent rights. In that category were also placed money orders, checks, drafts, notes and other negotiable instruments which might pass as the equivalent of money. On the other hand, correspondence, including shipping documents, money-order lists, and papers of that character, even though relating to enemy supplies or exports, unless carried on the same ship as the property referred to, were, in the opinion of the Department, to be regarded as genuine correspondence, and entitled to unmolested passage.⁴

The United States, in so distinguishing between the various forms of mail matter and the treatment to be accorded them, appeared to admit by implication a right of censorship, when exercised on the high seas, in order to enable a belligerent to ascertain the contents of packages or letters that might contain matter deemed to be fairly subject to seizure. Thus, also, a distinction was impliedly raised between the right to censor and the right to make seizures. By admitting the right of examining the mails of neutral vessels on the high seas for any purpose, the theory of inviolability was necessarily swept aside as impracticable.

The Allied Governments in October, 1916, contended that the right to inspect private mails to ascertain whether they contained contraband goods, or if carried on an enemy ship, whether they contained enemy property, and said to be recognized by the United States, necessarily involved the opening of covers so as to verify the contents, a procedure which could not be carried out on board ship without great confusion, serious delay and danger of loss or miscarriage to letters in transit.⁵ For that reason, it was declared, the Allies had had mail bags landed and sent to centers provided with the necessary force and equipment for prompt handling. A distinction was drawn between the seizure and confiscation of genuine mails on the high seas (conduct to which the Allied Governments had declared themselves unwilling to resort), and such treatment of mails on neutral vessels voluntarily entering an allied port. It was stated that in no case where a neutral ship had been summoned on the high seas and compelled to make such a port, had the mails been subjected to treatment other than if the ship had been visited on the high seas.

³ The practice complained of was said to be a violation also of the spirit of the announcement contained in a memorandum submitted by the French Ambassador at Washington in behalf of the Allies, April 3, 1916, and dated Feb. 15, 1916. *Id.*, 599.

⁴ *Id.*, 607-608.

⁵ Memorandum representing the joint views of the British and French Governments, enclosure in note of the French Ambassador, to Mr. Lansing, Secy. of State, Oct. 12, 1916, *Id.*, 624.

See in this connection, Alice M. Morrissey, *American Defense of Neutral Rights, 1914-1917*, 136-141.

With respect to the mails on vessels voluntarily entering allied ports, it was contended that entrance was voluntary when a master acted upon the instructions of the owner of the ship, and not upon those of the Allied Governments, and that a master so acting did not undergo any restraint.⁶ Ships putting in of their own accord were, therefore, it was said, making voluntary calls. The subjection to the local laws of merchant ships entering voluntarily a foreign port was declared to be a general rule of law accepted particularly in the United States,⁷ a law giving to local authorities the right to make sure that the vessels carried nothing inimical to the national defense before granting clearance.

The Hague Convention of 1907 was said to be inapplicable because it only referred to mails found at sea, and for the reason that it had not been signed or ratified by six of the belligerent powers.⁸ With respect to mails found at sea, it was not admitted that the convention expressed "a final provision legally binding" upon the Allied Governments, and from which they could not possibly depart. The right to do so was said to be expressly reserved "in case enemy abuses and frauds, dissimulations and deceits should make such a measure necessary." It was denied that from the practice of the powers in prior wars, a general rule could be seen prohibiting belligerents from exercising, on the open seas, "as to postal correspondence, the right of supervision, surveillance, visitation, and, if need be, seizure and confiscation, which international law confers upon them in the matter of any freight outside of the territorial waters and jurisdiction of the neutral powers."⁹

It was announced that the authorities had been instructed not to stop shipping

⁶ In this connection it was said: "In consideration of certain advantages derived from the call at an Allied port, of which he is at full liberty to enjoy or refuse the benefits, the owner instructs his captain to call at this or that port. He does not, in truth, undergo any constraint." (*Id.*, 625.)

See J. B. Scott, *Survey of Int. Relations between United States and Germany*, 59-65.

⁷ The case of *United States v. Dieckelman*, 92 U. S. 520, was cited. *For. Rel.* 1916, Supp., 625. This was the case of a German ship which entered the blockaded port of New Orleans, Aug. 24, 1862, pursuant to special regulations of the Treasury Department to which the vessel had impliedly assented.

⁸ "For that very reason," it was declared, "Germany availed itself of Article 9 of the convention and denied, so far as it was concerned, the obligatory character in these stipulations; and for these several reasons the convention possesses in truth but rather doubtful validity in law. In spite of it all, the Allied Governments are guided in the case of mails found on board ships in ports by the intentions expressly manifested in the conferences of The Hague sanctioned in the preamble to convention XI, and tending to protect pacific and innocent commerce only." (*Id.*, 626.)

⁹ The note adverted to the conduct of Russia and Japan in the war of 1904, of France in 1870, of Great Britain in the Boer War, and of the United States in the Mexican and Civil Wars.

In the case of the S.S. *Calchas*, it was said that the steamer, captured in July, 1904, by Russian cruisers, "had 16 bags of mail that had been shipped at Tacoma by the postal authorities of the United States seized on board and landed and the prize court of Vladivostock examined their contents, which it was recognized it could lawfully do." (*Id.*, 627.) It was not stated that those 16 bags, addressed to Japanese and Korean ports, were but a part of 122 bags on board, the remainder being presumably destined for neutral places, and which, it does not appear from the decision of the prize court, were unsealed or examined. *Hurst and Bray's Russian and Japanese Prize Cases*, I, 136, 138, 139, 141. It should be noted, however, that the diplomatic correspondence of the United States records complaint from the Department of State that one bag of mail on the *Calchas*, addressed to the U.S.S. *Cincinnati*, had been opened and resealed by the Russian post office at Vladivostock. *For. Rel.* 1904, 772-774.

documents and commercial correspondence found on neutral vessels, even in an allied port, "and offering no interest of consequence as affecting the war."¹⁰ To lists of money orders were not assigned the character of ordinary mail ascribed to them by the United States.¹¹ In conclusion it was declared to be the belligerent right of the Allies to exercise on the high seas the supervision granted by international law to impede any transportation to aid the enemy. It was denied that the United States, as a neutral power, could rightfully give protection to correspondence or communications in any shape whatever "having an open or concealed hostile character and with a direct or indirect hostile destination, which American private persons can only effect at their own risk and peril."

Admissions of the United States lessened the significance of the inquiry whether the prior practice of belligerent powers had established a rule of inviolability for postal correspondence when encountered on the high seas. While the right there to examine the mails was conceded, the abuse of it in such waters was not a matter of discussion.¹² If it be admitted that the entrance to allied ports of neutral steamers from which the mails were removed was technically voluntary, and hence subjected such vessels to the local jurisdiction, it is, nevertheless, believed that any right to remove, detain or confiscate mails destined for neutral ports was unrelated to the belligerent right of visit and search. The propriety of the former conduct rested upon proof that it was a reasonable assertion of the right of control or jurisdiction exercised by a belligerent over alien property within the national domain. The essence of the complaint of the United States was not that mail vessels were involuntarily drawn to allied ports, or that the exercise of jurisdiction or control over such vessels voluntarily therein was abused, but rather that by virtue of sheer naval force the Allied Governments compelled neutral steamship lines to cause their mail steamers to put into allied ports and thus subject themselves to the control of the territorial sovereign.¹³

¹⁰ It was declared that "Mail matter of that nature must be forwarded to destination as far as practicable on the very ship on which it was found or by a speedier route, as is the case for certain mails inspected in Great Britain." (For. Rel. 1916, Supp., 628.)

¹¹ In this connection it was said, "As a matter of fact, the lists of money orders mailed from the United States to Germany and Austria-Hungary correspond to moneys paid in the United States and payable by the German and Austro-Hungarian post offices. Those lists acquaint those post offices with the sums that have been paid there which in consequence they have to pay to the addressees. In practice, such payment is at the disposal of such addressees and is effected directly to them as soon as those lists arrive and without the requirement of the individual orders having come into the hands of the addressees. These lists are thus really actual money orders transmitted in lump in favor of several addressees. Nothing, in the opinion of the Allied Governments, seems to justify the liberty granted to the enemy country so to receive funds intended to supply by that amount its financial resisting power." (*Id.*, 628.)

¹² It may be observed that the right of examination might be easily abused on the high seas, in case a naval commander undertook to exercise a rigid censorship over all private mail not purporting from its nature to be of a kind subject to detention. This fact suggests the desirability of establishing, by some form of neutral governmental certification, the inviolability of certain forms of private correspondence.

¹³ The distinction between compelling a steamship company to cause its vessels to put into port and compelling the master of a ship directly to do so must be apparent. Although vessels which, in consequence of pressure brought to bear upon their owners, may be said to enter port without duress, because the territorial sovereign has not in fact exerted force against the ships to compel obedience to its commands, the conduct whereby a State so intimidates neutral shipping as to force it to yield to a control to which it would not other-

(iii)

§ 730A. **The Controversy with Great Britain, 1940.** In January 1940, the Government of the United States announced the text of a complaint which it had lodged with the British Foreign Office on account of the removal from American and other ships of sealed letter mail sent from the United States and addressed to neutral countries.¹ While the right of the British Government to censor private mails originating in or destined to the United Kingdom or private mails which normally passed through the United Kingdom for transmission to their final destination was admitted, it was declared that the Government of the United States could not admit the right of British authorities to interfere with American mails on American or other neutral ships on the high seas, and that it could not admit the right of the British Government to censor mail on ships which had involuntarily entered British ports. Adverting to the inviolability of correspondence on the high seas as recognized in the eleventh Hague Convention of 1907, it was declared that the Government of the United States felt that the same rule obtained regarding such correspondence as might be on ships which were required by British authorities to put into a British port.² Particular objection was made of "the practice of taking mails from vessels which ply directly between American and neutral European ports and which through some form of duress are induced to call at designated British control bases."³

In its response, received by the American Embassy at London on January 17, 1940,⁴ His Majesty's Government, not denying the applicability of the immunity conferred by the Hague Convention of 1907, which it was said did not in any case cover postal parcels, and was "enjoyed only by genuine postal correspondence," contended that a belligerent was therefore at liberty to examine mail bags, and if necessary, their contents in order to assure itself that they constituted such correspondence and not articles of a noxious character such as contraband.⁵ Asserting that the letter post as well as the parcel post could be wise be subject, and to which it could not be lawfully compelled to submit, must be deemed to be perverse of justice.

See, in this connection, proclamation of Feb. 16, 1917, modifying the British order in council of March 11, 1915, and declaring that "a vessel which is encountered at sea on her way to or from a port in any neutral country afforded means of access to the enemy territory without calling at a port in British or Allied territory shall until the contrary is established be deemed to be carrying goods with an enemy destination or of enemy origin and shall be brought in for examination and if necessary for adjudication before the prize court." (For. Rel. 1917, Supp., 1, 493.)

Concerning the censorship of communications by mail, cable, radio or other means of transmission passing between the United States and any foreign country from time to time specified by the President, "or carried by any vessel, or other means of transportation touching at any port, place or territory of the United States to or from any foreign country," after the United States became a belligerent in World War I, see Executive Order No. 2739-A, Oct. 12, 1917, For. Rel. 1917, Supp. 2, Vol. II, 1242.

§ 730A.¹ Dept. of State Bulletin, Jan. 6, 1940, 3.

Attention was called to a number of specific cases which had come to the attention of the Department of State.

² There was quoted Art. 1 of the Convention, stipulating that "if the ship is detained, the correspondence is forwarded by the captor with the least possible delay."

³ Finally it was said: "The United States Government feels compelled to make a vigorous protest against the practices outlined above and to express the hope that it will receive early assurances that they are being discontinued."

⁴ Dept. of State Bulletin, Jan. 27, 1940, 91.

⁵ It was declared that "This view must, in the opinion of His Majesty's Government, be regarded as established by the practice during the war of 1914-1918, when none of the bel-

used to convey contraband, and that even though letters were addressed to a neutral country their ultimate destination might be Germany, it was contended that His Majesty's Government were entitled to ascertain by examining the contents of sealed letters, whether they contained merchandise fairly to be deemed contraband, a conclusion which it was said to be impossible to reach without such examination.⁶ Adverting to the use of the letter post by Germans to transmit military intelligence, to promote sabotage and to carry on other hostile acts, it was declared to be in accordance with international law for belligerents to prevent intelligence reaching the enemy which might assist them in hostile operations.⁷ Finally, it was maintained that for the foregoing reasons His Majesty's Government found themselves unable to share the views of the United States Government that "their action in examining neutral mail in British or neutral shipping is contrary to their obligations under international law."⁸

The solution of the controversy was not facilitated by projecting into the discussion the Hague Convention of 1907 apart from any question touching its applicability,⁹ and regardless of what might be the correct interpretation of that instrument. The issue pertained to something outside of the purview thereof. Nor was the principal grievance of the United States one that challenged the right of a belligerent to prevent by lawful means letter mail that might by reason of its content or character be fairly assimilated to contraband from reaching the enemy. The real basis of the American complaint was the British action that caused mails on board of neutral ships, and having an immediate or direct neutral destination, to be carried into belligerent ports and there be subjected to a rigid censorship. It was the abuse of a belligerent privilege revealed in the method by which it was applied which was the chief ground for objection. The American admissions of 1916 weakened the value of any fresh contentions that even letter mail might not be inspected by some appropriate process which did not involve the taking of such mail into a belligerent port as a means of making desired examinations thereof.¹⁰

ligerents accepted the view that Article I of this Convention constituted an absolute prohibition of interference with mail bags, and the general right to search for contraband was regarded as covering a full examination of mails for this purpose." (*Id.*) Reference was made, moreover, to correspondence with the United States in 1916, and to admissions of the latter set forth therein.

⁶ "It would be difficult," it was said, "to prevent the use of the letter post for the transmission of contraband to Germany, a use which has been made on an extensive scale, without submitting such mail to that very examination to which the United States Government is taking objection." (*Id.*, 92.)

⁷ It was added that there was destruction of mails on board ships "sunk by the illegal methods of warfare adopted by Germany," and that certain specified ships, known to have been carrying mails had been destroyed with as little regard for the safety of the neutral correspondence on board as for the lives of the inoffensive passengers and crew. "Yet," it was said, "His Majesty's Government are not aware that any protest regarding this destruction of postal correspondence has been made to the German Government." (*Id.*)

⁸ *Id.*

⁹ If the Hague Convention was inapplicable in 1916, it was also inapplicable in 1939 and 1940.

¹⁰ It may be observed that the admissions of Secretary Lansing, embraced in his note of May 24, 1916, to the French Ambassador at Washington, were part of a response to a joint memorandum from the British and French Governments of Feb. 15, 1916, purporting to be interpretative of the Hague Convention. See For. Rel. 1916, Supp., 604, 607-608.

Notwithstanding the wealth of material contained in the illuminating Comment on Paragraph (m) of Art. 63 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War (*Am. J. XXXIII. Supplement Section 2. Julv. 1939. 640-*

The potentialities of sealed letter mail, howsoever destined or carried, as a belligerent instrumentality have become so vast and obvious that the claim of a right to inspect is not likely to be relinquished or even held within such leash as the United States might reasonably demand. It is to be expected that the Hague Convention will be increasingly regarded as inept or inapplicable. Inviolability of letter mail must, in order to be of practical value, rest upon a surer foundation than is to be found in any existing multi-partite arrangement. It calls for neutral governmental certification that particular articles or bags of mail contain no information or substance that would be of military aid to a belligerent which gained possession of it.¹¹ General agreement providing for such certification and setting forth the precise conditions under which it should be heeded might possibly yield a substantial deference for the inviolability of neutral letter mail that is not otherwise to be anticipated.

(3)

RESISTANCE OR EVASION OF VISIT AND SEARCH — THE CONSEQUENCES THEREOF

(a)

§ 731. **Neutral Ships.** A belligerent may rightfully employ force to compel a neutral ship to submit to visit and search.¹ The attempt, therefore, to escape by flight, notwithstanding a reasonable signal to stop, subjects the merchantman to the danger of lawful attack.² Before, however, making attack, it should be clearly evident that the vessel is attempting not only to avoid search by escape,³ but also is aware of the demand of the pursuer to lie to.⁴ The effort of a neutral ship to keep beyond range of a signal to stop is not believed to be wrongful, even

653), and which is at least suggestive of what might or might not at the present time be acceptable to belligerent States, that paragraph merely announces that "postal correspondence on a captured neutral vessel is inviolable, unless it is being carried to or from a blockaded place on a vessel which is subject to condemnation for breach of blockade." (*Id.*, 189.) It is said in Paragraph (n) of the same Article that "postal parcels may be treated as cargo." (*Id.*)

Concerning the censorship of United States airmails at Bermuda on Jan. 18, 1940, by the forcible seizure of some 2600 pounds of letters from a Pan American Airways Clipper, see Associated Press statement in *New York Times*, Feb. 22, 1940, p. 1.

¹¹ According to Japanese regulations of 1904, Art. 34, it is interestingly announced that "in cases where a mail steamer of a neutral State is visited or searched, the search must not extend to the mail bags if the postal official of the country to which the ship belongs, carried on board the ship, makes a written declaration that there are in the mail bags no documents which are contraband of war." (2 Hurst and Bray, *Russian and Japanese Prize Cases*, 430.)

§ 731. ¹ Art. XXXII, U. S. Naval War Code of 1900, Naval War College, *Int. Law Discussions*, 1903, 110.

² See, for example, Mr. Lansing, Secy. of State *ad interim*, to Mr. Gerard, Ambassador to Germany, telegram, June 9, 1915, *For. Rel.* 1915, Supp., 436; Same to Same, telegram, July 21, 1915, *id.*, 480.

See, also, The *Hipsang*, Hurst and Bray's *Russian and Japanese Prize Cases*, I, 36; The *Ship Rose*, 36 Ct. Cl. 290.

"If the summoned vessel resists or takes to flight she may be pursued and brought to, by forcible measures, if necessary." Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 45. *Id.*, No. 44.

³ Article XXXIII, U. S. Naval War Code of 1900, Naval War College, *Int. Law Discussions*, 1903, 110.

⁴ Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, telegram, June 21, 1916, concerning the attack on the American S.S. *Petrolite*, *For. Rel.* 1916, Supp., 276.

though a belligerent vessel of war is compelled in consequence specially to exert itself in order to get within such range.⁶

Declared the Naval War College in 1936:

The attempt of an enemy merchant vessel to escape visit and search is natural and lawful, and well established rules exist to protect the merchant vessel in the exercise of the effort to escape. Even when attempting to escape the merchant vessel has from the eighteenth century been entitled to considerate treatment and is not liable to penalty merely because of the attempt. Signals must be given to bring the merchant vessel to. The warning gun across the bow was commonly required, and the vessel of war was required to hoist its true colors before firing a gun in action.⁶

It is assumed that this statement is designed to have reference to the case where the enemy merchant vessel has not received an appropriate signal to stop or surrender; and that it is not sought to be intimated that such a ship after the receipt of such a signal may continue with immunity its endeavor to escape.⁷

According to Article 22 of the treaty on Limitation and Reduction of Naval Armament concluded at London, April 22, 1930, and to which the United States is a party, it is accepted as an established rule of international law that "except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety."⁸ It may be observed that the exception is as significant as the rule to which it is appended. The active resistance to which reference is made may well be deemed to embrace any attempt on the part of the merchant vessel, after having obeyed a summons to stop, to frustrate, as by communicating with a war vessel of the opposing belligerent, the exercise of the privilege of visit and search.⁹

⁶ This is due to the fact that the right of visit and search is conceded to the belligerent solely on condition that it possess the means of fulfilling the several requirements incidental to its exercise. One of these is the making of an appropriate signal to stop. To compel, therefore, a cruiser to overhaul a neutral merchantman and give to it such a signal is merely to call upon the former to place itself in a position where it can satisfy this obligation. There seems to be, therefore, an important distinction between the legal nature of an attempt of a neutral vessel to escape by flight before the receipt of a signal to stop, and that of an attempt to do so thereafter.

Compare General Report of the Drafting Committee to the International Naval Conference, 1908-1909, Charles' Treaties, 318.

⁷ Int. Law Situations, 1936, 61.

⁸ It may be observed that the excerpt quoted above follows on the same page, the text of a memorandum on the Conduct of Naval Vessels toward Merchant Ships, communicated by Mr. Lansing, Secy. of State, to Mr. Gerard, American Ambassador to Germany, April 28, 1916, For. Rel. 1916, Supp., 252, in which it is stated: "A belligerent warship can directly attack if a merchant vessel resists or continues to flee after a summons to surrender."

⁹ U. S. Treaty Vol. IV, 5268, 5281.

⁹ A neutral ship carrying contraband in the interest of a particular belligerent will be obviously zealous to escape visit and search by a naval vessel of the opposing belligerent, and may be sorely tempted to inform the former of its plight, as a possible means of causing the latter to refrain from such action.

See German note of Dec. 16, 1916, relative to the sinking of the American ship *Columbian* in November 1916, For. Rel. 1916, Supp., 325. Cf. Art. 54 (3) of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 186, where the adjective "unarmed" is employed to describe the type of merchant vessel to which reference is made. It is to be regretted that the London Convention of 1930 did not contain a like qualification.

In general, after receipt of a signal to stop, any further effort on the part of a neutral ship to avoid visit and search by any process must, on principle, be deemed internationally illegal conduct, because it constitutes interference with the exercise of an admitted belligerent right.¹⁰ Thus, irrespective of the character of the cargo or the apparent destination of the ship, resistance by violence justifies its seizure; likewise, evasion of search through the presentation of fraudulent papers, or the absence of those necessary to establish the objects of search, or the destruction, defacing, or concealing of papers.¹¹ Although such conduct

¹⁰ "All that I assert is, that legally it cannot be maintained, that if a Swedish commissioned cruiser during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right." Sir W. Scott, in *The Maria*, 1 Ch. Rob. 340, 361, 362.

See, also, *Maley v. Shattuck*, 3 Cranch, 458, 488; *The Baigorri*, 2 Wall. 474, 481; *The Ship Rose v. United States*, 36 Ct. Cl. 290; *The Ship Amazon v. United States*, 36 Ct. Cl. 378; *The Schooner Jane*, 37 Ct. Cl. 24.

¹¹ See U. S. Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 781, Moore, Dig., VII, 485; also Art. XXXIII, U. S. Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 110; memorandum of Department of State, March 25, 1916, For. Rel. 1916, Supp., 244, 246; Mr. Marcy, Secy. of State, to Mr. Buchanan, Minister to Great Britain, April 13, 1854, H. Ex. Doc. 103, 33 Cong., 1 Sess., 12, 13, Moore, Dig., VII, 484.

See, also, Story, J., in *The Dos Hermanos*, 2 Wheat. 76, 89, Moore, Dig., VII, 486, who said: "It is certainly the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property, and if their conduct be fair and honest, there can rarely occur an occasion to use disguise, or false documents. At all events, when false or colouring documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal to induce a court of prize to rest satisfied with it. To say the least of it, the excuse is not, in this case, satisfactory; for the disguise is as strongly pointed to elude American, as British or Spanish capture."

Ship's papers. — "The papers which will generally be found on board a private vessel are:

" 1. The certificate of registry or nationality.

" 2. A certified bill of sale, or certificate thereof duly authenticated, in the absence of certificate of registry or nationality, or in the case of a vessel which has recently been transferred from enemy to neutral ownership.

" 3. The crew list.

" 4. The passenger list.

" 5. The log book.

" 6. The bill of health.

" 7. The clearance papers.

" 8. The charter party, if chartered.

" 9. Invoices or manifests of cargo.

" 10. Bills of lading.

"The evidence furnished by the papers against a vessel is conclusive. Regularity of papers and evidence of the innocence of cargo or destination furnished by them are not necessarily conclusive, and if doubt exists a search of the ship or cargo should be made to establish the facts. If a vessel has deviated far from her direct course, this, if not satisfactorily explained, is a suspicious circumstance warranting search, however favorable the character of the papers." Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 50. See *Id.*, Appendix II, for American ship's papers.

Certain early treaties of the United States provided that in case either of the contracting parties should be engaged in war the ships belonging to the nationals of the other should be furnished with sea letters or passports containing specified information, as well as with certificates containing particulars as to the cargo. See, for example, Art. XVII, treaty with Spain, Oct. 27, 1795 (respecting which see *The Pizarro*, 2 Wheat. 227, Moore, Dig., VII, 486), *Malloy's Treaties*, II, 1646; also Art. XXVIII, treaty with Peru, July 26, 1851, *id.*, II, 1397; Art. XVI, treaty with Venezuela, Aug. 27, 1860, *id.*, II, 1850.

See L. A. Atherley-Jones, *Commerce in War*, 345-353, for a description of the several papers of a ship, and giving a list of papers carried by vessels of the chief maritime powers as evidence of their nationality, and other papers which ought to be found on board.

with respect to the ship's papers may be capable of explanation before a prize court,¹² it may be fairly deemed by the commander of a belligerent naval vessel to afford ample justification for seizure,¹³ inasmuch as it purports to be an attempt to render illusory the right of search.

With respect to the effect of resistance or evasion upon the cargo of a neutral ship, it is believed that liability to condemnation should be dependent upon the relation of the conduct of the owner of the former to the acts giving rise to complaint. Thus in case of resistance, goods belonging to the owner or master of the ship should, like it, be subject to condemnation.¹⁴ Efforts of the owner of the cargo to resort to disguise or to use false documents, or any connivance with an attempt of the master to evade search, should be penalized accordingly.

Where, on the other hand, the owner of the cargo is guilty of no misconduct in respect either to documents relating to it, or to the management of the vessel, it is not believed that any penalty for the act of resistance or evasion should be visited upon him in case the cargo is not destroyed in consequence of an encounter.

The duty of a neutral ship to submit to visit and search does not, however, imply an obligation to submit without resistance to lawless acts of a belligerent unrelated to its acknowledged rights as such.¹⁵ Thus, as is noted elsewhere, the United States in 1917, prior to the outbreak of war with Germany, did not hesitate to place an armed guard upon American merchant vessels sailing through areas proscribed by that State, for the protection of the ships and their occupants,¹⁶ not against visit and search or capture, but against lawless attacks at sight by naval submarines.

It seems hardly necessary to observe that the equipment of its merchant fleet by a neutral with armament designed to enable the vessels thereof to defend themselves against the illegal acts of a particular belligerent may fail to afford desired protection, or to prevent or discourage conflicts between those vessels

It has been said that "A certificate under the authority of the United States must be taken by foreign powers as genuine, and can be impeached by them only by application to the Government of the United States." Wharton, Dig., § 409, quoted in *The Conrad*, 37 Ct. Cl. 459, Moore, Dig., VII, 486.

¹² *The Pizarro*, 2 Wheat. 227.

¹³ *The Aggi*, Hurst and Bray's Russian and Japanese Prize Cases, II, 131; also *The Oldhamia*, *id.*, I, 145.

¹⁴ According to Art. LXIII of the Declaration of London: "Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods." Charles' Treaties, 280. See General Report of the Drafting Committee, *id.*, 319.

¹⁵ Declared Sir W. Scott in the case of *The Maria*, 1 Ch. Rob. 340, 374: "I don't say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause; a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), 'I will submit to no such inquiry, but I will take the law into my own hands by force.'"

See President Wilson, address to the Congress, April 2, 1917, For. Rel. 1917, Supp., 1, 195.

See, also, Prisoners of War, Occupants of Neutral Ships, *infra*, § 774.

¹⁶ See *infra*, § 751.

and the warships of the offending belligerent.¹⁷ Accordingly, a neutral may well conclude that a better deterrent of unlawful belligerent interference with its merchant fleet is to be found in the power of its own navy.

(b)

§ 732. **Belligerent Ships — Their Use by Neutrals.** In the case of a belligerent ship, what may purport to be resistance or evasion of visit and search is in reality opposition to capture, and is not unlawful.¹ No duty rests upon the vessel to yield to the enemy that which a neutral ship, because it is such, is bound to yield to a friend.² The action, therefore, of a naval officer in visiting and searching an enemy merchantman commonly manifests the performance of a duty to enable the former to ascertain what pressure may be justly brought to bear upon the latter.³ At the present time when a neutral places his property on a belligerent ship for transportation, it is his hope rather than fear that if the vessel falls in with a hostile cruiser, visit and search may ensue, and thereby afford the means of establishing a reason for saving the cargo from destruction.

In the case of the *Nereide*, the Supreme Court of the United States was of opinion in 1815, that a neutral shipper may lawfully place his goods on board a belligerent armed vessel for transportation without necessarily becoming a participant in the war, and without subjecting his property to condemnation in case of resistance to capture which he himself does not in any way assist.⁴ In 1818,

¹⁷ See Sec. 6 of Neutrality Act approved November 4, 1939, prohibiting the arming of American merchant vessels in a war between foreign States and not engaging the United States, Public Res., No. 54, 76th Cong.

§ 732. ¹ See *Belligerent Forces, Private Vessels Defensively Armed*, *supra*, § 709.

Also Memorandum on the Status of Armed Merchant Vessels, Department of State, Mar. 25, 1916, For. Rel. 1916, Supp., 244, 247.

² "An act perfectly lawful in a belligerent, may be flagrantly wrongful in a neutral; a belligerent may lawfully resist search, a neutral is bound to submit to it; a belligerent may carry on his commerce by force, a neutral cannot; a belligerent may capture the property of his enemy on the ocean, a neutral has no authority whatever to make captures." Story, J., in the *dissenting* opinion in *The Nereide*, 9 Cranch, 388, 438.

See A. P. Higgins in *Am. J.*, VIII, 715, 716; Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 44.

³ See *Visit and Search, Nature and Purpose*, *supra*, § 724.

"The question is, why may not a neutral transport his goods on board an armed belligerent? No writer on the law of nations has suggested this restriction on his rights; and it can only be sustained, on the ground of its obstructing the exercise of some belligerent right. What belligerent right does it interfere with? Not the right of search, for that has relation to the converse case; it is a right resulting from the right of capturing enemy's goods in a neutral bottom." Johnson, J., in *The Nereide*, 9 Cranch, 388, 433.

⁴ 9 Cranch, 388. In the course of the opinion of the court, Chief Justice Marshall declared that the belligerent has a perfect right to arm in his own defense, and the neutral a perfect right to transport his goods in a belligerent vessel; that these rights do not interfere with each other, and that by placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. (426-427.) With respect to the right of visit and search he said in part: "But it is said, that the exercise of this right may be prevented by the inability of the party claiming it, to capture the belligerent carrier of neutral property. And what injury results from this circumstance? If the property be neutral, what mischief is done, by its escaping a search? In so doing, there is no sin, even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if, by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them." (428.) It is believed that this statement of the learned Chief Justice is significant proof of his conviction as to the absence of a legal duty on the part of a neutral shipper so to transport his goods by sea as to give a belligerent opportunity for visit and search.

in the case of the *Atalanta*, the same Court declared it then to be the law of nations that "the goods of a friend are safe in the bottom of an enemy," but stated that the law might and probably would be changed or so impaired as to leave no object to which it would be applicable.⁵ That Tribunal has not as yet had occasion to determine whether it would apply the same principle if the vessel utilized as a carrier were a public belligerent ship. It is greatly to be doubted whether that circumstance would or should alone suffice to produce a different conclusion.⁶

A neutral State may, as a matter of policy, forbid its nationals to make particular uses of belligerent ships. Thus, through the Neutrality Act approved November 4, 1939, it was rendered unlawful for a citizen of the United States to travel on vessels of belligerent States, except in accordance with such rules and regulations as might be prescribed.⁷

(4)

EXEMPTIONS FROM VISIT AND SEARCH

(a)

§ 733. **Public Neutral Ships.** Public neutral ships are exempt from visit and search.¹ The reasons for the exemption are in part those which always serve to

See, also, concurring opinion of Johnson, Justice (431), and the elaborate dissenting opinion of Story, Justice (436). The latter appeared to regard the relation of the shipper to the vessel and its actions as unneutral, and also to deem his placing of his goods upon an armed belligerent ship as decisive of an effort to employ a belligerent force to prevent unjustly the capture of them.

It is believed that the placing of neutral property on board of an armed belligerent merchantman for purposes of transportation does not necessarily imply an attempt on the part of a shipper to thwart capture by resistance, as is the necessary inference in the case where a belligerent convoy is relied upon, but may with as much reason indicate merely an attempt to obtain transportation by means of a vehicle which, in spite of its special danger of destruction, retains a fair chance of reaching its destination expeditiously. If loss of immunity from attack at sight is the legal consequence of the arming of a merchantman, the shipper who makes use of such a carrier subjects his property to a danger which may prove disproportional to any benefits to be derived from the utilization of such a means of transportation.

See Armed Vessels, Merchantmen, *infra*, §§ 742-743.

⁵ 3 Wheat. 409, Moore, Dig., VII, 489.

⁶ *Dicta* of Chief Justice Marshall in *The Nereide* would not encourage a change of opinion.

Compare A. P. Higgins in *Am. J.*, VIII, 720-722, citing the decision of Sir W. Scott in *The Fanny*, 1 Dods. 443, 448.

⁷ Sec. 5 (a).

§ 733. ¹ General Orders, No. 492, of the Navy Department, June 20, 1898, comprising instructions to blockading vessels and cruisers, declared that "The belligerent right of visit and search may be exercised without previous notice, upon all neutral vessels after the beginning of war, to determine their nationality, the character of their cargo, and the ports between which they are trading." For. Rel. 1898, 780, 781. The avowed purposes of the exercise of the right forbid the inference that the words "all neutral vessels" were to be strictly construed.

Art. XXXII of the Oxford Manual of Naval War declares that "All vessels other than those of the navy, whether they belong to the State or to individuals, may be summoned by a belligerent war-ship to stop that a visit and search may be conducted on board them." *Annuaire*, XXVI, 649, J. B. Scott, Resolutions, 181.

The Russian Regulations Relating to Naval Prizes, of Mar. 27, 1895, provided in paragraph 6, that "merchant vessels (all vessels not forming part of a war fleet being considered such) may be subjected to stoppage and examination with the object of ascertaining what

restrain a State from asserting in any waters jurisdiction over public vessels of another power with which it is at peace, and also the unlikelihood that a neutral State would be so neglectful of its obligations to a belligerent as to permit a vessel in the public service to participate in the war. Doubtless the word of the commander must be accepted as to the character of the ship and the nature of its service.² The absence of any right of jurisdiction over the vessel does not, however, indicate that "within the theater of actual operations" its movements may not be controlled.

Should neutral public ships be employed on a large scale as carriers of cargoes destined for belligerent States, it is probable that the claim to immunity would be challenged unless the contents of each vessel were fully certified by the authorities of the neutral State. For such purpose the commander of the ship might not be deemed competent to give the requisite assurance.

(b)

§ 734. Neutral Convoy. The term convoy in respect to maritime war refers to the case where one or more vessels are escorted by a public ship, which is commonly a vessel of war. When a neutral merchantman sails under convoy, it is with the design either of giving reliable assurance to any belligerent cruiser encountered, respecting facts otherwise ascertainable by visit and search, or of employing force to resist visit and search or capture.

A neutral merchantman under convoy of a vessel of war of its own nationality is at the present time deemed to be exempt from search, because a belligerent cruiser is believed to be able to find in the word of the commander of the convoy as full an assurance as would be afforded by the exercise of visit and search itself,¹ and also for the reason that the presence of the convoying ship is not necessarily indicative of a design to oppose force to force.² Hence, the requisite assurance may well and consistently with such a theory be given by the commander of a neutral unarmed public ship. In earlier centuries, however, when neutral coun-

is their nationality, and whether they are observing neutrality." Hurst and Bray's *Russian and Japanese Prize Cases*, I, 312.

The Japanese Regulations Relating to Capture at Sea, of Mar. 15, 1904, provided, in Art. XXXII, that "private ships" may be visited and searched, *id.*, II, 430.

See Dana's *Wheaton*, § 441; also Dana's Note No. 67; Oppenheim, *Lauterpacht's* 6 ed., II, 708; R. H. Pyke, *Law of Contraband*, 195.

² See G. G. Wilson, *Int. Law*, 2 ed., 324. See Art. XXII, treaty between Mexico and Salvador, April 24, 1893, *Brit. and For. St. Pap.*, XCV, 1353, 1363, Deák and Jessup, *Neutrality Laws, Regulations and Treaties*, Vol. II, 1498.

§ 734.¹ General Report of Drafting Committee to London Naval Conference, 1908-1909, *Charles' Treaties*, 282, 316, 317, where it is said: "If neutral Governments allow belligerents to search vessels sailing under their flag, it is because they do not wish to be responsible for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation is altered when a neutral Government consents to undertake that responsibility; the right of search has no longer the same importance."

See, in this connection, Arts. 56-58 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 186-187.

² But see, in this connection, J. Q. Adams' *Memoirs*, VI, 86, quoted in Moore, *Dig.*, VII, 492. Declares Prof. Moore: "It may be observed that the conception of neutral convoy by nations which recognize and practice it is not that of resistance to search, but of the substitution for the process of search of a responsible governmental guarantee." *Dig.*, VII, 497. See E. Gordon, *La Visite des Convois Neutres*, Paris, 1935.

tries were prepared to back by force the data lodged on their vessels pertaining to the activities in which they were engaged and the cargoes with which they were laden, the armed neutral vessel employed as the medium of conveying assurances to interested belligerents was expected, if need be, to defend by force as against belligerent interference the ships which it escorted.³

The exemption from visit and search through a neutral convoy has found recognition in the naval regulations of maritime States,⁴ and in the Declaration of London, as well as in the United States Naval Instructions Governing Maritime Warfare, of June 30, 1917.⁵ It is there provided that if the commander of "the United States vessel" has reason to suspect that the commander of the convoy has been deceived regarding the innocent character of any of the vessels (and their cargoes or voyages) under his convoy, the former officer shall impart his suspicions to the latter. In such case it is to be expected that the commander of the convoy will undertake an examination to establish the facts, the commander of the convoy alone conducting the investigation.⁶ It is also provided that the latter may be expected to report the result of his investigation to the commander of the United States vessel. It is declared that should that result confirm the latter's suspicions, the former may be further expected to withdraw his protection from the suspected vessel, and that thereupon she shall be made a prize by the commander of the United States vessel.⁷

³ "In the seventeenth and eighteenth centuries, wars were so nearly continuous that the normal complement of ship's papers was based upon the necessity of satisfying belligerent demands. . . . When these devices failed to satisfy the belligerent, the neutral opposed force to force and sought to secure the undisturbed passage of his merchantmen by the presence of an armed convoy prepared to sustain the truth of his certification by the strength of his cannon—a practice which culminated in the Armed Neutrality of Catherine II in 1780. . . . In the case of convoy, the neutral made an assertion of fact or law and the belligerent could accept the *ipse dixit* or fight." (Jessup and Deák, *Neutrality (Origins)*, I, 160, and 200.)

⁴ Section 6, Russian Regulations Relating to Naval Prizes, March 27, 1895, Hurst and Bray's Russian and Japanese Prize Cases, I, 312; Art. XXXIII, Japanese Regulations relating to Capture at Sea, March 15, 1904, *id.*, II, 430.

The right of exemption by means of convoy has found expression in numerous treaties of the United States. See, for example, Art. XIX, treaty with Italy, Feb. 26, 1871, Malloy's Treaties, I, 975; Art. XXIX, treaty with Peru, July 26, 1851, *id.*, II, 1397.

Art. XVIII of the treaty with Venezuela, of Aug. 27, 1860, provides that the contracting parties shall not "admit under the protection of their convoys ships which shall have on board contraband goods destined to an enemy." *Id.*, II, 1851.

⁵ Nos. 51–53.

⁶ *Id.*, No. 52.

⁷ *Id.*, No. 53.

Compare Arts. LXI and LXII of the Declaration of London, Charles' Treaties, 280.

See, also, Report of the American Delegates at the London Conference to Mr. Bacon, Secy. of State, March 2, 1909, *id.*, 338, in which it was said: "Great Britain formerly refused to admit the right of convoy of neutral merchant vessels by neutral ships of war. In a spirit of conciliation that Government receded from its former position and admitted the right of convoy. There remained then only the determination of the method of its exercise." See, also, Report of the Drafting Committee to the London Conference, Charles' Treaties, 316–318.

Concerning the British attitude see Lauterpacht's 6 ed. of Oppenheim, II, 717–718, *citing* The Maria, I C. Rob. 340, and The Elsebe, 5 C. Rob. 173. Cf. Salucci v. Johnson, 4 Dougl. 224, referred to in Jessup and Deák, *Neutrality (Origins)*, I, 227, footnote 93, and in which it was held that neutral resistance to visitation and search was not to be regarded as ground for condemnation.

See correspondence between the British and Netherland Governments in 1918 concerning the despatch of a Dutch convoy to the East Indies, Misc. No. 13 (1918), Cd. 9028. In this case, the British Government appeared to waive its "right of visit and search" as an

A neutral convoy signifies that assurances as to the innocence of neutral ships and cargoes requisite to support a claim to exemption from visit and search are to be found in what is extrinsic to those entities, and to emanate from neutral governmental sources. The procedure has broad implications. It suggests that authentic and competent tokens of governmental certification may be equally convincing and of like potency if registered in documents confided to the commander of the merchantman which it has sought to render immune. For that reason the principle responsible for the use and efficacy of neutral convoys emphasizes the practical availability and employment of neutral governmental certifications in a broader fashion. It is not apparent why they may not assume documentary form and, if desired, be quite unassociated with the commanders of public neutral vessels. If a system of neutral governmental certifications were ultimately to be accepted and generally utilized by maritime States as a substitute, and as possibly the price to be paid for, the relinquishment of various belligerent measures that press harshly and inequitably upon neutral commerce, the use of neutral convoys might cease to be regarded as more than the precursor of what it suggested; for neutral public vessels would not be needed to accompany merchantmen and to act as conveyors of governmental assurances pertaining to them.

(c)

§ 735. **Belligerent Convoy.** It is believed that the acceptance by a neutral vessel of the conveying aid of a belligerent vessel of war affords good ground for the condemnation of the former, because that acceptance marks a preparedness and an expectant effort to prevent or ward off acts on the part of the opposing belligerent which are legitimate and should not be opposed by or in behalf of the neutral, as well as the readiness to resist by force, if occasion arises, the endeavor of that belligerent to examine the vessel by visit and search, or to bring it in for adjudication.¹

The United States is commonly supposed to have taken a different ground in a discussion with Denmark early in the nineteenth century.² According to the

act of courtesy, laying stress on the "altogether exceptional nature of such a concession, which must not be treated as a precedent for similar concessions in future, nor held to commit His Majesty's Government in any way to the abandonment of their just claims on other occasions." (*Id.*, 9.) In 1927, the Naval War College declared that "this case involved official Government transport and a form of certification which was resorted to as a matter of convenience such as might often be found advantageous by both parties." (*Int. Law Situations*, 1927, 34.)

See Proclamation of the King of Sweden, Oct. 29, 1915, concerning the conveying of Swedish merchant ships, *Naval War College, Int. Law Documents*, 1918, 153.

§ 735.¹ Declares Prof. Moore: "That the acceptance by a neutral vessel of the convoy of a belligerent man-of-war is an illegal act, and in itself affords good ground for condemnation, if the vessel, while under such convoy, be captured by the other belligerent, is maintained by the English courts and English writers, and also by leading publicists of the United States, among whom may be mentioned Kent, Duer, Woolsey and Dana." *Dig.*, VII, 495.

See, also, *dissenting opinion* of Story, J., in *The Nereide*, 9 Cranch, 388, 445, 453, 454, Moore, *Dig.*, VII, 494; *The Nancy*, 27 Ct. Cl. 99; *The Sea Nymph*, 36 Ct. Cl. 369.

² Concerning the position of the United States and the relation thereto of Mr. Wheaton, see Moore, *Dig.*, VII, 495-499, and documents there cited.

For Mr. Wheaton's argument in the convoy cases, see Moore, *Arbitrations*, V, 4555. For a

Naval Instructions Governing Maritime Warfare of June 30, 1917, "any vessel under convoy of a vessel of war of an enemy is liable to capture."⁸ The Italian Law of Neutrality, of July 8, 1938, makes no unreasonable claim in announcing that "neutral merchant vessels convoyed by warships or military aircraft of the enemy, in addition to being subject to the risks of military operations, are subject to capture and confiscation."⁴

3

ATTACK

a

§ 736. Preliminary. A belligerent enjoys the right to attempt to control or destroy all enemy vessels not exempt from capture. The exercise of this right calls for the use of force or the threat to use it. In each particular case the law of nations is concerned with the process employed. It does not sanction needless sacrifice of life or property. A vessel of war is thus not permitted to launch an attack upon certain ships of the enemy, even though not exempt from capture, if control of them may be acquired without bloodshed and without jeopardizing the safety of the captor.

The term capture implies an achievement which may or may not have been the result of attack. Before endeavoring to ascertain what constitutes such a feat, it is necessary to observe with care the circumstances when a naval commander may justly open fire upon a ship of the enemy. The propriety of his conduct must be examined with special reference to the nature, the occupation, and the conduct of the vessel which he may encounter, and with consideration also for the character of his own craft.

discussion of it, see Moore, Dig., VII, 496-499, in which it is said (499): "As a whole, it appears (1) that it was directed against the condemnation and not against the capture of the vessels; (2) that it was chiefly designed to show that the condemnations were, under the special circumstances of the case, improper; (3) that it alleged that the condemnations proceeded upon a construction of the instructions of 1810, which was, as has been pointed out, more extensive in its effect than that which was originally given to them by the Danish Government; (4) that it nowhere suggests that the acceptance of belligerent convoy did not create an adverse presumption which justified the sending in of the vessels for adjudication."

After voluntary or involuntary separation from a belligerent convoy, a neutral vessel is said to be not subject to capture or condemnation for having sailed under it. The *Galen*, 37 Ct. Cl. 89, 95, Moore, Dig., VII, 499.

⁸ No. 54.

See, also, *Nicolas G. Kyriakides v. Germany*, Greco-German Mixed Arbitral Tribunal, 1928, McNair and Lauterpacht, *Annual Dig.*, 1927-1928, Case No. 387; statement by Parker, Umpire, in case of the Steamship *Motano*, Mixed Claims Commission, United States and Germany, Consolidated Edition of Decisions and Opinions, 1925, 88, 89.

⁴ *Gazzetta Ufficiale, Supplemento*, No. 211, Sept. 15, 1938, translated and quoted in Comment on Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 679. According to Art. 64 of that Convention: "A belligerent may treat as an enemy merchant vessel, a neutral vessel . . . sailing under the convoy of enemy warships." (*Id.*, 189.)

See, also, Art. 32 of German Prize Law Code of Aug. 28, 1939, *Comparative Law Series*, III, 35, 41.

b

Effect of Nature, Use or Conduct of Enemy Vessel Encountered

(1)

UNARMED VESSELS

(a)

MERCHANTMEN

(i)

§ 737. **Surface Craft.** Long before World War I, States were agreed that unarmed enemy merchant vessels were in general not subject to attack at sight, and that if they were guilty of no improper conduct, the propriety of attack or destruction was dependent upon the giving of opportunity for the removal of persons on board to a place of safety.¹ Such respect for human life was, moreover, broadly acknowledged without discrimination between carriers of passengers and freight, and irrespective of the nationality of the persons involved. This practice is believed, however, to have been of fairly recent origin, because attributable to circumstances not commonly present in wars as late as that of 1812.

In days when privateering flourished the unarmed merchantman was a thing unknown. Ships of commerce did not put to sea without substantial armament. This at times sufficed to enable the possessor to offer prolonged resistance and positive danger to any type of vessel encountered.² Consequently there was no reason to deal lightly with a vessel itself capable of initiating hostilities, and possibly alert to do so whenever favorable opportunity presented itself. Dictates of humanity could only urge restraint when at least, apart from other considerations, the merchantman ceased to be a source of danger to the naval forces of the enemy.³

With the abandonment of privateering and the confining of hostilities to public vessels specially adapted for war, the arming of merchantmen became increasingly infrequent because of the helplessness of such vessels in engagements with a vessel of war, which was the only type of craft from which acts of aggression were to be anticipated. The latter, moreover, with its vast preponderance of offensive power and defensive strength, found the merchantman, even if slightly or moderately armed, a negligible danger, and regarded it rather as an object of prey. Thus the weakness of the latter became its very safeguard, and the unarmed merchantman gained the right to be called upon to surrender before at-

§ 737. ¹ Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915, For. Rel. 1915, Supp., 393; Mr. Lansing, Secy. of State, *ad interim*, to same, June 9, 1915, *id.*, 436; Mr. Lansing, Secy. of State, to same, July 21, 1915, *id.*, 480; same to same, April 18, 1916, *id.*, For. Rel. 1916, Supp., 232; Mr. Gerard to Mr. Lansing, No. 3848, May 4, 1916, *id.*, 257, containing note of same date from the German Foreign Office.

² See Marshall, Chief Justice, in *The Nereide*, 9 Cranch, 388.

See, also, *Private Vessels Defensively Armed*, *supra*, § 709.

³ See *Armed Vessels, Merchantmen*, *infra*, §§ 742-743.

tack. Although useful to its own State as a carrier of articles classed as contraband, such a vessel did not lose that right so long as the ship was not a public one.

The foregoing practice grew out of conditions relating solely to surface craft, unequipped with modern means of communication and for the most part not propelled by steam. Neither statesmen nor naval officers were called upon to make nice decisions as to circumstances when military requirements might outweigh the duty to respect human life, for the problem rarely presented itself where, in dealing with the unarmed merchantman guilty of no reprehensible conduct, the equities were not agreed to be on the side of such a vessel and its occupants.⁴

§ 738. **The Same.** At the present time an unarmed enemy merchant vessel, such as a trans-Atlantic liner of great tonnage and high speed, although designed and employed primarily for the transportation of passengers and mail, is still capable of rendering incidentally substantial military service as a carrier of war material. Its speed may enable the vessel to out-distance a pursuer and to keep beyond range of a signal to stop. Wireless telegraphic equipment may offer means of summoning aid whenever needed. The instant destruction of the ship without warning may thus offer the sole means of preventing its escape and the delivery of war material at a belligerent destination.¹ Moreover, the success of the voyage, despite its principal purpose, may serve to prolong the war by adding to the resources of the State to which the vessel belongs. It is not believed, however, that the indirect harm to be wrought in consequence of escape equals that to be anticipated from the deliberate disregard and destruction of the lives of the occupants of the ship. Claims of military necessity still fail to turn the scales of justice.

The unarmed freighter, not so given over to the transportation of war material as to be deemed primarily an instrument of belligerent service, is believed to be entitled to similar treatment. The absence of passengers does not deprive officers and crew of safeguards which are fairly due to non-combatants. Nor does the smallness in number of the individuals whose lives are at stake weaken the equities of the occupants of the ship, unless it is bent on an essentially hostile mission. The slower speed of the vessel as compared with that of the passenger liner lessens, moreover, the chances of its escape in case of pursuit.

Doubtless the peculiar occupation or sinister conduct of an unarmed mer-

⁴ See James Parker Hall, "Precedents in International Law," *International Journal of Ethics*, Jan., 1916, 149.

§ 738. ¹ The S.S. *Lusitania*, torpedoed by a German submarine off the coast of Ireland, May 7, 1915, did not present a case like that suggested in the text. See Shipping Casualties, Loss of the S.S. *Lusitania*, Cd. 8022; also Submarine Craft, The Controversy with Germany, *infra*, §§ 747-749.

It is not without significance that in its correspondence with the United States in relation to submarine warfare, Germany, in 1916, appears to have abandoned the distinction which it had earlier made between the treatment to be accorded enemy freighters and passenger vessels encountered in the war zone surrounding the British Isles, and declared that neither should be sunk "without warning and without saving of human lives." Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, telegram, May 4, 1916, For. Rel. 1916, Supp., 257, 259; Mr. Lansing to Mr. Gerard, telegram, April 18, 1916, *id.*, 232.

chantman may in some cases so strengthen the claim of an enemy vessel of war as to cause the immediate military necessity to outweigh every other consideration. The cases falling within this category do not, however, weaken the principle that the carrier is normally exempt from attack at sight, or that the enemy vessel which fires upon it without warning assumes the burden of showing that its victim forfeited the right to exemption from such treatment.

It has been contended that a belligerent may fulfill its duty with respect to warning by making general announcement before a ship leaves port that all enemy ships entering certain proscribed waters will be attacked at sight.² The validity of the notice in such case depends upon the lawfulness of the acts respecting which notice is given. If they are of a kind which the law of nations forbids, such as those contemplating wanton disregard of unoffending human life, the mere announcement of their probable commission cannot alter their real character.

(ii)

§ 739. **Submarine Craft.** The arrival at Baltimore, in July, 1916, of the S.S. *Deutschland*, an unarmed submersible merchantman, with a valuable cargo for sale in the United States, and the subsequent departure of the vessel from that port for Bremen, suggested the question whether principles established for the regulation of the rights and duties of surface craft could be applied with equal justice to merchantmen capable of taking refuge in the bowels of the sea.

The unarmed submersible merchantman, like that which is obliged to remain on the surface, cannot open fire upon an enemy ship. It serves, moreover, a useful purpose as a carrier of persons and property. It is unique, however, with respect to its mode of and facility in eluding pursuit and signals to surrender. It may be doubted whether this circumstance alone suffices to place the submarine in a less favorable position. A surface craft of extraordinary speed, enabling it to out-distance every pursuer and to keep beyond the range of signals, would not for that sole reason be exposed to attack at sight. Refusal to obey a reasonable signal to lie to, should doubtless subject a submarine vessel to the same penalties as a non-submersible ship. The peculiar ability of the former to disregard such a signal with impunity does not excuse the failure of the enemy to make it, unless it can be shown that the right to capture is an absolute one, unfettered by the dictates of humanity. Such is not the case in the normal situation where the merchantman remains a private ship, or until guilty of reprehensible conduct. Hence it is believed that the submarine vessel when observed on the surface, if its harmless character is then ascertainable, is entitled to the same warning which it might justly claim if it could not submerge.

Excuse for attack at sight may, however, exist when a hostile vessel of war, upon first encountering a submarine, is in fact unable to distinguish it from an armed submarine known to be employed as a weapon of offense. In order to re-

² See *Aide mémoire* of the Austro-Hungarian Government, contained in telegram of Mr. Penfield, American Ambassador at Vienna, to Mr. Lansing, Secy. of State, Mar. 2, 1917, For. Rel. 1917, Supp., I, 161, 163, 164.

move occasion for such uncertainty it is believed that the unarmed submersible vessel should undertake the burden of exhibiting some distinctive token or proof of its peaceable character, which by general convention maritime powers should agree both to respect and to refrain from abusing.¹

It may be urged that the sheer ability of a craft to submerge betokens such special adaptability for engagement in hostile operations that the military necessity to the enemy to destroy or capture it should be recognized as paramount to every other consideration. The treatment of surface craft affords perhaps a parallel. An unarmed passenger liner, built with special reference to its use in time of war as a transport or as a scout cruiser, with decks constructed so as to admit of the easy addition of armament, does not lose its quality as a merchantman, if designed primarily as a carrier of persons and property, and while employed in fact as a vehicle of commerce.

The principle that the immunity of an unarmed vessel of whatsoever type from attack at sight depends upon its own defenselessness, requires clear perception and general recognition. It must be obvious that the existence of this right does not imply that such a vessel is exempt from capture, but rather that the mode of subjecting it to control is not unregulated.

(b)

§ 740. **Public Vessels.** The absence of armament on a public vessel (not exempt from capture) has not been deemed to offer a sufficient reason why an enemy force should not attack it at sight.¹ The exercise of this right does not appear to be limited to circumstances when attack or destruction is the only means of preventing escape. The unarmed public ship seems to be regarded as without the right to demand opportunity to surrender prior to attack even under circumstances when neither resistance nor flight would otherwise be attempted.² Thus the existing practice excuses if not encourages reckless disregard of human life; for the burden is on the ship to make special efforts to surrender before it is attacked.³

Even if it be admitted that the character of a public ship is always such as to justify the employment by the enemy of whatever force is necessary in order

§ 739. ¹ In case a ruthless belligerent employs armed submarine naval vessels to attack at sight all classes of ships of the enemy, and that in every sea where the latter may be found, unarmed submarine merchantmen of such belligerent may be fairly deemed to belong to a class of ships which have forfeited the right to claim immunity from destruction without warning. The statement in the text has reference to a system of maritime law agreed upon and sought to be observed by all participants in a war.

§ 740. ¹ Declares Admiral Stockton: "After the outbreak of war all men-of-war and other vessels like those just mentioned of the enemy [including unarmed public vessels] which are met by a man-of-war of the other belligerent on the high seas or within the territorial waters of either belligerent can at once be attacked after displaying the national ensign of the attacking vessel or fleet." *Outlines*, 335.

² Note the case of the British S.S. *Cymric*, torpedoed at sight by a German submarine, in May, 1916.

³ "Merchant or other private ships which place themselves in the service of a belligerent as transport, despatch ship, or the like which carry military crews or armaments with which to commit hostilities of whatever character may indeed be destroyed without further ado according to existing laws." *Aide mémoire* from the Austro-Hungarian Government, contained in telegram of Mr. Penfield, American Ambassador at Vienna, to Mr. Lansing, Secy. of State, Mar. 2, 1917, *For. Rel.* 1917, Supp., 1, 161, 164.

to reduce it to control, it does not follow that the use of force unnecessary to accomplish that end is always likewise justified. It is believed, therefore, that the attack upon such a vessel at sight should be confined to cases where the immediate use of force appears to be the only means of preventing the escape of the ship, or of interference with the attempt to effect its capture by another vessel of the same belligerent, or by some other external force exerted in its behalf. The reasonableness of demanding restraint on the part of the enemy must be apparent in the case where the unarmed public vessel is, when encountered, known to be employed on a service unrelated to the prosecution of the war.⁴

(2)

ARMED VESSELS

(a)

§ 741. **Public Vessels.** The right to attack at sight an armed public vessel is the obvious possession of the naval force of the enemy. No equity of the former balances the military necessity of the latter, prior at least to actual surrender.¹ A public vessel so equipped as to enable it to take the offensive subjects itself to the danger of instant destruction whenever the enemy is able to effect it. This principle receives general recognition.

(b)

§ 742. **Merchantmen.** In the course of World War I, as a safeguard against the operations of enemy submarines, numerous merchantmen under British and allied flags were equipped with substantial armament.¹ In January, 1916, Secretary Lansing proposed to the several belligerent maritime powers that it be reciprocally agreed among them —

that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.²

It proved to be impossible, however, to obtain such an agreement. Nevertheless, the reasons in support of the proposal deserve close attention. Secretary Lansing declared that, prior to 1915, belligerent operations against enemy commerce had been conducted by heavily armed cruisers, a condition by virtue of which international law appeared to permit a merchant vessel to carry armament for defensive purposes "without losing its character as a private commercial

⁴ "Not all enemy vessels are liable to attack though the right to approach and visit in time of war is generally admitted except for neutral public vessels, and some enemy vessels may be attacked at sight." (Naval War College, Int. Law Situations, 1935, 35.)

§ 741. ¹ "To continue an attack after knowledge of surrender, or to sink a vessel after submission, is a violation of the rules of civilized warfare, only permissible in cases of treachery or renewal of the action." Stockton, Outlines, 336.

§ 742. ¹ See Private Vessels Defensively Armed, *supra*, § 709.

In 1917 and thereafter, the United States had recourse to the same practice.

² See informal and confidential letter from the Secretary of State to the British Ambassador, Jan. 18, 1916, For. Rel. 1916, Supp., 146.

vessel." "This right," he said, "seems to have been predicated on the superior defensive strength of ships of war, and the limitation of armament to have been dependent on the fact that it could not be used effectively in offense against enemy naval vessels, while it could defend the merchantmen against the generally inferior armament of piratical ships and privateers." He declared that the use of the submarine had, however, changed those relations; that comparison of the defensive strength of a cruiser and of a submarine showed that the latter, relying for protection on its power to submerge, was almost defenseless in point of construction, and that even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. He adverted to the disappearance of pirates and sea rovers from the main channels of the sea, and to the abolishment of privateering. Consequently, he said, that the placing of guns on merchantmen "at the present day of submarine warfare" could be explained only on the ground of a purpose to render such vessels superior in force to submarines, and to prevent warning and visit and search by them. Any armament on a merchant vessel appeared, therefore, he declared, to have the character of an offensive armament. "If," he added, "a submarine is required to stop and search a merchant vessel on the high seas and, in case it is found that she is of enemy character and that conditions necessitate her destruction, to remove to a place of safety all persons on board, it would not seem just or reasonable that the submarine should be compelled, while complying with these requirements, to expose itself to almost certain destruction by the guns on board the merchant vessel."³

It is believed that the Secretary of State sought to formulate no new principle of law, but rather to gain recognition of the inapplicability of an old rule to existing conditions of maritime warfare, which were at variance with the theory on which the rule was based, and that he endeavored to encourage a practice both in harmony with that theory and responsive to the requirements of justice. Nor did his proposal indicate the abandonment of any neutral right.

In a memorandum of February 8, 1916, the German Foreign Office announced that in view of circumstances therein set forth, armed enemy merchantmen no longer possessed the right "to be considered as peaceable vessels of commerce," that German naval forces would receive orders to treat such vessels as belligerents, and that "this status of affairs" was brought to the knowledge of neutral powers in order that they might warn their nationals against continuing to entrust their persons or property to armed merchantmen of the Powers at war with the German Empire.⁴ Shortly thereafter a vigorous but unsuccessful at-

³ *Id.*, 147. See, also, in this connection, *aide mémoire* contained in telegram of Mr. Penfield, American Ambassador at Vienna, to Mr. Lansing, Secy. of State, March 2, 1917, For. Rel. 1917, Supp., I, 161.

⁴ See enclosure in communication of Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, Feb. 10, 1916, For. Rel. 1916, Supp., 163, 165. The circumstances relied upon in support of the policy proposed were alleged official orders issued to British armed merchantmen to attack German submarines wherever they came near, and so to conduct war upon them. See British Instructions for defensively armed merchant ships, of Oct. 20, 1915, in which it was stated that "The armament is supplied for the purpose of defence only, and the object of the master should be to avoid action whenever possible." *Id.*, 250, 251.

See, also, memorandum from the German Embassy at Washington, March 8, 1916, *Id.*, 198; Circular Note Verbale from the Austro-Hungarian Government, Feb. 10, 1916, *Id.*, 166.

tempt was made in the Congress to secure the enactment of legislation requesting the President to warn all American citizens within the borders of the United States to refrain from traveling on armed merchantmen of a belligerent power.⁵

The legal problem confronting the United States in consequence of the German announcement was not one concerning the right of American citizens to take passage on British or other armed merchantmen, but rather one whether the presence of armament robbed vessels equipped therewith of the right to demand immunity from attack without warning, and hence justly exposed the occupants, of whatsoever nationality, to grave personal danger.

§ 743. **The Same.** By direction of the President a memorandum was prepared by the Department of State in March, 1916, in regard to the so-called status of armed merchant vessels in neutral ports and on the high seas.¹ It was therein declared (*a*) to be a necessity for a belligerent warship to determine the status of an armed merchant vessel of an enemy encountered on the high seas, since the rights of life and property of belligerents and neutrals on board the vessel may be impaired if its status is that of an enemy warship; (*b*) that the determination of warlike character must rest in no case upon presumption but upon conclusive evidence, because the responsibility for the destruction of life and property depends on the actual facts of the case, and cannot be avoided or lessened by a standard of evidence which a belligerent may announce as creating a presumption of hostile character; that to safeguard himself from possible liability for unwarranted destruction of life and property the belligerent should, in the absence of conclusive evidence, act on the presumption that an armed merchantman is of peaceful character; (*c*) that a presumption based solely on the presence of armament on a merchant vessel of an enemy is not a sufficient reason for a belligerent to declare it to be a warship and proceed to attack it without regard to the rights of the persons on board, and that conclusive evidence of a purpose to use the armament for aggression is essential; that a belligerent warship can on the high seas test by actual experience the purpose of an armament on an enemy merchant vessel, and so determine by direct evidence the status of the vessel. By way of summary it was added that the status of such vessel as a warship on the high seas must be determined only upon conclusive evidence of aggressive purpose, in the absence of which it is to be presumed that the vessel has a private and peaceful character, and that it should be so treated by an enemy warship.

Apart from any question respecting the applicability of the foregoing declara-

⁵ See House Resolution No. 147, 64 Cong., 1 Sess., which was laid on the table March 7, 1916, and discussion thereof on that day in the House of Representatives, Cong. Record, Vol. LIII, 4207-4224.

§ 743. ¹ For. Rel. 1916, Supp., 244-248. It may be noted that in the memorandum the term "warship" is employed in preference to that of "vessel of war."

See, also, memorandum on status of armed merchantmen issued by Department of State, Sept. 19, 1914, For. Rel. 1914, Supp., 611.

See A. Pearce Higgins, *Defensively Armed Merchant Ships and Submarine Warfare*, London, 1917; J. B. Scott, *Survey of Int. Relations between the United States and Germany*, New York, 1917, 247-264.

tion to the special conditions confronting the United States in March, 1916, the author, with greatest deference for the opinion of those responsible for the memorandum, confesses his inability to accept it as a statement of international law for the following reasons:

(a) It fails to heed the fact that the immunity of merchant vessels from attack at sight grew out of their impotency to endanger the safety of public armed vessels of an enemy, and that maritime States have never acquiesced in a principle that a merchant vessel so armed as to be capable of destroying a vessel of war of any kind should enjoy immunity from attack at sight, at least when encountering an enemy cruiser of inferior defensive strength.²

(b) That an armed merchantman may retain its status as a private ship is not decisive of the treatment to which it may be subjected. The potentiality and special adaptability of the vessel to engage in hostile operations fraught with danger to the safety of an enemy vessel of war, rather than the designs or purposes of those in control of the former, however indicative of its character, have been and should be deemed the test of the right of the opposing belligerent to attack it at sight. In view of this fact the lawful presence on board the armed merchantman of neutral persons or property cannot give rise to a duty towards the ship not otherwise apparent. Every occupant thereof must be held to as-

² See proposal of Mr. Lansing, Secy. of State, Jan. 18, 1916, For. Rel. 1916, Supp., 146; also James Parker Hall, "The Force of Precedents in International Law," *International Journal of Ethics*, Jan., 1916, 149, 156, 157.

In its instructions of April 3, 1776, "to the commanders of private ships or vessels of war, which shall have commissions or letters of marque and reprisal, authorizing them to make captures of British vessels and cargoes," the Continental Congress declared: "You may by force of arms attack, subdue and take all ships and other vessels belonging to the inhabitants of Great Britain, on the high seas, or between high and low water mark, except ships and vessels bringing persons who intend to settle and reside in the United Colonies; or bringing arms, ammunition, or warlike stores to the said colonies for the use of such inhabitants thereof as are friends to the American cause." *Journals of the Continental Congress*, IV, 253. There was no suggestion that the private armed ship should be treated with special leniency. As doubtless the entire merchant marine of the enemy was armed, at least defensively, it was logical that the instructions should place all enemy vessels in the same category. As enemy merchantmen were the special objects of pursuit and capture by privateers, the following words of Georg Friederich de Martens, in his *Essay on Privateering*, T. H. Horne's translation from the French, London, 1801, are significant: "Letters of marque authorize the captain of privateers, and the person whom they may appoint in his stead, to attack, surprise, seize, and take by his ship every place or fortress, every ship, vessel, goods, etc., belonging to or used by his sovereign's enemies in all seas, bays, ports, or rivers; such is the formula which the English laws contain [citing 13 Geo. II, c. 4, st. 2; 17 Geo. II, c. 34, st. 3; 29 Geo. III, c. 34, st. 3; 16 Geo. III, c. 5, st. 5; 19 Geo. III, c. 67, st. 2], I know not whether the formulæ are exactly the same in all countries, but it is clear that they resemble one another as to the authority which they grant of *attacking* the enemy." (50, 51.)

The instructions of President Madison to American privateers, issued in 1812, stated that "towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members." 2 Wheat. App. 80, Moore, Dig., VII, 544. No discrimination was, however, made in respect to armed merchantmen, and doubtless none was thought of.

It should be observed that in days of privateering the mere attack upon a ship, however sudden, did not necessarily cause its destruction. The limitations of offensive armaments combined with the desire of the captor to reap the fruits of victory by sending in a prize, saved enemy merchantmen and their occupants from the dangers of instant destruction. Nevertheless, the right of such vessels to claim immunity from attack at sight could not come into being so long as they were able to offer substantial resistance to the enemy and also make a formidable offensive fight. It was only when the power to do so was relinquished that merchantmen could justly claim and did in fact attain the right to demand exemption from attack without warning.

sume that the enemy will use every lawful but no unlawful means to subject the vessel to control or destroy it.

(c) To test the propriety of an attack at sight by the existence of conclusive proof of the aggressive purpose of the merchantman places an unreasonable burden on a vessel of war of an unprotected type, whether a surface or undersea craft, for no evidence of the requisite purposes of the merchantman may be in fact obtainable until the vessel of war encountering the former becomes itself the object of attack. The mere pursuit of the merchantman, prior to any signal made to it, may cause the vessel to attack the pursuer as soon as it gets within range.³

What constitutes, moreover, an act by way of defense must always remain a matter of uncertainty. The possession of substantial armament encourages the possessor to assert or claim that it acts defensively whenever it opens fire. Thus in practice the distinction between the offensive and defensive use of armament disappears, for the armed merchantman is disposed to exercise its power whenever it can safely do so.⁴ To presume, therefore, that such a vessel has a "peaceable character," on the supposition that it will not when occasion offers open fire on vulnerable vessels of war of the enemy is to ignore an inference fairly deducible from the conduct of vessels equipped with effective means of committing hostile acts.⁵

It is believed, therefore, that the equipment of a belligerent merchant marine for hostile service, even though designed to be defensive rather than offensive, serves, on principle, to deprive the armed vessels of the right to claim immunity from attack without warning.⁶ It may be doubted whether the wise

³ The memorandum contains the statement: "If, however, before a summons to surrender is given, a merchantman of belligerent nationality, aware of the approach of an enemy warship, uses its armament to keep the enemy at a distance, or after it has been summoned to surrender it resists or flees, the warship may properly exercise force to compel surrender." For. Rel. 1916, Supp., 248. This statement had reference to what proved to be a common occurrence, and so was illustrative of a normal situation. Address of President Wilson to the Congress, April 2, 1917, *Id.*, 1917, Supp., 1, 195-203.

⁴ See *Private Vessels Defensively Armed*, *supra*, § 709.

⁵ It should be observed also that the equipment of belligerent merchantmen with armament produces certain practical difficulties which the United States has already experienced. A gun crew, although composed of men attached to the naval service, is subordinate to the master of the ship oftentimes unattached to any public service. The movements of the vessel are under his control. Thus he may or may not navigate the ship in such a way as to render it offensively as well as defensively successful or unsuccessful. The possession of such control by the master tends in reality to cause the commission of hostilities by private rather than public agencies, and so to add disorder to maritime warfare. Moreover, it exposes to attack vessels which as vehicles of commerce should be normally immune therefrom.

⁶ The memorandum of the Department of State, by way of limiting the application of the principles announced therein, contained the statement that merchant vessels armed and under orders or commission to attack in all circumstances certain classes of enemy naval vessels for the purpose of destroying them, and entitled to receive prize money for such service from their Government or liable to a penalty for failure to obey the orders given, should lose their status as peaceable merchant ships and become to a limited extent incorporated in the naval forces of their Government, although it was not their sole occupation to engage in hostile operations. For. Rel. 1916, Supp., 248. It is not apparent how the existence of domestic regulations of a belligerent state in regard to prize money, or the imposition of penalties for failure to observe orders given, affects the right of the enemy to deal with an armed merchantman of the former if the ship is authorized as well as equipped to attack naval vessels.

The memorandum also declared that a merchant vessel subject to similar orders or penalties and engaged intermittently in commerce and in pursuit and attack upon naval craft possessed a status tainted with a hostile purpose which could not be thrown aside or assumed

and humane effort to obtain general recognition by maritime States of the solid equities of unoffending belligerent vessels, and thus also to safeguard the lives and property of neutral occupants, will be strengthened by declarations assertive of immunities for armed ships. The proposal of Secretary Lansing of January 18, 1916, is believed to indicate the correct theory and, therefore, the true basis of the rule to which States generally should be invited to adhere.

It must be clear, however, that the lawlessness of a belligerent in attacking unarmed enemy merchantmen at sight may force its adversary to arm its merchant marine as the only effective means of preserving it from destruction. Thus the United States, when at war with Germany in 1917, found itself without an alternative.⁷

(3)

§ 744. **Attempts to Escape Capture — Ruses.** By various processes a vessel of a belligerent State may lawfully attempt to escape capture.¹ The effect of such efforts upon the rights of vessels normally entitled to immunity from attack at sight deserves examination. Any form of resistance is believed to destroy immunity. This is true when, for example, an unarmed surface craft attempts to ram its assailant, an enemy submarine. It is also true, according to the Department of State, when an armed merchantman, prior to a summons to surrender, and yet aware of the approach of an enemy warship, uses its armament to keep the enemy at a distance.²

The attempt of an unarmed merchantman of any type to escape, either by flight on the surface, or by submerging, prior to a signal to surrender or to come

at will, and should be considered as an armed public ship and treated accordingly. It was said that any person taking passage on such vessel was deemed to be entitled to no immunity other than that accorded persons on board a warship. It was added that "A private vessel, engaged in seeking enemy naval craft, without such a commission or orders from its Government, stands in a relation to the enemy similar to that of a civilian who fires upon the organized military forces of a belligerent, and is entitled to no more considerate treatment." *Id.*, 248.

See in this connection, correspondence between the United States and Great Britain in 1916, respecting British Admiralty instructions for the guidance of masters of defensively armed merchant vessels *Id.*, 239, 249, 250-251, 271-272.

See Borchard and Lage, *Neutrality for the United States*, 1937, 122-123.

But see A. Pearce Higgins, *Studies in International Law and Relations*, Cambridge, 1928, chap. XIV; also Lauterpacht's 6 ed. of *Oppenheim*, II, 363 and 419, where the legal effect of arming upon the claim to immunity from attack by an enemy vessel of war is obscured by references to the "status" of defensively armed ships.

⁷ See *infra*, § 751. It needs constantly to be borne in mind that the question as to the effect of arming a belligerent merchantman upon the immunities from attack at sight which the vessel previously enjoyed, is unrelated to the question as to the right to arm such a ship defensively. Acknowledgment of such a right is far from indicative of the consequences that flow from the exercise of it. The important distinction between these two questions has at times been obscured in both popular and technical discussions.

It may be noted that Art. 22 of the treaty on Limitation and Reduction of Naval Armament, signed at London April 22, 1930, U. S. Treaty Vol. IV, 5268, providing for the conformity of belligerent submarines to the rules of international law to which surface vessels are subject, and making provision for the treatment to be accorded to the occupants of enemy merchantmen that may be encountered by such submarines, makes no reference to armed merchantmen as such.

§ 744. ¹ See *Private Vessels Defensively Armed*, *supra*, § 709.

² Memorandum of the Department of State in regard to the status of armed merchant vessels, March 25, 1916, where it is stated that in such case "the warship may properly exercise force to compel surrender." *For. Rel.* 1916, Supp., 244, 248.

to, and with the obvious purpose of keeping beyond range of signals of a recognized pursuer, does not, as has been seen, authorize the latter to attack the vessel without warning.³ The situation is otherwise, however, when, as has also been observed, the vessel, although unarmed, is a public ship, or one engaged primarily in a public service connected with the prosecution of the war.⁴

Any belligerent vessel of any kind or type exposes itself to instant attack if, after a reasonable summons to surrender, it persists, by any process, in an attempt to escape.⁵ After the receipt of such a signal or following the abandonment of flight, in consequence thereof, the attempt to summon aid by wireless telegraph or other process is analogous to resistance, and justifies the enemy in taking summary steps to cause its discontinuance. These might produce a difficult situation in case the call for aid brought to the scene an armed ship, endangering the safety of the enemy vessel of war or frustrating its attempt to effect a capture. In such a situation, however, the Department of State appears to hold that the mere effort to summon assistance should not alter the obligation of the hostile ship seeking to make the capture, to respect the safety of the lives of those on board an unarmed merchantman.⁶ There is believed to be a distinction between preventing by reasonable force an enemy ship which has received a summons to surrender and has abandoned flight from persisting in an endeavor to summon aid by radio or otherwise, and penalizing by force such a vessel on account of its having already made such an endeavor. The commander of the opposing belligerent vessel may encounter difficulty in determining

³ See Unarmed Merchantmen, *supra*, §§ 738-739; also Resistance or Evasion of Visit and Search by Belligerent Ships, *supra*, § 732.

⁴ See Unarmed Public Vessels, *supra*, § 740.

⁵ Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 45.

⁶ The destruction of the British passenger steamer *Falaba* by a German submarine Mar. 28, 1915, caused the death by drowning of one Leon C. Thrasher, an American citizen. For. Rel. 1915, Supp., 393. By way of explanation, the German Foreign Office declared that the commander of the submarine had the intention of allowing passengers and crew ample opportunity to save themselves. It was said that, "It was not until the captain disregarded the order to lie to and took to flight, sending up rocket signals for help, that the German commander ordered the crew and passengers, by signals and megaphone, to leave the ship within 10 minutes. As a matter of fact he allowed them 23 minutes and did not fire the torpedo until suspicious steamers were hurrying to the aid of the *Falaba*." Herr von Jagow, German Minister for Foreign Affairs, to Mr. Gerard, American Ambassador at Berlin, May 28, 1915, *id.*, 419. In response, Mr. Lansing, Secy. of State, *ad interim*, said, "The Government of the United States is surprised to find the Imperial German Government contending that an effort on the part of a merchantman to escape capture and secure assistance alters the obligation of the officer seeking to make the capture in respect to the safety of the lives of those on board the merchantman, although the vessel had ceased her attempt to escape when torpedoed. These are not new circumstances. They have been in the minds of statesmen and of international jurists throughout the development of naval warfare, and the Government of the United States does not understand that they have ever been held to alter the principles of humanity upon which it has insisted. Nothing but actual forcible resistance, or continued efforts to escape by flight when ordered to stop for the purpose of visits, on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew." Telegram to Mr. Gerard, June 9, 1915, *id.*, 436.

From the British report of the formal investigation into the circumstances attending the foundering of the steamer, it appears that the Marconi operator, upon hearing the German command by megaphone to take to the boats, and that it was planned "to sink the ship in five minutes," sent a call for help. No rockets or other signals were fired or shown by the *Falaba*. "Shipping Casualties," Loss of the Steamship *Falaba*, Cd. 8021.

See also Art. 22, of the treaty on the Limitation and Reduction of Naval Armament, signed at London, April 22, 1930, U. S. Treaty Vol. IV, 5281.

whether the effort of the former ship to summon aid has in fact completely subsided; but if it has, and he has no reason to believe that further effort is being made to summon aid, it is felt that he should deal with the ship and its occupants in normal fashion and not subject them to attack.

As between opposing belligerents the employment of ruses untainted by perfidy, such as the use by an unarmed ship of a neutral flag in order to prevent the detection of its nationality, does not wholly deprive the user of the right to enjoy an immunity from attack at sight which it would otherwise possess.⁷ Thus the mere flying of such a flag by a vessel recognized by the enemy, in spite of that fact, as a belligerent unarmed merchantman, would not suffice to justify an attempt to destroy it without warning. Even if an opposing vessel of war were in fact deceived by the device, and in consequence failed to avail itself of its power to make an effective summons to surrender, it would hardly be justified, if again sighting the vessel, in endeavoring to prevent its escape at all hazards, and to that end, as a safeguard against failure, in attacking it without warning. Inasmuch as the use of a false flag by an unarmed belligerent ship is commonly for the purpose of aiding escape by flight rather than of offering resistance, the attempt to deceive, whether successful or unsuccessful, is neither perfidious nor harmful to the pursuer. Detection should not, therefore, excuse attack without warning upon the ship resorting to such a ruse.⁸

It may be observed that the Advisory Committee in aid of the American Delegation at the Washington Conference on the Limitation of Armament, 1921-1922, recommended the enactment of laws prohibiting not only the offensive arming of merchant vessels, but also their use of false flags.⁹ The Neutrality Act of 1939 declared it to be unlawful for any vessel belonging to or operating under the jurisdiction of any foreign State to use the flag of the United States thereon, or to make use of any distinctive signs or markings, indicating that the ship was an American vessel.¹⁰

⁷ Early in 1915, the United States endeavored to secure agreement from both Germany and Great Britain that each of those belligerents would require their respective merchant vessels not to use neutral flags for the purpose of disguise or *ruse de guerre*. Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador at London, telegram, Feb. 20, 1915, For. Rel. 1915, Supp., 119. Same to Same, telegram, Feb. 10, 1915, *id.*, 100.

⁸ The situation is otherwise, however, where the use of the flag by an unarmed ship is for the purpose of alluring a hostile cruiser into waters where it will be subjected to attack by other vessels, or its safety endangered by unknown mines. In such case it is believed that the vessel resorting to the ruse may be fairly attacked without warning upon the discovery of its design.

⁹ See Conference on Limitation of Armament, Senate Doc. No. 126, 67 Cong., 2 Sess., 274.

¹⁰ In British Governmental Instructions of March 2, 1916, it was said: 'Though, however, the use of disguise and false colors to escape capture is a legitimate *ruse de guerre*, its adoption by defensively armed merchant ships may easily lead to misconception. Such vessels, therefore, are forbidden to adopt any form of disguise which might cause them to be mistaken for neutral ships.'

"At the end of October 1914, the German cruiser *Emden*, hiding her identity by rigging up a dummy fourth funnel and flying the Japanese flag, passed the guardship of the harbour of Penang in the Malay States, made no reply to its signals, came down at full speed on the Russian cruiser *Zhemshug*, and then, after lowering the Japanese flag and hoisting the German flag, opened fire and torpedoed her" (Oppenheim, Lauterpacht's 5 ed., II, 405-406.)

¹⁰ Section 14 (a). According to Section 14 (b) any vessel violating the above provisions was to be denied for a period of three months the right to enter the ports or territorial waters of the United States except in case of force majeure. Public Resolution, No. 54, 76th Cong.

(4)

§ 745. **Certain Conclusions.** It is believed that the true significance of the equities of the unarmed belligerent ship possessed of negligible means of committing hostile acts requires broader acknowledgment. The existing practice which appears to test the right of such a vessel to immunity from attack at sight by the nature of the service in which it is at the time employed, is both impracticable and unjust in its operation. It seems to be admitted that, as the United States maintains, a passenger liner or a freighter incidentally carrying contraband is not shorn of its normal privileges. On the other hand, it appears to be accepted doctrine that an equally defenseless ship, directly employed for military service, may be lawfully destroyed at sight. The difficulty is complicated by the suggestion that the requisitioning of a ship by the belligerent to whose merchant marine it belongs, impresses upon the vessel such a public character as to place it in the class of ships exposed to destruction without warning.

Thus far no generally accepted rule has indicated the precise nature or extent of the public belligerent service which suffices to deprive a vessel of its rights with respect to warning or in relation to the safety of its occupants; and none can be laid down which is capable of affording enlightenment to hostile vessels of war, or an adequate measure of safety to ships whose equities are admittedly unimpaired. If the right to attack a belligerent vessel without warning depends upon the nature of its service, or upon its having a public rather than a private character, the propriety of the action of a hostile cruiser must rest upon circumstances concerning which, in the particular case, its commander may possess little or no information. The enemy's leviathan which he sights from the horizon may be a transporter of troops or a carrier of passengers; if it happens to be the former, he may sink it without warning; but if it is the latter, he must pursue a wholly different course.

If it is perceived that the reason for the claim to immunity from attack without warning depends upon the impotency of the ship asserting it to cause harm to an opposing vessel of war, rather than upon any other basis, the equities of the public unarmed vessel, howsoever employed, become apparent. Its claims are then seen to be entitled to respect even when the ship is given over to the transportation of war material or military forces. These claims obviously oppose military interests, and doubtless call for the yielding of belligerent rights which a naval commander might be reluctant to abandon. They do not, however, imply an exemption from capture, but rather emphasize the unreasonableness of effecting it by certain means.

Should maritime States undertake to disarm their merchant marine, and conversely forbid all naval craft of every type to attack unarmed ships without warning and without according a place of safety to the occupants, it would be reasonable and highly desirable, on the one hand, to remove all armament from all belligerent vessels not attached to a naval or military service and not designed to participate in hostilities, and on the other, to accord to all unarmed

belligerent ships, regardless of their service or connection with the State, the same broad immunities.¹

It should be observed, however, that the potentialities of enemy vessels encountered have not, in public discussions, received the attention or consideration that has been given to the character or potentialities of various types of naval vessels employed for purposes of attack; and that in determining the equities of the latter and the particular conditions under which they should engage in offensive operations, relevant conventions, designed to restrict recourse to offensive action, have at times betokened indifference on the part of the authors, concerning various considerations which need to be duly appraised before it is possible to determine impartially the relative value of opposing equities, or to prescribe rules that are in harmony with the requirements of justice or logic.²

c

Mode of Conduct with Reference to Nature of Attacking Vessel

(1)

§ 746. **Surface Craft.** The law of nations with respect to the exercise of the rights of attack and capture grew out of the exigencies of wars where each vessel taking the offensive was a surface craft, possessing as such certain potentialities which were influential in establishing the duties of the vessel of war towards a helpless foe. Thus the ability of an attacking ship to offer a refuge on its decks for the occupants of an unarmed merchantman of the enemy, and the ease of doing so without appreciable loss of military efficiency, may have encouraged recognition of the obligation to respect and safeguard non-combatant human life, and to restrain certain hostile operations until ample provision had been made to that end. This obligation had become so clearly and widely understood when World War I was initiated, that there was then and thereafter reason to regard it as a rule of law too firmly established to be shaken in any case by the absence of circumstances which had been in part responsible for its earliest acceptance.

(2)

§ 747. **Submarine Craft — the Controversy with Germany.** World War I early gave rise to the inquiry whether the existing rules of maritime warfare with respect to attack were applicable to the operations of submarine naval vessels bent on the destruction of the enemy's merchant marine. It fell to the United States when a neutral to discuss this question.¹

§ 745.¹ An arrangement such as is suggested in the text is obviously not feasible until by some process the covenants of *all* maritime powers agreeing with respect to modes of warfare, are to be accepted as indicative of a steadfast purpose to observe both the spirit and letter of their mutual undertakings. At the present time the likelihood that such covenants will be so accepted seems remote. The conduct of belligerent States since the outbreak of World War II offers frail support for the expectation that there is in the making any fresh and workable scheme designed to improve the conditions of maritime warfare, through a nice balancing of belligerent privileges, which could be counted on to deter ruthless participants from pursuing an inconsistent course.

² See Submarine Craft — Conventional Arrangements since World War I, *infra*, § 749A.
§ 747.¹ See J. B. Moore, *Principles of American Diplomacy*, 66–101; J. B. Scott, *Survey*

On February 4, 1915, the German Admiralty announced that the waters surrounding Great Britain and Ireland, including the whole British Channel, were to be deemed a war zone, and that on and after the 18th day of February, 1915, "every enemy merchant ship" found in the zone would be destroyed "without its being always possible to avert the dangers threatening the crews and passengers on that account." Even neutral ships, it was said, would be exposed to danger in the war zone in view of alleged "misuse of neutral flags" ordered by the British Government, "and of the accidents of naval war." Northward navigation around the Shetland Islands, in the eastern waters of the North Sea, and in a strip of not less than 30 miles in width along the Netherland coast, was said to be in no danger.² Simultaneously the German Foreign Office announced that the policy proclaimed comprised retaliatory measures rendered necessary by the means employed by England deemed contrary to international law, in intercepting neutral maritime trade with Germany with a view to the reduction of that country by famine. It was intimated that enemy merchant vessels might be attacked at sight. Accordingly, neutral powers were warned not to continue to entrust their crews, passengers, or merchandise to such vessels. The incidental dangers to neutral ships in the war zone were emphasized. No reference was made to submarine warfare, but as Germany was then incapable of accomplishing its design by means of surface craft, the inference was clear that the work of destruction was to be undertaken by undersea vessels.³

The response of the United States appears to have been a protest designed chiefly against the dangers anticipated for neutral ships. The right to attack at sight British merchantmen was not then discussed.⁴

of Int. Relations between United States and Germany, 136-176; J. W. Garner, "War Zones and Submarine Warfare," *Am. J.*, IX, 594; same Author, *Int. Law and the World War*, I, §§ 228-243; J. Perrinjaquet, "*La Guerre Commerciale Sous-Marine*," *Rev. Gén.*, XXIII, 117, 394; XXIV, 137, 365; Sir Frederick Smith, *The Destruction of Merchant Ships under International Law*, London, 1917; R. de Villeneuve-Trans, *Le Blocus de L'Allemagne — La Guerre Sous-Marine*, Paris, 1917.

See also, Borchard and Lage, *Neutrality for the United States*, New Haven, 1937, 125-197; K. Mori, *The Submarine in War*, Tokyo, 1931; J. Trévily, *Essai sur l'histoire et la situation du Sous-Marin en Droit International*, Paris, 1931.

² Enclosure, in communication of Mr. Gerard, American Ambassador to Germany, to Mr. Bryan, Secy. of State, Feb. 6, 1915, American White Book, European War, I, 52. A slightly different translation of this document may be found in *For. Rel.* 1915, Supp., 94.

Compare British Admiralty order of Nov. 3, 1914, declaring the North Sea to be a war zone, *For. Rel.* 1914, Supp., 464.

³ Enclosure 2, in communication of Mr. Gerard, American Ambassador at Berlin, to Mr. Bryan, Secy. of State, Feb. 6, 1915, American White Book, European War, I, 53. A slightly different translation of this document may be found in *For. Rel.* 1915, Supp., 96.

⁴ Mr. Bryan, Secy. of State, to Mr. Gerard, American Ambassador at Berlin, telegram, Feb. 10, 1915, *For. Rel.* 1915, Supp., 98.

Germany was warned that it would be held to "strict accountability" in case the commanders of German vessels of war acting upon the presumption that the American flag was not being used in good faith, should destroy on the high seas an American vessel or the lives of American citizens (obviously on such a ship). "To destroy any merchant vessel of the United States or cause the death of American citizens" was what the Department of State sought to prevent. The mode of causing the death of such citizens was not dwelt upon. There was no specific reference to submarine attacks without warning on British merchantmen. In its note to Germany of May 13, 1915, following the destruction of the S.S. *Lusitania*, the Department said that the Government of the United States had already taken occasion to inform that of Germany that the former could "not admit the adoption of such [retaliatory] measures or such a warning of danger to operate as in any degree an abbreviation of the

On May 1, 1915, a formal warning purporting to come from the German Embassy at Washington, and advising persons in the United States of the danger involved in taking passage on a vessel of the enemies of Germany and bound for the waters of the war zone, was published in newspapers in the United States.⁵ On the same day the British S.S. *Lusitania* left New York for England.

On May 7, 1915, the *Lusitania* was torpedoed without warning by a German submarine off the Old Head of Kinsale, Ireland. The vessel sank within twenty minutes. 1,198 men, women and children were drowned, of whom 124 were American passengers. On the course of the voyage in question, the *Lusitania* carried 1,959 persons, of whom 1,257 were passengers. The cargo was a general one of the ordinary kind, consisting in part, however, of about 5,000 cases of cartridges. The ship was unarmed; it carried no masked guns or trained gunners, or special ammunition. It was not transporting troops, and it had violated no laws of the United States.⁶

rights of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality; and that it must hold the Imperial German Government to a strict accountability for any infringement of those rights, intentional or incidental." *Id.*, 394, 395. If this statement refers, as appears to be the case, to the note of Feb. 10, 1915, it gives to the earlier communication a broader interpretation than is apparent from the face of that document. Technically it embraced the rights of neutral persons and property on any ships. Careful examination of the note compels the conclusion that it failed to convey to Germany a definite impression of how the United States would regard submarine attacks at sight on British merchantmen causing the loss of American life. That the note was devoted to a discussion of the rights of neutral ships, is borne out by the German reply of Feb. 16, 1915. *Id.*, 107. See the comment on the note of Feb. 10, 1915, contained in telegram of Mr. Lansing, Secy. of State, to Mr. Gerard, April 18, 1916, *id.*, For. Rel. 1916, Supp., 232. From the published correspondence with Germany from Feb. 10, 1915, until May 13, following, it does not appear that the treatment which submarines should accord to belligerent merchantmen conveying neutral passengers was formally discussed.

⁵ See, for example, the *New York Sun*, for May 1, 1915, page 9, which contained the following: "Notice.—Travelers intending to embark on the Atlantic voyage are reminded that a state of war exists between Germany and her allies and Great Britain and her allies; that the zone of war includes the waters adjacent to the British Isles; that, in accordance with formal notice given by the Imperial Government, vessels flying the flag of Great Britain, or any of her allies, are liable to destruction in those waters and that travelers sailing in the war zone on ships of Great Britain or her allies do so at their peril. Imperial German Embassy. Washington, D. C., April 22, 1915."

⁶ "Shipping Casualties." Loss of the Steamship *Lusitania*, being report of the British investigation of the loss of the vessel, dated July 17, 1915. It appears also therefrom that the *Lusitania* was torpedoed about 2.15 p.m., when 10 to 15 miles off the coast, the weather being clear and the sea smooth, that two torpedoes were fired, both striking the ship on the starboard side; the first striking somewhere between the third and fourth funnels; that the torpedoes were discharged by a submarine at a distance variously estimated from two to five hundred yards; that the ammunition comprising a part of the cargo was entered in the manifest, and was stowed well forward in the ship, and about fifty yards from where the torpedoes struck it; that there was no other explosive on board.

"Whatever be the other facts regarding the *Lusitania*, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. The fact that more than 100 American citizens were among those who perished makes it the duty of the Government of the United States to speak of these things and once more, with solemn emphasis, to call the attention of the Imperial German Government to the grave responsibility which the Government of the United States conceives that it has incurred in this tragic occurrence, and to the indisputable principle upon which that responsibility rests. The Government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every Government honors itself in respecting and which no Government is justified in resigning on

On August 19, 1915, the British liner *Arabic* was torpedoed by a German submarine off the coast of Ireland,⁷ and on March 24, 1916, the French channel steamer *Sussex*, while crossing from Folkstone to Dieppe. Both were unarmed passenger ships, attacked without warning, and on board of which American passengers were among the victims suffering injury or death.⁸

These deplorable acts, arousing deep indignation throughout the United States, presented the following problems for solution: (a) Whether undersea war vessels could and should be subjected to the existing rules respecting attacks on unarmed enemy merchantmen; (b) whether, even if the foregoing question were to be answered affirmatively, Germany had a solid excuse for not observing them, by reason of alleged excesses of its enemies; (c) whether knowledge of the presence of neutral passengers on board belligerent merchantmen altered the normal obligations of the opposing submarine; (d) by what process Germany could be forced to abate a practice deemed objectionable; and (e) what reparation should be sought for the loss of American life and the mode of obtaining it.

In its first note to Germany after the destruction of the *Lusitania* the Department of State declared it to be a "practical impossibility" to employ submarines against enemy commerce "without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative." Thus it was said to be practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo, and "to make a prize of her"; that if they could not put a prize crew on board of her, they could not

behalf of those under its care and authority. Only her actual resistance to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the Government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity as well as upon the law founded upon this principle that the United States must stand." Mr. Lansing, Secy. of State *ad interim*, to Mr. Gerard, Ambassador to Germany, telegram, June 9, 1915, For. Rel. 1915, Supp., 436, 437.

See, also, *The Lusitania*, 251 Fed. 715.

⁷ American White Book, European War, III, 199-227.

⁸ Papers Relating to the Torpedoing of the S.S. *Sussex*, American White Book, European War, III, 237-307. Referring to this case, Secretary Lansing declared on April 18, 1916, in a communication to Mr. Gerard: "The Government of the United States is forced by recent events to conclude that it is only one instance, even though one of the most extreme and most distressing instances, of the deliberate method and spirit of indiscriminate destruction of merchant vessels of all sorts, nationalities, and destinations which have become more and more unmistakable as the activity of German undersea vessels of war has in recent months been quickened and extended. . . . Great liners like the *Lusitania* and *Arabic* and mere passenger boats like the *Sussex* have been attacked without a moment's warning, often before they have even become aware that they were in the presence of an armed ship of the enemy, and the lives of noncombatants, passengers and crew, have been destroyed wholesale and in a manner which the Government of the United States cannot but regard as wanton and without the slightest color of justification. No limit of any kind has in fact been set to their indiscriminate pursuit and destruction of merchantmen of all kinds and nationalities within the waters which the Imperial Government has chosen to designate as lying within the seat of war. The roll of Americans who have lost their lives upon ships thus attacked and destroyed has grown month by month until the ominous toll has mounted into the hundreds," *id.*, For. Rel. 1916, Supp., 232, 233, 234.

See, also, address of President Wilson before the Congress on Relations with the German Government, Apr. 19, 1916, House Doc. 1034, 64 Cong., 1 Sess.

sink her without leaving the several occupants to the mercy of the sea in small boats; and that manifestly submarines could not be used against merchantmen "without an inevitable violation of many sacred principles of justice and humanity."⁹ On July 21 following, the Department declared, however, that the previous two months had indicated that it was possible and practicable to conduct submarine operations in substantial accord with the accepted practices of regulated warfare, and that the whole world had looked with interest and satisfaction at the demonstration of that possibility by German naval commanders.¹⁰ Finally, after the series of lamentable events culminating in the torpedoing of the S.S. *Sussex*, the Department renewed the stand which it had taken at the outset, that the use of submarines for the destruction of enemy commerce was of necessity "utterly incompatible with the principles of humanity, the long-established and incontrovertible rights of neutrals, and the sacred immunities of non-combatants." Nevertheless, the United States appears to have demanded and expected an abandonment of the existing "methods of submarine warfare" rather than of the use of undersea vessels as commerce destroyers.¹¹

§ 748. **The Same.** If the limited means possessed by a submarine of ascertaining, by any process, the identity, or nature, or national character, or movements of any ship encountered, necessarily involve danger of indiscriminate attack at sight upon public or private vessels, armed or unarmed, vessels of war or passenger liners, it would be difficult to justify under plea of military necessity the use of such an instrument of naval warfare, unless it were acknowledged that a belligerent may employ any means of reducing its foe.¹ Maritime States have not as yet agreed thus to subordinate the claims of humanity, or so to sanction wanton disregard of unoffending human life. It is not to be anticipated that they will generally tolerate the removal from a war vessel of any type of the duty to apprise itself as to the nature and character of enemy ships encountered, as a condition precedent to lawful attack upon them.²

If a submarine identifies an enemy vessel as an unarmed merchantman, normally immune from attack at sight and not guilty of conduct forfeiting that privilege, no right to attack without warning is apparent. Nor is any to be de-

⁹ Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 13, 1915, For. Rel. 1915, Supp., 393, 395. Also declaration of Sir Cecil Spring-Rice, British Ambassador at Washington, to Mr. Bryan, March 1, 1915, *id.*, 127.

¹⁰ Telegram to Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, July 21, 1915, *id.*, 480.

¹¹ Same to Same, telegram, April 18, 1916, *id.*, For. Rel. 1916, Supp., 232, 234. Also Mr. Lansing, Secy. of State, to the British Ambassador, Jan. 18, 1916, *id.*, 146.

§ 748. ¹ Proof of the efficacy of such a weapon in turning the tide of war in favor of the belligerent relying upon it, and of the necessity of making use of it in order to accomplish that end, would not suffice as an excuse for the inadvertent destruction of neutral ships incidentally attacked in pursuance of a ruthless effort to destroy primarily those of the enemy.

² Thus on Aug. 3, 1916, a German submarine signaled to the American S.S. *Owego* to stop, at a distance of 6,000 meters and before its flag was recognizable. Although this signal was not understood, the vessel was finally stopped at 2,000 meters. Mr. Gerard, American Ambassador to Germany, to Mr. Lansing, Secy. of State, telegram, Aug. 27, 1916. For. Rel. 1916, Supp., 285.

See Art. 22 of treaty on Limitation and Reduction of Naval Armament, signed at London, April 22, 1930, U. S. Treaty Vol. IV, 5281.

rived from the difficulty which the former may anticipate in providing for the safety of the occupants of the latter.

After giving adequate warning, no destruction of the vessel should be attempted until its occupants are assured of at least a temporary place of refuge.³ The lifeboats offer at best, as the Department of State has indicated, "a poor measure of safety."⁴ On numerous occasions great loss of life has ensued when the occupants of a merchantman have, pursuant to orders, endeavored to take to the boats.⁵ In case of a heavy sea, recourse thereto must always be attended with great danger. Moreover, a lifeboat, even if it keeps afloat, affords slight protection from exposure to those long obliged to depend upon it as their sole place of refuge in inclement weather or on an unfrequented sea. Hence the reasonableness of causing passengers and crew of an unoffending merchantman to put to sea on such craft seems to depend upon the presence of special circumstances indicative of the absence of those dangers usually attending such procedure.

Mere incapacity of a naval submarine to offer a place of refuge on its own decks does not justify a disregard of the safety of the persons aboard the enemy merchantman which has surrendered or obeyed a signal to stop.⁶ It indicates rather a limitation of the right to destroy the ship until by some process the safety of its occupants has been assured. Should a small surface craft, such as a typical destroyer, or a naval vessel even more diminutive, fall in with an enemy passenger liner having 2,000 persons aboard, the inability of the former to offer a place of refuge to a majority of those persons, or to spare an adequate prize crew, would not in itself be deemed to justify the demand that the occupants of the liner take to the boats, or otherwise jeopardize their safety in order to permit the destruction of the vessel on which they were carried.⁷ The submarine is subject to the same duty.

In a word, the United States is believed to have taken an impregnable stand in its demand that the normal obligation of a vessel of war not to attack at sight an unarmed enemy merchantman is applicable to undersea vessels, and that

³ Prof. Westlake has adverted to the fact (Int. Law, 2 ed., II, 137) that according to chapter 231 of the *Consolat del Mar*, the admiral might compel a friend's ship to do certain acts, and in case of refusal, might, under certain circumstances, sink the ship, "saving always that he ought to save the lives of those on board of her." Pardessus, *Lois Maritimes*, II, 303.

⁴ Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 13, 1915, For. Rel. 1915, Supp., 393, 395.

⁵ See the case of the British S.S. *Falaba*, whose occupants, 242 in number, were given the briefest interval within which to take to the boats by the commander of a German submarine, Mar. 28, 1915, who thereupon torpedoed the ship. Only 138 persons were saved. "Shipping Casualties," Loss of the Steamship *Falaba*, Cd 8021.

See, also, case of the Italian ship *Ancona*, attacked by an Austrian submarine Nov. 7, 1915, as reported in communication from the Austro-Hungarian Foreign Office, Dec. 29, 1915, and telegraphed on that date by Mr. Penfield, American Ambassador at Vienna, to Mr. Lansing, Secy. of State. For. Rel. 1915, Supp., 639.

⁶ Compare *aide mémoire* from Austro-Hungarian Government, contained in telegram from Mr. Penfield, American Ambassador at Vienna, to Mr. Lansing, Secy. of State, March 2, 1917, For. Rel. 1917, Supp., I, 161.

⁷ Declared the Naval War College in 1930. "Manifestly the argument that a vessel of war because weak should have special belligerent rights as regards neutrals or opposing belligerents has little weight." (Int. Law Situations, 1930, 36-37, following which statement there is quoted the paragraph of the text above, taken from the earlier edition of this work, Vol. II, p. 482.)

hence the right to employ them as commerce destroyers depends upon the power and disposition of those controlling them to respect that obligation.⁸

In its official correspondence Germany did not assert that the rules of international law respecting the treatment due to unarmed merchantmen were inaccurately enunciated by the United States, or that submarine vessels were incapable of observing them.⁹ It was sought to excuse the practices of such vessels on the ground that the conduct of Great Britain was in such sharp defiance of international law that Germany was obliged to have recourse to a ruthless procedure by way of so-called retaliation, and in defense of its vital interests as a belligerent.¹⁰ In a strict sense, the retaliatory plea was dependent upon proof that the enemies of Germany were in fact subjecting German merchantmen to treatment similar in kind to that to which British and French vessels were being subjected.¹¹ The British acts of which Germany made complaint were, however, of a widely different character. Even if illegal, they did not contemplate the deliberate destruction of non-combatant human life on unarmed vessels, and hence offered no adequate excuse for the commission of such acts by the enemy. In the absence of such an excuse Germany owed to its enemy and to the nationals thereof who were on board the *Lusitania* and other British ships of irreproachable conduct a duty which no acts on the part of the State to which those vessels belonged had served to lessen. Neutral States had the right to assume that that duty would not be wantonly violated.¹²

The United States dealt with the German plea without, however, adverting to the circumstance that the conduct of which it made complaint was not strictly retaliatory. The Department of State contended that "if a belligerent cannot retaliate against an enemy without injuring the lives of neutrals, as well as their property, humanity, as well as justice and a due regard for the dignity of neutral

⁸ Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 13, 1915, *id.*, For. Rel. 1915, Supp., 393; Mr. Lansing, Secy. of State *ad interim*, to Same, telegram, June 9, 1915, *id.*, 436; Mr. Lansing, Secy. of State, to Same, telegram, July 21, 1915, *id.*, 480; Same to Same, telegram, April 18, 1916, *id.*, For. Rel. 1916, Supp., 232; Same to Mr. Penfield, Ambassador to Austria-Hungary, Dec. 6, 1915, concerning the case of the S.S. *Ancona*, *id.*, For. Rel. 1915, Supp., 623.

See, also, "Some Questions of International Law in the European War," by James W. Garner, *Am. J.*, IX, 594; "The Force of Precedents in International Law," by James Parker Hall, *International Journal of Ethics*, Jan., 1916, 149.

⁹ A possible exception to the statement in the text may be believed by some to appear in the course of a memorandum from the German Embassy, filed with the Department of State, March 8, 1916, in which it was said: "Germany was compelled to resort, in February, 1915, to reprisals in order to fight her opponent's measures, which were absolutely contrary to international law. She chose for this purpose a new weapon, the use of which had not yet been regulated by international law, and, in doing so, could and did not violate any existing rules, but only took into account the peculiarity of this new weapon, the submarine boat." For. Rel. 1916, Supp., 198, 199.

¹⁰ See, for example, German memorandum of Feb. 4, 1915, enclosed in communication of The German Ambassador at Washington, to Mr. Bryan, Secy. of State, Feb. 7, 1915, For. Rel. 1915, Supp., 95; Herr von Jagow, German Secy. for Foreign Affairs, to Mr. Gerard, July 8, 1915, *id.*, 463.

¹¹ The term being "retaliation" signifies technically, as its derivation indicates, the return of like for like. It is retorsion in kind. It is believed that the use of the word by the United States as well as by Germany and Great Britain, in diplomatic correspondence to describe the stern and ruthless measures of one belligerent occasioned by the alleged excesses of its enemy of a totally different kind, bred confusion of thought. See Retaliation, *supra*, § 588.

¹² Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915. *Id.*, 393.

powers, should dictate that the practice be discontinued," and that "if persisted in it would in such circumstances constitute an unpardonable offense against the sovereignty of the neutral nation affected."¹³ The rights of neutrals were based, it was said, upon principle, not upon expediency, and the principles were declared to be immutable. It was said to be the duty and obligation of belligerents to find a way to adapt the new circumstances to them.

On February 16, 1916, the German Government made the following significant response:

The Imperial German Government having subsequent to the sinking of the *Lusitania* issued to its naval officers the new instructions which are now prevailing, expresses profound regret that citizens of the United States suffered by that event and, recognizing its liability therefor, stands ready to make reparation for the life of the citizens of the United States who were lost, by the payment of a suitable indemnity.¹⁴

Here was acknowledgment that the retaliatory plea failed to offer adequate excuse for the curtailment of neutral rights.¹⁵

§ 749. **The Same.** It is doubtless true that the great body of neutral rights, such as those pertaining, for example, to neutral vessels on the high seas, possess the character ascribed to them by the United States. It may be admitted that since the Declaration of Paris the right of neutral nationals to employ belligerent ships for the transportation of their persons or property has been so widely acknowledged that any belligerent practices tending to curtail the value of it may now be fairly regarded with disapprobation. Nevertheless, it may be doubted whether this neutral right of transportation was ever acknowledged to embrace a special protection for neutral persons or property from hostile operations which might be not unjustly directed against the belligerent carrier. In this regard the rights of neutral occupants were not deemed to be greater than, and were in fact assimilated to, those of persons of belligerent nationality on the same ship. The presence of the former gave the vessel no immunity from treatment to which the enemy might otherwise justly subject it.¹ If this were not true, one belligerent power, however lawless in its treatment of the enemy's vessels, could, by alluring neutral persons to take passage on its merchantmen, shield itself

¹³ Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, July 21, 1915, *id.*, 480.

¹⁴ For. Rel. 1916, Supp., 171. In the same note it was said: "Germany has notwithstanding limited her submarine warfare, because of her long-standing friendship with the United States and because by the sinking of the *Lusitania*, which caused the death of citizens of the United States, the German retaliation affected neutrals which was not the intention, as retaliation should be confined to enemy subjects."

¹⁵ See Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy, *infra*, § 888A.

§ 749. ¹ Declares Hall: "Just as a neutral individual in belligerent territory must be prepared for the risks of war and cannot demand compensation for loss or damage of property resulting from military operations carried on in a legitimate manner; so, if he places his property in the custody of a belligerent at sea he can claim no more than its bare immunity from confiscation, and he is not indemnified for the injury accruing through loss of market and time, when it is taken into the captor's port, or in some cases at any rate for loss through its destruction with the ship." Higgins' 8 ed., 876.

from the danger of retaliation, and so deprive its adversary of that weapon of defense.²

Germany was not, however, in a position to take advantage of this point, because of the essential weakness of its own plea, and by reason of the lack of any solid excuse for the practical curtailment by its naval forces of the neutral right to utilize British merchantmen as carriers of persons and property.

On September 1, 1915, the German Ambassador, under instructions, informed the Department of State that "liners will not be sunk by our submarines without warning and without safety of the lives of non-combatants, provided that the liners do not try to escape or offer resistance."³ Again, in January, 1916, the Department was similarly informed that German submarines in the Mediterranean had had from the beginning "orders to conduct cruiser warfare against enemy merchant vessels only in accordance with general principles of international law."⁴

On April 18, 1916, in view of the torpedoing of the S.S. *Sussex* during the previous month, Secretary Lansing announced that unless Germany should then immediately declare and effect an abandonment of its existing methods of submarine warfare against passenger and freight-carrying vessels, the Government of the United States could have no choice but to sever diplomatic relations with the German Empire altogether.⁵ On May 4, 1916, the German Foreign Office announced a readiness to do its utmost to confine the operations of the war for the rest of its duration to the fighting forces of the belligerents, and notified the United States that German naval forces had received the following orders:

In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both

² In the case of the *Lusitania*, the German Government, in its note of May 28, 1915, declared that the English steamship company must have been aware of the danger to which passengers on board that vessel were exposed, that "the company quite deliberately tried to use the lives of American citizens as a protection for the ammunition carried," and that the company "wantonly caused the death" of the passengers who lost their lives. Herr von Jagow, German Minister for Foreign Affairs, to Mr. Gerard, Ambassador to Germany, For. Rel. 1915, Supp., 419, 420. It is not believed that the presence of neutral passengers on board the *Lusitania* altered the duty which Germany owed to that vessel. The obligation not to sink it at sight was one which was due to an unarmed enemy merchantman, irrespective of the nationality of its occupants. If the company was at fault in encouraging neutral passengers to embark on the ill-fated ship, that fault lay in the failure to warn them that German submarines might not be deterred from wanton disregard of the legal duty not to sink an enemy merchantman at sight, by even the lawful presence on board of neutral passengers.

See *The Lusitania*, 251 Fed. 715, 734-736.

By provisions of Section 5 (a) of the Neutrality Act of 1939, it was rendered unlawful, under conditions therein set forth, when the United States was a neutral, for any citizen of the United States to travel on any vessel of a belligerent State, except in accordance with such rules and regulations as might be prescribed. Public Resolution, No. 54, 76th Cong.

³ Count von Bernstorff, German Ambassador, to Mr. Lansing, Secy. of State, Sept. 1, 1915, For. Rel. 1915, Supp., 530, 531; Same to Same, Oct. 5, 1915, *id.*, 560, in which it was said that "The orders issued by His Majesty the Emperor to the commanders of the German submarines — of which I notified you on a previous occasion — have been made so stringent that the recurrence of incidents similar to the *Arabic* case is considered out of the question."

⁴ Same to Same, Jan. 7, 1916, *id.*, 1916, Supp., 144; Same to Same, Feb. 16, 1916, *id.*, 171.

⁵ Mr. Lansing, Secy. of State, to Mr. Gerard, telegram, Apr. 18, 1916, *id.*, 232, 234.

See, also, address of President Wilson before the Congress on "Relations with Germany," Apr. 19, 1916, House Doc. 1034, 64 Cong., 1 Sess.

within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives unless these ships attempt to escape or offer resistance.⁶

The foregoing statement was a significant admission that the rights of unarmed belligerent merchantmen were recognized by international law, and that the duty with respect to warning and the saving of human life was as applicable to the naval submarine as to the non-submersible cruiser.

In the months that followed, German naval authorities interpreted narrowly the agreement as to the "saving human lives." The occupants of enemy merchantmen were compelled to take to the boats on short notice, and with slight concern for their subsequent fate. Such individuals were subjected to the dangers and hardships necessarily incidental to such a proceeding, and so exposed to treatment at variance both with the requirements of justice and with the terms of the understanding with the United States.

In a memorandum accompanying a note from the German Ambassador at Washington to the Secretary of State, January 31, 1917, it was announced that the alleged illegal measures of its enemies served to give Germany that freedom of action which had been reserved in its note to the United States of May 4, 1916, and that to meet such measures, after February 1, 1917, all ships, both neutral and enemy, within a specified zone around Great Britain, France, Italy and in the eastern Mediterranean, would be sunk.⁷

On February 3, 1917, Secretary Lansing informed the German Ambassador at Washington that in view of the declaration of his Government which withdrew "suddenly and without prior intimation the solemn assurance given in the Imperial Government's note of May 4, 1916," the American Government had "no alternative consistent with the dignity and honor of the United States"

⁶ Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, May 4, 1916, For. Rel. 1916, Supp., 257, 259.

It was added, however, that neutrals could not expect that Germany, "forced to fight for her existence," for the sake of neutral interest would restrict the use of an effective weapon if her enemy was "permitted to continue to apply at will methods of warfare violating the rules of international law"; that it was not doubted that the United States would demand and insist that Great Britain observe the rules of international law universally recognized before the war, and as laid down in certain specified notes of the United States to the British Government, and that should the steps taken by the former not attain the object it desired ("to have the laws of humanity followed by all belligerent nations"), the German Government would then be facing a new situation, in which it reserved for itself complete liberty of decision. The United States responded that it would rely upon a scrupulous execution thenceforth of the altered policy of the Imperial Government; that it was taken for granted that that Government did not intend to imply that the maintenance of the newly announced policy was in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and that of any other belligerent, and that the United States thereby notified Germany, that the former could not for a moment entertain, much less discuss, "a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any other Government affecting the rights of neutrals and non-combatants. Responsibility in such matters," it was said, "is single, not joint; absolute, not relative." Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 8, 1916, *Id.*, 263.

⁷ Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secy. of State, Jan. 31, 1917, For. Rel. 1917, Supp., 1, 97, 100.

See, also, British order in council of Feb. 16, 1917, and with respect to its validity see *The Leonora*. [1918]. P. 182.

but to take the course which it had explicitly announced in its note of April 18, 1916, that it would take "in the event that the Imperial Government did not declare and effect an abandonment of the methods of submarine warfare then employed and to which the Imperial Government now purpose again to resort." He added that the President had, therefore, directed him to announce to the Ambassador that all diplomatic relations between the United States and the German Empire were severed and that the American Ambassador at Berlin would be immediately withdrawn, and in accordance with such announcement to deliver to the German Ambassador his passports.⁸

It may be observed that even if the German announcement of January 31, 1917, could be fairly regarded as in harmony with the reservation contained in its note of May 4, 1916, and thus did not constitute a violation of its undertaking of that date, it announced a determination to embark upon an illegal course of belligerent action.

§ 749A. **Conventional Arrangements since World War I.** Since the termination of World War I certain maritime States have sought to reach agreement concerning what should be deemed to be the requirements of international law as applied to uses of belligerent submarines as agencies of attack. Moreover, in the course of that effort they have considered whether, and to what extent, the employment of such vessels as such agencies should be forbidden. The Washington Conference on the Limitation of Armament, 1921-1922, was the scene of interesting discussions which did not, however, always reveal the thought responsible for desires to retain the submarine for belligerent purposes.¹

The United States has in recent years favored the abolition of the submarine as an instrument of naval warfare, making clear its position at the London Naval Conference in 1930, where Secretary Stimson declared: "It seems to the

⁸ Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Feb. 3, 1917, For. Rel. 1917, Supp., 1, 106.

See Attacks on Neutral Vessels, *infra*, § 750.

§ 749A.¹ Divergence of opinion revealed at the Conference, precluded the adoption of a resolution to abolish the submarine. There was, however, a highly interesting discussion of the matter. See Conference on the Limitation of Armament, Senate Doc. 126, 67 Cong., 2 Sess., 264-335. In a report on submarines adopted by the Advisory Committee of the American Delegation, Dec. 1, 1921, it was said: "As a scout the submarine has great possibilities. It is the one type of vessel able to proceed unsupported into distant enemy waters and maintain itself to observe and report enemy movements. At present its principal handicaps are poor habitability and lack of radio power to transmit its information. However, these may be overcome in some degree in the future. Here, again, the submarine has come to stay — it has great value, a legitimate use, and no nation can decry its employment in this fashion." (*Id.*, 275.) On Feb. 6, 1922, there was signed at the Conference a treaty Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War (U. S. Treaty Vol. III, 3116) which did not become operative. According to Art. IV thereof: "The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto." Earlier articles of the treaty were open for criticism on various grounds. See in this connection, Visit and Search, Nature and Purpose, *supra*, § 724; R. F. Roxburgh, "Submarines at the Washington Conference," *Brit. Y.B.*, 1922-23, 150.

American Delegation that we have a common interest in the abolition of the submarine; first of all, for the purpose of suppressing costly weapons which we can forego by agreement and by the abolition of which we reduce our requirements in other classes of ships; and, second, for the purpose of eliminating for the future the dreadful experiences of the past. The American Delegation, therefore, urges that we set aside purely technical considerations and give careful study to the possibility of eliminating this whole problem.”² As yet, no multi-partite arrangement registers an agreement of the parties to relinquish the employment of submarines. Progress has been made, however, in obtaining agreement as to the uses and methods of such vessels.

According to Article 22 of the Treaty on the Limitation and Reduction of Naval Armament concluded at the London Naval Conference April 22, 1930, the following were accepted “as established rules of International Law”:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.³

² Dept. of State Conference Series, No. 3, 21–22.

It was also said in this connection: “The essential objection to the submarine is that it is a weapon particularly susceptible to abuse, that it is susceptible of use against merchant ships in a way that violates alike the laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my own country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way that is most effective for immediate purposes, regardless of consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished. We have come to the conclusion that our problem is, whether in this day and age, and after the experiences of the last war, the nations at this conference are justified in continuing to build these instruments of warfare, thereby assuming responsibility for the risk of repeating in any possible future wars the inhumane activities which have been condemned by the verdict of history.” (*Id.*, 21.)

³ U. S. Treaty Vol. IV, 5281. Declared the Naval War College in 1934: “It cannot be presumed that those are in error who would read the treaty as follows: ‘(1) In general, in their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject, but (2) In particular, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search.’” (*Int. Law Situations*, 1934, 51.)

The treaty was confirmed in a Protocol signed at London, Nov. 6, 1936 (*Am. J.*, XXXI, *Official Documents*, 137, British Treaty Series No. 29 [1936], Cmd. 5302.)

“This treaty [of 1930] was not ratified by France or Italy. Prior to the meeting of the London Naval Conference of 1935, which met to frame a new treaty to replace the treaty of 1930, the British Government approached the Governments of the United States, Japan, France, and Italy and invited them to perpetuate, in a separate protocol, part IV of the treaty of 1930. The four Governments expressed their approval, and on November 6, 1936, the French and Italian Governments deposited their instruments of ratification of part IV

On January 15, 1937, the British Ambassador at Washington informed the Secretary of State that the German Government had notified that of Great Britain on November 23, 1936, that it adhered as from that date to the rules governing the action of submarines with regard to merchant ships in time of war, set forth in the procès-verbal signed at London, November 6, 1936.⁴

The rules of 1930 mark an improvement over those which emanated from the Washington Conference, 1921–1922. There is wisely omitted any pronouncement declaratory of an obligation to have recourse to visit and search. Although there is no specific reference to armed enemy merchantmen as such, there is no necessary intimation that their condition or action when encountered would entitle them to the treatment to be accorded unarmed ships. The treaty is chiefly significant as a warning that belligerent submarine craft must conform to the requirements exacted of belligerent surface craft when encountering merchant vessels, and as an exposition, in a broad sense, of what those requirements really are. It should be noted that in the International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines, signed at Nyon, September 14, 1937, any submarine attacking a merchant ship “in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on the 22nd April, 1930, and confirmed in the Protocol signed in London on the 6th November, 1936,” was to be “counter-attacked and, if possible, destroyed.”⁵

§ 749B. The Renewal of Submarine Operations in September, 1939. Upon the outbreak of the European War in September, 1939, submarine craft were employed by Germany for offensive action against the enemy. The British unarmed passenger steamer *Athenia* was the victim of attack without warning on the night of September 3, 1939, and was sunk in consequence thereof with resulting loss of life.¹

of the treaty of 1930. On the same day the United States, Australia, Canada, France, United Kingdom of Great Britain and Northern Ireland, India, Irish Free State, Italy, Japan, New Zealand, and Union of South Africa signed a procès-verbal embodying the rules of part IV and inviting all powers not signatory thereto to accede to the rules ‘definitely and without limit of time.’” (Hackworth, Dig., II, 692.)

⁴ Dept. of State, Treaty Information Bulletin, No. 88, Jan. 31, 1937, 9. See other adherences referred to in *Am. J., XXXI, Official Documents*, 139.

⁵ *Am. J., XXXI, Official Documents*, 179; British Treaty Series, No. 38 (1937), Cmd. 5568. The agreement was signed in behalf of the United Kingdom of Great Britain and Northern Ireland, Bulgaria, Egypt, France, Greece, Rumania, Turkey, Union of Soviet Socialist Republics, and Jugoslavia.

See Collective Measures Against Attacks in the Mediterranean by Submarines in 1937, *infra*, § 751A.

See in this connection, documents in Hackworth, Dig., II, 692–695.

See Aspects of Aerial Bombardment, *supra*, § 663.

§ 749B. ¹ Declared Mr. Winston Churchill, First Lord of the Admiralty, in the House of Commons, Sept. 6, 1939: “It is now clearly established that the disaster was due to an attack without warning by a submarine. At 7.45 p.m. local time on the night of Sunday, September 3, a torpedo struck the ship abaft the engine-room on the port side when she was 250 miles north-west of the coast of Ireland. Soon after the torpedo struck the ship the submarine came to the surface and fired a shell which exploded on the middle deck. The submarine cruised around the sinking ship and was seen by numerous persons, including American survivors, a considerable number of whom—I think twelve or more—have given affidavits to this effect.” (*Manchester Guardian Weekly*, Sept. 8, 1939, 186.)

§ 749C. **Case of the *Robin Moor*.** On May 21, 1941, the American ship *Robin Moor* was sunk by a German submarine in the South Atlantic Ocean (25 degrees and 40 minutes west, 6 degrees and 40 minutes north). According to depositions of survivors, the vessel was sunk within thirty minutes of the time of the first warning given by the commander of the submarine. The nationality of the *Robin Moor* was known to the commander of the latter, which nationality was likewise clearly indicated by the flag and other markings. The vessel was sunk without provision for the safety of the passengers and crew who were left afloat in small lifeboats from approximately two to three weeks when they were accidentally discovered and rescued by friendly vessels. In a message to the Congress on June 20, 1941, President Roosevelt declared that the action of the German submarine "flagrantly violated the right of the United States vessels freely to navigate the seas subject only to a belligerent right accepted under international law," and that "this belligerent right, as is known to the German Government, does not include the right deliberately to sink a merchant vessel, leaving the passengers and crew to the mercies of the elements." "On the contrary," he declared, "the belligerent is required to place the passengers and crew in places of safety." He added "the total disregard shown for the elementary principles of international law and of humanity brands the sinking of the *Robin Moor* as the act of an international outlaw."¹

The President did not suggest that the German breach of duty grew out of failure to observe conventional obligations rather than those of the customary law. Nor did he advert to the fact that the ship was unarmed.

The President did declare that the sinking of the *Robin Moor* marked a disclosure of German policy as well as an example of method, and that it appeared to be a first step in assertion of the supreme purpose of the German Reich to seize control of the high seas, "the conquest of Great Britain being an indispensable part of that seizure." He added: "We must take it that notice has now been served upon us that no American ship or cargo on any of the seven seas can consider itself immune from acts of piracy. Notice is served on us, in effect, that the German Reich proposes so to intimidate the United States that we would be dissuaded from carrying out our chosen policy of helping Britain to survive. In brief, we must take the sinking of the *Robin Moor* as a warning to the United States not to resist the Nazi movement of world conquest. It is a warning that the United States may use the high seas of the world only with Nazi consent. Were we to yield on this we would inevitably submit to world-domination at the hands of the present leaders of the German Reich. We are not yielding and we do not propose to yield."²

It is believed that the sinking of the *Robin Moor* was rather a simple case that portrayed the unconcern of the German Reich for those requirements of

§ 749C. ¹ Dept. of State Bulletin, June 21, 1941, 741.

The President added: "The Government of the United States holds Germany responsible for the outrageous and indefensible sinking of the *Robin Moor*. Full reparation for the losses and damages suffered by American nationals will be expected from the German Government." (*Id.*)

² *Id.*, 742.

international law that restricted the procedure of submarine warfare, and which it had previously appeared to acknowledge to exist.⁸ Obviously, those requirements, in so far as they concerned the obligation to afford a place of safety for the occupants of a ship sought to be controlled or sunk, were not modified or diminished by the character of the contents or the destination of the vessel. Thus, the presence on the *Robin Moor* of any articles which Germany might reasonably have deemed to be contraband in consequence of a possible destination to its enemy, did not suffice to excuse the treatment accorded the occupants of the ship.

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§ 750. **Attacks on Neutral Vessels.** A neutral vessel is not subject to attack unless resisting or evading the effort of a belligerent vessel of war to exercise the right of visit and search,¹ or unless the former has so identified itself with the service of the opposing belligerent as to become assimilated in point of character to one of its public ships employed in the prosecution of the war. In such case the neutral merchantman doubtless subjects itself to whatever treatment the law of nations permits a belligerent to apply to the public vessels of its enemy.² If the unneutral service is not, however, of such a kind, the mere fact of participation in the war, although internationally illegal, and serving to penalize the ship if captured, does not also serve to expose it to attack. The mere carriage of contraband, for example, does not deprive the neutral carrier of the right to be called upon to stop and submit to visit and search.³

As neutral private ships, whether or not so employed, are commonly unarmed, and are, moreover, forbidden by the law of nations to attack belligerent vessels of war, the latter, when encountering neutral merchantmen, have no reason to anticipate the commission of any hostile acts.⁴ These circumstances combine, therefore, to render illegal attacks at sight upon neutral ships or other treatment of them calculated to jeopardize the safety of the occupants. The United States is believed to have been correct in its stand that no valid excuse for the failure of a belligerent to respect this obligation is to be found in mistakes of belligerent commanders, who, without attempting visit and search, open fire upon neutral ships under the supposition that they belong to the enemy. Nor is the duty of the belligerent believed to be altered by constant use by its enemy of neutral flags for purposes of deception, or by the attempt to create war zones

⁸ See *supra*, § 749A.

§ 750.¹ See Visit and Search, Neutral Ships, *supra*, § 731.

² See Effect of Nature, Use, or Conduct of Enemy Vessel Encountered, Unarmed Public Vessels, *supra*, § 740.

See, also, Art. XVI, U. S. Naval War Code of 1900, withdrawn in 1904, Naval War College, Int. Law Discussions, 1903, 106.

³ See Contraband, Penalty for Carriage, *infra*, § 815.

⁴ Section 6 of the Neutrality Act of 1939 rendered it unlawful under conditions when there was found to exist a war between foreign States and the United States was a neutral, "for any American vessel engaged in commerce with any foreign State to be armed, except with small arms and ammunition therefor, which the President may deem necessary and shall publicly designate for the preservation of discipline aboard any such vessel." (Public Resolution, No. 54, 76th Cong.)

within specified areas of the high seas, or by the limitations of new instruments of naval warfare, such as submarine craft.⁵

Controversies respecting the propriety of the treatment accorded neutral ships oftentimes relate to the commission of acts after detention or seizure, rather than before, and concern the destruction of neutral prizes. Difficulties arising from prior attacks are frequently attributable to inadequate or unanswered signals, or to mistakes in fact,⁶ rather than to the assertion of any belligerent right to attack neutral vessels at sight.

§ 751. **The Same.** In April, 1916, Secretary Lansing, in a discussion with Germany, charged the naval authorities of that country with repeated attacks without warning upon neutral as well as belligerent vessels.¹ The German assurance given the United States in May, that merchant vessels would not be sunk without warning, sufficed in its terms to embrace the treatment due to neutral as well as belligerent ships.² The withdrawal of that assurance without prior intimation on January 31, 1917, caused the United States, as has been observed, to sever diplomatic relations with Germany on February 3, 1917.³ On February 26, President Wilson requested of the Congress authorization to supply American merchant ships with defensive arms, should that become necessary, and with the means of using them, and to employ any other instrumentalities or methods that might be necessary and adequate to protect those ships as well as the American people "in their legitimate and peaceful pursuits on the seas."⁴ Such specific authorization was withheld. On March 12, the Department of State declared that in view of the German announcement of January 31, the Government of the United States had determined to place upon all American vessels sailing through the barred areas "an armed guard for the protection of the vessels and the lives of the persons on board."⁵ Such action was taken.⁶ It is understood that on

⁵ See Mr. Bryan, Secy. of State, in a telegram to Mr. Gerard, Ambassador to Germany, Feb. 10, 1915, For. Rel. 1915, Supp., 98. See the facts in the case of the American S.S. *Nebraska*, attacked by a German submarine 35 nautical miles off Fastnet Rock, May 25, 1915, as set forth in telegram of Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, July 12, 1915, *id.*, 468.

⁶ Concerning the torpedoing of the American S.S. *Gulfight*, off the Scilly Islands, by a German submarine May 1, 1915, see Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915, *id.*, 393; Herr von Jagow, German Minister for Foreign Affairs, to Mr. Gerard, telegram, May 28, 1915, *id.*, 419; Same to Same, June 1, 1915, *id.*, 431; Mr. Lansing, Secy. of State *ad interim*, to Mr. Gerard, telegram, June 9, 1915, *id.*, 436.

Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, telegram, June 21, 1916, concerning the attack upon the American S.S. *Petrolite* by an Austro-Hungarian submarine, For. Rel. 1916, Supp., 858.

§ 751. ¹ Mr. Lansing, to Mr. Gerard, telegram, April 18, 1916, For. Rel. 1916, Supp., 232.

² Mr. Gerard, to Mr. Lansing, telegram, May 4, 1916, *id.*, 257.

See Mode of Conduct with Reference to Nature of Attacking Vessel, Submarine Craft, The Controversy with Germany, *supra*, § 749.

³ See *id.*

Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Feb. 3, 1917, For. Rel. 1917, Supp., I, 106; Address of President Wilson to the Congress, Feb. 3, 1917, *id.*, 109. Also J. B. Scott, Survey of Int. Relations between United States and Germany, Chap. XV.

⁴ Address of President Wilson to the Congress, Feb. 26, 1917, For. Rel. 1917, Supp., I, 150.

⁵ Statement of the Department of State given to all foreign embassies and legations at Washington, March 12, 1917, *id.*, 171.

March 20, the American Government "assumed official responsibility for the firing of guns and put naval men in charge of them."⁷ The United States thus asserted the right, although not at war, to employ force in order to safeguard its merchant fleet against what were conceived to be illegal depredations by a particular belligerent. This assertion had broad implications; for it signified that in the mind of the American Government it was not necessary for the nation to embark upon war in order to maintain the freedom of that fleet from unlawful interference on the part of a ruthless belligerent, and that in the work of maintenance the normal obligation resting upon a neutral to abstain from employing force against a belligerent had ceased to be applicable.⁸

On April 2, the President, in an address to the Congress, declared that

The new policy [of Germany] has swept every restriction aside. Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents. Even hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium, though the latter were provided with safe-conduct through the proscribed areas by the German Government itself and were distinguished by unmistakable marks of identity, have been sunk with the same reckless lack of compassion or of principle. . . .

It is war against all nations. American ships have been sunk. American lives taken, in ways which it has stirred us very deeply to learn of, but the ships and people of other neutral and friendly nations have been sunk and overwhelmed in the waters in the same way. There has been no discrimination. The challenge is to all mankind. . . .

Armed neutrality is ineffectual enough at best; in such circumstances and in the face of such pretensions it is worse than ineffectual; it is likely only to produce what it was meant to prevent; it is practically certain to draw us into the war without either the rights or the effectiveness of belligerents. There is one choice we cannot make, we are incapable of making: we will not choose the path of submission and suffer the most sacred rights of our nation and our people to be ignored or violated. The wrongs against which we now array ourselves are no common wrongs; they cut to the very roots of human life. . . . I advise that the Congress declare the recent course of the Imperial German Government to be in fact nothing less than

See telegram from the American Consul at Amsterdam, to the Secy. of State, of March 22, 1917, respecting the torpedoing without warning of the American tank steamship *Healdton*, *id.*, 183.

⁶ See Navy Department "Regulations Governing the Conduct of American Merchant Vessels on Which Armed Guards Have Been Placed," *Savage, Policy of the United States toward Maritime Commerce in War* (Dept. of State publication No. 835), II, 582.

⁷ Borchard and Lage, *Neutrality for the United States*, 1937, 173.

⁸ Declared Mr. Lansing, Secy. of State, in a communication to the President, March 6, 1917: "It seems to me that there is no more impropriety in placing armed guards on an American merchant vessel to preserve the lives of the persons on board than there is to land guns and blue jackets to protect the lives of American citizens on foreign soil when they are in danger of lawless attack." (*Savage, Policy of the United States toward Maritime Commerce in War*, II, 571, 573.)

See Aspects of Neutral Responses to Unlawful Treatment by a Belligerent, *infra*, § 888C.

war against the Government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put the country in a more thorough state of defense but also to exert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war.⁹

On April 6, the United States declared war against Germany.¹⁰

§ 751A. Collective Measures Against Attacks in the Mediterranean by Submarines in 1937. Arising out of the conflict then existing in Spain, attacks were frequently committed in the Mediterranean in 1937, by submarines against merchant ships not belonging to either of the Spanish parties. Regarding these attacks as at variance with the rules of international law set forth in Part IV of the Treaty of London of April 22, 1930, and confirmed in the Protocol signed at London, November 6, 1936, pertaining to the sinking of merchant ships, and as constituting acts "contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy," a group of maritime States through an arrangement signed at Nyon, September 14, 1937, agreed to take the following action with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties. Any submarine which attacked such a ship in a manner contrary to the rules of international law referred to,¹ was to be counter-attacked and, if possible, destroyed; and such action by the Participating Powers was to extend to any submarine encountered in the vicinity of a position where a ship not belonging to either of the conflicting Spanish parties had "recently" been attacked in violation of the rules referred to, in circumstances giving valid grounds for the belief that the submarine had been guilty of the attack.² Those Powers agreed to appropriate measures to facilitate the putting into force of the common plan, and in so doing to restrict the use of their submarines in the Mediterranean in a specified way.³

It is not surprising that either party to the conflict in Spain should have employed force to prevent its adversary from receiving foreign sustenance by sea, or that in so doing it made use of submarines as a convenient instrument of prevention. It is, however, an amazing fact that such vessels were utilized with such persistence and impropriety that neutral or quasi-neutral States felt

⁹ For. Rel. 1917, Supp., I, 195. See, also, circular telegram of Mr. Lansing, Secy. of State, to all American diplomatic missions, April 2, 1917, *id.*, 194.

¹⁰ See proclamation by President Wilson, April 6, 1917, *id.*, 207.

¹ § 751A. See Conventional Arrangements, since World War I, *supra*, § 749A.

² *Am. J.*, XXXI, *Official Documents*, 179; British Treaty Series, No. 38 (1937), Cmd. 5568.

It was said in the preamble: "Whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed and without prejudice to the right of any participating Power to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas or to the possibility of further collective measures being agreed upon subsequently, it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines."

³ See sections IV and V.

obliged to unite to protect themselves and their shipping by their own naval vessels as against the offending submarines.⁴ Apart from the question whether or to what extent either party to the Spanish conflict was entitled to exercise the privileges of a belligerent, the fact stands out that the employers of submarines as agencies of destruction, enjoyed in that regard no greater privileges than those possessed by a belligerent, and that the methods of those employers were contemptuous of restrictions which a belligerent recognized as such would be obliged to respect. The experience of the States which found it necessary to accept the Nyon Agreement is a stern warning of what unscrupulous possessors of submarine craft may endeavor to accomplish in future conflicts.

§ 751B. **Attack by Aircraft.** According to an agreement of September 17, 1937, supplementary to the Nyon arrangement of September 14, 1937, and which was to be regarded as an integral part thereof, both surface vessels and aircraft when engaged in attack in the Mediterranean were subjected to the rules of international law with regard to warfare at sea "which are referred to in Part IV of the Treaty of London of April 22nd, 1930, and confirmed in the Protocol signed in London on November 6th, 1936."¹

Here was sound intimation that the offensive use of military aircraft by a belligerent in maritime warfare was conditioned upon full deference for the equities of those objectives which submarine craft were expected to heed. This fact or conclusion implied that belligerent aircraft, notwithstanding their difficulty in meeting those conditions, could not otherwise properly be used for purposes of attack. Nevertheless, in the course of World War II, initiated in 1939, German aircraft were constantly employed for purposes of attack with seeming contempt for the equities of unoffending ships which it was sought to destroy, and with little or no regard for any obligation to provide a place of safety for the occupants of such vessels as were encountered.²

4

CAPTURE

a

§ 752. **Acts Falling Short of Capture.** A belligerent vessel of war may, for various purposes, assert control over a foreign ship encountered on the high

⁴ See George A. Finch, "Piracy in the Mediterranean," *Am. J.*, XXXI, 659; Norman J. Padelford, "International Law and the Spanish Civil War," *Am. J.*, XXXI, 226; Norman J. Padelford and Henry G. Seymour, "Some International Problems of the Spanish Civil War," *Pol. Sc. Quar.*, LII, 364.

See aspects of Aerial Bombardment, *supra*, § 663.

§ 751B.¹ *Am. J.*, XXXI, *Official Documents*, 182.

² "Several months after the outbreak of the war in 1939 Germany proceeded to resort on a wide scale to indiscriminate attacks by aircraft upon merchant shipping, including fishing craft and lightships. In the attack on the *Domala*, a ship of the British Indian line, in March, 1940, one hundred passengers and members of the crew were killed. Such depredations when directed against unconvoyed vessels not forming part of the naval forces of the belligerent must be regarded as constituting a flagrant violation of International Law." (Lauterpacht's 6th ed. of *Oppenheim*, II, 420.)

See Aspects of Aerial Bombardment, *supra*, § 663.

seas or elsewhere, with or without the consent of its commander. The initial assertion may not, and oftentimes can not, betoken a definite design to seize or confiscate the ship, or to endeavor to bring about its condemnation. It may imply merely a desire to make enquiry whether steps should be taken to ascertain as by visit and search (if the ship be a neutral vessel), if there is ground to detain the vessel or cargo and bring either or both into port for adjudication before a prize court. If in consequence of visit and search the belligerent asserter of control proceeds to follow it up by detaining the ship and sending it in, the action amounts, as will be seen, to what is commonly described as capture.¹ Unless, however, the detention or continued exercise of control is effected with such a design, the vessel encountered, if a neutral ship, is hardly to be regarded as having been captured. A neutral merchantman which in the course of detention is compelled to put into a belligerent port merely in order there to undergo a thorough search may be said to remain uncaptured and to retain the right to fly its own flag throughout the period of investigation.²

As enemy ships are, with certain well known exceptions, subject to capture, the initial assumption of control by a belligerent vessel of war over a ship belonging to its adversary commonly compels an inference that is inconsistent with a design merely to examine rather than to seize or confiscate. Mere detention of a hostile ship normally exempt from capture might, however, imply a purpose simply to ascertain whether in fact the vessel had by any process forfeited its acknowledged immunity.

b

§ 753. What Constitutes Capture. Capture consists of the acquisition and assumption of control over a vessel by persons not in control of it, with the purpose of seizing and retaining, or destroying the vessel and cargo, or both, as prize. There must be some act indicative of such an intention.¹ Whether or not the seizure be effected by the employment of superior force, it is believed that an open, visible possession should be claimed, and a submission to the control of the seizer yielded.² As the Judicial Committee of the Privy Council declared

§ 752. ¹ See, for example, the situation in *The Thompson*, 3 Wall. 155.

² See *Searches in Port*, *supra*, § 727.

See Naval War College, *Int. Law Situations*, 1930, 38-40.

§ 753. ¹ *The Alexander*, 8 Cranch, 169, Moore, Dig., VII, 499; *The Grotius*, 9 Cranch, 368, 370, Moore, Dig., VII, 500. Also Wheaton, *Dig. of Law of Maritime Captures and Prizes*, 52; J. A. Hall, *The Law of Naval Warfare*, 2 ed., 1921, 282-285.

According to the Oxford Manual of Naval War: "*Capture* is the act by which the commander of a war-ship substitutes his authority for that of the captain of the enemy ship, subject to the subsequent judgment of the prize court as to the ultimate fate of the ship and its cargo.

"*Seizure*, when applied to a ship, is the act by which a warship takes possession of the vessel detained, with or without the consent of the captain of the latter. Seizure differs from capture in that the ultimate fate of the vessel may not be involved as a result of its condemnation." *Annuaire*, XXVI, 642, note 1, J. B. Scott, *Resolutions*, 175, note 1.

² *The Josefa Segunda*, 10 Wheat. 312. It should be observed that this case was a proceeding against a vessel and the negroes on board of her, under the slave-trade act of 1807. In the course of the opinion of the Court, Story, J., said: "There must be an open, visible possession claimed, and authority exercised, under a seizure. The parties must understand that they are dispossessed, and that they are no longer at liberty to exercise any dominion on board of the ship. It is true that a superior physical force is not necessary to be employed if there is a voluntary acquiescence in the seizure and dispossession. If the party, upon

through Lord Sumner in 1922, in the case of *The Pellworm*: "In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done, *deditio* is complete, even although there may be on the part of the prize an intention to seize an opportunity of escaping, should it present itself. Submission must be judged by action, or by abstention from action; it cannot depend on mere intention, although proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous, and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary."³

The requisite design on the part of the seizer may be inferred from his conduct.⁴ Thus, his sending a neutral ship in for adjudication after visit and search necessarily implies that capture has been effected; yet a different inference is permissible when the ship is detained or possibly diverted merely for purposes of examination, as by a search in port.⁵ Should there be, however, general denunciation of searches in port, the action of a vessel of war in bringing a neutral ship to such a place would be open to but one interpretation.⁶

The persons effecting a capture may in fact belong to the military, naval or other public service, or they may be private citizens. They may even be occupants of the ship that is seized. Thus the crew of a captured vessel, in charge of a prize crew of inferior strength, may rescue the ship from those asserting control over it, and so capture it. The work of capture, save when such action takes the form of rescue by occupants of a captured ship, or is the consequence of resistance to capture, should be confined to the public, and preferably the naval forces of a belligerent.⁷

notice, agrees to submit, and actually submits to the command and control of the seizing officer, that is sufficient; for, in such cases, as in cases of capture *jure belli*, a voluntary surrender of authority and an agreement to obey the captor supplies the place of actual force." (325.)

³ 3 Grant's British and Colonial Prize Case, 1053, 1059, where it was added at 1060-1061: "What a combatant seeks to intimate by acts signifying surrender is first and foremost that he ceases to fight and submits to being taken prisoner; what a merchantman intimates is, that she means to do as she is told, and that the chattel property may be captured in prize, although the seamen in charge of it are not made prisoners, or placed under personal restraint. In the present case, according to evidence given for the Crown, the hauling down of their flags by the German steamers was accompanied by a change of course towards the land, and, as it preceded any British signal by flag or cannon shot, it was in the circumstances anything but a clear intimation of submission. On the contrary, it is obvious that the German ships continued to move towards and shortly crossed the three-mile limit, and that this was neither inadvertent nor was incapable of being prevented. They had not abandoned the intention of escaping, nor had they arrested their movement towards the region of safety. They submitted just so far as to minimise the risk of being fired on; they disobeyed orders just so far as to ensure that the ships would of themselves glide or be carried over the line. They were already heading towards the territorial waters, and desired to obtain whatever advantage might be derivable from getting within them. This was why they did not obey the order to alter course to the westward. It is not shown that they could not have done so. Under these circumstances their Lordships see no reason to differ from Lord Sterndale's conclusion, that the vessels were not captured until they had entered Dutch waters, for up to that time they were endeavouring to escape, and were resisting or evading submission to the captor's will."

⁴ See *The Grotius*, 9 Cranch, 368.

⁵ See *Acts Falling Short of Capture*, *supra*, § 752.

⁶ See *Searches in Port*, *supra*, §§ 727-728.

⁷ See *Belligerent Forces*, *supra*, §§ 703-709.

c

§ 754. **Probable Cause.** The propriety of capture does not depend upon the existence of evidence such as in the absence of exculpatory proof would justify condemnation, but upon whether the seizure is made under circumstances which warrant suspicion that the vessel or cargo is for some reason subject to confiscation or condemnation.¹ It is not the bare fact of suspicion, but the reasonableness of it which appears to be requisite.² To possess such a quality the suspicion should be based on information or evidence obtained at the time of seizure. The grounds for suspicion should be, as the Tribunal assembled at The Hague in the case of the *Carthage* declared, of a "juridical nature."³ They should therefore reveal some ground for the conclusion that as a matter of law the ship, if it be neutral, is violating a duty towards the State of the captor, or that its cargo is contraband. In the case of an enemy ship, grounds for capture, save with respect to exceptions easily observable, are always present.

A naval commander may, however, find himself bound by instructions from his Government which, under existing circumstances, leave him no alternative. If those instructions contemplate capture on grounds which according to accepted usage would be deemed insufficient, the wrongfulness of what they sanction must be apparent; for no belligerent can by virtue of a domestic law lessen any obligation which under international law it owes to a neutral State.

That the suspicions of the captor, however warranted, do not result in condemnation of a vessel brought in as prize is not necessarily indicative of an illegal capture. If the captor has probable cause, he is not regarded as a wrongdoer.⁴ Nor will damages and costs in such case be given the claimant.⁵

d

§ 754A. **Place of Capture.** In the prosecution of a war a belligerent may employ whatever arm of its service is found to be most useful for its purposes.¹

Doubtless a belligerent State may commission whomsoever it will to effect captures in its behalf, and the propriety of its conduct in so doing will not be questioned in its own prize courts. The *Mary and Susan*, 1 Wheat. 46, 57, Moore, Dig., VII, 502. Those tribunals will not permit the claimants of property liable to condemnation to litigate the question of the captor's commission. The *Dos Hermanos*, 2 Wheat. 76, 99, Moore, Dig., VII, 503; The *Amiable Isabella*, 6 Wheat. 1, 66, Moore, Dig., VII, 503.

§ 754.¹ Marshall, Chief Justice, in *Locke v. United States*, 7 Cranch, 339, 348, where the Court was concerned with the meaning of "probable cause" to justify a seizure under the collection law of March 2, 1799.

² Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Dec. 26, 1914, For. Rel. 1914, Supp., 372; see also Mr. Lansing, Secy. of State, to Same, Oct. 21, 1915, *id.*, 1915, Supp., 578.

³ J. B. Scott, Hague Court Reports, 334. See, also, Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, For. Rel. 1915, Supp., 578.

⁴ *Jennings v. Carson*, 4 Cranch 2, 28, where Marshall, Chief Justice, declared that "A belligerent cruiser who, with probable cause, seizes a neutral and takes her into port for adjudication, and proceeds regularly, is not a wrongdoer. The act is not tortious."

See, also, *The Dashing Wave*, 5 Wall. 170, 178.

⁵ *The Thompson*, 3 Wall. 155.

§ 754A.¹ As illustrative of the latitude enjoyed by a belligerent in exercising rights thereof according to a procedure congenial to itself, may be noted the fact that the United States, when it became a participant in the World War in 1917, asserted title to numerous private enemy ships in its ports by virtue of executive orders in pursuance of an act of Congress. See *infra*, § 765; also Garner, *Prize Law*, xliii.

Whatever be its choice, the law of nations lays down some restrictions which limit the places wherein offensive action may be taken. The limitation is, however, a relatively narrow one, forbidding the commission of hostile acts within the domain of a neutral or within neutralized zones. The prohibition is applicable to agencies of maritime warfare, as it is to others.² International law does not, however, demand that a belligerent refrain from using particular instrumentalities in particular places. Thus, it does not deny to a belligerent the privilege of employing its naval forces for offensive purposes in any waters where it is permitted to employ force. They may embrace rivers, inland seas or lakes, as well as the high seas and the waters appurtenant thereto.³

When a belligerent employs its naval (or other appropriate) forces for the purpose of effecting the capture of anything afloat, it probably enjoys the privilege, in the absence of agreement to the contrary, of invoking and applying what may be referred to as the laws of maritime warfare and the procedure thereof as developed in its prize courts.⁴ The practice of States reveals their sense of freedom.⁵ A prize court, with deference for the expression of the will of its sovereign, may be expected to be concerned primarily with interpreting manifestations thereof to be found in domestic legislation or regulations. In so doing the tribunal may be reluctant to assume that its sovereign has, with design or otherwise, sought to pursue a course necessarily at variance with an international contractual or customary obligation; and it may not feel obliged or competent to probe the question concerning the propriety, under international law, of the applicability of the particular system of law which the sovereign sees fit to invoke.⁶

² According to No. 62 of the Naval Instructions Governing Maritime Warfare of June 30, 1917: "Enemy vessels are liable to capture outside of neutral jurisdiction."

³ See *The Odessa*, 2 Lloyd's Prize Cases 405, 421.

⁴ See *Oakes v. United States*, 174 U. S. 778. Compare the situation in *Brown v. United States*, 8 Cranch 110; and in *United States v. 269½ Bales of cotton*, 1 Woolworth 236.

For a good discussion of the American cases, see Manley O. Hudson in *Am. J.*, XVI, 379-382.

⁵ Declares Prof. Garner, in relation to belligerent action during the World War: "Seizures of enemy vessels in the territorial waters, harbors, and ports of the captor State were made by the naval forces or the civil authorities of all the maritime belligerent powers and in the case of those in which Prize Courts were set up the ships seized were generally condemned as good prize or were ordered to be detained until the end of the war or until further order of the Prize Court, and no question was ever raised as to the validity of the seizures by reason of the places where they were made."

"Many captures were likewise made in the territorial waters, harbors, and ports of the enemy or in those of States occupied by the enemy and were the objects of prize adjudication."

"A goodly number of captures were made in the rivers and fluvial ports both of the captor State and of the enemy State or of territory under his occupation." (*Prize Law*, 207.)

⁶ The extent to which a belligerent may in fact go is illustrated in the case of *The "Roumanian"*, 2 Lloyd's Prize Cases, 378, in which Lord Parker of Waddington in the course of the judgment of the Judicial Committee of the Privy Council, declared, Nov. 10, 1915: "Their Lordships, therefore, have come to the conclusion that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Ltd., for safe custody, and that, therefore, its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm,

For that reason, the decision of prize courts sustaining the applicability of the laws of maritime war may frequently be regarded as mere expositions of what is deemed to be the local law, rather than pronouncements concerning what the law of nations permits.

It is not inconceivable that a belligerent State may abuse its powers and in clothing its prize courts with a desired jurisdiction in particular cases with a view to applying the laws of maritime warfare, may violate certain international obligations, such as those attributable to the Regulations annexed to the Hague Convention of 1907, concerning the Laws and Customs of War on Land where it is declared in Article LIII that "all appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depôts of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."⁷ It should be observed, however, that the text quoted does not indicate what cases are to be deemed to be governed by naval law.

e

Effect of Capture

(1)

§ 755. **Upon the Rights of the Occupants of the Captured Vessel.** The fact of capture gives rise to special duties on the part of the captor. Among them is that obliging the latter to afford a place of safety to persons on board the captured vessel. The equities of such individuals may, however, be affected by the nature and conduct of their own ship. If it be a belligerent vessel of war or a private armed vessel which in consequence of resistance or otherwise has become unseaworthy, the duty to offer safe accommodation to persons on board would appear to be dependent upon the military requirements of the captor. On the other hand, to deprive the occupants of any captured ship of such measure of safety as it is capable of affording without offering a reasonable substitute, is believed to be generally unwarrantable. The equities of the occupants may, however, depend upon the nature of their own ship. Should it be a vessel of war capable, if recaptured, of offering renewed resistance, the military necessity occasioned by the special circumstances of the particular case might justify such a subordination of the safety of the occupants as to excuse the demand, for example, that they take to the boats, if the captor could not itself conveniently offer a better place of refuge.

Where the captured ship is unarmed, and so incapable of resistance, the equities are wholly with the occupants. No claim of military necessity is believed to excuse the deprivation of a place of safety. Forcing such individuals

but it is unnecessary to decide this point." (403-404.) For a discussion of this and other relevant foreign cases, see Garner, *op. cit.*, 210-224.

See, also, Manley O. Hudson, "Seizures in Land and Naval Warfare Distinguished," *Am. J.*, XVI, 375.

⁷ Malloy's Treaties, II, 2290.

to take to the boats must be deemed to be a wanton abuse of power and incapable of justification save when it can be shown that such procedure, in view of all the attending circumstances, is not likely to produce personal injury or death.¹

When the captured ship is a neutral vessel, whether or not a participant in the war, the duty to afford the occupants a place of safety must be clear. It should be observed, however, that the obligation of the captor in this regard is in general not attributable to the nationality either of the ship encountered or of the individuals on board, but to the dictates of humanity as they have permeated the law; and they are never to be deemed subordinate to military needs when the captured ship is incapable, even if recaptured, of offering resistance.²

(2)

UPON THE VESSEL AND ITS CARGO

(a)

§ 756. Enemy Prizes — Their Destruction. The law of nations permits the State of the captor to appropriate to its own use a captured enemy ship and the enemy property on board. According to that law the act of capture is deemed, as between the opposing belligerents, to be essentially confiscatory and to suffice to transfer title.¹ In order, however, to establish an indefeasible title as against the various neutral claims which may obtrude, an enemy prize is commonly sent

§ 755.¹ See Attack, Mode of Conduct with Reference to Nature of Attacking Vessel, Submarine Craft: The Controversy with Germany, *supra*, §§ 747-749; also Conventional Arrangements since World War I, § 749A.

See Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915, For. Rel. 1915, Supp., 393; Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, concerning the case of the *Ancona*, Dec. 6, 1915, *id.*, 629.

See, also, undertaking of Germany, May 4, 1916, in communication of that date from the Foreign Office, For. Rel. 1916, Supp., 257.

See No. 97 of Naval Instructions Governing Maritime Warfare, of June 30, 1917.

"The generally enunciated rule in regard to destruction of an enemy's vessel is, 'an enemy's ship can be destroyed only after her crew has been placed in safety.' If this is to be strictly interpreted, there would be considerable doubt as to whether the deck of a war vessel, whose commander fears that his prize is in imminent danger of recapture because of the approach of the enemy, would be a 'place of safety.' It is held that the property and persons of belligerents are subject to the hazard of war when coming within the field of operations. It would scarcely follow that such persons should be forced to assume such hazards, particularly when it is a matter of doubt before adjudication by the court whether the vessel is a proper subject for seizure. What is true of the belligerent vessel is even more emphatically true of a neutral vessel." Naval War College, Int. Law Topics, 1905, 73.

² This obligation was constantly disregarded by Germany in its submarine activities during The World War, before as well as after Feb. 1, 1917, and with respect to both neutral and belligerent prizes. The policy announced in the communication of Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secretary of State, Jan. 31, 1917, respecting submarine operations to be undertaken in waters adjacent to territories of the Allies, was a distinct repudiation of it. See For. Rel. 1917, Supp., 1, 97.

See Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, Oct. 12, 1915, telegram in connection with the case of the *William P. Frye*, For. Rel. 1915, Supp., 570.

§ 756.¹ "It being the right of a belligerent sovereign to appropriate under specified conditions certain kinds of moveable property belonging to his enemy, the effectual seizure of such property in itself transfers it to him. Beyond this statement it is needless for legal purposes to go as between the captor and the original owner, because possession is evidence that an act of appropriation has been performed the value of which an enemy can always test by force." Hall, Higgins' 8 ed., § 149.

in for condemnation.² Domestic regulations directing an adjudication before a prize court thus contemplate the perfecting of a right of property and control entitled to recognition as against any adverse alien claims preferred in any forum.³

The right of the captor to deal summarily with a captured enemy ship depends primarily upon the military necessities of the particular case; intervening equities of third parties are of subordinate significance, and at times may be ignored. So long as adequate provision be made for safety of the occupants of the vessel, the destruction of an enemy prize is not open to question when the captor deems it necessary to take such a step. In its instructions to blockading vessels and cruisers in the course of the Spanish War, the Navy Department declared that unseaworthiness, the existence of infectious disease or the lack of a prize crew, as well as danger of recapture would justify destruction.⁴ According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, "an enemy ship made prize may be destroyed by the capturing officer in case of military necessity, when the vessel cannot be sent or brought in for adjudication."⁵ It is declared that a neutral vessel engaging in unneutral service, being stamped with a hostile character may, under similar circumstances, be destroyed.⁶ It is provided that in no case after a vessel has been brought to, may it be destroyed until after a visit and search have been made, and all persons on board have been placed in safety, including, if practicable, their personal effects.⁷ It is believed that these instructions are in substantial harmony with the present practice of maritime States.⁸

² See, for example, Articles XX–XXIII, Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 782, Moore, Dig., VII, 514. These instructions advert to Sections 4615, 4616 and 4617 of Rev. Stat. of 1878.

³ See No. 99 of Naval Instructions Governing Maritime Warfare, of June 30, 1917.

⁴ Johnson, J., in *The Adventure*, 8 Cranch, 221, 226, Moore, Dig., VII, 623.

⁵ See American Prize Courts and Procedure, Enemy Prizes, Condemnation, *infra*, § 903; Recapture, *infra*, § 759.

⁶ Article XXVIII, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 782, and comment on them in Moore, Dig., VII, 525–526; Dana's Note No. 186, Dana's Wheaton, 480, 485; *The Santo Domingo*, 119 Fed., 386, 389.

⁷ No. 94.

⁸ No. 95.

⁷ No. 97. It is added that "all the documents, letters, and papers found on board the prize shall be taken on board the capturing vessel of war and be inventoried and sealed in accordance with the procedure of section 4615, Revised Statutes, for delivery to the prize court, with especial view to the protection of the interests of the owners of any innocent neutral cargo on board. All mails on board should be saved so far as possible and practicable."

According to No. 98: "Every case of destruction of prize shall be reported to the Navy Department at the earliest practicable moment"

See Art. 22, Treaty on Limitation and Reduction of Naval Armament, signed at London, April 22, 1930, U. S. Treaty Vol. IV, 5281.

See, also, W. Senior, "Ransom Bills," *Law Quar. Rev.*, XXXIV, 49, 57.

⁸ See Conclusions of Naval War College, Int. Law Topics, 1905, 62–76, and documents there cited; statement in Moore, Dig., VII, 522–527; J. W. Garner, *Am. J.*, IX, 613–624.

See, also, *The Felicity*, 2 Dods. 381; *The Leucade*, Spinks, 221.

See F. J. Swayze, "The Right of a Belligerent to Destroy a Captured Prize," *Harv. L.R.*, XVIII, 284. Concerning the destruction of enemy prizes by American warships in the War of 1812, and by the commander of the Confederate warship *Alabama*, in the Civil War, see statement in Moore, Dig., VII, 516, 517, citing American State Papers, Naval Affairs, I, 373, 376, and an article by John A. Bolles in *Atlantic Monthly*, XXX, 88, 95–97.

Respecting the destruction of certain enemy ships by American vessels of war at Manzanillo, July 18, 1898, see Message and Documents, 1898–99, Abridgment, IV, 261–266. The

Existing conditions of maritime warfare, due in part to the employment of submarine naval vessels incapable of furnishing numerous prize crews, or of conducting prizes into court, and in constant danger of destruction if encountered by armed enemy ships, serve to encourage a submarine captor to regard destruction as a necessity whenever a prize is taken in waters remote from the domain of the captor. The exigencies of a naval commander now tend to make of common occurrence acts which in wars of the last century were less frequently committed, not because they were deemed essentially illegal, but rather for the reason that destruction was usually regarded as unnecessary or undesirable.

If, as Oppenheim has pointed out, the destruction of an enemy merchantman is lawful, and if it is not possible to remove the cargo, no compensation need be paid the neutral owners of the cargo.⁹ Otherwise, the cargo would become a shield to protect the vessel from the lawful act of the enemy, unless it could be maintained, as a rule of international law, that the belligerent right to destroy an enemy ship with its contents is subject to the condition subsequent that the destroyer compensate the neutral owner of the cargo for his losses resulting from such action. The practice of States fails, however, to indicate the existence of such a rule, or to intimate that the neutral ownership of a cargo serves in itself to impose special limitations on the right to destroy. Decisions of the Imperial Supreme Prize Court at Berlin in 1915,¹⁰ and in 1916,¹¹ denying the obligation to compensate neutral owners, have been criticized on the ground that they were merely interpretative of German Prize Regulations that too lightly yielded the privilege of destruction, making the propriety of such conduct dependent upon the mere convenience of the captor, and which thus assumed to be lawful conduct which itself was open to challenge.¹² Such considerations, however re-

senior naval officer present appeared to regard each of the vessels destroyed as a public ship. See, also, in this connection, Elbert J. Benton, *Int. Law and Diplomacy of the Spanish-American War*, 178.

Concerning the practice in the Russo-Japanese War, see Takahashi, *International Law Applied to the Russo-Japanese War*, 275-310.

See Art. CIV, Oxford Manual of Naval War, *Annuaire*, XXVI, 669, J. B. Scott, *Resolutions*, 198, in which it is declared that "Belligerents are not permitted to destroy seized enemy ships, except in so far as they are subject to confiscation and because of exceptional necessity, that is, when the safety of the captor ship or the success of the war operations in which it is at that time engaged, demands it."

"Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship. The same rule shall hold, as far as possible, for the goods."

"A *procès-verbal* of the destruction of the captured ship and of the reasons which led to it must be drawn up."

Compare Art. L, of International Regulations Concerning Prizes, contained in *Annuaire*, VI, 221, J. B. Scott, *Resolutions*, 55, where it is noted that "the word 'enemy' was omitted by mistake from the definitive text, but the Institute made formal rectification of the article at its Heidelberg session," citing *Annuaire*, IX, 200, 202.

See the Eorus, Japanese Prize Court at Sasebo, Jan. 9, 1915, *Naval War College, Int. Law Decisions and Notes*, 1923, 169.

⁹ Lauterpacht's 5 ed., II, 389.

¹⁰ The *Glitra*, *Am. J.*, X, 921; *Entscheidungen*, 1, 34. See, also, in this connection, the case of the *Norwaerts* (sometimes referred to as the *Vorwärts*) and the *Ludwig*, *Dalloz, Jurisprudence Générale, Recueil Périodique*, 1872, Part 3, 94

¹¹ The *Indian Prince*, *Am. J.*, X, 930; *Entscheidungen*, 1, 87.

¹² See Quincy Wright, "The Destruction of Neutral Property on Enemy Vessels," *Am. J.*, XI, 358; Garner, *Prize Law*, Section 274.

sponsible for judicial conclusions in particular cases, do not impair the soundness of the proposition that when destruction of an enemy ship is itself lawful, the destroyer is not necessarily burdened with a legal obligation to compensate the neutral owner of property which has also been destroyed. It is not understood that the United States had occasion as a belligerent during World War I to invoke or apply the test here laid down.

It should be observed that problems pertaining to the treatment to be accorded prizes by the captor thereof are not identical with those which concern the conditions under which a belligerent vessel of war is permitted to attack or otherwise subject to control an enemy ship which at the time has not been seized or captured.

(b)

§ 757. **Neutral Prizes — Their Destruction.** The capture of a neutral ship must be due to a belief that it is engaged in some unneutral service, or that the cargo, by reason of its character and destination, will, if unmolested, be of direct aid to the enemy in the prosecution of the war. The purpose of seizure is twofold. It is first to initiate a proceeding in order to ascertain whether in fact the ship is guilty of the conduct suspected of it, and to mete out appropriate penalties if the vessel is found to be guilty, or the cargo to comprise contraband. The purpose is also to prevent the enemy from receiving such forms of neutral aid as the vessel or its cargo, or both, are believed to be capable of unlawfully contributing. The distinction between these purposes is believed to be important. The one concerns primarily an inquiry to determine whether wrongful conduct has been committed and punishment should be inflicted. The other concerns the right of a belligerent, by reason of facts clearly known to itself as captor, to deprive the enemy of an obvious military advantage. The accomplishment of the former may lead to a change of ownership of the property in question; that of the latter, to the immediate destruction of that property.

The bare fact of capture of a neutral vessel does not, as may happen in the case of a belligerent ship, effect a change of ownership. Such a change is only brought about by an adjudication showing illegal conduct, and resulting in the formal imposition of a penalty which takes the form of forfeiture. To bring about such a result the ship is sent in and subjected, with its cargo, to the jurisdiction of a prize court. The rule requiring an adjudication as a necessary means of passing the title is merely responsive to the requirement of justice that one charged with wrongdoing is not to be deemed guilty without a hearing. The law of nations has accepted that rule, requiring, however, the State of the captor to hold the adjudication within territory subject to its control, yet permitting it to do so before a court composed of its own judges.¹

The normal obligation of the captor is doubtless to send in a neutral prize for condemnation. This is due not only to the fact that an adjudication is the fairest

§ 757. ¹ It should be observed that the rule is for the benefit of the neutral owners. If, through its non-observance, they sustain no loss additional to that which they would have suffered had the vessel been sent in, the duty to respect the rule may, under certain circumstances, be subordinated to other considerations.

mode of prosecuting a wrongdoer, but also to the circumstance that the sending in of the ship commonly imposes no inequitable burden upon the captor in its effort to prevent the enemy from gaining a military advantage. Belligerent States commonly accept the burden as a matter of course.

The question presents itself, however, whether a captor may, in order to prevent the enemy from gaining such an advantage, and to effect the second general purpose of capture, destroy a neutral prize.² In a case where, for example, the vessel contains a cargo consisting chiefly of munitions of war, destined to the territory of the enemy, and cannot be brought in owing to the proximity of an enemy vessel of war, the necessity of destruction would appear to outweigh the claims of private parties demanding that their property be protected at all hazards. That such a case may easily arise, suffices to render doubtful the wisdom of general denunciation of the destruction of neutral prizes as invariably indicative of illegal conduct.³ The provisions of naval codes of numerous maritime powers fail to warrant such an attitude.⁴ The real issue at the present time among interested States is believed to be one concerning the reasonable limits of the right of destruction rather than the existence of it. The attitude of the United States deserves special attention.

Orders issued to American cruisers and blockading vessels during the war with Spain made no distinction between the treatment to be accorded neutral and belligerent prizes.⁵ As has been observed, unseaworthiness, the existence of infectious disease, lack of a prize crew, and imminent danger of recapture, were said to justify destruction. The Naval War Code of 1900, withdrawn in 1904, declared that the existence of controlling reasons, such as the foregoing, why ves-

² Discussion of the question has been marked by confusion of thought due in part to a misconception of the views of Lord Stowell and Dr. Lushington, and to a failure to observe that the act of destruction is not necessarily illegal because of any duty which it may impose upon the captors to compensate the owners. The distinction between the nature of an act which is essentially wrongful and that of one which under certain circumstances may not be unlawfully committed if the equities of interested private parties are duly safeguarded must be apparent. For a careful statement as to the precise significance of the decisions of Lord Stowell in *The Felicity*, 2 Dods. 381, and in *The Zee Star*, 4 Ch. Rob. 71, and of Dr. Lushington in *The Leucade*, Spinks, 221, see Moore, Dig., VII, 522-523; also T. E. Holland, *Letters on War and Neutrality*, 2 ed., 1914, 162-167.

At the present time the extent of the injury to a belligerent resulting from the recapture of a single neutral prize, or from its reaching an enemy port if released, is likely to be so much greater than in wars of the last century, that the value of judicial or other precedents of that time arising under conditions no longer existent are to-day of doubtful value. See James Parker Hall, "Precedents in International Law," *Int. Journal of Ethics*, Jan. 1916, 149.

The present problem respecting the destruction of neutral prizes is complicated by differences of opinion concerning the correct limits to be assigned to contraband and to resulting disagreement concerning whether a particular neutral ship is in fact engaged in an internationally illegal practice. Moore, Dig., VII, 527.

³ See the situation as it is put in Moore, Dig., VII, 523. Compare Francis J. Swayze, "The Right of a Belligerent to Destroy a Captured Prize," *Harv. L.R.*, XVIII, 284, 292.

⁴ See, for example, Section 113, German Prize Code of Sept. 30, 1909, as in force July 1, 1915, Huberich and King's German Prize Code, 66. See "The Destruction of Neutral Prizes and the German Prize Code," by C. H. Huberich, *Ill. L.R.*, X, 5; Article XCI, of Japanese Regulations Relating to Capture at Sea, of Mar. 7, 1904, in force Mar. 15, 1904, Hurst and Bray's Russian and Japanese Prize Cases, II, 438; Article XL, Russian Instructions on Procedure Relating to Capture, Sept. 20, 1900, *id.*, I, 339.

⁵ General Orders No. 492, June 20, 1898, For. Rel. 1898, 780, 782, Moore, Dig., VII, 518.

sels properly captured might not be sent in, would justify appraisal and sale, and that if that could not be done, they might be destroyed.⁶ The sinking, during the Russo-Japanese War, by a Russian cruiser of the British steamer *Knight Commander* under American charter and carrying American property, elicited from the Department of State the declaration that the Government of the United States would view with gravest concern the application of similar treatment to American vessels and cargoes, and that the Government reserved all rights of security, regular treatment and reparation for the American cargo on board of that ship and in any seizure of American vessels.⁷ Later, however, Secretary Hay, in response to an inquiry from the British Government, announced that the Department could not say that, in case of imperative necessity, a prize might not be lawfully destroyed by a belligerent captor.⁸

In 1905, the Naval War College reached the conclusion that "if a seized neutral vessel cannot for any reason be brought into port for adjudication, it should be dismissed."⁹ In 1907, the Naval War College gave the problem closer consideration. It was then concluded that where a neutral ship loaded for the most part with contraband goods and destined for a fortified port of the enemy, was, when overtaken by a belligerent cruiser, unable by reason of unseaworthiness to undertake a voyage to a port of that cruiser, the contraband might, as a military necessity, be destroyed, if it was impossible for the cruiser to take over such portion of the cargo. In that case it was declared that the vessel should be dismissed, and merely penalized by the loss of freight. It was said that the same treatment should also be applied where both vessel and cargo belonged to the same owners. If, it was said, the captor, upon overtaking the merchantman, discovered itself in danger of immediate attack by the enemy, the ship was to be dismissed unless a prize crew could be spared to send it in. Under no circumstances, it was said, would the captor be justified in compelling a neutral, engaged in commerce for which there was "a fixed penalty," to run additional risks of war by accompanying the captor's force. Nor would the commander thereof be justified, it was declared, "in taking upon his own vessel, about to be attacked, the crew and perhaps the passengers of the neutral vessel in order that he might sink the vessel."¹⁰ If the personnel of his fleet were so reduced that he could

⁶ Art L, in which it was said that "the imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize." Naval War College, Int. Law Situations, 1903, 114.

⁷ For. Rel. 1904, 734.

⁸ Telegram to Mr. Choate, Ambassador to Great Britain, Aug. 6, 1904, For. Rel. 1904, 337, in which it was also said that the Department was not sufficiently advised of all the facts and circumstances connected with the sinking of the *Knight Commander* to be prepared to express an opinion on the case. Moore, Dig., VII, 519, 520. Compare telegram of Mr. Loomis, Acting Secretary of State, to Mr. Choate, July 29, 1904, For. Rel. 1904, 333.

Concerning the same case, see Hurst and Bray's Russian and Japanese Prize Cases, I, 54 and 357; also Naval War College, Int. Law Situations of 1907, 85-91; Theodore S. Woolsey, "The *Knight Commander* Case," *Yale L.J.*, XVI, 566.

⁹ Naval War College, Int. Law Topics, 1905, 62. In this connection it was said, "Further it is generally admitted that the destruction of neutral property can only be justified to the neutral by full restitution of value. The naval officer destroying a neutral vessel would thus assume a serious responsibility in case the destruction is not justifiable. In case it is not warranted there would fall upon the belligerent destroying the neutral vessel not merely claim for full restitution of value, but also claim for damages." (73.)

¹⁰ Naval War College, Int. Law Situations, 1907, 74-108.

not spare a crew to take the vessel in, the conclusion was expressed that he should dismiss the ship, although, in accordance with certain American treaties, "he might take or destroy the cargo, retaining the proper papers."

At the Second Hague Peace Conference of 1907, the American delegation proposed that "if for any reason whatever a neutral vessel can not be subjected to an adjudication, the ship ought to be released."¹¹

The Declaration of London, although announcing the normal duty of a captor not to destroy a neutral prize, declared that where the captured vessel was itself liable to condemnation, it might be destroyed if the observance of such duty would involve danger to the safety of the vessel of war or to the success of the operation in which it was then engaged.¹² The captor resorting to such procedure was, however, obliged, prior to any decision respecting the validity of the prize, to establish that he acted in the face of an "exceptional necessity." In case of failure to do so, the captor was burdened with the obligation to compensate the parties interested, and no examination was to be made as to the validity of the capture.¹³ It was provided that in case of justifiable destruction of a vessel, the capture of which was subsequently held to be invalid, the captor State should pay compensation to the parties interested in place of the restitution to which they would have been entitled.¹⁴ For neutral goods not liable to condemnation, if destroyed with the vessel, the owner of the former was to be given compensation.¹⁵ The captor was accorded the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not itself subject to condemnation, provided the circumstances were such as to justify the destruction of the vessel (under Article XLIX) if it

¹¹ *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 1171.

Gen. Davis of the American delegation, in advocating the adoption of an almost identical proposal of Great Britain, appeared to lay stress on the case of the *Felicity*, and to overlook the exact significance of the decision therein. *Id.*, 1048-1051. Gen. Davis wisely adverted to the absence of necessary accommodations on a vessel of war for prisoners, and still less for neutral non-combatant passengers taken from captured ships.

See, also, General Report of the Fourth Commission to The Hague Conference, *id.*, I, 262, J. B. Scott, Reports to Hague Conferences, 609.

¹² Arts. XLVIII and XLIX, Charles' Treaties, 277. According to Article L, "Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship."

According to Art. XL, "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

¹³ Art. LI. The exceptional necessity was to be "of the nature contemplated in Article XLIX."

It must be borne in mind that the allegation that a neutral vessel is carrying contraband, or that a neutral owner of the cargo is exporting contraband, is a charge that such vessel or owner is participating in the war and so guilty of conduct which the law of nations permits the captor to thwart. If the act of destruction serves by any process to deprive the alleged wrongdoer of a means of proof otherwise available, that there was no such participation, he is believed to be entitled to compensation for all loss occasioned by the destruction. Where, however, the captor is able to convince the prize court that the owner of the vessel or cargo has suffered no injury in the defense of his case through the destruction of his property, the mere act of destroying it should not be decisive of any right of compensation unless, in view of circumstances of the particular case, it is shown to be wrongful, or unless property not subject to condemnation was destroyed, or unless some special consideration (such as failure to comply with Article LI of the Declaration of London) would require the imposition of a penalty.

¹⁴ Art. LII.

¹⁵ Art. LIII.

were subject to condemnation. The captor, in such case, was obliged to enter the goods surrendered or destroyed in the log book of the vessel stopped, and to obtain duly certified copies of all relevant papers. Upon the handing over or destruction of the goods, and the completion of the necessary formalities, the master was to be allowed to continue his voyage.¹⁶

It is believed that the foregoing provisions are indicative of the opinion of the leading maritime powers in 1909, that the destruction of neutral prizes under the exceptional circumstances specified is far from wrongful. The United States Naval Instructions Governing Maritime Warfare, of June 30, 1917, contemplate such procedure in case a capturing officer is confronted with "the gravest military emergency which would not justify him in releasing the vessel or sending it in for adjudication."¹⁷

§ 758. **The Same.** On January 27, 1915, the American steel sailing vessel *William P. Frye* was captured by the German armed cruiser *Prinz Eitel Friedrich* on the high seas. The former had cleared from Seattle, under a charter to one Houser of Portland, Oregon, and was bound for Queenstown, Falmouth or Plymouth for orders, with a cargo consisting solely of wheat owned by the charterer and consigned "unto order or to its assigns." After examination of the ship's papers the commander of the cruiser directed that the cargo be thrown overboard, but subsequently decided to destroy the vessel, and on the following morning the *Frye* was sunk.¹ The propriety of this action was vigorously challenged by the United States, on the ground that it constituted a violation of Article XIII of the treaty with Prussia, of July 11, 1799, renewed by Article XII of the treaty of May 1, 1828.² It was contended that the treaty did not

¹⁶ Art. LIV. It was added that "The provisions of Articles LI and LII respecting the obligations of a captor who has destroyed a neutral vessel are applicable."

¹⁷ No. 96.

See Certain Foreign Regulations and Orders contained in Naval War College, Int. Law Documents, 1925, 72-81.

§ 758. ¹ Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, March 31, 1915, For. Rel. 1915, Supp., 357.

² Malloy's Treaties, II, 1490 and 1499.

Attention has been called by the Naval War College, Int. Law Situations, 1907, 104-106, to the following Articles of other early treaties of the United States, purporting, in varying form, to shield neutral vessels carrying contraband, from the consequences of such action, when encountered by belligerent warships: Art. XII, treaty with Sweden, April 3, 1783, Malloy's Treaties, II, 1729; Art. XVIII, treaty with Brazil, Dec. 12, 1828, *id.*, I, 139; Art. XIX, treaty with Bolivia, May 13, 1858, *id.*, I, 119; Art. XXIII, treaty with Haiti, Nov. 3, 1864, *id.*, I, 927.

"There is no case on record in which, during the World War, the Allied and Associated Powers destroyed intentionally a single neutral ship. The Central Powers, on the other hand, are believed to have sunk no less than 1716. In a few cases—such as those of the American vessels *Gulfight*, torpedoed on May 7, 1915, and *Nebraskan*, torpedoed on May 25, 1915—Germany admitted or claimed that a mistake had been made; and in a few others—such as those of the *Draupner*, *Saga*, and *Asta*—the German Prize Court of Appeal, reversing the lower court, declared the destruction of the vessels to have been illegal, and compensated the owners. But in most cases the destruction of neutral vessels at sight without visit and search, no provision, or no adequate provision, being made for the safety of passengers and crew, was upheld by the Central Powers, mainly on the ground (which their submarines did not stop to verify) that they were carrying contraband, and that to have brought them to a port of a Prize Court would have involved danger to the captor. Among the best-known cases are those of the American neutral vessel *William P. Frye*, sunk by the German cruiser *Prinz Eitel Friedrich*, and the Dutch vessels *Maria* and *Medea*, the sinking of which was

authorize the destruction of a neutral American vessel under any circumstances.³ Germany on the other hand, maintained that the treaty did not preclude the right of destruction, provided the captor made adequate compensation. The Government of the United States dissented, moreover, from the German view that "there would be no foundation for a claim of the American Government unless the prize courts should not grant indemnity in accordance with the treaty," and declared that the American claim was for an indemnity for a violation of a treaty, as distinct from an indemnity in accordance with a treaty, and was, therefore, "a matter for adjustment by direct diplomatic discussion between the two Governments and is in no way dependent upon the action of a German prize court."⁴ The controversy involved two questions, one concerning the correct interpretation of the treaty, and the other concerning the mode of fixing the amount of indemnity to be paid by Germany "under its admitted liability" for the losses sustained by the owners and captain on account of the destruction of the *Frye*. The American Government was generally willing to accept the German proposal that the question of treaty interpretation be submitted to arbitration pursuant to Article 38 of the Hague Convention for the Pacific Settlement of International Disputes; and simultaneously, it made clear its desire that the question pertaining to the amount of indemnity be settled by diplomatic negotiation, concurring with a German suggestion that the simplest way of so doing would be through an agreement that the two governments designate experts who should endeavor jointly to fix the amount of indemnity for the vessel and any American property which might have been sunk with her.⁵ The effort to reach a final accord proved to be unsuccessful.⁶ The discussion incidental to the matter of arbitration was, however, not without significance. In re-

upheld by the German Prize Courts. But the torpedoing of neutral vessels at sight became a regular feature of German submarine warfare, and no neutral maritime State was exempt. Over 2000 sailors are said to have been drowned." (Oppenheim, Lauterpacht's 5 ed., II, § 431A.)

³ Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, June 24, 1915, For. Rel. 1915, Supp., 450; also Mr. Bryan, Secy. of State, to the same, April 28, 1915, *id.*, 376.

⁴ *Id.* The German position was set forth in a note of April 4, 1915, contained in a telegram from Mr. Gerard to the Secy. of State, April 5, 1915, *id.*, 360; also in a note of June 7, 1915, contained in telegram from Mr. Gerard to the same, June 7, 1915, *id.*, 435.

⁵ See Mr. Gerard to the Secy. of State, telegram, July 30, 1915, *id.*, 493; also, especially, Mr. Lansing, Secy. of State, to Mr. Gerard, Aug. 10, 1915, *id.*, 504.

⁶ See documents in For. Rel. 1916, Supp., 278 and 281.

See decision by Parker, *Umpire*, Mixed Claims Commission, United States and Germany, under agreement of Aug. 10, 1922, in case of Arthur Sewall and Co. v. Germany, April 21, 1926, in which it was declared: "Wherefore, as the American and German Agents have agreed that, measuring the damages suffered by claimants resulting from the act of Germany in sinking the *William P. Frye* on the basis of the fair market value of that vessel on the date of her destruction, the claimants herein have suffered damages in the sum of \$91,450.00 and no more, and as the National Commissioners on October 30, 1925, entered an award herein on behalf of the claimants for that amount with interest thereon at the rate of five per cent annum from the date of the loss to the date of payment, the Commission decrees that the said award be, and it is hereby, in all things confirmed; and the Commission further decrees that the Government of Germany is not obligated to pay to the Government of the United States any further or additional amount on behalf of the claimants herein because of any loss or damage alleged to have been sustained by them connected with or growing out of the destruction of the *William P. Frye*." (Consolidated edition of Decisions and Opinions, 1926, 681, 684-685.)

sponse to an inquiry from the American Government respecting the mode of German naval operations pending arbitral proceedings, the Imperial Government announced that it had issued orders to its naval forces not to destroy American merchantmen "which have loaded conditional contraband, even when the conditions of international law are present, but to permit them to continue their voyage unhindered if it is not possible to take them into port," but that, on the other hand, the right was reserved to destroy vessels carrying absolute contraband wherever such destruction was permissible according to the Declaration of London.⁷ In response, the Department of State announced that, without admitting the Declaration of London to be in force, and on the understanding that its requirement obliging the captor to place in safety all persons on board a vessel about to be destroyed, was not satisfied by merely giving them an opportunity to escape in lifeboats, the United States was willing, pending the arbitral award, to accept the Declaration of London as the rule to govern the treatment of American vessels carrying cargoes of absolute contraband, and that on that understanding it agreed to refer to arbitration the question of treaty interpretation.⁸ Thereupon the German Government expressed acquiescence in the view that all possible care should be taken for the security of the crew and passengers of a vessel to be sunk, and announced that persons found on board would not be ordered into the lifeboats "except when the general conditions, that is to say, the weather, the condition of the sea, and the neighborhood of the coasts afford absolute certainty that the boats will reach the nearest port."⁹

The foregoing correspondence is deemed important as illustrating the readiness of the Department of State to yield to a belligerent the right of destruction in accordance with the requirements of the Declaration of London. It is believed that the provisions of the declaration are fairly responsive to existing conditions of maritime warfare. Those are such, however, as to require, as the foregoing correspondence indicates, greater precision of statement as to the requisite place of safety to be afforded the occupants of neutral prizes.¹⁰ Acknowledging the wisdom of burdening the captor with the duty to show that the act of destruction is occasioned by real necessity, it may be doubted whether the requirement that such necessity be also "exceptional" now serves a useful purpose. Actual need of destruction may oftentimes recur within a single naval campaign in the course of which the gravity of the military exigency is not lessened by the frequency with which it presents itself. The attempt to indicate fully the circumstances when necessity may as a matter of law be deemed to exist, is not believed to be useful.

⁷ Mr. Gerard to Mr. Lansing, telegram, Sept. 20, 1915, For. Rel. 1915, Supp., 551. See, in this connection, Horace S. Oakley, *The Freedom of the Seas: The Sinking of the William P. Frye*, being a brief prepared for Dr. S. E. Mezes, under date of Jan. 26, 1918.

See also Garner, *Int. Law and the World War*, II, §§ 474-494.

⁸ Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, Oct. 12, 1915, For. Rel. 1915, Supp., 570.

⁹ Herr von Jagow, German Foreign Minister, to Mr. Gerard, Nov. 29, 1915, *id.*, 644.

¹⁰ See Art. 22 of treaty on Limitation and Reduction of Naval Armament signed at London, April 22, 1930, U. S. Treaty Vol. IV, 5281.

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§ 759. **Recapture — Salvage.** The term "recapture" refers to the retaking by force of a captured ship from the control and possession of the captor. The retaking may assume the form of rescue by persons on board the captured ship; or it may be accomplished by persons disconnected with the vessel and attached to another craft. The captor dispossessed of its prize may be, and at the present time usually is, the enemy of the recaptor. The former, may, however, be a pirate ship or in fact any group of persons who have, however unlawfully, seized the ship that is retaken.¹

Long ago the question presented itself as to the circumstances when after recapture, and upon what terms, restitution should be made to the original owners. In seeking its solution, statesmen were confronted with two distinct and unrelated considerations. The first had to do with the time within which a prize might be deemed to have become vested in the captor or its State, so as to cut off all claims of the original owners; the other was concerned with the special problem arising from the recapture of neutral ships taken by the enemy.² It was obvious that a belligerent might determine at will when the rights of its own nationals respecting property captured by the enemy became divested. Any circumstance might be made the test, such as the lapse of a specified interval of time, or the taking of a prize into a place subject to the control of the captor. The problem was a domestic one. It attained international significance, however, when the property rights of neutrals became involved. The State of the recaptor was not free to deal similarly with them unless its enactments conformed to the requirements of the law of nations.³ These were understood to impose certain restraints. One of them was that neither the bare fact of capture, nor the lapse

§ 759. ¹ Concerning recaptures from pirates, see Dana's Wheaton, Section 361, where it is said that in such case "there can be no doubt the property ought to be restored to the original owner; for as pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his possession, to which he is restored by the recapture. For the service thus rendered to him, the recaptor is entitled to a remuneration in the nature of salvage."

² "Recapture, to which rescue as a technical term is equivalent, is when a ship captured by the enemy and in his power, not necessarily in his actual possession, is retaken by her compatriots. The question then arises whether she shall be restored to her original owner, by an application of the Roman doctrine (*postliminium*) which treated men and things recovered from the enemy as restored to their pristine condition, a reward being allowed to the recaptor as salvage, or whether she shall become the property of the recaptor, the original owner being deemed to have lost his property by her misadventure. We have seen that the *Consolat del Mar* adopted the latter solution, on condition that the first captor had brought the ship to a place of safety, *intra* or *infra praesidia* as it is expressed in subsequent technical language, which in the time of the *Consolat* would scarcely happen unless she had been brought to a port of the captor's country, but in the times of more developed navies might happen by her being brought within the protection of a fleet. The principle was that in order to change the property the possession resulting from the capture must be what is often described as firm, and this it was sometimes thought that the possession had not been when the recapture was immediate, although the ship had been brought *intra praesidia*. Hence it became a widely accepted rule that the original owner did not lose his right until the ship had been in the enemy's possession for 24 hours or during a night (*pernoctatio*)." Westlake, 2 ed., II, 178, 179.

³ The Resolution, 2 Dall. 1, 4, where the Court was unwilling to impute to the Continental Congress an intention to infringe the neutral right of restitution prior to condemnation, in an early statute regulating the *jus postliminium* and limiting the right of restitution to a recapture within 24 hours after capture. See act of Nov. 29, 1775, Journals of Continental Congress, Library of Congress ed., III, 407.

of a fixed interval of time after that achievement (such as 24 hours), could oust the neutral owner of his title. Again, when the capture was illegal, as frequently was the case, the presumption that no condemnation would ensue and that the vessel would be released by the State of the captor, deprived the recaptor of the right to claim the rendition of a meritorious service, or to earn salvage.⁴

As early as 1781, the Federal Court of Appeals declared that the law of nations permits a neutral subject whose property has been illegally captured to pursue and recover it in whatsoever country it may be found prior to condemnation.⁵ In 1801, the Supreme Court of the United States concluded that even prior to condemnation the neutral should not be necessarily entitled to restitution without payment of salvage if it could be shown that the act of recapture served in fact to prevent the State of the captor from condemning according to an illegal practice the captured property.⁶

The United States early took the position that the right of an owner to claim restitution, on whatsoever terms, was cut off by the condemnation of the property by a competent court of the captor. Any subsequent taking of the ship from the captor was regarded, therefore, as a fresh capture rather than as a recapture.⁷

⁴ Marshall, Chief Justice, in *The Amelia*, 1 Cranch, 1, 37.

See Chas. Noble Gregory, "The Right of the Master and Crew of a Captured Ship to Effect her Rescue," *Am. J.*, XI, 315, where it is said: "The conclusion is reached that the master and crew of a captured vessel, in attempting the rescue of their ship and cargo, are guilty of no crime so far as the laws of their own country are concerned or so far as any law of any neutral country is concerned; that the attempt, however, may be resisted, even to the death by the captors; that, not accompanied by violence, no serious penalty attaches, further than closer confinement; but if accompanied by violence, punishment may be inflicted by the captor according to his laws and regulations, if the prisoner does not escape beyond his jurisdiction." (326.)

⁵ The Resolution, 2 Dall. 1, 4, Moore, Dig., VII, 528.

⁶ *The Amelia*, 1 Cranch, 1, Moore, Dig., VII, 528. See the limitations of the decision of *The Amelia* as laid down in *The Charming Betsy*, 2 Cranch, 64, 121, Moore, Dig., VII, 530.

See, also, Hooper, *Administrator v. United States*, 22 Ct. Cl. 408, 457-459.

Recaptures by neutrals.—According to Dana, it was settled by the cases of the brig *Experience* in 1799, and the case of the *Emily St. Pierre* in 1862, which were the subject of diplomatic correspondence between the United States and Great Britain, "that a neutral Government is not required, by executive action, to restore a private vessel of one of its citizens which has been rescued by her crew from her captors before condemnation, on demand of the Government of the captors. The possessory, belligerent right of the captors is not to be enforced by neutral powers by any positive action in the way of penalty or seizure for restitution. Whether the right can be vindicated by a possessory suit by the captors in the admiralty courts of the neutral, has not been judicially determined; but the course of the political departments of both Governments, and the reasoning on which they proceeded, seem to settle the judicial as well as the political question." Dana's *Wheaton*, Note No. 183, *citing* *Dip. Cor.* 1862, 75-148, "at intervals." The principle of law as above stated is accepted in *Snow's Manual*, 2 ed., edited by Stockton, 102. See, also, Coleman Philipson's fifth edition of *Wheaton*, 602-603. The cases mentioned are discussed in the following pages of *Diplomatic Correspondence*, 1862: 75, 79, 86, 87, 91, 97, 106, 110, 113, 127, 147, 148, 149.

⁷ *Declared Story*, J., in *The Star*, 3 Wheat. 78, 86: "It is admitted, on all sides, by public jurists that in cases of capture, a firm possession changes the title to the property; and although there has been, in former times, much vexed discussion as to the time at which this change of property takes place, whether on capture, or on the pernocation, or on the carrying *infra praesidia*, of the prize; it is universally allowed, that at all events, a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign. It would follow, of course, that property recaptured from an enemy, after condemnation, would, by the law of nations, be lawful prize of war, in whomsoever the antecedent title might have vested."

Concerning the systems of other States respecting the limitation of the rights of the

The statutory law with respect to the treatment of neutral property was, however, based upon the principle of reciprocity. In its present form it is provided that if the recaptured property belong to any person permanently resident within the territory and under the protection of any foreign prince, Government or State in amity with the United States, and by the law or usage of such prince, Government, or State, the property of an American citizen would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner, upon his claim, upon such terms as by the law or usage of such prince, Government, or State would be required of a citizen of the United States under like circumstances of recapture. When no such law or usage is known, it is provided that the property shall be adjudged to be restored upon the payment of such salvage, costs and expenses as the court shall order.⁸

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§ 760. Ransoms — Safe-conducts. At a time when the preservation of the pecuniary interest of a particular captor in a prize was believed to exceed the military detriment to be suffered by the State of the captor through the acquisition of the vessel by the enemy, in case of its release, it was natural that recourse should be had to the practice of ransoming captured ships.¹

A ransom, according to Mr. Justice Story, was a repurchase of the actual right

original owner see Westlake, 2 ed., II, 179–180; Coleman Phillipson's fifth edition of Wheaton, 595–599; L. A. Atherley-Jones, *Commerce in War*, 611–620.

See Article XCVIII, of German Prize Code, as in force July 1, 1915, Huberich and King's Prize Code of the German Empire, 57.

Articles CXIX–CXXII of the International Regulations Concerning Prizes of the Institute of International Law, do not appear to restrict the time within which the owner of a private recaptured vessel may claim restitution. *Annuaire*, IX, 217, J. B. Scott, Resolutions, 77.

Article CVIII of the Oxford Manual of Naval War declares that "when a ship has been taken and retaken and is then captured from the recaptor, the last captor only has the right to it." *Annuaire*, XXVI, 670, J. B. Scott, Resolutions, 199. See, also, in this connection, *The Astrea*, 1 Wheat. 125, *citing The Adventure*, 8 Cranch, 221.

The principle was announced in *The Adventure*, 8 Cranch, 221, that the donation on the high seas of a captured vessel by a captor to a neutral who brings it into a port of his own country presents a case of salvage.

⁸ Revised Statutes, Section 4652; 34 U.S.C.A. § 1158. See, also (under the Act of March 3, 1800, applying likewise the rule of reciprocity), *The Adeline*, 9 Cranch, 244, 288, Moore, Dig., VII, 530.

Revised Statutes, Section 4652, also provides that: "When any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case. If the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the Treasury of the United States the salvage, costs, and expenses ordered by the court. If the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners, upon their claim, on the payment of such sum as the court may award as salvage, costs, and expenses . . . The whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize. Nothing in this Title shall be construed to contravene any treaty of the United States." (34 U.S.C.A. § 1158.)

Concerning the requirements of Section 4652, see *Oakes v. United States*, 174 U. S. 778.

§ 760. ¹ Dana's Wheaton, § 411, Dana's Note No. 199; L. A. Atherley-Jones, *Commerce in War*, 637–643; Oppenheim, *Lauterpacht's* 5 ed., II, 392; Phillimore, III, § 432; Coleman Phillipson, 5 ed. of Wheaton, 587–589; Twiss, II, §§ 180–182; Westlake, 2 ed., II, 181, 182; Woolsey, 6 ed., § 150.

of the captors at the time, whatever that might be; or more properly, a relinquishment of all the interest and benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal.² By that process the prize was released, while the interest of the captor was preserved. Repurchase was effected by the giving of a so-called ransom bill to the captor in consideration of the release. A copy of the bill was retained as a safe-conduct for the vessel, and, according to Hall, served to protect it from seizure by ships of the enemy or its allies, so long as a prescribed course was kept for a port of destination agreed upon.³ It was the custom to deliver a hostage to the captor as a means of insuring payment of the undertaking. If suit thereon became necessary, the English practice required that it be brought by the hostage rather than by the alien enemy holder of the bill.⁴ The ransoming of prizes gave rise to numerous legal questions connected with the fate of the ransomed ship, or concerning the capture, or the bill and hostage, or relating to the recovery upon the bill.

The exigencies of modern warfare have caused the practice to sink into desuetude.⁵ The advantages derivable from the possession of a collectible ransom bill, even though it enure to the benefit of the State of the captor, are outweighed by the injury sustained through the retention or acquisition of control of the prize by the enemy. At the present time the ransoming of captured vessels is believed to be a matter possessing merely historic interest. "The last we hear of ransom bills in history is when Captain Semmes of the *Alabama*, coming out of Cherbourg to fight the *Kearsarge* on the morning of June 19, 1863, left his collection of them (which were to be paid after the recognition of the Confederate States) along with his other valuables in safe custody ashore."⁶

Numerous reasons may impel a belligerent to grant a safe-conduct to an enemy ship, or to a neutral vessel employed on a service of special importance to the enemy. The validity of such a document, by whomsoever issued, depends upon the consent of the highest authorities of the State in whose behalf it pur-

² In this respect, there was said to be no legal difference between the case of the ransom of the property of an enemy and that of a neutral. *Maisonnaire v. Keating*, 2 Gallison, 325, 338.

³ Hall, Higgins' 8 ed., § 151; also statement in Moore, Dig., VII, 533.

⁴ *Anthon v. Fisher*, 2 Douglas, 650, note; *The Hoop*, 1 Ch. Rob. 200. Compare *Goodrich and De Forest v. Gordon*, 15 Johns. 6. See, also, *Dana's Wheaton*, *Dana's Note No. 199* and cases there cited; *Cornu v. Blackburne*, 2 Douglas, 640.

⁵ Oppenheim declares that "the practice of accepting and paying ransom, which grew up in the sixteenth century, is in many countries now prohibited by municipal law. Thus, for instance, Great Britain by section 45 of the Naval Prize Act, 1864, prohibits ransoming except when specially provided for by Order in Council." *Lauterpacht's* 5 ed., II, 392.

It is not understood that the statutory law of the United States has forbidden contracts for ransom. See *Goodrich and De Forest v. Gordon*, 15 Johns. 6.

See Section 93, Huberich and King's Prize Code of the German Empire, as in force July 1, 1915.

⁶ W. Senior, "Ransom Bills," *Law Quar. Rev.*, XXXIV, 49, 62. That writer in his interesting discussion, in adverting to the hardship which might befall the hostage declares: "The unfortunate Munden, in the case just mentioned, remained a prisoner at St. Malo from October, 1696, until the making of the first decree against the ship in 1698, and having regard to the dilatory character of the Court's procedure probably for a long time afterwards. Nearly a century later a seaman was detained in America as security for a ransom from May, 1780, until August, 1783." (*Id.*, 53.)

ports to be granted.⁷ It should indicate, moreover, the nature and extent of the protection accorded the vessel concerned.

5

EXEMPTIONS FROM CAPTURE

a

§ 761. In General. The exemption from capture of any person or thing belonging to a belligerent and encountered on the high seas is due to the fact that the military advantage derivable from capture is generally deemed to be outweighed by opposing considerations. Inasmuch as the making of a capture when lawfully effected and when unresisted, is characterized by orderly procedure unattended by harsh treatment of persons or property taken, the reason for any exemption is usually due to the fact that the restraint imposed upon a belligerent does not add appreciably to its burden in prosecuting the war, and also to the expediency of securing a reciprocal concession from the enemy. Dictates of humanity play their part; but their rôle is less important than when they are concerned with methods of attack.

The place where enemy property is found oftentimes serves to prevent the exercise of the right of capture. The restriction in such case is attributable to the interposition of a new factor such, for example, as the duty to respect the inviolability of neutral territory. In a technical sense it is unsatisfactory to treat such form of restraint arising from a circumstance unrelated to the use or nature or military value to the enemy of the property concerned, as illustrative of an exemption. It reveals rather a limitation upon the general right of capture. Nevertheless, respect for usage, and simplicity and convenience, suffice to justify the attempt to deal with such a check upon belligerent freedom of action as if it were an exemption.

Neutral property encountered on the high seas is not generally subject to capture unless it be closely associated with an internationally illegal attempt on the part of the owners or their agents to participate in the conflict. For that reason the belligerent duty to respect such property is not dealt with as the manifestation of an exemption. The circumstances are observed elsewhere, when, under the theoretically abnormal situation, neutral ships and neutral property become subject to capture, a matter discussed under the general topics of Contraband and Blockade.

b

§ 762. Enemy Property on Neutral Ships. At the beginning of the nineteenth century American statesmen were not ready to admit that the law of

⁷ See, for example, form of document which the American consul at Martinique was, on July 22, 1898, instructed by telegraph to issue to a Spanish trans-Atlantic steamer, and contained in communication of Mr. Moore, Acting Secy. of State, to Secy. of War, July 25, 1898, 230 MS. Dom. Let. 374, Moore, Dig., VII, 535. Also Naval War College, Int. Law Situations, 1901, 165.

nations as understood by maritime States forbade the capture of non-contraband property of an enemy found on board the ships of a neutral. On the contrary, they were of opinion that according to that law, such goods so situated were fair prize.¹ It had early been felt, however, that the law should be otherwise.² Those Secretaries of State who advocated a change evinced candor in acknowledging the fact that the rule remained unaltered.³ As late as 1854, Secretary Marcy expressed hope that the principle that free ships make free goods might become incorporated into the international code.⁴ Certain of the early treaties of the United States contained provisions in mitigation of the belligerent right.⁵ These, however, lacked uniformity, and could not well be deemed to be declaratory of international law, especially in view of the fact that by the Jay Treaty with Great Britain, the propriety of the opposite practice had been recognized.⁶

The reasons advanced in support of the exemption deserve attention. Mr. Jef-

§ 762. ¹ See Mr. Jefferson, Secy. of State, to Mr. Genet, July 24, 1793, Am. State Pap., For. Rel. I, 166, Moore, Dig., VII, 436; also Mr. Pickering, Secy. of State, to Mr. J. Q. Adams, July 17, 1797, Am. State Pap., For. Rel. II, 250; Moore, Dig., VII, 437; Mr. Madison, Secy. of State, to Mr. Armstrong, Minister to France, Mar. 14, 1806, MS. Inst. United States Ministers, VI, 322, Moore, Dig., VII, 440.

Declares Prof. Moore: "That the fate of the goods is determined by the belligerent or neutral character of the owner, without regard to whether the ship is enemy or neutral, was at one time the common law of Europe. It was laid down in the *Consolato del Mare* and was universally accepted. But about the middle of the seventeenth century a new rule began to be introduced, and it was stipulated in various treaties that the goods of an enemy should be free when on board a neutral ship. This rule was in time embodied in the marine ordinances of France. It was strenuously advocated by the Dutch. It was embraced in the Declaration of the Empress of Russia of 1780, which formed the basis of the first armed neutrality. Great Britain generally adhered to the old rule, and in the maritime wars of the eighteenth century the new rule was little observed. Eventually, however, Great Britain came to accept the new rule." Dig., VII, 434.

Concerning the historical development of the treatment of private enemy property on neutral ships, see Westlake, 2 ed., II, 136-146; Twiss, II, §§ 76-89.

See also Jessup and Deák, *Neutrality (Origins)*, Vol. I, 1935, Chap. V, where it is said by way of conclusion: "Thus, in the middle of the eighteenth century the disproportionate assertion of belligerent rights was still in vogue in spite of all the efforts made during the seventeenth century to assure more freedom to the seaborne commerce of neutral nations. The rule of 'free ships, free goods' found its way into many treaties from the middle of the sixteenth century on, and that rule governed the relations between the most important maritime powers over a long period. It is evident, however, that at the close of the century the rule had not taken firm root as a general principle of the law of nations and it was not strong enough to affect the conduct of the English government except when embodied in particular treaties.

"Another century had to elapse before the Declaration of Paris of 1856 gave this rule so strong a conventional foundation that it could rally to its support practically the unanimous approval of the world." (p. 156.)

² See, for example, President Jefferson to Mr. Livingston, Sept. 9, 1801, 8 Jefferson's Writings, Ford's ed., 88, Moore, Dig., VII, 439; Mr. Madison, Secy. of State, to Mr. Armstrong, Minister to France, Mar. 14, 1806, MS. Inst. United States Ministers, VI, 322, Moore, Dig., VII, 440.

³ Mr. Adams, Secy. of State, to Mr. Anderson, Minister to Colombia, May 27, 1823, MS. Inst. United States Ministers, IX, 274, Moore, Dig., VII, 444.

⁴ Compare Mr. Jefferson to Mr. Everett, Feb. 24, 1823, 7 Jefferson's Works, 270, 271, Moore, Dig., VII, 443.

⁵ Mr. Marcy, Secy. of State, to Mr. Buchanan, April 13, 1854, H. Ex. Doc. 103, 33 Cong., 1 Sess., Moore, Dig., VII, 447.

⁶ See Moore, Dig., VII, 434-436, respecting the treaties of the United States, and the views of its judicial department; also, Dana's Wheaton, Dana's Note No. 223.

⁷ Mr. Madison, Secy. of State, to Mr. Armstrong, Minister to France, March 14, 1806, MS. Inst. United States Ministers, VI, 322, Moore, Dig., VII, 440.

See Art. XII, treaty with Prussia, Sept. 10, 1785, Malloy's Treaties, II, 1481. Also Art. XVI, treaty with Venezuela, Aug. 27, 1860, *id.*, 1850.

person declared that it was a principle dictated by "national morality." He contended, moreover, that "on an element which nature had not subjected to the jurisdiction of any nation, but had made common to all for the purposes to which it was fitted," the particular portion of it occupied by a vessel of any nation, in the course of its voyage, was "for the moment the exclusive property of that nation, and, with the vessel," was "exempt from intrusion by any other, and from its jurisdiction, as much as if it were lying in the harbor of its sovereign."⁷ John Quincy Adams opposed the seizure of the property of an enemy in the vessel of a friend on the ground that it was the relic of a barbarous warfare of barbarous ages, and as inconsistent with the mitigated usage of modern wars which had respect for the private property of individuals on land. He regarded the practice as a violation of the natural right of a neutral to pursue, unmolested, his peaceful commercial intercourse with his friend.⁸ He also announced that the high seas were a "general jurisdiction common to all, qualified by a special jurisdiction of each nation over its own vessels," into which a belligerent should not be permitted to pursue its enemy.⁹

The fact that a belligerent possessed the right to visit and search neutral ships for the purpose of ascertaining whether they were engaged in an unneutral service, was proof that maritime States had been unwilling to yield to a neutral such control over its own vessels on the high seas as it could freely maintain within its own territory.¹⁰ Thus the theory which likened the right of national control over a vessel to that exercised within the national domain was at variance with a practice which had long prevailed and has not yet been abandoned.

The United States as a neutral and American State, detached from wars engaging European maritime powers, had the greatest possible interest in promoting the extension of neutral rights.¹¹ These may have been advocated on loose grounds, but they were based upon principles which opposed the arrogance with which belligerent States abused and extended privileges which they were then supposed to possess. The pleas of the United States in its earlier days were those of a weak nation demanding as of right what it had slight power to enforce. Nevertheless, the reasonableness of the claim had long been apparent to certain European powers. The exemption had found expression in numerous treaties. Upon the outbreak of the Crimean War in 1854, Great Britain and France declared that during the conflict the principle that free ships make free goods would be observed.¹² When the Declaration of Paris of April 16, 1856, an-

⁷ President Jefferson to Mr. Livingston, Sept. 9, 1801, 8 Jefferson's Writings, Ford's ed., 88, Moore, Dig., VII, 439.

⁸ Mr. Adams, Secy. of State, to Mr. Canning, June 24, 1823, MS. Notes to For. Legs. III, 141, Moore, Dig., VII, 445.

⁹ Mr. Adams, Secy. of State, to Mr. Anderson, Minister to Colombia, May 27, 1823, MS. Inst. United States Ministers, IX, 274, Moore, Dig., VII, 444.

¹⁰ Note of Messrs. Pinckney, Marshall, and Gerry to the French Minister of Foreign Affairs, M. de Talleyrand, Jan. 17, 1798, Am. State Pap., For. Rel. II, 171, Moore, Dig., VII, 438.

¹¹ Mr. Madison, Secy. of State, to Mr. Armstrong, American Minister to France, Mar. 14, 1806, MS. Inst. United States Ministers, VI, 322, Moore, Dig., VII, 440.

¹² See correspondence between Great Britain and France in March, 1854, Brit. and For. State Pap., XLVI, 243, 244; also British proclamation with reference to neutrals, Mar. 28, 1854, *id.*, 36.

nounced in its second rule that enemy goods on board a neutral ship, with the exception of contraband, were exempt from capture, the executive department of the United States deemed the pronouncement as indicative of the then existing requirements of international law.¹³

It should be observed, however, that the courts of the United States had not recognized the exemption. Entrusted with the duty of enunciating the law as they found it, they naturally observed the old rule, and were doubtless justified in so doing at a time when maritime States had not completely altered their practice and when the political department of the Government had not taken such a stand as might be deemed to establish the position of the United States.¹⁴

Almost simultaneously with the outbreak of the War with Spain in 1898, the Department of State declared in instructions to American diplomatic representatives, that the Government would act upon the second, third and fourth rules of the Declaration of Paris, as "recognized rules of international law."¹⁵ Shortly thereafter President McKinley announced in a proclamation that the rules that a neutral flag covers enemy goods with the exception of contraband of war, and that neutral goods not contraband of war are not liable to confiscation under the enemy's flag, would be observed by American authorities.¹⁶ Thus, as Professor Moore has declared, "a step was taken which legally fixed the position of the United States as an adherent of the rule of free ships free goods."¹⁷ From that position it will be ever reluctant to depart. It is not understood, however, that the United States while a participant in World War I, found occasion to apply to its own conduct as a belligerent the restraints of the rule to which it was an adherent.¹⁸

See, also, President Pierce, Annual Message, Dec. 4, 1854, Richardson's Messages, V, 275, Moore, Dig., VII, 449.

¹³ "With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established and they maintain that belligerent property, on board a neutral ship, is not liable to capture; and from existing indications they hope to receive the general concurrence of all commercial powers in this position. . . . It is not necessary that a neutral power should have announced its adherence to this declaration [of Paris of 1856] in order to entitle its vessels to the immunity promised." Mr. Cass, Secy. of State, to Mr. Mason, Minister to France, No. 190, June 27, 1859, MS. Inst. France, XV, 455, Moore, Dig., VII, 450.

¹⁴ Declared Marshall, Chief Justice, in *The Nereide*, 9 Cranch, 388, 418: "The rule that the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States."

See, also, *The Antonia Johanna*, 1 Wheat. 159, Moore, Dig., VII, 442; *The Pizarro*, 2 Wheat. 227, 246; Note of Reporter 247, Moore, Dig., VII, 442; note in Wharton, Dig., III, 309, quoted in Moore, Dig., VII, 451.

"Although American statesmen had advocated the adoption of the rule [as to exemption] the American courts, except where a treaty had prescribed a different rule, had uniformly confiscated enemy property even when it was seized under a neutral flag." Moore, Dig., VII, 435.

¹⁵ Instructions to American diplomatic officers, April 22, 1898, Moore, Dig., VII, 452.

¹⁶ Proclamation of President McKinley, April 26, 1898, For. Rel. 1898, 772; also Spanish War decree of May 3, 1898, *id.*, 774.

¹⁷ Moore, Dig., VII, 452.

¹⁸ For an interesting discussion of the decisions of British and other foreign prize courts in cases growing out of belligerent acts during World War I, and interpretative of article II of the Declaration of Paris, see Garner, Prize Law, 307-324; see also Oppenheim, Lauterpacht's 5 ed., II, § 177, 362, footnote 1.

It ought to be obvious that the practical value of the exemption set forth in article II of the Declaration of Paris depends upon a general understanding as to the limits to be assigned to contraband. Uncertainty and lack of accord in this regard serve to encourage the enlargement of belligerent pretensions concerning the scope of the exception to the rule, and so proportionally lessen the burden of the injunction. Abuses of belligerent power manifested in forms of conduct that are likely to be contemptuous of restrictions which have heretofore been developed and which, upon the outbreak of World War I, were supposedly incorporated in the international code, are stern reminders of the fact that effective deterrents of the ultimate confiscation of enemy property encountered at sea on vessels of whatsoever character must await fresh and general agreement concerning a variety of problems pertaining to belligerent action, and in which the relation of interposing neutral equities are duly respected. For that reason, uncoördinated efforts to safeguard enemy private property on neutral ships on the high sea offer, at the present time, frail hope of quickening respect for desired safeguards.¹⁹ The matter can not be dealt with piecemeal.

c

§ 763. **Enemy Vessels in or Sailing for Port at Outbreak of War—Days of Grace.** The attempt to establish an exemption for enemy vessels in or sailing for port at the outbreak of war is of recent origin.¹ The Turkish declaration of war against Russia, October 4, 1853, announced that the Turkish Government did not deem it just to place an embargo on Russian merchant vessels conformably with ancient usage, and that consequently they would be warned to go, within a period to be fixed subsequently, to the Black Sea or the Mediterranean according to their choice.² Russia in response granted permission to Turkish vessels within its ports to return to their destination until a specified time.³ The following year, when France and Great Britain entered the conflict, the former by a declaration of March 27, 1854, and the latter by an order in council of March 29, 1854, allowed Russian merchant vessels within their respective dominions six weeks for loading their cargoes and departing. Moreover, a Russian vessel which, prior to the date of the British order, had sailed from any foreign port bound for any port or place in Her Majesty's dominions, was to be permitted to enter therein, discharge its cargo, and afterwards forthwith depart without molestation, and if met at sea was to be permitted to continue its voyage to any port not blockaded.⁴

¹⁹ See Proposed General Immunity of Enemy Private Property, *infra*, §§ 771-772.

§ 763 ¹ "It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars." Moore, Dig., VII, 453.

² Brit. and For. State Pap., XLII, 1321, 1326.

³ Halleck, 3 ed. by Baker, I, 553, note, quoted in Moore, Dig., VII, 453.

⁴ Brit. and For. State Pap., XLVI, 242 and 39, respectively.

See also, Prussian ministerial declaration of June 21, 1866, respecting Austrian merchant vessels in Prussian ports, or whose masters, unaware of the outbreak of war, might enter therein, enclosed in communication of Baron von Gerolt, Prussian Minister, to Mr. Seward, Secy. of State, Aug. 7, 1866, MS. Notes from Prussia, Moore, Dig., VII, 454.

The uninterrupted practice of belligerent powers from the outbreak of the Crimean War down to 1907, when the Second Hague Peace Conference convened, was to allow enemy merchant vessels in their ports at the outbreak of hostilities to depart on the return voyages. The privilege had been accorded such vessels which had sailed before the outbreak of hostilities, to enter and depart from a belligerent port without molestation, on the homeward voyage.⁵

Upon the outbreak of the Spanish War, President McKinley, in a proclamation of April 26, 1898, announced certain rules for the guidance of American officers. It was declared that —

Spanish merchant vessels in any ports or places within the United States shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, That nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.⁶

The Supreme Court of the United States in applying the foregoing rule expressed the opinion, through Mr. Justice Peckham, that inasmuch as enemy merchant vessels engaged in innocent commercial enterprises at the time of, or just prior to the outbreak of hostilities, "would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive," it became necessary, upon the issuance of a proclamation respecting the treatment of merchant vessels, "to put upon the words used therein the most liberal and extensive interpretation of which they are capable," and that where there were two or more interpretations which possibly might be put upon the language, the one which would be most favorable to the belligerent party in whose favor the proclamation was issued ought to be adopted.⁷ Accordingly it was held that a Spanish vessel, the *Buena Ventura*, which had sailed from Ship Island, Mississippi, April 19, 1898, for Rotterdam, with a lawful permit to call at Norfolk for bunker coal, and was captured on April 22, by an American cruiser eight or nine miles from Sand Key Light on the coast of Florida, was within the exemption from capture given by the President's proclamation.⁸ It is not without signifi-

⁵ The language of the text is substantially that of the report of the American delegates at the Second Hague Peace Conference to the Secretary of State, For. Rel. 1907, II, 1144, 1158.

⁶ For. Rel. 1898, 772, Moore, Dig., VII, 454.

According to the Spanish War decree of Apr. 23, 1898, a term of five days from the date of publication thereof in the *Madrid Gazette* was allowed to all United States ships anchored in Spanish ports, during which they were at liberty to depart. For. Rel. 1898, 774.

⁷ The *Buena Ventura*, 175 U. S. 384, 388. The learned Justice cited the cases of *The Phoenix*, *Spinks' Prize Cases*, 1, and *The Argo*, *Spinks' Prize Cases*, 52, as exemplifying the doctrine of the English courts which the Supreme Court believed to be proper and correct.

See also, *dissenting* opinion of Mr. Justice White in *The Pedro*, 175 U. S. 354.

⁸ The Court took pains to declare that it did not assert that the exemption given by the proclamation would apply to a vessel which had left a port of the United States prior to the commencement of the war and had arrived at a foreign port and there discharged its cargo, and had then left for another foreign port prior to May 21.

cance that the Court based its interpretation of the exemption claimed, partly upon the historic attitude of the United States in favor of mitigating, as to all non-combatants, the hardships and horrors of war, and partly also upon the so-called later practice of civilized nations. It may be doubted, however, whether in view of the facts involved and the nature of the proclamation indicating the position of the United States, the decision purported to be more than an authoritative interpretation of an executive pronouncement.⁹

The same Tribunal held that the exemption did not extend to a Spanish vessel owned by a subject of the enemy, when armed for hostile use and designed in the event of war to be employed as a war vessel, and which was destined to a port of the enemy, even though the armament was one which the vessel, as a mail steamship, was obliged by contract with the Spanish Government to carry.¹⁰

The President's proclamation announced also the rule that —

Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.¹¹

A majority of the Supreme Court held, in applying the rule, that a Spanish vessel sailing from Habana for Santiago on April 22, 1898, with no cargo except what was destined for the enemy's ports, was subject to capture, although the voyage began at Antwerp and the vessel was under charter to proceed from Cuba to a port of the United States to get a cargo for a return voyage to Europe.¹² Chief Justice Fuller, who delivered the opinion of the Court, adverted to the fact that the vessel remained at Habana from the 17th until the 22d of April, not leaving that port until the day after that designated by Congress and the President as the one on which war actually began; and that the vessel had no cargo to be discharged at any port of the United States, but had cargo for Cuban ports held by the Spanish forces. He declared that the vessel was not within the letter of the proclamation or within the reasons usually assigned for the exemption.

It should be observed that Chief Justice Fuller, and Justices Gray and McKenna, dissented from the opinion of the Court.

⁹ It is believed that the American delegation to the Second Hague Peace Conference in its report to the Secretary of State possibly attached to the decision a significance to which it was hardly entitled when they cited it in support of the view that the privilege enjoyed by enemy merchant vessels in port at the outbreak of hostilities "had acquired such international force as to place it in the category of obligations." For. Rel. 1907, II, 1158.

¹⁰ The Panama, 176 U. S. 535.

¹¹ For. Rel. 1898, 772.

¹² The Pedro, 175 U. S. 354. Mr. Justice White, with whom concurred Justices Brewer, Shiras and Peckham, delivered a vigorous and extended dissenting opinion. It was contended that at the time of capture the vessel was engaged in no new and independent voyage from Habana to Santiago, but was in reality pursuing its original voyage from Antwerp to the United States. It was declared that the absence of a cargo for the United States was immaterial under the President's proclamation. Reliance was placed upon the decision of Dr. Lushington in the case of *The Argo*, Spinks' Prize Cases, 52, interpreting the British order in council of March 29, 1854, which in part appeared to be identical with the President's proclamation.

Apart from the importance of the foregoing cases in applying domestic rules, it may be doubted whether they serve to aid the solution of the problem as to the right of a belligerent to withhold the exemption.

The Naval War College, in 1906, concluded that upon the outbreak of war each belligerent should announce a date before which enemy vessels bound for, or within its ports at the outbreak of war, should under ordinary conditions be allowed to enter, to discharge cargo, to load cargo and to depart, without liability to capture while sailing directly to a permitted destination. It was said that if one belligerent allowed a shorter period of time than the other, its enemy might as a matter of right reduce its period of time correspondingly. It was declared that each belligerent might make such regulations in regard to sojourn, conduct, cargo, destination, and movements after departure, of innocent enemy vessels as might be deemed necessary in order to protect its military interests. It was added, however, that a private vessel suitable for warlike use, belonging to one belligerent and bound for or within a port of the enemy at the outbreak of war, was liable to detention unless the government of the vessel's flag made satisfactory agreement that the ship would not be put to any warlike use, in which case it might be accorded the same treatment as innocent enemy vessels.¹³

§ 764. **The Hague Convention of 1907.** The Second Hague Peace Conference, of 1907, revealed the fact that maritime powers were unwilling to agree that a legal obligation rested upon a belligerent to grant days of grace to enemy ships within its ports. The agreement concluded was a compromise, which in the judgment of the American delegation registered a step backwards. The convention was not signed by that delegation, and has not been accepted by the United States.¹ According to Article I it was said to be "desirable" that a belligerent ship in an enemy port should be allowed to depart freely, either immediately upon the outbreak of hostilities, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated. The same rule, it was said, should apply to a ship which left its last port of departure before the commencement of the war, and while ignorant of the outbreak of hostilities, entered a port belonging to the

¹³ Int. Law Topics and Discussions, 1906, 46-65. Attention was called to the days of grace allowed by both belligerents in the Russo-Japanese War. Respecting the few days of grace allowed, see imperial ordinance of Japan, No. 20, Feb. 9, 1904, Hurst and Bray's Russian and Japanese Prize Cases, II, 445, For. Rel. 1904, 414; Russian order, Feb. 14, 1904, Hurst and Bray's Russian and Japanese Prize Cases, I, 346, 347, For. Rel. 1904, 727.

"In general the principle of reciprocity has received approval since July, 1914, and the practice in many instances has been similar to that proposed by the United States Naval War College in 1906." Naval War College, Int. Law Documents, 1915, 18.

§ 764. ¹ For the text of the Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, being the sixth convention of the Second Hague Peace Conference, see *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 644, J. B. Scott, Reports to Hague Conferences, 579.

Concerning the convention, see General Report of the Fourth Commission at The Hague, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 250, J. B. Scott, Reports to Hague Conferences, 582; A. P. Higgins, Hague Peace Conferences, 312-321, with bibliography; Oppenheim, Lauterpacht's 5 ed., II, 275-276; J. B. Scott, "Status of Enemy Merchant Ships," *Am. J.*, II, 259.

See, also, report of the American delegates to the Secretary of State, For. Rel. 1907, II, 1148, 1158.

enemy. Article II forbade the confiscation of a merchant ship unable, "owing to circumstances of *force majeure*," to leave an enemy port within the period of grace allowed, or which was not allowed to leave. There was given to the opposing belligerent the right to detain the ship without payment of compensation, but subject to the obligation to restore it after the war, or requisition it on payment of compensation. Article III forbade the confiscation of enemy merchant ships which, after leaving their last port of departure before the commencement of the war, might be encountered on the high sea while still ignorant of the outbreak of hostilities. It was declared that they were only liable to detention on the understanding that they should be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation.²

By Article IV enemy cargo on board vessels referred to in Articles I and II was likewise liable to detention and restoration after the termination of the war without payment of compensation, or to relinquishment on payment of compensation, with or without the ship. The convention was rendered expressly inapplicable, according to Article V, to merchant vessels so built as to show that they were intended for conversion into vessels of war.

§ 765. **Results of World War I.** Upon the outbreak of war between Great Britain and Germany in 1914, the former, by an order in council of August 4, made provision that enemy merchant ships which at the date of the outbreak of hostilities were in any port to which the order was applicable, or which had cleared from their last port before the declaration of war, and after the outbreak of the war might enter a port to which the order was applicable, and with no knowledge of the war, should be allowed until midnight of August 14, for loading or unloading cargoes and for departure, provided that such vessels should not be allowed to ship any contraband of war, and requiring also the discharge of any such articles already shipped.¹ Such indulgence, however, was conditioned upon the receipt of information of a satisfactory nature, not later than midnight on August 7, that not less favorable treatment was accorded British merchant ships and their cargoes which at the date of the outbreak of hostilities were in the ports of the enemy. On a similarly reciprocal basis provision was made for enemy merchant ships which had cleared from their last port before the declaration of war, and which with no knowledge of the war arrived at a British port after the expiry of the time allowed for loading or unloading cargo and for departure. The right, recognized by The Hague Convention, to requisition subject to compensation cargoes on board enemy vessels, was reserved. There was expressly denied indulgence "to cable ships, or to seagoing ships designed to carry oil fuel, or to ships whose tonnage exceeds 5,000 tons gross, or whose speed is 14 knots or over." Such vessels were to remain liable, on adjudication by the prize court, to detention during the period of the war, or to requisition, in accordance, in either case, with the Hague Convention. It was declared that the

² In case of destruction, provision was to be made for the safety of persons on board, as well as for the security of the ship's papers.

§ 765.¹ British Manual of Emergency Legislation, 1914, 138.

privileges granted would also not extend to merchant ships which showed by their build that they were intended for conversion into vessels of war.² In the event of failure to receive satisfactory information on the date specified of the according of no less favorable treatment by the enemy to British merchant ships and their cargoes, the indulgences were to become inoperative and the full belligerent right of capture to be exercised.³

In the absence of receipt by Sir Edward Grey by midnight August 7, 1914, of satisfactory assurance of equally favorable reciprocal provisions by Germany, the days of grace were withheld.⁴ Nevertheless, the Judicial Committee of the Privy Council concluded in 1922, that article II of the Convention had been applicable with respect to certain German vessels seized in British ports upon the commencement of hostilities with Germany in August 1914.⁵ It may be observed that the British Government found it possible to extend indulgences on a reciprocal basis to Austro-Hungarian merchant ships and their cargoes.⁶

While the foregoing experiences of opposing States point to the reasonableness and desirability of endeavors to make reciprocal concessions respecting days of grace, they fail to indicate acknowledgment, in the absence of treaty, of the existence of a legal obligation to enter into such arrangements, or to grant any definite period of time to enemy ships for the loading or unloading of cargoes, or for departure.⁷

² Enemy merchant ships allowed to depart pursuant to the terms of the order were to be provided with a pass indicating the port to which they were to proceed, and the route which they were to follow. Deviation from the course indicated thereon was to cause liability to capture.

It was expressly provided that "neutral cargo, other than contraband of war, on board an enemy merchant ship which is not allowed to depart from a port to which this order applies, shall be released."

³ The following contingency was, however, provided for: "In the event of information reaching one of His Majesty's principal Secretaries of State that British merchant ships which cleared from their last port before the declaration of war, but are met with by the enemy at sea after the outbreak of hostilities, are allowed to continue their voyage without interference, with either the ship or the cargo, or after capture are released with or without proceedings for adjudication in the prize court, or are to be detained during the war or requisitioned in lieu of condemnation as prize, he shall notify the Lords Commissioners of the Admiralty accordingly, and shall publish a notification thereof in the 'London Gazette,' and in that event, but not otherwise, enemy merchant ships which cleared from their last port before the declaration of war, and are captured after the outbreak of hostilities and brought before the prize courts for adjudication, shall be released or detained or requisitioned in such cases and upon such terms as may be directed in the said notification in the 'London Gazette.'"

⁴ Manual of Emergency Legislation, 1914, 141.

Declared Sir Edward Grey, British Foreign Secretary, in a communication to Mr. W. H. Page, American Ambassador at London, Feb. 10, 1915: "We could come to no arrangement with the German Government for the reciprocal grant of days of grace, and the German merchant vessels lying in British ports when the war broke out have, therefore, been sentenced to detention in lieu of condemnation." For. Rel. 1915, Supp., 324, 327.

⁵ The Blonde, Law Reports [1922] A. C. Vol. I, 313. Declared Lord Sumner, in the course of the judgment: "The language of the communications, when carefully examined, does not support but displaces the theory that a new agreement was in negotiation between the belligerents to effect what could have been better secured by reciprocal recognition of a Convention, to which both parties had adhered while they were still at peace." (*Id.*, 322.)

⁶ Manual of Emergency Legislation, 1914, 97, 142.

See review of various regulations of belligerents in World War I in Naval War College, Int. Law Documents, 1915, 17-18, and texts of such regulations, *id.*, 19-32.

For a discussion of certain foreign cases, see Garner, Int. Law and The World War, I, §§ 107-114.

⁷ As Lord Sumner significantly declared in the course of the judgment of the Privy Council

Two classes of merchant vessels — those designed for conversion into vessels of war, and those which by reason of large tonnage or high speed are capable of rendering useful public service as transports or otherwise, must, at the present time, be subjected to detention. Similar treatment should also be accorded such private seagoing yachts of high power as are adapted for easy transformation into naval vessels. In a word, to no enemy ship, able to render a substantial military or naval or other belligerent service, should days of grace be yielded. Belligerent requirements of the present day call for narrower concessions than could be tolerated during the Crimean War, or the Spanish-American War, for the reason that the need of large and swift carriers to a State engaged in conflict, may become a matter of utmost concern. This circumstance justifies the confining of the exemption to relatively small ships of low speed. The military detriment to be sustained in consequence of the opposite procedure has become such as to diminish the likelihood of the conclusion of any general agreement extending the exemption, and establishing a legal duty of restraint where none today exists.

Provision for the detention or requisition on compensation, of enemy vessels in port, in lieu of confiscation, is a mark of respect for private property which should enjoy universal approval. That respect is not lessened when a detained ship is either appropriated or destroyed, provided the owner is reimbursed for what he has lost in consequence of such action.

Upon the rupture of diplomatic relations between the United States and Germany in February, 1917, numerous German merchantmen within the territorial jurisdiction of the United States were partially disabled by their crews, supposedly in pursuance of instructions from the Imperial Government. Such action was doubtless due to the assumption that in the event of war those vessels would be taken into the service of the United States for belligerent purposes.⁸

In pursuance of secret instructions from the Secretary of Treasury, German and Austrian vessels in American ports were on April 6, 1917, and April 8, 1917,

in the case of *The Blonde*, Feb. 10, 1922: "It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule [permitting a belligerent to make prize of an enemy merchantman found within its ports at the outbreak of war] and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognized by the law of nations should be mitigated or not. It is not surprising that the negotiators of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the Power entitled to capture, was a thing desirable indeed, but not obligatory." (Law Reports [1922], A. C. Vol. I, 313, 326-327.)

⁸ See statement in Official Bulletin, I, No. 196, p. 14, Dec. 31, 1917. The disabling of these ships was an intimation that the German Government did not regard Article XXIII of the treaty between the United States and Prussia of July 11, 1799, and renewed by Article XII of the treaty of May 1, 1828, as imposing upon the United States any duty to exempt them from seizure in case war ensued. Malloy's Treaties, II, 1494 and 1499.

Early in February, 1917, customs guards were placed on board certain German vessels to prevent their departure. At New York, Hoboken and elsewhere such guards together with local police aid made endeavor to protect German merchantmen from destruction. See in this connection, Eleanor Wyllis Allen, *Belligerent Merchant Vessels in Port at Outbreak of War*, MS. Thesis submitted to Carnegie Endowment for International Peace, Aug. 21, 1920, 252-255.

See *The Control of Belligerent and Other Foreign Merchantmen in Neutral Ports*, *infra*, § 888D.

respectively, taken possession of by collectors of customs.⁹ On April 12, 1917, the British Embassy at Washington made inquiry concerning the procedure which the Government of the United States proposed to adopt "with reference to the German ships laid up in ports of the United States, information being particularly desired as to whether it is proposed to take these vessels before a prize court and whether the provisions of the Hague Convention No. 6 will be applied."¹⁰ On April 28, 1917, in response to an inquiry from the Attorney General whether there was "any rule of international law binding on the United States which would require that the merchant ships now in the harbors of the United States belonging to alien enemies be condemned in prize courts rather than by action of Congress," Secretary Lansing expressed the opinion "that there is no rule of international law requiring that the ships in question be condemned in prize courts rather than by any other procedure selected by Congress with opportunity for neutral and American owners to be heard in court."¹¹

By a Joint Resolution approved May 12, 1917, the President was authorized to take over for the United States, the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all Territories and insular possessions of the United States, except the American Virgin Islands, and which at the time of coming into that jurisdiction, was owned in whole or in part by any corporation, citizen or subject of any nation with which the United States might be at war when such vessel was taken, or was flying the flag of or was under the register of any such nation, or any political subdivision or municipality thereof and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.¹² On June 30, 1917, President Wilson ordered that, through the United States Shipping Board, there be taken over to the United States the possession and title of 87 vessels which were specified.¹³ It is not believed that this action on the part of the President and the Congress violated any legal duty imposed by the law of nations upon the United States with respect to its adversary.

It has been noted elsewhere that by the terms of the Treaty of Versailles of June 28, 1919, Germany consented to the cession to the Allied and Associated Governments of the property "in all the German merchant ships which are of

⁹ See communication from the Under Secretary of the Treasury to the Secretary of State, Oct. 25, 1928, and printed in *For. Rel. 1917, Supp., 2, Vol. II, 1245* (which volume was not published until 1932).

It is not understood that the acts of the collectors of customs was confiscatory in the sense that it expressed any endeavor by the United States to divest the owners of the vessels of their title thereto. See Mr. Polk, for the Secy. of State, to the Swedish Minister at Washington, June 11, 1917, *For. Rel. 1917, Supp., 2, Vol. II, 1256*.

¹⁰ In a memorandum from the Dept. of State to the British Embassy, April 17, 1917, it was said: "In reply the Department of State advises the British Embassy that it is expected that Congress will empower the President to take over these ships by requisition for use during the present war to supply the needs of water transportation rendered urgent by the ravages of submarine warfare." (*Id.*, 1246.)

¹¹ *Id.*, 1249.

¹² 40 Stat. 75.

¹³ Executive Order No. 2651, *For. Rel. 1917, Supp., 2, Vol. II, 1257*. See also certain other Executive Orders subsequent to the Joint Resolution of May 12, 1917, *id.*, 1254-1256.

See also Naval War College, *Int. Law Documents*, 1917. 246-248.

1,600 tons gross and upwards," reckoned in a specified manner.¹⁴ Germany also made a broad waiver of claims against the Allied and Associated Governments and their nationals, arising from the detention, employment, loss or damage of German vessels.¹⁵

In virtue of article II of the Treaty Restoring Friendly Relations Between the United States and Germany, of August 25, 1921, the former acquired rights and advantages stipulated in the Treaty of Versailles for its benefit as defined in specified portions thereof embracing Part VIII in Relation to Reparation which included the arrangement pertaining to the cession of ships.¹⁶

d

Vessels Exempt by Occupation or Service

(1)

§ 766. **Coastal Fishing Vessels.** In 1899, the Supreme Court of the United States expressed the opinion, delivered by Mr. Justice Gray, that after a review of the precedents and authorities on the subject, it appeared to be abundantly demonstrated that —

At the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.¹

The learned Justice declared that the exemption did not apply to such fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; ² "nor when military or naval operations create a necessity to which all private interests must give way."³ It was added that the rule of international law was one of which prize courts, administering the law of nations, were bound to take judicial notice, and to which they were obliged to give effect, in the absence of any treaty or public act of their own

¹⁴ See War Claims against Germany under the Treaty of Versailles, The General Theory of Reparation, *supra*, § 298. Observe the theory laid down in Art. 236 of the treaty, U. S. Treaty Vol. III, 3421.

¹⁵ Paragraph 8, Annex III, Part VIII of the same treaty, *id.*, 3431. See in this connection discussion in Garner, Int. Law and The World War, I, § 117.

¹⁶ U. S. Treaty Vol. III, 2598.

§ 766. ¹ The Paquete Habana, The Lola, 175 U. S. 677, 708. Chief Justice Fuller, with whom concurred Justices Harlan and McKenna, delivered a dissenting opinion. Mr. Justice Gray made extended reference to the early practice of maritime States, treaties, judicial decisions and the views of text writers (686-708). He distinguished from the cases under consideration, the decision of Sir William Scott in *The Young Jacob and Johanna*, 1 Ch. Rob. 20, as one based upon a British order in council, as well as upon strong evidence of fraud (693, 694).

² Thus if coastal fishing vessels be equipped with radio, and so prepared (as well as disposed) to warn their country of the approach of the enemy by air or sea, they would not be deemed to share the exemption.

³ The learned Justice added: "Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought

government in relation to the matter. It was held that the capture of two unarmed enemy fishing smacks, privately owned and engaged in fishing along the coast of Cuba, and with cargoes of fresh live fish, was unlawful and without probable cause.⁴ The decision is believed to be one of the most important declarations of international law to which the Supreme Court of the United States has in recent years given utterance, not by reason of the nature of the question involved, but rather on account of the method by which the Court, unfettered by any domestic law or pronouncement, endeavored to ascertain what the law of nations was, and proceeded to apply it.⁵ The influence of the decision was seen in the statement by a British prize court in 1914, that it had become a "sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves."⁶

The Second Hague Peace Conference, of 1907, produced a convention relative to the Right of Capture in Naval War, Article III of which dealt with the exemption from capture of certain fishing vessels.⁷ It was there provided that those used exclusively for fishing along a coast are "exempt from capture, as well as their appliances, rigging, tackle, and cargo." The exemption was to cease, however, as soon as there might be any participation whatever in the hostilities. The contracting powers agreed, moreover, not to take advantage of the harmless character of such vessels in order to use them for military purposes while preserving their peaceful appearance.⁸

According to Naval Instructions of the United States, Governing Maritime Warfare, of June 30, 1917, small coast (not deep-sea) fishing vessels are, when innocently employed, exempt from capture.⁹

fresh to market, but are salted or otherwise cured and made a regular article of commerce." *Id.*, 708.

Denying the right of exemption to fishing vessels other than those engaged in coastal fishing, see *The Alexander, Hurst and Bray's Russian and Japanese Prize Cases*, II, 86; *The Berlin*, 2 *Lloyd's Prize Cases*, 43; *Am. J.*, IX, 544.

See also the *Evangelistria*, Fauchille, *Jurisprudence Française*, 423, discussed in *Garner, Prize Law*, § 178.

⁴ It may be observed that one of the vessels, the *Lola*, had extended her fishing voyage from the coast of Cuba to that of Yucatan, where she had engaged in fishing for eight days. Concerning the case, see communication in *Rev. Gén.*, VIII, 53.

⁵ See Mr. Lansing, Secy. of State, in a communication to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, *For. Rel.* 1915, *Supp.*, 578.

⁶ *The Berlin*, 2 *Lloyd's Prize Cases*, 43, 67, *Am. J.*, IX, 544, 547.

See, also, Art. XXXV, Japanese Regulations Relating to Capture at Sea, Mar. 15, 1904, *Hurst and Bray's Russian and Japanese Prize Cases*, II, 430; Section 6, German Prize Code as in force July 1, 1915, Huberich and King's Prize Code of the German Empire, 7.

⁷ *Malloy's Treaties*, II, 2348.

⁸ Concerning the convention, see General Report of the Fourth Commission, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 269; J. B. Scott, Reports to Hague Conferences, 738; A. P. Higgins, Hague Peace Conferences, 402-404, with bibliography; Simeon E. Baldwin, "The Eleventh Convention Proposed by The Hague Conference of 1907," *Am. J.*, II, 307.

See Art. XLVII, of Oxford Manual of Naval War, *Annuaire*, XXVI, 654, J. B. Scott, Resolutions, 185; also Naval War College, *Int. Law Topics and Discussions*, 1913, 89.

⁹ No. 63. According to No. 65 such fishing vessels may be subjected to special regulations

Belligerents, because they are such, are inclined to resort to pretext in order to excuse the capture of enemy ships which under customary or conventional law are supposedly exempt from such treatment. This fact not only shows that a vessel claiming and entitled to exemption, such as a coastal fishing vessel, must make extraordinary effort to avoid conduct sufficing to deprive it of immunity from capture, but also accentuates the ineffectiveness of conventional arrangements designed to deter a maritime State engaged in war from penalizing the shipping of an enemy when favorable opportunity presents itself.¹⁰ For that reason, the exemption recognized by the Supreme Court of the United States in the case of the *Paquete Habana*¹¹ and exemplified by the article III of the Hague Convention of 1907, may not fare well in future wars between maritime States bent on exercising the full measure of their strength against each other, unless solid benefits from a common restraint are definitely acknowledged. The point to be observed is that consciousness of such benefits may not be general or be equally acknowledged by the opposing belligerents. Moreover, a variety of circumstances may cause it to be diminished in intensity from generation to generation. Thus, treaties that fail to take cognizance of the possibility of such changes of thought are likely to prove valueless as deterrents of conduct, if as a result of those changes the parties cease to regard as undesirable the commission of acts which at the time of agreement they were ready to unite to proscribe. In view, therefore, of the changing estimate by belligerent States concerning what is or is not mutually advantageous conduct to which resort should be had as against an enemy, it is believed to be sheer optimism to conclude that a community of interests which sufficed at a particular time to bring into being a general agreement to exempt certain forms of enemy property from capture at sea is likely to remain unaltered as time goes on, or to exert a permanent influence upon the conventional or customary law.¹² Of still greater practical importance is the fact the class and number of vessels entitled to exemption according to the decision in the case of the *Paquete Habana* are diminishing, and so lessening the value and significance of the immunity as there enunciated.

imposed by the United States naval commander operating in the vicinity. "They are liable to capture if such regulations be disobeyed or if they engage in any undertaking prejudicial to United States military operations by land or sea."

¹⁰ Declares Oppenheim: "None the less, the immunity of coast fishing-boats from capture was valueless during the World War, because Germany sank British fishing-boats, and all the belligerents captured and interned members of the crews of military age." (Lauterpacht's 5 ed., II, 379.)

See also Garner, *Int. Law and the World War*, I, 362, and especially footnote 2.

¹¹ 175 U. S. 677.

¹² The permanence of a common sense of benefits derivable from abstaining from particular forms of conduct as against an enemy may be challenged and even destroyed by a variety of considerations. These are likely to be attributable to changes in the potentialities of particular instrumentalities, or to geographical considerations, or to the differing effects of abstention upon the economic or military interests of the States in conflict. This circumstance renders it impossible to prophesy with confidence whether the community of interest that suffices to beget a widespread acknowledgment at a particular time of a common benefit from a particular restraint is to be long-lived and incorporated in the international code.

(2)

§ 767. **Small Boats Engaged in Local Trade.** The Hague Convention of 1907, relative to the Right of Capture in Naval War, established for small boats engaged in local trade an exemption similar to that accorded coastal fishing vessels, and on like terms.¹ The reasonableness of such an exemption must be tested by its effect upon the military operations of the enemy. Boats, however small, irrespective of their employment for purposes of trade, if capable of rendering a distinct service to the belligerent in whose waters they belong, ought to be subject to capture. Those for which the convention provides an exemption are doubtless oftentimes valueless for such purpose, and so differ from small yachts of high power and speed, which do not purport to be within the scope of the agreement. The development of boats of the latter type within recent years seems to call for greater precision of statement respecting the extent of the exemption and the vessels to which it should be granted.² This conclusion is perhaps fortified by the natural tendency of prize courts in dealing with an exemption not regarded as reflecting an obligation attributable to the customary law,³ to construe somewhat narrowly the immunity yielded by the convention.⁴

(3)

§ 768. **Vessels Charged with Religious, Scientific or Philanthropic Missions.** Vessels charged with religious, scientific or philanthropic missions were likewise rendered exempt from capture by Article IV of The Hague Convention of 1907, relative to the Right of Capture in Naval War. This provision was due to a proposition of the delegation of Italy, and was unanimously adopted by the commission responsible for the convention.¹ The importance of giving formal sanction to a custom of long standing and of universal benefit must be obvious. The military detriment occasioned by the concession is insignificant.² Some

§ 767.¹ In the Report of the Fourth Commission to The Hague Conference it is said with reference to the exemption: "In conformity with the proposition of Austria-Hungary, the text grants immunity, under the same conditions, to small boats employed in local trade; that is to say, boats and barks of small dimensions transporting agricultural products and engaged in small local trade—for example, between the coast and the neighboring islands or islets." *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 271, J. B. Scott, Reports to Hague Conferences, 740. While this explanation accords with the proposition offered by the Austro-Hungarian delegation, it emphasizes the fact that the text of the convention failed to correspond with that proposal. The French text—"Les bateaux exclusivement affectés . . . à des services de petite navigation locale"—seems to be loosely translated in the English text as "small boats employed in local trade." Malloy's Treaties, II, 2348. See, also, A. P. Higgins, Hague Peace Conferences, 404.

² No. 65, Naval Instructions Governing Maritime Warfare of June 30, 1917.

³ See *The Maria*, 1 Brit. and Col. Prize Cases, 259. See discussion of the case in Garner, Prize Law, § 181.

⁴ See Judgment of the Judicial Committee of the Privy Council in the case of *Floating Craft of Deutsche Kohlen Depot*, Dec. 13, 1918, 8 Lloyd's Prize Cases 147. In his Prize Law, §§ 183-188, Prof. Garner discusses other foreign decisions interpretative of the treaty.

§ 768.¹ Malloy's Treaties, II, 2348.

See General Report of the Fourth Commission to The Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 271, J. B. Scott, Reports to Hague Conferences, 740.

² Opinion of Mr. Justice Gray in *The Paquete Habana*, 175 U. S. 678, 709, where attention is called to *The Marquis de Somerueles*, Stewart Adm. (Nova Scotia), 445, 482, and to *The Amelia*, 4 Philadelphia, 417.

maritime States have not hesitated to yield it in their naval regulations.³

The decisions of prize courts in cases arising out of World War I revealed a natural tendency to construe strictly exemptions claimed under the Hague Convention, and a readiness of tribunals established by the captor to seize upon any plausible ground as a means of denying the exemption claimed.⁴

(4)

§ 769. **Hospital Ships.** Properly designated hospital ships when innocently employed are exempt from capture. The Hague Convention of 1907, concerning the adaptation of the principles of the Geneva Convention to maritime warfare, made elaborate provisions respecting the scope of the exemption and the conditions to be observed by vessels claiming it.¹ The military detriment suffered by a belligerent in consequence of yielding the concession is commonly outweighed by the benefit derived from the similar action on the part of the enemy; and it is insignificant as compared with the equities attaching to a vessel devoted to the care of the sick and wounded, provided it abstain from any other form of participation in the war.² The construction and equipment, as well as the operation and conduct, of such a vessel may serve, however, to convince a prize court that that condition has not been satisfied.³

"The custom of granting immunities has now been converted into a definite rule of international law, but the conditions, although not mentioned in the Article, must be understood to be the same as those on which the immunities to fishing boats, etc., are granted, namely, abstention from all interference in hostilities." A. P. Higgins, *Hague Peace Conferences*, 405.

³ See, for example, Art. XXXV of Japanese Regulations of Mar. 15, 1904, Relating to Capture at Sea, Hurst and Bray's Russian and Japanese Prize Cases, II, 430; also Section 6 of German Prize Code as in force July 1, 1915, Huberich and King's Prize Code of the German Empire, 7. Also conclusions of Naval War College, Int. Law Topics and Discussions, 1913, 89; Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 63.

Declaring that the immunity accorded enemy vessels engaged in scientific discovery and exploration had ripened into a general international usage before the convening of the Second Hague Conference of 1907, Oppenheim has said: "The usage grew up in the eighteenth century. In 1866, the French explorer Bougainville, who started from St. Malo with the vessels *La Boudeuse* and *L'Étoile* on a voyage round the world, was furnished by the British Government with safe-conducts. In 1776, Captain Cook's vessels *Resolution* and *Discovery*, sailing from Plymouth for the purpose of exploring the Pacific Ocean, were declared exempt from attack and seizure on the part of French cruisers by the French Government. Again, the French Count Lapérouse, who started on a voyage of exploration in 1785 with the vessels *Astrolabe* and *Boussole*, was secured immunity from attack and seizure. During the nineteenth century this usage became quite general, and had almost ripened into a custom." (Lauterpacht's 5 ed., II, 377, footnote 3.)

⁴ See the Paklat, 1 Brit. and Col. Prize Cases 515. It should be observed, however, that in this case the Court made use of the official report of the committee of the *Deuxième Conférence Internationale de la Paix*, and which, it declared, left no reasonable doubt as to the construction to be placed upon the article of the convention. See discussion of the case in C. J. Colombos, *Law of Prize*, 1926, § 144, and in Garner, *Prize Law*, § 189. Also The *Haelen*, Supreme Prize Court at Berlin, June 28, 1918, 2 *Entscheidungen*, 177, Naval War College, Int. Law Decisions, 1923, 1.

§ 769. ¹ Malloy's Treaties, II, 2326; also report of the American delegation at the Second Hague Peace Conference of 1907, to the Secretary of State, For. Rel., 1907, II, 1128, 1163.

Concerning the convention, see *infra*, §§ 777-781.

² See Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 63.

³ See judgment of the Judicial Committee of the Privy Council, May 8, 1916, in the case of The Steamship "*Ophelia*," 3 Lloyd's Prize Cases 121.

See, also, Naval War College, Int. Law Situations, 1935, 106-113.

(5)

§ 770. **Cartel Ships.** That a vessel employed in the exchange of prisoners pursuant to agreement, or for the carriage of official communications to and from the enemy should be exempt from capture, is of mutual benefit to opposing belligerents. A vessel engaged in such a service is a cartel ship, and as such is, therefore, accorded such an exemption.¹ That service is, however, so highly important to the interests of humanity that, as Sir William Scott declared in 1803, it should be conducted in such a manner as not to become a matter of jealousy and distrust between the nations concerned.² Consequently, he proceeded to enunciate in certain cases before him the conditions with which a cartel ship should comply in order to retain the privilege of exemption. Thus he declared that such a ship is not at liberty to trade or take in a cargo.³ He laid it down to be clear that a cartel ship is entitled to its exemption both in carrying prisoners and in returning from such service.⁴ He allowed, moreover, cartel privileges to a ship engaged in transporting prisoners pursuant to an understanding, although not strictly provided with the usual formal documents of cartel.⁵

At the present time a cartel ship designated for and engaged in the exchange of prisoners ought to be furnished with such documents and instructions as to minimize the danger of forfeiting its exemption and of removing every temptation calculated to produce that result.⁶ It is needless to add that the conduct of those controlling the ship should correspond completely with such instructions.

§ 770. ¹ Naval War College, *Int. Law Topics and Discussions*, 1913, 89; also Oppenheim, *Lauterpacht's* 5 ed., II, 429; J. A. Hall, *Law of Naval Warfare*, 2 ed., 96-97; Westlake, 2 ed., II, 162.

According to Article XLV of the Oxford Manual of Naval War, "ships called cartel ships, which act as bearers of a flag of truce, may not be seized while fulfilling their mission, even if they belong to the navy. A ship authorized by one of the belligerents to enter into a parley with the other and carrying a white flag is considered a cartel ship.

"The commanding officer to whom a cartel ship is sent is not obliged to receive it under all circumstances. He can take all measures necessary to prevent the cartel ship from profiting by its mission to obtain information. In case it abuses its privileges, he has the right to hold the cartel ship temporarily.

"A cartel ship loses its rights of inviolability if it is proved, positively and unexceptionably, that the commander has profited by the privileged position of his vessel to provoke or to commit a treacherous act." *Annuaire*, XXVI, 654, J. B. Scott, *Resolutions*, 185.

See, also, Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 63.

² *The Venus*, 4 Ch. Rob. 355, 357. The learned judge observed that "It is, therefore, a species of navigation which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose and to the rules which have been built upon it, since if such a mode of intercourse is broken off it cannot but be followed by consequences extremely calamitous to individuals of both countries."

See Harold H. Martin and Joseph R. Baker, *Laws of Maritime Warfare affecting Rights and Duties of Belligerents*, as existing Aug. 1, 1914, Dept. of State, 1918, 529-531.

³ *The Venus*, 4 Ch. Rob. 355, 358. See, also, *La Rosine*, 2 Ch. Rob. 372.

⁴ *The Daifjie*, 3 Ch. Rob. 139, 143. In this case cartel ships going from the Texel to Flushing to take exchanged prisoners on board in order to bring them to England were restored.

⁵ *La Gloire*, 5 Ch. Rob. 192.

⁶ The Naval War College, in 1913 adverted to the fact that enemy vessels, both public and private, may acquire exemption from capture by treaty or special proclamation. *Int. Law Topics and Discussions*, 1913, 89.

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§ 771. **Proposed General Immunity of Enemy Private Property.** From earliest days of the Republic American statesmen have sought to extend exemptions from capture. Franklin proposed the insertion in the first treaty with Great Britain of a provision that all merchants or traders with their unarmed vessels employed in commerce, exchanging the products of different nations, and thereby rendering the necessary conveniences and comforts of human life more easy to obtain and more general, should be allowed to pass freely unmolested.¹ At a time when privateers were utilized, the capture of enemy private property was characterized by acts of depredation and plunder for the enrichment of the captors, and which resembled conduct which in warfare on land was supposedly unlawful. It was this aspect of a practice which at times appeared to bear but a remote relation to any useful public service, that doubtless encouraged some to urge abandonment of what may have seemed also to involve no sacrifice of a substantial military benefit.²

It came to be understood in the United States as elsewhere, that any exemption of enemy private property from capture needed to be restricted by a reservation in respect to contraband goods and the law of blockade. The exemption, subject to these limitations, was long urged for general adoption.³

At The Hague Peace Conferences of 1899,⁴ and 1907, the United States sought in vain to gain the acquiescence of the other participating Powers. At the later conference, the American delegates urged the adoption of the following proposition:

The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend

§ 771. ¹ Address of Mr. Choate at the Second Hague Peace Conference of 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 766. Also Art. XXIII, treaty with Prussia, Sept. 10, 1785, Malloy's Treaties, II, 1484.

² Mr. Adams, Secy. of State, to Mr. Rush, Minister to Great Britain, July 28, 1823, MS. Inst. U. S. Ministers, X, 68, Moore, Dig., VII, 462, in which are quoted the views of Franklin in a letter of March 14, 1785.

³ See, generally, documents in Moore, Dig., VII, 461-473.

Declared Prof. Moore, in an address on "Contraband of War," in 1912: "What therefore the United States since 1850 has proposed is, not that private property at sea shall be exempt from capture, but that it shall be so exempt, subject to the exceptions of contraband and blockade. The proposal, as thus qualified, no doubt had a substantial character in 1857, since the Government of the United States at that day still recalled the limitations upon contraband for which it had traditionally contended. The case was the same when, by the treaty of commerce between the United States and Italy of Feb. 26, 1871, it was actually agreed (Art. XII) that, in the event of war between the two countries, the private property of their citizens and subjects should be exempt from capture on the high seas or elsewhere, subject to the exceptions of contraband and blockade; for the treaty then proceeded (Art. XV) precisely to limit the scope of contraband, confining it to arms and munitions of war, and declaring that those articles 'and no others' should be comprehended under that denomination." *Proceedings of American Philosophical Society*, LI, No. 203, January-March, 1912.

⁴ Memorial of American Commission, Holls, 307; also speech of Mr. Andrew D. White, of the American Commission, in support of the proposal, *id.*, 314.

exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers.⁵

The American proposition was presented by Mr. Choate who pleaded with skill in its behalf.⁶ He dwelt at length upon the views from time to time expressed by American statesmen, and the encouraging responses elicited from those of European States. He declared that the existing right of capture was of decreasing value to belligerents by reason of increased facilities of transportation by land from neutral ports and through neutral territories to belligerents, and because the great powers were then constructing their fleets for purely military operations, looking to the control of the sea, and were only building vessels which were useful for combat. He adverted to the fact that the United States had advocated the exemption uniformly without regard to the effect upon its temporary interests. Without denying the right of a belligerent to take or destroy by land or sea enemy property in case of military necessity, he declared that there was a perfect analogy between the exemption of private property on land not needed for military purposes from spoliation and destruction, which had been established for centuries by the usage of nations, and the similar exemption claimed for private property at sea, likewise not so needed.⁷ He said that the remnant of the belligerent right of capture being limited since the Declaration of Paris, to that of capturing and destroying enemy ships (and obviously enemy property thereon) was rapidly diminishing in its military value, and was no longer a potent factor in reducing a belligerent to submission as a means of terminating war. He urged by way of summary the acceptance of the proposal for the following reasons: First, on humanitarian grounds; secondly, on a ground "more important still, of the unjustifiable interference with innocent and legiti-

⁵ *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 766. Also General Report of the Fourth Commission to The Hague Conference, *id.*, I, 245-249, J. B. Scott, Reports to Hague Conferences, 599-603.

⁶ See, generally, Charles de Boeck, *De la Propriété Privée Ennemie sous Pavillon Ennemi*, Paris, 1882; Charles Henry Butler, "Immunity of Private Property at Sea from Capture during War," *Int. Law Association, Proceedings 18th Conference*, 66; International Law Association, *Proceedings 19th Conference*, 230-298; Sir William Rann Kennedy, "Exemption of Private Property at Sea," *International Law Association, Proceedings 23d Conference*, 134, published in *Law Mag. and Rev.* No. 342, November, 1906, 28; C. H. Stockton, "Would Immunity from Capture during War of Nonoffending Private Property upon the High Seas Be in the Interest of Civilization?" *Am. J.*, I, 930; E. P. Wheeler, *Proceedings*, *Am. Society Int. Law*, I, 80; H. S. Quigley, "The Immunity of Private Property from Capture at Sea," *Am. J.*, XI, 22. Also The Bobrik, Hurst and Bray's Russian and Japanese Prize Cases, II, 107, 113.

See, also, Lauterpacht's 6 ed. of Oppenheim, II, § 178, with bibliographical material on the views of Continental text writers in footnote 2, p. 357.

⁷ The text of Mr. Choate's address is contained in *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 750 and 766 (translation), and also in J. B. Scott, American Addresses at Second Hague Peace Conference, I. See, also, address of U. M. Rose, of the American delegation, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 795.

In this connection Mr. Choate said: "The wanton spoliation of noncombatant ships and cargoes not needed for military purposes, for the mere purpose of enriching the captors, or their governments, or of terrorizing the unfortunate owners and their governments and coercing them to submit to the will of the triumphant belligerent, and to accept his terms, is abhorrent to every principle of justice and of right, and ought to be remitted to the same category of condemnation in which similar outrages upon noncombatants on land are now universally included."

mate commerce which concerns not alone the nation to which the ship belongs, but the whole civilized world"; thirdly, because it was a direct advance towards the limitation of war to its proper province, "a contest between the armed forces of the States by land and sea against each other and against the public property of the respective States engaged"; and fourthly, because the old practice was no longer necessary and tended to provoke war as a natural result of its continuance. At the close of his address he dwelt upon the interest of neutrals, constituting at all times the majority of nations, as one to be first considered.⁸ Refraining from an attempt to convince the representatives of any nation taking part in the conference that its national interest required it to give up the ancient practice, he sought rather to satisfy that body as a whole that the general welfare of all the nations together, having a community of interest in the commerce of the world, required the adoption of the principle of immunity.⁹

§ 772. **The Same.** The conduct of World War I revealed the impressive fact that belligerent maritime States do not at the present time regard that capture of enemy private property, of any kind whatsoever, as of slight military importance. On the contrary, the exercise of the existing right has been rather one of the most persistent and aggressive means by which naval forces have sought to reduce a foe. It has been relied upon as one of three effective methods of cutting off enemy sea-borne commerce. The other two have been manifest in the establishment of blockades of an extended and novel type, and in broadening the limits assigned to contraband. These activities have proven so disastrous to neutral commerce as to lessen materially the interest of maritime States in the proposed exemption. They have also, doubtless, weakened the value of the bare belligerent right of capture of unoffending private enemy property. Conse-

⁸ On this point, see C. C. Hyde, *Proceedings*, Am. Soc. Int. Law, I, 73, 78-79.

⁹ He sought, moreover, to anticipate certain objections often presented in public discussions. Thus the suggestion that the most effective means of preventing war is to make it as terrible as possible and that to such end the destruction of private property at sea was a justifiable expedient, he declared to lack both truth and sanity. The contention that the retention of the ancient right of capture and detention was necessary as the only means of bringing war to an end he declared to be a purely fanciful and imaginary proposition, not sustained by the history of modern wars. "Besides," he added, "there is a limit to the legitimate right of even the victor upon the seas for the time being to employ his power for purposes of destruction. Victory in naval battles is one thing, but ownership of the high seas is another. In fact, rightly considered, there is no such thing as ownership of the seas. According to the universal judgment and agreement of nations they have been and are always free seas—free for innocent and unoffending trade and commerce. And in the interest of mankind in general they must always remain so." He denied that the existing right of capture served in fact as a deterrent of war through the effect it produced upon commercial interests to prevent an outbreak of hostilities. He declared that however bloodless the process of capture might be, it was still "the extreme of oppression and injustice practiced upon unoffending and innocent individuals, and it has no appreciable effect in reaching or compelling the action of the Government of which the sufferers are subjects."

Compare views of Dr. Thomas Baty, who in 1930 declared: "If the modern idea of war is to prevail, the principle of the exemption of private property from maritime capture is as out-of-date as the Declaration of Paris. If war is not only a relation of State to State, but involves every individual adhering to either party in its demands through one belligerent and in its attacks through the other; if every workman and housewife is regarded as a prop of the army and to be exterminated accordingly; it is clearly absurd to refrain from exterminating the merchant's trade and the ship-owner's business. The fashionable collectivism of the day is, however, slowly giving place to a neo-individualism which in ten or twenty years may be very powerful." (*The Canons of International Law*, 497.)

quently it may be doubted whether the United States would at the present time deem it worth while to renew the proposal offered at The Hague, unless assured of sincerity of purpose on the part of other powers not to render nugatory the operation of the exemption by the extension of other forms of belligerent rights.¹ The problem is so closely associated with those concerning contraband and blockade as to preclude a reasonable expectation of permanent adjustment as a distinct and unrelated question. It may be observed also that the present tendency of maritime States when at war to nationalize the vessels of their respective merchant marines by requisitioning such craft for public service, further limits the belligerent interest in obtaining the immunity proposed.

To an insular State possessed of a substantial merchant marine, and depending upon it for the transportation to itself of foodstuffs, even if they should be generally acknowledged to be other than absolute contraband, the value of the existing right of capture must be proportional to the ability of the belligerent to guard itself against any instrument of naval warfare which genius may devise, and which if acquired by the enemy may endanger the safety of importations.² Thus for the right to reduce by starvation an enemy dependent for food supplies upon its ocean shipping, the aggressor must pay a price sufficient at all times to safeguard fully its own requirements. That price may be disproportional to the value of the right, or a particular belligerent may be unable to pay it. To a State such as the United States, not dependent upon distant oversea territories for its food supplies, the retention of the right of capture offers an offensive military advantage at lower cost than to any enemy of another continent. Although the establishment of the exemption might prove a military detriment to the United States, there are, nevertheless, solid advantages which it would derive therefrom and which require candid acknowledgment.³

§ 772. ¹ It should be noted, however, that on Feb. 5, 1929, the Senate agreed to an amendment of the Senator from Missouri (Mr. Reed) as modified, to an amendment of the Senator from Idaho (Mr. Borah), to a bill (H. R. 11526) to authorize the construction of certain naval vessels, and for other purposes in which it was declared: "First. That the Congress favors a treaty, or treaties, with all the principal maritime nations regulating the conduct of belligerents and neutrals in war at sea, including the inviolability of private property thereon.

"Second. That such treaties be negotiated if practically possible prior to the meeting of the conference on the limitation of armaments in 1931." (*Cong. Rec.*, Vol. LXX, Part 3, 2810, 2811, and 2839.)

² The Report of the Royal Commission (of Great Britain) on Supply of Food and Raw Material in Time of War, 1905, concluded that in case of war, Great Britain with a strong fleet would have no reason to fear such interruption of its supplies as would lead to the starvation of its people, and that there was no evidence that there was likely to be any serious shortage. House of Commons, Sessional Papers, 1905, vol. 39, p. 35. It was admitted, however, that if the command of the sea were lost, and affairs had reached a point at which the British Navy was no longer able to prevent organized attack upon the commerce of England, there would be a serious shortage of supplies from abroad which, under certain circumstances, would not only produce a severe panic but also cause "such serious suffering that the country could hold on no longer." *Id.*, 44. See, also, C. H. Stockton, with reference to these views, in *Am. J.*, I, 941.

³ States rarely seek to effect changes of public law solely for altruistic purposes. The attempt to minimize the interest of a State proposing a change is likely to arouse suspicion as to its motives, and to retard rather than encourage acquiescence. It is believed that the United States has an interest in securing the exemption of non-offending enemy private property from capture, and that the persuasiveness of its voice in advocating that concession depends upon the candor with which that interest is acknowledged.

World War I has emphasized the harm resulting from captures effected in waters remote from general areas of hostilities, and unrelated to the attainment of any immediate military end. Cases have been numerous such, for example, as the operations of a German submarine vessel off the New England coast in September, 1916, which fell within the analogy drawn from land warfare by Mr. Choate. Moreover, the work of destroying enemy commerce by submarine vessels has almost invariably served to inflict grievous suffering upon the occupants of ships encountered through the failure of the captors to accord a reasonable place of safety to the persons on board.⁴

Possession of the right of capture has led, as has been seen, to the assertion also of the right of conversion of private vessels into vessels of war upon the high seas, and this in turn, to the arming, even in times of peace, of merchantmen as a safeguard against the operations of a probable foe.⁵ So long as the existing right remains unfettered, a belligerent is tempted to employ every means at its disposal to make the exercise thereof effective. If it yields to ruthlessness, defensive measures are encouraged which, as has been observed, are productive of acts of hostility committed by private agencies oftentimes unrestrained by public control.⁶ The result is a warfare of a type long since sought to be abolished.

The collective injury to neutral interests through the capture of private enemy property other than contraband may sometime be deemed of greater concern to the family of nations than the preservation of the belligerent right. Moreover, the protection for its commerce to be gained by the individual State when a neutral may be regarded as of greater value than what it is called upon to relinquish in time of war. It should, however, be constantly borne in mind that the neutral interest in the establishment of the exemption is invariably dependent upon the scope of the accepted limitations respecting blockade and contraband, and that while those remain vague and indefinite, the endeavor to obtain immunity from capture of non-offending private property must remain ineffectual.⁷

At the present time there appears to be no common acknowledgment that the benefit to be derived from relinquishment of the right of capture suffices to warrant acceptance of the exemption as advocated by the United States.

⁴ See Effect of Capture upon the Rights of the Occupants of the Captured Vessel, *supra*, § 755.

⁵ See Conversion of Volunteer, Auxiliary or Subsidized Vessels, Place of Conversion, *supra*, §§ 707-708.

⁶ See Private Vessels Defensively Armed, *supra*, § 709.

⁷ J. B. Moore, "Contraband of War," *Proceedings*, Am. Philosophical Society, LI, No. 203; H. S. Quigley, in *Am. J.*, XI, 22, 27.

6

PRISONERS OF WAR

a

Persons who may be regarded as Prisoners of War

(1)

§ 773. **Occupants of Enemy Ships.** The right of a belligerent to regard the occupant of a captured enemy ship as a prisoner of war may depend upon the character of the vessel, or upon the conduct of the individual, or upon his relationship to the service of the enemy.

If the vessel is a public ship of any kind, save one exempt from capture and which has not forfeited the exemption, the captor is believed to be justified in dealing with every person officially connected with the ship, and of whatsoever nationality, as a prisoner of war. It is the relation of the vessel to the public service of the enemy, rather than any other circumstance, which appears to be decisive of such a right.¹ Other enemy persons not officially connected with the ship may also be fairly regarded as subject to detention and treatment similar to that accorded civilian prisoners; and evidence of their participation in hostile acts on board the ship will subject them to treatment as prisoners of war.

The right of neutral occupants not officially connected with a captured enemy ship to treatment more favorable than that accorded prisoners of war or of so-called civil prisoners, would seem on principle to depend upon a reasonable showing that they had taken no part in hostile operations chargeable to the vessel.²

If the captured ship is a private vessel, such as a merchantman, its participation in hostilities, even by way of defense, would appear to justify the detention and restraint of officers and crew as civil prisoners, and those members thereof who might belong to a naval force, such as the gun crew of an armed ship, as prisoners of war. In view of the right of the vessel to resist capture, all persons officially attached to the ship should be entitled to the privileges of prisoners. It is believed that the right of other occupants, of neutral nationality, to claim

§ 773.¹ As has been noted elsewhere, the Geneva Convention on Prisoners of War, concluded July 27, 1929 (U. S. Treaty Vol. IV, 5224), declares in art. I that it is applicable "to all persons belonging to the armed forces of belligerent parties, captured by the enemy in the course of military operations at sea or in the air, except for such derogations as might be rendered inevitable by the conditions of capture." See Grounds on which Individuals are Treated as Prisoners of War, *supra*, § 675. See, also, The Geneva Convention of 1929, *supra*, §§ 669-672.

According to the unratified Berne agreement of Nov. 11, 1918, signed in behalf of the United States and Germany, the term "prisoners of war" was confined to persons officially connected with a belligerent military or naval establishment, and who were captured while in the active service of the armed forces thereof. Sanitary personnel were excluded.

The term "civil prisoners" embraced the officers and members of crews of merchant ships. Annex 7, Sections 1 and 2, For. Rel. 1918, Supp., 2, 156.

² There might, however, be strong reluctance on the part of the State of the captor to permit a neutral occupant to make such a showing if the captured ship were a vessel of war. See Art. X, Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 105.

more favorable treatment would depend upon their abstinence from participation in the hostilities. No presumption adverse to neutral nationals having no official connection with the ship should be derived from their mere presence on board.³

According to the Hague Convention of 1907, Relative to the Right of Capture in Naval War, the capture of an enemy merchant ship which does not take part in hostilities does not justify the captor in making prisoners of war of neutral members of the crew, or of a neutral captain and officers, "if they [captain and officers] promise formally in writing not to serve on an enemy ship while the war lasts."⁴ The captain and officers, and members of the crew, even when nationals of the enemy, are not to be made prisoners of war, if they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operation of the war.⁵ It is provided also that the names of the persons retaining their liberty under the foregoing conditions are to be notified by the belligerent captor to the enemy, which in turn is forbidden knowingly to employ such individuals.⁶ It is believed that the provisions respecting officers and crews who are nationals of the enemy are hardly responsive to belligerent requirements of the present day which may call for the control and restraint of such individuals by the captor. As the Convention is expressly rendered inapplicable to vessels taking part in hostilities,⁷ the restrictions imposed are necessarily of limited scope.

(2)

§ 774. **Occupants of Neutral Ships.** Upon the capture of a neutral vessel, the treatment of the occupants depends partly upon the conduct of the ship and partly also upon that of its inmates, as well as the relation of the latter, through nationality or otherwise, to the enemy of the captor.

That the ship is guilty of certain forms of unneutral conduct such, for example,

³ In January, 1917, the German prize ship *Yarrowdale* was brought to Swinemunde, having on board a large number of prisoners, taken from certain British armed merchantmen which had been captured and sunk by German naval vessels. Among these individuals were some eighty-five American citizens. Practically all of the latter were engaged in service, principally as members of crews on the British vessels from which they had been taken. The several prisoners were subjected to many hardships after leaving the *Yarrowdale*. The Department of State demanded the release of those held who were of American nationality. This was, after some delay, granted. See correspondence in American White Book, European War, IV, 389-399.

⁴ Art. V, Malloy's Treaties, II, 2348.

Concerning the provisions of the convention, see Report of the Fourth Commission to the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 267, J. B. Scott, Reports to Hague Conferences, 736, where it is declared: "In present international practice, the men, the officers, and the captain composing the crew of a captured enemy merchant ship are treated as prisoners of war. The right of capture is, in a manner, applied to the crew as well as to the ship itself, often without endeavouring to distinguish between neutral subjects and enemy subjects."

⁵ Art. VI.

Declares Oppenheim: "However, the provision that members of the crew who were enemy subjects might only be made prisoners if they refused to give parole was *ipso facto* modified by the practice followed during the World War, according to which all enemy civilians of military age could be prevented from returning home, and could be interned. Accordingly, all the belligerents interned the enemy crews of captured enemy merchant vessels." (Lauterpacht's 5 ed., II, 220-221.)

⁶ Art. VII.

⁷ Art. VIII.

as blockade running, or the carriage of contraband, has not been deemed sufficient so to penalize the vessel as to make prisoners of war of its officers and crew,¹ and still less of neutral persons not officially connected with the ship. On the other hand, where the vessel, in spite of neutral register and flag, is primarily devoted to the military service of the belligerent enemy of the captor, the latter may deal with the ship as if it were a public enemy vessel, and treat its occupants accordingly.

In case a neutral ship, not given over to a belligerent service, takes part in hostilities, a belligerent against whose vessels such hostile acts are directed, might believe itself justified in dealing summarily with all persons officially connected with the vessel or who participated in such acts. To excuse the captor, the participation in hostilities should have manifested itself in the illegal opposition of force to force. The mere attempt of a neutral ship to frustrate the exercise of the right of visit and search through escape by flight would not, if unsuccessful, excuse the failure of the captor to accord officers and crew the rights of prisoners.

When a neutral ship is under extraordinary circumstances justified on grounds of self-defense in defending itself against extreme violence on the part of a belligerent vessel of war abusing its rights as such, by attempting to do something more than effect visit and search or capture, the conduct of the former is not tainted with an illegal quality, and hence does not deprive the occupants of the rights which in the event of capture under normal circumstances they might justly claim. It does not resemble "an opposition of illegal violence to legal right."² In case the neutral State should by any process nationalize armed vessels of its merchant marine so as to cause their assimilation to ships in its public service, a belligerent encountering them would be deprived of the claim that defensive neutral measures lacked a lawful aspect by reason of the absence of requisite public authority. It is not admitted, however, that such nationalization would be essential in order to establish the legality of the defensive act of an armed neutral ship, or the reasonableness of the claim of an occupant thereon to treatment, if captured, as a prisoner of war.³

b

§ 775. **Treatment.** In the treatment of prisoners, the belligerent finds itself subject to the operation of those general principles which are applied in land warfare.¹ The exigencies of maritime operations may, however, give rise to

§ 774.¹ Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 781, Moore, Dig., VII, 370.

The treatment as prisoners of war of enemy persons removed from neutral ships not subject to capture is not unreasonable under circumstances when the right of removal is admitted to exist.

See Carriage of Enemy Persons and Despatches, Mode of Interception, *infra*, § 820.

² Sir W. Scott in *The Maria*, 1 Ch. Rob. 340, 362; *id.*, 374.

See Attacks on Neutral Vessels, *supra*, §§ 750-751.

³ See President Wilson, war message to the Congress of April 2, 1917, For. Rel. 1917, Supp., 1, 195.

§ 775.¹ Art. LXXIX, Oxford Manual of Naval War, *Annuaire*, XXVI, 663, J. B. Scott, Resolutions, 193.

situations peculiar to engagements at sea, and calling for the temporary detention of prisoners afloat.

Doubtless the right to hold or intern prisoners of war on board of a ship and as a temporary measure, must be recognized.² In case of the exercise of it, the captor seems to owe a special duty to the prisoners to impose no unnecessary hardships, and to expose them to no unnecessary dangers. Should, for example, a submarine naval vessel capture an enemy ship carrying a large number of persons fairly subject to treatment as prisoners of war, it would appear to be normally the duty of the captor either to allow those persons to remain on their own ship, or to transfer them to another vessel equally or reasonably safe from the perils of the sea. In every case the propriety of exposing prisoners taken at sea to great personal danger or hardship would depend upon whether, under the particular circumstances, the captor had the right to deprive them of the safeguards of their own craft without substituting others of substantial value, a question of which the solution might hang upon the propriety of the measures by which capture was effected.³

7

SICK, WOUNDED AND SHIPWRECKED PERSONS

a

§ 776. **The Situation Prior to the Hague Convention of 1907.** A convention concluded at Geneva October 20, 1868,¹ by representatives of certain European Powers, proposed certain Articles to be added to The Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in time of War.² Articles VI to XV dealt with conditions of maritime warfare. The Articles of 1868, although acceded to by the United States March 1, 1882, subject to promulgation after general exchange of ratifications, had not been formally adopted or ratified by the Powers at the time of the Spanish-American War in 1898. An amendment to Article IX had been proposed by France, and in its correspondence with England that Article had been interpreted and elucidated. Upon the outbreak of war with Spain, the United States at once commissioned the ambulance ship *Solace* to accompany the Atlantic fleet as a non-combatant hospital ship, to be employed solely to render aid to the sick, wounded and

See Land Warfare, Prisoners of War, Treatment, *supra*, §§ 668-672.

Concerning the treatment of Spanish prisoners captured by American naval forces in 1898, see Moore, Dig., VII, 370-371, and documents there cited, contained in For. Rel. 1898.

"At the commencement of our participation in the World War a number of German naval officers who had been in our custody as internés automatically became prisoners of war. Some of them were in the immediate charge of the Navy Department, others had already been turned over to the War Department." (Commander Raymond Stone, U. S. N., in *Am. J.*, XIII, 406, 434.)

² Art. LXXI, Oxford Manual of Naval War, *Annuaire*, XXVI, 662, J. B. Scott, Resolutions, 192.

³ See Effect of Capture upon the Rights of the Occupants of the Captured Vessel, *supra*, § 755.

§ 776. ¹ Malloy's Treaties, II, 1907.

² *Id.*, II, 1903.

dying, and to observe in spirit the additional Articles of the Geneva Convention. On April 23, 1898, the United States was addressed by the Swiss Minister at Washington, who proposed the formal adoption by the Governments of both belligerents of the additional Articles as a *modus vivendi* during the existing war. The proposal was accepted by the United States and Spain.³

At the First Hague Peace Conference of 1899, there was concluded a convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864.⁴ The Convention of 1899 was, however, replaced by the provisions of the Tenth Convention of the Second Hague Peace Conference of 1907, with respect to the Adaptation to Naval War of the Principles of the Geneva Convention, at least as between the parties to the latter agreement.⁵

Inasmuch as the Geneva Convention of July 6, 1906, of which the principles were sought to be adapted to naval war through the Tenth Hague Convention of 1907, was replaced, as is noted elsewhere, by the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field,⁶ there is room for a fresh and appropriate naval convention applying to maritime warfare the principles enunciated in the later agreement.

b

The Hague Convention of 1907

(1)

§ 777. **Hospital Ships.** The special need of hospital ships to accompany a belligerent fleet in order to remove, care for and transport to a base hospital the sick and wounded, makes imperative the yielding to such vessels of an exemption from capture. The concession ought not, however, to be granted without assurance that hospital ships will not be employed for any hostile purpose whatsoever. The Hague Convention of 1907 contains the declaration that the "Governments undertake not to use these ships for any military purpose."¹ It is provided also that hospital ships shall in no wise hamper the movements of

³ Circular of Mr. Day, Secy. of State, May 13, 1898, *id.*, II, 1912, followed by correspondence indicating the position of the United States with respect to the *modus vivendi*. See, also, Moore, Dig., VII, 372-378.

⁴ Malloy's Treaties, II, 2035.

⁵ *Id.*, II, 2326, and especially Art. XXV, *id.*, 2337.

⁶ The Geneva Convention of 1929, *supra*, § 681A.

§ 777. ¹ Art. IV.

Concerning the Convention, see Report of Committee of Examination to the Third Commission of the Hague Conference (Mr. Renault, Reporter), *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 70, J. B. Scott, Reports to Hague Conferences, 715; *Am. J.*, II, 295; A. P. Higgins, Hague Peace Conferences, 382-394; War and the Private Citizen, 73-76; *Law Quar. Rev.*, XXVI, 408; Oppenheim, Lauterpacht's 5 ed., II, 398-404, with bibliography; Laws of Maritime Warfare affecting Rights and Duties of Belligerents (as existing Aug. 1, 1914), prepared by Harold H. Martin and Joseph R. Baker, Dept. of State, 1918, 563-600.

Section XVI of the Instructions for the Navy of the United States governing Maritime Warfare, of June 30, 1917, announced that "Officers will be governed by the provisions of Convention III, Hague, 1899, and Convention X, Hague, 1907, for the adaptation to maritime warfare of the principles of the Geneva Convention."

See Naval War College, Int. Law Situations, 1935, 113.

the combatants, that during and after an engagement they will act at their own risk and peril, that they are subject to belligerent control and search, that they may be refused help, ordered off, compelled to take a certain course, obliged to take on board a commissioner, and that they may even be detained "if important circumstances require it."² By such process an opposing belligerent is empowered to prevent abuse of the immunity accorded.³ It is provided also by way of penalty that hospital ships and sick wards of vessels cease to be entitled to protection if employed for the purpose of injuring the enemy. The arming, however, of the staff of such vessels and wards for the maintenance of order and for defense of sick and wounded, as well as the presence of wireless telegraphy apparatus, is not made a sufficient reason for withdrawing protection.⁴

Immunity from capture is granted to hospital ships of the following classes: first, to military hospital ships, described as vessels constructed or assigned by States specially and solely with a view to assist the wounded, sick and shipwrecked;⁵ secondly, to hospital ships equipped wholly or in part at the expense of private individuals or officially recognized relief societies, and officially commissioned by the belligerent power to which they belong;⁶ and thirdly, to hospital ships equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries, if placed under the control of one of the belligerents, with the previous consent of their own government and with the authorization of that belligerent.⁷ The immunity of such ships of each class is made dependent upon the communication of their names to the belligerent powers at the commencement or during the course of hostilities, and in any case before employment.⁸

Military hospital ships are to be distinguished by being painted white out-

² Art. IV. It was here also declared that "As far as possible the belligerents shall enter in the log of the hospital-ships the orders which they give them."

³ Concerning the temptation of a naval line officer to employ a hospital ship for military purposes, see Surgeon Frank L. Pleadwell, U.S.N., "The Relationship of the Hospital Ship and Medical Transport to the Fleet in Time of War," *The Military Surgeon*, XXXIII, 318. See, also, The Orel, Hurst and Bray's Russian and Japanese Prize Cases, II, 354.

⁴ Art. VIII.

⁵ Art. I.

In the case of the "Ophelia," 3 Lloyd's Prize Cases, 13, the Prize Court concluded May 21, 1915, that the vessel, a German hospital ship, "was not constructed, adapted, or used for the special and sole purpose of affording aid and relief to the wounded, sick and shipwrecked; and that she was adapted and used as a signalling ship for military purposes." (*Id.*, 117.) It was held that the vessel had forfeited protection claimed under the Hague Convention, and it was condemned as lawful prize. On May 8, 1916, the Judicial Committee of the Privy Council agreed with this finding, which, as it said, justified the condemnation of the vessel as lawful prize. *Id.*, 121, 150-151. A variety of circumstances impelled the latter tribunal to reach this conclusion. Among them may be noted the possession by the ship of signalling apparatus and equipment regarded as very largely in excess of the narrow limits necessary for a *bona fide* hospital ship; the destruction, after capture, of a record of the number of signal lights on board; the unsatisfactory condition of the principal log; and also the spoliation of documents when the vessel was about to be searched.

⁶ Art. II. It is required that ships of this class be provided with a certificate from the competent authorities declaring that they have been under the control thereof while fitting out and on final departure.

⁷ Art. III.

⁸ "No question is raised as to the necessary formalities to constitute the *Ophelia* a hospital ship having been complied with. She had a proper certificate, and her name had been duly communicated to the belligerent Powers." (The Steamship "Ophelia," judgment of the Judicial Committee of the Privy Council, May 8, 1916, 3 Lloyd's Prize Cases, 121, 123.)

side with a horizontal band of green about a meter and a half in breadth; the other two classes of hospital ships are to be painted white outside with a horizontal band of red of similar width.⁹ All hospital ships are required to make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and also, if belonging to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed. Hospital ships which, under the terms of the Convention, are detained by the enemy, must haul down the national flag of the belligerent to which they belong. It is declared that ships desiring to insure by night freedom from interference to which they are entitled, must, subject to the assent of the belligerent which they are accompanying, take necessary measures to render their special painting sufficiently plain. The foregoing distinguishing signs are only to be used, whether in time of peace or war, for protecting or indicating the ships mentioned.¹⁰

(2)

§ 778. The Sick and Wounded on Board Vessels of War. In case of a "fight on board" a vessel of war, it is declared that the sick wards are to be respected and spared as far as possible. It is provided that such wards and the *matériel* belonging to them remain subject to the laws of war; but that they cannot be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.¹ The commander, however, into whose hands they have fallen is permitted to apply them to other purposes, if the military situation requires it, "after seeing that the sick and wounded on board are properly provided for."

The religious as well as medical and hospital staff of any captured vessel is declared to be inviolable, and its members are not to be made prisoners of war. On leaving the ship they are permitted to take with them the objects and surgical instruments which are their own private property. Such staff is obliged to discharge its duties while necessary, and may afterwards leave when the commander-in-chief considers it possible.² It is said that sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, to whatever nation they belong, are to be respected and tended by the captors.³

(3)

§ 779. Assistance of Neutral Vessels. Belligerents are permitted to appeal to the charity of the commanders of neutral merchant ships, yachts or boats to take on board and tend the sick and wounded. It is provided that vessels re-

⁹ Art. V. It is declared that "The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting."

¹⁰ Art. VI.

§ 778. ¹ Art. VII.

² Art. X. It is also provided that "The belligerents must guarantee to the said staff when it has fallen into their hands the same allowances and pay which are given to the staff of corresponding rank in their own navy."

³ Art. XI.

sponding to such an appeal, and also those which have of their own accord rescued sick, wounded or shipwrecked men, shall enjoy special protection and certain immunities. In no case are they to be captured for having such persons on board. Apart, however, from special undertakings given to them, such neutral commanders remain liable to capture for the commission of any violations of neutrality.¹

If sick, wounded or shipwrecked persons are taken on board a neutral vessel of war, it is declared that every precaution must be observed that they do not again take part in the operations of the war.² Acknowledgment that such a vessel may not unlawfully render aid to such individuals betokens a respect for the dictates of humanity not counterbalanced by any opposing military considerations.³

(4)

§ 780. **Surrender to a Vessel of War, of Sick, Wounded, or Shipwrecked Persons.** The Hague Convention permits a belligerent vessel of war to demand the surrender to itself of the sick, wounded or shipwrecked persons on board hospital ships of every kind, as well as upon merchant ships, yachts

§ 779. ¹Art. IX. Concerning this Article, see Report of Mr. Renault, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 74, J. B. Scott, Reports to Hague Conferences, 719.

²Art. XIII.

³See Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 75-77, concerning the treatment of the sailors of certain Russian vessels whose crews had been rescued at Chemulpo by neutral cruisers in the Russo-Japanese War.

Shipwrecked persons embrace those obliged to take to lifeboats by reason of attacks upon or destruction of the vessel of which they were occupants. Within that category may be individuals of every nationality and kind, including obviously those who would and those who would not be subject to restraint or treatment as prisoners of war in case of rescue by the captor.

Upon the destruction by a German naval submarine vessel of certain enemy merchantmen off the coast of New England in October, 1916, American destroyers were sent from Newport by Rear-Admiral Knight, U.S.N., to rescue persons from the lifeboats in which they had been obliged to take refuge, and to land them on American soil. This work of rescue was not illegal, and was supposedly regarded with approval by Germany, inasmuch as the good offices so rendered by the United States Navy served in fact to offer a place of safety which it was the legal duty of the German submarine to offer to the persons on board the vessels attacked.

"Two new classes of cases, however, which occurred during the World War, raised difficulties as to the proper interpretation of this article. (1) It speaks only of neutral *men-of-war*, and says nothing concerning the case in which other neutral *public vessels*—such as lightships, revenue cutters, and the like—rescue wounded, sick, or shipwrecked soldiers or sailors. There ought to be no doubt that this article must be applied to such vessels by analogy, although during the World War it was reported that Holland did not detain, but released, a number of German airmen who had been rescued by a Dutch public lightship (see Spaight, *Air Power*, 436).

"In the case of the *Runhild*, the question arose whether Article 13 applied if a neutral warship rescued wounded, sick, or shipwrecked soldiers or sailors, not on the open sea, but within the maritime belt of the neutral concerned. The *Runhild* was a Swedish vessel, captured in November 1916, by a German submarine. While being navigated by a prize crew towards a German port, she struck a mine and sank. All on board entered the lifeboats and rowed towards the Swedish coast; after having reached the Swedish maritime belt, they were taken on board by a Swedish torpedo boat and subsequently landed in Sweden. The prize crew were at first interned by Sweden according to Article 13; but, on protest from Germany, they were released in July 1917, the Swedish Government asserting—incorrectly, I believe—that this article only applies when the rescue is effected on the open sea (see Feilchenfeld in *Strupp, Wört.*, ii, p. 410)." (Oppenheim, McNair's 4 ed., II, 553, footnote 5.)

or boats, irrespective of the nationality of such vessels.¹ The propriety of this provision has been the subject of much discussion. Its value at the present time is not to be tested by the consideration whether the right itself accords with the general principle "by virtue of which the combatants of a belligerent who fall into the hands of the adversary thereby become its prisoners,"² but rather by the inquiry whether the belligerent demand should be deemed of greater consequence than the physical needs of the unfortunate persons whose surrender may be sought. It is believed that the right as expressed in the Convention unwisely fails to discriminate between hospital ships of the three classes above described, and private ships of neutral flag not under public control. The placing of the individuals specified in a single category, regardless of their physical condition, is also unfortunate. The beneficent work of a hospital ship violating no duty imposed by the Convention should not be thwarted by interference tending to increase the sufferings of the sick and wounded, and to cause needless death. The military detriment to a belligerent deprived of gaining control or restraint of such individuals is not likely to prove serious. The dictates of humanity appear to demand accordingly appropriate modification of the arrangement.

(5)

§ 781. **Miscellaneous Provisions.** The shipwrecked, wounded or sick of one belligerent who fall into the power of the enemy are declared to be prisoners of war. The captor is given the decision, according to circumstances, whether to keep them or to send them to a port of his own country, or to a neutral port, or to an enemy port.¹

Such individuals who are landed at a neutral port with the consent of the local authorities, in the absence of a contrary arrangement between the neutral State and the belligerent States, must be guarded by the former "so as to prevent them again taking part in the operations of the war."²

After every engagement it becomes the duty of the opposing belligerents, so far as military interests permit, to take steps to look for the shipwrecked, sick and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.³

Every belligerent is obliged to send, as early as possible, to the authorities of

§ 780. ¹ Art. XII.

² Report of Mr. Renault, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 75, J. B. Scott, Reports to Hague Conferences, 720. The Article was said to correspond to an amendment presented by the German delegation, but, as Mr. Renault said, "makes the provision general." The German proposal appeared to contemplate the belligerent demand for surrender merely in the case of neutral merchant ships, yachts or boats.

Concerning the Article, see A. P. Higgins, *Hague Peace Conferences*, 387-389; Westlake, 2 ed., II, 188-189; J. B. Scott, *Hague Peace Conferences*, I, 609-610.

See, also, position of Captain A. T. Mahan, U.S.N., of the American delegation at the First Hague Peace Conference of 1899, Holls, 497-506.

§ 781. ¹ Art. XIV. It is declared that repatriated prisoners cannot serve again while the war lasts.

² Art. XV. It is here also declared that "the expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded belong."

³ Art. XVI. It is also here provided that "they shall see that the burial whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse."

their country, navy or army, the military marks or documents of identity found on the dead, and the description of the sick and wounded who have been picked up. It is provided that the belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded. All the objects of personal use, valuables, letters, etc., found on captured ships, or left by the sick and wounded who died in hospital, are to be collected for forwarding to the persons concerned by the authorities of their own country.⁴

C

§ 782. Results of World War I. German submarine attacks on Allied hospital ships in the course of World War I were notorious.¹ The allegation by the German Government in its memorandum of January 28, 1917,² of misuse of British hospital ships was in all probability put forth as an excuse for the deliberate attacks upon such vessels incidental to a naval policy which sought to divert enemy destroyers from the work of safeguarding the transportation of military forces and supplies to that of convoying hospital ships.³ The ruthlessness of the plan caused the British Government to remove from such vessels their distinctive markings and to conceal rather than proclaim their beneficent missions.⁴

⁴ Art. XVII. According to Art. XVIII, the provisions of the Convention do not apply except between the contracting powers, "and then only if all the belligerents are parties to the Convention."

According to Art. XIX, which corresponds to Art. XXV of the Geneva Convention of 1906, the commanders-in-chief of the belligerent fleets must see that the above Articles are properly carried out; they are obliged also to see to cases not covered thereby, in accordance with instructions of their respective Governments, and in conformity with the general principles of the Convention.

Art. XX contains the important provision that the signatory powers must take necessary measures to bring the provisions of the Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, "and for making them known to the public."

Art. XXI, corresponding to Arts. XXVII and XXVIII of the Geneva Convention of 1906, makes provision for the repression of abuses and infractions by undertakings for the enactment or proposal to the legislatures of the signatory powers, of appropriate criminal laws.

Art. XXII declares that "In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship."

See, also, Arts. LXXXI-LXXXVII of Oxford Manual of Naval War, *Annuaire* XXVI, 664-665, J. B. Scott, Resolutions, 193-195.

§ 782.¹ Report of Commission of Responsibilities, Paris Conference of 1919, Annex I, No. 24, Carnegie Endowment for International Peace, Division of Int. Law, Pamphlet No. 32, p. 11.

See, also, *The War on Hospital Ships from the Narratives of Eye-witnesses*, London, 1917; Hall, Higgins' 8 ed., 481.

See instances mentioned and well discussed in J. W. Garner, *Int. Law and The World War*, I, §§ 316-319.

"Even hospital ships . . . have been sunk with the same reckless lack of compassion or of principle." President Wilson, address to the Congress, April 2, 1917, *For. Rel.* 1917, Supp., 1, 195, 196.

² See Misc. No. 16 (1917), Cd. 8692, p. 3. See, also, German memorandum of March 29, 1917, concerning the adoption of further measures against the misuse of hospital ships, *id.*, p. 5; detailed British reply to the German allegations, *id.*, p. 8.

³ Rear-Admiral W. S. Sims, U.S.N., "The Victory at Sea," *World's Work* (Sept., 1919), XXXVIII, 488.

⁴ Statement of British Admiralty, April 23, 1917, U. S. Naval War College, *Int. Law Docu-*

It must be clear that it is a constant temptation to a belligerent to employ a hospital ship for minor military uses such as the transportation of individuals or supplies, or the communication of intelligence, and so to rob such a vessel of its normal immunities.⁵ If, however, a hospital ship remains unarmed, the right of the enemy to prevent the abuse of its privileges, as by capture and detention, ought not to embrace the right also to attack the ship as if it were a cruiser.⁶ The Hague Convention does not sanction such procedure.

Nevertheless, as a means of safeguarding hospital ships and of facilitating their legitimate employment, there is believed to be need of further international arrangement announcing with precision the particular services which such vessels are forbidden to perform, and prohibiting, on the other hand, at all times attacks upon them, unless they are armed.

8

ENEMY CHARACTER IN RELATION TO PROPERTY AT SEA

a

§ 783. **General Liability of Enemy's Property to Seizure.** In general, enemy property at sea, such as vessels, whether public or private, save those enjoying special exemptions, as well as enemy property thereon, are subject to seizure and confiscation.¹ This is due to the circumstance that the special objects of maritime war embrace "the destruction of the enemy's commerce and means of communication and the weakening or destruction of the enemy's means of defense and support."²

ments, 1918, 90. See, also, note of International Red Cross Committee, of Geneva, to German Government, *id.*, 90, note 1.

Declared the Naval War College in 1935: "There were many charges and counter-charges in regard to the misuse of hospital ships during the World War. The French Government even announced that its hospital ships would carry a certain number of German officers who had been made prisoners of war, and in retaliation the German Government announced that it would expose French officers in the war zone on land. In the Mediterranean the controversy was adjusted by an agreement in September 1917, that a Spanish officer should accompany the hospital ship in order to see that the Hague Convention should be observed. The experience of the World War showed that in spite of revisions, the Geneva convention should have still further revision to meet new and changing conditions of warfare. Such questions arise as: What should be the degree of sickness entitling a military man to travel upon a hospital ship; how far may hospital ships evacuate crowded hospitals on land; might a transport ship on an outward voyage to the seat of war act as a hospital ship carrying sick and wounded on its return?"

"In general the tendency during the World War was to interpret convention X strictly and to confine the action of the ships to 'assisting the wounded, sick, and shipwrecked,' and not including those wounded or sick on land by evacuating land hospitals." (Int. Law Situations, 1935, 106-107.)

⁵ Surgeon (now Medical Director) Frank L. Pleadwell, U.S.N., in *The Military Surgeon*, XXXIII, 318.

⁶ See Attack, Unarmed Public Vessels, *supra*, § 740; also Attack, Certain Conclusions, *supra*, § 745.

¹ § 783. ¹ Clifford, J., in *The William Bagaley*, 5 Wall. 377, 405; Sir Samuel Evans, President of the Prize Court, in *The Roumanian*, 1 Lloyd's Prize Cases, 191, 286; Naval War College, Int. Law Topics, 1913, 91-92; Naval Instructions Governing Maritime Warfare, June 30, 1917, Section IX; *Hannay v. Eve*, 3 Cranch, 242, Moore, Dig., VII, 398.

² Wilson, Int. Law, 2 ed., 297. See, also, Dana's Wheaton, § 355, and Dana's Note, 171,

The question constantly presents itself, therefore, respecting what should be deemed the basis of the relationship between various forms of property afloat and the enemy, such as to stamp the former with a hostile character and justify its treatment accordingly. It will be seen that property, whether ships or cargoes, may be associated with the enemy in one of at least two distinct ways. The property may be said to belong to or within hostile territory, and thus gain its national character from its own relation thereto, regardless of the non-hostile character of the owner. Again, the connection between the owner and the enemy or its territory may prove to be such as to cause the property to be deemed to partake of a hostile character. In each particular case the inquiry presents itself, directly or indirectly, whether it is the nature of the relationship of the property concerned, or of the owner thereof, with the enemy, which establishes the decisive bond.

b

Ships

(1)

§ 784. **Enemy Character.** A ship may attain so close a connection with the enemy of a particular belligerent as to justify its assertion that the vessel be regarded as having what may be described as an enemy character. The requisite connection is always apparent when a ship has had the national character of the enemy impressed or stamped upon it by the authority of its government from which the documents of the vessel issued.¹ Thus, hostile nationality breeds a hostile character. It will be seen, however, that even when a vessel fails to possess the nationality of the enemy, it may, nevertheless, be so intimately associated therewith as to be regarded as clothed with an enemy character and hence subject to capture as an enemy ship. This circumstance has caused a recent writer to observe that "only in a definitely confined sense are 'enemy character' and 'enemy nationality' synonymous."² Failure to heed this fact has led to a

quoted by Sir Samuel Evans in *The Miramichi*, 1 Lloyd's Prize Cases, 157, 168-170, where the learned judge declared: "There is no distinction now to be made between capture at sea and seizure in port; and apart from the practice introduced by the Declaration of Paris in favour of neutral vessels, it does not matter in what ship the cargoes seized or captured may happen to be."

§ 784. ¹ *The William Bagaley*, 5 Wall. 377, 410.

"It was argued that the *Pedro* was not liable to capture and condemnation because British subjects were the legal owners of some and equitable owners of the rest of the stock of *La Compañía La Flecha*, and because the vessel was insured against risks of war by British underwriters. But the *Pedro* was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish flag and a Spanish license; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship and to be dealt with accordingly." (Chief Justice Fuller, in *The Pedro*, 175 U. S. 354, 367-368, citing *Story on Prize Courts*, Pratt's ed., 60, 66, and cases there cited, *The Friendschaft*, 4 Wheat. 105, *The Ariadne*, 2 Wheat. 143, *The Cheshire*, 3 Wall. 231, Hall, Int. Law, section 169.) See, also, *The Guido*, 175 U. S. 382.

See *The Manchuria*, Hurst and Bray's Russian and Japanese Prize Cases, II, 52, 55-56; *The Marie Glaeser*, 1 Lloyd's Prize Cases, 56, 111.

See Corporations, *infra*, § 794.

² Robert Rienow, *The Test of the Nationality of a Merchant Vessel*, New York, 1937, 130. See also *id.*, Chap. VI.

confusion of thought manifesting itself in some important instruments declaratory of policy if not of law.

The Declaration of London of 1909,³ and the Oxford Manual of Naval War of 1913,⁴ together with the United States Naval Instructions Governing Maritime Warfare of June 30, 1917,⁵ announced the conclusion that the neutral or enemy character of a ship is governed by the neutral or enemy character of the State whose flag the vessel has a right to fly.⁶ This formula was unfortunate for the reason that it failed to take sufficient cognizance of situations where ships under a neutral flag and possessed of a neutral nationality might, nevertheless, attain such a relationship to a war as to destroy the reasonableness of any claim that they should not be dealt with as belligerent vessels. Some of those situations and the consequences of them had been generally acknowledged before the signature of the Declaration of London;⁷ others were recognized in the terms

³ Art. LVII, which provided that "Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

"The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in nowise affected by, this rule." (Charles' Treaties, 279.)

See, in this connection, Report of Mr. Renault in behalf of the Drafting Committee, *id.*, 314; *Proceedings of International Naval Conference*, Misc. No. 5 [1909], Cd. 4555, 115-119; Higgins' 8 ed. of Hall, 587, note 1.

⁴ Art. LI, *Annuaire*, XXVI, 658, J. B. Scott, Resolutions, 186.

⁵ No. 56.

The United States has concluded numerous treaties embodying provisions like those contained in Art. VII of the treaty with the Argentine Republic, of July 27, 1853, Malloy's Treaties, I, 22, in which it is declared: "The contracting parties agree to consider and treat as vessels of the United States and of the Argentine confederation all those which, being furnished by the competent authority with a regular passport or sea-letter, shall, under the then existing laws and regulations of either of the two Governments, be recognized fully and *bona fide* as national vessels, by that country to which they respectively belong." It should be observed that this provision has reference to national rather than enemy character.

⁶ "It has been contended that a ship under a neutral flag may nevertheless be treated as an enemy ship if she is owned in whole or in part by an enemy, but the proposition stated in this general way appears to His Majesty's Government to go too far, and to be difficult as well as unjust in application. In existing circumstances its application would sometimes amount to absurdity, because it might be that the ownership by an enemy subject of one sixty-fourth only of a vessel divided between sixty-four private owners would turn that ship into an enemy vessel, whereas a ship owned by a limited company registered in a neutral country would not be an enemy ship, although the large majority of its shareholders might conceivably be citizens or subjects of the enemy State. On the whole, His Majesty's Government consider that it would be right to assent to the principle that the test of the nationality of the ship should be the flag which she is entitled to fly." (Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary to the London Naval Conference, Dec. 1, 1908, Misc. No. 4 [1909], Cd. 4554, p. 32.)

A British order in council of Nov. 2, 1914, adopting certain provisions of the Declaration of London, accepted the requirement of Art. LVII determining the neutral or enemy character of a vessel by the flag which she was entitled to fly. For. Rel. 1914, Supp., 262. In the case of *The Proton*, 7 Lloyd's Prize Cases, 208, the Judicial Committee of the Privy Council recognized the positive prescription as to national character there laid down, but declared that the Crown could not by an order in council prescribe the law to be administered by the Prize Court (adverting to the decision in *The Zamora* [1916] 2 A. C. 77), and that such a tribunal had a duty, notwithstanding such order, to consider proved facts in order to ascertain what the character of a ship really was. In the particular case it was found that the vessel did not belong to the appellant, a Greek, and that his ostensible ownership thereof was "a mere blind to enable a German ship to conceal her character by continuing to fly the Greek flag as before." The vessel was regarded as an enemy ship.

See *The Solveig*, *Conseil des Prises*, Oct. 8, 1915, Fauchille, *Jurisprudence Française*, 126, *Journal Officiel*, Nov. 12, 1915.

Also *The St. Tudno*, 2 Brit. and Col. Prize Cases, 272.

⁷ See Oppenheim, *Lauterpacht's* 6 ed., II, 223, where it is observed that: "Even before the

of that instrument;⁸ still others, not so recognized, were seen in their full significance during World War I.⁹ That conflict served to bring home to interested States a consciousness of the unrealistic aspects of the formula, and thus to hasten the denunciation of Article 57 of the Declaration of London as a test of ascertaining whether a vessel possessed an enemy character and should be dealt with as an enemy ship.¹⁰

In 1934, the Naval War College made the following significant statement: "The purpose of the annulment of article 57 by the Allied Powers was to enable the prize courts to look beyond the right to fly the flag to the actual ownership of the vessel which might be a corporation, the stock of which was for the most part enemy- rather than neutral-owned. That the owner should bear the legitimate risk of loss in case of capture seemed a logical conclusion, and ownership which might in time of peace be advantageous to all, might in time of war, if carried by a neutral flag, escape such liability."¹¹

At the present time, it would be difficult to maintain that a belligerent State violates international law when it treats as an enemy ship a vessel which be-

World War, the flag of a neutral State was the deciding factor only when the vessel was legitimately sailing under it; should it be found that a vessel sailing under the flag of a certain neutral State had, according to the Municipal Law of such State, no right to fly the flag she showed, the real character of the vessel had to be determined in order to decide whether or not she bore enemy character."

⁸ Thus it was declared in Art. 46: "A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

"(1) If she takes a direct part in the hostilities;

"(2) If she is under the orders or control of an agent placed on board by the enemy Government;

"(3) If she is in the exclusive employment of the enemy Government;

"(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

"In the cases covered by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation." (Charles' Treaties, 277.)

⁹ Such was the case with respect to instances where enemy-owned vessels were registered under neutral flags.

The United States when a neutral in the course of World War I, appeared to be inclined to test the enemy character of a ship, at least in some cases, by the nationality of the vessel, and to challenge the right of a belligerent to regard as an enemy ship subject to treatment as such, a vessel lawfully flying the American flag. See Mr. Lansing, Secy. of State, to the British Ambassador at Washington, May 10, 1916, For. Rel. 1916, Supp., 388.

¹⁰ In Oct., 1915, the annulment by Great Britain and France of Art. 57 of the Declaration of London was duly announced. See documents in For. Rel. 1915, Supp., 179-182.

Following his discussion of decisions of the British Prize Court interpretative of Art. 57 of the Declaration of London in his work on Prize Law During the World War (369-383), Prof. Garner declares that according to the views of those tribunals "a non-enemy flag, whether British or neutral, was never regarded as conclusive as to the non-enemy character of the ship—not even when Article 57 of the Declaration of London was in effect and admitted to be binding. On the other hand, the enemy flag was held to be conclusive as to enemy character, and claimants were not allowed to produce 'further proof' to establish neutral ownership." See especially *The Proton*, 7 Lloyd's Prize Cases, 208.

¹¹ Int. Law Situations, 1934, 20.

See in this connection *The Hamborn*, 7 Lloyd's Prize Cases, 67, 71, where Lord Sumner in the judgment of the Judicial Committee of the Privy Council declared: "The true question is one, in the President's phrase, of determining the neutral or enemy character of the *Hamborn*. Unless either her Dutch flag, or the place of residence of her subordinate managers, or some or all of these matters be conclusive, she bore a character which justified her condemnation, for she formed part of that enemy commerce, which a belligerent is entitled to disable and restrain."

longs to the enemy by reason of possessing its nationality, or when the vessel, even though without that nationality, is in fact engaged in the public service of the enemy, or is operating under its control, or is substantially owned by the nationals thereof.¹² In a word, if during the war, the ship is associated with the enemy by ties of nationality, service, control or ownership, its capture by the opposing belligerent as an enemy vessel is not internationally illegal or a violation of a legal obligation towards any State with which the ship may be associated by ties akin to those of nationality. Nor is it to be anticipated that in maritime wars that remain to afflict the world States that participate therein will be inclined to agree to accept a narrower test of enemy character. Their grim determination to seize and condemn through the convenient instrumentalities of prize courts vessel property thus related to the enemy will not be relaxed through deference for a formula which as registered in the Declaration of London came to be regarded as an inconvenient and undesirable deterrent.

(2)

TRANSFER OF ENEMY SHIPS TO NEUTRALS

(a)

§ 785. **Public Ships.** A belligerent State cannot deprive the enemy of the right to capture a public ship of the former by its sale in good faith and for a commercial purpose to a neutral purchaser, and even at a time when the vessel is in neutral waters.¹ Notwithstanding the validity of the transaction according to the law of the neutral State where the property is at the time of transfer, the law of nations may be said to permit the enemy of the vendor to disregard the sale and treat the vessel as though title still remained in the seller.²

(b)

§ 786. **Private Ships.** The United States has long maintained that a neutral national may lawfully purchase a private ship under a belligerent flag and thereby acquire a title to be respected by the enemy of the State of the vendor, provided the transaction is a *bona fide* one, by the terms of which no right to purchase or recover the vessel is reserved to the seller, and the price paid gives

¹² It will be recalled that the Joint Resolution approved May 12, 1917, 40 Stat. 75, whereby the President was enabled to take over for the United States title to certain German and other foreign vessels was based upon the enemy ownership or enemy flag or register of the ships concerned. See *supra*, § 765.

See The "*Elvira III*," Lloyd's Prize Cases, I, 2 Series, 8.

§ 785.¹ The Georgia, 7 Wall. 32, 42, where it was said that "The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy. The removed armament of a vessel, built for war, can be readily replaced, and so can every other change be made, or equipment furnished for effective and immediate service." Reliance was placed upon the case of The Minerva, 6 Ch. Rob. 396.

² "The Transfer of War Vessels from Belligerents to Neutrals," editorial comment, *Am. J.*, IX, 195. See also Lauterpacht's 6 ed. of Oppenheim, II, 231-232, and 600, footnote 1.

evidence of a reasonable sacrifice by the purchaser.¹ Other considerations, such as the motives impelling a sale, have not been deemed to be decisive of the validity of the transaction. It has been observed, however, that as the opportunities for fraud are great, "the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war."²

In contrast to this view the idea has prevailed among certain European States that a transfer, if made after the outbreak of hostilities, should be deemed null and void.³ Again, the theory has been vigorously advocated that the propriety and validity of a sale should depend upon the absence of circumstances showing that transfer was effected with a view to avoiding consequences attending the retention by the vessel of its belligerent character.

The provisions of the Declaration of London purport to make application of this idea by the establishment of certain rules to indicate when the purpose of evading the consequences of enemy character may be brought home to the vendor, and when not. The method adopted with such a view is based upon the relation of the transfer to the time of the outbreak of hostilities. Thus the absence of the noxious intention is deemed to be apparent in proportion to the length of time intervening between the transfer and the commencement of war, and the presence of such intention to be presumed in the event of a transfer following the outbreak thereof.

§ 786.¹ Opinion of Mr. Cushing, Atty. Gen., 6 Ops. Attys. Gen., 638, Moore, Dig., VII, 415; also Mr. Marcy, Secy. of State, to Mr. Mason, Feb. 19, 1856, MS. Inst. France, XV, 321, Moore, Dig., VII, 416; Mr. Cass, Secy. of State, to U. S. consuls, circular No. 10, June 1, 1859, MSS. Dept. of State, Moore, Dig., VII, 417; open letter of Mr. Boutwell, Secy. of Treas., to Mr. Washburne, Minister to France, May 23, 1871, sent to Mr. Fish, Secy. of State, on the same day, MS. Misc. Letters, Moore, Dig., VII, 418; Mr. Fish, Secy. of State, to Mr. Marsh, Jan. 29, 1877, MS. Inst. Italy, II, 11, Moore, Dig., VII, 418; Mr. Evarts, Secy. of State, to Mr. Christiancy, Minister to Peru, June 20, 1879, For. Rel. 1879, 884, Moore, Dig., VII, 419; Same to Same, Dec. 26, 1879, For. Rel. 1879, 894, Moore, Dig., VII, 420. See, also, in this connection, The Virginia, *Conseil des Prises*, *Journal Officiel*, June 30, 1916, 5750.

See *Murray v. Schooner Charming Betsy*, 2 Cranch, 64, 118, Moore, Dig., VII, 415.

"This Government is in receipt of information that ships carrying the Spanish flag have been, or are about to be, furnished with British or other neutral papers upon colorable transfers of ownership, made for the purpose of avoiding belligerent capture. It is desired that any such cases coming to your notice should receive your immediate attention, and that steps should be taken to prevent the colorable and void transfers of vessels under the Spanish flag to a neutral flag." (Circular, Mr. Day, Secy. of State, to the diplomatic and consular officers of the United States, July 1, 1898, For. Rel. 1898, 1176, Moore, Dig., VII, 422.)

² The language employed in the text is that of Hall, 4 ed., 525, quoted by Chief Justice Fuller in *The Benito Estenger*, 176 U. S., 568, 578. He cited Story, *Notes on Principles and Practice of Prize Courts* (Pratt's ed.), 63, *The Sechs Geschwistern*, 4 C. Rob. 100, *The Jemmy*, 4 C. Rob. 31, *The Omnibus*, 6 C. Rob. 71, *The Island Belle*, 13 Fed. Cases, 168, *The Baltica*, Spinks' Prize Cases, 264, *The Soglasie*, Spinks' Prize Cases, 104, *The Ernst Merck*, Spinks' Prize Cases, 98.

See, also, R. T. Mount, "Prize Cases in the English Courts Arising Out of the Present War," *Columbia Law Rev.*, XV, 316, 327-334, in connection with the cases of *The Tommi* and *The Rothersand* [1914], p. 251.

³ See, for example, memorandum of France respecting transfer of flag, offered at the International Naval Conference of 1908-1909, and also that of Russia, likewise there offered, *Proceedings*, International Naval Conference, Misc. No. 5 [1909], Cd. 4555, 113 and 114, respectively.

Accordingly it is provided that the transfer of an enemy vessel to a neutral flag effected before the outbreak of hostilities is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.⁴ Again, if the transfer was effected more than thirty days before the outbreak of hostilities, there is said to be an "absolute presumption" that it is valid if it is unconditional, complete and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from, the employment of the vessel remain in the same hands as before the transfer. If, however, the vessel lost belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is, according to the Declaration of London, void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, said to be an absolute presumption that the transfer is void: (a) if the transfer has been made during a voyage or in a blockaded port; (b) if a right to repurchase or recover the vessel is reserved to the vendor; (c) if the requirements of the municipal law governing the right to fly the flag under which such vessel is sailing have not been fulfilled.⁵

It has been observed that "during the World War, Articles 55 and 56 of the

⁴ Art. LV, Charles' Treaties, 278; also General Report of Drafting Committee, *id.*, 311; Report of the American delegation to the Secy. of State, *id.*, 336. See, also, memorandum submitted by Prof. Wilson, of the American delegation, *Proceedings*, International Naval Conference, Misc. No. 5 (1909), Cd. 4555, 290.

⁵ Art. LVI, Charles' Treaties, 279. See, also, General Report of Drafting Committee, *id.*, 311.

In a communication from Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Feb. 10, 1915, with regard to the transfer to a neutral flag of enemy ships belonging to companies incorporated in enemy territory, but all of whose stockholders were neutral, it was said. "The rules applied by the British and by the American prize courts have always treated the flag as conclusive in favour of the captors in spite of neutral proprietary interests (see the case of the *Pedro*, 175 U. S. 354). In several cases, however, we have consented to waive our belligerent right to treat as enemy vessels ships belonging to companies incorporated in Germany which were subsidiary to and owned by American corporations. The only condition which we have imposed is that these vessels should take no further part in trade with the enemy country." (For. Rel. 1915, Supp., 324, 333.)

See decision of the *Conseil des Prises* in the case of *The Colonia*, *Journal Officiel*, June 15, 1915, 3952, where the transfer was deemed invalid.

According to Art. 67 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A prize court may treat as an enemy vessel:

"(a) A vessel transferred after the outbreak of war from the flag of a belligerent to the flag of a neutral State unless it is proved that such transfer was not made in order to evade capture by the enemy. But the court may decline to receive such proof: (1) If the transfer has been made while the vessel was on a voyage or was in blockaded territory; (2) If a right to repurchase or recover the vessel is reserved to the vendor; (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

"(b) A vessel transferred within thirty days before the outbreak of war, if it is proved that such transfer was made in anticipation of the outbreak of war and for the purpose of evading capture by the enemy of the State from whose flag the vessel was transferred." (*Am. J.*, XXXIII, *Supplement Section 2*, 190.) See Comment, *id.*, 683-689.

Declaration of London were generally followed, although minor variations appear in the prize instructions and regulations."⁶

§ 787. **The Same.** The provisions of the Declaration of London appeared to receive approval of the Naval War College.¹ They were, moreover, reproduced in Article LII of the Oxford Manual of Naval War.² Nevertheless, it is believed that there is need of reconsideration of the theory on which they are based. If it is desirable to permit the transfer of a private belligerent ship to a neutral shortly before the outbreak of hostilities or at any time thereafter, it may be doubted whether the validity of the transaction should be dependent upon the absence of a purpose on the part of the seller to evade dangers to which an enemy vessel would otherwise be exposed. Such a purpose is frequently if not commonly possessed by the vendor, and he should not be encouraged fraudulently to disclaim it. Again, the importance of being able to determine at all times whether a transfer is valid, is such as to require a more stable assurance of validity than is likely to be afforded by knowledge of the state of mind of the vendor at the time of transfer. Therefore, it is suggested, in apparent harmony with the proposal of the American delegation at the London Naval Conference,³

⁶ *Id.*, 685, citing Verzijl, *Le Droit des Prises de la Grande Guerre* (1924), p. 403 ff.; Garner, *Prize Law During the World War* (1927), Sec. 304.

§ 787. ¹ Naval War College, *Int. Law Topics and Discussions*, 1913, 155-160. Compare *id.*, 1906, 21-22. Cf. *Int. Law Situations*, 1934, 6-7.

² *Annuaire*, XXVI, 656, J. B. Scott, Resolutions, 187. Mr. Beichmann, then an associate, and later President of the Institute, and President of the Court of Appeals at Drontheim, Norway, announced that he would abstain from voting in favor of the Article which established a system of very complicated presumptions of a nature, in his judgment, to bear heavily upon the interests of vessels whose transfer to a neutral flag would have been legitimately effected. *Annuaire*, XXVI, 567. Messrs. Edouard Rolin-Jaequemyns and Strisower said that they only accepted the text of the Declaration of London because they considered it impossible at that time for the Powers to arrive at any other conclusion. They expressed a preference for the rule contained in paragraph 26 of the Regulations of the Institute concerning Prizes. *Id.*, 287-288. That paragraph which was adopted at the meeting of the Institute at Turin in 1882, is as follows: "The legal document (*L'acte juridique*, which has been translated elsewhere as 'the legal process') showing the sale of an enemy vessel made during the war must be perfect, and the vessel should be registered before it leaves the port of departure, and in accordance with the law of the country whose nationality it acquires. The new nationality cannot be acquired by a vessel which is sold during a voyage." (*Annuaire*, VI, 217, J. B. Scott, Resolutions, 50)

³ That proposal was as follows: "The transfer of a ship from one flag to another before the outbreak of hostilities is valid, even though made in view of hostilities, provided it conforms to the laws of the countries of the vendor and purchaser.

"The transfer during hostilities of a privately owned ship carrying the flag of a belligerent is valid only when made in good faith and when there is a complete transfer of the rights of the owner. Further, the delivery of the ship to the buyer must be completed in a port outside the jurisdiction of the belligerent countries and must conform to the laws of the countries of the vendor and purchaser.

"Good faith on the part of the contracting parties is presumed only when the transfer was made before the outbreak of hostilities.

"When the transfer occurs after the outbreak of hostilities, the burden of proving its validity is on the contracting parties." (*Proceedings*, International Naval Conference, Misc. No. 5 [1909], Cd. 4555, 245.)

See comment by Mr. Kriege, of the German delegation, on the meaning of the term "good faith" as employed in the American proposal, *id.*, 260. See, also, memorandum of Professor Wilson, of the American delegation, *id.*, 290.

For a translation of extracts from the Proceedings of the International Naval Conference, and of the Institute of International Law, 1882 and 1913, see "Transfer of Flag," prepared by Legislative Reference Bureau of Library of Congress, for use of the Senate Committee on Foreign Relations, 1915.

that the test of validity have a simpler basis, and merely rest upon the good faith of the parties to the commercial transaction, and upon the absence of proof of the retention by the vendor of any interest in, or control over the vessel, and of any power of revocation of the sale at the conclusion of the war.⁴ Such a view was reflected in the United States Naval Instructions Governing Maritime Warfare of June 30, 1917.⁵ If maritime States remain unwilling to accept such a test, it is suggested that acknowledgment of a broad belligerent right to disregard generally transfers made after the outbreak of hostilities or within a brief interval prior thereto, is preferable to a plan which runs counter to the known purposes of belligerent vendors.⁶

§ 787A. **The Same.** If the neutral flag which a vessel rightfully flies does not suffice to save it from condemnation when it is enemy owned, the transfer of a ship from a belligerent to a neutral flag that does not also obliterate belligerent ownership must be a futile effort to safeguard the vessel from such a fate after capture.¹ Thus, with the elimination of the formula exemplified in article LVII of the Declaration of London as a test of enemy character, the chief question growing out of a transfer from a belligerent to a neutral flag is one concerning the completeness of the divesting of the transferor of ownership or interest in the vessel concerned.² A prize court is warranted in making careful scrutiny of the transaction in order to satisfy itself whether by any process the attempt has been made by the transferor to retain its interest in the ship, and to make

⁴ Cf. Memorandum of Mr. Johnson, Solicitor for the Department of State, Aug. 7, 1914, Senate Doc. No. 563, 63 Cong., 2 Sess., 83; also comment in decision of the *Conseil des Prises* in the case of *The Dacia*, *Journal Officiel*, Sept. 28, 1915, 6912, *Am. J.*, IX, 1015. Compare Statement of the Motives and Facts Concerning the Purchase of the S.S. *Dacia*, by E. N. Breitung, House Doc. No. 979, 63 Cong., 3 Sess. In this case the French Court, testing the validity of the sale in December, 1914, of a German merchantman in American waters by the requirements of Art. LVI, of the Declaration of London, interpreted the latter as demanding that "a transfer could only be valid if there was reason to believe that it would have been effected just the same had the war not occurred." Deeming the transfer of the vessel to have been effected with a view to carrying on trade with the enemy and of protecting the ship while so engaged, the transaction was held to be illegal as against an enemy of Germany. The vessel having been captured Feb. 27, 1915, by a French cruiser near the English Channel bound ostensibly for Rotterdam, was condemned. See discussion of the case in Garner, *Int. Law and The World War*, I, §§ 125, 131-133.

⁵ Nos. 57 and 58.

⁶ "In reply to a request for some sanction or approval of the proposed transfer of enemy vessels to a neutral in a blockaded Cuban port in 1898, the Department of State said that it could not 'give desired permission or concede any privilege because of transfer from belligerent to neutral in a blockaded port. Vessels might be allowed to sail subject to capture and to adjudication by prize court of bona fides of transaction and of effect, if any, of mortgage, on national character of vessels, prior to transfer.'" (Statement in Moore, *Dig.*, VII, 422, quoting Mr. Moore, Assist. Secy. of State, to Messrs. Butler, Notman, Joline and Mynderse, May 10, 1898, 228 Dom. Let. 378.)

The Act of Congress of Sept. 7, 1916, establishing a United States Shipping Board empowered to purchase, charter or lease vessels, forbade the purchase, lease, or charter of any vessel "which is under the registry or flag of a foreign country which is then engaged in war." Ch. 451, § 5, b, 39 Stat. 730.

§ 787A.¹ See Ships, Enemy Character, *supra*, § 784.

² See, for example, documents concerning the transfer of foreign merchant ships to the American flag, in special relation to the *Dacia*, contained in *For. Rel.* 1915, Supp., 674-697.

A different situation is, of course, obvious where at the time of transfer from a belligerent flag a vessel is owned by neutral nationals who endeavor by changing the nationality of the ship to safeguard it from the hostile (or enemy) character necessarily attributable to its rightfully flying such a flag.

use of changes of title as well as of flag merely to disguise the retention of a real association between the vessel and the enemy.⁸

It is a reasonable assumption that most transfers from a belligerent to a neutral flag (embracing those of similar aspect shortly before the outbreak of the war) are for the purpose of preserving an asset from confiscation by the opposing belligerent as it proceeds to exercise its rights as such. When a transfer assumes the form of an out and out sale, devoid of efforts to retain any interest in what is disposed of, it is not apparent how legal obligations towards the opposing belligerent are necessarily violated, despite the fact that there may thus be removed from its reach at sea assets of its enemy which it might otherwise be able to acquire. The argument that an asset associated with a belligerent, such as vessel property, must be retained or continued in a form and place where it may enure to the benefit of the enemy by reason of the relative ease with which it may be subjected to control and ultimate confiscation is not convincing. If there is to be an improvement in practice there must also be attained a clearer perception of the meaning of events that normally attend endeavors to transfer vessel property from belligerent to neutral flags. The first of these is the fatal effect of the retention under any guise of what may fairly be regarded by the capturing or opposing belligerent as enemy ownership; the second is the reasonableness of the endeavor of a belligerent owner to divest itself of all interest in vessel property as such and to put the asset represented therein in a place or form where it will be in less danger of forcible acquisition by the enemy.

(3)

§ 788. **Vessels in the Enemy's Service.** As early as January, 1782, the Federal Court of Appeals declared that the neutral owners of a ship may violate their neutrality "by taking a decided part with the enemy," and that according to the law of nations, a ship, under such circumstances, is "in the predicament of enemy's property, and subject to seizure and confiscation."¹ Again, in 1865, the Supreme Court of the United States, through Chief Justice Chase, announced that neutrals who place their vessels under belligerent control and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent

⁸ Declared the Naval War College in 1934: "The question as to transfer of merchant vessels from a belligerent to a neutral flag was often raised during the World War. New problems and new complications would, of course, arise with changing means and methods of transportation and communication. In the early period the ownership and operation of a vessel by the owner or the partners of the owner sharing in the navigation and in the results of the venture made a transfer comparatively easy to follow. Later, corporate ownership of vessels and the distribution of stock in these corporations through many countries introduced factors which had to be considered. Further, the distribution and incidence of insurance might make the loss or transfer of a vessel a matter of concern to other states than those of the vendor and vendee. In other words, the transfer of the flag of a vessel of a belligerent might be a much less simple transaction than formerly, and the belligerents during the World War endeavored to meet some of the problems by new expedients and novel statements as to legal rights." (Int. Law Situations, 6.)

§ 788. ¹ *Darby v. The Brig Ernsten*, 2 Dall. 34, Moore, Dig., VII, 410.

See, also, Mr. Bryan, Secy. of State, to Mr. Page, Ambassador to Great Britain, Mar. 30, 1915, For. Rel. 1915, Supp., 152.

in whose service they are employed, and cannot complain if they are seized and condemned as enemy property.²

It must be apparent that a neutral national who by any process permits his property at sea to minister to the needs of a belligerent becomes to that extent a participant in the conflict. That he may be lawfully prevented from continuing such participation by the opposing belligerent, and likewise penalized for so doing, is accepted doctrine which has been reflected in neutrality proclamations of the United States following that of Washington of April 22, 1793.³

Difficulties arise respecting the mode of prevention and the extent and nature of the penalty, where unneutral participation is inadvertent or merely an incident of an otherwise legitimate voyage or undertaking. Some of these are discussed elsewhere.⁴ It here suffices to note that neutral property placed in the direct service of a belligerent is subject to capture and condemnation. According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, a neutral vessel is to be deemed in that service and to be treated as an enemy merchant vessel (a) if she takes a direct part in the hostilities; (b) if she is under the orders or under the control of an agent placed on board by the enemy Government; (c) if she is wholly chartered by or in the exclusive employment of the enemy Government; (d) if she is at the time exclusively engaged in, or wholly devoted to, either the transport of enemy troops or the transmission of information in the interest of the enemy by radio or otherwise.⁵

In the foregoing situations the nature of the relationship established between the neutral ship and the belligerent in whose service it is employed, enables the opposing belligerent to regard the ship as one possessed of enemy character when the naval forces of that belligerent encounter the vessel, or its prize court adjudicates with respect to it.⁶

² The Hart, 3 Wall. 559, 560, Moore, Dig., VII, 410; The Baigorri, 2 Wall. 474.

³ Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 750.

Also, Neutrality Proclamation of President Wilson, May 24, 1915 (upon the outbreak of the war between Italy and Austria-Hungary), American White Book, European War, II, 15, 17.

See Contraband of War, Penalty, Nature of the Traffic, *infra*, § 814.

⁴ See Contraband, Penalty for Carriage, *infra*, § 815; also Indirect Unneutral Service, *infra*, §§ 817-823.

A neutral vessel may doubtless participate in a war by conduct which, although subjecting the ship to the imposition of a penalty, does not imply direct engagement in the service of a belligerent, and does not expose it to treatment accorded a ship so engaged. This is illustrated in the practice of releasing a neutral ship the contraband portion of whose cargo represents a minor part of the value, weight or volume thereof, or of the freight thereon.

⁵ No. 39.

Compare the language of Article XLVI, Declaration of London, Charles' Treaties, 277. See comment on this Article in General Report of the Drafting Committee, *id.*, 308; also report of the American delegation to the London Naval Conference (Rear Admiral Stockton and Prof. Wilson) to the Secretary of State, *id.*, 335.

See, also, memorandum as to the case of the S.S. *Washington*, contained in communication of Mr. Seward, Secy. of State, to Mr. Hassaurek, Minister to Ecuador, Dec. 28, 1865, MS. Inst. Ecuador, I, 184, Moore, Dig., VII, 411; Case of the *Kow-shing*, Takahashi, Cases on Int. Law during Chino-Japanese War, 24-51, 192-204; The *Mukden*, Hurst & Bray's Russian and Japanese Prize Cases, II, 12.

⁶ According to Art. 65 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A belligerent may treat as an enemy warship:

"(a) A neutral vessel taking a direct part in hostilities on the side of the enemy;

"(b) A neutral vessel exclusively engaged at the time in the transportation of enemy troops." (*Am. J.*, XXXIII, *Supplement Section 2*, 189.)

c

Enemy Character of Cargoes

(1)

§ 789. **Belligerent Domicile. Effect of Relationship between the Owner of Property and Belligerent Territory.** The closeness of the relationship of an individual to a belligerent State or its territory may serve to impress upon his property a hostile character, even though the latter may never have been within the limits of that territory. Respecting the nature of the relationship productive of such an effect, there has been diversity of opinion. It has been commonly said that according to the view prevailing in the United States and England, the neutral or enemy character of goods is to be determined by the so-called domicile of the owner rather than by his nationality.¹ Disagreements as to what the term domicile signifies when made the criterion of enemy character, and as to the circumstances when it should be applied as such, has rendered obscure the actual tests relied upon by the courts. It is important to observe those employed by American tribunals.

In 1787, the Federal Court of Appeals regarded one Vantylengen, a merchant who had been residing in a British settlement on the Bay of Honduras, "not barely having a transient residence, but carrying on trade from that settlement, like other inhabitants," and enjoying the privileges and subject to the inconveniences of other merchants there residing, as though he were a British enemy subject, and his property was dealt with accordingly. "To whom his natural allegiance was due" the court deemed immaterial. The matter of his domicile, howsoever understood, was not discussed.² In 1804, the Supreme Court of the United States declared that an American citizen might acquire in a foreign country "the commercial privileges attached to his domicile," and so be exempt from the operation of an Act of Congress of February 27, 1800, respecting non-intercourse between the United States and France and the dependencies thereof. In this case an American-born citizen had removed to the island of St. Thomas while an infant, long resided there, carried on trade as a Danish subject, married and acquired real property in the island, and had sworn allegiance to the Crown of Denmark. There seems to have been little doubt that his domicile had been changed. Concerning his freedom, if any, to change his nationality no opinion was expressed.³

In 1813, in an action of covenant upon a policy of insurance on the cargo of a vessel, a certain Spanish subject who had removed from Spain to the United

§ 789. ¹ "The domicile of a merchant, and not his natural allegiance, determines the neutral or unneutral character of his trade." Moore, Dig., VII, 424, citing *Chester v. Experiment*, 2 Dall. 41, and adverting to *The Harmony*, 2 C. Rob. 322, *The Herman*, 4 C. Rob. 228, *The Jonge Klassina*, 5 C. Rob. 302, *Wilson v. Marryat*, 8 T. R., 45, *Bell v. Reid*, 1 Maul & Selw., 726, *The Albo*, 1 Spinks 349, *The Gerasimo*, 11 Moore, P. C., 88, *The Baltica*, *id.*, 141.

See instructions of Sir Edward Grey, British Foreign Secy., to Lord Desart, British Plenipotentiary at the London Naval Conference, Dec. 1, 1908, Misc. No. 4 [1909], Cd., 4554, p. 32.

² *The Experiment*, 2 Dall. 41.

³ *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 120.

States in time of peace and for purposes of trade under a license from the Spanish Crown, and who there remained so engaged, was regarded by the Supreme Court of the United States as an American merchant, after the initiation of war between Spain and Great Britain, "whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish Provinces." It was said that the lower court had erred in making his neutral character depend on the kind of trade in which he was engaged, "instead of its depending on residence and trade, whether general or limited."⁴ The requisites of domicile do not, however, appear to have been discussed.

In the case of *The Venus*, decided in 1814, Mr. Justice Washington, delivering the opinion of the Supreme Court, laid emphasis upon the definition of domicile given by Vattel as "a habitation fixed in any place, with an intention of always staying there."⁵ Chief Justice Marshall was unwilling to impute such an intention to a merchant residing in a foreign country with which his own became engaged in war; and he dissented, therefore, from the opinion of the Court to the effect that if a citizen of the United States established his business and residence in a foreign country with which war afterwards ensued, any property shipped by him before knowledge of the war and captured by an American cruiser after the declaration thereof should be condemned as prize.⁶ If an intention to remain permanently was essential to the acquisition of a domicile in a foreign country, it was logical to deny that when an American citizen went to reside for commercial purposes in the territory of a foreign State, he possessed the intention to remain there in the event of war between that country and his own. It was not unreasonable, therefore, to assert that the scope of the intention to be a resident and trader in foreign territory was to be deemed limited, in point of time, to the interval of peaceful relationship between the State of residence, and that of nationality. In *The Venus*, a majority of the Court, from the prolonged residence and business in England of the individuals concerned, concluded that a domicile had been there acquired, and so formulated the basis of a rule of law.⁷ This circumstance seems important, for it indicates that, notwithstanding the reference to Vattel, the actual intentions of the claimants with

⁴ *Livingston v. Maryland Insurance Company*, 7 Cranch 506, 536-537.

⁵ 8 Cranch 253, 278-279.

⁶ Declared the learned Chief Justice: "Let it be remembered that, according to the law of nations, domicile depends on the intention to reside permanently in the country to which the individual has removed; and that a change of this intention is, at any time, allowable. If, upon grounds of general policy and general convenience, while the circumstances under which the residence commenced, continue the same, residence and employment in permanent trade be considered as evidence of an intention to continue permanently in the country, and as giving a commercial national character, may not a total change in circumstances—a loss of the capacity to carry on the trade—be received, in the absence of all conflicting proof, as presumptive evidence of an intention to leave the country, and as extricating the trade, carried on in the time of supposed peace, from the national character, so far as to protect it from the perils of war? At any rate, do not reason and justice require that this change of circumstances should leave the question open to be decided on such other evidence as the war must produce? . . . His intention, then, to reside in the country, his domicile in it, and consequently, his commercial character, unless he continued his trade after war, would be clearly limited by the duration of peace. It would not, I think, be unreasonable to say, that the intention, to be implied from his conduct, ought to have the same limitation." (8 Cranch 295-296, 297.)

⁷ *Id.*, 279, where the case of *The Bernon*, 1 Ch. Rob. 86, 102, was cited.

respect to permanence of abode may not have been deemed important. It reveals the fact that possibly the domicile of the claimants was not made the test of enemy character, but something simpler, namely, their residence and business in England.⁸ For that reason it is felt that the Court would have attached slight significance to evidence proving the absence of such intention as was then understood to be necessary for the acquisition of a foreign domicile.⁹ In another case decided the same day, the Supreme Court applied the same rule to the property of an American residing in England, notwithstanding evidence calculated to challenge the acquisition of a domicile therein. According to Chief Justice Marshall, the rights of the claimant, James Thompson, were dependent entirely "on his national commercial character," which, he added, was "decided by the opinion given in the case of *The Venus*."¹⁰

It is believed to be confusing to employ the term domicile, which involves the mental attitude of an individual concerning a place of residence, to describe the relationship of a person to a belligerent territory such as to impress a hostile character upon his goods when that relationship may be wholly unrelated to his state of mind respecting the nature or length of his abode in that place.¹¹ The phrase commercial domicile is open to less objection, and is commonly employed to describe such a connection on the part of the owner of property with a belligerent State as to impress a hostile character upon his property in the event of its capture by the enemy.¹² Nevertheless, as this commercial home may be distinct from and yet consistent with a legal home elsewhere, it would be desirable for States whose prize courts attach significance to the former, to adopt an expression describing with greater precision the fatal connection with

⁸ The burden of the opinion of the Court was to show why one who had acquired a residence and business in a foreign country, and by a conclusive presumption, a domicile therein, could not rid himself of the consequences thereof, save by actual removal or a bona fide attempt to effect one, when that country engaged in war with his own. The burden of the opinion of the dissenting Chief Justice was to show that no domicile had been acquired by the particular claimants, and hence to deny the consequences admitted to follow the acquisition of one.

It is suggested that the case merely decided that if naturalized American citizens of British origin resided and were established in business in England, between whose sovereign and the United States war ensued, property shipped by them from the territory of the former State before knowledge of the war and captured by an American cruiser after the declaration thereof was subject to condemnation.

⁹ It may be observed that American judges in civil cases of a domestic character have departed from the view that an intention to remain permanently in the place of residence is essential to the acquisition of a new domicile. In response to the requirements of a numerous population in the United States given to frequent changes of residence, those tribunals have evinced readiness to acknowledge the acquisition of a fresh domicile where the conduct of the individual shows merely absence of intention to live elsewhere than in the place of new abode. See, for example, *Putnam v. Johnson*, 10 Mass. 488, *Beale's Cases on Conflict of Laws*, I, 174; *Wilbraham v. Ludlow*, 99 Mass. 587, *Beale's Cases on Conflict of Laws*, I, 189; *Williamson v. Osenton*, 232 U. S. 619; *Gilbert v. David*, 235 U. S. 561.

Compare *Bell v. Kennedy*, Law Reports, 1 House of Lords (Scotch), 307, *Beale's Cases on Conflict of Laws*, I, 145; *Udny v. Udny*, Law Reports, 1 House of Lords (Scotch), 441, *Beale's Cases on Conflict of Laws*, I, 155.

¹⁰ *The Frances*, 8 Cranch 335, 336, 347; *The Frances*, 8 Cranch 363, 371. See, also, *The Mary and Susan*, 1 Wheat. 46, 55, also note of Wheaton at 55.

¹¹ Statement in Wharton, Dig., III, 344, and quoted in Moore, Dig., VII, 428.

¹² Declared Sir Samuel Evans in his decision in the case of *The Clan Grant*, 1 Lloyd's Prize Cases 398, 404: "Everyone knows that if a person carries on business in the enemy's country he has his commercial domicile there."

belligerent territory.¹⁸ It is to be observed that in cases where that connection exists, there are frequently present circumstances which justify condemnation on grounds other than the residential relationship of the owner with belligerent territory. Thus the association of the property with that territory may suffice. Upon such a basis it is believed that the American cases illustrative of so-called commercial domicile may oftentimes be said to rest.

§ 790. **The Same.** According to American theory, it may be said that while the domicile rather than the nationality of a merchant determines generally the enemy or neutral character of his trade, his domicile, as synonymous with his legal home, yields as a test of such character to his residence in and commercial connection with the territory of a belligerent State, and may even yield to his commercial establishment therein in spite of actual residence elsewhere, with respect at least to property belonging to that establishment. In applying these principles, the personal disposition of such an individual towards the State opposing that of his residence is immaterial.¹ Nor does his connection with a neutral Government as a consular officer serve to exempt his property if his residence and trade are such as to impress upon them an enemy character.²

Some States of Continental Europe, in opposition to the views prevailing in the United States and England, regard the nationality of the trader rather than the place of his commercial domicile as the true test of the neutral or unneutral character of his property.³ Wide divergence of views as to the correct test precluded agreement at the International Naval Conference at London of 1908–1909.⁴ Consequently, the Declaration of London left the problem unsolved. It was declared in Article LVIII that the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.⁵ The mode of determining the character of the latter was

¹⁸ See T. Baty, "Trade Domicile in War," *Jour. Comp. Leg.*, n. s. IX, Part I, 157; X, 183; J. Westlake, "Trade Domicile in War," *id.*, IX, Part II, 265.

§ 790. ¹ The *Benito Estenger*, 176 U. S. 568, Moore, Dig., VII, 429.

See, also, *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, where Chief Justice Chase, delivering the opinion of the Court, said: "It is said that though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory."

² *The Indian Chief*, 3 Ch. Rob. 12, Moore, Dig., VII, 431. Concerning this case see Mr. King, Minister to England, to the Secy. of State, No. 60, Dec. 28, 1797, MS. Desp. England, Moore, Dig., VII, 431. Also opinion of Mr. Griggs, Atty. Gen., 22 Ops. Atty. Gen., 327, Moore, Dig., VII, 432.

³ See, for example, the views expressed in memoranda filed at the International Naval Conference of 1908–1909, in behalf of Germany, Austria-Hungary, France, Italy, and Russia. *Proceedings*, Int. Naval Conference, Misc. No. 5 (1909), Cd., 4554, 115–119.

⁴ Report of Mr. Renault in behalf of the drafting committee, *Charles' Treaties*, 314; Report to the Secretary of State by the American delegates to the Conference (Rear Admiral Stockton and Prof. Wilson), *id.*, 338.

⁵ *Charles' Treaties*, 279.

According to Article LIX: "In the absence of proof of the neutral character of goods found on board an enemy vessel they are presumed to be enemy goods."

Article LI of the Oxford Manual of Naval War reproduced Article LVIII of the Declaration of London. *Annuaire*, XXVI, 656, J. B. Scott, Resolutions, 186. The former added, however, the provision that "each State must declare, not later than the outbreak of hostilities, whether the enemy or neutral character of the owner of the goods is determined by his place of residence or his nationality."

not fixed. According to the Naval Instructions Governing Maritime Warfare of June 30, 1917: "The neutral or enemy character of merchandise found on board an enemy private vessel is determined by the neutral or enemy commercial domicile of the owner, whether the owner be an individual, a firm, or corporation. In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods."⁶

(2)

§ 791. **Effect of Certain Relationships between Property and Belligerent Territory.** The nature of the relationship between property encountered at sea and the territory of a particular belligerent may fairly serve to impress upon the former a hostile character.¹ Thus, according to American opinion, property coming from enemy territory is said to bear the impress thereof, and hence to be liable to condemnation irrespective of the domicile or guilt or innocence of the owner.² The produce of the enemy's soil is similarly regarded, notwithstanding the neutral character of the owner.³ Again, property suffered to remain in enemy territory by an owner who, abandoning such territory, returns to his proper allegiance, becomes, in the absence of a prompt effort to remove it, impressed with a hostile character.⁴

⁶ No. 59.

See *The Gloria*, Lloyd's Prize Cases, 2nd Series, I, 11.

§ 791. ¹ Declared Story, J., in the case of *The San Jose Indiano*, 2 Gall. 268, at 286, "The principle to be extracted from these cases seems to be, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country upon the same footing and with the same advantages as native resident subjects, his property, *so employed*, is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may. And the principle seems founded in reason. Such a trade, so carried on, has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It subserves his manufactures and industry; and its whole profits accumulate and circulate in his dominions and become regular objects of taxation, in the same manner as if the trade were pursued by native subjects."

The effort to attach an enemy character to property by reason of the connection or association of the owner as well as the property itself with a particular belligerent, is analogous to the attempt of a State, in raising revenue for the support of the Government, to tax persons as such, because of their connection by domicile with the territory of the State, regardless of the location of their property, and to tax property as such because found and belonging within the national domain, regardless of the legal home of the owner.

² *The Gray Jacket*, 5 Wall. 342, 369-370, where the Court declared, however, that "the only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it."

³ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch 191, 199, where Chief Justice Marshall, delivering the opinion of the Court, declared: "Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed; wherever the owner may reside, that land is hostile or friendly, according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offence to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities." The learned Chief Justice placed reliance upon the opinions of Sir William Scott in *The Phoenix*, 5 Ch. Rob. 20, and in *The Vrow Anna Catharina*, 5 Ch. Rob. 161.

⁴ *The William Bagaley*, 5 Wall. 377, 408-409. The language of the text referring to this case is in substance that contained in Moore, Dig., VII, 427.

See, also, *Gates v. Goodloe*, 101 U. S. 612, 617, Moore, Dig., VII, 427.

It is declared that the property of a house of trade, established in the enemy's country, is condemnable as a prize, whatever may be the domicile of the partners.⁵ When such a house is so established, the property of all of the partners therein is said to be condemnable, although some of them may have a neutral residence.⁶ In case a house established in a neutral country has branches in various other countries, and among them one in a belligerent State where business is done while the war ensues, the opposing belligerent is not justified in regarding as enemy property goods belonging to the house and encountered at sea when they have no connection of any kind with the branch established in the territory of its adversary.⁷

§ 791A. **The Same.** The contrasting theories on which maritime states have in practice undertaken to attach an enemy character to property encountered at sea render it arbitrary to assert that reliance on the nationality of the owner or his relationship by domicile or commercial domicile with enemy territory, or certain associations of the property concerned with that territory constitutes unreasonable or improper conduct.¹ Events of World War I reveal the fact that belligerent States have felt the need of a more flexible system than was available through testing the enemy character of property by recourse to a single theory.² At the present time, therefore, it may be doubted whether it is a profitable task to endeavor to point out that in the domicile or commercial domicile of the owner there is to be found, for most purposes, a better test of enemy character than is to be derived from the nationality of the owner. It is more important to take cognizance of what the future is likely to bring. One must anticipate that in maritime wars that remain to be fought belligerent States

⁵ The language of the text is that of Mr. Justice Story, delivering the opinion of the Court in *The Friendschaft*, 4 Wheat. 105, 107.

⁶ *The San Jose Indiano*, 2 Gall. 268, Moore, Dig., VII, 432; *The Cheshire*, 3 Wall. 231, Moore, Dig., VII, 433.

Conversely, the share of a partner in a neutral house, when his own domicile is in a hostile country, is subject to confiscation. *The Antonia Johanna*, 1 Wheat. 159, Moore, Dig., VII, 432. See, also, in this connection, *The Clan Grant*, 1 Lloyd's Cases 398; *Dana's Wheaton*, Dana's Note, No. 161.

In *The San Jose Indiano* it was announced that the connection of a house of trade with enemy territory does not, however, affect the separate property of the partner having a neutral residence. 2 Gall. 268, 291. See, also, *The Sally Magee*, Blatchf. Pr. Cases, 382; *The Aighurth*, *id.*, 635, both of these cases being cited in Moore, Dig., VII, 433.

⁷ See *The Lützow* [1918] A. C. 435, 6 Lloyd's Prize Cases 289.

§ 791A. ¹ "The Continental Prize Courts [in cases arising out of the World War] uniformly applied the test of nationality when the claimant was a neutral by nationality but was domiciled in enemy country. Thus the German Prize Court held that goods shipped to and belonging to a Swiss subject domiciled in France were neutral property. (*The Kediri*, II *Entsch.* 275.) and that the presumption was against enemy destination in the case of goods shipped to England and resold there by a Dutch merchant domiciled in London. (*The Lestris*, II, *ibid.*, 207; *Fauchille et De Visscher*, *Jurispr. All.* 302.) The Italian Prize Commission appears to have adopted the same view in a case where it held that the nationality of goods seized on an enemy ship must be determined by the nationality of the bank which had a property right in them and the nationality of the bank being neutral in this case the goods must be released." (*The Ambra*, *Fauchille et Basdevant*, *Jurispr. Ital.*, 73.) (Garner, *Prize Law*, 444.)

For a discussion of British and other foreign cases arising out of World War I, see *id.*, Chap. XI.

² See the British Secretary of State for Foreign Affairs (Grey), to the American Ambassador (Page) at London, Oct. 10, 1916, *For. Rel.* 1916, Supp., 462, 463.

will be inclined to invoke both the nationality of the owner and his commercial or other domicile as convenient means of treating property encountered at sea as sufficiently associated with the enemy to be regarded as enemy property.³ The United States, although it has not as yet gone so far, may find it expedient and necessary to pursue such a course. In such event it may be difficult to brand its conduct as internationally illegal.

(3)

§ 792. **Title to Property in Transit.** The right of a belligerent to appropriate, by force, enemy interests in cargoes at sea cannot be cut off by the transfer of title to the goods in transit to a neutral.¹ Thus, the Naval Instructions Governing Maritime Warfare of June 30, 1917, declare: "Enemy goods on board an enemy vessel retain their enemy character, notwithstanding any transfer effected after the outbreak of hostilities."² Difficulties may arise, however, in determining whether at the time of seizure, the property encountered is to be regarded as owned by an enemy person rather than a friend.³ To aid in the solution of them certain rules have been developed. One of these has long been that "property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property."⁴ Again, shipper and consignee

³ "It is safe to predict that if the world is unfortunate enough to see another war of the dimensions of the last, the belligerents will not be contented to rely solely on one or other of the two alternative principles of nationality and domicile, but would combine the two in some proportion. The path now seems clear for the conclusion of an international convention defining enemy character. Combining the two principles in their widest application the general effect of such a convention would be as follows:

"Enemy character attaches to all enemy subjects wherever resident or carrying on business. It also attaches to all persons resident or carrying on business in enemy territory and territory under enemy occupation." (M. M. Lewis, "Domicile as a Test of Enemy Character," *Brit. Y.B.*, 1923-24, 60, 77.)

See in this connection, T. Baty, *Canons of International Law*, London, 1930, 170-190.

§ 792.¹ The *Sally Magee*, 3 Wall. 451, 460, where Mr. Justice Swayne, delivering the opinion of the Court, declared: "The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to encumber the property, or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals."

See, also, the *Danckebaar Africaan*, 1 Ch. Rob. 107; the *Vrow Margaretha*, 1 Ch. Rob. 336; the *Jan Frederick*, 5 Ch. Rob. 128.

² No. 61.

³ These are oftentimes accentuated by the attempt to conceal the actual character of the ownership. Thus a prize court is frequently confronted with the problem of destroying the veil of obscurity, and of ascertaining the precise relation of neutral claimants to the property seized.

See the problems for adjudication in *The Fortuna*, 3 Wheat. 236, Moore, Dig., VII, 400; *The Merrimack*, 8 Cranch 317, Moore, Dig., VII, 401; *The Maria Dolores*, 88 Fed. 548, Moore, Dig., VII, 402; *The Carlos F. Roses*, 177 U. S. 655, Moore, Dig., VII, 403; *The Susan and Mary*, 1 Wheat. 25, Moore, Dig., VII, 400.

⁴ *The Sally*, 3 Ch. Rob. 300, note, 302. "This department is not disposed to deny the rule of law which forbids the transfer of an enemy's property to a neutral when on its way to the enemy's country. The leading case on this subject is that of the *Sally*." (Mr. Bayard, Secy. of State, to Mr. Godoy, Chilean Minister, April 11, 1885, MS. Notes to Chilean Leg., VI, 337, Moore, Dig., VII, 405.) Also *The Anna Catharina*, 4 Ch. Rob. 107, 118; Mr. Hay, Secy. of State, to Mr. von Holleben, German Ambassador, No. 178, January 18, 1899, MS. Notes to German Leg., XII, 247, Moore, Dig., VII, 405; R. T. Mount, in *Columbia L. Rev.*, XV, 567, 571-574; *The Frances*, 8 Cranch 354, 357; *The Ship Ann Green and cargo*, 1 Gall. 274, 291.

are not permitted, either in time of war or in contemplation of it, to divide their risk as they please so as to defraud a possible captor, and thereby evade the operation of the foregoing rule.⁵ Property in transit from a belligerent shipper to a neutral consignee, at the risk of the former, is not deemed to have become vested in the latter so as to become exempt from seizure.⁶ While in the ordinary course of mercantile transactions a delivery to a shipmaster is a delivery to the consignee, that act may, nevertheless, be so qualified by the shipper as to produce a retention of control and ownership in himself. He may, in fact, prescribe certain conditions or reservations to be complied with before the consignee is to be entitled to delivery. Under such circumstances, if the shipper be a neutral, and the consignee a belligerent, the goods are not deemed to acquire upon shipment a hostile character.⁷ If it appears from the conduct of the parties that title passed from a seller in the enemy territory to a neutral buyer and consignee at the moment of shipment, the non-hostile character of the property concerned must be apparent.⁸ Whether in the particular case there has been a passing of title depends upon the relevant and perhaps complicated set of facts which point to the design of the parties to the transaction.⁹ It seems to be accepted opinion in America and England that where the enemy owner-

⁵ The Packet De Bilboa, 2 Ch. Rob. 133, 134-135.

⁶ The St. Joze Indiano, 1 Wheat. 208, Moore, Dig., VII, 405; The Merrimack, 8 Cranch 317, 327.

⁷ The Frances, 9 Cranch 183, Moore, Dig., VII, 404; The Frances, 8 Cranch 354; The London Packet, 5 Wheat. 132.

Declared Sir Samuel Evans, President of the Prize Court, in the case of The Miramichi, 1 Lloyd's Prize Cases 157, 166 and 167-168. "Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. . . . In my opinion the result of the many decisions . . . is, that in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid."

⁸ See Judgment of the Judicial Committee of the Privy Council in The Parchim, [1918] A.C. 157, 4 Lloyd's Prize Cases 390; also note in *Yale L. J.*, XXVII, 1076, Garner, Prize Law, 467-468.

⁹ In each case the question, who holds the legal title to the cargo seized, is a question of fact. It will be noted from the authorities discussed that neither the bill of lading or ship's manifest, nor the invoice, is of itself conclusive evidence of title. In many of the cases title was determined by none of these documents but by contemporaneous correspondence between the parties, and the task of the court was to determine whether as a matter of fact the claimant held title to the property at the time of shipment and of capture, or merely held documents covering the property as security for a loan or advances. The consignee named in a bill of lading or the holder of a bill of lading endorsed in blank may demand delivery of the goods from the ship, and at common law is regarded as the owner of the goods in so far as the rights and obligations of the shipowner are concerned; and if the bill of lading has been delivered to him as security for advances he may sell the goods to reimburse himself, passing the legal title. But this ability to obtain possession of the goods or even to pass title is not the equivalent of title in a Prize Court. The question of title is one of fact, to be found from the intent of the parties." (Russell T. Mount, in *Columbia L. Rev.*, XV, 567, 584.)

See also The Dirigo, 8 Lloyd's Prize Cases 395, 429, where it was declared: "The question of when the property passes is one of the intention of the parties, and I think that here the intention was that it should pass when the goods were appropriated to the contract by putting them on board the ship, and that the master from that time held the goods as bailee for the person named in the bill of lading, and that therefore there was delivery."

See discussion of British and foreign prize cases in Garner, Prize Law, Chap. XII.

ship of property is established, no liens against it held by non-hostile parties can be set up against the captor as grounds for the prevention of condemnation.¹⁰

The invalidity of the transfer of enemy goods in transit was recognized in Article LX of the Declaration of London.¹¹ It was there stated, however, that if prior to capture a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they "regain" their neutral character.¹² According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, the goods in such a situation are said to "retain" their neutral character.¹³

A transfer of title made before the outbreak of hostilities and not in contemplation of war is not open to objection.¹⁴

Should the United States again be engaged in a maritime war, such as that initiated in 1939, and its courts have occasion to adjudicate as prize tribunals in cases involving questions pertaining to the treatment of property in transit by sea, it is to be anticipated that the foregoing principles will be duly heeded, and that in determining where title exists at a particular time, deference will be paid to the design of the parties to the transaction involved.

(4)

§ 793. **Change of Commercial Domicile.** The right of an individual to rid himself, after the outbreak of war, of such a connection with belligerent territory as serves to impress a hostile character upon his goods is necessarily limited. If he resides and trades in the territory of the enemy, utmost promptitude is required of him in changing any form of domicile which he may have acquired therein, and in returning to the State of his allegiance.¹ After that return and change he is not deemed to be free to go abroad and acquire by residence and trade such a relationship with a foreign State as will enable him to establish, as against his own country, a neutral character for himself or his property.² It is not impossible, however, for one residing and commercially established in a neutral country to return temporarily on business to the State of his allegiance when itself a belligerent without forfeiting his neutral character.³

¹⁰ *The Carlos F. Roses*, 177 U. S. 655, Moore, Dig., VII, 403; *The Odessa* [1915], P. 52, 1 Lloyd's Prize Cases 301; *The Odessa* [1916], 1 A.C. 145.

¹¹ Charles' Treaties, 279.

¹² *Id.*, *The Constantia*, 6 Ch. Rob. 321, 324-325.

¹³ No. 61.

¹⁴ *The Vrow Margaretha*, 1 Ch. Rob. 336. See also, *The Southfield*, 3 Lloyd's Prize Cases 404, 410; *The Daska*, 5 Lloyd's Prize Cases 317, 323.

For what is declared to be a "correct summary of the principal rules applicable by British Prize Courts in deciding whether or not to condemn captured goods which have been sold while *in transitu* on board British or Allied or enemy vessels," see Lauterpacht's 5 ed. of *Oppenheim*, II, 190-191.

§ 793. ¹ *The William Bagaley*, 5 Wall. 377, 408, where it was said that a "presumption of the law of nations is against one who lingers in the enemy's country, and if he continue there for much length of time without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy." Citing *MacLachlan on Shipping*, 480, *The Ocean*, 5 Robinson, 91, *The Venus*, 8 Cranch 278.

² *The Dos Hermanos*, 2 Wheat. 76, 98, Moore, Dig., VII, 433.

³ *The Freundschaft*, 3 Wheat. 14, 52, Moore, Dig., VII, 433.

The national of a neutral State who has acquired a commercial domicile in belligerent territory may resume his neutral character if, within a reasonable interval after the outbreak of war he takes appropriate steps to disassociate himself from the business and returns to his own State.⁴ In 1917, the Judicial Committee of the Privy Council was of opinion that such an individual was not entitled to the benefit of an exception in his favor merely by reason of the circumstance that his goods had been shipped prior to the outbreak of war. That fact was not deemed to excuse a neutral owner having a commercial domicile in hostile territory from taking the necessary measures within the requisite period of time in order to rid himself of that domicile.⁵

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§ 794. **Corporations.** With respect to corporate property encountered at sea the question presents itself as to the extent to which the normal tests of determining enemy character applied when title is lodged in an individual are also applicable. The question is further complicated when the property involved is a ship rather than a cargo.

If it is reasonable to ignore the neutral flag which a vessel is entitled to fly, and to test its character according to the nature of the relationship existing between the owner of the ship and the enemy, it is logical to press the inquiry further and ascertain what is, in fact, the connection between the neutral corporate owner and the enemy.¹ That the property involved is a ship does not preclude such an inquiry, unless it be admitted that the flag which a vessel lawfully flies is to be deemed the invariable test. Events of World War I showed that maritime States have become increasingly indisposed to make that admission.² If a vessel lawfully sailing under a neutral flag were owned by a neutral corporation the center of whose administrative business was situated in enemy territory, it is probable that a prize court, unless restricted by the legislation or regulations of its own State, would regard the ship as subject to condemnation.³

In the case of cargoes which have such a connection with belligerent territory

⁴ *United States v. Guillem*, 11 How. 47, Moore, Dig., VII, 433. In delivering the opinion of the Court, Chief Justice Taney declared at p. 60, that: "The rights of the neutral in this respect have always been recognized in the prize courts of England, and were sanctioned by this Court in the case of *The Venus*, 8 Cranch 280, 281." Concerning the case see, also, Mr. Hoffman, Minister to Russia, to Mr. Evarts, Secy. of State, April 14, 1879, For. Rel. 1879, 913.

⁵ *The Anglo-American*, 34 T. L. R. 149.

§ 794. ¹ See *Ships, Enemy Character*, *supra*, § 784; also *The St. Tudno*, 2 Brit. and Col. Prize Cases, 272.

² See, for example, order in council of Oct. 20, 1915, abandoning Art. LVII of the Declaration of London, For. Rel., 1915, Supp., 179; *The Polzeath*, 32 T. L. R. 647.

³ In 1916, the Department of State made complaint of the action of British authorities in seeking to condemn certain ships owned by an American corporation and flying the American flag, because of the British belief that the vessels were entirely or to a large extent "enemy owned." The importance attached by the Crown to beneficial ownership was apparently great, while no importance, it was said, was attached "to the flag or corporate ownership." In this connection the Department adverted to the fact that in requisitioning vessels flying the British flag, where the entire beneficial interest in them was owned by American citizens and in connection with requests in their behalf for the release of requisitioned ships, the British Government had apparently taken the position "that the vessels, flying the British flag and being owned by British corporations, must, of course, be regarded

as suffices to cause them normally to be impressed with a hostile character regardless of that of the owners, obviously no different rule should be applied than that followed when title is not in a corporation.⁴

§ 795. **The Same.** A more difficult situation presents itself in the case where the principal reason for impressing a hostile character on a cargo is the bare connection between the corporate owner and the enemy or its territory. Inasmuch as the impress of such a character serves to subject the property to condemnation in case of capture, utmost care is required in order to establish justly the ground of the fatal connection.¹ The practice which heeds the commercial domicile of an individual regardless of his legal home in determining the condemnability of his goods offers guidance.² It illustrates the practicability and hence the reasonableness of disregarding a man's actual domicile (as the term is understood at common law as interpreted by American as well as British courts) which is a legal condition attached to him irrespective of his will,³ if he has in fact established by his residence and commercial activities within enemy territory a definite and intimate relationship therewith. That he may do so is consistent with his retention of a legal home elsewhere, and, therefore, renders irrelevant inquiry respecting either the place of his actual domicile or the legal effect of it.

Between a neutral corporation and a belligerent State varying degrees of intimacy may exist. Within the territory of the latter all or most of the shareholders may reside; business may there be transacted through a local branch or other agencies; the corporation may even establish its center of administrative control within the hostile domain. In determining whether any of these considerations should suffice to impress an enemy character upon corporate property encountered at sea, it seems unnecessary to make inquiry respecting the correct theory of determining the domicile of the corporation;⁴ for the legal connection (however great or little significance be attached to it) between the neutral State of incorporation and the entity which it has created or clothed with power, appears to have no bearing upon the question of fact respecting the degree of intimacy or the nature of the relationship actually subsisting between the corporation and the belligerent State. Upon the solution of that

as British and not as American vessels." Mr. Lansing, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador, May 10, 1916, For. Rel. 1916, Supp., 388, 389.

⁴ See Effect of Certain Relationships between Property and Belligerent Territory, *supra*, § 791.

§ 795. ¹ Where the impressment of hostile character does not expose the property to condemnation, but merely results in causing seizure and retention during the period of war, as in the case of private property on land, there is less danger of an abuse of power.

² See Belligerent Domicile, Effect of Relationship between the Owner of Property and Belligerent Territory, *supra*, §§ 789-790.

³ When a man goes to a place with the requisite intention, his acquisition of a domicile there is due to the fact that the law imposes it upon him. That consequence may be and oftentimes is sharply at variance with the desires of the individual. Instances are numerous where a person struggles vainly to defeat the operation of the law. See, in this connection, *In re Steer*, 3 H. & N. 594.

⁴ For an illuminating discussion of that question see E. Hilton Young, "The Nationality of a Juristic Person," *Harv. L. Rev.*, XXII, 1; also bibliography in comments, *Yale L. J.*, XXVII, 108, 109, note 1; Ralph A. Norem, "Determination of Enemy Character of Corporations," *Am. J.*, XXIV, 310.

question should depend in each case the liability to condemnation of the goods involved.

§ 796. **The Same.** If the center of administrative control is within enemy territory, that circumstance manifests the existence of a relationship between the corporation and the belligerent State, which doubtless suffices to stamp property of the former with hostile character.¹ If the sole connection between the corporation and the enemy is the transaction of business within its domain through a branch house there situated, the relationship would probably not be deemed to taint with a hostile character goods other than those connected with the local branch. In such case the circumstance that the corporation was not only incorporated, but also chiefly administered and controlled in non-belligerent territory would seem to prevent such a consequence.² If the connection between the corporation and a belligerent is manifested solely by the ownership of the stock of the former by persons residing within the domain of the latter, a more difficult problem arises. In such a situation the domicile of the corporation is not to be regarded as a hostile one.³ Even if that fact is immaterial in determining the enemy character of the property concerned, it must be apparent that great practical difficulty necessarily attends the effort to make liability to condemnation dependent upon the hostile place of ownership, especially where numerous shares are held by persons inhabiting friendly territory. It is possible also that in such case the center of administrative control may be in a non-belligerent country. If, however, the entire stock is held in enemy territory, it is probable that the practical control as well as the beneficial interest is lodged therein.⁴

§ 796.¹ Such appears to be the trend of British opinion. See *Daimler Co., Ltd. v. Continental Tyre & Rubber Co., Ltd.* [1916], 2 A.C. 307, in which Lord Parker declared (339): "It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at. My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character."

See also *The Hamborn*, 7 Lloyd's Prize Cases 54, and the judgment of the Judicial Committee of the Privy Council therein, delivered by Lord Sumner, *id.*, 68, 72.

See, also, Dr. E. J. Schuster, "The Nationality and Domicile of Trading Corporations," *Proceedings*, Grotius Society, II, 57, 79; C. M. Picciotto, "Alien Enemy Persons, Firms, and Corporations in English Law," *Yale L. J.*, XXVII, 167, 175-178; comment in *Yale L. J.*, XXVII, 108-113; note in *Law Quar. Rev.*, XXXII, 340; notes in *Harv. L. Rev.*, XXVIII, 629, and XXX, 83; Oppenheim, *Lauterpacht's* 6 ed., II, § 88 a.

Compare view of Lord Reading in *Continental Tyre & Rubber Co., Ltd. v. Daimler Co., Ltd.* [1915], 1 K. B. 893.

See *Standard Oil Company Tankers Case*, majority award of arbitral tribunal instituted by the Reparation Commission and the Government of the United States, Aug. 5, 1926, *Am. J.*, XXII, 404.

² The situation in such case would appear to be like that of an unincorporated commercial house having a branch in enemy territory, yet having its principal business in neutral territory.

³ See, in this connection, E. Hilton Young, "The Nationality of a Juristic Person," *Harv. L. Rev.*, XXII, 1, 2-7.

⁴ Practically the same situation arises where substantially all of the stock is held in enemy territory and a nominal number of shares are owned by officers living within non-hostile territory.

See *The Roumanian*, 1 Lloyd's Prize Cases, 191.

In such case it is believed that condemnation of the corporate property as having an enemy character would indicate no abuse of a belligerent right.⁵

It should be observed that the practice of nations has not thus far brought into being any rule of general acceptance which forbids a belligerent to disregard the nationality or the domicile of a corporation in determining the enemy character of property belonging to it. Although neither may be observed as the test of the propriety of condemning corporate property, it does not follow that in the converse situation where a corporation has a hostile nationality and (according to the prevailing American theory) a hostile domicile, its property is ever to be regarded as lacking an enemy character. It is not deemed to be an unjust rule which, at least for purposes of condemnation, stamps the beneficial interests of all shareholders with the nationality of the belligerent State which gave life to the corporation and endowed it with necessary functions.

Until there is general agreement as to the theory to be followed, it is to be anticipated that captors will always demand condemnation when the corporate owner is either of hostile nationality, or so connected with the enemy as to warrant the conclusion that within its territory is to be found the real center of corporate administrative control. Moreover, in making such demands before the prize courts of a single State, on both or either of these grounds, it will be urged with force that so long as the practice of nations has not fixed the test to be applied, a belligerent is not compelled to abide by any one.⁶

§ 796A. **The Same.** In the course of World War I the United States did not find occasion or deem it necessary to assert or exercise the full measure of its rights as a belligerent in relation to corporate property encountered at sea. Its courts were not confronted with questions as to the circumstances when such property so encountered might under the law of nations be fairly regarded by the captor as possessing enemy character. Moreover, the legislation of the United States exemplified a conservative claim that was not perhaps prophetic of what the Congress might essay to do in the event of a maritime war calling for or involving a broad American effort to capture such property at sea on the ground that the character of the association of the corporate owner with the enemy, despite the nationality of that owner, sufficed to attach to the property a hostile character.

⁵ See, in this connection, the views of the Earl of Halsbury in *Daimler Co., Ltd. v. Continental Tyre & Rubber Co.* [1916], 2 A.C. 307, 315-317.

⁶ It is submitted that events of World War I have shown the futility of reliance upon either the nationality or the domicile (in the sense attributed to that term in the common law cases) of the owner, whether an individual or corporation, as an exclusive test of enemy character. One result of that conflict seems to have been the growth of a tendency to disregard both fictions and legal structures as the basis of the right of condemnation of property, and to endeavor to get to the root of the matter by close observation of the actual relationship existing between the owner and the territory of the enemy. It is believed that the theory of commercial domicile, however unfortunate in a descriptive sense, serves at least as a guide in the right direction. In any attempt to formulate a basis of general international agreement, it would seem wise to shun the use of terms which are either misunderstood or looked upon with distrust, and to lay down no rule which does not clearly and simply ascribe to the realities of intimate associations between the corporate owners of property and enemy territory their true significance.

According to the Trading with the Enemy Act of October 6, 1917, for a corporation to be deemed an "enemy" or "ally of enemy" it needed either to be incorporated within the territory of a country with which the United States was at war (embracing territory occupied by its military or naval forces) or within that of an ally of such enemy, or to be incorporated within the territory of any country other than the United States and to be "doing business within" the territory of such enemy or ally of enemy.¹ These tests of the enemy character of a corporation were in sharp contrast to the broader British claim that enemy control might serve to stamp even a British corporation with a hostile character.²

§ 796A.¹ § 2, 40 Stat. 411; 50 U.S.C.A., Appendix, § 2.

² Declared Mr. Justice McReynolds in the course of the opinion of the Court in *Behn, Meyer & Co. v. Miller*, 266 U. S. 457, at 472: "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co. v. Continental Tyre & Rubber Co.*, 2 A.C. [1916] 307, decided June 30, 1916." See also *Hamburg-American Co. v. United States*, 277 U. S. 138, 141.

"It is to be noted that American law departed in two important respects from English law. In English law a domestic corporation could assume enemy character in two ways. It became enemy, according to the terms of the proclamation of September 14, 1915, if it carried on trade in territory under enemy control. In accordance with the *dictum* of Lord Parker in the *Daimler* case, it also took on enemy character if under enemy control. But according to the terms of the Act of October 6, 1917, no corporation incorporated in the United States could take on enemy character. As a direct consequence of the control theory, an English court could disregard the corporate entity in order to determine whether or not it was enemy controlled. In the Act of October 6th no provision is made for disregarding the corporate entity. In the United States the entity was in all cases to be respected." (Ralph A. Norem, "Determination of Enemy Character of Corporations," *Am. J.*, XXIV, 310, 331.)

TITLE I

CONTRABAND

1

§ 797. **Preliminary.** At the time when the United States declared its independence the experience of nations had developed a practice which, on the one hand, acknowledged the right of a belligerent to seize on the high seas property even of neutral ownership and found on board vessels of whatsoever national character, if destined to the enemy and calculated to aid its operations, and which, on the other, restrained a belligerent in determining under what circumstances property might be justly regarded as bearing such a relation to the enemy. It was the nature of the restraint as well as the scope of the right which it became the task of American statesmen to clarify. The significant fact is that long before the close of the eighteenth century there was an understanding, apparent in England as well as continental Europe, that a belligerent was not free to cut off generally neutral commerce with enemy territory. Such a situation was in sharp contrast to that which had once prevailed, when no State engaged in war hesitated to regard as hostile to itself, and therefore as subject to restraint, the ships or goods of any foreign merchant who ventured to trade with the enemy.¹ The reasons which had gradually compelled some measure of respect for the neutral claim may have been various. Possibly the most influential were the increasing inability of a belligerent to win respect for its pretensions, and the danger to itself involved in the attempt to enforce them. At times, however, the character of its own interests inspired a belligerent to relax the full measure of its claims.

In attempting to restrict neutral commerce, belligerents from an early date resorted to the practice of announcing lists of articles not to be traded in. This procedure served not merely to afford a warning to neutral merchants, but also to indicate generally the justification of the policy so announced. The notification enabled neutral States to determine whether in their judgment the restraint of trade in the inhibited articles was merely for the benefit of the belligerent proscribing them, rather than an actual means of depriving its enemy of direct

§ 797. ¹ Walker, *Hist.*, I, 136, quoted in H. R. Pyke, *Law of Contraband of War*, 30. See, also, E. Nys, *Les Origines du Droit International*, 226-228; Westlake, 2 ed., II, 198; J. B. Moore, "Contraband of War," Philadelphia, 1912, *Proceedings*, Am. Philosophical Society, LI, No. 203, 39.

Concerning the practice of England during the sixteenth century, see Edward P. Cheyney, *History of England from the Defeat of the Armada to the Death of Elizabeth*, Philadelphia, 1914, I, chap. xxii, and documents there cited; same writer, "International Law Under Queen Elizabeth," *English Hist. Rev.*, XX, 659.

See Jessup and Deák, *Neutrality (Origins)*, I, chap. III.

military aid. Controversies arising from belligerent announcements revealed neutral alertness to challenge pretensions failing to show that a prohibited trade constituted some direct military advantage to the State sought to be deprived of it.²

It was natural that articles which a belligerent asserted the right to prevent by certain processes from reaching its enemy should have been described by a particular term expressive of the prohibition applied to the trade in them. The word "contraband" was employed for that purpose, as signifying "something prohibited — a trade carried on, or an article imported or dealt in, in violation of some inhibition."³

Difficulties in regard to contraband were increased in complexity by the contention that under certain circumstances a belligerent might lawfully intercept and even confiscate articles which were normally not to be deemed contraband when destined to hostile territory. Grotius had, in 1625, made a threefold classification of articles of commerce, placing in the first class those of use only in war; in the second class, those not useful in war but serving only for pleasure; and in the third, articles of use both in war and out of war, such as money, provisions, ships and their belongings (*quae navibus adsunt*).⁴ Respecting articles of the first class, it was said that he belonged to the enemy who ministered to his necessities. The second class was declared to furnish no ground for complaint. Respecting the third, embracing articles of double use (*usus ancipitis*), a distinction was to be made according to the circumstances of the war. If defense demanded interception of what was sent, necessity, he declared, gave the right of interception, but under the obligation of restitution, unless there was cause to the contrary.⁵ It has been observed that the opinion of Grotius as to the third class of goods "did not appear to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent," and that he did not consider "the right of seizure as a means of effecting the reduction of the enemy," but as the indispensable means of his own defense.⁶ This necessity, moreover, he explained elsewhere

² Concerning lists of contraband issued by the United States, see Certain Other Articles, *infra*, § 806.

³ J. B. Moore, "Contraband of War," Philadelphia, 1912, p. 18; Oppenheim, Lauterpacht's 5 ed., II, § 391, p. 656; Westlake, 2 ed., II, 277; H. R. Pyke, Law of Contraband of War, 6.

The treaty of offensive and defensive alliance between the United Netherlands and Great Britain concluded at Southampton, Sept. 7/17, 1625, is said to have been the earliest treaty employing the word contraband or its equivalent. In Art. XX "*toutes marchandises de contrebande*" are broadly defined and declared to be good prize together with the ships and men who shall carry them. For the text of the treaty, together with an introduction concerning its history and bibliography, see European Treaties Bearing on the History of the United States and its Dependencies to 1648, edited by Frances Gardiner Davenport, Carnegie Institution, Washington, 1917, 290-299.

⁴ *De Jure Belli ac Pacis*, Lib. III, c. I, v. 1-3.

⁵ "*Nam situeri me non possum nisi quae mittuntur intercipiám, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat.*"

To illustrate a cause for withholding restitution, Grotius declared that "If the supplies sent impede the exaction of my rights, and if he who sends them may know this; as if I were besieging a town, or blockading a port, and if surrender or peace were expected; he will be bound to me for damages." (Whewell's Grotius, III, 7.)

⁶ Lawrence's Wheaton, 2 ed., 1863, 792, 793, in connection with a summary of the respective contentions of the United States and Great Britain urged before the mixed commission under Art. VII of the Jay Treaty of Nov. 19, 1794.

as one which should be of the extremest kind,⁷ and not to be invoked until all other possible means had been used.⁸ Thus his theory did not appear to countenance the doctrine that articles of a double use might be reasonably subjected to capture as a mere means of harassing the commerce of the enemy, as for the purpose of interfering with the normal life of its civil population. Nevertheless, his views, however misconceived and loosely applied, encouraged respect for the idea that the propriety of belligerent interference with articles useful both in peace and war depended upon proof by the captor of the existence of special conditions. That he failed to observe those which might afford the most convincing excuse for seizure proved to be less significant than his perception of the possible legal value of the belligerent claim of requisition.⁹

While it would be inaccurate to attribute to Grotius the reasons which in England, and later in the United States, were advanced in support of a belligerent right to capture and confiscate articles useful in the arts of peace as well as in the science of war, the doctrine of conditional contraband, as it was developed in those countries, doubtless owed much to his classification. That doctrine was based upon the theory that a belligerent should not be deterred from confiscating articles normally not to be deemed contraband, if it could be shown that they were actually destined for a hostile use by the enemy. If the application of this principle opened the way to abuse of power and so afforded opportunity for dangerous extension of the belligerent prerogative as understood in continental Europe, the advocates of it were at least able to maintain that it contemplated no unrestrained confiscation of articles not destined for a hostile use, and that it called for a moderation of conduct oftentimes not manifested by belligerent States committed to an opposing view.¹⁰ Grave practical considerations pertaining both to the matter of proof and the nature of the use which should justify confiscation, served to render it increasingly difficult to obtain general agreement as to the precise circumstances justifying the confiscation of articles alleged to be conditional contraband. The procedure adopted in certain quarters proved to be a means of harassing rather than protecting neutral commerce. Moreover, the method of classification necessitated the use of tests which belligerents ignored in determining what should be regarded as absolute rather than conditional contraband.

§ 798. **The Same.** Thus the controversy concerning contraband possessed a two-fold aspect, with respect, first, to the nature of articles to be deemed generally subject to confiscation; and, secondly, to the circumstances when articles

"He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class (among which provisions are included), *not bound to a port besieged or blockaded*, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defense, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common." (*Id.*)

⁷ *De Jure Belli ac Pacis*, Lib. III, c. XVII, i.

⁸ *Id.*, Lib. II, c. II, vi-ix, and comments thereon in Lawrence's Wheaton, 2 ed., 793.

⁹ See especially in this connection, Westlake, 2 ed., II, 282.

¹⁰ Westlake, 2 ed., II, 285.

of a particular kind, such as those useful in the pursuits of peace as well as of war, should be treated as if they were contraband. Permanent adjustment required wide recognition of the true reason why a belligerent might justly endeavor to confiscate neutral goods consigned to the territory of the enemy. If that reason were merely the military necessity of the belligerent as conceived by itself, general acquiescence on the part of the family of nations would have assumed a form distinctly intolerant of neutral claims. In such case the embarrassment occasioned a belligerent through the commercial intercourse of neutrals with its adversary would have encouraged the former to resort to pretext for the treatment as contraband of any articles whatsoever, and thus to substitute for blockade a possibly more convenient method of cutting off access to enemy territory. If, on the other hand, the reason was founded on the right to prevent the enemy from deriving definite succor as a belligerent from articles destined to its territory or to its forces, there was a solid ground on which a State engaged in war might base a claim to confiscate, and one also justifying resentment of the efforts of a neutral to obstruct the repression of a trade constituting participation in the conflict.

States were, however, oftentimes seemingly guided by political expediency rather than devotion to principle. In consequence, by the close of the eighteenth century maritime powers, and notably Great Britain, had concluded various treaties inconsistent with national pretensions.¹ The intrusion of such factors obscured a vision of any applicable principle that was influencing the conduct of States and begetting a rule of law. Yet there was one.

The gradual coming into being of a rule of international law, whether imposing a restriction where none was in earlier times acknowledged to exist, or marking acquiescence in the exercise of a particular privilege, such as one assertive of interference with the foreign trade of an enemy, must be forged and welded together in the heat of conflict between opposing interests. Thus, in its final form the rule may appear to be little more than the product of compromise resulting from a general sense of expediency, perhaps due in part to the influence of sheer power wielded by dominating States. In relation to the matter of contraband and to the law pertaining to it, such a conclusion is partly true; but it fails to take cognizance of the bearing of an idea or theory that was invoked before the days of Grotius and before the word "contraband" was employed, and which has survived a period of some three hundred and fifty years, to measure the strength or weakness of belligerent claims. It was of course a harsh and unreasonable assertion of power that warring States or monarchs once made when they claimed freedom to cut off any or all trade by sea between their enemies and the outside world. Yet there was a time when it could not be maintained that a commonly acknowledged obligation rested upon the former to pursue a different course. In the slow development of the law among nations general respect for belligerent assertions could only be won by the reasonableness of the idea responsible for what was claimed; for the re-

§ 798. ¹ Concerning the treaties concluded by Great Britain, see Hall, Higgins' 8 ed., 767-770.

quirements of logic must always sustain what is put forth as the basis of a legal right that is to commend itself to the several members of the international society. When belligerent States were able to find and invoke a reasonable basis for interference with some forms of trade with their enemies they were on solid ground, and were in a position to discuss the soundness of their pretensions in the light of a theoretical law. Such States, as will be seen, early found that basis and proceeded to make good use of it.

Through the turmoil of centuries there stands out one long-continued assertion which belligerent States did not cease to make as the basis of a claim of right — the reasonableness of preventing foreign aid by sea from reaching and sustaining their enemies.² This was a fair claim and still remains one. It was

² Lord Burleigh in 1589, proclaimed to the Hanse merchants who had been zealously sustaining the Spanish Armada: "Her Majesty thynketh and knoweth it by the rules of the law as well of nature as of men, and specially by the law civil, that whenever any doth directly help her enemy with succours of eny victell, armor, or any kynd of munition to enable his shippes to maintain themselves, she may lawfully interrupt the same; and this agreeth with the law of God, the law of nature, the law of nations, and hath been in all tymes practised and in all countries betwyxt prynce and prynce, and country and country." (Edward P. Cheyney in *English Hist. Rev.*, XX, 664, citing Lansdowne MS. civ. 30, f. 70; Jessup and Deák, *Neutrality, Origins*, I, 56.) In 1596, Queen Elizabeth's Council announced that "Her Majesty's navy had orders to refrain from injury to the persons and property of all men, except, in the first place, subjects of the king of Spain; in the second, such other persons as should give to that king 'manifest aid with men, shippes, artillery, victuals, and other warlike provisions for invasion of her majesty.'" (Cheyney, *op. cit.*, 655; Jessup and Deák, *op. cit.*, 58.) In 1626, England instructed its naval officers "that if any of His Majestie's ships, or others having letters of reprisall, shall meet with anie ship carrying forbidden goods or merchandise, or otherwise so assisting our enemies with arms, vittaille, or munition, or if they shall meet with anie ship returning from our enemies' countrie, which hath in that voyage outward carried forbidden goods or merchandise, or otherwise assisted our saied enemies, as is before expressed, that it be lawfull for His Majestie's saied ships, or others having letters of reprisall, to take and bring in such ship or ships as if they were the ships of enemies." (R. G. Marsden, *Documents relating to the Law and Custom of the Sea*, printed for the Navy Records Society, London, 1915, I, 416, 421; Jessup and Deák, *op. cit.*, 63.) In 1653, the States General, being at war with England, took a substantially similar stand in correspondence with Sweden. (Jessup and Deák, *op. cit.*, 66, citing Thurloe, I, 436-437.) Some of the Council struck the same note in suggestions addressed to the British admiralty judges in 1665, declaring that "His Majesty will in vain attempt to reduce his enemies" if they shall enjoy "the freedom of such unlimited supplies" of specified articles. (Marsden, *op. cit.*, II, 57; Jessup and Deák, *op. cit.*, 70.) In 1681, the French Marine Ordinance announced that "The arms, powder and bullets, and other munitions of war, as well as horses and their equipment, which shall be transported for the use of our enemies, shall be confiscated." (Jessup and Deák, *op. cit.*, 72, citing I Lebeau, 80, 85.) The second Earl of Nottingham, in the Finch line, and Secretary of State under William and Mary, declared in 1689: "The trade of Sweden to France is generally in such commoditys as are necessary to their fleet and for that reason, although we had made no treaty of prohibition, it cannot be expected that we should allow it while we are at warr with France at sea." (Jessup and Deák, *op. cit.*, I, 74, citing British Diplomatic Instructions, 1689-1789, III, Denmark, 10, 11.) In May, 1709, a British Order in Council, adverting to the enemy's "great distress for want of corn," and its endeavor to supply itself therewith from British dominions and by way of Spain, declared that "to prevent therefore a practice that so visibly tends to the support of the enemy, more especially at this time, and to the prejudice of the whole alliance, . . . all sorts of corn that shall be bound in any ships whatsoever to the enemy's country is and shall be deemed contraband." (Marsden, *op. cit.*, II, 212; Jessup and Deák, *op. cit.*, I, 89.) This order followed a draft instruction of the previous month directing the Lord Admiral to stop corn in neutral ships bound to the enemy's ports, accompanied by announcement of an intention to detain and pay for such cargoes so brought in. (Marsden, *op. cit.*, II, 211; Jessup and Deák, *op. cit.*, I, 89.) In 1747, Paul, the British Admiralty Advocate, announced that "If a liberty of carrying materials for war were allowed, it would be a permission to aid and support one of the contending partys in the war, which would be contrary to the law of nations," citing Grotius, *Lib. 3, cap. 17, sect. 3*. (Marsden, *op. cit.*, II, 339, 341.) In 1753, the Law Officers of the Crown, reporting as to the action of Frederick II, in with-

oftentimes misapplied, misapplications being seen in efforts to prevent trade with an enemy in what did not in fact minister to its needs as a belligerent. The ensuing controversies between belligerent and neutral powers increasingly centered, however, on the question whether particular articles were to be deemed to have such a relation to an enemy receiver as to justify its adversary in placing them under a ban. There was a diminution of challenges of the soundness of the principle underlying the belligerent claim. The issue pertained rather to its abuse. That principle was, moreover, significantly invoked when a belligerent essayed to preempt what it asserted the right to prevent from reaching and aiding its enemy, the preemptive claim being put forth as an incident or consequence of the right to interfere with and oppose a ministration in aid of the enemy, and as a milder belligerent claim than one which embraced the condemnation (as contraband) of what was seized. It is not here sought to discuss the suggestion that what a belligerent might lawfully prevent from reaching its enemy it might also condemn. It is desired rather to advert to the paucity of documentary evidence that before the United States came into being the preemptive claim was asserted independent of, or unsupported by the allegation that, the neutral property thus to be dealt with was subject to seizure because of its importance to the enemy as a belligerent.⁸

In the course of the long struggles between belligerent and neutral States there were numerous mind-diverting complications that were productive of side issues. Thus the belligerent assertion of a right to interfere with traffic in particular articles through preventive seizures and condemnations was challenged when such action appeared to discriminate against the trade of particular un-

holding payment of interest on the Silesian loan, stated that "contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality." (Marsden, *op. cit.*, II, 348, 350; Jessup and Deák, *op. cit.*, 101.)

All of the foregoing documents are referred to in the illuminating and penetrating discussion of contraband contained in Chapter III of Jessup and Deák's *Neutrality*, I, Origins.

⁸ The British Order in Council of 1667, providing for the offer for purchase of naval stores captured by His Majesty's ships, at an appraised price, to the Commissioners for the Navy, was designed chiefly to prevent undesired competition with private purchasers. It did not indicate any claim of a right to capture and bring in cargoes with a view to preemption. (Marsden, *op. cit.*, II, 69.) The British draft order to the Lord Admiral in 1709, directing him to stop corn in neutral ships bound to the enemy's ports, although accompanied by a declaration indicating a design to detain and pay for such cargoes as might be brought in, was based on the statement that Her Majesty "judging it to be of the highest importance to her affairs, as well as those of all her allies, to distress the enemy as much as possible by taking the most effectual methods for preventing their receiving such supplies at this juncture," issues the instruction. (Marsden, *op. cit.*, II, 211.) See also Order of the Lords to captains of H.M. ships to seize naval stores in neutral ships bound to an enemy port, Oct. 15, 1745, Marsden, *op. cit.*, II, 321. In instructions from the Lords to Corbett, of March 22, 1745, in relation to naval stores bound to an enemy port, it was declared: "You are to give the said captains to understand that it is not intended to make such ships prizes, unless in cases where by treaty the goods are declared contraband; but only to prevent the enemy from being supplied with large naval stores, whereby they are enabled to fit out ships of war and privateers, to ruin our commerce and furnish assistance to His Majesty's rebellious subjects, and even to threaten His Majesty's dominions with an invasion." (Marsden, *op. cit.*, II, 322.) The brief published excerpt from the opinion of the Law Officers of the Crown of May 10, 1746, concerning the bringing in of neutral ships with corn and provisions for the enemy on board, and the compulsory purchase of their cargoes by the Government, contains in terms no broader or different assertion of the basis of the belligerent right. (Marsden, *op. cit.*, II, 323.)

avored neutrals.⁴ Again, there were frequent relaxations of stringent applications of the belligerent claim, which for reasons of policy a warring State might see fit to yield on account of special exigencies confronting it; it might deem it inexpedient to press a claim which would imperil a trade that was to be anticipated when it itself became a neutral. Through a maze of treaties of inconsistent scope and tenor, States were making their way with little conscious effort to produce a general law-proclaiming code. Yet through the repercussions of the period from Elizabeth to the Declaration of American Independence there was perceived and proclaimed a test which was to be increasingly applied in passing upon the soundness of belligerent interferences with neutral trade with an enemy. Throughout its life as a State the United States has found occasion to employ it.

Development of the science and instrumentalities of warfare, changes in the relationship of various articles of commerce to the conduct of hostilities, the increasingly close connection of the civilian male population of belligerent territories with hostile operations, the vast development of agencies of transportation within neutral territory adjacent to belligerent countries,⁵ together with the enlargement of means of communication by radio, and the advent of aircraft, have, especially during the present century, perceptibly and unceasingly combined to modify the bearing which neutral traffic in particular articles once had upon the military achievement of the belligerent receiving them. Such changes have been deemed sufficient to justify enlargements of lists of articles fairly to be regarded as contraband, and also to broaden the conditions justifying the imputation of a hostile destination to goods in transit, even when consigned to a neutral seaboard. Thus it is that no pronouncement concerning what may fairly be regarded as contraband in the course of one war can afford exact guidance as to reasonable conclusions to be anticipated in a later conflict. Nevertheless, the principle underlying the fundamental belligerent claim remains unalterable, and has, therefore, never ceased to be applicable as a test of the propriety of belligerent conduct. It is worth while, therefore, to observe the influence of the principle upon the conduct of the United States, both as a neutral and as a belligerent.

2

§ 799. **Early Treaties of the United States.** When the United States entered upon its being as a nation, two opposing ideas had long found expression in European conventions—that contained in the Treaty of the Pyrenees concluded between France and Spain, November 7, 1659,¹ confining articles of

⁴See, for example, Swedish complaint of June 12, 1653, against the action of the States General in prohibiting the carrying of contraband goods to England, Scotland and Ireland, Jessup and Deák, *op. cit.*, I, 66, citing Thurlow, I, 264–265.

⁵See, in this connection, Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Feb. 10, 1915, *For. Rel.* 1915, Supp., 324, 327.

§ 799. ¹Arts. XII and XIII, *Les Grands Traités du Règne de Louis XIV*, Paris, 1893, 100, 101.

²By a treaty between France and the Hanse Towns, signed at Paris, May 10, 1655, contraband was confined to munitions of war, and it was expressly declared that wheat and grains of all sorts, vegetables, and other things serving to sustain life, might be carried to the enemy, provided that they were not transported to towns and places actually under at-

contraband to those of warlike character and excluding foodstuffs, and that set forth in the Treaty of Whitehall concluded between Great Britain and Sweden, October 21, 1661, placing money and provisions in the same category as munitions of war.² The latter was thus declaratory of a theory hostile to the rights and interests of neutral maritime powers, and sharply in contrast to the spirit of a series of conventions which the United States began to conclude. Thus its treaty of commerce with France of February 6, 1778, specified what should be deemed contraband, confining the list of prohibited articles to those chiefly of special use to a belligerent, such as instruments of war,³ and declaring that certain kinds of merchandise should not be "reckoned among contraband or prohibited goods." In this class were embraced cloth, wearing apparel, gold, silver and baser metals, coal, wheat and other grains, tobacco and spices, as well as fish, cheese and butter, beer, oils, wines, sugars and salt, "and in general all provisions which serve for the nourishment of mankind and the sustenance of life." It was provided that all other merchandise and things not comprehended in the enumeration of contraband should be free, and might be transported and carried "in the freest manner by the subjects of both confederates,

tack and were taken voluntarily and not under compulsion of the enemy, in which case they might be seized and retained on paying their just value.

"Nov. 7, 1659, there was concluded between France and Spain the famous Treaty of the Pyrenees. Articles XII and XIII dealt with the subject of contraband, including therein only such things as were distinctly of warlike character and excluding therefrom wheat, corn, and other grains, pulse, oils, wines, salt, and generally all things useful to sustain life, unless destined to towns and places 'besieged, blocked up, or surrounded.' [Citing vol. 1, pp. 45, 46 of 'A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers relating to Peace and War,' 2d edition, London, 1732.]

"The Dutch agreed to these categories in 1662, and were soon followed by Great Britain, in treaties made with the United Provinces and Spain in 1667, and with France in 1677.

"In 1713 came the Peace of Utrecht. By the treaties concluded between France and the other powers on that occasion the subject of contraband was definitely regulated on the most advanced lines. For example, in the treaty of commerce with Great Britain signed April 11, 1713, while contraband was limited to certain enumerated articles of warlike character, the noncontraband list, which embraced wheat, barley, and other grains, pulse, tobacco, spices, salt and smoked fish, cheese and butter, beer, oils, wines, sugars, salt, 'and in general all provisions which serve for the nourishment of mankind and the sustenance of life,' was extended to many other articles, all of which were declared to be free except when transported to places 'besieged, blocked up round about, or invested.' [Citing Jenkinson's 'Treaties,' II, 51.]

"Similar stipulations were incorporated in the British-French commercial treaty signed at Versailles, Sept. 26, 1786.

"In the manifesto of the Empress Catherine of Russia of 1780, which formed as heretofore stated, the basis of the Armed Neutrality, it was declared that her Imperial Majesty adhered to Articles X and XI of her treaty of commerce with Great Britain, and extended their provisions to all the nations at war. This treaty was concluded June 20, 1766. With the 'single exception' of certain enumerated articles, which were 'accounted ammunition or military stores,' it was agreed that the subjects of the one party might transport 'all sorts of commodities' to places belonging to the enemy of the other that were not 'actually blocked up or besieged, as well by sea as by land.' [Citing Chalmers, I, 7.]

"Such was the condition of things when the wars growing out of the French Revolution began." (J. B. Moore, "Contraband of War," Philadelphia, 1912, *Proceedings*, American Philosophical Society, LI, 203, pp. 28-30.)

² Art. XI, Brit. and For. State Pap., I, 701, 705.

³ Art. XXIV, Malloy's Treaties, I, 476.

Saltpetre and "horses with their furniture" were embraced in the contraband list. Hall adverts to the fact that the United States had between 1778 and the end of the eighteenth century "concluded four treaties, by which munitions of war, horses, and sulphur or saltpetre, or both, were ranked as contraband." (Higgins' 8 ed., 775.)

even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested.”⁴ The treaty with Sweden of April 3, 1783, reproduced generally these provisions,⁵ as did also that with Spain of October 27, 1795.⁶

According to the treaty with Prussia of September 10, 1785, it was agreed that in the event of war between one of the contracting parties and a third power, in order “to prevent all the difficulties and misunderstandings that usually arise respecting the merchandise heretofore called contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of one of the parties to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals.”⁷ The right was given, however, to stop and detain such vessels and articles subject to payment by the captors of reasonable compensation for the losses thereby occasioned; and the captor was further allowed to use any military stores so detained on payment of full value therefor according to the current price at the place of destination. Moreover, a vessel deemed to be carrying contraband was given the right to escape further detention and to proceed on her voyage in case the master should deliver to the captor the contraband goods. These provisions were also contained in the treaty with Prussia of July 11, 1799,⁸ and were “revived” in that of May 1, 1828.⁹

In the Jay Treaty with Great Britain of November 19, 1794, it was agreed that under the “denomination” of contraband should be included all arms and implements serving for the purposes of war, by land or sea, and a list of articles deemed to possess such a character was specified. These were declared to be just objects of confiscation whenever the attempt was made to carry them to an enemy. It was also provided that in view of the difficulty of agreeing on the precise cases “in which alone provisions and other articles not generally contraband may be regarded as such,” it was expedient to provide against the “inconveniences and misunderstandings which might thence arise.” Accordingly, the important provision was made that whenever “any such articles so becoming contraband, according to the existing law of nations,” should for that reason be seized, there should be no confiscation, but that the owners should

⁴ It was also provided that “all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors and any parts of anchors, also ships’ masts, planks, boards and beams of what trees soever; and all other things proper either for building or repairing ships, and all other goods whatever which have not been worked into the form of any instrument or thing prepared for war by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods.”

⁵ Arts. IX and X, Malloy’s Treaties, II, 1728.

⁶ Art. XVI, Malloy’s Treaties, II, 1645. Also Art. XXIV, treaty with the Netherlands, Oct. 8, 1782, *id.*, 1240.

⁷ Art. XIII, Malloy’s Treaties, II, 1481.

⁸ *Id.*, 1490.

⁹ Art. XII, *id.*, 1499.

Concerning the effect of the treaty arrangement with Prussia upon the propriety of the destruction of the American merchantmen *William P. Frye* by the German vessel of war, *Prinz Eitel Friedrich*, Jan. 28, 1915, see correspondence in For. Rel. 1915, Supp., 357, 360, 376, 551, 570, 644.

be "speedily and completely indemnified."¹⁰ It was declared that the captors or, in their default, the government under whose authority they might act, should pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention.¹¹

The foregoing arrangements are of more than historic interest. Their significance lies in the fact that the several contracting parties found it possible to agree with the United States that articles fairly to be regarded as contraband might well be confined to those within a relatively small field. Such action necessarily implied that those parties were prepared to acknowledge that articles outside the limits of that field, such particularly as foodstuffs, would not necessarily so minister to the military needs of a belligerent receiver as to excuse seizure and condemnation by its enemy, and accordingly, to justify the treatment of them as contraband. That numerous treaties were being concluded on a different basis which was at variance with that view is also not without significance. Conditions of transportation and communication at the time revealed, however, the fact, accentuated by the treaties of the United States, that there was a considerable commerce between neutral and belligerent States which ought not to be interfered with, as through seizure and condemnation, on the alleged ground that it constituted a means of assistance to the enemy which might reasonably be thwarted. Because there was such a commerce there was room for a law that took cognizance of it and for treaties that respected it. It gave strength to neutral opposition to abusive belligerent pretensions.

3

CONTROVERSIES RESPECTING CERTAIN ARTICLES

a

Foodstuffs

(1)

§ 800. **Early Diplomatic Discussions of the United States.** The right of a belligerent to confiscate munitions of war destined to enemy territory afforded no ground for controversy because of the necessary implications as to their hostile use. With respect to foodstuffs the situation was otherwise, and the controversy protracted. The wars growing out of the French Revolution early compelled the United States to take a definite stand.

A decree of the French National Convention, May 9, 1793, directed French armed vessels to seize and bring in neutral vessels loaded with provisions and

¹⁰ Here was acknowledgment that the right to pre-empt articles such as provisions depended upon their becoming contraband under the existing law of nations, with the intimation that while they were not generally to be regarded as such, they might under some circumstances be deemed to attain such a character.

¹¹ Art. XVIII, Malloy's Treaties, I, 601. See S. F. Bemis, *Jay's Treaty*, 1923; W. Alison Phillips, *Neutrality*, II, *The Napoleonic Period*, Part I, chap. III.

bound to enemy ports, and provided that provisions "being neutral property" should be paid for at the price for which they would have sold at the port of destination. Such neutral vessels were to be released as soon as the provisions on board were landed, or the seizure of any merchandise effected. Freight, as well as compensation for the detention of the vessels, were to be allowed through judicial channels.¹ On June 8, 1793, a British order in council instructed British ships of war and privateers to detain all vessels loaded wholly or in part with corn, flour or meal, bound to any port in France, or any port occupied by French armies, with a view to the purchase of such provisions on behalf of his Majesty's Government. It was provided that the ships should be released after such purchase, and after due allowance for freight.²

Great Britain undertook to justify its action on the ground that "by the law of nations, as laid down by the most modern writers," all provisions were to be considered as contraband and as such, liable to confiscation, "in the case where the depriving an enemy of these supplies, is one of the means intended to be employed for reducing him to reasonable terms of peace." The actual situation of France was said to be notoriously such as to lead to the employment of this mode "of distressing her" by the joint operations of the different powers engaged in the war. The reasoning of the authors relied upon was deemed "much more applicable to the *present* case, in which the distress results

¹ See document accompanying communication of Mr. Genet, Minister of France, to Mr. Jefferson, Secy. of State, Sept. 27, 1793, Am. State Pap., For. Rel. I, 243, 244.

"This was a claim not of contraband but of preemption. Nevertheless, the United States protested against it, and it was not uniformly enforced against American vessels." (J. B. Moore, "Contraband of War," Philadelphia, 1912, 30.)

See, in this connection, W. Alison Phillips, *Neutrality*, II, The Napoleonic Period, Part 1, chaps. 2 and 3. The author declares: "On March 26 the French Convention passed another decree which, though more important in other aspects, may serve to explain the attitude of the British Government towards the disputed question as to whether provisions should be treated as contraband. Already, on February 19, the Convention had opened the French colonial ports to American vessels on terms similar to those enjoyed by French shipping. By the decree of March 26 the vessels of the United States of sixty tons burden or under, laden only with flour and provisions, as also with the articles specified in the *arrêt* of August 30, 1784, and with bacon, butter, salt, salmon, and candles, were to be admitted to the ports of the French colonies exempt from all duties, and were to be permitted to load with a certain proportion of coffee, sugar and other colonial produce on payment of the duties. The object of the decree of February 19 had been to safeguard the traffic of France with her colonies by placing it under the protection of a neutral flag, and it led inevitably to the reaffirmation by Great Britain of the 'Rule of 1756,' which laid down that a neutral has no right to deliver a belligerent from the pressure of his enemies' hostilities by trading with his colonies in time of war in any way that was prohibited in time of peace. The decree of March 26 was clearly intended to encourage the importation of those supplies from the United States without which the French islands could not have held out against the British attacks, and it was therefore an additional inducement to the British Government not only to enforce the Rule of 1756 but also to treat provisions as contraband of war." (30.)

Referring to a communication from Lord Grenville to Mr. Hammond, British Minister to the United States, March 12, 1793 (P.R.O.F.O.5.1.), the same writer declares that "its abiding interest lies in the indication it gives that Great Britain intended to treat provisions as contraband, though only when the cutting off of food supplies from the enemy seemed to give a reasonable chance of reducing him to terms." (*Id.*, 33.) He also adverts to the significant fact that the "ostensible justification" of the French decree of May 9, 1793, "was thus the right of retaliation," and that "the last article (v) laid down that the law would cease to have effect after the allied powers should have declared free and not liable to seizure, although destined to the ports of the Republic, provisions which might be neutral property, and merchandise loaded in neutral ships, which belonged to the French Government or to French citizens." (*Id.*, 35.)

² Am. St. Pap., For. Rel. I, 240.

from the unusual mode of war employed by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of *commencing* and supporting hostilities against all the Governments of Europe." This reasoning was said to be most of all applicable to the circumstances of a trade in a great measure entirely carried on by the ruling party of France, and was, therefore, no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war and were then carrying it on against Great Britain. Under such circumstances that State would have been justified, it was said, had it considered all provisions as contraband and to be brought in for confiscation.³ The United States vigorously challenged the soundness of the British claim. Mr. Jefferson, as Secretary of State, declared that reason and usage had established that when two nations go to war, "those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual; to go and come freely, without injury or molestation; and, in short, that the war among others shall be, for them, as if it did not exist." He declared that corn, flour and meal were not of the class of contraband and consequently remained articles of free commerce. He denied that the existing war gave a right to interrupt the exchange of agricultural products of the United States with all nations, and he protested against the attempt of a belligerent to close a market otherwise open to a neutral, or to determine with whom it might trade. He adverted to the fact that the British order tended directly to draw the United States into the war, by causing it to act with partiality if it yielded to Great Britain what was not also yielded to France. The withholding of all corn supplies from Europe might be a necessary alternative. This, he declared, was a dilemma, which Great Britain had no right to force upon the United States. "She may," he said, "indeed, feel the desire of starving an enemy nation; but she can have no right of doing it at our loss, nor of making us the instrument of it."⁴

Mr. Hammond maintained that the contentions of his Government were supported by "all the ancient authors," and the writings of Vattel. He denied that treaties which the United States through Mr. Pinckney, its minister at London, had invoked in support of a different view, were declaratory of the law of nations, and maintained that they were restrictions of that law. He adverted to the circumstances that of the two only existing treaties by which the conduct of Great Britain was regulated towards neutrals in the war, that with Sweden

³ Mr. Hammond, British Minister, to Mr. Jefferson, Secy. of State, Sept. 12, 1793, Am. State Pap., For. Rel. I, 240, Moore, Dig., VII, 676.

Mr. Hammond added that "the present measure pursued by His Majesty's Government, so far from going to the extent which the law of nations and the circumstances of the case would have warranted, only has prevented the French from being supplied with *corn*, omitting all mention of *other* provisions; and even with respect to corn, the regulation adopted is one which, instead of confiscating the cargoes, secures to the proprietors, supposing them neutral, a full indemnification for any loss they may possibly sustain."

⁴ Communication to Mr. Pinckney, American Minister at London, Sept. 7, 1793, Am. State Pap., For. Rel. I, 239. See, also, Mr. Jefferson to Mr. Hammond, British Minister, Sept. 22, 1793, Am. State Pap., For. Rel. I, 240.

of 1661 expressly included provisions in the enumeration of contraband articles.⁵

Mr. Randolph, Secretary of State, made rejoinder. He declared that a fitness for war, as indicated by what were called instruments of war, was the "original criterion of contraband." He said that while provisions did indeed support men and men wielded arms, the former offered support no less in peace than in war, and that if by a "circuit of construction" food could be universally ranked among military engines, he asked what article to which human comfort of any kind could be traced was not to be "registered as contraband." He admitted that corn, meal and flour might be reasonably so regarded under the peculiar circumstances of a blockade, siege or investment. He called attention to certain treaties of England, which either omitted provisions from the list of contraband, or excluded them in terms,⁶ and he declared that "all the major nations of Europe," as well as Denmark and Sweden, had followed the same practice in their treaties. These furnished, he said, "the striking features of the *customary* law of nations, as defined by Vattel." He declined to acknowledge that the treaty between Great Britain and Sweden of 1661 was declaratory of the law of nations. He discussed at length the views of Grotius and Martens, observing that neither author gave support to the British view. He expressed doubt whether the actual condition of France was such as to afford a clear and unequivocal prospect of defeat by famine. He said that to counterbalance the innocence of individuals and drive all from the course of their commerce upon the vague suspicion that the ruling power of France was gathering supplies under their names, as appeared to be intimated, was "to humiliate and to punish." The dictum of Vattel in support of the treatment of provisions as contraband "*in certain junctures*, when there are hopes of reducing the enemy by famine," was said to be controverted by the opinions of other respectable writers. Attention was called to the extent and seriousness of the injuries to American trade to be anticipated in consequence of the British order. "But after all," he said, "the real question is, whether any belligerent Power can thus fetter neutral trade." This he answered in the negative.⁷

Orders in council of November 6, 1793,⁸ and January 8, 1794,⁹ further restrained American trade in foodstuffs. John Jay was that year sent to England on a special mission to adjust the differences with that country.¹⁰ As has been observed,¹¹ the treaty which he concluded on November 19, 1794, and which

⁵ Communication to Mr. Randolph, Secy. of State, April 11, 1794, Am. State Pap., For. Rel. I, 449.

⁶ In this connection he said: "We are at a loss to determine why, in 1645, Cromwell omitted provisions from his treaty with the United Provinces, if they were contraband. The nerve of his character was not apt to stop short of his rights, or to discard any possibility by which he might accomplish his designs."

⁷ Communication to Mr. Hammond, British Minister, May 1, 1794, Am. State Pap., For. Rel. I, 450.

⁸ Am. State Pap., For. Rel. I, 430.

⁹ Am. State Pap., For. Rel. I, 431; also communication of Mr. Pinckney, American Minister at London, to Mr. Randolph, Secy. of State, Jan. 9, 1794, *id.*, 430.

See, also, in this connection, Moore, Arbitrations, I, 305.

¹⁰ Message of President Washington to the Senate, April 16, 1794, nominating John Jay as envoy to Great Britain, Am. State Pap., For. Rel. I, 447. See, also, instructions of Mr. Randolph, Secy. of State, to Mr. Jay, May 6, 1794, *id.*, 472.

¹¹ See Early Treaties of the United States, *supra*, § 799.

bears his name, made provision respecting foodstuffs apparently at variance with the theories advanced by Mr. Hammond, and implying that a belligerent lacked generally the right to regard them as contraband.

"Nor was this all. A mixed commission was established under the treaty (Art. VII) to adjudicate complaints on account of seizures. The British authorities, where they made compensation for cargoes of provisions, adopted as a basis the invoice price plus a mercantile profit of 10 per cent. The claimants contended that this was inadequate. The commission allowed the net value of the cargo at its port of destination at the time at which it probably would have arrived there had it not been seized. The awards of the commission in the case of captured vessels laden with provisions and bound to France are estimated to have amounted to £720,000, or approximately \$3,500,000.

"The position successfully maintained by the United States in the case of Great Britain was altogether in accord with that which was reciprocally acted upon in its relations with other powers."¹²

From the foregoing data it seems clear that at the close of the Eighteenth Century the United States was far from admitting that the right of a belligerent to prevent foreign aid by sea from reaching and sustaining its enemies embraced the privilege of cutting off generally neutral supplies of foodstuffs destined thereto, either by labelling such articles as contraband, or by a process of pre-emption. That a warring State could lawfully reduce its enemy by starvation at the expense of a neutral purveyor was utterly denied. The strength of the American position rested on the actual relationship of such trade to the military achievements or potentialities of the belligerent so nourished. Conditions of communication and transportation by sea and land rendered possible and oftentimes probable, the consumption by non-participating and strictly non-combatant persons of much that was imported. Then-existing methods of warfare and lack of development in the organization and regimentation of man-power howsoever defined gave room for the contention that a substantial human part of the belligerent State was to be clearly differentiated from its fighting forces, that to maintain the life of the former was not to be deemed a military aid to the latter, and that, moreover, foodstuffs destined for the former might be expected actually to reach them and not necessarily be diverted for the use of a hungry soldiery. Under such circumstances neutral States, and notably the United States, could reasonably insist upon a narrow application of the Elizabethan formula. Conditions of trade between belligerent and neutral States and the relationship thereof to belligerent activities and successes had not reached the stage where thinking could be expected to be focused on the legal consequences of sharply differing situations that were to come with the later centuries.

(2)

§ 801. **Later Discussions.** In 1816, in the case of the *Commercen*, Mr. Justice Story declared in an opinion in behalf of the Supreme Court of the United States,

¹² J. B. Moore, "Contraband of War," Philadelphia, 1912, p. 32.

Respecting the commission under Article VII of the Jay Treaty, see Moore, *Arbitrations*, I, 299-349; Lawrence's *Wheaton*, 2 ed., 788-796; the case of *The Neptune*, Moore, *Arbitrations*, IV, 3843-3885.

that while by the modern law of nations provisions were not in general deemed contraband, they might become so, "although the property of a neutral, on account of the particular situation of the war, or on account of their destination."¹ He added:

If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise, if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and, more especially, if the property of his subjects, and destined for enemy's use, there does not seem to be any good reason for the exemption; for, as Sir William Scott has observed, in such case, the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.²

This acknowledgment that provisions might under certain circumstances be justly treated as contraband, was attributable in large degree to the respect entertained for the views of Sir William Scott. The treaties of the United States subsequently concluded were, however, based on a different theory and contained no intimation that foodstuffs should be deemed even conditionally contraband.³

In the case of the *Peterhoff*,⁴ arising in consequence of the Civil War, the Supreme Court of the United States gave fresh recognition, in 1866, to the doctrine of conditional contraband. In that particular case, however, no question as to the character of foodstuffs arose.⁵

§ 801.¹ 1 Wheat. 382, 388, Moore, Dig., VII, 679.

² The learned Justice cited *The Jonge Margaretha*, 1 Ch. Rob. 189.

See, also, *Maissonaire v. Keating*, 2 Gall. 325, Moore, Dig., VII, 679; *Balfour, Guthrie & Co. v. Portland & Asiatic Steamship Co.*, 167 Fed. 1010.

³ See Arts. XIV and XV of treaty with Colombia, Oct. 3, 1824, Malloy's Treaties, I, 296, 297, where it was declared that "all other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blocked up; and, to avoid all doubt in this particular, it is declared that those places only are besieged or blockaded which are attacked by a belligerent force capable of preventing the entry of the neutral."

See, also, Arts. XVII and XVIII, treaty with Bolivia, May 13, 1858, Malloy's Treaties, I, 119; Arts. XVI and XVII, treaty with Brazil, Dec. 12, 1828, *id.*, 138; Arts. XVI and VXII, treaty with Central America, Dec. 5, 1825, *id.*, 165; Arts. XIV and XV, treaty with Chile, May 16, 1832, *id.*, 175, 176; Arts. XIII and XIV, treaty with Dominican Republic, Feb. 8, 1867, *id.*, 408; Arts. XVII and XVIII, treaty with Ecuador, June 13, 1839, *id.*, 426; Arts. XX and XXI, treaty with Hayti, Nov. 3, 1864, *id.*, 926, 927; Art. XV, treaty with Italy, Feb. 26, 1871, *id.*, 973; Arts. XVIII and XIX, treaty with Mexico, April 5, 1831, *id.*, 1090, 1091; Arts. XVII and XVIII, treaty with New Granada, Dec. 12, 1846, *id.*, 307, 308; Arts. XIII and XIV, treaty with Peru-Bolivia, Nov. 30, 1836, *id.*, II, 1379, 1380; Arts. XXIII and XXIV, treaty with Peru, July 26, 1851, *id.*, 1395; Arts. XVII and XVIII, treaty with Salvador, Jan. 2, 1850, *id.*, 1542, 1543; Art. III, treaty with Two Sicilies, Oct. 1, 1855, *id.*, 1816; Arts. XVII and XVIII, treaty with Venezuela, Jan. 20, 1836, *id.*, 1836; Art. XIII, treaty with Venezuela, Aug. 27, 1860, *id.*, 1849.

Also Mr. Cass, Secy. of State, to Mr. Mason, Minister to France, No. 190, June 27, 1859, MS Inst. France, XV, 426, Moore, Dig., VII, 657.

⁴ 5 Wall. 28, 58.

⁵ Chief Justice Chase, in the opinion of the Court, said: "A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American

In 1885, France, when at war with China, announced a determination to exercise the right of considering and treating rice as contraband when bound to ports north of Canton.⁶ Although the United States is not known to have made definite protest,⁷ Dr. Wharton, the Solicitor for the Department of State, advised that the Government concur in the position taken by that of Great Britain that rice could not as a general rule be regarded as contraband.⁸ In the course of the war with Spain in 1898, instructions to American blockading vessels and cruisers, prepared by the Department of State and issued by the Navy Department, placed provisions in the list of articles deemed "conditionally contraband," declaring that they were to be so regarded "when destined for an enemy's ship or ships, or for a place that is besieged."⁹ In the course of a discussion between the United States and Great Britain, during the Boer War as to the treatment of provisions, the significant statement was made by Lord Salisbury that "food-stuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces." "It is not sufficient," he declared, "that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure."¹⁰ During the Russo-Japanese War,

and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." (*Id.*, 58.) The learned Chief Justice cited Lawrence's *Wheaton*, 772-776, note; *The Commercen*, 1 *Wheat*. 382; Dana's *Wheaton*, 629, note; Parsons' *Mar. Law*, 93, 94.

⁶ See Mr. Roustan, French Minister at Washington, to Mr. Frelinghuysen, Secy. of State, Feb. 20, and Feb. 24, 1885, *For. Rel.* 1885, 384, Moore, Dig., VII, 682. See also other documents, *id.*

⁷ "Mr. Frelinghuysen, who was then Secretary of State of the United States, merely acknowledged receipt of these notifications, but instructed the American minister at Peking that the United States reserved the question as to foreign rice going to China in American ships." (Statement in Moore, Dig., VII, 682.)

⁸ Report to Mr. Bayard, Secy. of State, May 5, 1885, MSS. Dept. of State, Moore, Dig., VII, 684. See, also, communication of Mr. Kasson, American Minister at Berlin, to Mr. Bayard, April 23, 1885, *For. Rel.* 1885, 411, Moore, Dig., VII, 683.

According to Hall: "The pretension was resisted by Great Britain on the ground that though, in particular circumstances, provisions may acquire a contraband character, they cannot in general be so treated. In answer the French government alleged that a special circumstance of such kind as to justify its action was supplied by the fact of 'the importance of rice in the feeding of the Chinese population' as well as of the Chinese armies. Thus they implicitly claimed that articles become contraband, not by their importance in military or naval operations, but by the degree in which interference with their supply will put stress upon the noncombatant population." (6 ed., 659, *citing* *Parl. Papers, France*, No. I, 1885, and quoted in Moore, Dig., VII, 679, 680.)

⁹ General Orders, No. 492, June 20, 1898, *For. Rel.* 1898, 780, 782.

See, also, Naval War Code, promulgated by the Navy Department, June 27, 1900, and subsequently withdrawn.

¹⁰ Communication to Mr. Choate, American ambassador at London, Jan. 10, 1900, *For. Rel.* 1900, 555.

Concerning seizure by British authorities of merchandise of American shippers off the east coast of Africa during the Boer War, and restitution made on account thereof, see *For. Rel.* 1900, 529-618; also statement in Moore, Dig., VII, 684, 685.

See, also, R. G. Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*, *Baltimore, Johns Hopkins University Studies*, Series XXVI, 1908, Nos. 4-6, 78, 112.

both the United States and Great Britain maintained a similar stand.¹¹ A Russian order denouncing as contraband rice and foodstuffs (as well as other articles capable of serving a warlike purpose), if transported on account of, or to the destination of the enemy, was criticized by Mr. Hay, Secretary of State, because of the vagueness of the language employed in a matter of so great importance. He adverted to the fact that foodstuffs and other articles, such as coal and cotton, though of ordinarily innocent use, were not subject to capture and confiscation, although capable of warlike use, unless shown by evidence to be actually destined for the military or naval forces of a belligerent. "This substantive principle of the law of nations," he declared, "cannot be overridden by technical rules of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces."¹² Russia amended its ruling with respect to rice and other foodstuffs in substantial conformity with the American and British views.¹³

After much deliberation the Institute of International Law adopted, in 1896, significant regulations respecting contraband.¹⁴ These limited the articles to be deemed such to arms of all kinds, munitions of war and explosives, military matériel (articles of equipment, gun mountings, uniforms, etc.), vessels fitted out for war, and instruments designed exclusively for the immediate manufacture of munitions of war.¹⁵ It was provided that an article should not be con-

¹¹ For the position of the British Government, see Parl. Papers, Russia, No. 1 (1905), 9, 11, quoted in Moore, Dig., VII, 686.

¹² See extended and important communication to Mr. McCormick, American Ambassador at St. Petersburg, No. 143, Aug. 30, 1904, For. Rel. 1904, 760, Moore, Dig., VII, 688. This note had reference to the decision of the Russian prize court at Vladivostok, condemning the American cargo, composed of railway material and flour, on board the steamer *Arabia*, the cargo being destined to Japanese ports and addressed to commercial houses therein. See, also, circular of Mr. Hay, Secy. of State, to American Ambassadors in Europe, respecting neutral commerce in articles conditionally contraband of war, June 10, 1904, For. Rel. 1904, 3, Moore, Dig., VII, 687.

See *The Arabia*, Hurst and Bray's Russian and Japanese Prize Cases, I, 42-53, embracing the decisions both of the Vladivostok Prize Court and of the Supreme Prize Court. The latter tribunal, pursuant to amended regulations as to foodstuffs, reversed the decision of the lower court with respect to the condemnation of flour consigned to firms at Kobe.

See case of the Claim of the Mutual Marine Indemnity Insurance Company respecting a parcel of salmon on board the steamer *Knight Commander*, and the decision of the Russian Supreme Court of Appeals placing the burden on the neutral claimants of proving the innocent character of the goods in question, pursuant to the requirements of the imperial order of Feb. 14, 1904, Hurst and Bray's Russian and Japanese Prize Cases, I, 357, 365.

¹³ See Russian instructions of Sept. 30, 1904, and memorandum of Oct. 22, 1904, Hurst and Bray's Russian and Japanese Prize Cases, I, Appendix G.

¹⁴ See Note of Gen. den Beer Poortugael, Nov., 1893, *Annuaire*, XIII, 50; note of Mr. Lardy, Dec. 31, 1893, *id.*, 67; report submitted by Messrs. Kleen and Brusa, reporters for the Commission of the Institute on Contraband of War and Traffic Forbidden to Neutrals, 1894, *id.*, 75; draft proposed by the Commission, and submitted to the Institute in 1895, *Annuaire*, XIV, 33; observations of Gen. den Beer Poortugael, *id.*, 43; new propositions of Mr. Perels, *id.*, 58; final report and draft presented by Messrs. Kleen and Brusa in behalf of the Commission in 1896, *Annuaire*, XV, 98; discussion by the Institute, Sept. 29, 1896, *id.*, 205.

The work of the Institute is briefly described in J. B. Scott, Resolutions, 129.

¹⁵ *Annuaire*, XX, 374, 375, J. B. Scott, Resolutions, 129. It was added that "an enemy destination is presumed when the shipment goes to one of the enemy's ports, or to a neutral port which, according to incontestable proofs and indisputable facts, is only an intervening point, with ultimate enemy destination in the same commercial transaction."

According to Section 2, the term "munitions of war" was to include articles which, to be used directly in war, needed only to be assembled or combined.

sidered contraband simply because it was intended to be used to aid or to favor an enemy, or because it could be useful to an enemy or used by him for military purposes, or because it was meant for his use.¹⁶ The classes known as "conditional contraband" or "accidental contraband" were declared to be abolished.¹⁷ A belligerent was, however, accorded the right upon payment of indemnity to sequester or preempt articles bound for a port of its adversary, and which might be used for purposes either of peace or of war.¹⁸ No specific reference was made to foodstuffs.

§ 802. **The Same.** The Second Hague Peace Conference of 1907 produced no convention dealing with contraband. It was proposed, however, on behalf of the United States, that the right of capture should be confined to articles agreed to be absolute contraband.¹

The Declaration of London of 1909, enumerated lists of articles to be treated as absolute contraband, and as conditional contraband, and of those not to be declared contraband. Foodstuffs were placed in the conditional class.² Conditional contraband was, according to Article XXXIII, liable to capture if shown to be destined for the use of the armed forces or of a Government department of the enemy State, unless in the latter case the circumstances showed that the articles could not in fact be used for the purposes of the war in progress.³ The destination referred to in that Article was presumed to exist if the goods were consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplied articles of such a kind to the enemy. A similar presumption was said to arise if the goods were consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption was, however, to be raised in the case of a merchant vessel bound for one of such places, and if it was sought to prove that she herself possessed a contraband character. In cases where the foregoing presumptions did not arise it was declared that the destination was presumed to be innocent. The presumptions established in the Article were capable of rebuttal.⁴ Conditional contraband was, moreover, ren-

¹⁶ Section 3.

¹⁷ Section 4.

¹⁸ Section 5.

§ 802. ¹ Admiral Sperry declared that the American delegation did not think it possible, in view of constantly changing conditions, to formulate a list of contraband articles which could prove sufficient for a long period of years. For that reason, he said that his delegation had made a proposal to confine contraband in narrow but general terms, to articles always having a military use, and to restrict conditional contraband by close provisions respecting quality and quantity. *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 870. For the text of the foregoing proposal, see *id.*, 1160.

Concerning the British proposal for the abolition of contraband, and the reasons advanced in support of it by Lord Rea, see *id.*, 854; also Report of Mr. Fromageot on Contraband of War, to the Conference, *id.*, I, 256. At the tenth session of the Fourth Commission, July 31, 1907, 25 States voted in favor of the British proposal, and 5 against it, the latter being the United States, France, Germany, Montenegro, and Russia. *Id.*, III, 881.

See Instructions of Mr. Root, Secy. of State, to the American delegation, May 31, 1907, For. Rel. 1907, II, 1128, 1138; also J. B. Scott, Hague Peace Conferences, I, 704-716.

² For the text of the Declaration of London see Charles' Treaties, 268, also Naval War College, Int. Law Topics, 1909, 169.

³ It was declared that this last exception did not apply to a consignment coming under Art. XXIV (4) of gold and silver in coin or bullion, and paper money.

⁴ Art. XXXIV.

dered not liable to capture, according to Article XXXV, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it was not to be discharged at an intervening neutral port. The ship's papers were to be regarded as conclusive proof both as to the voyage on which the vessel was engaged, and as to the port of discharge of the goods, unless she was found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.⁵ In the attempt to render the doctrine of continuous voyage inapplicable to conditional contraband, it would have been desirable to indicate with greater precision the circumstances when articles within that category should be free from the danger of condemnation. The effort to compensate a belligerent for the restriction applied with respect to the doctrine of continuous voyage, resulted in an arrangement which removed safeguards supposedly surrounding articles deemed conditionally contraband, and served to obliterate the distinction between them and articles acknowledged to be absolute contraband.⁶

(3)

§ 803. **The Controversy during World War I.** Events of World War I served to emphasize the reluctance of belligerent States to observe uniform respect for the theory of conditional contraband as it had been advocated by neutral powers in the Russo-Japanese War.

The controversy between the United States and Great Britain with respect to foodstuffs in 1914 and 1915 concerned the treatment of cargoes consigned to neutral ports rather than those consigned to, and on board of vessels bound for, Germany.¹ Sir Edward Grey, British Foreign Secretary, took occasion, however, to declare that the most difficult questions in connection with conditional contraband arise with reference to the shipment of foodstuffs, and acknowledged that no country had in modern times maintained more stoutly than Great

⁵ See report by Mr. Renault in behalf of the Drafting Committee with respect to Articles XXXIII-XXXV, Charles' Treaties, 300-302; also report of the American delegates (Rear Admiral Stockton and Prof. Wilson) to the Secy. of State, *id.*, 332, 334, 335.

Also instructions of Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary at the London Conference, Dec. 1, 1908, Misc. No. 4, 1909, International Naval Conference, Cd. 4554, 20, 23; J. B. Scott, "The Declaration of London," *Am. J.*, VIII, 274 and 520.

⁶ Declared Prof. Moore: "These grounds of inference are so vague and general that they would seem to justify in almost any case the presumption that the cargo, if bound to any enemy port, was 'destined for the use of the armed forces or of a government department of the enemy State.' Any merchant established in the enemy country, who deals in the things described, will sell them to the Government; and if it becomes public that he does so, it will be 'well known' that he supplies them. Again, practically every important port is a 'fortified place'; and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that, in this age of railways, almost any place may serve as a 'base' for supplying the armed forces of the enemy. And of what interest or advantage is it to a belligerent to prevent the enemy from obtaining supplies from a 'base,' from a 'fortified place,' or from a merchant 'well known' to deal with him, in his own country, if he is permitted freely to obtain them from other places and persons, and especially, as countries having land boundaries can for the most part easily do, through a neutral port?" ("Contraband of War," Philadelphia, 1912, p. 39.) See, also, MS. memorandum of L. H. Woolsey, legal adviser of Department of State, on Contraband of War, 1916, p. 34.

§ 803. ¹ Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram, Dec. 26, 1914, For. Rel. 1914, Supp., 372.

Britain the principle that a belligerent should abstain from interference with such articles intended for a civil population. He questioned, however, whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible supplies intended for the civil population, remained effective for the purpose, or were suitable to existing conditions. He said that the principle involved was one which the British Government had constantly had to uphold against the opposition of continental powers. In the absence of some certainty that the rule would be respected by both parties to the existing conflict, he expressed doubt whether it should be regarded as an established principle of international law.² He contended also that elaborate machinery had been organized by the enemy for the supply of foodstuffs from overseas for the use of the German armies. He declared that under such circumstances it would be absurd to give any definite pledge that in cases where supplies could be proved to be for the use of the enemy forces, they should be given complete immunity by the simple expedient of despatching them to an agent in a neutral port. The reason, he said, for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government, disappeared when the distinction between the civil population and the armed forces itself disappeared.³ He declared also that the power to requisition would be used to the fullest extent in order to make sure that the wants of the military were supplied, and that however much goods might be imported for civil use, it was by the military they would be consumed if military exigencies so required, especially in view of the fact that the German Government had taken control of all the foodstuffs in the country. It is believed that in point of principle this argument was unanswerable.⁴ If it could be shown

² Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Feb. 10, 1915, *id.*, 1915, Supp., 324, 332.

³ Compare the reasoning of Mr. Hammond, British Minister to the United States, in his communication to Mr. Jefferson, Secy. of State, Sept. 12, 1793, Am. State Pap., For. Rel. I, 240.

⁴ In connection with the detention by British authorities of the American ship *Wilhelmina* with a cargo of foodstuffs consigned to a commission company in Hamburg, early in 1915, the Department of State declared. "According to well-established practice among nations, admitted, as this Government understands by the Government of Great Britain, the articles of which the *Wilhelmina's* cargo is said to consist, are subject to seizure as contraband only in case they are destined for the use of a belligerent government or its armed forces. The Government of the United States understands that the British authorities consider the seizure of the cargo justified on the ground that a recent order of the Federal Council of Germany promulgated after the vessel sailed, requires the delivery of imported articles to the German Government." It was said that the owners of the cargo represented that the German regulations were made inapplicable to products imported after Jan. 31, 1915, that these regulations contemplated the disposition of foodstuffs to individuals through municipalities, and that the latter were not agents of the Government. It was declared that the Government of the United States had received formal assurance from the German Government that all foodstuffs imported from the United States directly or indirectly would not be used by the German Army or Navy or by Government authorities, but would be left to the free consumption of the German civil population, excluding all Government purveyors. Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram, Feb. 15, 1915, For. Rel. 1915, Supp., 105, 106. See responses from Great Britain embodied in telegrams from Mr. Page to Mr. Bryan, Feb. 19, 1915, and Apr. 8, 1915, *id.*, 335 and 363, respectively.

In a report to the Department of State of Dec. 2, 1915, Mr. Gerard, American Ambassador at Berlin, declared that in so far as the control of use of imported goods was concerned, the German Government regarded the enemy's list of conditional contraband as of no impor-

that all provisions imported into the territory of a belligerent State would be likely to minister to the needs of its military and naval forces by reason of a general shortage of foodstuffs, the attempts of neutral traders to ship such articles to that territory would constitute participation in the war and transform their traffic into one of contraband.

The United States in February, 1915, endeavored to obtain mutual concessions from both Great Britain and Germany, and to obtain assurance from the former that (among other things) foodstuffs would not be placed upon the absolute contraband list, and that shipments of such commodities would not be interfered with or detained by British authorities if consigned to agencies designated by the United States Government in Germany for their receipt and distribution solely to the non-combatant population. Germany was asked to agree that all such articles imported from the United States be consigned to such agencies, and that they have entire charge, without German governmental interference, of the receipt and distribution of such importations, and distribute them solely to licensed dealers entitling them to furnish such food to non-combatants only. Germany was also asked to agree not to requisition any of such foodstuffs for any purpose whatsoever, or permit their diversion to the use of armed forces.⁵ These assurances were to constitute part of a broader understanding between the opposing belligerents, embracing the mode of conducting maritime war and the use of certain instruments of destruction. The effort of the United States was unsuccessful.⁶

§ 804. **The Same.** In early stages of World War I, foodstuffs were scheduled as conditional contraband in the lists announced by Great Britain, France and Russia.¹ Germany indicated a readiness to respect the substance of the Declara-

tance; and also that the receipt and distribution in Germany of certain imported food and fodder products might take place only through a central organization which distributed to civil parties only; but he added that the military authorities had power to requisition against payment anything needed by the army or navy, and that the Chancellor had power to grant exemption from control and distribution, while the military authorities had power to guarantee in advance freedom from requisition of designated imported consignments in whole or in part. *Id.*, 622.

⁵ Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram, Feb. 20, 1915, *For. Rel.* 1915, Supp., 119.

⁶ Mr. Gerard, to Mr. Bryan, telegram, March 1, 1915, *id.*, 129; Sir Cecil Spring-Rice, British Ambassador at Washington, to Mr. Bryan, March 1, 1915, *id.*, 127.

The British order in council of March 11, 1915, purporting to prevent commodities of any kind from reaching or leaving Germany, and with the object of establishing a blockade, was so enforced as to diminish thereafter the importance to the United States, while a neutral, of the British attitude respecting contraband. For the text of the order see Mr. Page, American Ambassador at London, to Mr. Bryan, March 15, 1915, *id.*, 143.

"Most of the neutral vessels stopped by British or French authorities after March 11, 1915, were stopped in pursuance of the 'blockade' policy rather than with a view to search for contraband. Even in the cases of ships searched for contraband the procedure was often a mere formality, readily accomplished at sea, by virtue of the undertakings of responsible organizations in the neutral countries to prevent the reexportation of contraband goods to enemy territory. Detention of innocent vessels in port, with a view to search for contraband, was of negligible importance after 1915." (Turlington, *Neutrality*, III, 1936, 30.)

§ 804. ¹ See lists of contraband articles in American White Book, European War, I, 1-26; also British list as of Nov. 5, 1915, *id.*, III, 95-106.

tion of London (which treated foodstuffs as conditional contraband), and to apply its provisions, if they were not disregarded by other belligerents.² On April 18, 1915, the German prize ordinance "in retaliation of the regulations adopted by England and her Allies, deviating from the London Declaration of maritime law," declared that foodstuffs and other specified articles "coming under the designation of conditional contraband," would be "considered as contraband of war."³ On April 13, 1916, the British Foreign Office announced that the circumstances of the war were so peculiar that His Majesty's Government considered that for practical purposes the distinction between absolute and conditional contraband had ceased to have any value. So large a portion of the inhabitants of the enemy country were taking part, it was said, directly or indirectly, in the war that no real distinction could be drawn between the armed forces and the civilian population. It was declared that the enemy Government had taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they were then available for government use. So long as such exceptional conditions continued, British belligerent rights with respect to the two kinds of contraband were, it was said, the same, and treatment of them would have to be identical. Foodstuffs, with other articles normally in the conditional class, were placed in the broad category of articles deemed simply contraband.⁴

In response to the British announcement of April 13, 1916, the Government of the United States declared that in view of the established practice of a number of maritime nations, including Great Britain and the United States, "of distinguishing between absolute and conditional contraband," it was impelled to notify the British Government "of the reservation of all rights of the United States or its citizens in respect of any American interests which may be ad-

² Mr. Gerard, American Ambassador at Berlin, to Mr. Bryan, Secy. of State, telegram, Sept. 4, 1914, American White Book, European War, I, 27.

It should be observed that while the Senate of the United States had on April 24, 1912, advised and consented to the ratification of the Declaration of London, it was not ratified by the President, and hence never proclaimed. Naval War College, Int. Law Topics, 1915, 93. On Aug. 6, 1914, the United States suggested to the belligerent powers the advisability of adopting the declaration as a temporary code of naval warfare during the existing conflict. This suggestion was withdrawn Oct. 24, 1914, because of the unwillingness of certain belligerents to accept the declaration without modification. The Department of State simultaneously declared that the Government would insist that the rights and duties of the Government and citizens of the United States in the war be defined by the existing rules of international law and the treaties of the United States "irrespective of the provisions of the declaration." Mr. Lansing, Acting Secy. of State, to Mr. Gerard, American Ambassador at Berlin, telegram, Oct. 24, 1914, For. Rel. 1914, Supp., 259. Also correspondence in American White Book, European War, I, 5-8.

³ American White Book, European War, I, 30.

⁴ Enclosure in report of Mr. Reed, American Vice-Consul at London, to Mr. Lansing, Secy. of State, Apr. 20, 1916, For. Rel. 1916, Supp., 385.

"Wheat and provisions are classed as conditional contraband of war under generally accepted principles of international law, and therefore subject to capture and confiscation by belligerent vessels if destined for a belligerent government, its army or navy, or its port blockaded or held by military forces; if not so destined they are not contraband of war." (Mr. Bryan, Secy. of State, to Representative Stephens, Aug. 8, 1914, For. Rel. 1914, Supp., 274.)

"The United States has always insisted that food-stuffs are legitimate articles of commerce, and that mere destination to an enemy port is not of itself justification for their seizure or confiscation." (Mr. Lansing, Acting Secy. of State, to the American Ambassador at London, Sept. 26, 1914, For. Rel. 1914, Supp., 225, 229.)

versely affected by the abolition of the distinction between these two classes of contraband, or by the illegal extension of the contraband lists during the present war by Great Britain or her allies.”⁵

In the Naval Instructions Governing Maritime Warfare, issued June 30, 1917, “all kinds of fuel, food, foodstuffs, feed, forage, and clothing and articles and materials used in their manufacture” were declared to be contraband when “actually destined for the use of the enemy Government or its armed forces, unless exempted by treaty.”⁶

(4)

§ 805. **Conclusions.** The foregoing discussions, from the time of the French Revolution until the entrance of the United States as a belligerent in the World War in 1917, illustrated the failure of maritime powers to reach any agreement with respect to the treatment to be accorded foodstuffs, and the insufficiency of any existing code to meet with general approval or to restrain belligerent action. Such failure and insufficiency were due in part to the circumstance that in the formulation of rules, the especial interests of particular States or groups of States overshadowed any united effort to promote justice for all. Attempts, moreover, to outline a procedure according, on the one hand, some measure of protection to articles such as foodstuffs, and on the other, exposing them to capture and condemnation, were unresponsive to the practical requirements of international trade, on account of the constant doubt as to the safety of any neutral cargo destined, under almost any circumstances, to any belligerent port.¹

On principle, as has been observed, the right of a State engaged in war to treat as contraband any article of neutral commerce on its way to belligerent territory is attributable, not to inconvenience or annoyance occasioned by the prosperity of the enemy through the vigor of its foreign commerce, and still less to the necessities of the captor, but rather to the fact that the neutral contribution serves an essentially military end by strengthening the recipient as a belligerent. The question is, therefore, whether at the present time foodstuffs,

⁵ Mr. Lansing, Secy. of State, to the American Ambassador at London, Nov. 11, 1916, For. Rel. 1916, Supp., 483. See Naval War College, Int. Law Situations, 1933, 5-20.

⁶ No. 24, p. 15. See, also, Nos. 70, 71 and 72. It is to be noted that the Naval Instructions of June 30, 1917, make no use of the term “conditional contraband.”

The Meeting of the Foreign Ministers of the American Republics at Panama in 1939, in a Resolution on Contraband of War, of Oct. 3, 1939, registered “its opposition to the placing of foodstuffs and clothing intended for civilian populations, not destined directly or indirectly for the use of a belligerent government or its armed forces, on lists of contraband.” (*Am. J.*, XXXIV, *Supplement, Official Documents*, 13, 14.)

§ 805.¹ Declared Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary to the London Naval Conference, Dec. 1, 1908: “It should be borne in mind that what the commerce of the world above all desires is certainty. The object of all rules on this subject should be to insure that a trader anxious to infringe in no way the accepted rights of belligerents, could make sure of not being, unwittingly, engaged in the carriage of contraband, and of thus avoiding the danger of condemnation and loss either of goods or ship, while the trader who deliberately shipped or carried contraband would do so with a knowledge of the risk he ran, and would have no claim to sympathy or compensation if his ship or goods were captured and subsequently condemned by the due process of a prize court.” (Correspondence respecting the International Naval Conference, Misc. No. 4 [1909], Cd. 4554, 20, 23.)

howsoever consigned to belligerent territory, may be justly deemed to serve such an end. It must be clear that if in any conflict importations of them are shown to toughen the sinews of a belligerent by saving its soldiery from starvation, and to produce directly that effect, the right of the enemy to cut off that source of aid by dealing with the forms of sustenance as contraband, is unassailable. Nor, under such circumstances, is it less so, if food supplies are consigned to private agencies rather than governmental establishments. In either case, there is a destination which the opposing belligerent may fairly regard as hostile.

Thus, at the present time, the merit of the claim of a neutral that exportations of foodstuffs from its domain to belligerent territory should not be dealt with as a trade in contraband, depends upon the fact that such articles entering that territory are not, and will not become, a source of military strength to its sovereign. At the close of the eighteenth century it was not only easy for a neutral to make such a showing, but also very difficult for a belligerent to prove that its treatment of foodstuffs as contraband was for a purpose other than to harass a non-combatant population, rather than to deprive the enemy of a military advantage. It was this circumstance which rendered feasible and acceptable the numerous treaty provisions protecting foodstuffs from condemnation as contraband, and which accounted for the distinction as to ultimate use laid down by Sir William Scott and followed by the Supreme Court of the United States. Otherwise it would have been impossible for a practice to develop which tended to place upon a belligerent the burden of proving the ultimate hostile use of provisions bound for the territory of its enemy. The rule of restraint, in so far as there was one, manifested regard for actual conditions of neutral trade. It did not purport to cope with those which did not exist, and still less to hamper a belligerent in intercepting articles likely to fulfill a distinctly hostile purpose.

As war is now conducted, it is a probability rather than a possibility that foodstuffs imported into belligerent territory will serve a military end and so be used for a hostile purpose, if there is a general shortage of such articles. It may be doubted whether, in a conflict greatly taxing the strength of the participants where the entire male population capable of bearing arms is called to the colors and where the power of requisition is lodged in and exercised by a central government, the necessary showing as to non-military use can be made. Reason for doubt becomes strong where a belligerent State, the population of whose territory furnishes large importers, lacks a supply of food sufficient to maintain the inhabitants of its domain. It is not suggested, however, that in a particular case assurance may not be given, convincing to all concerned, that no military advantage will be gained or taken by a belligerent from imported foodstuffs. In such a situation a neutral State would have the strongest ground to protest against their treatment as contraband. It must, nevertheless, be acknowledged that the temptation of a belligerent to use for a military purpose any articles adapted for that purpose and within its reach, might prove irresistible if the need were imperative. The danger of enabling such a State to receive into its domain

what, under any circumstances, might serve to avert defeat or prolong the war cannot be ignored.

It is clear that a just solution of the problem forbids that the matter be left to vague surmises indissolubly connected with the application of the theory of conditional contraband. There should be no recrudescence of arguments once prevailing in British and American prize courts on account of conditions of trade long since obsolete. The need of general and precise agreement among maritime powers is obvious. The possibility of effecting one is believed to depend upon the candor and readiness with which States concerned, such as the United States, acknowledge the applicability of the fundamental principle that a belligerent may intercept whatever offers military aid to its adversary. Such acknowledgment is not inconsistent with the reasonableness of an unmolested neutral trade in that which does not in fact afford such aid. New rules must, however, point to a definite and authoritative mode of establishing the innocence of the traffic. It may be fairly contended that existing conditions of war place the burden squarely upon those who claim the right to be unmolested. Neutral as well as belligerent governmental assurance ought to be given the State called upon to forego the right of capture and confiscation. In a word, the right to deal with foodstuffs as contraband must be recognized, and simultaneously that of neutrals to demand that a belligerent refrain from exercising its privilege in case of a sufficient showing as specified by general agreement, that such articles will serve no military end. In the absence of such a showing, it is not unreasonable that foodstuffs consigned to belligerent territory should be deemed to have a hostile destination. The bare need of provisions for its own use should never, however, suffice to excuse a belligerent captor from dealing with them as contraband. That excuse requires no invocation where the neutral claim to immunity fails to be supported by the requisite proofs of its merit.

It is in the nature and scope of assurance of innocent use that lies the hope of retaining for neutral States the enjoyment of a trade which, as war is now waged, must otherwise be regarded as a traffic in contraband.² It is not suggested, however, that adequate assurance may always be given, or that a belligerent may not with reason decline as insufficient that which is offered in a particular case.³

² See suggestions of J. B. Moore, in "Contraband of War," Philadelphia, 1912, and in "Problems of War and Commerce," Proceedings, Second National Foreign Trade Convention, St. Louis, January, 1915, 15, 24.

³ Food imported into belligerent territory for any class of the population necessarily releases for consumption other food, and so tends to cause each shipload received from abroad to become an indirect source of maintenance of the military and naval forces, even if consumed entirely by persons unattached thereto. Thus the power of substitution accorded the belligerent whose civil population is maintained by imports may prove a vital means of averting the starvation of armies.

The United States as a belligerent in 1917 and 1918 applied this principle in limiting exports of foodstuffs to neutral European States in close proximity to Germany. See statement issued by War Trade Board, in Official Bulletin for May 4, 1918, respecting a general commercial agreement between the United States and Norway, signed by Mr. Vance C. McCormick, chairman of the War Trade Board, and by Dr. Fridtjof Nansen, special representative of the Norwegian Government.

See *infra*, § 813A.

See Jessup, *Neutrality*, IV, 1936, 202-203.

b

§ 806. **Certain Other Articles. Fuel.** Much controversy has arisen concerning the treatment to be applied to numerous articles other than foodstuffs, and which are also of common use in the pursuits of peace, as well as of war. Neutral States, such as the United States, heretofore accepting the doctrine of conditional contraband, have oftentimes contended that a destination to belligerent territory does not suffice to justify the inference of probable hostile use where a cargo was consigned to a commercial house as distinct from a governmental agency. The merit of such contentions has varied according to the nature of the articles concerned in the particular case, and to their importance for military purposes in the war being waged. Various materials such as, for example, ingredients employed in the manufacture of guns or explosives or component parts thereof, possess a degree of usefulness in the prosecution of war such as to render it highly improbable that a belligerent into whose territory they are imported will permit their use for any unrelated purpose. This circumstance illustrates the impractical and hence illusory aspect of the attempt to establish a general criterion of conduct according to the theory that the common use of an article or product in the pursuits of peace should necessarily limit the right of a belligerent to deal with it as contraband.¹

§ 806. ¹ **CONTRABAND LISTS OF THE UNITED STATES.**—According to a proclamation of President Johnson of April 29, 1865, the following articles were described as contraband of war: "Arms, ammunition, all articles from which ammunition is manufactured, gray uniforms and cloth, locomotives, cars, railroad iron, and machinery for operating railroads, telegraph wires, insulators, and instruments for operating telegraphic lines." (Brit. and For. Stat. Pap., LVI, 190.)

By a proclamation of President Johnson of June 13, 1865, "arms, ammunition, all articles from which ammunition is made, and gray uniforms and cloth" were described as contraband. (*Id.*, 193.)

General Orders, No. 492, of the Navy Department, June 20, 1898, announced that the term "contraband of war" comprehended only articles having a belligerent destination, as to an enemy's port or fleet. With that explanation the following articles were, "for the present," to be treated as contraband:

"*Absolutely contraband.*—Ordnance; machine guns and their appliances, and the parts thereof; armor plate and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders, signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accoutrements and equipments of all sorts; horses.

"*Conditionally contraband.*—Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged." (For. Rel. 1898, 782.) See, also, list contained in Section VI of Stockton's Naval War Code of 1900, withdrawn Feb. 4, 1904, Naval War College, Int. Law Discussions, 1903, 111.

The Naval Instructions Governing Maritime Warfare of June 30, 1917, Section II, are as follows:

"23. In the absence of notice of change which the Government of the United States may make at the outbreak of or during war, the following classification and enumeration of contraband will govern commanders of ships of war:

"24. The articles and materials mentioned in the following paragraphs (a), (b), (c), and (d), actually destined to territory belonging to or occupied by the enemy or to armed forces of the enemy, and the articles and materials mentioned in the following paragraph (e) actually destined for the use of the enemy Government or its armed forces, are, unless exempted by treaty, regarded as contraband:

With respect to many articles capable of either use, it is doubtless true that numerous consignments are in fact not designed for a hostile purpose by the importer, and are also not calculated to be actually employed as a military aid. This may be the case with respect, for example, to shipments of coal.² The United States has repeatedly taken the stand that fuel should be regarded as conditional rather than absolute contraband. Such was its position as a belligerent in 1898, when at war with Spain;³ and also as a neutral in the course of the Russo-Japanese War.⁴ In World War I, Great Britain, as well as France and Russia, were at the outset disposed to regard fuel as conditional contraband;⁵ and Germany, together with Austria-Hungary, indicating willingness to follow the Declaration of London if its provisions were not disregarded by the other belligerents, appeared also ready to do so.⁶ Turkey placed coal in the absolute list.⁷ As late as November 5, 1915, Great Britain classified fuel as conditional contraband.⁸ But, in April, 1916, as has been observed, announcing that while specified "exceptional conditions" continued, British belligerent rights with respect to the two kinds of contraband were the same and that the treatment of them must be identical, Great Britain declared fuel, other than mineral oils, to be simply contraband.⁹ In April, 1915, Germany placed coal and coke in the absolute class, announcing that other forms of fuel "coming under the designation of conditional contra-

"(a) All kinds of arms, guns, ammunition, explosives, and machines for their manufacture or repair, component parts thereof; materials or ingredients used in their manufacture; articles necessary or convenient for their use.

"(b) All contrivances for or means of transportation on land, in the water or air, and machines used in their manufacture or repair; component parts thereof. materials or ingredients used in their manufacture; instruments, articles or animals necessary or convenient for their use.

"(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers, and other articles, machines, or documents necessary or convenient for carrying on hostile operations.

"(d) Coin, bullion, currency, evidences of debt; also metal, materials, dies, plates, machinery, or other articles necessary or convenient for their manufacture.

"(e) All kinds of fuel, food, foodstuffs, feed, forage, and clothing, and articles and materials used in their manufacture.

"25. Articles and materials, even though enumerated in paragraph 24, if exempted, by special treaty provisions, are not regarded as contraband."

Concerning the views of the principal maritime States engaged in World War I in relation to the matter of contraband, see J. H. W. Verzijl, *Le Droit des Prises de la grande Guerre*, Leyden, 1924, Chap. 17.

² J. C. Piliidi, *Du Combustible en Temps de Guerre*, Paris, 1909, 271-338, 376-393.

³ General Orders, No. 492, Navy Department, June 20, 1898, For. Rel. 1898, 780, 782, where it was declared that "coal, when destined for a naval station, a port of call, or a ship or ships of the enemy," should be treated as contraband.

⁴ Circular of Mr. Hay, Secy. of State, to American Ambassadors in Europe, June 10, 1904, For. Rel. 1904, 3; Same to Mr. McCormick, American Ambassador at St. Petersburg, No. 143, Aug. 30, 1904, *id.*, 760.

It may be observed that Russia, notwithstanding the protests of the United States and England, declined to amend its regulations of Feb. 14, 1904, which included as unconditional contraband "every kind of fuel, such as coal, naphtha, alcohol, and other similar materials." Moore, Dig., VII, 674, 675, citing Parl. Papers, Russia, No. 1 [1905], 13, 14, 21, 22, 26.

See the decision of the Supreme Russian Prize Court in the case of *The Oldhamia*, Hurst and Bray's Russian and Japanese Prize Cases, I, 145, 158.

⁵ American White Book, European War, I, 11, 13, 16, 19, 20, 22, 24, 26.

⁶ American White Book, European War, I, 27 and 32.

⁷ *Id.*, I, 33.

⁸ *Id.*, III, 104.

⁹ For. Rel. 1916, Supp., 385, 386.

band," should be "considered as contraband of war."¹⁰ In its Naval Instructions Governing Maritime Warfare of June 30, 1917, the United States, then a belligerent, declared, as has been observed, that all kinds of fuel, if actually destined for the use of the enemy Government or for its armed forces, should be regarded as contraband.¹¹

The years 1915 and 1916 witnessed the gradual and general giving up of deference by the belligerents for the distinction between absolute and conditional contraband.¹² By various processes they proceeded to evade and sweep aside restraints which respect for the distinction necessarily entailed. One was by letting down the traditional requirement as to proof of hostile use of articles regarded as conditional contraband,¹³ a method which, moreover, smoothed the way for the application of the doctrine of continuous voyage to articles deemed to belong to that category.¹⁴ Another was by extending the scope of lists of absolute contraband so as to embrace commodities adapted to non-hostile as well as hostile uses.¹⁵ Still another was by deliberate abandonment of the distinction during the conflict. Such abandonment to which recourse was finally had, whether as a retaliatory weapon or otherwise, was the natural and logical, although internationally illegal, mode which won the day.¹⁶ It at least reflected a candor not apparent when States professing respect for the distinction evaded the obligation generally to prove the hostile use (save under exceptional situations such as those set forth in the Declaration of London) of articles that might well be susceptible of employment or consumption for non-hostile purposes.¹⁷ Under the circumstances it was inevitable that fuel as well as cotton should fall under the ban and be dealt with as absolute contraband.¹⁸ It should be observed,

¹⁰ American White Book, European War, I, 30, 31.

¹¹ No. 24 (e).

¹² To quote a careful observer: "During the war the distinction between absolute and conditional contraband was entirely disregarded, and so many of the articles on the noncontraband list of the Declaration of London were included in the contraband lists of the belligerents that it was almost correct to say that any commodity which could by any possibility be deemed to be useful to the armed forces or the government or the people of an enemy was *ipso facto* contraband." (Turlington, *Neutrality*, III, 8; also *id.*, 9-23, where the record of events is portrayed.)

See also Garner, *Prize Law*, § 386; Spaight, *Air Law*, 2 ed., 1933, 394.

¹³ See, for example, British Order in Council of Oct. 29, 1914, *For. Rel.* 1914, Supp., 261, 264.

¹⁴ See *The Kim* (1915), p. 215.

¹⁵ "Metallic ores, resins, and rubber, which are listed as absolute contraband in the (British) Proclamation of December 23, 1914, had, curiously enough, been placed by the Declaration of London in the category of commodities that could never be declared contraband." (Turlington, *Neutrality*, III, 9.)

¹⁶ See British statement of April 13, 1916, *For. Rel.* 1916, Supp., 385; Maritime Rights Order in Council of July 7, 1916, *id.*, 413. See also French decree of July 7, 1916, *id.*, 417; German prize ordinance of July 22, 1916, referred to in communication from the American Consul General at Berlin, to the Secy. of State, July 26, 1916, *id.*, 281.

¹⁷ See *The Doctrine of Continuous Voyage*, Conclusions, *infra*, § 813.

¹⁸ While during the Civil War the United States seized cotton on land as hostile property, it did not treat cotton as contraband. *Brandon v. United States*, 46 Ct. Cl. 559; also correspondence between Mr. Bayard, Secy. of State, and Mr. Muruaga, Spanish Minister at Washington, in 1886, *For. Rel.* 1886, 1006, 1015 and 1108, and comment thereon in Moore, *Dig.*, VII, 693, 694.

Concerning the objections of the United States against the treatment by Russia of cotton as absolute contraband during the Russo-Japanese War, see circular of Mr. Hay, Secy. of State, to American Ambassadors in Europe, June 10, 1904, *For. Rel.* 1904, 3; communication

however, that the prize courts of Great Britain and certain other belligerents did not regard the distinction between conditional and absolute contraband as necessarily non-existent, but rather as a requirement which under the exigencies of the situation the belligerents were excused from heeding.¹⁹

It may be doubted whether any rule of restraint applicable to the treatment of fuel or of any other particular article equally susceptible to a double use can well be laid down. It savors of the academic now to contend that belligerent States will be disposed to acknowledge a legal obligation to refrain from treating such an article as other than contraband in the absolute sense, save in a situation where the enemy is itself abundantly supplied therewith, and not tempted to employ for a belligerent purpose what its citizenry endeavors to import. Fuel is likely to attain a relation to the conflict such that the use of importations chiefly for a non-military purpose is not to be anticipated. Like inferences may be equally reasonable with respect to importations of cotton. It is believed that in order to preserve unmolested a neutral trade with a belligerent country in such commodities, formal and convincing assurance of innocent use should be given the belligerent called upon to refrain from interference. General international agreement indicating the mode and nature of the assurance should point to the procedure to be followed by interested States.

It is not to be anticipated that maritime States will be disposed to agree to forego the privilege of confiscating articles or materials necessary or convenient in the use, or for the manufacture, of instruments of war. With respect, however, to some commodities, their usefulness for military purposes might not pre-

of Mr. Hay to Mr. McCormick, American Ambassador at St. Petersburg, Aug. 30, 1904, *id.*, 760; Same to Same, Jan. 13, 1905, *id.*, 1905, 744, 747, where it was said: "Nor could the United States Government acquiesce in the treatment of raw cotton as absolutely contraband of war. While that product may enter to some extent into the manufacture of explosives and military clothing, the quantity of it used for such purposes is so far out of proportion to its uses in the arts of peace that the recognition of its treatment as absolutely contraband would, in principle, justify the same treatment of all forms of iron and steel, as well as wood, wool, all kinds of fuel, and all other materials which could be used in the manufacture of guns, carriages, or any other article of potentially military use, and would, therefore, be destructive of virtually all commerce of neutral states with the noncombatant population of belligerents." Concerning the attitude of Russia, see documents in Moore, Dig., VII, 692, 693.

On Jan. 7, 1915, Sir Edward Grey, British Foreign Secretary, informed Mr. Page, American Ambassador at London, that "His Majesty's Government have never put cotton on a list of contraband; they have throughout the war kept it on the free list; and, on every occasion when questioned on the point, they have stated their intention of adhering to this practice. But information has reached us that precisely because we have declared our intention of not interfering with cotton, ships carrying cotton will be specially selected to carry concealed contraband; and we have been warned that copper will be concealed in bales of cotton." (For. Rel. 1915, Supp., 299, 301.) Great Britain on Aug. 20, 1915, placed cotton and cotton products on the list of absolute contraband. *Id.*, 174. With respect to the reasons for this action, see Mr. Lansing, Secy. of State, to Mr. Page, Oct. 21, 1915, *id.*, 578, 583; also memorandum from the British Embassy at Washington, April 24, 1916, For. Rel., 1916, Supp., 368, 377.

¹⁹ See Garner, Prize Law, § 386, where it is declared: "The Prize Courts appear to have never abandoned entirely the theoretical distinction. Many of the German decisions turned upon the question whether particular articles were absolute or conditional contraband according to the Declaration of London [citing list of decisions in Verzijl, 739 ff.]. Even the Prize Courts of Great Britain, where the distinction had been most completely abandoned by Orders in Council, did not in reaching their conclusions always ignore the traditional difference between the two classes of contraband (citing *The Louisiana*, 5 Lloyd's Prize Cases, 248)."

clude the conclusion of an arrangement contemplating a system of regulated trade under neutral governmental auspices and embracing a mode of giving requisite assurance that particular articles would be employed for no hostile purpose. Possibly the readiness of some States to acquiesce in such an arrangement might be accelerated in case simultaneously general agreement were made that neutral maritime powers should undertake, either to forbid the exportation from their territories of munitions of war and ingredients in their manufacture, or to facilitate the task of a belligerent in ascertaining both the character and destination of cargoes comprising such articles.²⁰

c

§ 806A. **Lists of September, 1939.** Shortly after the outbreak of the European War in 1939, His Majesty's Government, as well as the Government of the Reich, made announcement of lists of articles to be treated as contraband of war.¹ Schedule II of the British list made reference to "Conditional Contraband," placing in that category "all kinds of food, foodstuffs, feed, forage, and clothing and articles and materials used in their production," and nothing else. As within the category of conditional contraband (subject to the conditions of Article 24 of the prize law code of August 28, 1939) the German announcement made reference to "foodstuffs (including live animals), beverages and tobacco and the like, fodder and clothing; articles and materials used for their preparation or manufacture." The schedules of both belligerents pertaining to absolute contraband embraced fuels of all kinds. While it may occasion surprise that these lists purported to keep alive the distinction between absolute and conditional contraband, it was in large measure a valueless gesture so long as by the application of the doctrine of continuous voyage it was possible to rob the distinction of the great worth which it formerly possessed.²

²⁰ See suggestion of Prof Moore, in "Contraband of War," Philadelphia, 1912, p. 41.

See, also, Visit and Search, *supra*, § 728; Observations on Extended Applications of the Doctrine, *infra*, § 813; Some Deductions from World War I, *infra*, § 813A

Declared the Naval War College in 1933. "Modern conditions, as shown in the many and lengthy communications during the World War, have changed the ideas as to the actual conduct of war.

"As to contraband, it has become increasingly difficult to employ intelligently such categories as contraband by nature because some article which by nature is specially essential to the life of a population at peace may be even absolutely essential to the State forces in time of war. A new invention or discovery during war may transform a category of articles, which at the beginning of the war were solely of use for the peaceful population, into essential war material. The list of such articles should ordinarily be determined by the belligerent and each belligerent would normally expect that the other might include in his contraband list any article included in the list of the opponent. There is also evident in modern times the influence of the unfavorable attitude which one or more neutral States may take toward a contraband list which does not bear the marks of military need justifying interference with neutral goods" (Int Law Situations, 1933, 44-45.)

§ 806A.¹ The British list, announced Sept. 13, 1939, was contained in C C H War Law Service, 1939, p. 65, 552. The German list, as of Sept. 14, 1939, was contained in *id.*, p. 65, 553. These lists were also contained in Dept. of State Bulletins, Sept. 16, 1939, 250, and Sept. 23, 1939, 285, respectively

See also French list announced Sept. 4, 1939, C C H War Law Service, p. 65, 554, Dept. of State Bulletin, Nov. 18, 555; New Zealand list announced Sept. 7, 1939, C C H War Law Service, p. 65, 555, Dept. of State Bulletin, Nov. 18, 1939, 556; Canadian list proclaimed March 2, 1940, C C H War Law Service, p. 65, 568.

² See *infra*, §§ 813 and 813A.

4

DESTINATION

a

§ 807. **Necessity of Hostile Character.** In order to justify the treatment of articles as contraband of war it is essential that they have a hostile destination as well as a hostile character. Goods possessed of such a character if having no hostile destination are not to be deemed contraband.¹ While this principle is acknowledged, its application has given rise to controversy because of disagreement as to what constitutes a hostile destination, and respecting the circumstances when it should be inferred. The doctrine of conditional contraband has, moreover, added complexity to the problem, because the propriety of confiscation of certain classes of articles depends upon the establishment of a probable hostile use thereof as an element of hostile destination. With respect, therefore, to articles within that category, such a destination signifies something more than one within a place controlled by a belligerent. At the end of the eighteenth century means of transportation by land were not such as to encourage or justify the inference that neutral goods consigned to neutral territory and there unladen, would be shipped overland to an adjacent belligerent State. Consequently, it was natural that a rule should develop protecting in such case the neutral trader from the imputation of participation in the war and his goods from confiscation, irrespective of their character.² Such a rule might not, however, have come into being had it been possible for traffic to develop in articles of hostile character between neutral and belligerent States by means of transportation by sea to neutral territory and thence by land to that of a State engaged in the war. The truth of this is shown by the growth of the law as understood in England and America, where traffic between neutral and belligerent territories depended upon transportation by sea, and an intervening neutral port was relied upon to break the voyage.³

It may be observed that in reservations by the delegations of Argentina and of Paraguay to Art. VI of the Convention to Coordinate, Extend and Assure the Fulfillment to the Existing Treaties Between the American States, when concluded at Buenos Aires, Dec. 23, 1936, it was declared that in no case under that article could foodstuffs or raw materials destined for the civil populations of belligerent countries be considered as contraband of war. (U. S. Treaty Vol. IV, 4835.)

§ 807.¹ *Historicus on International Law*, 191, quoted in Moore, Dig., VII, 695.

² "A century ago the difficulties of land transport rendered it impracticable for the belligerent to obtain supplies of sea-borne goods through a neighboring neutral country. Consequently the belligerent actions of his opponents neither required nor justified any interference with shipments on their way to a neutral port. This principle was recognized and acted on in the decisions in which Lord Stowell laid down the lines on which captures of such goods should be dealt with" (Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Feb. 10, 1915, For. Rel. 1915, Supp., 324, 327.) See also The *Imina*, 3 Ch. Rob. 167.

³ See The Doctrine of Continuous Voyage, The Civil War Cases, *infra*, § 809.

b

The Doctrine of Continuous Voyage

(1)

§ 808. **Early Applications.** The doctrine of continuous voyage offered a device which was employed by the prize courts to frustrate evasion by neutral traders of belligerent prohibitions such as those forbidding participation in the colonial trade of the enemy, or the carrying of contraband to its territory, or the attempting to break a blockade of its coasts.¹

It may be unnecessary at the present time to endeavor to indicate the nature of the transactions in which the theory was first judicially applied. They were certainly not those pertaining to the breach of a blockade. In a case dealing with contraband the doctrine of continuous voyage is said to have been "clearly in the minds of the English judges" in 1761.² The principle doubtless found early significant illustration in cases arising from neutral participation in the colonial trade of a belligerent, contrary to the so-called rule of the War of 1756. The attempts of neutral traders to evade the rule served to afford the courts somewhat later a convenient reason for resorting to the theory of continuous voyage both to inflict a penalty and to effect a deterrent.³ What the rule of the War of 1756 forbade deserves brief attention.

§ 808. ¹C. B. Elliott, "The Doctrine of Continuous Voyages," *Am. J.*, I, 61; Lester H. Woolsey, "Early Cases on the Doctrine of Continuous Voyages," *id.*, IV, 823; Simeon E. Baldwin, "The 'Continuous Voyage' Doctrine during the Civil War, and Now," *id.*, IX, 793; H. Arias, "The Doctrine of Continuous Voyages in the Eighteenth Century," *id.*, 583; J. W. Garner, "Some Questions of International Law in the European War," *id.*, 372.

See, also, documents in Moore, *Dig.*, VII, 697-744; Naval War College, *Int. Law Topics*, 1905, 77-106; Evans' *Leading Cases*, 421, note; C. N. Gregory, "The Doctrine of Continuous Voyage," *Int. Law Association Proceedings*, XXVI, 119; E. L. de Hart, "Contraband Goods and Neutral Ports," *Law Quar. Rev.* XVII, 193; H. R. Pyke, *Law of Contraband of War*, London, 1915, 143-163; O. H. Mootham, "The Doctrine of Continuous Voyage, 1765-1815," *British Y.B.* 1927, 62; D. J. Llewelyn Davies, "Enemy Property and Ultimate Destination during the Anglo-Dutch Wars 1664-7 and 1672-4," *id.*, 1934, 21.

See also Oppenheim, *Lauterpacht's* 6 ed., II, § 400; H. W. Briggs, *The Doctrine of Continuous Voyage*, Baltimore, 1926; J. W. Gantenbein, *The Doctrine of Continuous Voyage particularly as Applied to Contraband and Blockade*, Portland, Oregon, 1929.

²Declares D. J. Llewelyn Davies: "Examination of the records of the High Court of Admiralty shows that the principle of looking beyond the immediate destination of a cargo was well established in Prize proceedings at the end of the seventeenth century. The object with which it was then applied was to overcome the attempt to disguise as neutral property, goods which in fact were going to the enemy, and probably upon their account. The theory that Continuous Voyage made its first appearance in Prize Law in connexion with the Rule of 1756 must therefore be reconsidered in the light of the information obtained from these earlier proceedings." (*British Y.B.* 1934, 33.)

After thorough examination of the earliest English cases, Lester H. Woolsey has concluded that "the doctrine of continuous voyages in connection with blockade running, contraband carriage, and enemy trade was a British doctrine known to the English judges and more or less frequently applied by them almost before America became known as a nation, the early cases on blockade dating back to 1805 and 1808, those on contraband to about 1761, and those on enemy trade to 1762 or 1764." ("Early Cases on the Doctrine of Continuous Voyages," *Am. J.*, IV, 823, 847.) The same writer cites and quotes the case of *The Jesus*, Burrell, 164, which was finally decided in 1761, as an instance where "the doctrine of continuous voyages appears to have been clearly in the minds of the English judges" in a case dealing with contraband. *Id.*, 832.

³*Id.*, *Am. J.*, IV, 833-846, where that writer calls attention to the cases of *The Africa*, 1762, Burrell, 228, and *The St Croix*, 1763, Burrell, 228.

See, also, C. B. Elliott, "The Doctrine of Continuous Voyages," *Am. J.*, I, 61, 62.

Trade between European States and their transmarine colonies, in time of peace, was not, in the eighteenth century, open to the navigation of other nations. When, under the stress of war, any one of these States threw open this interdicted colonial trade to neutrals, the hostile power refused to recognize this as lawful neutral commerce. On the contrary, it was treated as succor to the enemy, in relief of its trade, which the war had strangled, and the belligerent captured and condemned the ships and cargoes of the neutral as if an enemy; but, as trade between the colonies and the neutral, and between the neutral and the European States, was incontestably open to the neutral, a trade was attempted of colorable importation from Cuba, for instance, to Boston, and exportation from Boston to Spain, and so of return cargoes through the interposition of a neutral port. This scheme was denounced and this commerce attacked by the belligerent. The question for the prize courts was, whether the importation into and the exportation from the neutral port were really transactions of the neutral's own, and, of course, legitimate commerce, or whether it was really a trade between the colony and the parent state and the interposition of the neutral port was only colorable.⁴ In 1805, it was held in Great Britain that even the landing of goods and payment of duties in the neutral port was not conclusive evidence that the importation was not colorable, and that those acts did not interrupt the continuity of the voyage of the cargo unless there was an honest intention to bring the goods into the common stock of the country.⁵

⁴ Declares Prof. Moore: "Under the rule of colonial monopoly that universally prevailed in the eighteenth century, the trade with colonial possessions was exclusively confined to vessels of the home country. In 1756 the French, being, by reason of England's maritime supremacy, unable longer to carry on trade with their colonies in their own bottoms, and being thus deprived of colonial succor, issued licenses to Dutch vessels to take up and carry on the prostrate trade. Thereupon the British minister at The Hague, by instruction of his Government, announced to the Government of the Netherlands that Great Britain would in the future enforce the rule that neutrals would not be permitted to engage in time of war in a trade from which they were excluded in time of peace. The restriction thus announced was enforced by the British Government through its prize courts. It has since been known as 'the rule of the war of 1756.' It was against it that the first article of the declaration of the Empress of Russia of 1780, which formed the basis of the armed neutrality, was leveled, in affirming the right of neutrals to trade from port to port on the coasts of the powers at war.

"In the wars growing out of the French Revolution, in which the rule was revived, American vessels, which had then come upon the seas as neutral carriers, sought to avoid its application by first bringing the cargo to the United States and thence carrying it on to its European or colonial destination, as the case might be. To thwart this mode of prosecuting the trade, Sir William Scott applied what was called the doctrine of continuous voyages." (Dig., VII, 383, where attention is called to the note in 1 Wheat. 507, "On the Rule of the War of 1756," and to the passage there quoted from William Pinkney's memorial to Congress from the merchants of Baltimore.)

⁵ The paragraph of the text is substantially the language of Hon. Wm. M. Evarts, in his brief for the claimants in the case of *The Springbok*, British and American Mixed Commission, under Art. XII, of the Treaty of Washington, May 8, 1871, Memorials, &c., XXI, Case No. 316, pp. 47-48.

See *The William*, 5 Ch. Rob. 385; also *The Essex* (not reported, but referred to in *The William*).

With respect to the case of *The William*, Chief Justice Chase declared in his opinion in *The Bermuda*: "In an elaborate judgment Sir William Grant reviewed all the cases and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo unless there be an honest intention to bring them into the common stock of the country." (3 Wall. 514, 554.)

See also Jessup and Deák, *Neutrality*, I (Origins), 152-156; Gantenbein, *Continuous Voyage*, 4-10.

It has frequently been observed that the captures were made on the voyage from the neutral to the enemy port, and that the British prize courts did not assume, upon interception of the voyage to the neutral port, "to invent or surmise, out of the state of trade, and its profits and temptations, the further voyage *from* the neutral port, which was necessary to the *corpus delicti*."⁶ Doubtless this circumstance simplified the task of drawing correct inferences from the evidence presented.

At the beginning of the nineteenth century the courts of England, and possibly also those of America, were familiar with the application of the doctrine of continuous voyage to questions relating to contraband.⁷ Cases arising in the Civil War gave opportunity for a fresh judicial application of it.

(2)

§ 809. **The Civil War Cases.** During the Civil War large quantities of various forms of military supplies reached the blockaded ports of the Confederacy by means of an elaborate and successful system of blockade running. Such supplies originating in England, were carried on English ships to neutral ports in the West Indies, where they were transhipped and taken by other vessels to their destination.¹ This traffic attained large dimensions. In order to thwart it,

⁶ Argument of Wm. M. Evarts, above cited, in *The Springbok*, p. 48.

"In every reported case in which the doctrine of continuous voyage was applied to the prohibited colonial trade the vessel concerned appears to have been captured only after she had actually left the neutral port and was on her way to the hostile one. But although the case does not seem to have happened, the same principle must have applied if the capture had been made during the first part of the transport, supposing the intention to be proved that the goods were only being sent to the neutral port in order to be subsequently transhipped or transported further on the same or another ship to the enemy country." (H. R. Pyke, *Law of Contraband of War*, 148.)

"In the cases of the *Susan* and the *Hope*, neutral American vessels were condemned by Sir William Scott for carrying, on voyages from Bordeaux to the neutral port of New York, official dispatches destined to French authorities in the West Indies. In neither case does it appear to have been alleged that the apparent destination of the vessel was not her true and final destination, or that she was specially employed by the French Government. Nevertheless, it was held that the transportation of the dispatches toward their belligerent destination was an *unneutral and prohibited service*" (Moore, Dig., VII, 727.)

⁷ See *The Jesus*, Burrell, 164, which had been decided in 1761, and comment thereon by L. H. Woolsey, in *Am. J.*, IV, 832, and 847. Also *Gantenbein*, *Continuous Voyage*, 34. See dictum by Sir William Scott in *The Twende Brodre*, 4 Ch. Rob. 33, and comment thereon by Briggs, in his *Doctrine of Continuous Voyage*, 38; also *The William*, 5 Ch. Rob. 385.

The language of Mr. Justice Story, in *The Commercen*, 1 Wheat. 382, 388, 389, reveals his familiarity with the application of the doctrine to contraband, notwithstanding the facts which called for no decision necessitating such an application.

The doctrine of continuous voyage was applied by the Supreme Court of the United States with reference to American shipments to Mexican ports during the Mexican War. *Jecker v. Montgomery*, 18 How. 114. See reference to this case in *The Bermuda*, 3 Wall. 514, 553, 554.

See also the application by the French courts during the Crimean War in *The Frau Houwina*, Calvo, 5 ed., V, § 1961.

§ 809.¹ "As the system of blockade running grew in notoriety it became more difficult of execution, and Confederate agents were established in the various West India islands to facilitate its operations; and, instead of direct voyages to blockaded ports, goods were shipped in British bottoms to neutral ports and there transhipped into steamers of light draft and great speed, which could carry coal enough for the short passage to Charleston, Savannah, or Wilmington. Of the neutral ports thus used, Nassau, in the Island of New Providence, acquired the greatest celebrity." (Moore, Dig., VII, 698, *citing* Moore, *Arbitrations*, I, 580-581.)

United States vessels of war proceeded to capture and send in for condemnation neutral ships and cargoes ostensibly bound for neutral ports.²

Certain of the adjudicated cases deserve close attention. The first of these pertaining to contraband was that of the *Dolphin*.³ She was a small steamer captured in 1863, near Porto Rico, while ostensibly prosecuting a voyage from Liverpool to Nassau, and after having attempted to escape pursuit and capture. A part of the cargo, consisting of rifles and cavalry swords, were described in the freight list as "hardware." A letter from one Grazebrook, a merchant of Liverpool, who claimed to be the owner of the vessel and cargo, and addressed to his agents at Nassau, indicated an intention on his part, according to the conclusion of the Court, that the vessel should merely touch at that port and proceed thence to a Confederate port, such as Charleston. The Court adverted to the circumstance that there was no market in Nassau for the rifles and swords.⁴ The vessel and cargo were condemned.⁵ In view of the evidence, the case may be regarded as one where there appeared to be an attempt, sought to be concealed, to transport absolute contraband on one vessel from England to belligerent territory. The decision was thus not necessarily attributable to the circumstance that the ultimate destination of the vessel was a blockaded port. The contraband character of the swords and rifles justified the condemnation of other portions of the cargo belonging to the same owner, which was that also of the vessel.⁶

In the case of the *Pearl*, captured January 20, 1863, on her way from England to Nassau, the vessel was English, and her cargo consisted merely of 10 bales of seamen's jackets and cloth consigned to a firm at Nassau which had become well known as one engaged in the business of blockade running.⁷ The testimony of several of the seamen concurred in representing the vessel as destined to some Confederate port. The Supreme Court of the United States was of opinion that there was no reasonable ground for belief that the *Pearl* was not at the time of capture "destined to employment in breaking the blockade." The vessel was condemned. There was not discussion as to the nature of the cargo, which appeared to be owned by the owner of the vessel.⁸ No claim was put in by him,

² See instructions of Mr. Welles, Secy. of the Navy, to U. S. cruisers, Aug. 18, 1862, For. Rel. 1915, Supp., 589.

³ 7 Fed. Cases, 868 (No. 3975).

⁴ Declared Marvin, Judge: "Probably not three merchant steamers ever arrived at that port from any part of the world until after the present blockade was established, except the regular Government mail steamers. Was her cargo to be sold in Nassau, including the 920 rifles and the 2,240 swords? These are questions which it is not unreasonable that a prize court should ask, and expect some reasonable solution of, in a case like this." (870.)

⁵ With reference to the principle of law involved the Court declared that "the offense of attempting to carry articles contraband of war to the enemy is complete, and the vessel liable to capture the moment she enters upon her voyage. (The *Imina*, 3 Ch. Rob. 167.) The offense consists in the act of sailing, coupled with the illegal intent. The cutting up of a continuous voyage into several parts, by the intervention, or proposed intervention, of several intermediate ports may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be; but it cannot make a voyage, which in its nature is one, to become two or more voyages, nor make any of the parts of one entire voyage to become legal, which would be illegal, if not so divided."

⁶ See *Gautenbein, Continuous Voyage*, 64.

⁷ The *Pearl*, 19 Fed. Cases, 54; 5 Wall. 574.

⁸ The Supreme Court reversed the decree of the district court which had ordered restitution of the vessel and cargo on payment by the claimants of expenses and costs.

while a claim by the captain in behalf of the consignees at Nassau was unsupported by any affidavits of title made by them. This neglect was construed as an admission that the consignees were not entitled to restitution, and the cargo was condemned.⁹

The *Stephen Hart*¹⁰ was a vessel captured January 29, 1862, about 25 miles from Key West, and about 82 miles from Point de Yeacos, Cuba.¹¹ Both the vessel and cargo were claimed by British subjects. The cargo consisted of war supplies, and the vessel, when captured, was bound ostensibly for Cuba, and without invoices, bills of lading or a manifest. There was evidence that the vessel was enemy property. The owners of the cargo directed the master to report to, and take the directions of one Helm, an agent of the Confederate States in Cuba, with reference to the vessel and cargo.¹² The District Court concluded that the case was "one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade." The Court declared that if a guilty intention that the goods should reach an enemy port existed when they left their English port, that intention could not be obliterated by an innocent intention of stopping at a neutral port on the way.¹³ The vessel and cargo were con-

⁹ While the decision of the Supreme Court appeared to rest upon the ground that the *Pearl* was believed at the time of capture to be destined to employment in breaking the blockade of the Confederate ports, it is suggested that the condemnation of the cargo and ship might have been placed on other grounds. In view of instructions of the Treasury Department issued in 1862, regarding cloth as contraband, and the proclamations in 1865 of President Johnson, it is fair to assume that the cargo of the *Pearl* might have been regarded at the time of capture as consisting of contraband. If this were true, the case might be treated as one where contraband was captured because deemed to possess a hostile destination, and the carrier penalized by condemnation because having the same ownership as the cargo.

¹⁰ The *Stephen Hart*, Blatchf. Prize Cases, 387.

¹¹ The *Hart*, 3 Wall. 559, Moore, Dig., VII, 704.

¹² "The Government was able to show by evidence which was practically conclusive that the cargo of contraband goods was, when it left London, destined for delivery to the Confederates either directly by the *Stephen Hart* or through transshipment at Cardenas to another vessel; that the vessel and the cargo were equally involved in the forbidden transaction, and that the papers of the vessel were simulated and fraudulent." (C. B. Elliott, in *Am. J.*, I, 78.)

¹³ Blatchf. Prize Cases, 432, 433.

The Court (Betts, J.) also said: "If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy." (*Id.*, 407.)

The Court also declared that if the *Stephen Hart* was "in fact, a neutral vessel, and if her cargo, although contraband of war, was being carried from an English port to Cardenas, for the general purpose of trade and commerce at Cardenas, and for use or sale at Cardenas, without any actual destination of the cargo, prior to the time of the capture, to the use and aid of the enemy, then most certainly both the vessel and her cargo were free from liability to capture" (*Id.*, 411.)

demned and the decree affirmed by the Supreme Court of the United States, which, through Chief Justice Chase, declared that "neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and cannot complain if they are seized and condemned as enemy property."¹⁴

The case furnished a simple application of the doctrine of continuous voyage to a transaction involving absolute contraband. At the time of capture there appears to have been an attempt on the part of the owners of the cargo to ship articles of such kind to belligerent territory, and on the part of the master of the ship, an effort fraudulently to assist in that undertaking. That the breaking of a blockade may have been also contemplated, was unimportant.

The case of the *Bermuda* proved to be significant.¹⁵ That vessel, which had sailed from Liverpool March 1, 1862, under the British flag, arrived at the port of St. Georges in Bermuda, March 19 or 20, remaining there five weeks waiting for orders and without transshipment of the cargo. Sailing from that port on April 23, in the direction of Nassau, the vessel was captured April 27, near Great Abaco Island in the British West Indies. The captor alleged that the vessel was enemy property, and with her cargo, largely composed of munitions of war, had been intended, either directly or by transshipment, to break the blockade of the southern ports, and that both the vessel and cargo were subject to condemnation. The *Bermuda* had once run a blockade at Savannah, returning to Liverpool. There was strong evidence of enemy ownership of the vessel. The contraband goods embraced articles marked with the Confederate flag and other Confederate devices.¹⁶ The master of the ship was a citizen of South Carolina. Out of 45 bills of lading, 31 were for goods shipped by Messrs. Fraser, Trenholm & Co., a firm doing business in Liverpool and Charleston, fiscal agents of the Confederacy in England, and engaged in fitting out blockade runners. The whole of the cargo was shipped under their direction, and was, according to the bills of lading, to be delivered at Bermuda "*unto order or assigns.*" No consignees were named on the bills. Correspondence found on board indicated that a light-draft tender, the *Herald*, had preceded the ship, awaiting her arrival at Bermuda, and would go "*first into Charleston.*" At the time of the capture and after the *Bermuda* was boarded, the captain's brother, by his order, threw overboard two small boxes and a package which he swore that he understood contained postage stamps, as well as a bag which he understood contained letters, "*and which he was instructed to destroy in case of capture.*"¹⁷

¹⁴ 3 Wall. 559, 560.

¹⁵ The *Bermuda*, 3 Wall. 514.

¹⁶ Concerning the details of the cargo, the letters of friendship and business found in the vessel from people abroad to different persons in the Confederate States, the several persons on board described as "Government passengers," and the nature of their probable function in connection with the issue of Confederate postage stamps and paper money, see *id.*, 518-523.

See, also, statement of facts in Moore, Dig., VII, 708.

¹⁷ "This spoliation," declared Chief Justice Chase, "was one of unusual aggravation, and warrants the most unfavorable inferences as to ownership, employment, and destination." (3 Wall. 550.)

See also The *Gertrude*, Moore, Dig., VII, 707, citing Official Records of the Union and Confederate Navies, Ser. 1, vol. 2, p. 159.

The Supreme Court appears to have believed that the vessel was enemy property; but on the theory that she was a neutral ship, it concluded that she was engaged in a fraudulent attempt to convey contraband goods destined to a belligerent port, and which served to make the owner (if he was a neutral as alleged) "responsible for unneutral participation in the war." It was declared that the cargo, having all been consigned to enemies, "and most of it contraband," should share the fate of the ship.¹⁸ In view of the conclusion that the ultimate destination of the cargo was hostile, such being the intention of its owners, it was declared by Chief Justice Chase in the course of the unanimous opinion of the Court, that it was immaterial whether the destination to the hostile port was ulterior or direct, and that the question of destination could not be affected by transshipment at Nassau. "A transportation," he declared, "from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene." He added that there seemed to be no reason why the "reasonable and settled doctrine" of continuous voyage should not be applied to the ship where several were engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability depended, he said, on the good or bad faith of the owners of the ships.¹⁹ While the Court was satisfied that the original destination of the *Bermuda* was a blockaded port or an intermediate port with intent to send forward the cargo by transshipment into one that was blockaded, the decision was really based on the ground that the cargo was contraband and the vessel fraudulently engaged in carrying it.²⁰

In the case of the *Peterhoff* a different situation arose.²¹ The vessel was captured February 25, 1863, on a voyage as a British merchant steamer from London to Matamoras, Mexico. Numerous bills of lading stipulated for the delivery

¹⁸ 3 Wall. 557, 558. For the contentions of the claimants, *id.*, 529-542.

¹⁹ *Id.*, 555. He added: "If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship cannot be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage, must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other."

The learned Chief Justice was careful to observe that neutral trade was entitled to protection in all courts, and that neutrals might convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. *Id.*, 551.

²⁰ "Having thus," declared the learned Chief Justice, "disposed of the questions connected with the ownership, control, and employment of the *Bermuda*, and the character of her cargo, we need say little on the subject of liability for the violation of the blockade." (*Id.*, 558.)

"To support the condemnation of the *Bermuda*, it was enough to show that she was virtually and knowingly carrying contraband goods to an enemy's port. It was not essential to show that it was also a blockaded port" Simeon E. Baldwin, "The Continuous Voyage Doctrine during the Civil War and Now," *Am. J.*, IX, 793, 796, where the writer comments on the statement of Chief Justice Chase as to the decision, in the course of his opinion in the case of the *Peterhoff*, 5 Wall. 28, 56.

²¹ 5 Wall. 28, Moore, Dig., VII, 715.

of the goods shipped "off the Rio Grande, Gulf of Mexico, for Matamoras," adding that they were to be taken from alongside the ship, providing lighters could cross the bar. The cargo was a miscellaneous one, shipped by different shippers, all British subjects except one; and a part was owned by the owners of the vessel. A substantial portion of the cargo consisted of articles of military equipment,²² while other portions consisted of those deemed conditional contraband and non-contraband in character. The town of Matamoras was situated on the Mexican side of the Rio Grande, almost opposite Brownsville, Texas, under Confederate control. There was a vigorous trade between these two places. The Court concluded that the voyage was not simulated, that the vessel was in the proper course of her voyage, and that there was nothing to warrant the belief that the cargo had other than a direct destination. The delivery of the cargo into lighters was usual and reasonable in the course of trade, and was deemed to warrant no inference of an intention of conveyance to the blockaded coast of Texas. In spite of the vigorous contention of the captors, the Court held that "the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free."²³ The Court concluded that the articles to be regarded as absolute contraband in character were destined for Texas by way of Matamoras, and were subject to condemnation as well as other articles belonging to the same owner. A large portion of the cargo consisting, however, of articles useful for purposes of war or peace, according to circumstances, were not proved, in the estimation of the Court, "to have been actually destined to belligerent use," and could not, therefore, it was said, be treated as contraband. The vessel was restored on payment of costs and expenses.²⁴ The unwillingness of the Tribunal to sustain the contention as to the establishment of a blockade of an international river such as the Rio Grande by the United States, was hardly less significant than the failure to conclude that the articles regarded as conditionally contraband were destined for an ultimate hostile use. In this latter respect the case furnished an interesting instance of the practical inap-

²² The cargo included artillery harness, army boots, so-called artillery boots, "government regulation gray blankets," horseshoes suitable for cavalry service, as well as horseshoe nails. "There were also considerable amounts of iron, steel, shovels, spades, blacksmiths' bellows and anvils, nails, leather; and also an assorted lot of drugs; 1,000 pounds of calomel, large amounts of morphine, 265 pounds of chloroform, and 2,640 ounces of quinine. There were also large varieties of ordinary goods. Owing to the blockade of the whole Southern coast, drugs, and especially quinine, were greatly needed in the Southern States." (5 Wall. 32.)

²³ 5 Wall, 54.

Chief Justice Chase in the course of the unanimous opinion of the Court said: "Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly, and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence." (*Id.*, 57.)

²⁴ These conditions of restitution were due to the circumstance that the captain of the *Peterhoff*, when brought to by the U.S.S. *Vanderbilt* (which effected the capture), refused to send his papers on board, and to the warranted belief of the captor that the *Peterhoff* had on board contraband destined to the enemy which gave rise to the duty to bring the ship in for adjudication, and also to the fact that the captain of the *Peterhoff* ordered the destruction of certain papers at the time of capture. *Id.*, 61.

plicability at the time of the Civil War of the doctrine of continuous voyage to conditional contraband.²⁵ The failure of the Court to apply the doctrine to articles seemingly within such a category was of much significance; for it saved the case from becoming a precedent in support of the belligerent claim.²⁶

The most celebrated of the Civil War cases was that of the *Springbok*.²⁷ She was a bark owned by British subjects and commanded by the son of one of the owners. The vessel was chartered to "*proceed to Nassau, or so near thereunto as she may safely get, and deliver same.*"²⁸ She sailed from London December 8, 1862, and was captured February 3, 1863, making for the harbor of Nassau. The Supreme Court concluded that the vessel was not at fault. Her papers were regular, showing that her voyage was one from London to Nassau. They were also genuine; there was no concealment of any of them and no spoliation. Her owners were neutral persons, and appeared to have no interest in the cargo; and there was not sufficient proof that they had any knowledge of its alleged unlawful destination. The cargo, of substantial value, was evidenced by three bills of lading, which concealed rather than disclosed the contents of almost two-thirds of the packages involved. These bills, moreover, named no consignee, but ordered delivery to order or assigns.²⁹ The concealment was deemed by the Court to be attributable to a desire of the owners to hide from the scrutiny of United States cruisers the contraband character of a portion of the contents of the cargo. A small part of the cargo consisted of arms and munitions of war, "contraband within the narrowest definition"; while another and somewhat larger portion consisted of articles "useful and necessary

²⁵ The brief and unimportant cases of *The Science*, 5 Wall. 178, and *The Volant*, 5 Wall. 179, may be also noted.

²⁶ Cf. Gantenbein, *Doctrine of Continuous Voyage*, 68-72; 176.

²⁷ 5 Wall. 1, Moore, Dig., VII, 719. For the decision of the district Court, see Blatchf. Prize Cases, 349.

²⁸ The charter party was endorsed by the firm of Speyer & Haywood of London, who instructed the master to the effect that "Your vessel being now loaded, you will proceed at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo and any further information you may require." A letter addressed to Hart by Messrs. Speyer & Haywood stated that "*Under instructions from Messrs. Isaac, Campbell & Co., of Jermyn Street, we enclose you bills of lading for goods shipped per Springbok, consigned to you.*" (5 Wall. 3.)

²⁹ "On the hearing before the District Court, counsel for the captors invoked the proofs taken in two other cases then on trial, namely, *United States v. The Steamer Gertrude*, and *United States v. the Schooner Stephen Hart*. As has been seen, the *Stephen Hart* was captured Jan. 29, 1862, and the claimants of her cargo were Isaac, Campbell & Co., who claimed jointly with one Begbie the cargo of the *Springbok*. The brokers who had charge of the lading of the *Stephen Hart* were also Speyer & Haywood. The *Gertrude* was captured April 16, 1863, off one of the Bahama Islands while on a voyage ostensibly from Nassau to St. John's, N. B. She was condemned, and no claim was put in either to the vessel or her cargo. The testimony showed that she belonged to Begbie; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3,960 pair of gray army blankets, 335 pair of white blankets, linen, woolen shirts, flannel, 750 pair of army brogans, 25 congress gaiters and 24,900 pounds of powder, that she was captured after a chase of three hours, and when making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name.

"The opinion of the Supreme Court in the case of the *Springbok* was delivered by Chief Justice Chase. He admitted that the invocation of the documents in the cases of the *Gertrude* and the *Stephen Hart*, at the original hearing, was not 'strictly regular'; but he also held that the irregularity was not such as to justify a reversal of the decree of the court below, or a refusal to examine the documents invoked and forming part of the record." (Statement in Moore, Dig., VII, 719-720.)

in war, and therefore contraband within the constructions of the American and English prize courts.”³⁰ From the special fitness of certain articles for use in the Confederate military service and the adaptability of others for that use, the Court concluded that a considerable portion of the cargo was destined to the Confederate States, where alone it could be used. The bills of lading, the manifest, a letter in behalf of the charterers, and other evidence, were deemed to indicate an intention that the cargo was to be sent forward by transshipment. It was concluded that “the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.”³¹ The Court decreed restitution of the ship without costs or damages, and affirmed the decree of the District Court condemning the cargo.

It is not believed that the reference to blockade was essential to the decision, in view of the conclusion of the Court as to the ultimate destination of the contraband goods.³²

§ 810. **The Same.** From the foregoing cases certain conclusions are to be drawn. The blockade of the long coast line under Confederate control sufficed to account for the statements as to the intent of owners of cargoes or ships to violate that blockade. In each case, with a possible exception of that of the *Pearl*, there was found to be an intent either on the part of the owners of the cargo to ship what was deemed to be contraband to belligerent territory, or an intent by the master of the vessel fraudulently to carry contraband. Therefore the references to blockade were sometimes unnecessary and tended to be confusing.¹ In no

³⁰ “These portions being contraband,” declared Chief Justice Chase, “the residue of the cargo, belonging to the same owners, must share their fate.” (5 Wall. 26, citing *The Immanuel*, 2 Ch. Rob. 196, *Carrington v. Merchants’ Insurance Co.*, 8 Pet. 495.)

³¹ 5 Wall. 27, 28.

³² See, in this connection, S. E. Baldwin, in *Am. J.*, IX, 793, 798; also C. B. Elliott, *id.*, I, 61, 104.

§ 810. ¹ Declares C. B. Elliott: “The *Dolphin*, the *Hart* and the *Bermuda* were carrying contraband of war to a belligerent and were liable to condemnation without reference to the additional fact that it was necessary to run the blockade in order to deliver the cargo to the belligerents. The *Peterhoff* and the *Springbok* were also carrying contraband and the cargoes were condemned and the ships released. As the doctrine of continuous voyages was properly applicable to the carriage of contraband goods the judgments entered in all these cases were correct regardless of the fact that the Court included among the reasons for condemnation the additional fact that the vessels were engaged in blockade running.” (*Am. J.*, I, 104.) Adverting to the cases here mentioned, L. H. Woolsey observes that “there is none which applies the doctrine solely to blockade,” and he adds: “Nor have any later cases, so far as have been found, so applied the doctrine.” (*Am. J.*, IV, 827.) Again, he says: “Though, as we have seen, the connection between the doctrine of continuous voyages and blockade running appears to have been recognized long prior to the Civil War, still among all the English and American cases examined one has not been found in which the doctrine was directly and exclusively applied to a purely blockade case.” (*Id.*, 829, note 30.) This statement is noted with apparent approval by Judge Baldwin, who declares that “The doctrine of continuous voyage is practically concerned only with cargoes of contraband goods, bound — directly or indirectly — to the country of an enemy of the captor. Theoretically, it may include a ship not carrying contraband, but intending to run a blockade either in ballast or

one of these cases was the application of the doctrine of continuous voyage with respect to traffic in or carriage of contraband made to depend upon the fact that the articles involved were conditional contraband. The approval by the Supreme Court of the principle that a belligerent enjoys the right to capture a neutral ship between two neutral ports and condemn the vessel, if at the time of capture the master was participating in a fraudulent attempt to carry contraband ultimately destined for hostile territory, and to condemn the contraband articles in the cargo, if at that time there was intent on the part of the owner to send them even by transshipment to that territory, proved to be of lasting significance. The application of the doctrine of continuous voyage in the case of the *Springbok* gave rise to much criticism because of the basis of the inference that the cargo had a hostile destination.² Apart from the merits of the decision, the case doubtless served to illustrate the danger of injustice to innocent persons involved in no unlawful transaction through inferences derived from surmise or conjecture.³ In spite of acknowledged difficulties as to the sufficiency of evidence, the doctrine as applied by the Supreme Court did enable a belligerent to thwart

with noncontraband goods. Such an intention has been viewed as a fault of the ship for which she may be seized anywhere on the high seas at the very beginning of her voyage." (*Id.*, IX, 797, citing *The Adula*, 176 U. S. 361, 370.)

Declared Sir Edward Grey in instructions to Lord Desart, British plenipotentiary to the London Naval Conference, Dec. 1, 1908: "It is exceedingly doubtful whether the decision of the Supreme Court [in the case of the *Springbok*] was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly, if such was the intention, the decision would *pro tanto* be in conflict with the practice in British Courts." (Correspondence and Documents Respecting the International Naval Conference, Misc. No. 4 [1909], Cd. 4554, 27, quoted in communication of Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, For. Rel. 1915, Supp., 578, 585.)

² It should be observed that the British Government abstained from protest against the decisions by which ships and cargoes were condemned in the United States. See communication of Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, July 23, 1915, and communicated the following day by telegram to the Secretary of State, For. Rel. 1915, Supp., 168, 170. See, also, documents in Moore, Dig., VII, 723-725.

Concerning the claims for compensation made in the cases of the *Springbok*, *Peterhoff*, *Dolphin*, and *Pearl*, before the British-American Mixed Commission, under Article XIII of the Treaty of Washington of May 8, 1871, see Moore, Arbitrations, IV, 3928-3935. An award of \$5,065 was made on account of the detention of the *Peterhoff* from the date of the decree of the District Court to that of her discharge under the decree of the Supreme Court.

³ Declared Mr. Wm. M. Evarts in his argument in the case of the *Springbok* before the British-American Mixed Claims Commission: "The important question, for neutrals, is, whether trade between neutral ports to which the actual voyage intercepted is really confined, is to be made guilty, by surmise, conjecture, or moral evidence, and that, even, not of the further carriage and further carrier, but only of a probability that such supplementary further carriage, and *some* supplementary carrier may or must have been included in the original scheme of the commercial adventure. . . .

"The doctrine of 'continuous voyage,' as applied in the case of the *Springbok*, which permits interception during the innocent voyage between the neutral ports, and condemnation of cargo only, *upon destination to ultimate market inferred from the demand for such cargo in the enemy ports*, scatters to wind all the limitations on belligerent interference with neutral trade which are confessedly to be observed when the voyages are *direct* between the enemy and the neutral port; it breaks down all the safeguards of the prize procedure, widens the province of circumstantial or moral evidence so as to embrace the proof of the *corpus delicti*, and in fact, exposes neutral trade between neutral ports, which the war develops, injuriously to belligerent interests, to suppression *as itself unlawful*." (Memorials, XXI, Case No. 316, Brief for Claimants, 46 and 58.)

For further criticisms of the doctrine of continuous voyage, as enunciated in the *Springbok*, see documents in Moore, Dig., VII, 727-739, especially opinion of the members of the maritime prize commission of the Institute of International Law, 731-732, quoted from *Rev. Droit Int.* XIV, 329-331. See, also, T. Baty, *Proceedings*, Int. Law Association, XXVI, 118.

effectively unlawful participation by neutrals in the interests of its enemy. The reasonableness of the theory thus judicially applied was tested and vindicated by events of World War I.⁴

(3)

§ 811. Discussions with Great Britain during World War I. In December, 1914, the United States complained of British interference with American vessels and cargoes ostensibly bound for neutral European States.¹ It was declared that commerce between countries not belligerents should not be interfered with by States engaged at war unless such interference was "manifestly an imperative necessity" to protect the national safety of the latter, and then only to the extent of such necessity. It was said that the British policy towards neutral ships and cargoes exceeded the manifest needs of a belligerent, and constituted restrictions upon the rights of American citizens not justified by the rules of international law or required under the principle of self-preservation. Special complaint was lodged against the seizure of American cargoes, notably of food-stuffs and other articles of common use and ordinarily dealt with as conditional contraband, on mere suspicion, and because of a belief that although originally not so intended by the shippers, such cargoes would ultimately reach belligerent territory.² Many of the great industries of the United States were suffering, it

⁴ See S. E. Baldwin, in *Am. J.*, IX, 793, 800, 801; James Gantenbein, *Continuous Voyage*, 77-85.

§ 811. ¹ Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram Dec. 26, 1914, *For. Rel.* 1914, Supp., 372.

PRACTICE BETWEEN THE CIVIL WAR AND WORLD WAR I. — The doctrine of continuous voyage was the subject of international controversy and of judicial scrutiny on various occasions prior to World War I. See case of the *Gaelic*, a British steamer searched by Japanese authorities at Yokohama, while on her way from San Francisco to Hong Kong, in September, 1894, Takahashi, *Cases on Int. Law during Chino-Japanese War*, 52-63, with comment by Prof. Westlake, xvii-xxvii.

Concerning the case of the *Doelwijk*, a Dutch vessel captured by an Italian cruiser in 1896, in the course of the war between Italy and Abyssinia, see *Naval War College, Int. Law Topics*, 1905, 100, 101; Prosper Fedozzi, "*Le Droit International et les Récentes Hostilités Italo-Abyssines*," *Rev. Droit Int.*, XXIX, 49, 55; G. Diena, "*Le Jugement du Conseil des prises d'Italie dans l'Affaire du 'Doelwijk'*," *Clunet*, XXIV, 268.

See declarations of Brazil, Spain and Sweden in the course of the Spanish-American War, referred to by Fauchille in his 8th edition, II, 865, and commented on in Gantenbein, *Continuous Voyage*, 89-90.

With respects to the discussion between Great Britain and Germany arising from the seizure by British vessels of war during the Boer War of the German mail steamers *Bundesrath*, *Herzog* and *General*, bound for Delagoa Bay, see Moore, *Dig.*, VII, 739-743, and documents there cited; R. G. Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*, 85-112, and documents there cited; *Naval War College, Int. Law Topics*, 1905, 95-100.

See correspondence between Great Britain and Russia, 1907-1910, respecting the destruction of the steamship *Oldhamia* in May, 1905, *Brit. and For. State Pap.*, CV, 318-351; also in this connection, note of Mr. Wheeler, American Chargé d'Affaires at St. Petersburg, to Mr. Isvolsky, Russian Foreign Secy., July 10 (23), 1910, *id.*, 352.

See decision of the Supreme Russian Prize Court in the case of *The Tetartos*, Hurst and Bray's Russian and Japanese Prize Cases, I, 166, 181, where it was declared that "The Supreme Prize Court cannot attach any importance to a theory [that of continuous voyage] which has never been sanctioned by Russia in international relations, and which throws open the door to all manner of arbitrary decisions."

It may be doubted whether the case of the *Carthage* between France and Italy, decided May 6, 1913, by a Tribunal selected from the Permanent Court of Arbitration at The Hague, sheds any light on the doctrine of continuous voyage. J. B. Scott, *Hague Court Reports*, 327, G. G. Wilson, *Hague Arbitration Cases*, 352.

² In this connection it was said: "In spite of the presumption of innocent use because destined to neutral territory, the British authorities have made these seizures and detentions

was said, because their products were denied long-established markets in European countries, which, though neutral, were contiguous to the nations at war.

In response the British Government expressed cordial concurrence in the principle that a belligerent in dealing with trade with neutrals should not interfere unless such action were necessary to protect the belligerent's national safety, and then only to the extent of the necessity, and announced also an endeavor to keep British action within the limits of that principle, on the understanding that it admitted a right to interfere when interference was "not with *bona fide* trade between the United States and another neutral country, but with trade in contraband destined for the enemy's country."³ It was declared that British naval operations had not caused any diminution in the volume of American exports, and that those to neutral countries had increased since the beginning of the conflict, a circumstance which, it was said, justified the inference that a substantial part of the American trade was intended for countries hostile to Great Britain, "going through neutral ports by routes to which it was previously unaccustomed."⁴ Attention was called to the fact that while a century earlier the difficulty of land transport rendered it impracticable for a belligerent to obtain supplies of sea-borne goods through a neighboring neutral country, the advent of steam power had rendered it as easy for a belligerent to supply itself through the ports of such a country as through its own, and therefore made it impossible for its opponent to refrain from interfering with commerce intended for the enemy merely because it was on its way to a neutral port. Adverting to the application of the doctrine of continuous voyage by the United States during the Civil War, it was contended that then for the first time a belligerent found itself obliged to capture contraband goods on their way to the enemy, "even

without, so far as we are informed, being in possession of facts which warranted a reasonable belief that the shipments had in reality a belligerent destination, as that term is used in international law. Mere suspicion is not evidence and doubts should be resolved in favor of neutral commerce, not against it. The effect upon trade in these articles between neutral nations resulting from interrupted voyages and detained cargoes is not entirely cured by reimbursement of the owners for the damages which they have suffered after investigation has failed to establish an enemy destination. The injury is to American commerce with neutral countries as a whole through the hazard of the enterprise and the repeated diversion of goods from established markets.

"It also appears that cargoes of this character have been seized by the British authorities because of a belief that, though not originally so intended by the shippers, they will ultimately reach the territory of the enemies of Great Britain. Yet this belief is frequently reduced to a mere fear, in view of the embargoes which have been decreed by the neutral countries to which they are destined, on the articles composing the cargoes." (For. Rel. 1914, Supp., 374.)

³ Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Jan. 7, 1915, For. Rel. 1915, Supp., 299.

⁴ Same to Same, Feb. 10, 1915, *id.*, 324, 326.

In support of the statement "as to the unprecedented extent" to which supplies were reaching neutral ports the following figures respecting the exports of certain meat products to Denmark during the months of September and October, 1914, were given: "In 1913, during the above two months, the United States exports of lard to Denmark were nil, as compared with 22,652,598 pounds in the same two months of 1914. The corresponding figures with regard to bacon were: 1913, nil; 1914, 1,022,195 pounds; canned beef, 1913, nil; 1914, 151,200 pounds; pickled and cured beef, 1913, 42,901 pounds; 1914, 156,143 pounds; pickled pork, 1913, nil; 1914, 812,872 pounds.

"In the same two months the United States exported to Denmark 280,176 gallons of mineral lubricating oil in 1914, as compared with 179,252 in 1913; to Norway, 335,468 gallons in 1914, as against 151,179 gallons in 1913; to Sweden, 896,193 gallons in 1914, as against 385,476 gallons in 1913." (*Id.*, 332-333.)

though at the time of capture they were *en route* for a neutral port from which they were intended subsequently to continue their journey.”⁵ The British Government laid stress upon the extent of the effort of traders to conceal the true destination of cargoes intended for enemy territory, and upon the necessity for careful and elaborate searches of neutral ships in calm water and in belligerent ports such as those of Great Britain.⁶ Admitting that the doctrine of continuous voyage was being applied to conditional contraband, such as foodstuffs, it was said that an order in council of October 29, 1914, was issued with a view to inflicting the minimum of injury and interference with neutral commerce. That order provided that conditional contraband should be liable to capture on board a vessel bound for a neutral port if the goods were consigned “to order,” or if the ship’s papers failed to show who was the consignee of the goods, or if they showed a consignee thereof in territory belonging to or occupied by the enemy. In each of these cases the burden was placed upon the owners to prove that the destination of their goods was innocent.⁷

It was contended that in view of the peculiar circumstances of the existing struggle, where the forces of the enemy comprised so large a portion of the population, and where there was so little evidence of shipments on private as distinguished from government account, it was most reasonable that the burden of proof should rest upon the claimant.⁸ Thus the novel aspect of the British policy was the placing upon the owner of a cargo consigned to a neutral port, the burden of proving the innocence of the transaction, even when no articles absolutely contraband were present, and when those of which the entire cargo was comprised might be capable of use in the neutral country. This application of the doctrine of continuous voyage exceeded the limits of belligerent action laid down in the Declaration of London. It found, moreover, lack of support in the Civil War cases, where, as has been observed, no judicial inference of an unlawful intention of the owner of a cargo or the master of a ship bound for a neutral port, was ever derived from the mere presence on a vessel of goods regarded as conditional contraband. The Government of the United States had never asserted in diplomatic correspondence a belligerent claim resembling that expressed in the order in council of October 29, 1914, and the Supreme Court had never had occasion to express approval of so broad a pretension.⁹

It was not until after Great Britain had in March, 1915, established a so-called blockade of German territory through neutral as well as direct channels of communication, that the United States made full response. When it did so its chief concern was the nature and scope of the blockade.¹⁰ Thus the question

⁵ It was said that the policy then followed by the United States “was not inconsistent with the general principles already sanctioned by international law, and met with no protest from His Majesty’s Government, though it was upon British cargoes and upon British ships that the losses and the inconvenience due to this new development of the application of the old rule of international law principally fell.” (*Id.*, 328.)

⁶ See *Visit and Search*, *supra*, §§ 727-728.

⁷ *For. Rel.* 1914, Supp., 261, 262.

⁸ See communication of Feb. 10, 1915, *For. Rel.* 1915, Supp., 324, 332.

See, also, *Controversies Respecting Certain Articles, Foodstuffs*, *supra*, §§ 803-804.

⁹ See Borchard and Lage, *Neutrality for the United States*, 1937, 69-71.

¹⁰ *Mr. Lansing, Secy. of State, to Mr. Page, Ambassador at London, Oct. 21, 1915, For. Rel.* 1915, Supp., 578.

as to the propriety of the British application and theory of the doctrine of continuous voyage with respect to the mere exportation and carriage of contraband ceased to be a distinct matter of discussion.¹¹ Nevertheless, Secretary Lansing took pains to challenge the propriety of the whole British system both of obtaining evidence and of raising inferences of hostile destination. He declared that the contention that greatly increased imports of neutral countries, adjoining Great Britain's enemies, raised a presumption that certain commodities though destined for those countries were intended for reexportation to the belligerents who could not export them directly, and that that fact justified detention for the purpose of examination of all vessels bound for the ports of those neutral countries, notwithstanding the fact that most of the articles of trade had been placed on their embargo lists, could "not be accepted as laying down a just or legal rule of evidence." "To such a rule of legal presumption," he said, "this Government can not accede, as it is opposed to those fundamental principles of justice which are the foundation of the jurisprudence of the United States and Great Britain." He adverted also to the fact that British exports to the neutral countries had also materially increased since the beginning of the war.¹² He denied, moreover, the right of a belligerent to seize goods listed as conditional contraband destined to an enemy country through a neutral country.¹³

¹¹ See Case of the steamer *Joseph W. Fordney* which, having sailed from New York, March 20, 1915, was seized by a British vessel of war some 4 miles off the Norwegian coast and brought into Kirkwall, April 8. The cargo consisting entirely of cattle fodder was consigned to a consignee at Malmö, Sweden. The Department of State complained that the goods were seized without probable cause and on suspicion. See correspondence in American White Book, European War, III, 117-128; For. Rel. 1915, Supp., 369, 372, 376, 380, 399, 404, 427, 601, 608, 619; For. Rel. 1916, Supp., 363, 387; and especially telegram of Mr. Lansing, to Mr. Page, April 13, 1916, *id.*, 363, in which it was said "Department has made known to British Government through you its views that if proper examination warranting the seizure of goods in question was not disclosed by proper examination of vessel at the time of its seizure, there could be no lawful seizure of the cargo and, therefore, no subsequent lawful prize court proceedings, and that seizure of a vessel and cargo can not be justified on the strength of evidence of illegal destination of cargo discovered, as appears according to the British Government's statement to have been the case with reference to steamer *Joseph W. Fordney*, approximately one-half year after seizure took place."

¹² In this connection he said: "Thus Great Britain concededly shares in creating a condition which is relied upon as a sufficient ground to justify the interception of American goods destined to neutral European ports. If British exports to these ports should be still further increased, it is obvious that, under the rule of evidence contended for by the British Government, the presumption of enemy destination could be applied to a greater number of American cargoes, and American trade would suffer to the extent that British trade benefited by the increase. Great Britain cannot expect the United States to submit to such manifest injustice or to permit the rights of its citizens to be so seriously impaired." (See communication of Oct. 21, 1915, For. Rel. 1915, Supp., 578, 581-582.)

¹³ He said. "When goods are clearly intended to become incorporated in the mass of merchandise for sale in a neutral country, it is an unwarranted and inquisitorial proceeding to detain shipments for examination as to whether those goods are ultimately destined for the enemy's country or use. Whatever may be the conjectural conclusions to be drawn from trade statistics, which, when stated by value, are of uncertain evidence as to quantity, the United States maintains the right to sell goods into the general stock of a neutral country, and denounces as illegal and unjustifiable any attempt of a belligerent to interfere with that right on the ground that it suspects that the previous supply of such goods in the neutral country, which the imports renew or replace, has been sold to an enemy. That is a matter with which the neutral vendor has no concern and which can in no way affect his rights of trade. Moreover, even if goods listed as conditional contraband are destined to any enemy country through a neutral country, that fact is not in itself sufficient to justify their seizure." (*Id.*, 582.)

Declares Turlington: "The American intimation that Great Britain was increasing her

§ 812. *The Kim*. The British doctrine found important illustration in the case of the *Kim*, decided by Sir Samuel Evans, President of the Prize Court, September 16, 1915.¹ The *Kim*, a Norwegian ship, and three other Scandinavian vessels² were chartered to an American corporation of which the president was a German residing in America. They all started, within a period of three weeks, in October and November, 1914, from New York for Copenhagen, with very large cargoes of lard, hog and meat products, oil stocks, wheat and other food-stuffs; two of them had cargoes of rubber, and one of hides. The ships were captured and their cargoes seized on the ground that they were conditional contraband alleged under the circumstances to be confiscable.³ The *Kim*, which sailed November 11, was the only vessel whose departure from New York did not antedate the order in council of October 29, 1914.⁴ Denmark, with its small

own trade with the border neutral countries, at the same time that she was hampering American trade with those countries, was dealt with in a British memorandum of December 13, 1915 [For. Rel. 1915, Supp., 630, 632], in which figures were quoted from the official reports of the Department of Commerce of the United States to prove 'that the export trade of the United States has not suffered from the inevitable restrictions on neutral commerce deriving from the state of war, and that there is no vestige of foundation for the insinuation that Great Britain has taken advantage of war conditions and of the measures necessitated by military considerations, in order to increase British exports to neutral countries at the expense of American trade.'

"It may be noted that the figures for British and American exports to the Northern European neutrals in 1913, 1914, and 1915 are as follows (in millions of dollars):

Year	American Exports	British Exports
1913	165	218
1914	151	220
1915	340	323

"It may be noted also that the question whether the increase of British exports to the border neutrals was made 'at the expense of American trade' was logically irrelevant to the question of the soundness of the presumption of the enemy destination, and consequent liability to seizure as contraband, of commodities imported by the border neutrals in excess of the pre-war imports of those commodities. If that presumption was sound with respect to the increased American exports, it was equally sound with respect to the increased British exports. The British authorities were of course in a position to satisfy themselves in advance that any increased exports from Great Britain were not actually destined for the enemy. They were not, and could not well be, in possession of satisfactory advance assurances regarding the ultimate destination of American exports. Their good faith, in stopping American goods en route to neutral ports at the same time that they were allowing their own goods of the same character to go to the neutrals in increasing quantities, was subjected to an intolerable strain. The severity of this strain was enhanced by the fact that it was obviously to their commercial advantage to sell their own products in neutral countries and obtain other goods in exchange. It is not surprising, in the circumstances, that, confident of the rectitude of their conduct from their own point of view, they chose more or less deliberately to ignore the logical issue and to draw across the trail the red herring of increased American exports. Nor is it surprising that the American Department of State was baffled and annoyed by the demonstration, in Sir Edward Grey's notes, that the English, though a reasonable people, are not distinguished by the clarity of their legal processes." (Neutrality, III, 19-20.)

§ 812.¹ *The Kim* [1915], P. 215, *Am. J.*, IX, 979, 3 Lloyd's Prize Cases, 167.

Concerning the case, see Chandler P. Anderson, "British Prize Court Decision in the Chicago Packing House Cases," *Am. J.*, XI, 251; also memorandum from the British Embassy at Washington received at Department of State, Oct. 12, 1915, For. Rel. 1915, Supp., 566; also Gantenbein, *Continuous Voyage*, 111-116.

² The other vessels were the *Alfred Nobel*, the *Björnstjerne Björnson* and the *Fridland*.

³ There was an exception in the case of one cargo of rubber, which was seized as absolute contraband.

⁴ An order in council adopting with modifications the provisions of the Declaration of London, and promulgated on Aug. 20, 1914, provided that conditional contraband, if shown

population of less than three millions, was regarded, as to foodstuffs, as an exporting rather than an importing country. Its situation, moreover, rendered convenient the transportation of goods from its territory to German ports and places. The total cargoes in the four ships amounted to about 73,237,000 pounds in weight; the quantity of goods claimed in the adjudication covered about 32,312,000 pounds (exclusive of rubber and hides). It appeared that the average annual quantity of lard imported into Denmark during the three years from 1911 to 1913 was 1,459,000 pounds; the quantity of lard consigned to Copenhagen on the four ships was 19,252,000 pounds.⁵ Of the several claimants, which were 25 in number, 5 were well-known American packing companies of Chicago, which as consignors of lard and meat products made claim to 23,274,-584 pounds of the four cargoes.

Some aspects of the evidence in relation to the claims of the four principal American consignors deserve attention. A large export business with Germany had been transacted before the war, upon the outbreak of which their agents were removed from that country to Denmark. Intercepted communications from agents in that country and elsewhere, advised against shipment to Copenhagen if exports were prohibited, or made inquiry whether it was possible to purchase in Germany large quantities of goods from America via Copenhagen to Stettin.⁶

to have the destination referred to in Art. XXXIII of the declaration (that is, if destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances showed that the articles could not in fact be used for the purposes of the war in progress) was liable to capture, to whatever port the vessel was bound and at whatever port the cargo was to be discharged. It was also provided that the destination referred to in Art. XXXIII might be inferred from any sufficient evidence, and (in addition to the presumption laid down in Art. XXXIV) should be presumed to exist if the goods were consigned to or for an agent of the enemy State or to or for a merchant or other person under the control of the authorities of the enemy State. American White Book, European War, I, 7.

Declared Sir Samuel Evans: "By the proclamation of the 4th August all the goods now claimed (other than the rubber and the hides) were declared to be conditional contraband. The cargoes of rubber seized were laden on the *Fridland* and the *Kim*. Rubber was declared conditional contraband on the 21st Sept., 1914; and absolute contraband on the 29th Oct. Accordingly the rubber on the *Fridland* was conditional contraband; and that on the *Kim* was absolute contraband. The hides were laden on the *Kim*. Hides were declared conditional contraband on the 21st Sept., 1914. No contention was made on behalf of the claimants that the goods were not to be regarded as conditional or absolute contraband, in accordance with the respective proclamations affecting them." (*Am. J.*, IX, 982, 983.)

⁵ "To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 pounds, as compared with 854,856 pounds for the same months in 1913 — showing an increase for the two months of 49,792,993 pounds; or, in other words, the imports during those two months in 1914, were nearly sixty times those for the corresponding months of 1913.

"One more illustration may be given from statistics which were given in evidence for one of the claimants (Hammond and Swift). In the five months, August–December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 pounds. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 pounds. On the other hand, during those periods, similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 pounds to 59,694,447 pounds" (*Id.*, 981, 982.)

⁶ Thus one agent cabled from Copenhagen, in January, 1915, to one of the claimants: "Don't ship any lard Copenhagen, export prohibited." Another writing from Hamburg in September, 1914, asked "whether it is possible for us to buy great quantities of oleo and lard, etc., from America c. i. f. Stettin," and also "whether it is possible to send the goods from

The consignor claimants failed to reveal correspondence between themselves and their agents respecting the particular transactions involved. Books of account or other commercial documents were withheld.⁷ All of the foodstuffs were suitable for the use of troops in the field; and certain consignments of one consignor of canned meats were similar in kind, wrapping and packing, to what was supplied in large quantities to British troops, and were not ordinarily supplied for civilian use. Certain tins were of a brand and kind offered for use in the British Army and could only have been made up, in the judgment of the Court, for the use of troops in the field.⁸ Among the products shipped were large quantities of so-called fat backs, for which there was no market in Denmark and for which there was a demand in Germany, on account of the glycerin contained in them. Certain shipments were consigned to the order of the consignors. Counsel for one claimant declared that "our case was not that the goods were intended for consumption in Denmark, but that the persons to whom they were consigned sold them to Germany."⁹

The Court concluded "from the facts proved and the reasonable and indeed irresistible inferences from them," that the cargoes were not on their way to Denmark to be incorporated into the common stock of that country by consumption or bona fide sale, or otherwise, but, on the contrary, "that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination." Sir Samuel Evans expressed the opinion that there seemed to be an absence of logical reason for the exclusion by the Declaration of London of the doctrine of continuous voyage in the case of conditional contraband,¹⁰ and stated that

America via Copenhagen to Stettin, if the bill of lading bears the following inscription: 'Party to be notified, Orders Pay & Co.,' so that you stand *quasi* as consignee." (*Id.*, 984 and 987.)

⁷ According to an affidavit of an officer of one claimant, "In the month of October, 1914, the claimant shipped on board the Norwegian steamship *Alfred Nobel* the goods particulars of which are set out in the schedule to this affidavit. The whole of said goods was shipped 'to order' Morris & Company, notify claimant's agent in Copenhagen (said agent being a native-born citizen of the United States of America) for sale on consignment in the agent's own district in the ordinary course of business. The standing instructions to the agent that no sales were to be made outside of the agent's district were never withdrawn by the claimant." (*Am. J.*, IX, 984.)

According to an affidavit of another claimant, "None of the goods shipped by Armour & Co. to the Copenhagen company subsequent to the outbreak of war were sold to the armed forces or to any government, department of Germany, or to any contractor for such armed forces or Government department. About ninety per cent of the goods were sold to firms who had been customers of the company and established in Denmark and Scandinavia for many years. These sales were all genuine sales and payment was made against documents in the ordinary way, and on delivery Armour & Co.'s interest in the goods absolutely ceased." (*Id.*, 985.)

The foregoing affidavits were deemed insufficient by the Court.

⁸ It should be observed that "as against this there was evidence that goods of the same class had been ordinarily supplied to and for civilians." (*Am. J.*, IX, 992.)

⁹ *Id.*, 986.

¹⁰ For the reasons given by the British delegation to the London Naval Conference in their report to Sir Edward Grey, British Foreign Secretary, March 1, 1909, see *Correspondence and Documents Respecting the International Naval Conference*, Misc. No. 4, 1909, Cd. 4554, p. 96.

See, also, report of the American delegates (Rear Admiral Stockton and Prof. Wilson) to the London Conference, to Mr. Root, Secretary of State, March 2, 1909, *Charles' Treaties*, 332, 335; report of Mr. Renault accompanying the Declaration of London, *id.*, 282, 299-302; J. B. Moore, "Contraband of War" (Philadelphia, 1912), 38.

he had no hesitation in applying that doctrine, declared to be a "part of the law of nations," to the cargoes concerned. "The result is," he said, "that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen, but is entitled and bound to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and if so, what the real ultimate destination was."¹¹ Apart from the operation of the orders in council of August 20, and October 29, 1914, Sir Samuel Evans deemed the cargoes on all four vessels (except for certain claims which were allowed) to be confiscable.¹²

There may have been as much reason to infer that the cargoes on board the four Scandinavian vessels were bound for German forces as that the cargo on board the *Springbok* was bound for belligerent territory. It seems important to observe, however, that the Supreme Court of the United States did not in fact undertake to hold in any of the Civil War cases, as the ground for its decision, that the ultimate destination of articles then deemed to be conditional contraband and bound for a neutral port, justified a presumption of hostile use or a reason for condemnation.¹³ The doctrine of continuous voyage appears thus to have been given an extended application in the case of the *Kim*.¹⁴

§ 812A. Further Considerations. The Matter of Proof. With the gradual application by important participants in World War I of the doctrine of continuous voyage to conditional contraband,¹ the prize courts, fortified by the

¹¹ *Am. J.*, IX, 996.

See, also, *The Louisiana and Others*, 5 Lloyd's Prize Cases, 230; *The San José*, 6 Lloyd's Prize Cases, 33; *The Balto*, 6 Lloyd's Prize Cases, 141.

See C. J. Colombos, "Some Notes on the Decisions of the French Prize Courts," *Journal of Society of Comparative Legislation*, New Series, XVI, No. 35, p. 300-321, and cases there cited, especially *The Sibilla*, *Journal Officiel*, March 18, 1916, 2135; also *The Insulinde*, *id.*, June 4, 1915, 3600, *Rev. Gén.*, XXII, *jurisprudence*, 18. See, also, Higgins' 8th ed. of Hall, *citing* the above cases, 806, note 1 and 811, note 2.

¹² Interpreting the order in council of Oct. 29, 1914, see decision of the Judicial Committee of the Privy Council in *The Louisiana*, 34 Times L. R. 221, V Lloyd's Prize Cases, 248; *affirming* that of Sir Samuel Evans in 32 Times L. R. 619.

¹³ In Higgins' 8 ed. of Hall, note 1, p. 731, it is said that in applying the doctrine of continuous voyage to both absolute and conditional contraband, British and French prize courts "were following the line marked out by the American courts in the Civil War." The accuracy of this statement may be doubted.

See memorandum in behalf of Great Britain at the London Naval Conference respecting the doctrine of continuous voyage in relation to contraband, Proceedings, International Naval Conference, Misc. No. 5, 1909, Cd. 4555, 95.

¹⁴ Sir Samuel Evans quoted a portion of a communication from Mr. Bryan, Secretary of State, to Mr. Stone, chairman of the Senate Committee on Foreign Relations, Jan. 20, 1915, stating that "the rule of 'continuous voyage' has been not only asserted by American tribunals but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order,' from which as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government therefore cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practiced as heretofore." (For. Rel. 1915, Supp., VI.) It may be observed that this statement made no specific reference to any American judicial application of the doctrine of continuous voyage to conditional contraband.

§ 812A. ¹ Declares Garner: "The German prize ordinance, in conformity with Article 35 of the Declaration of London, excluded the application of the doctrine of continuous voyage

terms of executive regulations and decrees, placed heavy burdens on the claimant who sought to maintain that cargoes to be unladen in neutral ports were not to be judicially deemed to be tainted with a hostile destination. Not only were hostile uses lightly inferred from hostile destinations,² but hostile destinations were themselves also lightly imputed to cargoes because of their susceptibility to belligerent uses and by reason of efforts that might be anticipated to remove them to belligerent soil not remote from neutral places of consignment. Through executive and judicial agencies, Great Britain, for example, proceeded to apply a theory in contrast to that which it had promulgated at the London Naval Conference of 1908–1909, where it had been declared in its behalf that the doctrine of continuous voyage was only applicable when the whole transportation was made in pursuance of a single mercantile transaction, and that it would not be applied where the evidence went no further than to show that the goods were sent to the neutral port in the hope of finding a market there for delivery elsewhere.³ Thus, in relation to a cargo of oranges (dealt with as conditional contraband) on Spanish neutral vessels consigned to Rotterdam, the Judicial Committee of the Privy Council found itself unable to hold that the fact that the goods would be offered for sale at the port of arrival was in itself conclusive of the innocence of their destination.⁴ Absence of a design

to the carriage of conditional contraband but in consequence of the British and French modifications the ordinance was amended, by way of reprisal, in April 1915, so as to bring it into conformity with the new Anglo-French rule. Until then the German Prize Courts did not apply the doctrine in the case of conditional contraband, but after that date it was applied whenever the question was raised. [*Citing The Artemis* No. I, Verzijl, 844.]

"The French Prize Council appears to have had no occasion to apply the doctrine prior to the decree of November 6, 1914, when the rule of the Declaration of London was modified. After that date the doctrine was applied within the limits laid down by the decree. After the decree of July 7, 1916, when the Declaration of London was abrogated in its entirety the doctrine of continuous voyage was applied without question as to the conformity of the doctrine with international law. [*Citing The Nieuw Amsterdam*, Fauchille, *Jurisp. Franc.*, 14; *The Eir*, *id.*, 32; *The Jiul*, *id.*, 26; *The Cotentin*, *id.*, 299.]

"The Italian Prize Commission applied the doctrine to conditional contraband after the promulgation of the decree of June 3, 1915, which altered the rule of the Declaration of London in the same sense as did the British and French orders and decrees. [*Citing the case of the Kyzicos*, Fauchille and Basdevant, *Jurisp. Ital.*, 57.]" (*Prize Law*, 565.) Declares Gantenbein: "From the very beginning of the war, it has been observed, executive provisions were made for application under certain conditions of the doctrine of continuous voyage to conditional contraband in Great Britain and France, later in Italy, and as the war progressed, these conditions were broadened, reaching a culmination in the attempted abolition by the British and Italian Governments of the distinction between the two kinds of contraband, while Germany, by way of retaliation, pursued much the same course. These various executive declarations were, with the exception of the total abolition of the distinction between conditional and absolute contraband, followed in the prize courts, and it is probable that of the contraband cases involving the doctrine of continuous voyage before the courts of Great Britain, France, Germany, and Italy, a majority concerned conditional contraband." (*Continuous Voyages*, 176–177.)

² "According to the British prize court, in the leading case of *The Kim*, lard and fat backs could be used to produce glycerine and glycerine could be used to manufacture nitroglycerine for high explosives. Neutrals shipping lard and fat backs to Denmark might therefore in reality be supplying Germany with high explosives." (*Jessup, Neutrality*, IV, 43–44.)

³ Correspondence and Documents, International Naval Conference, Misc. No. 4 [1909], Cd. 4554, p. 8.

⁴ See *The Norne* and Other Vessels, IX Lloyd's Prize Cases, 402, 432, where it was added by Lord Parmoor: "It would appear to them [their Lordships] to be too wide a generalization that whatever the special conditions may be, the goods could never be condemned as contraband, if once it is established that they would be offered at public auction in a neutral market." Declares Prof. Garner in this connection: "It is not clear if the sale of imported

on the part of a shipper to send goods to a belligerent destination, when he had relinquished control over their final use, offered no safeguard when the consignee was possessed of such a design.⁵ A consignment of goods to the Netherlands Oversea Trust Company for delivery to a firm that intended to forward them to German territory was condemned despite the fact that the reputable consignee would have done all that it could to prevent such action.⁶ Dealing with the bare question of fact whether goods at time of seizure were to be forwarded to enemy territory rather than to attain such a connection with neutral territory as should be a bar to condemnation, judicial conclusions became increasingly the product of inferences that fell short of proof;⁷ and the readiness so to be influenced was enhanced by the terms of executive orders or decrees that relaxed requirements as to proof, or imposed the burden thereof upon the neutral shipper or claimant.⁸ Furthermore, the requisite connection of cargoes with neutral territory as by incorporation into the common stock thereof was not deemed to be satisfied if raw materials there unladen were, after transformation into manufactured goods, such as boots, found to have a hostile destination.⁹ While British judges did not appear to hold that the bare supplying to a neutral of goods which served to enable it to release others for exportation to belligerent territory sufficed to justify condemnation, and so did not apply the doctrine of continuous voyage as a deterrent of substitution, they referred to situations where there might be a sufficient connection between what was received and what was exported to warrant such action.¹⁰

fruit at public auction in a neutral port does not have the effect of incorporating it in the common stock, what could constitute such incorporation?" (Prize Law, 571.)

⁵ The *Norne*, 9 Lloyd's Prize Cases, 402, 427-428.

⁶ The *Noordam*, 8 Lloyd's Prize Cases, 337.

⁷ The *Pacific*, 5 Lloyd's List Law Reports, 105.

⁸ As illustrative, see The *Norne*, 9 Lloyd's Prize Cases, 402, where it was declared by the Judicial Committee of the Privy Council. "Whether goods in any particular instance are contraband, by application of the doctrine of continuous voyage, is a question of fact. Under the terms of the Order in Council the appellants must discharge the burden of proving that the destination, if the voyage had not been interrupted, would have been innocent." (427.)

⁹ See The *Balto*, 6 Lloyd's Prize Cases, 141, where Sir Samuel Evans declared: "In my view, the notion that leather, imported into a country for the express purpose of being at once turned into boots for the enemy's forces, becomes incorporated in the common stock of the neutral country is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage." (148.)

¹⁰ Declared Sir Samuel Evans in a dictum in the case of The *Bonna*, in 1918: "If it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continuous voyage applies so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination. I should go even further, and hold that if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular producers or vendors of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results." (7 Lloyd's Prize Cases, 367, 377-378.)

See also The *City of Lincoln* and *Demodocus*, Garner, Prize Law, 570; *Verzijl*, 866.

Declares Gantenbein: "In a number of cases, the courts upheld the validity of the Orders in Council providing for presumptions of an ultimate enemy destination under certain conditions. As the war progressed, however, they went much further and held that the burden of proof rested with the claimants of goods shipped to neutral countries which were receiv-

The character of the agency or combination of agencies through which a belligerent asserts its rights as such is of course unimportant in passing upon the propriety of its conduct. No participant in World War I could by its own decrees, however influential upon, or decisive of the conclusions of, its own tribunals, relax its legal obligations towards neutral powers. The gist of the complaint of the latter was that belligerent States had been guilty of such relaxation by evolving and using a system whereby neutral consignments for delivery on neutral soil could be, and were subjected to condemnation on grounds that fell short of proof, and under circumstances when the evidence failed to establish the existence of a hostile destination. There was also the subsidiary source of complaint in the character of the requirement laid down in order that a consignment to neutral territory should be deemed to be incorporated in the common stock thereof. The result augured sadly for the future unless neutral States were to attain the power and disposition to nullify the influence of bad precedents by naval force, or unless there should come into being a general willingness of maritime States to enter into fresh understandings providing for the reconciliation of belligerent and neutral claims.

4

§ 813. **Observations on Extended Applications of the Doctrine.** The problem during World War I, as likewise during the American Civil War, grew out of the difficulty in determining what cargoes should be deemed to have such a relationship with neutral territory to which they were consigned as to prevent condemnation on the ground that their ultimate destination or use was hostile. Yet there was this difference. In the course of the Civil War, in relation to the matter of contraband, the courts were confronted chiefly with cases pertaining to absolute contraband, and in no case applied the doctrine of continuous voyage to goods regarded as conditional contraband, whereas in World War I most of the cases in which the doctrine was applied were those pertaining to commodities that were at the time regarded as conditional contraband.

It should be borne in mind that the reason in justification of the classification differentiating conditional from absolute contraband had been the sense of a need of solid proof that articles regarded within the former category, because capable of employment for purposes both related and unrelated to war, were in fact destined for a hostile use by a belligerent.¹ It was oftentimes exceedingly difficult to obtain the requisite proof that goods of such a kind and consigned to a neutral port were to be forwarded to a place where they would be used

ing abnormally large quantities of imports. Such cases were termed by the courts "‘statistical cases.’" (Continuous Voyage, 126.) As illustrative, see *The Oranje Nassau*, 9 Lloyd's Prize Cases, 189.

For a discussion of certain French and German cases see Garner, *Prize Law*, §§ 423 and 424; also Gantenbein, *Continuous Voyage*, (France) 134-143; (Germany) 143-156; (Italy) 157-160.

See especially *The Norden*, *Entscheidungen*, II, 35.

§ 813. ¹Mr. Hay, Secy. of State, to Mr. McCormick, American Ambassador at St. Petersburg, No. 143, Aug. 30, 1904, For. Rel. 1904, 760, Moore, Dig., VII, 688; see, also, *Same* to *Same*, Jan. 13, 1905, For. Rel. 1905, 744.

for what might fairly be deemed to be a military end. It was the possibility of their use in neutral territory either through local consumption, or in its general export trade (other than with a belligerent State) which weakened the value of inferences of hostile employment. These might be so frequently opposed by conflicting inferences of equal weight as to forbid, save under exceptional circumstances, any reasonable presumption adverse to the owner of the cargo. This was strikingly illustrated in the case of the *Peterhoff*, where the Supreme Court of the United States found it impossible to conclude from the evidence presented that the articles deemed to be conditional contraband and consigned to Matamoras were actually destined for Confederate uses in Texas.²

There was reason, therefore, either for the adoption of a rule which, without changing or opposing an established practice, forbade the application of the doctrine to conditional contraband,³ or for the abandonment of the distinction pertaining to it, provided, in the latter alternative, that there was no relaxation in the requirement as to proof of hostile destination. The attempt, however, to keep alive the distinction between absolute and conditional contraband, and simultaneously to loosen the requirements of proof as to the ultimate hostile use of articles rendered subject to condemnation because destined for such use, was not consistent. The action of Great Britain in 1914 and 1915, as manifested by orders in council, diplomatic correspondence and judicial opinion, was in reality a step towards the abandonment of the theory of conditional contraband — and such action for the purposes of the existing conflict was definitely taken the following year.⁴

It may be observed, parenthetically, that after the United States became a belligerent in World War I, it did not resist the temptation to acknowledge the applicability of the doctrine of continuous voyage to particular articles which it doubtless then regarded as conditional contraband — all kinds of fuel, food, foodstuffs, feed, forage, and clothing and articles and materials used in their manufacture — declaring them to be liable to capture if actually destined for the use of the enemy government or its armed forces, and announcing it to be immaterial whether the carriage was direct in the original vessel, or involved

² 5 Wall. 28, 58.

³ See Art. XXXV of the Declaration of London, Charles' Treaties, 275.

Prof. Wambaugh has well said. "Early in the World War Great Britain and France, though they had not ratified the Declaration [of London], professed to adopt such of its novel provisions as were favorable to belligerents and simultaneously professed to reject such of its novel provisions as were favorable to neutrals; . . . this mode of dealing with a compromise document was both questionable on general principles and contrary to one of the express provisions of the document itself. . . . The Declaration as Declaration was never binding at all; . . . the parts of it already parts of international law were binding irrespective of this unratified Declaration, . . . the novel parts of it never became binding, . . . and from a recognition of the old parts and an occasional insistence upon the novel parts it is a mistake to infer any recognition of the Declaration as Declaration at any time." (*Harv. Law Rev.*, XXXIV, 693, 695)

⁴ See memorandum from the British Foreign Office, Apr. 13, 1916, For. Rel. 1916, Supp., 385. See, also, The Maritime Rights Order in Council, of July 7, 1916, and memorandum explanatory of it, *id.*, 413; also decree of same date by the French Government and memorandum, *id.*, 416.

See American protest of Sept. 18, 1916, against the rules of the Order in Council of July 7, 1916, *id.*, 446.

transshipment or transport overland.⁵ Here was a sharp deviation from the provisions of the Declaration of London, which (with respect to articles regarded as conditional contraband) yielded no such concession to a belligerent.⁶ Nevertheless, at the time when the United States took such action, the distinction between conditional and absolute contraband had, for the purpose of the existing war, broken down.⁷ If the American regulations injected the requirement of proof of hostile use as a means of technically preserving that distinction which there was reluctance formally to abandon at least with respect to the articles noted, they served with equal clearness to reveal indifference whether in the future course of the conflict then being waged the distinction itself should be maintained.⁸

The abandonment of the distinction between the two classes of contraband doubtless simplifies the belligerent task because it removes the duty to prove an ultimate hostile use whenever an ultimate hostile destination is established. Hence it may appear to mark a large concession to belligerent pretensions. Yet the concession is not unreasonable if solid proof of such a destination be rigorously demanded. In view of the conditions in which both war and commerce are now conducted, it is felt that a belligerent should enjoy the right to intercept and condemn all articles capable of assisting the enemy, if proved to be ultimately destined by land or sea to the domain of the enemy, regardless of

⁵ Naval Instructions Governing Maritime Warfare of June 30, 1917, Nos. 24 *e* and 70. With respect to the articles here referred to, a destination for the use of the enemy government or its armed forces "is presumed to exist if the contraband is consigned — (a) To enemy authorities. (b) To a port of equipment or supply of the armed forces of the enemy or other place serving as a base for such armed forces. (c) To a contractor or agent in enemy territory who, by common knowledge, supplies articles of the kind in question to the enemy authorities." (No. 71.)

With respect to other forms of contraband, such, for example, as munitions of war, a destination to territory belonging to or occupied by the enemy or to the armed forces of the enemy, is presumed to exist if the contraband is consigned "To order," or "To order or assigns," or with an unnamed consignee, but in any case going to territory belonging to or occupied by the enemy, or to neutral territory in the vicinity thereof. (No. 72.) The pertinent sections of the foregoing instructions are to be found in *Foreign Relations 1918, Supp.*, 1, Vol. II, 920-921.

⁶ See Art. 35, Charles' Treaties, 235.

See Alice M. Morrissey, "The United States and the Rights of Neutrals, 1917-1918," *Am. J.*, XXXI, 17, 19-20.

⁷ Declared Lester H. Woolsey, formerly the Solicitor for the Department of State, in 1935: "In the last war almost every article useful in warlike operations was put on the contraband list. Conditional contraband was wiped out. I recall that when the Naval Regulations of 1917 were drafted by Professor Wilson and me, we left out the terms "conditional contraband" — the first time they had ever been left out of an American list. But I think they were properly left out, although the distinction was subtly carried in the definition. Germany was a wholly regimented country. A shipload of food entering Germany was like a spoonful added to a cup of water — the whole supply was augmented by that much. Even the United States as a belligerent had its Food Control Board. It is likely that in future wars there will be no distinction between absolute and conditional contraband." (*Proceedings*, *Am. Soc. Int. Law*, 1935, 75.)

⁸ Moreover, it may have been assumed that an American prize court would not hesitate, if in possession of ample proof that articles of the kind referred to, despite an intervening transit through neutral territory, were in fact destined for a hostile belligerent use, to condemn the same, and would not feel obligated by any requirement of international law to pursue a different course. One may be permitted to doubt, however, whether the Supreme Court of the United States, on the record of the evidence of the law as it existed when World War I broke out, would have been disposed to acquiesce in such a conclusion, or would have accepted as authoritative guidance the provisions set forth in the Regulations Governing Maritime Warfare of June 30, 1917.

the final destination of the vehicles that convey them to an intervening neutral port. In wars to come the participants may, however, be expected, as heretofore, to attempt to exercise the full measure of the right without themselves satisfying the condition as to proof of ultimate hostile destination, and in lieu thereof to permit under executive orders, fatal imputations of such destination from circumstances that do not conclusively establish the same, and that are not the necessary consequence of what the evidence reveals.⁹ From such action must be anticipated also a recurrence of sharpest controversy between neutral and belligerent powers, unless some fresh basis of accord be apparent.

For the solution of the problems associated with the practical application of the doctrine of continuous voyage there is needed common acknowledgment of the fact that as war is now conducted a belligerent may derive substantial and possibly decisive aid from cargoes shipped to ports of neighboring neutral countries with which easy commercial intercourse may be had by land or sea or air, and also equal acknowledgment that a neutral State may reasonably assert in behalf of the inhabitants of its domain the right to export articles of whatsoever kind to neutral territory for use therein. Both the right of the belligerent to intercept traffic designed to aid its enemy, and that of the neutral to engage in commerce with neutral territory must be assured. These rights are not at variance with each other. The belligerent merely seeks to thwart a traffic inherently wrongful in design, and the neutral to gain respect for one which is essentially lawful. The former does not in theory endeavor to interfere with trade which is innocent; nor does the latter claim immunity for one which is not. Conflict arises when either proceeds to abuse its privilege, the belligerent by condemning cargoes without solid proof of hostile destination, the neutral by shipping to foreign neutral territory goods that are to be re-exported to belligerent soil. Such abuse in either or both quarters is, moreover, likely to recur in wars engaging maritime States, unless rigorous effort be mutually made to prevent it. This circumstance inspires the suggestion that there might well be united governmental action designed to establish the actual nature of cargoes destined to neutral territory, and also to afford convincing assurance that there would be no reëxportation to places under belligerent control.¹⁰ It is believed, however, that the principal maritime powers are not in the mood to be expected to seek by general agreement plans for the safeguarding of neutral

⁹ See, Further Considerations, The Matter of Proof, *supra*, § 812A.

¹⁰ In the earlier edition of this work it was said (Vol. II, p. 628).

A uniform mode of securing requisite assurances from neutral importing as well as exporting countries, and embodied in an international convention accepted by maritime powers, would serve, if respected, to shield from detention and condemnation innocent cargoes, and simultaneously expose to their just fate those ultimately destined to belligerent territory. By virtue of such an arrangement belligerent efforts to apply the doctrine of continuous voyage would be confined to the cases of vessels whose cargoes lacked the authoritative tokens of innocence. As those tokens would never be beyond the reach of a vessel or cargo entitled to them, lawful neutral exports to neutral countries would secure freedom from molestation. It is believed that by acquiescence in a rule based on such a principle, and designed also to frustrate by adequate penalty attempts to evade it, the abuse of the doctrine of continuous voyage would cease to be a menace to legitimate trade with neutral States, because belligerent powers would suffer no detriment from that which remained unmolested.

trade as such, or by so doing to clarify or simplify belligerent rights in relation to contraband.¹¹

C

§ 813A. **Some Deductions from World War I.** Tested by standards fairly well accepted by maritime States prior to the outbreak of the World War in 1914, and roughly exemplified in the Declaration of London, the conduct of the principal participants in that conflict with respect to contraband, when the United States remained a neutral, was disdainful of the requirements of international law.¹ Deviations were numerous. They were conspicuous in the treatment as absolute contraband of various articles which by reason of their common use for non-hostile as well as hostile purposes, belonged at best (from a belligerent point of view) in the conditional class,² in relaxing the requirements as to proof of hostile use with respect to articles regarded as conditional contraband,³ in applying the doctrine of continuous voyage to conditional contraband,⁴ and finally, in obliterating for all practical purposes the distinction between conditional and absolute contraband.⁵ It is not here sought to discuss the value of retaliatory pleas as excuses for such action,⁶ but rather to emphasize the collapse of the system of understandings pertaining to contraband that supposedly governed the rights and obligations of the several belligerents at the outbreak of the war, and to draw deductions from the event.

It does not suffice to observe that the law was repeatedly broken, or to assert that the continuity of the law remained unaltered. The breaches were so widespread and persistent as to be a portent of the future. They pointed to forms of belligerent action to be anticipated in subsequent wars; they supplied precedents for convenient invocation in support of the repetition of conduct that neutral States deplored and vainly challenged as illegal. They accentuated the improbability that powerful maritime States when locked in desperate conflict could be compelled to admit or act on the theory that the test of the lawfulness of belligerent pretensions concerning contraband were to be taken from standards that long antedated World War I. If the numerous breaches in the

¹¹ See *infra*, § 924.

§ 813A.¹ By the time the United States became a belligerent the matter of contraband had diminished in importance by reason of the methods through which the war was then being prosecuted by the Allied Powers. The United States was not, therefore, tempted to pursue a course like that which its co-belligerents had seen fit to adopt. Its Regulations Governing Maritime Warfare of June 30, 1917, manifested a fairly conservative attitude not indicative of an effort to depart from the law as it was supposed to be in 1914, except with respect to the acknowledgment of the applicability of the doctrine of continuous voyage to conditional contraband. See *supra*, § 813.

² "It is manifest that a number of the commodities included in the Allied schedules of absolute contraband were not among the 'articles exclusively used for war' which might be added to the list of absolute contraband, upon notification, under the terms of the Declaration of London." (Turlington, *Neutrality, The World War Period*, III, 11.)

³ See, for example, British Order in Council of Oct. 29, 1914, *For. Rel.* 1914, Supp., 261, 264.

See *supra*, § 812A.

⁴ See *supra*, §§ 812 and 813.

⁵ See *supra*, §§ 804 and 806; also Garner, *Prize Law*, § 536.

⁶ See *Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy*, *infra*, § 888A.

course of that conflict did not themselves modify the character of the law, they surely paved the way for modification, and revealed, moreover, the nature of changes that might well be anticipated. Reasons for what took place were varied and complex. Some were doubtless to be found in resolute policies that were contemptuous of whatever appeared to thwart military achievement. Others, however, grew out of fresh factual situations that had not been attendant upon or incidents of wars in earlier centuries. Notable among them were the greatly increased facility with which a belligerent could turn to its own essentially military purposes any articles adapted therefor that reached its domain,⁷ the vast increase in the number and kind of articles fairly to be deemed within such a category, the impressively diminishing grounds for presuming that articles adapted in part for military uses would not be so employed when once they reached belligerent soil, with the resulting disintegration of the basis of and reason for conditional contraband, and also the obvious applicability of the doctrine of continuous voyage to broad categories of articles destined to enemy territory through neutral channels by sea or land, even when they were adapted to non-hostile as well as hostile uses. To these considerations was added a growing sense of the reasonableness and desirability of subjecting to interference (even by starvation) all who within the domain of an enemy were actively co-operating in measures calculated to add to its sinews of war.⁸ A law which through the nature and rigidity of its rules failed to make response to such factors, or to changes in thinking which they necessarily inspired, could not be expected to operate as an effective deterrent of much that it forbade. Out of its very failure so to operate during World War I there were indications showing how the law might be expected to shape itself in adapting the old Elizabethan formula, which was sound to the core, to the latest complexities of the international life.⁹ The problem of adaptation was and remains one that is not disdainful of the underlying principle, but rather one calling for fresh appraisal of the full significance of facts incidental to trade between neutral and belligerent countries, and also for appreciation of the uselessness of the further endeavor to lay down rules that may be heedless of those facts.

It would be a fruitless task to endeavor to convince prospective or actual

⁷ This increased facility was attributable to a vast development of means of communication, notably by radio, as well as to extensive improvements that marked the transformation of instruments of transportation by both land and air. Thus the power of a belligerent to inform itself as to the voyages of ships bound for its coasts, the opportunity to prepare itself for their arrival, and the ability to transport with despatch and ease to relatively distant places whatever was unladen therefrom in ports even remote from an area of hostilities, gave to every cargo that reached a belligerent port a significance that it could not have attained in wars of an earlier century. These factors necessarily weakened a sense of respect for rules that had grown up under conditions when a belligerent State lacked such potentialities. See *supra*, § 805.

⁸ The growing thought that all who were working to sustain a belligerent cause, even though unattached to a military arm of the State engaged in war, might be fairly subjected to various degrees of interference found strength in the fresh powers of regimentation and organization that were being employed by belligerent States in their effort to utilize every available human agency in opposition to the enemy. It was the ability and the success of the endeavor to do so that bore fruit, and which marked the contrast to the situation that earlier prevailed when the mere desire of a belligerent to oppose its whole strength against the enemy was beyond realization.

⁹ See *supra*, § 798.

belligerents that it is improper to treat as contraband any article which they have good reason to deem in any sense beneficial to the enemy as a resister of its foes, or that proof of hostile use is essential to condemnation if or when it be established that a particular article of such a kind is in fact destined for enemy territory. Nor would it be easier to convince them that, except under special circumstances not likely to recur with frequency,¹⁰ there is an obligation to apply the distinction between absolute and conditional contraband,¹¹ or to limit the application of the doctrine of continuous voyage to any category or class of articles that are fairly to be regarded as contraband.¹² Again, it would be difficult through the diplomatic channel to persuade States bent on getting the full benefit of that doctrine that they should not make easy the way of their prize courts as instruments of national policy through executive decrees permitting or demanding fatal inferences of hostile destinations from circumstances or events that failed in themselves conclusively to establish such facts. The power and readiness of aggrieved neutrals to oppose force to force might, however, in the particular case operate as a deterrent.¹³

No basis of hope for neutral States is to be found in efforts to challenge the right of belligerents to thwart ministrations to their foes that augment the power to fight, howsoever the contributions be labelled, and regardless of the mode or route of transportation to a hostile destination. It might, however, be found in the character and sufficiency of assurances from such States that trade between neutral and neutral, or even between neutral and belligerent, could not reason-

¹⁰ The special circumstances might be apparent in a case where a belligerent itself well supplied with, or without need of particular articles adapted to non-hostile as well as hostile uses, was not disposed to interfere with the use of such articles as might be consigned to its citizenry, and where in consequence proof of hostile use might be fairly demanded as a condition precedent to condemnation.

¹¹ The lists of contraband articles announced by Great Britain and Germany in 1939, in so far as reference was made to conditional contraband, were not to be deemed to be declaratory of obligations due to neutral States, but rather tokens of policy. See *supra*, § 806A.

¹² See Spaight, *Air Power*, 2 ed., 1933, 394.

Declared Secretary Lansing in the course of a memorandum, Jan. 9, 1915: "Experience thus far has shown that the distinction between *absolute* and *conditional* contraband is valueless. Economic as well as military pressure is being utilized, so that trade in conditional contraband is as strictly prevented as trade in absolute contraband. To preserve the 'conditional' character of contraband is to perpetuate a difference which in actual practice is not recognized by belligerents. This classification, which is not observed, is a legal fiction. Its recognition causes uncertainty and dispute. It would be better for all parties to abolish the list of conditional contraband, and place certain articles on a general list of contraband, it being understood that all other articles are non-contraband" (Carlton Savage, *Policy of the United States Toward Maritime Commerce in War*, Dept. of State Publication, No. 835, 1936, II, p. 533, footnote 20.)

¹³ See Further Considerations, The Matter of Proof, *supra*, § 812A; Observations on Extended Applications of the Doctrine, *supra*, § 813.

In his general comment on neutral trade, the Reporter (Prof. Jessup) of the Harvard Draft Convention on Rights and Duties of Neutral States in Maritime and Aerial War, proposed to abolish the principle of contraband — as did the British Government at the Second Hague Peace Conference of 1907. *Am. J.*, XXXIII, *Supplement Section 2*, 499. In this connection he said: "In view of the long history of conflict attending the subject of contraband and in view of the apparent impossibility of defining it in a satisfactory way, it is believed that the only solution lies in reviving the British proposal in 1907. However, just as the British proposal failed in 1907, any similar proposal would probably also fail unless it took account of the traditional and inevitable point of view of belligerents who will never tolerate the free shipment of essential war materials to the enemy if they have the physical power to prevent it. The proposals contained in this Draft therefore contemplate some extensions of the belligerent right of blockade."

ably be regarded, in the particular case, as constituting such a ministration.¹⁴

In the absence of general agreement, the strength of neutral opposition to belligerent pretensions in relation to contraband may cause the participants in a maritime war to resort to blockade or to some analogous procedure as a simpler and perhaps more effective mode of reducing the foe. It is not improbable that in some conflicts that are yet to afflict the international society, as was the case in the development of World War I,¹⁵ the struggle for victory may manifest itself, in so far as pertains to neutral commerce, less in the endeavor to capture and condemn goods as contraband than in the effort to cut off all access to enemy territory, and so isolate it as though it were a besieged place. In such event neutral States will have less to dread or combat in controversies growing out of belligerent pretensions relating to contraband than in those to be anticipated from recourse to blockade.¹⁶ Aspects of the problem are discussed elsewhere.¹⁷

5

PENALTY

a

§ 814. **Nature of the Traffic.** Traffic in contraband between neutral and belligerent States involves two distinct forms of activity and also not less than two commercial interests. Those activities may be conducted by the same individuals in whom both interests may also be united.

The conduct of the owner of the cargo in contrast to that of those who carry it towards a belligerent destination invites attention. The former by placing his goods on board a vessel about to leave neutral waters and with the design that they may thus find their way to a belligerent destination, does not thereby necessarily become a participant in the conflict; for participation depends upon the departure and movements of the ship. If, however, the vessel, after having entered upon its voyage, is captured, and the nature of the cargo, together with the design of its owner, ascertained, the latter possesses no right of complaint in case his goods are confiscated. He is in the position of one who has sought to take advantage of a special opportunity to place his property within reach of a belligerent desirous of his aid in prosecuting the war. Hence he is penalized accordingly.

Those who control the movements of a ship which carries contraband on its

¹⁴ One must not, however, be unmindful of the discouraging prospect that must attend the effort to secure general acceptance of schemes designed to regularize the conduct of war in relation to the matter of contraband. The several members of the international society are to be expected to focus attention on measures designed to prevent the outbreak of war or to penalize the State which in violation of its covenants embarks upon war, rather than on measures which are designed to safeguard the interests of neutrals and belligerents pertaining to international trade. See *infra*, § 924. See *supra*, §§ 805, 806 and 813.

¹⁵ See Edgar Turlington, *Neutrality, The World War Period*, III, Chap. II.

¹⁶ Events of the war initiated in 1939 have already revealed the correctness of this statement.

¹⁷ See Blockade, *infra*, §§ 832, 832A and 832B.

way to belligerent territory constitute participants in the conflict. Neutral individuals who thus take part must on principle be deemed guilty of unneutral conduct. The gravity of their offense may be tested by various considerations.

In his neutrality proclamation of April 22, 1793, President Washington warned his fellow countrymen that they would render themselves liable to punishment or forfeiture "under the law of nations" by carrying to any of the powers engaged in war "those articles which are deemed contraband by the modern law of nations," and that individuals so engaged would not receive the protection of the United States against such a punishment or forfeiture.¹ American neutrality proclamations in a similar sense continue to advert to the illegal aspect of the carriage of contraband, and to the circumstance that those embarking in the business can in no wise obtain protection from the United States against the consequences of their misconduct.² From these acknowledgments of the right of a belligerent to impose a penalty upon neutral persons carrying contraband on neutral ships on the high seas, there is necessary admission that the impropriety of transportation is attributable to international law rather than to any other.³ Such a view finds support, moreover, in the expressions of certain judges of the Permanent Court of International Justice.⁴

§ 814. ¹ Am. State Pap. For. Rel. I, 140, Moore, Dig., VII, 750.

"The transportation of contraband articles to one of the belligerents is in itself an assault for the time being upon the other belligerents, in the fact that it may furnish them with the weapons of war and thereby increase the resources of their power as against their adversary; and for that reason, upon the broad ground of self-preservation incident to nations as well as individuals, the parties against whom the quasi assault is made have the right to defend themselves against the threatened blow by seizing the weapon before it reaches the possession and control of their enemy.

"The seizure of contraband is not only punishment, but it is also prevention, and the paramount purpose of its exercise is prevention, just as in self-defense on the part of persons it is to protect; but when the act is accomplished, the damage suffered, and the danger passed, then the incidents of self-defense cease." (Weldon, J., in *The Sloop Ralph*, 39 Ct. Cl. 204, 207, 208.)

"In a general way, it may be said that the merchant vessel which violates neutrality, whether by carrying contraband of war or by breaking blockade, affords aid to the enemy, and it is on this ground that the belligerent whom she injures by her acts is justified in inflicting on her certain losses." (Report of Mr. Renault accompanying the Declaration of London, Charles' Treaties, 305.)

² See, for example, President Wilson's neutrality proclamation of May 24, 1915, American White Book, European War, II, 15, 17.

³ "The statement is frequently made that the trade in contraband of war is lawful, even though this broad affirmation be immediately followed by the admission that the trade is carried on subject to the risk of capture and confiscation of the goods, and of the detention, loss of freight, and perhaps even the confiscation of the ship. This admission should alone suffice to put us on our guard. Merchandise is not confiscated, voyages are not broken up, ships are not condemned, for acts that are innocent; these severe and destructive inflictions are penalties imposed for acts that are unlawful . . . Obviously, the determination of the question whether an act is lawful or unlawful depends not upon the circumstance that the right or duty to punish it is committed to one agency or another, but upon the fact that it is or is not punishable. The proof that it is unlawful is found in the fact that its commission is penalized. All acts for the commission of which international law prescribes a penalty are in the sense of that law unlawful. That there are various acts of this kind, such as the supplying of contraband of war to a belligerent, which neutrals are not obliged to prohibit and punish by their municipal law, merely signifies that the interests of neutrals have not been regarded as negligible, and that there are limits to the burdens which they have been required to assume and to the exertions which they are required to make." J. B. Moore, "Contraband of War," Philadelphia, 1912, 19, 20.

⁴ See dissenting opinion of Judges Anzilotti and Huber in the Case of the S.S. Wimbledon, Publications, Permanent Court of International Justice, Series A, No. I, 35, 42.

Art. 1 of the Habana Convention on Maritime Neutrality, concluded Feb. 20, 1928, makes

b

§ 815. **Penalty for Carriage.** A neutral vessel carrying contraband on its way to a hostile destination is generally subject to capture, unless permitted by treaty to surrender the contraband to the captors, in which case the vessel, by so doing, becomes entitled to continue the voyage.¹ If the ship is captured and brought in, the common penalty imposed on the vessel is the loss of freight and expenses.² It has long been perceived, however, that a heavier penalty may be justly imposed, such as one entailing condemnation of the carrier, where the mode of transportation or the interest of the owners of the ship in the success of the voyage accentuates their participation in the conflict. There has been diversity of opinion as to the circumstances which should serve to enhance the penalty.³

It was pointed out in the case of the *Bermuda* that the indulgent rule which does not condemn the ship is inapplicable where good faith is wanting on the part of its owners.⁴ Thus, according to American opinion, if persons controlling the vessel attempt fraud upon a belligerent by any process, such as the con-

reference to the right of belligerent warships to stop and visit on the high seas, and in territorial waters that are not neutral, "any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade." (U. S. Treaty Vol. IV, 4745.) See, in this connection, Lauterpacht's 6 ed. of Oppenheim, II, p. 672, footnote 3.

§ 815 ¹ Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 64 (c).

See, in this connection, Art. XIII of treaty between the United States and Prussia, of July 11, 1799, Malloy's Treaties, II, 1490; also correspondence between the United States and Germany concerning the case of the *William P. Frye* in 1915, For. Rel. 1915, Supp., 435, 450, 493, 504, 551, 570, 644.

According to Art. XIX of the treaty with New Granada (Colombia), of Dec. 12, 1846, "No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they cannot be received on board the capturing ship without great inconvenience; but in this and all other cases of just detention, the vessel detained shall be sent to the nearest convenient and safe port for trial and judgment according to law" (Malloy's Treaties, I, 308.) See, in this connection, Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 86.

² See *The Commercen*, 1 Wheat 382, 394, where Mr. Justice Story declared that "On the whole, the court is of opinion that the voyage in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight." See Note by Wheaton, *id.*, 394.

See, also, Story, Justice, in *Carrington v. Merchants' Insurance Co.*, 8 Pet. 495, 519.

³ See instructions of Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary to the London Naval Conference, Dec. 1, 1908, Misc. No. 4, 1909, Cd. 4554, p. 24.

See, also, H. R. Pyke, *Law of Contraband of War*, 220-255; *The Atlantic*, 37 Ct. Cl. 17; *The Lucy*, 37 Ct. Cl. 97.

⁴ 3 Wall. 514, 555, where Chief Justice Chase said: "This has been called an indulgent rule, and so it is [*Citing The Ringende Jacob*, 1 Ch. Rob. 90. *The Sarah Christina*, *id.*, 238.] It is a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof.

"The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting." See comment on this language by Sir Samuel Evans, in *The Hakan*, 2 B. & C. P. C. 210, 218.

cealment of the voyage under false papers respecting the destination or the nature of the cargo, the form of participation is such as to justify condemnation of the ship.⁵

The Declaration of London made wise provision that a vessel carrying contraband may be condemned if the contraband, reckoned by value, weight, volume or freight, forms more than half the cargo.⁶ In such event, the vessel may fairly be regarded as identified in point of interest with the unneutral venture,⁷ and that without calling for inquiry into the actual knowledge possessed by the owner.⁸ The rule exemplified in the Declaration of London should not, however, in the absence of agreement, be deemed necessarily to forbid condemnation of the ship if the owner thereof has knowledge that goods constituting a substantial part of the cargo are contraband.⁹ Nor should he be permitted to profit from lack of such knowledge if he has chartered the vessel on a time-charter to one who is notorious in supplying contraband to a belligerent, if at the time of capture the vessel was being employed as a vehicle of transportation on such a mission.¹⁰ In such situations the circumstance that the contraband articles constitute less than half of the cargo, howsoever reckoned, would hardly suffice to render condemnation internationally illegal.

In case the vessel belongs to owners of the contraband goods there is evidence of a singleness of purpose and effort which has been regarded as sufficient to

⁵ It is believed that the destruction of papers or property indicative of the true destination or nature of the cargo by persons controlling the carrier so aggravates the unneutral aspect of transportation as to justify condemnation of the ship. *The Bermuda*, 3 Wall. 514, 557.

⁶ Art. XL, Charles' Treaties, 276. See, also, report of Mr. Renault, *id.*, 303; report of the American delegates to the London Conference (Rear Admiral Stockton and Prof. Wilson), to the Secretary of State, *id.*, 335.

⁷ *The Hakan* 2 B. & C. P. C. 210, in which Sir Samuel Evans, after an extensive review of the practice of maritime States, declared that in his opinion the Court was justified "in accepting as forming part of the law of nations at the present day a rule that neutral vessels carrying contraband, which by value, weight, volume, or freight value forms more than half the cargo, are subject to confiscation and to condemnation as good and lawful prizes of war." (226)

The President of the Prize Court also applied the principles of the decision in *The Hakan* in the case of *The Maracaibo*, 2 B. & C. P. C. 294, where the ship was engaged in carrying contraband from Venezuela to Amsterdam, the cargo being ultimately destined to Hamburg. Also, George Grafton Wilson, "Contraband of War," *Encyclopaedia of Social Sciences*, 1931, IV, 321, 322.

⁸ *The Lorenzo*, 1 B. & C. P. C. 226.

⁹ See judgment of the Privy Council in *The Hakan*, 5 Lloyd's Prize Cases, 188.

¹⁰ *Id.*, where after discussion of *The Neutralitet*, 3 Ch Rob. 294, and *The Ringende Jacob*, 1 Ch Rob. 89, as well as *The Bermuda*, 3 Wall. 514, it was declared that "Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge; and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. . . . A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy Government for the purpose of the war, is, in their lordships' opinion, deliberately 'taking hostile part against the country of the captors' and 'mixing in the war' within the meaning of those expressions as used by Chase, C. J., in the *Bermuda*." (191-192, 196.) See note on this case in *Yale L. J.* XXVII, 841.

See also *The Zamora* No. 2, in the Privy Council, 8 Lloyd's Prize Cases, 347, 367. *Cf.* situation in *The Ran*, 9 Lloyd's Prize Cases, 90. See *The Kim* and *Other Vessels*, No. 2, 10 Lloyd's Prize Cases, 10.

See discussion of British cases in Garner, *Prize Law*, §§ 425-432; also Lauterpacht's 5 ed. of *Oppenheim*, II, 686, footnote 1.

justify the same treatment of both. Hence both the vessel and the goods have been condemned.¹¹

According to the Declaration of London, if a vessel carrying contraband is released, she may, nevertheless, be condemned to pay the costs and expenses incurred by the captor in respect to the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.¹² It is provided, however, that if the vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to the cargo, the vessel is not liable to condemnation or to the costs and expenses above mentioned. The same rule is said to apply if the master, after becoming aware of the outbreak of hostilities or of the declaration of contraband, has had no opportunity of discharging the contraband.¹³ A vessel is, however, deemed to be aware of the existence of a state of war or of the declaration of contraband, if she left a neutral port subsequent to the notification to the power to which such port belongs, of the outbreak of hostilities or of the declaration of contraband, respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.¹⁴ The Declaration of London provides that a vessel which has been stopped on the ground that she is carrying contraband, and is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent vessel of war.¹⁵

It is believed that in any fresh attempt to secure general acceptance of the provisions of the Declaration of London in relation to the establishment of penalties for the carriage of contraband, maritime powers should not endeavor to deprive belligerents of the right to condemn a ship in case of fraudulent conduct on the part of those controlling the vessel, or in case the ship and any portion of the contraband goods have a single owner.

When the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, even though the latter may be the proceeds of the contraband. The same rule would seem, by analogy, to apply to the cases where the contraband articles have been deposited at an intermediate port, on the outward voyage, and before it terminated. But if, with a view to practice fraud upon the bel-

¹¹ *The Bird*, 38 Ct. Cl. 228, 234.

"It has always been held that if any part of the contraband carried belonged to the owner of the ship the ship itself was subject to the penalty of confiscation, as was the contraband." (Sir Samuel Evans, in *The Hakan*, 2 B. & C. P. C. 210, 225.)

¹² Art. XLI, Charles' Treaties, 276.

¹³ Art. XLIII, Charles' Treaties, 276. It is also provided that under the circumstances specified in the Article, the contraband cannot be condemned except on payment of compensation, and that the remainder of the cargo is to be dealt with on the same basis as the ship.

¹⁴ Art. XLIII.

¹⁵ Art. XLIV, where it is also provided that the delivery of the contraband must be entered by the captor on the log book of the vessel stopped, and that the master must give the captor duly certified copies of all relevant papers.

ligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband is not allowed to "purge away the guilt of the fraudulent conduct of the neutral."¹⁶

According to the Declaration of London, a vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.¹⁷ It was perhaps unfortunate that, as practices of World War I served to emphasize, the relevant article did not permit the penalization of the vessel or its owner if on such previous occasion it had pursued successfully its mission under false papers.¹⁸

C

§ 816. **Treatment of the Cargo.** Contraband goods are always subject to seizure when being conveyed to a belligerent destination, whether the voyage is direct or indirect.¹ Such goods are liable to condemnation and likewise those which belong to the same owner and are on board the same vessel. It is said that in such case the contraband articles contaminate by a doctrine of infection the non-contraband parts of the cargo, causing both to share the same fate.²

Where the contraband portions of a cargo are pursuant to the provisions of a treaty surrendered to a belligerent vessel of war the articles so delivered should be accompanied by an inventory and a receipt therefor given for the protection of interested parties.³ According to the Declaration of London, the captor is at liberty to destroy the contraband delivered to him under these conditions.⁴

¹⁶ The language of the paragraph is substantially that of Mr. Justice Story, in *Carrington v. Merchants' Insurance Co.*, 8 Pet. 495, 520, Moore, Dig., VII, 745, where attention was particularly called to the case of *The Baltic*, 1 Acton, 25, and *The Margaret*, *id.*, 333.

See, also, *The Alwina*, 5 Lloyd's Prize Cases, 127 and 151.

¹⁷ Art. XXXVIII, Charles' Treaties, 275.

¹⁸ Declares Garner. "Soon after the outbreak of the late war Great Britain, France, and Russia put into effect Article 38 subject to the reservation that a vessel should be liable to condemnation in such a case if she had succeeded in carrying contraband to the enemy by means of false papers. Germany and Austria-Hungary, by way of reprisal, soon followed the example of their adversaries and proclaimed that the vessel in such cases should not only be liable to capture on the return voyage but at any time up to the end of war." (Prize Law, 591-592.)

In the case of *The Alwina*, 5 Lloyd's Prize Cases, 127 and 151, abandonment by a neutral ship of an attempt under false papers to carry contraband to a belligerent, saved the vessel from condemnation following its capture after it had sold the cargo in a neutral port and had resumed its homeward voyage.

§ 816. ¹ *The Bermuda*, 3 Wall. 514.

² *The Peterhoff*, 5 Wall. 28, 59, 60, where Chief Justice Chase declared: "This rule is well stated by Chancellor Kent, thus: 'Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation.'" See also Sir Samuel Evans in the case of *The Kim*, *Am. J.*, IX, 979, 1005, 1 B. & C. P. C. 405, 491; *The Kronprinsessan Margareta*, 2 B. & C. P. C. 409, 415. See Art. XLII of the Declaration of London, Charles' Treaties, 276.

³ Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 86.

⁴ Art. XLIV, Charles' Treaties, 276.

6

INDIRECT UNNEUTRAL SERVICE—THE CARRIAGE OF ENEMY PERSONS AND DESPATCHES

a

§ 817. **In General.** A neutral ship may render a distinct belligerent service somewhat resembling in kind that undertaken in the carriage of contraband, and yet without the transportation of anything deemed to be such. This is true, although the vessel is not placed under the orders or control of a belligerent and is not to be regarded as in its employment.¹ The transportation of persons attached to the military or naval service of a State engaged in war affords instances.

In exercising the right to prevent the enemy from benefiting from the aid rendered by a neutral ship, a belligerent engages in a twofold task—that of intercepting what is being carried, and that also of penalizing the carrier. It must be clear that the right of interception is not dependent upon the knowledge or ignorance of persons controlling the vessel. Even when they are guilty of no intentional misconduct, an aggrieved belligerent may, nevertheless, attempt, with reason, to check the actual transportation.

It is important to observe that persons or despatches sought to be intercepted and withheld cannot be fully dealt with as though they were contraband. Thus hostile destination, proof of which plays so important a part in the treatment of contraband, need not always be shown to exist in order to justify interference with the carriage of enemy military persons; for the right to intercept them may, in the particular case, rest upon the nature of their mission or service, or upon their actual conduct while in transit.

Inasmuch as in the treatment of the subjects of transportation and of ships engaged in this form of unneutral service, the principles of law relating to contraband offer no exact guidance, the employment of the phrase “analogues of contraband” to describe the objects of interception, whether enemy persons or despatches, or to suggest the procedure to be followed with respect to the carrier, is unfortunate and misleading.²

§ 817.¹ In an exhaustive and illuminating note on the carriage of military persons and despatches, Prof. Moore calls attention to the fact that Sir William Scott in the cases of *The Carolina*, 4 Ch. Rob. 256, *The Friendship*, 6 Ch. Rob. 420, and *The Orozembo*, 6 Ch. Rob. 430, condemned the vessel “as a transport of the enemy engaged in the carriage of military persons in his service.” Moore, *Dig.*, VII, 755, 760.

The instructions to American blockading vessels and cruisers issued in the course of the war with Spain, June 20, 1898, *For. Rel.* 1898, 781, and also Stockton's Naval War Code of 1900, which was repealed in 1904, did not make reference to the acts of transporting military persons except when the neutral vessel was in the service or under the control of a belligerent. Art. XLV of the Declaration of London, Charles' Treaties, 276, took cognizance of the essentially unneutral service that may be rendered by a neutral ship not under control of a belligerent and engaged in the work of transportation as a commercial venture. Such a service was more broadly dealt with under the description of “indirect unneutral service” in the United States Naval Instructions Governing Maritime Warfare, of June 30, 1917, Nos. 36–38.

² See Naval War College, *Int. Law Topics*, 1905, 171–188, concerning the question, “Is there sufficient ground for the recognition of certain acts as a distinct class under some such name as ‘unneutral service’?”

Controversy has arisen with respect to the class of individuals whom a belligerent may reasonably endeavor to intercept. There is disagreement, also, concerning what persons are to be assigned to classes such as those embracing individuals within a military or naval service, the carriage of whom on neutral ships is acknowledged, under certain circumstances, to justify interference.

It has long been apparent that the transportation of even a single individual or a pouch of despatches may be of special benefit to the belligerent interested therein, and should, therefore, subject the carrier, under certain circumstances, to a graver penalty than is sometimes imposed for the bare transportation of contraband. Wrongfulness of conduct on the part of persons controlling the ship depends, however, upon whether they possess, or may be justly deemed to possess, knowledge of the nature and mission of the individuals or things being transported, or of the unneutral acts being committed by such persons in transit. Doubtless where a voyage is specially undertaken to transport individuals connected with a belligerent military or naval service, guilty knowledge may be fairly imputed to those who control the ship.

There has been diversity of opinion as to the procedure to be followed when a belligerent vessel of war encounters a neutral ship carrying enemy persons or despatches which, under the circumstances, are reasonably subject to interception. Respecting the conditions, if any, when either may be removed and the vessel released, there still appears to be lack of general agreement.

b

Persons Subject to Interception

(1)

§ 818. **The Trent Case.** On November 8, 1861, the British mail contract packet boat *Trent*, on its way from Habana to a British port, was stopped by the U.S.S. *San Jacinto*, Capt. Wilkes, and compelled by force to give up Messrs. Mason and Slidell, Confederate commissioners, together with their two secretaries. The four persons were passengers bound for Europe.¹ Great Britain demanded their release "and a suitable apology for the aggression" alleged to have been committed, which was declared to be "an affront to the British flag and a violation of international law."² In response, Mr. Seward, stating that Mr. Mason was proceeding to England "in the affected character" of minister

§ 818. ¹ Concerning the case see correspondence with Great Britain, Brit. and For. State Pap., LV., 602-657, Moore, Dig., VII, 768-779, and documents there cited; Mountague Bernard, Notes on Some Questions Suggested by the Case of The *Trent*, London, 1862; Charles Clark, The *Trent* and *San Jacinto*, London, 1862; Thomas L. Harris, The *Trent* Affair, Indianapolis, 1896; Heinrich Marquardsen, *Der Trent-Fall*, Erlangen, 1862; Joel Parker, Case of The *Trent*, Cambridge, 1862; statement by Francis Wharton, Wharton, Dig., III, 451-453.

See Senate Ex. Doc., No. 4, 37 Cong., 3 Sess., embodying correspondence relative to the attempted seizure of Mr. Fauchet, the French plenipotentiary, by the commander of the British vessel of war, *Africa*, within the waters of the United States in 1795. See, also, in this connection, Mr. Seward, Secy. of State, to Mr. Adams, American Minister at London, No. 146, Dec 16, 1861, MS Inst. Great Britain, XVIII, 87, Moore, Dig., VII, 769.

² Earl Russell, British For. Secy., to Lord Lyons, British Minister at Washington, Nov. 30, 1861, Brit. and For. State Pap., LV, 604, 605.

plenipotentiary to that country, and that Mr. Slidell was going to Paris in like circumstances, "as a pretended minister to the Emperor of the French," declared that both gentlemen, together with their secretaries and despatches, "were contraband of war."³ Asserting that Capt. Wilkes had the right to detain and search the *Trent*, and, under the circumstances, to capture the vessel, Mr. Seward expressed opinion that that officer should have brought the *Trent* in for an adjudication with respect to the whole transaction. "What has happened," he said, "has been simply an inadvertency, consisting in a departure by a naval officer, free from any wrongful motive, from a rule uncertainly established, and probably by the several parties concerned either imperfectly understood or entirely unknown. For this error the British Government has right to expect the same reparation that we, as an independent State, should expect from Great Britain or from any other friendly nation in a similar case." It was said that the four persons then held in military custody at Fort Warren, would be "cheerfully liberated," at such time and place as the British Minister might indicate.⁴ The treatment of the case, although not including a definite apology, was satisfactory to Great Britain. Earl Russell differed, however, from Mr. Seward with respect to what Capt. Wilkes might have done without violating the law of nations.⁵ The British Government contended that the conveyance of public agents of a character such as Messrs. Mason and Slidell on their way to Great Britain and France, and of their credentials or despatches, on board the *Trent*, could not be a violation of the duties of neutrality on the part of that vessel, and that as the destination of those persons and their despatches was neutral, it was "clear and certain that they were not contraband." Declared Earl Russell:

If the real terminus of the voyage be *bona fide* in a neutral territory, no English, nor indeed, as Her Majesty's Government believe, any American authority can be found which has ever given countenance to the doctrine that either men or despatches can be subject, during such a voyage, and on board such a neutral vessel, to belligerent capture as contraband of war. Her Majesty's Government regard such a doctrine as wholly irreconcilable with the true principles of maritime law, and certainly with those principles as they have been understood in the courts of this country.⁶

³ Mr. Seward, Secy. of State, to Lord Lyons, British Minister at Washington, Dec. 26, 1861, MS. Notes to British Legation, IX, 72, Brit. and For. State Pap., LV, 627, Moore, Dig., VII, 769.

⁴ Declared Mr. Seward: "If I decide this case in favour of my own Government, I must disallow its most cherished principles, and reverse and forever abandon its essential policy. The country cannot afford the sacrifice. If I maintain those principles, and adhere to that policy, I must surrender the case itself. It will be seen, therefore, that this Government could not deny the justice of the claim presented to us in this respect upon its merits. We are asked to do to the British nation just what we have always insisted all nations ought to do to us."

"No wonder that Mr. Seward, in assuring Lord Lyons that the demand would be granted, congratulated himself on defending and maintaining 'an old, honored, and cherished American cause.'" J. B. Moore, *Principles of American Diplomacy*, 1918 ed., 115.

See *Impressment*, *supra*, § 237.

⁵ Earl Russell, British Foreign Secy., to Lord Lyons, British Minister at Washington, Jan. 10, 1862, U. S. Dip. Cor., 1862, I, 245.

⁶ Same to Same, Jan. 23, 1862, *id.*, 248, 252. In this communication Earl Russell declared that the views of Lord Stowell in *The Caroline*, 6 Ch. Rob. 461, 468, and in *The Orozembro*,

If individuals such as Messrs. Mason and Slidell were to be dealt with as contraband, the significance of their neutral destination was justly emphasized by Earl Russell. If persons and their despatches were to be placed in such a category, Mr. Seward was doubtless correct in questioning the propriety of a procedure, as tested by then existing practice, whereby a captor did not send in the ship and its occupants for adjudication. The discussion revealed the inapplicability of the law of contraband to a case such as that of the *Trent*, and betrayed certain confusion of thought as to the principles involved.

It suffices now to observe that at the time when the *San Jacinto* encountered the *Trent* the law of nations did not justify acts such as Capt. Wilkes committed. The representative character and mission of Messrs. Slidell and Mason served to withhold those gentlemen from, rather than to place them within, the class of individuals subject to belligerent interception.⁷

(2)

§ 819. **Tests of the Right of Interception.** On principle the right of a belligerent to intercept and exercise some measure of control over an enemy person on a neutral ship encountered on the high seas should depend upon the connection between the individual and the public service of his country, and also upon whether he is en route for a belligerent service or to a hostile destination, or is at the time engaging in a belligerent activity.

It is difficult to portray what American opinion at the present time deems to be the extent of the belligerent privilege under the law of nations. In the Naval Instructions Governing Maritime Warfare, of June 30, 1917,¹ any right to remove enemy persons from neutral ships was cautiously referred to, as seemingly based upon treaty, and confined to persons actually embodied in the military service of the enemy, reservists or other persons subject to military duty but not formally incorporated in military service, not being included.² In

6 Ch Rob. 430, 434, and which had been cited by Mr. Seward, failed to sustain the conclusions of the latter.

The passage quoted in the text was quoted by Mr. Bryan, Secy. of State, in a communication to Mr. Sharp, American Ambassador at Paris, March 2, 1915, respecting the detention of August Piepenbrink. See For. Rel. 1915, Supp., 747, 748.

⁷ "Messrs. Slidell and Mason were proceeding to Europe, according to their contention, as the diplomatic representatives of a belligerent; at that time the suggestion that the functions of a diplomatic representative should include the organizing of outrages upon the soil of the neutral country to which he was accredited was unheard of, and the removal of the gentlemen in question could only be justified on the ground that their representative character was sufficient to bring them within the class of persons whose removal from a neutral vessel was justifiable. The distinction between such persons and German agents whose object is to make use of the shelter of a neutral country in order to foment risings in British territory, to fit out ships for the purpose of preying on British commerce, and to organize outrages in a neutral country itself is obvious." (Sir Edward Grey, British For. Secy., to Mr. Page, American Ambassador at London, March 16, 1916, For. Rel. 1916, Supp., 633, 635.)

§ 819. ¹ See Nos. 89, 90, 91, 36 and 39.

² Apart from the matter of treaty, the wisdom of the special restriction in relation to reservists, doubtless attributable to respect entertained for the report of Mr. Renault in behalf of the Drafting Committee of the Declaration of London, may be doubted. For the text of the Report, see Charles' Treaties, 282, 306.

According to Art. XLVII of the Declaration of London: "Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel." (*Id.*, 277.)

1928, the Naval War College appeared to conclude that the existing "rules in regard to capture do not confer a right to remove from a neutral merchant vessel, when on a regular voyage, passengers of enemy nationality on the ground that from their age or capacity they may be called for military service."³ While here was an intimation that a right of removal was not necessarily dependent upon treaty, the limits placed upon the category of persons subject to removal was narrow. Both Great Britain and France in the course of World War I declined to admit that they were bound by so restrictive a test of enemy nationals whom it might be lawful to arrest.⁴ It is believed that an enemy person who as a reservist and in response to the summons of his country to serve its colors, takes passage on a neutral ship en route for a belligerent destination, may fairly be deemed to be embodied in a military force for purposes of interception. "No reason is seen for distinguishing between such a person and one already incorporated in the armed forces."⁵ An individual should not, however, according to American opinion, be regarded as within that category if he is enrolled as a member of the crew of the neutral ship, and the State to which the vessel belongs sees fit to regard him for purposes of protection as one of its own nationals.⁶

In 1916, Sir Edward Grey declared it to be of greatest importance for a belligerent power to intercept on the high seas not only mobilized members of the opposing army who might be found traveling on neutral ships, but also those agents whom the enemy might send to injure his opponent abroad, or whose services he enjoyed "without having himself commissioned them." The

³ Naval War College, Int. Law Situations, 1928, 107-108, where it is added that "While neutrals may after arriving in a belligerent State enroll in the military service, this does not subject them to interference prior to entering enemy service." See also *id.*, 1937, 30.

⁴ The *Federico*, *Journal Officiel*, May 10, 1915, p. 2995, *Rev. Gén.*, XXII, *jurisprudence*, 17, where a number of German and Austrian passengers on board a Spanish steamer en route from Barcelona to Genoa, were regarded as embodied in a belligerent service inasmuch as they belonged, by reason of their age, to classes mobilized by their respective Governments, and were returning in response to a summons.

See, also, Sir Edward Grey, British For. Secy., to Mr. W. H. Page, American Ambassador at London, March 16, 1916, For. Rel. 1916, Supp., 633.

⁵ Comment on Art. 62 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 602.

⁶ See the case of August Piepenbrink, a steward on the American ship *Windber*, taken therefrom on the high seas by officers of the French cruiser *Condé*, about Nov. 13, 1914. Piepenbrink was of German birth, but had regularly filed an intention to become an American citizen in 1910. He was deemed to be embraced within Section 2174, Revised Statutes, providing that every foreign seaman employed on board American merchant vessels having declared an intention to become an American citizen, should, "for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen." Piepenbrink was landed at Kingston, Jamaica, where the English authorities of that port held him as prisoner of war. The United States demanded and secured his release. Secretary Bryan adverted to the circumstance that Piepenbrink was not embodied in the armed forces of the enemy. Special stress was laid on the fact that the vessel on which he was carried was bound to a neutral port. That destination was said to cut off any belligerent right to remove the man "even if he could properly be regarded as a military person." The views of Earl Russell in the *Trent* case were invoked in this connection. See correspondence in For. Rel. 1915, Supp., 744-749, especially telegram of Mr. Bryan, Secy. of State, to Mr. Sharp, American Ambassador at Paris, March 2, 1915, *id.*, 747.

Declared Mr. Webster, Secy. of State, in a communication to Lord Ashburton, Aug. 8, 1842: "In every regularly documented American merchant ship the crew who navigate it will find their protection in the flag which is over them." (Webster's Works, VI, 316, 318, Moore, Dig., II, 399.)

British Secretary maintained that the removal by the British cruiser *Laurentic* from the American steamer *China*, on the high seas and about 10 miles from the entrance to the Yangtzekiang, of certain Germans, Austrians and Turks, en route to Manila, where there was reason to believe that they were to engage in the transmission to India of munitions of war and that for the purpose of arming, if possible, a German raider, was not illegal.⁷ Inasmuch as Great Britain had found that enemy subjects, oftentimes lacking any vestige of military character, were sent to neutral territory there to take part in measures notoriously and illegally opposed to its success as a belligerent, it had some reason to claim that the right of interception should not be restricted to the cases of persons attached to a military service or to those destined to a hostile place.⁸

In discussions with the British Government growing out of the treatment by Great Britain of persons on board the *China*, and on certain other vessels, the Department of State made a series of significant statements. On April 22, 1916, it declared: "The rule is plain and definite—only military or naval persons may be removed from neutral vessels on the high seas. This rule has been contended for and maintained by the United States for over a century. . . . The rule being established, the only question is one of fact, namely, whether the persons removed from the *China* are military or naval persons."⁹ In a memorandum for communication to Viscount Grey, accompanying a note from the Secretary of State to the American Ambassador at London, of November 23, 1916, it was said: "But even assuming that all of the persons taken from the S.S. *China* were of 'military character,' the Government of the United States does not admit that they may be arrested and seized on the high seas from an American vessel flying the American flag, for, as has heretofore been reiterated by the Government of the United States, such seizures are without justification in

⁷ Sir Edward Grey, British For. Secy., to Mr. Page, American Ambassador at London, March 16, 1916, For. Rel. 1916, Supp., 633.

See, also, complaint by Mr. Lansing, Secy. of State, in his telegram to Mr. Page, Feb. 23, 1916, *id.*, 632.

⁸ In the course of his note of March 16, 1916, Sir Edward Grey declared: "The present war has shown that the belligerent activity of the enemies of this country is by no means confined to the actual theaters of military and naval operations and that there is no limit to the methods by which Germany in particular seeks to secure a victory for her arms. The hostile efforts of the enemy have shown, and continue to show, themselves on neutral soil in many parts of the world in political intrigues, revolutionary plots, schemes for attacking the sea-borne trade of this country and her allies, endeavours to facilitate the operations of ships engaged in this task, and in criminal enterprises of different kinds directed against the property of neutrals and belligerents alike. War has in effect been extended far beyond the bounds of the area in which opposing armies manœuvre, and an unscrupulous belligerent may inflict the deadliest blows on his enemy in regions remote from actual fighting." (*Id.*, 634.)

It may be doubted, however, whether it could be fairly maintained that in 1916, the interception and removal of the enemy persons found on board the *China* was warranted by international law as manifested by the practice of maritime States. See protest of Mr. Lansing, Secy. of State, in note to Mr. Page, April 22, 1916, *id.*, 637. The persons held were released May 20, 1916.

⁹ Mr. Lansing, Secy. of State, to the British Ambassador at London, April 22, 1916, For. Rel. 1916, Supp., 637.

See also grounds on which Secy. Lansing sought the release by French authorities of one Miller who had been removed by French naval officers from the American steamer *Frederick Luckenbach*, on July 4, 1916, as set forth in a communication to the American Ambassador at Paris, Aug. 12, 1916, *id.*, 657.

international law.”¹⁰ In a memorandum also for communication to Viscount Grey, accompanying a note from the Secretary of State to the British Ambassador at London, of December 1, 1916, it was said “that there has never been by either country any ‘practice of taking out of a neutral ship enemy subjects employed in the service of an enemy State without capturing the vessel or placing it in the prize court,’ as Great Britain contends; that assuming that there has been such a practice, which is not admitted, it has been strictly limited by treaty agreement (of which there is none between the United States and Great Britain) and by practice to a particular stated class of persons, which never has and can not now be regarded as including enemy reservists or revolutionary plotters; that this specific class of persons, regarded as analogues of contraband, has not been considered as subject to capture, together with the vessel, when destined to neutral countries; and that these limitations upon the apprehension of this class of persons are founded on justice and equity and a reasonable regard for the sanctity of merchant vessels under neutral flags on the high seas.”¹¹ On February 28, 1917, Secretary Lansing declared that “persons are not lawfully subject to seizure from American ships on the high seas regardless of whether they are in the military service of an enemy of Great Britain.”¹² With the entry of the United States into the war as a co-belligerent with Great Britain, the former did not, however, hesitate to propose to, and conclude with, the latter an arrangement allowing reciprocal action whereby the warships of either of the two countries were free to arrest enemy persons found travelling on merchant vessels flying the flag of the other.¹³ This record speaks for itself.

It is believed that on principle an enemy person unattached to the service of the ship on which he is transported, or to that of the State to which the vessel belongs, ought not, irrespective of his destination, to enjoy absolute immunity from interception, if he be in fact engaged in behalf of his country and with its consent on a mission directly connected with the prosecution of the war. Doubtless there should be, however, definite understanding as to the procedure to be followed in ascertaining and establishing the hostile mission of such an individual, and especially for the purpose of preventing the interception and removal from neutral ships of enemy persons on vague surmise or bare suspicion. General acquiescence of maritime States in the observance of fresh rules of conduct may depend upon the regard that is had in the course of their formulation, for certain practical considerations which World War I made apparent to close observers.

There is strong probability that any enemy person of either sex if not under physical disability, and having a hostile destination, will offer some measure of direct aid to the State of allegiance after reaching its territory, regardless of the absence of any prior connection with its service as during the period of transit

¹⁰ *Id.*, 663, 666–667.

¹¹ *Id.*, 667, 677–678.

¹² For. Rel. 1917, Supp. 1, 527, 528.

¹³ See Mr. Balfour, British Foreign Secy., to the American Ambassador at London, May 31, 1917, For. Rel. 1917, Supp. 1, 530. See also generally, documents, *id.*, 526–532.

on the neutral ship. There is a probability that an enemy person attached to the military or civil service of his country, and departing from its territory, is engaged on a hostile as well as public mission, even though his destination be neutral. Such a probability may also exist in a particular case when the departure is from neutral rather than belligerent territory. The numerous reasons which have served to establish immunities for diplomatic officers still afford solid grounds of general policy opposing the molestation of public ministers and their despatches in transit on neutral ships. Reasons which call for authoritative governmental assurance respecting the innocent nature of exports from neutral territory, as a substitute for belligerent searches and seizures, suggest also the need of similar assurances as to the actual nature and mission of enemy persons encountered on neutral ships. It is believed that the dangers of unjust molestation are capable of practical elimination without weakening the value of the belligerent claim, if the right of an enemy person on such a vessel to continue his voyage without interception be established at the port of departure, vouched for by neutral governmental authority, and certified by it in a document lodged with the master of the ship, and capable of exhibition to the boarding officer of a belligerent vessel of war.

At the present time it is the extent rather than the existence of the privilege of interception concerning which there appears to be lack of accord.¹⁴ Under the circumstances, the proposal set forth in the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War is believed to be both helpful and reasonable. According to Article 62:

(1) A belligerent may arrest on board an uncertified neutral vessel and hold as a prisoner of war:

- (a) A person incorporated in the armed forces of the enemy;
- (b) A person traveling to the territory of the enemy or to territory under enemy occupation, in order to join the armed forces of the enemy;
- (c) A person of enemy nationality traveling as an agent of the enemy for the purpose of assisting its military or naval operations, provided he is not a member of a diplomatic mission or a person charged with a diplomatic function.

(2) A person arrested under this article may be removed from the vessel on which he is found, or if the vessel is brought in for adjudication, may be brought into port on the vessel. If the neutral State whose flag the vessel flies, disputes the liability to arrest of the person concerned, the belligerent shall afford to the neutral State an opportunity to have the question promptly determined in a court of the belligerent.¹⁵

If these provisions in any respect yield to a belligerent more than the law of nations may be fairly said to confer upon one, the concession is not broader

¹⁴ This was manifest in the correspondence between the British and Japanese Governments in 1940, in the case of the *Asama Maru*. See Japan No. 1 (1940), Cmd. 6166.

¹⁵ *Am. J.*, XXXIII, *Supplement Section 2*, 187-188. See also illuminating comment, *id.*, 601-618.

than that which a maritime State when engaged in war should be accorded, or more extensive than that which such a State may at the present time be expected to claim and utilize.¹⁶

The removal on January 21, 1940, by a British vessel of war of twenty-one Germans from the Japanese steamship *Asama Maru*, when proceeding on the high seas from Honolulu to Yokohama was regarded by the Japanese Government "as a serious, unfriendly act against Japan," and as one "giving a great shock to public opinion" in that country, and demanding prompt and valid explanation.¹⁷ In the ensuing discussion the British Government contended that the persons removed from the *Asama Maru* belonged to categories of merchant seamen whom the German Government was endeavoring to have transported to Germany for service in the German navy.¹⁸ While the two Governments were in sharp disagreement as to the propriety of the British action,¹⁹ the British Government, declaring that investigation having disclosed that some of the persons seized were "relatively unsuitable for military service," announced a readiness to hand over to Japanese authorities nine of the persons who had been removed from the ship;²⁰ and the Japanese Foreign Minister announced before the Diet that his Government had decided, in order to eliminate uneasiness on the part of Japanese vessels, to issue instructions to various Japanese shipping companies not to allow the persons who were embodied in the armed forces of the belligerent Powers (including those who were suspected as such) to take passage on board their vessels.²¹ It should be obvious that rigorous effort on the part of neutral States to prevent passage on their merchant ships of enemy persons within the categories and under the conditions set forth in Article 62 of the Harvard Draft Convention quoted above, would serve to re-

¹⁶ It has the merit of taking cognizance of the factual situation in special relation to the military uses of persons whose interception and removal are permitted. Moreover, it affords the dissatisfied neutral an opportunity for an appropriate adjudication which signifies that the judicial as well as the political or military arm of the belligerent government must agree as to the reasonableness of the action taken.

¹⁷ Memorandum from the Japanese Vice-Minister for Foreign Affairs, for the British Ambassador at Tokyo, Jan. 22, 1940, Japan No. 1 (1940), Cmd. 6166, 2.

¹⁸ Declared Sir R. Craigie, British Ambassador at Tokyo, to Mr. Arita, Japanese Minister for Foreign Affairs, Jan. 27, 1940: "His Majesty's Government in the United Kingdom are aware that the German Government are making an organized attempt to secure the return to Germany of German mercantile marine officers and men from America. So anxious are the German Government to obtain the services of these men that they are being despatched by the long and expensive route across the Pacific, via Japan and Siberia. It will not be suggested that the German Government would have devoted part of their scanty supplies of foreign exchange to so expensive an operation if the object of the return of these men was not to enable their services to be employed for military operations. As almost the entire German mercantile fleet is laid up in port, it is obvious that the object with which the German Government have arranged the journey of these men cannot have been that they should be employed in merchant ships, and that they are intended for service in the German Navy for which their special training, particularly in the case of officers and technical ratings, renders them particularly suitable. His Majesty's Government are aware of at least four parties of these men who were due to leave America in this way almost simultaneously; the first of these parties consisted of one about fifty in number which sailed on the *Asama Maru*. This ship was, as stated in the Japanese memorandum, stopped on the high seas by a British man-of-war, and of the fifty Germans on board thirteen officers and eight technical ratings were removed; the remainder, who, though trained seamen, did not possess the special qualifications of the officers and technical ratings, were allowed to proceed on their voyage." (*Id.*, 3.)

¹⁹ See Mr. Arita to Sir R. Craigie, Feb. 1, 1940, *id.*, 8.

²⁰ See Sir R. Craigie to Mr. Arita, Feb. 5, 1940, *id.*, 11.

²¹ Contemporary Japan, IX, March, 1940, documentary material, 364-366.

move from the horizon controversies such as those pertaining to the *China* and the *Asama Maru*.²²

(3)

§ 820. **Mode of Interception.** It is believed that, at the present time, an enemy person whom a belligerent may lawfully intercept in transit, such as one embodied in an armed force and en route for a military service, may be justly removed from the neutral ship of which he is an occupant. The Declaration of London provides that such an individual may be made a prisoner of war, even though there be no ground for the capture of the vessel.¹ Although the conduct of the carrier may justify its capture and condemnation, it does not follow that a belligerent is obliged to have recourse to that procedure, if it is merely desired to remove an enemy person found on board. From the right to penalize the ship there arises no duty to deal with the enemy occupants in a particular way.

It is believed that in case of removal, in order to prevent a miscarriage of justice, the enemy person should be taken to a belligerent port where, by judicial process, the right of the captor to remove him, and that of the State to retain him in custody, should be established.² While such procedure is not as yet deemed requisite, recourse to it is contemplated under certain conditions in the relevant Article of the Harvard Draft Convention.³

c

§ 821. **Enemy Despatches.** Doubtless a belligerent possesses the right to intercept enemy despatches being carried by a neutral ship, and purporting to relate to the conduct of the war. Those belonging to or possessed by enemy persons

²² See H. W. Briggs, "Removal of Enemy Persons from Neutral Vessels on the High Seas," *Am. J.*, XXXIV, 249, 259; Lauterpacht's 6 ed. of Oppenheim, II, § 413a.

It may be observed that the British merchant cruiser *Carnarvon Castle*, late in November, 1940, removed German persons from the Brazilian passenger ship *Itape* when on the high seas at point not remote from the Brazilian coast. See *New York Herald Tribune*, Dec. 2, 1940; also *id.*, Dec. 8, 1940.

§ 820. ¹ Art. XLVII, Charles' Treaties, 277. See, also, report of Mr. Renault, *id.*, 308; also report of the American delegates to the London Conference (Rear-Admiral Stockton and Prof. Wilson) to Mr. Root, Secretary of State, *id.*, 335; report of the British delegates to Sir Edward Grey, British For. Secy., Misc. No. 4, 1909, Cd. 4554, 97, 98; Sir Edward Grey, to Mr. Page, American Ambassador at London, March 16, 1916, For. Rel. 1916, Supp., 633.

See award May 6, 1913, by an arbitral tribunal selected from the members of the Permanent Court at The Hague, in the case of *The Manouba*, J. B. Scott, Hague Court Reports, 342, 348.

According to Art. XV of the treaty with Colombia (New Granada), Dec. 12, 1846, persons on board a "free ship," although "they be enemies to both or either party," are not to be taken out of such ship "unless they are officers and soldiers and in the actual service of the enemies." Malloy's Treaties, I, 306, 307. See, also, Art. XVI, treaty with Bolivia, May 13, 1858, *id.*, 119; Art. XXVI, treaty with China, June 18, 1858, *id.*, 220; Art. XVI, treaty with Italy, Feb. 26, 1871, *id.*, 974.

² It will be recalled that Mr. Seward, Secy. of State, in his communication to Lord Lyons, of Dec. 26, 1861, respecting the *Trent* case, adverted to the lack of any judicial remedy in case of the removal of an individual from a neutral ship.

An adjudication as to the propriety of removing an enemy person from a neutral ship would not require the presence of the vessel for the purpose of clothing the court with jurisdiction, or of insuring a correct decision. Documents deemed relevant for the purpose of deciding upon the validity of removal doubtless ought to be obtained by the captor from the neutral ship and presented to the tribunal.

³ Art. 62, *Am. J.*, XXXIII, *Supplement Section 2*, 187-188.

who may themselves be reasonably intercepted, may be fairly confiscated. Others found on board in consequence of search or otherwise may be examined and also confiscated in case they are deemed to convey information likely to benefit the enemy.¹

The right to intercept and confiscate is unrelated to that concerning the treatment of the ship. Cause for penalizing the latter for wrongful transportation does not compel an aggrieved belligerent to do so, or to forego the right of removing noxious despatches in case it is not desired to bring the vessel in for adjudication.

d

§ 822. Penalties for Carriage of Persons and Despatches. The right of a belligerent to condemn a neutral ship on account of the performance of an indirect unneutral service involved in the carriage of enemy persons or despatches seems to be attributable to the fact that those who control the ship actually or constructively know of and consent to the work of transportation, thereby permitting the carrier to become both an active participant in the conflict and a dangerous vehicle of belligerent aid.

According to the Naval Instructions Governing Maritime Warfare, of June 30, 1917, a neutral vessel is guilty of indirect unneutral service and may be sent in for adjudication as a neutral ship liable to condemnation:

(a) If she specially undertakes to transport individual passengers who are embodied in the armed forces of the enemy, and who are en route for military service of the enemy or to a hostile destination, or transmits intelligence in the interest of the enemy whether by radio or otherwise.

(b) If, to the knowledge of the owner, or the charterer, or of the agents thereof, or of the master, she is transporting a military detachment of the enemy, or one or more persons who are embodied in the military or naval service of the enemy and who are en route for military service of the enemy or to a hostile destination, or one or more persons who, during the voyage, lend direct assistance to the enemy, or is transmitting information in the interest of the enemy by radio or otherwise.¹

§ 821. ¹ See Visit and Search, Mail Steamers and Mail, *supra*, §§ 729-730A.

§ 822. ¹ No. 36. These provisions differ from those of Art. XLV, of the Declaration of London to the effect that:

"A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

"(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

"(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

"In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation." (Charles' Treaties, 276.)

It will be observed that this article does not appear to subject to condemnation (as do the Naval Instructions of June 30, 1917) a neutral vessel transporting with the knowledge of the owner or master one or more persons embodied in a belligerent force and en route for military service or to a hostile destination, if the voyage be not specially undertaken with a view to such transportation, or if such individuals in the course of the voyage do not directly assist in belligerent operations.

The foregoing provisions are said to be inapplicable if, when the vessel is met at sea, she is unaware of the existence of a state of war, or if the master, after becoming aware of the opening of hostilities, has not yet been able to disembark the passengers.² The vessel is deemed to be aware of the existence of a state of war if she left an enemy port after the opening of hostilities, or left a neutral port after the publication there of the notification to the neutral power to which the port belongs of the opening of hostilities.³

§ 823. **The Same.** The conditions under which the Naval Instructions Governing Maritime Warfare declare a neutral ship to be liable to condemnation were doubtless deemed to correspond generally with the conservative attitude of the United States with respect to the right of interception of enemy persons on board neutral ships. It must be clear that the owners of a vessel should not be penalized on account of a form of transportation respecting the unneutral nature of which it would be unreasonable to charge them with knowledge. On the other hand, knowledge on their part of the existence of circumstances combining to justify an aggrieved belligerent in attempting to intercept and to hold enemy persons in course of transportation on account of their hostile mission or destination, would appear on principle to remove just ground of complaint in case the ship is condemned.

The perpetration of any fraud by concealment or otherwise by persons controlling the ship should obviously justify its condemnation.¹

It is believed that a neutral vessel might be fairly condemned on account of the carriage of enemy despatches, regardless of the absence of fraud on the part of the master, if he had actual knowledge, or was under the circumstances chargeable with knowledge, that the ship was in fact conveying intelligence pertaining to the prosecution of the war and transmitted for the benefit of a belligerent.² The right of condemnation might well be restricted, however, where the knowledge of the master was confined to the contents of despatches accompanying a

According to Art. 64 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, a belligerent may treat as an enemy vessel: "(c) A neutral vessel on a voyage specially undertaken with a view to the transportation of individual passengers who are incorporated in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy; (d) A neutral vessel transporting, with the knowledge of either the owner, the charterer, or the master, a military detachment of the enemy, or one or more persons who, in the course of the voyage, with the consent of either the owner, the charterer or the master, directly assist the operations of the enemy." (*Am. J.*, XXXIII, *Supplement Section 2*, 189.) See also Comment, *id.*, 658-674.

² No. 37. See, also, Declaration of London, Art. XLV (2), Charles' Treaties, 277.

³ Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 38.

§ 823. ¹ Commenting on the decisions of Sir William Scott as to the character of official despatches, Prof. Moore declares that "it is to be observed (1) that, in cases in which the vessel or the vessel and cargo were condemned, he proceeded not upon the ground of governmental employment, but simply upon that of the aid rendered, knowingly or fraudulently, to the enemy; and (2) that, in cases in which knowledge or fraud not being proved, the vessel was restored, the claimants were required to pay the captors' expenses." (*Dig.*, VII, 763.)

See *The Atalanta*, 6 Ch. Rob. 440, Moore, *Dig.*, VII, 760.

² See *The Constantia*, mentioned in a note of the reporter and appended to the case of *The Caroline*, 6 Ch. Rob. 461, and commented on in Moore, *Dig.*, VII, 761.

belligerent diplomatic officer, so long as the latter was to be deemed immune from molestation or interception.

In a word, any unneutral service constitutes a participation in the conflict which an aggrieved belligerent may fairly regard as an object of interference. That which takes the form of the carriage of enemy persons or despatches is of a kind warranting the condemnation of the carrier when the persons controlling or responsible for its movements possess guilty knowledge within the limits above indicated.

TITLE J

BLOCKADE

1

§ 824. **Preliminary.** The right of a belligerent to cut off access by sea to a place controlled by the enemy has at all times since the establishment of international law been the resultant of a conflict between neutral and belligerent claims. The limits of the right have ever been held and fixed by neutral opposition to belligerent pretensions limited solely by military exigency. Until the beginning of the twentieth century the most significant aspect of this conflict was the insistent demand of neutrals that a belligerent exercising the right to establish a blockade and claiming the benefits thereof, should in fact exert sufficient power to make effective that mode of opposing the enemy. The difficulties imposed by this requirement were such as to tend to make it easier for a belligerent to attempt to isolate the enemy by resorting to the capture generally, under the guise of contraband, of articles destined to its territory. Against such procedure neutral nations were alert and vehement in protest. Belligerent powers constantly yielded, however, to both forms of excess. Recourse was had to so-called paper

§ 824. ¹ See, generally, Moore, Dig., VII, 780-858, and documents there cited; diplomatic correspondence in American White Books, European War, I-III; under "Restraints of Commerce"; Denys P. Myers, "The Legal Basis of the Rules of Blockade in the Declaration of London," *Am. J.*, IV, 571; J. W. Garner in *Am. J.*, IX, 818; Karl Güldenagel, *Verfolgung und Rechtsfolgen des Blockadebruchs* (with bibliography), Tübingen, 1911; Paul Fauchille, *Du Blocus Maritime*, Paris, 1882; Robert Fremont, *De la Saisie des Navires en cas de Blocus*, Paris, 1899; J. P. Deane, *The Law of Blockade*, London, 1855; G. Carnazza Amari, *Del Blocco Marittimo*, Catania, 1897; Nils Söderquist, *Le Blocus Maritime*, Stockholm, 1908; Fauchille, 8 ed., §§ 1591-1642, with bibliography; Oppenheim, *Lauterpacht's* 6 ed., II, §§ 368-390c, with bibliography; Hall, Higgins' 8 ed., 844-878; Westlake, 2 ed., II, 255-276; *Collected Papers*, 312-361; Charles Noble Gregory, "The Law of Blockade," *Yale L.J.*, XII, 339; C. L. Nordon, "Blockade and Contraband," *Law Mag. and Rev.*, XXIX, 179; Sir William R. Kennedy, "Some Points on the Law of Blockade," *Int. Law Association, Proceedings*, XXV, 33; A. Rougier, "Une Nouvelle Théorie sur l'Effectivité du Blocus Maritime," *Rev. Gén.*, X, 603; Yves Favrand, *Contrebande de Guerre, Blocus, Droit de Visite*, Limoges, 1916; Alexander Holtzoff, "Some Phases of the Law of Blockade," *Am. J.*, X, 53; A. H. Stockder, "The Legality of the Blockades Instituted by Napoleon's Decrees and the British Orders in Council, 1806-1813," *Am. J.*, X, 492.

See also ¹ H. W. Briggs, *The Doctrine of Continuous Voyage*, Baltimore, 1926; J. W. Gantenbein, *The Doctrine of Continuous Voyage Particularly as Applied to Contraband and Blockade*, Portland, Oregon, 1929; Garner, *Prize Law*, Chap. XV; Lieut. Louis Guichard, *The Naval Blockade 1914-1918*, translated and edited by C. R. Turner, New York, 1930; Jessup and Deák, *Neutrality (Origins)*, I, 1935, Chap. IV; P. A. Martini, *Blockade im Weltkrieg, Völkerrechtsfragen*, No. 36, Berlin, 1932; Baron Boris E. Nolde, *Russia in the Economic War*, New Haven, 1928; Maurice Parmelee, *Blockade and Sea Power*, London, 1924; J. M. Spaight, *Air Power and War Rights*, 2 ed., 1933, 396-400; Turlington, *Neutrality (The World War Period)*, III, 1936, Chap. III.

See also Arts. 68-82 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section* 2, 190-192, and Comment thereon, *id.*, 689-750.

blockades which were far from indicative of an attempt to bar access efficaciously to a particular coast by force of arms.) By virtue of such pronouncements maritime States, when engaged in war, abused the right of capture and wrought havoc with legitimate neutral commerce. The United States was, in early days of the Republic, a constant victim.⁽²⁾

Finally, however, the reasonableness of the neutral claim that a blockade, in order to be binding, should be effective, found general acknowledgment, and "the world accepted this principle with joyful unanimity."⁽³⁾ With the advent of the twentieth century, and, notably, with the outbreak of World War I, a different situation presented itself. The long range of guns, the efficacy of new modes of signaling by radio and otherwise, the power of electric searchlights, and the development of instruments of submarine warfare combined, on the one hand, to render it unsafe for a blockading squadron to form a close and stationary cordon around the ports of the enemy, and, on the other, vastly to increase the effectiveness of a blockading fleet, distributed rather than assembled, at remote distances from the coastline with which intercourse by sea was sought to be cut off. At the present time the inquiry with respect to the territorial area which a belligerent may attempt to blockade, especially in relation to the incidental effect upon access to the domain of neutral countries, has become of greater practical moment than that which formerly aroused discussion. It is now the abuse of naval power rather than the inadequate employment thereof which is the burden of neutral complaint. Moreover, the danger of such abuse is greatly enlarged by the potentialities of aircraft operated in association with a blockading fleet, and employed as a means of interference.

Oppenheim has observed that "blockade in the modern sense of the term is an institution which could not develop until neutrality was in some form a recognized institution of the law of nations, and until the freedom of neutral commerce was in some form guaranteed."⁽⁴⁾ Before that time belligerent monarchs had acknowledged no obligation not to attempt to thwart all intercourse with an enemy.⁽⁵⁾ With the slow development of a law that marked the acceptance of such an obligation, warring States were put to it to show why and when commercial or other intercourse with an enemy might fairly be interfered with.

Illustrative of the statement in the text, see documents in Moore, Dig., VII, 797-803, especially Mr. Madison, Secy. of State, to Mr. Monroe, Minister to Great Britain, Jan. 5, 1804, MS. Inst. United States Ministers, VI, 161, Moore, Arbitrations, V, 4447-4456, concerning situation confronting the United States in 1806 and 1807; Mr. Adams, Secy. of State, to Mr. Rush, Minister to Great Britain, Nov. 6, 1817, MS. Inst. United States Ministers, VIII, 152, Moore, Dig., VII, 800. See, also, *The Leonora* [1918], P. 182.

J. B. Moore, "Contraband of War," Philadelphia, 1912, 26.

Prof. William O. Stevens, of U. S. Naval Academy, "The Submarine," *Yale Rev.*, April, 1918, VII, 449, 467-470. See, also, Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram, March 30, 1915, For. Rel. 1915, Supp., 152.

⁽²⁾ Lauterpacht's 5 ed., II, 627.

⁽³⁾ Despite the fact that the law of blockade in its modern sense was so clearly developed in treaties and state papers even in the seventeenth century, it is remarkable that it apparently did not form an independent ground for condemnation in prize courts until the very end of the eighteenth century. It is probably true, as Roscoe suggests [Lord Stowell (1916), p. 53], that as a separate subject of prize law, blockade owes its origin to Sir William Scott." (Jessup and Deák, *Neutrality (Origins)*, I, 121.)

⁽⁴⁾ See Nils Söderquist, *Le Blocus Maritime*, 1908, 99.

The reasons for singling out particular classes of articles and placing them under a ban when destined to the enemy have been noted elsewhere.⁷ The growing habit of recourse to the procedure that was productive of the law pertaining to contraband, revealed the need also of supplying reasons why intercourse with an enemy marked by a commerce in articles not under a ban might also rightfully be proscribed. On what principle could a neutral traffic in non-contraband be fairly cut off? The logical response was and is that if neutral intercourse with a place belonging to the enemy balked the effort to take it or reduce it by siege, there was conduct that might well be thwarted.⁸ It was the link with a legitimate operation that saved the belligerent claim and caused neutrals to acknowledge the reasonableness of it.⁹ Thus, in the blockade of an enemy port or coast there was seen to be a procedure which as part of a belligerent movement against such port or coast was a convenient and excusable means of cutting off an intercourse therewith which it was greatly sought to restrain. The difference between the theories upon which the two forms of belligerent action in relation to contraband and blockade, respectively, were based gradually became apparent and continues to be important. Doubtless in a broad sense they appeared in early days to resemble one another as manifestations of attempts to interfere with any trade or intercourse regarded as beneficial to an enemy. Yet as time went on the contrast between them was more and more obvious.¹⁰ It came to be realized that the right to condemn contraband was the manifestation of an effort to intercept what by reason of its character would minister to the military aid of a belligerent if it reached the desired destination, while the right to establish a blockade was the manifestation of an effort directly to injure a belligerent by preventing all intercourse by sea with the blockaded area, regardless of the character of what might be impeded.¹¹

⁷ See Contraband, *supra*, §§ 798 and 813A.

⁸ Such a response had to be made once it was acknowledged that a belligerent was not free to cut off at will neutral commercial or other intercourse with its enemy. That acknowledgment was, however, a slow and gradual development. As late as 1601, Queen Elizabeth was asserting the right to cut off all commercial intercourse from every quarter with Spain, excusing her conduct on grounds of self-defense. See R. G. Marsden, *Documents Relating to Law and Custom of the Sea*, Publication of the Naval Records Society, 1935, I, 313; Jessup and Deák in their illuminating work on the Origins of Neutrality, cited above, picture well in Chapter IV, the transition in thought and practice which revealed belligerents early in the seventeenth century as connecting with a siege their endeavors to cut off commercial intercourse with an enemy, and as referring to blockades as incidents of such operations; and they also trace the development of illustrative conventional arrangements, finding it possible to declare: "In general, State practices during the seventeenth and early eighteenth centuries show more respect for the law of blockade as developed by the treaties than for almost any other branch of the law governing the respective rights of belligerents and neutrals." (*Id.*, 116.) Among agreements of special significance should be noted the treaty of peace between Denmark and Sweden, Jan. 20, 1613, 5 Dumont, II, 642; treaty between the States General and Spain, Dec. 17, 1650, 6 Dumont, I, 570; Treaty of the Pyrenees, between France and Spain, Nov. 7, 1659, 6 Dumont, II, 264.

⁹ As an interesting instance, see instructions from the States General to ambassadors sent to Sweden, in 1655, quoted in Jessup and Deák, *op. cit.*, 114, citing Thurloe, IV, 366, 367-368.

¹⁰ At times, however, state papers suggested a confusion of thought as when a treaty provided for the penalization of the carriers of foodstuffs to a place that was being attacked, as did that between the States General and France of April 18, 1646 (6 Dumont, I, 347, Jessup and Deák, *op. cit.*, 113), unless the arrangement manifested an attempt to deal specifically with foodstuffs as conditional contraband.

¹¹ See in this connection, Spaight, *Air Power*, 2 ed., 396.
Also, *infra*, § 832.

The claims of a belligerent to benefit by recourse to blockade were broadened when the right was asserted to prohibit neutrals from trading with an enemy port by virtue of a bare notification that it was blockaded, when in reality it was not actually besieged, although a siege was contemplated.¹² It was a further advance when a belligerent substituted a naval investment for a siege. Again, from a situation involving a naval operation against an enemy port, it was but a short step to the establishment of a blockade by a cordon of vessels engaging in no activities other than the prevention of access to or egress from the point in question. By so cutting off the commercial intercourse of the enemy with neutral States, the latter were obviously deprived of a traffic which, apart from that in articles deemed contraband, offered no military aid to the place blockaded.

At one time some American statesmen regarded blockades of such a nature with disapproval. Thus John Marshall, when Secretary of State in 1800, declared that on principle it might be questioned whether a rule permitting the confiscation of vessels bound for a blockaded port could be applied to a place not completely invested by land as well as by sea. He was obliged to admit, however, that the departure from principle had "received some sanction from practice."¹³ In 1859, Mr. Cass, Secretary of State, expressed opinion that the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, was a proceeding which would be difficult to reconcile with reason or with the opinions of modern times. He admitted, however, that such conduct had "long been recognized by the law of nations, accompanied, indeed, with precautionary conditions intended to prevent abuse, but which experience has shown to be lamentably inoperative."¹⁴ The United States concluded numerous treaties in harmony with these views. Thus it was

¹² Westlake, "Commercial Blockade," Collected Papers, 312, 320-321. According to that writer: "The word *blocus*, or *blockade*, is neither to be found in Du Cange nor in the vocabulary of barbarous Latinity appended to *Facciolati*. *Bloc*, in the language of the Walloon country, signified a high mound; whence persons who had died under sentence of excommunication, and whom it was not lawful to bury beneath the soil, were said to be *imblocati*, because the earth was heaped over their bodies as they lay on the surface (Du Cange *v. Imblocatus*). We are brought still nearer to the root by *bloche*, which, in the dialect of Champagne, signified a clod of earth (Du Cange *v. Blesta*); and *blocage* even now denotes in French the rubblework often used to fill up the interior of walls, or a rough wall itself, when entirely composed of such work. Our own block is obviously allied, though we do not use it of stones or nodules so small as to serve for rubblework. Thus, a stone, nodule, clod, or mass, smaller or larger; a funeral barrow, a dike or mound, themselves large blocks or masses, and piled up of smaller clods and rubble; even, if occasion serves, a rough and ready wall, built with the unwrought materials obtainable on the spot; lastly, a circumvallation; such is the series of ideas presented to us by the words of this family. It is interesting to observe that the word itself, as well as its juristic extension to the cruising of a few ships off a port or a coast, comes to us from the great battlefield of Europe, the Walloon and Flemish country, of which the soil has been turned by the spade of the foreign soldier as often as by that of the native peasant." (*Id.*, 337-338.)

¹³ Mr. Marshall, Secy. of State, to Mr. King, American Minister to Great Britain, Sept. 20, 1800, Am. State Pap., For. Rel., II, 486, 488, Moore, Dig., VII, 781, where it was said: "If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals."

¹⁴ Mr. Cass, Secy. of State, to Mr. Mason, American Minister to France, No. 190, June 27, 1859, MS. Inst. France, XV, 426, Moore, Dig., VII, 781.

provided in an agreement with Colombia, concluded October 3, 1824, that "those places only are besieged or blockaded which are actually attacked by a belligerent force capable of preventing the entry of the neutral."¹⁵

American judicial opinion did not, however, appear to doubt the right of a belligerent to maintain a blockade unrelated to any other naval or military operation.¹⁶ The United States acted upon such a theory when itself a belligerent. The blockade of the ports of the Confederacy during the Civil War,¹⁷ and that of a portion of the coast of Cuba in 1898, afforded instances.¹⁸

§ 825. **The Same.** It should be observed that the term blockade has, according to the law of nations, reference to a maritime operation undertaken by belligerent vessels of war.¹ As that law was developed under circumstances when such vessels were confined to surface craft, the several limitations imposed upon the exercise of the belligerent right assumed the form of rules contemplating the sole use of blockading ships of such a kind.² Belligerent military aircraft were non-existent.

At the present time the maritime forces of a State embracing as they do submarine vessels and aircraft, as well as submarine mines, enable it to employ such instrumentalities as means of prosecuting the naval operation that is involved when the establishment of a blockade is undertaken.³ From this cir-

¹⁵ Art. XV, Malloy's Treaties, I, 297. See, also, Art. XVII, treaty with Brazil, Dec. 12, 1828, *id.*, 138; Art. XV, treaty with Chile, May 16, 1832, *id.*, 176; Art. XVII, treaty with Guatemala, March 3, 1849, *id.*, 866; Art. XVIII, treaty with Salvador, Jan. 2, 1850, *id.*, II, 1543; Art. XIX, treaty with Peru, Aug. 31, 1887, *id.*, II, 1437. Compare the language of Art. XIII, treaty with Italy, Feb. 26, 1871, *id.*, I, 973. See also Art. XIX, treaty with Mexico, April 5, 1831, *id.*, 1091.

¹⁶ *McCall v. Marine Insurance Co.*, 8 Cranch, 59; *The Prize Cases*, 2 Black, 635, 671; *The Circassian*, 2 Wall. 135, 149; *The Admiral*, 3 Wall. 603. See, also, Fuller, C. J., in *The Olinde Rodriguez*, 174 U. S. 510, 518.

¹⁷ *The Admiral*, 3 Wall. 603.

¹⁸ Proclamation of President McKinley, April 22, 1898, For. Rel. 1898, 769; also proclamation of President McKinley, June 27, 1898, *id.*, 773.

§ 825. ¹ Fauchille, 8 ed., § 1589; Oppenheim, Lauterpacht's 5 ed., II, §§ 368 and 380a; Stockton, *Outlines*, § 187; Halleck, Baker's 3 ed., II, 184, § 3, quoted in Moore, *Dig.*, VII, 780.

² This is believed to have been true with respect to the provisions relative to blockade and comprising Chap. I of the Declaration of London. See Charles' Treaties, 269-272.

³ "That blockade by surface vessels may for certain purposes need the aid of aircraft to render it effective under modern conditions is evident. If, as is probable, wars of the future are to use aircraft, then the effectiveness of blockade will be measured by consideration of the factors entering into the blockade in which air as well as surface vessels are involved." (Naval War College, *Int. Law Situations*, 1935, 87.) See also Naval War College, *Int. Law Situations*, 1938, 27-28. See Spaight, *Air Power*, 2 ed., 396.

"For the purpose of establishment and maintenance of a blockade, a belligerent must use surface or submarine vessels or aircraft, and may also use fixed obstacles and anchored automatic contact mines which become harmless on becoming unanchored." (Art. 73, Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXX, *Supplement Section 2*, 191.)

Declared Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, July 28, 1886: "It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seek the port either as hostile cruisers or as blockade runners. This was done by the Dutch when attacked by Spain, in the time of Philip II; by England when attacked by the Dutch, in the time of Charles II; by the United States when attacked by Great Britain, in the Revolutionary war and in the war of 1812; by the United States during the late civil war; by Russia at the siege of Sebastopol; and by Germany during the Franco-German war of 1870. But while

cumstance, however, it is not to be concluded that the mere endeavor of a belligerent to render dangerous to shipping specified areas of the high seas adjacent to territorial waters of the enemy, as by the use of mines or other devices, is in itself an operation properly to be described as a blockade even though it be successful in cutting off access to the domain of the enemy.⁵

◀The German announcement of August 17, 1940, that the naval war in the waters around the British Isles was in full progress, that the whole area had been mined, that German planes attacked every vessel therein and that any neutral ship which thereafter entered those waters was liable to be destroyed is a recent instance which gained no standing in law from the declaration that a "complete blockade" of the British Isles was thereby effected.⁵⁷

During World War I, some belligerent States had recourse to forms of conduct which although referred to at times as instances of blockade, differed sharply from measures previously regarded as within such a category, and which failed, moreover, to satisfy some requirements which the law of nations imposed upon a blockader.⁶ By such means, moreover, those States undertook to extend the privileges supposedly possessed by a blockader, and by so doing became violators of the law. The success of such action, despite the protests of aggrieved neutrals, was prophetic of repetitions that took place in 1940.⁷

As Mr. Edgar Turlington has observed, blockades of the traditional type, described in the Declaration of London, were little used in World War I, although they were declared and maintained in no less than nine instances.⁸

such is the law, it is equally settled by the law of nations that when war ceases such obstructions, when impeding navigation in channels in which great ships are accustomed to pass, must be removed by territorial authorities." (For. Rel. 1886, 95, Moore, Dig., VII, 857.)

(⁵It would be difficult to establish that when World War I broke out there had been general acquiescence in the claim of a belligerent of a right incidental to that of blockade, to cut off access by sea to hostile territory by any instrumentalities, such as submarine vessels, endeavoring merely to render dangerous navigation on the high seas within particular areas adjacent to such territory. Thus the German Admiralty Proclamation of Feb. 4, 1915, declaring the waters surrounding Great Britain and Ireland to be a war zone within which enemy merchant vessels would be destroyed was not declaratory of the establishment of a blockade as such. (See For. Rel. 1915, Supp., 94.) Nor did the maritime danger zones maintained by Great Britain over certain waters of the high seas more closely resemble one. (See American White Book, European War, IV, 21-50.)

7 See War Zones and Areas of Hostilities, *supra*, §§ 720-721; Attack, Submarine Craft, *supra*, § 747.

(⁶Associated Press Despatch, *New York Times*, Aug. 18, 1940.

(⁸See The Controversy between the United States and Great Britain, 1915-1916, *infra*, §§ 829-832.

⁷ See *infra*, §§ 832A and 832B.

⁸Neutrality (The World War Period), III, 1936, 34-35, where that writer states: "The first of these blockades, announced by Austria-Hungary on August 10, 1914, was of the coast of Montenegro. During the same month parts of the coast of Kiauchau were blockaded by Japan. The coast of German East Africa and the adjacent islands were blockaded by Great Britain in February, 1915. Parts of the coast of the Cameroons were under blockade by the Allied Powers from April, 1915, to March, 1916. At the end of May, 1915, parts of the Austro-Hungarian and Albanian coasts were blockaded by Italy. In June, 1915, parts of the coast of Asia Minor, including the entrance to the Dardanelles, were placed under blockade by Great Britain and France. This blockade was extended to include the coasts of Asia Minor and Syria, from Samos to the Egyptian frontier, by a French notification of August 22, 1915. The Aegean coast of Bulgaria, from the Greek to the Turkish frontier, was blockaded by the Allies in October, 1915. Upon the occupation of Cavalla by the Bulgarians, in September, 1916, the Allied blockade of Bulgaria was extended to the coast of Macedonia, from the mouth of the Struma River to the Greco-Bulgarian frontier. The last of the blockades

⤵ The validity of a blockade may be challenged because of the nature of the area of territory to which access is barred, or on account of the ineffectiveness of the blockading measures, or by reason of lack of respect due to the authority endeavoring to maintain them, or in consequence of faults of procedure incidental to their enforcement. In each case the propriety of the belligerent action is to be tested by reference to the law of nations. 7

2

CERTAIN CONDITIONS OF VALIDITY

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§ 826. Authority to Institute — Acts of Unrecognized Insurgents. Every recognized belligerent enjoys the right to attempt to blockade the coasts and ports belonging to or occupied by the enemy and to demand respect for such action by neutral powers. ⤵ As the operation is essentially one pertaining to war, neutral States are justified in declaring that a blockade is a "measure permitted only to belligerents who are accorded other belligerent rights, and that it can be declared and executed by such competent belligerents only." ⤵ A blockade is, therefore, in a strict sense, according to the Department of State, conceived to be a definite act of an internationally responsible sovereign in the exercise of the right of belligerency, and involving in such exercise the successive stages, first, of proclamation; secondly, of warning vessels; thirdly, of the seizure of vessels; and, fourthly, of adjudication of the question of prize by a competent court of admiralty. ⤵

The attempts of insurgents not recognized as belligerents to establish blockades have given rise to perplexity. The attitude of the United States deserves attention. In 1860, the Navy Department announced that the President had decided to recognize no such blockade of certain Mexican ports as might be established by the insurrectionary government in Mexico under Miramón. ⤵ In 1891, in response to a notification that the Chilean ports of Iquique and Valparaiso would be blockaded by insurgent forces, the diplomatic representa-

of the traditional type was declared by France in December, 1916, against the coasts and isles of Greece upon the occasion of the temporary adherence of Greece to the cause of the Central Powers." (Citing Dumas, *Les Aspects économiques du droit de prise avant et depuis la guerre mondiale*, 1926, II, 163-166; Garner, *Prize Law*, 622-623.)

§ 826. ⤵ Freeman Snow, *Manual of Int. Law*, Stockton's 2 ed., 151; Naval War College, *Int. Law Situations*, 1902, 58. See, also, Art. XXX of Oxford Manual of Naval War, *Annuaire*, XXVI, 649, J. B. Scott, *Resolutions*, 180.

⤵ Naval War College, *Int. Law Situations*, 1902, 60. According to Art. V, Sec. 2, of the Regulations of the Institute of International Law concerning the Rights and Duties of Foreign Powers as regards the Established and Recognized Governments in Case of Insurrection: A third power, "as long as it has not itself recognized the belligerency, is not required to respect blockades established by the insurgents along those portions of the seacoast occupied by the regular government." (*Annuaire*, XX, 316, 317, J. B. Scott, *Resolutions*, 158.)

⤵ Mr. Hay, Secy. of State, to the Secy. of the Navy, Nov. 15, 1902, Naval War College, *Int. Law Situations*, 1902, 79-80.

⤵ Senate Ex. Doc. No. 29, vol. 9, p. 3, 35 Cong., 1 Sess., quoted in Naval War College *Int. Law Situations*, 1912, 32.

tives of the United States, France, Germany and Great Britain agreed that the blockade would be illegal.⁵ No blockade of either port was actually established. On January 11, 1894, in the course of an insurrection in Brazil, Mr. Gresham, Secretary of State, instructed the American Minister to that country in substance that "while an effective blockade of the port [of Rio] by the insurgents would be respected, they would not be permitted to accomplish indirectly the ends of a blockade by employing, either openly or under the guise of military operations, acts of force against foreign vessels engaged in commercial transactions."⁶ According to the Naval War College, these instructions recognized the right of the insurgents to carry on hostilities even by means of a commercial blockade of the port of Rio, a measure the enforcement of which might involve the extension of the insurgent operations to the high seas.⁷ In 1902, Mr. Hay, Secretary of State, in response to a memorandum presented by Prof. Wilson of the Naval War College, made a pronouncement as to the law. He declared that insurgents not recognized as possessing the attributes of full belligerency could not establish a blockade according to the definition of international law. He said that insurgents actually having before the port of the State against which they were in insurrection a force sufficient, if belligerency had been recognized, to maintain an international-law blockade, might not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas even though they were approaching the port. Within the territorial limits of the country, he said, the right of insurgents to prevent the access of supplies to their enemy was practically the same on water as on land — "a defensive act in the line of hostility to the enemy." He was not, however, he said, prepared officially to admit in advance the ability of insurgents to close, within the territorial limits, avenues of access to their enemies. He declared that in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters, "their only right being, as hostiles, to prevent the access of supplies to their domestic enemy." He said that the exercise of this power should be restricted to the precise end to be accomplished, and that no right of confiscation or destruction of foreign property in such circumstances could well be recognized, and that any act of injury so committed against foreigners would necessarily be at the risk of the insurgents.⁸ Secretary Hay did not intimate that unrecognized insurgents would have

⁵ Naval War College, *Int. Law Situations*, 1901, 113, Moore, *Dig.*, VII, 788, *citing* Blue Book, Chile, No. 1 (1892), 2, 8, 25-41. It appears that these diplomatic officers felt that they could not protest against the proposed blockade without involving a recognition of the insurgent fleet. As a compromise they instructed the consuls to protest at their respective ports.

⁶ The language quoted is that contained in Naval War College, *Int. Law Situations*, 1901, 123. See Mr. Gresham, Secy. of State, to Mr. Thompson, Minister to Brazil, *For. Rel.* 1893, 98-99, in which it was said: "The insurgents have not been recognized as belligerents, and should they announce a blockade of the port of Rio the sole test of its validity will be their ability to make it effective."

⁷ Naval War College, *Int. Law Situations*, 1901, 123.

⁸ Mr. Hay, Secy. of State, to the Secretary of the Navy, Nov. 15, 1902, Naval War College, *Int. Law Situations*, 1902, 79-83. See, also, memorandum accompanying letter of Prof. G. G. Wilson to Capt. F. E. Chadwick, United States Navy, President of Naval War College, Oct. 11, 1902, *id.*, 77.

the right to bar access generally of foreign vessels even within the territorial limits.⁹

In 1909, in the course of a revolution in Nicaragua, Mr. Knox, Secretary of State, declared that if the announced blockade of Greytown by the (unrecognized) insurgents under Gen. Estrada should be "effectively maintained, and the requirements of international law, including warning to approaching vessels," observed, the United States would not be disposed to interfere to prevent its enforcement.¹⁰ In 1910, the same position was taken with respect to a proposed blockade at Bluefields by the Madriz faction. It was said in this connection that the United States reserved its rights in respect to the validity of any proceedings against vessels as prizes of war.¹¹ It was also observed that the Government denied the right of either faction to seize American-owned vessels or property without consent of or recompense to the owners.¹²

In 1912, the Naval War College appeared to conclude that it was not unreasonable for an American cruiser to intervene to procure the release of an American merchantman seized by unrecognized insurgents within three miles of the coast blockaded by them, and as she was about to enter a blockaded port, although the commander of the cruiser might require the merchant vessel to proceed to some other port. In case, however, the latter had on board some war material, it was declared that the commander of the cruiser should inform the master that "while he would endeavor to prevent wanton seizure of his cargo, he would not interfere with proper action which the insurgents might take to prevent the war material from reaching their opponents."¹³

In the course of an insurrection in Mexico, 1923-1924, the Government of the United States was notified that the insurgents proposed to blockade the port

⁹ Declared Prof. Wilson in his memorandum: "When insurgents actually have before a port of the State against which they are in insurrection a force sufficient, if belligerency already had been recognized, to maintain an effective blockade, the United States Government may admit that such insurgent force may prevent the entry of United States commerce." (Naval War College, Int. Law Situations, 1902, 77.)

¹⁰ Mr. Knox, Secy. of State, to Mr. Merry, American Minister to Nicaragua, telegram, Nov. 21, 1909, For. Rel. 1909, 454-455; also Same to Mr. Moffat, American Consul, telegram, Nov. 21, 1909, *id.*, 454.

¹¹ Mr. Wilson, Acting Secy. of State, to Mr. Pierce, American Minister to Nicaragua, telegram, July 22, 1910, For. Rel. 1910, 756-757.

¹² In this communication attention was called to a letter from the Secretary of State to the Secretary of the Navy, of May 24, 1910, which contained the following proposed instruction to Commander Gilmer, which instruction was given: "The United States policy as to the blockade at Bluefields, whose announcement by the Madriz faction would seem to constitute a recognition on their part of the belligerency of the Estrada faction, will naturally be the same as that laid down in regard to the blockade at Greytown by the Estrada faction. The Secretary of State then held that if the announced blockade or investment was effectively maintained and the requirements of international law, including warning to approaching vessels, were observed, the United States Government would not be disposed to prevent its enforcement, but reserved all rights in respect to the validity of any proceedings against vessels as prizes of war. In the present instance it should, however, be observed that a vessel which, by deceiving the authorities at a port of the United States, sailed therefrom in the guise of a merchantman, but had in reality been destined for use as a war vessel, by such act has forfeited full belligerent rights, such as the right of search on the high seas and of blockade."

See, also, Mr. Knox, Secy. of State, to Mr. Moffat, American Consul at Bluefields, telegram, June 19, 1910, *id.*, 753.

¹³ Naval War College, Int. Law Situations, 1912, 9-10.

of Tampico.¹⁴ On January 15, 1924, the American Government made vigorous protest against any attempt by any process through a so-called blockade to cut off communication therewith by sea. Protest was made, moreover, against interruption of ingress to, or egress from, that port by any persons assuming to exercise control thereof. On January 19, 1924, the Department of State declared through appropriate instructions that the Government of the United States confidently expected that immediate steps would be taken to remove such a threat against the world's commerce by the adoption of measures which would permit free and uninterrupted intercourse with Tampico.¹⁵ On January 19, 1924, the American Consul at Vera Cruz advised the Department of State that following vigorous representations made to the head of the insurgent movement, the latter had determined to postpone the blockade until the end of that month. As a matter of fact the plan appears to have been abandoned.¹⁶

As the area of legitimate blockading operations may extend far beyond territorial waters and at remote distances therefrom, it is natural that States generally are reluctant to acknowledge the possession by unrecognized insurgents of privileges of which the normal exercise calls for the use of force on the high seas. It is improbable that the United States would at the present time be disposed to pay deference to a blockade instituted by unrecognized insurgents, although it might under some conditions respect their effort, if effectual, to close ports under their actual control by measures that were not sought to be enforced on the high seas. Thus,¹⁷ in a situation where the attending circumstances justified acknowledgment of the fact of insurgency, reasonable effort by the insurgents within the territorial waters appurtenant to an area under their control to prevent military aid from reaching their foes would probably be respected.

To create the right of blockade as against neutrals, it is not necessary that the party claiming it should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two States which engage in conflict and have recourse to arms.¹⁷

The United States has repeatedly announced that, according to the principles of international law, it cannot admit that a foreign State may lawfully close any ports in the hands of opposing belligerents or of insurgents, unless such closure takes the form of a blockade fully proclaimed and maintained as such.¹⁸ The Department of State took such a stand in correspondence with

¹⁴ The insurgents under the leadership of General de la Huerta had, at the close of the year 1923, gained control of certain Mexican ports with which access had long been enjoyed by American commerce. On December 10, 1923, the Mexican Government, under the régime of General Obregon, announced that the port of Vera Cruz was no longer under control of the federal Government.

¹⁵ The insurgent authorities were, moreover, advised that the U.S.S. *Richmond* had been ordered to proceed to Tampico to protect adequately the peaceful and legitimate commerce of the United States in and out of that port from interference under any assertions of the right of blockade. See Mr. Hughes, Secy. of State, to the Consul at Vera Cruz, Jan. 19, 1924, For. Rel. 1924, II, 432.

¹⁶ *Id.*, 433.

¹⁷ The Prize Cases, 2 Black, 635, 671; also statement in headnote at p. 636.

¹⁸ See important communication of Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, Apr. 24, 1885, For. Rel. 1885, 254, Moore, Dig., VII, 808, in which the

the Mexican Government on January 23, 1924, declaring that according to the requirements of international law revealed in a long line of precedents, the port of a foreign country declared by the Government thereof to be outside of its control could not be closed by such Government save by a blockade effectively maintained.¹⁹ Again, in the course of the revolution in Spain, Secretary Hull, on August 5, 1936, instructed the American Chargé d'Affaires at Madrid to inform the Spanish Government that the American Government could not admit the legality of any action on the part of the Spanish Government in declaring certain ports closed, which were in control of the insurgents, unless that Government declared and maintained an effective blockade thereof.²⁰ This²¹ was far from an intimation that the existing Government of Spain might not lawfully, by appropriate action, blockade areas that were held by the insurgents.²¹

It has recently been observed that "blockades of ports in the control of insurgent forces have not infrequently been proclaimed by the established government, and in some instances the insurgents themselves have proclaimed blockades; in such cases it has been the practice of the United States to recognize such blockades only 'if the sovereign decreeing such a closure have a naval force sufficient to maintain an effective blockade and if he duly proclaim and maintain such a blockade.'"²²

correspondence between the United States and Great Britain concerning the Act of Congress of July 13, 1861, authorizing the President to proclaim a closure of Confederate ports was reviewed. See, also, in the latter connection, Mr. Seward, Secy. of State, to Mr. Adams, American Minister at London, No. 42, July 21, 1861, Dip. Cor. 1861, 101, Moore, Dig., VII, 806. Also further documents in Moore, Dig., VII, 803-820.

See diplomatic correspondence in 1908, with respect to a revolution in Haiti, For. Rel. 1908, 425, 439, 440-442.

¹⁹ It was further stated that the Government of the United States could not advise Americans engaged in commerce with Mexico that they should not have access to ports outside of the control of the Mexican Government and which were in fact controlled by insurgent forces; and that it felt obliged to inform such persons that in having access to such ports for commercial purposes they might in accordance with international law deal with persons in authority in such ports with respect to all matters affecting commerce therewith.

In the course of an able dissenting opinion in the Oriental Navigation Company case, Oct. 3, 1928, Commissioner Nielsen declared: "I am of the opinion that judicial and administrative officials who have frequently asserted the broad principle embraced by the statement of Lord John Russell, that it is not competent for a Government to close ports in the hands of insurgents except by effective blockade measures, have made no distinction between the closure of ports occupied by revolutionists to whom the status of belligerents has been accorded by some affirmative act, and ports occupied by forces not so recognized as having that status. In my judgment they have logically refrained from making such a distinction, because such a recognition of belligerency is not a sound and practical standard by which to determine the propriety or impropriety of the closing of a port." (Opinions of Commissioners, American-Mexican Claims Commission, Convention of Sept. 8, 1923, as extended by Convention of Aug. 16, 1927, 1929, 23, 26, 29.)

(²⁰ Department of State Press Releases, Aug. 27, 1936, 192.

See Edwin D. Dickinson, "The Closure of Ports in Control of Insurgents," *Am. J.*, XXIV, 69.

²¹ See, however, attitude of certain European States as referred to in Padelford, *Spanish Civil Strife*, 10.

One has difficulty in understanding why the existing and recognized government of a State which is in the throes of revolution may not resort to blockade, and exercise the full measure of the privileges of a blockader as against its foes, if it conforms to the requirements of international law that are applicable when a condition of war exists between two States, provided the magnitude and character of the conflict are such as to warrant that government in acknowledging that its foes are entitled to belligerent privileges.

(²² Hackworth, Dig., I, 359; also documents there cited.

b

§ 827. **Effectiveness.** The Declaration of Paris of 1856 provided that "blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."¹ This principle, which found expression also in the Declaration of London,² has always been maintained by the United States,³ and was said in 1915 to have met with universal recognition.⁴

2 "The effectiveness of a blockade is manifestly a question of fact."⁵ Concerning the circumstances when such a fact may be fairly said to exist there has been much controversy. In view of changing conditions of maritime warfare, it has proven an elusive task to indicate with greater precision than does the Declaration of Paris, a test of effectiveness affording exact guidance in any particular case.⁶ According to the United States Naval Instructions Governing Maritime Warfare, of June 30, 1917:

3 "The blockade, to be effective and binding, must be maintained by a force sufficient to render ingress to or egress from the port dangerous. If the blockading vessels be driven away by stress of weather and return thereafter without delay to their station, the continuity of the blockade is not thereby broken. The blockade ceases to be effective if the blockading vessels are driven away by the enemy or if they voluntarily leave their stations, except for a reason connected with the blockade; as, for instance, the chase of a blockade runner.⁷

4 It may be doubted whether any statement concerning effectiveness should purport to specify the kind and number of instrumentalities to be employed in

§ 827. ¹ *Nouv. Rec. Gén.*, XV, 792.

² Art. II, Charles' Treaties, 269.

³ "No other principle was ever maintained by the United States, and it was chiefly against its violation that the United States went to war in 1812." (J. B. Moore, in Dig., VII, 797.)

⁴ Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, For. Rel. 1915, Supp., 578, 583.

See, also, Report of Mr. Renault in behalf of the Drafting Committee of the Declaration of London. Charles' Treaties, 282, 286.

⁵ Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, For. Rel. 1915, Supp., 578, 583.

According to Art. 72 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A blockade in order to be binding must be effective, that is to say, it must be maintained by a naval or aerial force sufficient really to prevent access to and egress from the blockaded territory by sea. The question whether a blockade is effective is a question of fact, but no blockade shall be considered effective unless surface or submarine vessels or aircraft of the blockading belligerent are actually patrolling or cruising off the blockaded territory." (*Am. J.*, XXXIII, *Supplement Section 2*, 191, also comment, *id.*, 709.)

⁶ Naval War College, *Int. Law Topics*, 1905, 107-131. See, also, opinion of Chief Justice Fuller in *The Olinde Rodriguez*, 174 U. S., 510, 513, where it was said: "Is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary that the test is whether the blockade is practically effective, and that is a question, though a mixed one, more of fact than of law." At p. 515, he added: "Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent."

See, also, Dana's Wheaton, Dana's Note No. 233.

⁷ No. 27.

maintaining a blockade, or to determine the exact radius of action or zone of operations within which their use should be confined.⁸

At the present time a blockading fleet stationed at a base remote from a hostile coast may be able, by virtue of the several devices employed in the undertaking, to cut off the access of the enemy's surface craft to the outside world; but it may be only partially successful in preventing the egress of certain types of hostile vessels of war, sallying forth for sudden offensive operations not far from the coast and returning to port; and it may be wholly incapable of checking the egress and ingress of submarine vessels or of aircraft.⁹ In 1935, the Naval War College declared that "a blockade maintained by surface vessels only without means of preventing or rendering dangerous the passage of aircraft or submarine would be 'a paper blockade' in so far as such craft were concerned even though proclaimed to include these."¹⁰ Nevertheless, it may be doubted whether that fact would as yet be regarded as invalidating generally a blockade effectively maintained by surface craft as against surface craft. If this be true, it becomes obvious that both the strength and weakness of the present-day blockader forbid too literal an interpretation of the effectiveness which in 1856, and until the beginning of the twentieth century, could be satisfied by a single type of instrument of maritime warfare without interference from craft operating from the air or from the bowels of the sea.¹¹

⁸ It should be observed that the statement of the American delegation at the London Naval Conference regarding "radius of action" had reference to the duty of a belligerent to define, upon the declaration of a blockade, the zone of contemplated operations. It was said: "The American delegation does not wish to impose upon belligerents set rules as to the length of radius of action, but simply to ask the right to fix a maximum of 1000 miles when circumstances so demand." (Charles' Treaties, 340.)

See discussion in the careful instructions of Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary at the London Naval Conference, Dec. 1, 1908, Misc. No. 4 (1909), Cd. 4554, 20, 25-27.

⁹ "The second duty, that of preventing enemy action on the sea, is another story. It is true that the capital ships of the German navy have been bottled up, but under the conditions of the distant blockade it is comparatively easy for single ships or even squadrons to dash out from their bases, make a swift raiding attack, and get safely home again. For the same reason a commerce-destroyer may slip out and take the high seas without being sighted by the blockading force. These things have been done repeatedly by the German navy, and it should be remembered that under present conditions such occasional exploits are almost impossible to prevent. As for keeping a submarine flotilla from getting to sea, that is wholly impossible. Since the U-boat can slip through any line of patrols, and since it is the deadliest menace to the very existence of those patrols, one might incline to the belief that Sir Percy's [Admiral Sir Percy Scott's] predictions had hit the mark. But the term 'effective blockade' has always, as in our Civil War, been interpreted not absolutely but as a matter of degree. It is true that nothing threatens so seriously the very existence of a blockade as the submarine, but if we compare the actual extent of enemy action on the sea with what it would be if there were no blockade whatever, we shall see that, after all, this second function of a blockade is being carried out in the main." (W. O. Stevens, "The Submarine," *Yale Rev.*, VII, 469-470, April, 1918.)

¹⁰ Int. Law Situations, 1935, 89. See, also, in this connection, General Report of Commission of Jurists, 1923 Rules of Warfare, Part II, Rules of Aerial Warfare, concerning Art. 53 (i), *Am. J.*, XXXII, *Official Documents*, 49.

¹¹ As a check upon blockade running by neutral or hostile aircraft it may become essential to employ aircraft, and to such end to attach them to the blockading fleet as a subsidiary agency thereof. See Lauterpacht's 5 ed. of Oppenheim, II, § 380 *a*. This practical necessity does not as yet point to the illegality or insufficiency of a blockade where, owing to lack of aircraft, the blockader simply fails to render dangerous the flight of aircraft to or from the blockaded coast. The time may come, however, when such failure may serve to permit so great an interference by air with the efforts of the blockader as to justify the neutral

c

✱ Extent and Limitations

(1)

§ 828. **In General.** A blockade must be limited to the ports and coasts belonging to or occupied by the enemy; it must not bar access to neutral ports or coasts. A blockade must be applied equally to the ships of all nations.¹ Such is the position taken by the United States.² It finds recognition also in the Declaration of London of 1909,³ as well as in the recent Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War,⁴ in which is wisely stressed the point that the requirement as to impartiality of application includes the vessels of the blockading belligerent.⁵

(2)

THE CONTROVERSY BETWEEN THE UNITED STATES AND GREAT BRITAIN,
1915-1916

(a)

§ 829. **The Discussion.** On March 1, 1915, the Department of State was informed by the British Embassy at Washington that by reason of alleged illegal practices on the part of Germany, her opponents were driven to frame retaliatory measures in order to prevent commodities of any kind from reaching or

claim that the belligerent has failed to satisfy the condition of effectiveness that is requisite for the validity of its operation.

"This article [72] requires that a blockade should be effective by sea; therefore, the inability of a belligerent to prevent aerial navigation to and from a blockaded place over land or sea, or to prevent access by land, does not affect the validity of a blockade. By the same token, aircraft are not to be deemed to commit a breach of blockade in entering or leaving by air a blockaded place." (Comment on Art. 72 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 711.)

§ 828.¹ The language of the text is that contained in U. S. Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 26.

² See Mr. Lansing, Secy. of State, to the American Ambassador at Rome, Nov. 2, 1915, in regard to declarations of the Italian Government to establish a blockade along the coast of Albania, a country not engaged in the war then existing. He said in this connection: "Articles 1 and 18 of the Declaration of London expressly declare that a blockade of a belligerent coast shall not be extended to that of a neutral country nor bar access to neutral ports or coasts. These articles have been accepted by the Italian Government without modification in its decree of June 3, 1915, adopting the Declaration of London with certain exceptions for the present war. Although this Government does not regard the Declaration of London as of the binding force in the existing war, nevertheless it believes that Articles 1 and 18 accurately state the rule regarding blockade as established by the law and practice of nations for over a century." (For Rel. 1915, Supp., 177, 178.)

³ Arts. I and V, Charles' Treaties, 269 and 270, respectively.

⁴ Art. 68, *Am. J.*, XXXIII, *Supplement Section 2*, 190.

See, also, Arts. 46 and 49 of German Prize Law Code of Aug. 28, 1939, promulgated Sept. 3, 1939, Comparative Law Series, III, Jan., 1940, 35, 43 and 44.

⁵ Art. 74, which according to the relevant comment "is designed, in particular, to prevent belligerents from using 'blockades' as pretexts for furthering their own trade with the enemies' countries at the expense of neutrals—situations not unknown in history." (*Am. J.*, XXXIII, *Supplement Section 2*, 191 and 717.) See, also, *infra*, § 830.

See Arts. 69-71 of the Harvard Draft Convention relating to a supporting measure termed a Blockade Zone. *Am. J.*, XXXIII, *Supplement Section 2*, 190-191.

leaving that country. It was declared that those measures would be enforced by the British and French Governments without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity, and that Great Britain and France would, therefore, hold themselves free to detain and take into port neutral ships carrying goods of presumed enemy destination, ownership or origin.¹ On March 11, 1915, a British order in council gave effect to the policy announced.² On March 13, the President of France issued a decree in the same sense.³ On March 30, 1915, the Department of State made reply.⁴

It was declared that the British order in council would constitute, were its provisions to be actually carried into effect as they stood, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations then at peace. "A nation's sovereignty over its own ships and citizens under its own flag on the high seas" and unlimited in time of peace, was said to suffer no diminution in time of war, except so far as the practice and consent of civilized nations had limited it by the recognition of certain clearly determined rights, which it was conceded that a belligerent might exercise, such as that of blockade. It was said to be a rule "sanctioned by general practice" that even though a blockade should exist and the doctrine of contraband as to unblockaded territory be rigidly enforced, innocent shipments might be freely transported to and from the United States through neutral countries to belligerent territory without being subject to the penalties of contraband traffic or breach of blockade, "much less to detention, requisition, or confiscation."⁵ To admit the British claim as justifying interference with the "clear rights of the United States and its citizens as neutrals" would amount, it was said, to the assumption of an attitude of "unneutrality" towards the existing enemies of Great Britain. The novel and quite unprecedented feature of the contemplated blockade was said

§ 829.¹ Communication from Sir Cecil Spring-Rice, British Ambassador at Washington, March 1, 1915, For. Rel. 1915, Supp., 127.

² Mr. Page, American Ambassador at London, to Mr. Bryan, Secy. of State, No. 1798, March 15, 1915, containing text of the order in council, *id.*, 143. See, also, Same to Same, No. 1795, March 15, 1915, embracing text of memorandum from Sir Edward Grey, British For. Secy., of March 13, 1915, *id.*, 140. In Sir Edward Grey's note to Mr. Page (embraced in No. 1798 of the latter's communication to Mr. Bryan) it was declared that the object of His Majesty's Government was, "succinctly stated, to establish a blockade to prevent vessels from carrying goods for or coming from Germany." It may be observed that the word "blockade" was not used in the order in council.

³ See enclosures in communication of Mr. Sharp, American Ambassador at Paris, to Mr. Bryan, Secy. of State, March 30, 1915, *id.*, 150.

⁴ Mr. Bryan, to Mr. Page, March 30, 1915, *id.*, 152.

⁵ It was said in this connection: "Moreover the rules of the Declaration of Paris of 1856 — among them that free ships make free goods — will hardly at this day be disputed by the signatories of that solemn agreement. His Majesty's Government, like the Government of the United States, have often and explicitly held that these rights represent the best usage of warfare in the dealings of belligerents with neutrals at sea. In this connection I desire to direct attention to the opinion of the Chief Justice of the United States in the case of the *Peterhoff*, which arose out of the Civil War, and to the fact that that opinion was unanimously sustained in the award of the Arbitration Commission of 1871, to which the case was presented at the request of Great Britain. From that time to the Declaration of London of 1909, adopted with modifications by the order in council of the 23d of October last, these rights have not been seriously questioned by the British Government." (*Id.*, 153.)

to be the barring of access to many neutral ports and coasts, and the subjecting of all neutral ships seeking to approach, to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain, and to unusual risks and penalties. The imposition of such limitations, risks and liabilities was deemed a distinct invasion of the sovereign rights of the neutral State whose ships, trade or commerce were so interfered with.

It appeared to be acknowledged that the old form of "close" blockade with its cordon of ships in the immediate offing of the blockaded ports was no longer practicable in face of an enemy possessing the means and opportunity to make an effective defense by the use of submarines, mines and aircraft. It was contended, however, that it could hardly "be maintained that, whatever form of effective blockade may be made use of, it is impossible to conform at least to the spirit and principles of the established rules of war."⁶

The necessity for retaliation, given as a reason for the British plan of action, was said to be interpreted as a ground for certain extraordinary naval activities rather than as an excuse for or prelude to unlawful action. If, it was said, the course pursued by the enemies of Great Britain should prove to be tainted by illegality and lawlessness, it was not to be supposed, and the United States did not suppose, that the British Government would wish the same taint to attach to their own action, or would cite such illegal acts as in any sense or degree a justification for similar practices on their part in so far as they might affect neutral rights.

On July 24, Sir Edward Grey made rejoinder.⁷ He maintained that the measures announced were not only reasonable and necessary in themselves, but constituted no more than an adaptation of the old principles of blockade to the peculiar circumstances confronting his country. He said that the United States admitted the right to establish a blockade, which would have no value except so far as it gave power to a belligerent to cut off sea-borne exports and imports of the enemy. He declared that the claim of the United States was understood to be "that if a belligerent is so circumstanced that his commerce can pass through adjacent neutral ports as easily as through ports in his own territory, his opponent has no right to interfere and must restrict his measures of blockade in such a manner as to leave such avenues of commerce still open to his adversary." This contention, it was said, the British Government deemed unsound on principle and felt unwilling to accept.⁸ Sir Edward Grey maintained that the only question which could arise in regard to the British measures was whether

⁶ It was added: "If the necessities of the case should seem to render it imperative that the cordon of blockading vessels be extended across the approaches to any neighboring neutral port or country, it would seem clear that it would still be easily practicable to comply with the well-recognized and reasonable prohibition of international law against the blockading of neutral ports by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon." (*Id.*, 154.)

⁷ Mr. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, telegram, July 24, 1915, *id.*, 168. The British note was dated July 23, 1915.

⁸ Sir Edward Grey declared that His Majesty's Government were "unable to admit that a belligerent violates any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances render such an application of the principles of blockade the only means of making it effective." (*Id.*, 169.)

they conformed to the spirit and principles of the rules of war, and such a test he was willing to apply thereto. Adverting to the practice during the Civil War, he declared that the United States had then developed the principles relating to blockade, and the application of the doctrine of continuous voyage. He added that difficulties which then imposed upon the United States "the necessity of reshaping some of the old rules" were somewhat akin to those which the Allies were facing in the existing conflict. He contended that if a blockade was in certain cases the appropriate and recognized method of intercepting the trade of an enemy country, and that if a blockade could only become effective by extending it to enemy commerce passing through neutral ports, the extension was defensible and in accordance with generally accepted principles.⁹ What was really important in the general interest was, he contended, that adaptations of the old rules should not be made unless they were consistent with the general principles upon which an admitted belligerent right was based, and that unnecessary injury to neutrals should be avoided. With such conditions he affirmed that the British action fully complied. He declared that the practice of nations with respect to blockade had not been uniform or clearly determined, and that in various particulars the mode of procedure had from time to time varied.¹⁰

The elaborate reply of Secretary Lansing of October 21, 1915, dealt with the several forms of American complaint against British restraints on neutral commerce.¹¹ He said that in spite of British assurances that there would be no interference with trade with the neutral countries contiguous to the territories of the enemies of Great Britain, the application of the blockade order after an experience of six months had given convincing proof of lack of success in the effort to distinguish between enemy and neutral trade,¹² and that the United States, under circumstances which had developed, could no longer permit the validity of the alleged blockade to remain unchallenged. He declared that it failed to meet the requirement of the Declaration of Paris as to effectiveness, because

⁹ He added: "To the contention that such action is not directly supported by written authority, it may be replied that it is the business of writers on international law to formulate existing rules rather than to offer suggestions for their adaptation to altered circumstances." (*Id.*, 170.) The distinguished Foreign Secretary may have been referring to the practice of such writers rather than to any function reasonably to be performed by them. It is the belief of the author that it is the obligation as well as privilege of writers on international law, not merely to reflect the practice of States by formulating rules declaratory of it, but also, when perceiving those rules to be unresponsive to fundamental principles, to suggest accordingly changes designed to promote justice.

¹⁰ He said in this connection: "The need of a public notification, the requisite standard of effectiveness, the locality of the blockading squadrons, the right of the individual ship to a preliminary warning that the blockade is in force, and the penalty to be inflicted on a captured blockade runner are all subjects on which different views have prevailed in different countries and in which the practice of particular countries has been altered from time to time." (*Id.*, 171.)

¹¹ Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, *id.*, 578.

¹² He said: "Arrangements have been made to create in these neutral countries special consignees, or consignment corporations, with power to refuse shipments and to determine when the state of the country's resources requires the importation of new commodities. American commercial interests are hampered by the intricacies of these arrangements, and many American citizens justly complain that their *bona-fide* trade with neutral countries is greatly reduced as a consequence, while others assert that their neutral trade, which amounted annually to a large sum, has been entirely interrupted." (*Id.*, 582-583.)

German coasts were open to trade with Scandinavian countries, and German naval vessels cruised both in the North Sea and the Baltic, seizing and bringing into German ports neutral ships bound for Scandinavian and Danish ports.¹³ These conditions were said, moreover, to indicate non-compliance with an essential principle of universal acceptance "that a blockade must apply impartially to the ships of all nations."¹⁴

Finally, he declared that there was no better-settled principle of the law of nations than that which forbids the blockade of neutral ports in time of war, and that Article XVIII of the Declaration of London, declaratory of it, was deemed by the Government of the United States to be "a correct statement of the universally accepted law."¹⁵ He said that without mentioning the other customary elements of a regularly imposed blockade, such as notification of the particular coast line invested, the imposition of the penalty of confiscation, etc., which were lacking in the existing British "blockade" policy, it needed only to be pointed out that, measured by the three universally conceded tests above set forth, the British measures could not be regarded "as constituting a blockade in law, in practice, or in effect." He declared it to be incumbent, therefore, upon the United States Government to give notice that the blockade, which was claimed to have been instituted under the order in council, could not be recognized as a legal blockade.¹⁶ He protested against it as "ineffective, illegal, and

¹³ He added that "from the recent placing of cotton on the British list of contraband of war it appears that the British Government have themselves been forced to the conclusion that the blockade is ineffective to prevent shipments of cotton from reaching their enemies, or else that they are doubtful as to the legality of the form of blockade which they have sought to maintain." (*Id.*, 583.)

¹⁴ Attention was called to the fact that this principle was set forth in the Declaration of London, was found in the prize rules of Germany, France and Japan, and had long been admitted as a basic principle of the law of blockade. He added: "So strictly has this principle been enforced in the past that in the Crimean War the judicial committee of the Privy Council on appeal laid down, that if belligerents themselves trade with blockaded ports they cannot be regarded as effectively blockaded. The *Franciska*, Moore, P. C., 56. This decision has special significance at the present time, since it is a matter of common knowledge that Great Britain exports and reexports large quantities of merchandise to Norway, Sweden, Denmark, and Holland, whose ports, so far as American commerce is concerned, she regards as blockaded. In fact, the British note of Aug. 13, itself indicates that the British exports of many articles, such as cotton, lubricating oil, tobacco, cocoa, coffee, rice, wheat flour, barley, spices, tea, copra, etc., to these countries have greatly exceeded the British exports of the same articles for the corresponding period of 1914. The note also shows that there has been an important British trade with these countries in many other articles, such as machinery, beef, butter, cotton waste, etc." (*Id.*, 584.)

See communication of Sir Edward Grey, British For. Secy., to Mr. Page, American Ambassador at London, Aug. 13, 1915, *id.*, 511.

¹⁵ *Id.*, 578, 584. He quoted in this connection the report of Mr. Renault in behalf of the Committee drafting the Declaration of London, also the instructions of Sir Edward Grey to the British delegates to the London Naval Conference, and adverted to the reliance placed by him upon the decision in the *Jonge Pieter*, 4 Ch. Rob. 79. Secretary Lansing added: "This has been the rule for a century, so that it is scarcely necessary to recall that the *Matamoras* cases, well known to the British Government, support the same rule, that neutral ports may not be blockaded, though 'trade with unrestricted inland commerce between such a port and the enemy's territory impairs undoubtedly, and very seriously impairs, the value of a blockade of the enemy's coast.'"

¹⁶ Adverting to the case of the *Springbok*, he called attention to the fact that Sir Edward Grey, in instructions to the British delegates to the London Naval Conference, had said that it was exceedingly doubtful whether the decision was in reality meant to cover a case of blockade running in which no question of contraband arose, and that if such had been the intention, the decision would be *pro tanto* in conflict with the practice of the British

indefensible." He said that the United States could not submit to the curtailment of its neutral rights by these measures, which were "admittedly retaliatory, and, therefore, illegal in conception and in nature, and intended to punish the enemies of Great Britain for alleged illegalities on their part."¹⁷

§ 830. **The Same.** In a memorandum transmitted by the British Embassy at Washington to the Department of State on April 24, 1916, the discussion was renewed.¹ Stress was laid on the action of the United States during the Civil War. It was said that the Supreme Court of the United States had extended the doctrine of continuous voyage so as to cover all cases where there was an intention to break the blockade of the Confederate ports by whatever means, direct or indirect. It was contended that the configuration of the European coast was such as to render neutral ports the most convenient for the passage of German commerce, and that just as it was essential to the United States in the Civil War to prevent the blockade from being nullified by the use of neutral ports of access, so it was essential to the Allied Powers to see that measures which they were taking to intercept enemy commerce should not be rendered illusory by the use of similar ports. Assurance was given that every effort was being made to distinguish between bona fide neutral commerce and that which was really intended for the enemy, a task said to be one of exceptional difficulty, as statistics showed that a great volume of imports intended for the enemy must have passed through adjacent neutral countries during the war. It was acknowledged that the rules evolved for regulating a blockade and which were summarized in concrete form in the Declaration of London, could only be applied to their full extent to a blockade in the sense of the term as there used. It was pointed out, however, that such a blockade, limited to a direct traffic with enemy ports, would in the existing war be ineffective by reason of Germany's geographical position. It was maintained that with the spirit of the rules there had been loyal compliance in the measures taken to intercept German imports and exports. It was said that due notice had been given of these measures, and that the objects with which the usual declaration and notification of a blockade were issued,

courts, a practice from which the British Government saw no reason to depart and for the correctness of which there should be endeavor to obtain general recognition. Emphasizing the fact that circumstances surrounding the *Springbok* case differed essentially from those of the existing conflict to which the rule laid down in that case was sought to be applied, Secretary Lansing said: "When the *Springbok* case arose the ports of the Confederate States were effectively blockaded by the naval forces of the United States, though no neutral ports were closed, and a continuous voyage through a neutral port required an all-sea voyage terminating in an attempt to pass the blockading squadron." (*Id.*, 585.) Concerning the decision in the *Springbok* case, see The Doctrine of Continuous Voyage, The Civil War Cases, *supra*, §§ 809-810.

¹⁷ For. Rel. 1915, Supp., 589. He declared that the United States might not be in a position to object to such measures if its interests and the interests of all neutrals were unaffected by them; but, being affected, it could not, he said, suffer with complacency further subordination of its rights and interests to the plea that the exceptional geographic position of the enemies of Great Britain required or justified oppressive and illegal practices.

According to the "Declaration of London Order in Council, of 1916," March 30, "neither a vessel nor her cargo shall be immune from capture for breach of blockade upon the sole grounds that she is at the moment on her way to a non-blockaded port." (For. Rel. 1916, Supp., 361.)

§ 830. ¹ *Id.*, 368.

had been fully achieved. It was declared that the effectiveness of the operations of the allied fleets was shown by the small number of vessels which escaped their patrols, and that it was doubtful whether there had ever been a blockade where the ships which slipped through bore so small a proportion to those which were intercepted. The measures taken by the Allies were said to be aimed at preventing commodities of any kind from reaching or leaving Germany, and not merely at preventing ships from reaching or leaving German ports. The circumstance that commerce from Sweden and Norway reached German ports in the Baltic in the same way that commerce still passed to and from Germany across the land frontiers of adjacent States, was said to render the allied operations against German trade no less justifiable.² "If," it was declared, "the doctrine of continuous voyage may rightly be applied to goods going to Germany through Rotterdam, on what ground can it be contended that it is not equally applicable to goods with a similar destination passing through some Swedish port and across the Baltic, or even through neutral waters only?"³ It was maintained that although the measures complained of might have been provoked by the illegal conduct of the enemy, they did not in reality conflict with any principles of international law, of humanity or civilization, and that they were enforced with consideration against neutral countries and were, therefore, judicially sound and valid.⁴

§ 831. **The Same.** The effectiveness of the British blockade was strengthened by the operation of the retaliatory order in council of February 16, 1917, caus-

² It was said: "Even if these measures were judged with strict reference to the rules applicable to blockades, a standard by which, in their view, the measures of the Allies ought not to be judged, it must be remembered that the passage of commerce to a blockaded area across a land frontier or across an inland sea has never been held to interfere with the effectiveness of the blockade. If the right to intercept commerce on its way to or from a belligerent country, even though it may enter that country through a neutral port, be granted, it is difficult to see why the interposition of a few miles of sea as well should make any difference." (*Id.*, 376.)

³ *Id.*, 376-377. It was added that: "In any case it must be remembered that the number of ships reaching a blockaded area is not the only test as to whether it is maintained effectively. The best proof of the thoroughness of a blockade is to be found in its results. This is the test which Mr. Seward, in 1863, when Secretary of State, maintained should be applied to the blockade of the Confederate States." (*Quoting* communication of Mr. Seward to Mr. Dayton, American Minister at Paris, March 8, 1863.)

⁴ "If the British were operating a blockade, it was their legal obligation to stop their own goods, no less than goods from the United States, en route to what they regarded as ports of entry to Germany. Their conception of the 'blockade' was, as Guichard remarks, commercial. It involved the attempt to supplant Germany in neutral markets and to maintain a mutually advantageous trade with the neutrals. France, on the other hand, according to Guichard, had a 'juridical conception' of the 'blockade' and was ready to sacrifice her commercial interests (not very extensive, it is true) to the complete isolation of the Central Powers. Secretary Lansing was, in this respect, much more French than English in his point of view." (Turlington, *Neutrality, The World War Period*, III, 57.)

See, also, Borchard and Lage, *Neutrality for the United States*, 1937, Chap. IV; Charles C. Tansill, *America Goes to War*, 1938, Chap. VIII.

It should be observed that the Department of State announced in its statement No. 1, for the Press, July 30, 1920, that the British Prize Court at London had decided that certain goods seized in warfare under the order in council of March 11, 1915, on the ground that the goods were of enemy origin or destination, should be released. It was added that at the hearing of the test cases counsel for the Crown did not oppose the release of the goods.

See cable message from the American Ambassador at London, to the Department of State, No. 3510, Dec. 10, 1919; also *The United States*, [1920] P. 430, July 14, 1920; *The Noordam* (No. 2), [1920] A. C. 904.

ing vessels on their way to or from a port in any neutral country affording means of access to enemy territory, to call at a British or allied port for examination, as the means of escaping a presumption of carrying goods with an enemy origin or destination otherwise to be raised.¹ The declaration of war by the United States in April, 1917, served automatically to unite its interests as a belligerent with those of the Allied Powers actively concerned in the blockade of Germany.² It is not understood, however, that as it became a participant in the conflict, the United States took affirmative steps to preserve its rights which as a neutral it had deemed to be violated.³

(b)

§ 832. **Conclusions.** The British argument in discussions with the Department of State appeared to rest primarily on the theory that the right to institute a blockade embraced the right also to render it effective and, secondarily, on the assumption that the conduct of the United States during the Civil War justified the procedure followed. It has already been observed¹ that in the so-called Civil War cases most frequently invoked, the decisions involved a question with respect to contraband or to enemy ownership or to unneutral service, rather than an application of the doctrine of continuous voyage to a simple breach of blockade.² Perhaps the most enlightening utterance to be found in any of those

§ 831. ¹ For. Rel. 1917, Supp., I, 493, Naval War College, Int. Law Documents, 1917, 142.

The order also provided that goods found on the examination of any vessel to be goods of enemy origin or of enemy destination should be liable to condemnation.

See decision of Sir Samuel Evans in *The Leonora*, 3 B. & C. P. C. 181, 190, sustaining the validity of the order; also judgment of the Judicial Committee of the Privy Council in *The Leonora*, 3 B. & C. P. C. 385; also *The Stigstad*, 3 B. & C. P. C. 347. Also Official Report on the Administration of the Blockade, issued by the British War Cabinet (Report for the year 1917), Naval War College, Int. Law Documents, 1918, 91.

It may be observed that the Civil War cases in the United States afforded no precedent for the presumption established by the British order. It was natural that the retaliatory plea should have found favor with the belligerent prize court. Possibly a like result might be anticipated in the United States under similar circumstances. There is grave doubt, however, whether the law of nations, as tested by the practice of maritime States up to 1917, gave to a belligerent in virtue of its belligerency a right to establish new and hostile presumptions against neutral vessels and their cargoes not following a course such as that prescribed by the British order. Nor is it to be admitted that general grounds of so-called retaliation afforded the basis of a valid excuse. See *infra*, § 888A.

² See Prohibitions of Exports, § 624.

³ See documents in For. Rel. 1918, Supp., I, Vol. II, 974-991, concerning the establishment of the Allied Blockade Committee at London, March 15, 1918, and of Inter-Allied Trade Committees in neutral countries and the participation of the United States.

See Alice M. Morrissey, "The United States and the Rights of Neutrals, 1917-1918," *Am. J.*, XXXI, 17.

§ 832. ¹ The Doctrine of Continuous Voyage, The Civil War Cases, *supra*, §§ 809-810.

² See, however, *The Circassian*, 2 Wall. 135. The case seems to have been an instance of the application of the doctrine of continuous voyage to blockade. No contraband was on board the ship; there was no charge of so-called unneutral service or proof of enemy ownership. The destruction of a package of letters almost at the moment of capture and by the order of the captain appears to have been regarded by the Court as furnishing additional evidence of guilty intent with respect to the ultimate destination at a blockaded port. Declared Chief Justice Chase in the course of his opinion in behalf of the court: "At the time of capture, ship and cargo were on their way to New Orleans, under contract that the cargo should be discharged there and not elsewhere, and that the blockade should be forced in order to the fulfillment of that contract. This condition made ship and cargo then and there lawful prize" (154). When captured the *Circassian* was 7 or 8 miles off the northerly coast of Cuba, about halfway between Matanzas and Habana, and seemed to be making its way to Habana. The main voyage had been begun at Bordeaux.

cases, in its relation to the measures taken by Great Britain, was that expressed by Chief Justice Chase in the *Peterhoff*, denying the propriety of the blockade of neutral territory, even though commerce between it and that of the enemy seriously impaired the value of a blockade of the latter's coast.³

The contention that the right to institute a blockade embraced the right also to make it effective, even though the means employed served to bar access directly or indirectly to neutral ports, was one which not only lacked the sanction of maritime States generally but appeared also to have encountered the evident disapproval of those participating in the London Naval Conference, and whose delegates, convening as late as 1908-1909, may be supposed to have been conversant with the then existing conditions of maritime warfare confronting a blockading power.⁴ Nor is it to be admitted that earlier practices manifested approval of the British theory. From acquiescence, however general, in the old form of blockade, the maintenance of which called for a stationary cordon of vessels within relatively close proximity to a blockaded coast and incapable of application to broad territorial areas not possessed by the enemy, there was not to be implied consent also to a form of blockade which, owing to changed conditions of naval warfare, enabled a belligerent to bar in fact access to neutral ports and coasts, or even compelled it to do so in order to render its measures efficacious. The steadfastness with which neutral States challenged the validity of the old-fashioned cordon whenever it proved to be actually ineffective was further indication that, so far as practice was to be taken as the criterion of lawful conduct, the rights of the blockader were restricted by something alien to its own military necessities. The admission by the United

The case of *The Thompson*, 3 Wall. 175, revealed the Supreme Court of the United States as seemingly of the opinion that the doctrine of continuous voyage was applicable to blockade. The brig *Thompson* on her return voyage to Halifax from Nassau was captured at sea with a cargo of noncontraband goods on June 16, 1863, and sent into New York for adjudication. In affirming the decree of the District Court granting restitution without costs and damages against the captors, the Supreme Court concluded that a case of "probable cause" for capture had clearly been made out, even though the evidence might not have sufficed to justify condemnation of vessel or cargo. The evidence showed that another ship, *The Argyle*, escaping from the blockaded port of Wilmington, North Carolina, had discharged her cargo direct at Nassau to the *Thompson*. Asked Mr. Justice Davis in the course of the opinion of the Supreme Court: "Does not the fact that the schooner *Argyle* did not discharge her cargo at Nassau, but hauled alongside of the *Thompson*, then at anchor, and transferred enough of her cargo to load the latter vessel, afford a reasonable ground of suspicion that there was concert between the vessels, and that the *Thompson* was purposely at Nassau to receive the cargo of the *Argyle*?" The plain inference seems to be that the Court, without discussing the matter, assumed that there was probable cause for the capture of the *Thompson* which, had the evidence been stronger, would have properly been condemned as a participant in a breach of a blockade outward. The denial of costs or damages to the claimant was, therefore, of special significance.

³ 5 Wall. 28, 57.

⁴ "When the British Foreign Office argued that there prevailed a fundamental and universally recognized principle that by means of blockade a belligerent was entitled to intercept the sea-borne commerce of its enemy, and that from such a right there emanated a subsidiary right to render it effective, that Office was without the realm of established international law, which, as evidenced by at least three decisions of Lord Stowell and one of the Supreme Court of the United States definitely denied the legitimacy of such a theory. Indeed, those decisions emanated from questions just such as the ones raised by the World War, and the courts expressly stated that it was immaterial whether the blockade measures were rendered ineffectual or not by indirect violations of it." (J. W. Gantenbein, *The Doctrine of Continuous Voyage*, 179.)

States in 1915, that under existing conditions a belligerent might not unreasonably depart from old forms of procedure was accompanied by a declaration that such departure would not justify a barring of access to and from neutral ports.

Lacking the essential characteristics of a blockade, the British measures resulted, as Secretary Lansing pointed out, in an operation which failed in certain respects to resemble one. Instead, there appears to have been made an attempt broadly to enlarge the right of capture, restricting the exercise thereof not by the limits assigned to contraband, but according to whether enemy territory was the ultimate destination or point of departure of what might be encountered on the high seas. If the Declaration of Paris is still to be deemed to indicate the requirements of international law, the freedom from capture of articles other than contraband on board of neutral ships marks a restriction which no belligerent may lawfully disregard even by indirection. It has not ceased to be reasonable for a neutral State to maintain that free ships make free goods.

The distinction between the right to intercept contraband and that to institute a blockade of hostile territory appears in this connection to require close observation.⁵ The former is due to the fact that articles deemed to possess military or other special value to the belligerent to whose domain they come, are objects which for that reason the enemy may reasonably endeavor to intercept when so destined. The application of the doctrine of continuous voyage to contraband merely signifies that the ultimate hostile use inferred from an ultimate hostile destination justifies seizure when the article is in transit to a neutral port while actually en route to belligerent territory. The right to establish a blockade is based on the claim that, in consequence of the power which a belligerent is able to exert against a particular place controlled by the enemy, all access by sea thereto may be lawfully barred. The act of maintenance constitutes in reality a hostile operation undertaken by a naval force and directed against the place blockaded as truly as if it were subjected to bombardment. Such a measure should not be directly or indirectly undertaken against territory possessed by States not participating in the war.

If the doctrine of continuous voyage may be fairly applied to a neutral ship ostensibly bound for a neutral port solely because of the fact that the vessel is ultimately bound for a blockaded enemy port, does it follow that non-contraband neutral cargoes may be likewise seized when bound for neutral ports, if further transportation by land or sea to the territory of the belligerent whose coast is blockaded is in reality sought to be effected? It is believed to be difficult to find a convincing negative answer, although it may be maintained with assurance that maritime States had not yielded so broad a right when World War I was initiated. Doubtless the application of the doctrine of continuous voyage to a pure case of breach of blockade opens the way in theory to dangerously broad belligerent pretensions. Practical considerations, which are, as the British measures conclusively illustrated, a necessary incident of existing conditions of blockading operations, offer solid objections. The placing

⁵ See *supra*, § 824.

of a screen or barrier before all commerce bound for neutral territory in proximity to that under blockade, and the interference with non-contraband and innocent traffic destined to the former, justify opposition such as emanated from the United States in 1915. It suffices also to account for the lack of general approval on the part of maritime States.

The success, in a military sense, of the British measures, which neutral States, especially after the United States became a belligerent, were in fact unable to thwart, was a portent of the future. It showed how earlier precedents and earlier standards would inevitably be ignored in subsequent wars if belligerent power could so assert itself with impunity. It prophesied that the blockader was to be the unfettered and persistent breaker of the law, and eventually the amender of it, unless the international society as such could find a way through which to stop him.⁶

(c)

§ 832A. **The British Blockade Policy Developed in 1939 and 1940.** By an Order in Council of November 27, 1939, the British Government undertook to intercept all ships and all goods emanating from German ports, and ports in territory under German occupation, after December 4, 1939, and all ships from whatever port sailing after that date, having on board goods of German origin or German ownership, and to require that such goods be discharged in a British or Allied port and placed in the custody of the marshal of the prize court.¹ The Government of the United States, in making objection on December 8, 1939, observed that "interference with neutral vessels on the high seas by belligerent powers must be justified upon some recognized belligerent right,"² that whatever might be said for or against measures directed by one belligerent against another, they might "not rightfully be carried to the point of enlarging the rights of a belligerent over neutral vessels and their cargoes, or of otherwise penalising neutral States or their nationals in connection with their legitimate activities." The Government was declared to be under the necessity of requesting that measures adopted by the British Government should not cause interference with the legitimate trade of American nationals, and of reserving meanwhile all the rights of the former Government and the rights of those nationals whenever, and to the extent that they might be infringed.³ It was

⁶ See *infra*, § 832B.

§ 832A.¹ Statutory Rules and Orders, 1939, No. 1709.

Acts of the enemy in violating specified conventional and customary obligations of international law were set forth as reasons for the enactment of the Order, and were said to give to His Majesty "an unquestionable right of retaliation."

See Correspondence with the Italian Government regarding the Exercise by His Majesty's Government in the United Kingdom of their Belligerent Rights at Sea, Rome, March 3/19, 1940, Cmd. 6191.

See Order in Council of June 11, 1940, applying the Order in Council of November 27, 1939, to Italy, Statutory Rules and Orders, 1940, No. 979.

See Order in Council of July 17, 1940, No. 1324, applying to civil aircraft the terms "merchant vessel" and "vessel" wherever occurring in Orders in Council of November 27, 1939, and June 11, 1940, Statutory Rules and Orders, 1940, No. 1324.

² Dept. of State Bulletin, Dec. 9, 1939, 651.

³ It was added: "Quite apart from the principles of international law thus involved, the maintenance of the integrity of which cannot be too strongly emphasized at this time when

thus intimated that the British action was violative of duties to the United States as a neutral; but the illegal character of that action was not definitely proclaimed, although the theory on which it rested was challenged as an inadequate excuse for the belligerent assertion.⁴

By an Order in Council of July 31, 1940,⁵ the blockade measures were extended. They were expressed in part as follows:

Any vessel on her way to or from a port through which goods might reach or come from enemy territory or the enemy armed forces, not being provided with a Ship Navicert valid for the voyage on which she is engaged, shall, until the contrary is established, be deemed to be carrying contraband or goods of enemy origin or ownership, and shall be liable to seizure as Prize; provided that a vessel, other than a vessel which sailed from or has called at an enemy port, shall not be liable to seizure under the provisions of this Article unless she sailed from or could have called at a port at which she would, if duly qualified, have obtained a Ship Navicert.⁶

Goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, and not covered by a valid Cargo Navicert or, in the case of goods shipped from a British or Allied port, by a valid Export or Transshipment License, where such License is required, shall, until the contrary is established, be deemed to have an enemy destination.

Goods shipped from any port from which goods of enemy origin or ownership might have been shipped, and not covered by a valid Certificate of Origin and Interest, shall, until the contrary is established, be deemed of enemy origin or ownership.

a tendency toward disrespect for law in international relations is threatening the security of peace-loving nations, there are practical reasons which move my Government to take notice of the Order-in-Council here in question. In many instances orders for goods of German origin have been placed by American nationals for which they have made payment in whole or in part or have otherwise obligated themselves. In other instances the goods purchased or which might be purchased cannot readily, if at all, be duplicated in other markets. These nationals have relied upon such purchases or the right to purchase for the carrying on of their legitimate trade, industry and professions. In these circumstances, the British Government will readily appreciate why my Government cannot view with equanimity the measures contemplated by the Order-in-Council which if applied cannot fail to add to the many inconveniences and damages to which innocent trade and commerce are already being subjected." (*Id.*)

⁴ See Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy, *infra*, § 888A.

⁵ Statutory Rules and Orders, 1940, No. 1436.

The reasons announced for the enactment of the Order were said to be the continuation in aggravated form of illegal acts on the part of the enemy referred to in previous Orders, and which were declared to give to His Majesty "an unquestionable right to adopt such measures as may be deemed expedient for restricting further the enemy's commerce and for maintaining the efficiency of those previously taken."

⁶ The term "Cargo Navicert" was defined as a pass issuable by the appropriate British or Allied authority in the neutral country of shipment in respect of goods consigned to any port or place from which they might reach the enemy, to the effect that, so far as was known at the date of issuance, there was no objection to the consignment. The term "Certificate of Origin and Interest" was defined as a pass issuable by the appropriate British or Allied authority in neutral territory (and, where necessary, endorsed at the port of shipment), certifying that a declaration of the non-enemy origin and ownership of the goods concerned had been made, supported by satisfactory documentary evidence. The term "Ship Navicert" was defined as a pass issuable to a vessel in respect of a given voyage by the appropriate British or Allied authority at all principal British, Allied or neutral ports, if that authority was satisfied that the vessel was duly qualified to receive it.

Goods of enemy origin or ownership shall be liable to condemnation.

Any vessel seized under Article 2 hereof and carrying contraband or goods of enemy origin or ownership shall be liable to condemnation in respect of such carriage.⁷

Thus, by a process reminiscent of practices to which the United States made objection when a neutral in the course of World War I, the Government of the United Kingdom undertook to exercise a control over neutral shipping that paid scant heed to the requirements of international law in relation to the matter of blockade, and which opposed barriers between neutral countries in their intercourse with each other.⁸ That conduct, in legal contemplation, gained little support in excuse for the impairment of neutral rights from the plea elaborately enunciated in recitals in the Orders in Council, that the illegal acts of the enemy justified the course pursued.⁹ It illustrated, however, the disintegrating effect upon the maintenance of the law pertaining to neutrality when conduct that is contemptuous of the rights of neutrals (such as that attributable to British authority in the course of World War I) meets with little opposition on the part of States which are the victims of it, and when also unresisted precedents of lawless aspect offer their sinister inducement to a belligerent to pursue again a course which was successfully carried out in an earlier conflict.

Inasmuch as the United States, after taking sides with Britain, made increasing effort during the year 1940, to prevent its downfall on grounds of self-defense,¹⁰ it ceased to evince an interest in denouncing as improper, or in endeavoring to restrain, the British blockade measures that were applied in consequence of the Orders in Council of that year.¹¹

(d)

§ 832B. Alternatives for Blockade. With the anticipation that Great Britain or other maritime States may, when engaged in war, repeat as so-called blockaders acts which they proclaimed the right to commit in the course of World War I, and again in that of World War II, and may invoke the conclusions of their prize courts to justify, on grounds of retaliation, measures which in the opinion of the Government of the United States constitute internationally illegal conduct,¹ there is solid reason for American resourcefulness to be applied to the endeavor to prevent or discourage the recurrence of such action. The influence

⁷ See Unofficial Commentary, Sept. 3, 1940, on the "Extended Blockade" set forth in C H War Law Service, paragraphs 66,091-66,096.

⁸ See *supra*, §§ 829-832.

⁹ The same objection was applicable to the German announcement of Aug. 17, 1940, with reference to the "complete blockade of the British Isles" by rendering dangerous to shipping the waters around them. See Associated Press Despatch in *New York Times*, Aug. 18, 1940.

See Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy, *infra*, § 888A.

¹⁰ See The Transfer of Destroyers to the United Kingdom in 1940, *infra*, § 848A.

¹¹ It should be observed, however, that Italy (while a neutral), as well as Japan and Russia, made vigorous protest against the character and operation of the British measures. § 832B.¹ See Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy, *infra*, § 888A.

of neutral naval power possessed by several States united in a common stand may, of course, in the particular case, suffice to check the abuse of the belligerent right.² Moreover, it is theoretically possible that by means of an agreement not designed to mirror what the law may, in the mind of belligerent or neutral, concede to either, but consummated rather to conserve both the interests of the trade and the fighter, access to neutral coasts adjacent or in proximity to belligerent territory may be preserved.³ It is not difficult to point to the objectives and scope of such an accord. The screening of neutral territory by belligerent forces should be relinquished, and access thereto of neutral ships and their occupants and cargoes should be unmolested. Conversely, nothing, whether vessel or cargo or individual, that reached neutral territory in proximity to belligerent territory should be permitted to find its way to the latter. Such a twofold accomplishment would call for an abstention from interference with ships destined to neutral ports, as well as for definite assurance that such vessels and their contents should not find their way to hostile territory through any channels of communication therewith.⁴ One may well doubt, however, whether in another major conflict the parties thereto, if left to themselves, will deem it expedient to embark upon such a scheme. Two great wars have taught civilization a different lesson.

The sheer power of belligerents amply equipped with the present-day instrumentalities of maritime warfare to cut off access to hostile territory, and under conditions and by devices that spell destruction to neutral commerce which in any way defies it, together with the relative inability of small States not parties to the conflict and the indisposition of strong ones to offer resistance, have already been productive of far-reaching deductions. They are these: (a) the irresistible temptation to a belligerent to yield to excesses when no armed opposition from neutral sources looms large enough to be a dangerous deterrent; (b) the complete absence, under a variety of circumstances, of a sense of legal duty on the part of belligerents to defer to standards of conduct which as late as August, 1914, practice had, in American opinion, laid down with respect to the conditions of a blockade; and (c) the improbability that the participants in another major

² The bearing of neutral opposition upon the retention of belligerent assertions is illustrated by Viscount Grey in his work entitled *Twenty-five Years (1892-1916)*, where he declared that the ill-will of the United States when a neutral, meant certain defeat of the Allies. In this connection he made the following oft-quoted statement: "The Allies soon became dependent for an adequate supply on the United States. If we quarrelled with the United States we could not get that supply. It was better therefore to carry on the war without blockade, if need be, than to incur a break with the United States about contraband and thereby deprive the Allies of the resources necessary to carry on the war at all or with any chance of success. The object of diplomacy, therefore, was to secure the maximum of blockade that could be enforced without a rupture with the United States." (II, 107.)

³ Declared Charles Warren, in 1934: "The situation confronting the United States today is that not a single neutral right of trade asserted by us is recognized officially by Great Britain, France, Italy or Germany to any greater extent than it was between August 1914 and April 1917." ("Troubles of a Neutral," *Foreign Affairs*, XII, 377, 388.)

⁴ See Annex II of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, concerning "Certificates of Neutrality," *Am. J.*, XXXIII, *Supplement Section 2*, 199-202; also general comment, *id.*, 487-489.

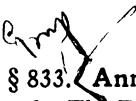
See, also, Annex III and Art. 47, with explanatory comment, in relation to Quotas, *id.*, 202, 183, and 523-528, respectively.

maritime conflict will, if possessed of the requisite instrumentalities, feel constrained to pursue a different course, or even regard it as feasible to attempt to agree to do so. Such considerations suggest the illusive aspect of efforts to curb prospective blockaders by conventional arrangements. In a word, the so-called blockader, embracing him who by any process thwarts access to the domain of his foe, has made himself the implacable foe to neutral commerce with his enemy, and is bound to remain such as long as he possesses and uses the several instruments appropriate to his end which man's skill has been able to devise. Until, therefore, the several members of the international society are prepared to relinquish those instruments to some common entity, and to allow it and none other, to have recourse to blockade, and that primarily for the purpose of penalizing a recalcitrant State, it is idle to expect the technical conditions of blockade as heretofore set forth by American statesmen to become practical obstacles to belligerent action. It remains to be seen whether that society shall, upon the conclusion of the present war, have reached a stage where a realization of its common interest shall be deemed inexorably to demand the relinquishment of blockade by the individual belligerent.⁵

3

BREACHES AND OTHER INCIDENTS OF BLOCKADE

a

§ 833.  **Announcement to Neutral States — Notification of Neutral Vessels.** The Declaration of London announces that a blockade in order to be binding must be declared and also notified to neutrals, and according to the provisions of certain Articles.¹ It is said that a declaration of blockade is made either by the blockading power or by the naval authorities acting in its name, and that the declaration specifies the date when the blockade begins, the geographical limits of the coast line under blockade, and the period within which neutral vessels may come out.²

It is announced that a declaration of blockade is notified —

(1) To neutral powers, by the blockading power by means of a communication addressed to the Government direct, or to their representatives accredited to it;

(2) To the local authorities, by the officer commanding the blockading

⁵ A particular form of belligerent activity may be as adverse to the welfare of the international society as the use of a particular instrumentality such as the submarine or the aircraft. See *supra*, § 663.

¹ § 833. ¹ Art. VIII, Charles' Treaties, 270.

² Art. IX. According to Art. X: "If the operations of the blockading power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with Art. IX (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative."

See the case of *The Adula*, 176 U. S. 361, where a blockade was established by Admiral Sampson at Guantanamo Bay in 1898, and over an area not embraced in any executive proclamations of blockade.

force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.⁷⁷

The purpose of the notification to neutral States, which it is now generally acknowledged to be the duty of the belligerent to give,⁴ is to enable them to warn vessels within their ports of the establishment of the blockade and of the risks to be encountered in ignoring it.⁵ The belligerent obligation to give such notification is distinct from that to notify neutral ships. It will be seen, however, that fulfillment of the former is productive of a direct effect upon the scope of the latter.⁷

At the close of the eighteenth century and well into the nineteenth, when the time required for the communication of intelligence between America and Europe was measured by the uncertain capacities of sailing craft venturing upon the trans-Atlantic voyage, it was not uncommon for vessels to leave neutral ports of the former for belligerent ports of the latter without knowledge of the existence of any blockade until encountering a cruiser of the squadron engaged in maintaining one. In order to protect neutral ships so circumstanced from capture, and also to lessen dangers incidental to notifications of proposed blockades at a time when the theoretical obligation to make such operations effective was loosely regarded,⁶ it was natural for the United States to incorporate in treaties provisions appropriate to the end in view. The nature of what found expression in numerous conventions deserves attention, especially as it does not appear always to have been closely observed or accurately described.

In Article XVIII of the Jay Treaty of November 19, 1794,⁷ and in numerous Articles of other later conventions,⁸ it was agreed that whereas it frequently

⁸ Art. XI. See, also, Art. XVI; Art. XXXIX, Stockton's Naval War Code of 1900 (withdrawn in 1904), Naval War College, Int. Law Discussions, 1903, 112.

See, in this connection, Oppenheim, Lauterpacht's 5 ed., II, § 376.

⁴ See Sir Edward Grey, British For. Secy., to Lord Desart, British plenipotentiary at the London Naval Conference, Dec. 1, 1908, Misc. No. 4 (1909), Cd. 4554, p. 27.

See, also, Mr. Rush, Secy. of State, to Mr. Correa, Portuguese Minister, May 28, 1817, MS. Notes to For. Legations, II, 229, Moore, Dig., VII, 823.

See Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, For. Rel. 1915, Supp., 578, 584.

⁵ "The notification or announcement is not sufficient without the reality of the blockade, but it is important on the question of the knowledge which is necessary for culpability. The neutral power which has received notification of a blockade is bound and presumed to publish the information throughout its dominions, and the announcement of a blockade by a belligerent may be the subject of notoriety." (Westlake, 2 ed., II, 269.)

⁶ See Mr. Madison, Secy. of State, Report, Jan. 25, 1806, Am. State Pap., For. Rel. II, 728, Moore, Dig., VII, 822.

⁷ Malloy's Treaties, I, 602.

See, in this connection, *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch, 185, Moore, Dig., VII, 820; Mr. Seward, Secy. of State, to Lord Lyons, British Minister, Mar. 24, 1862, MS. Notes to Great Britain, IX, 142, Moore, Dig., VII, 824.

⁸ Art. XII, convention with France, Sept. 30, 1800, Malloy's Treaties, I, 500; Art. XIX, treaty with Brazil, Dec. 12, 1828, *id.*, 139; Art. XX, treaty with Ecuador, June 13, 1839, *id.*, 427; Art. XX, treaty with Colombia (New Granada), Dec. 12, 1846, *id.*, 308; Art. XX, treaty with Bolivia, May 13, 1858, *id.*, 120; Art. XVIII, treaty with Haiti, Nov. 3, 1864, *id.*, 926; Art. XXIII, treaty with Peru, Sept. 6, 1870, *id.*, II, 1421; Art. XIV, treaty with Italy, Feb. 26, 1871, *id.*, I, 973.

See Mr. Bayard, Secy. of State, to Mr. Preston, Haitian Minister, Nov. 28, 1888, For. Rel. 1888, I, 1001, Moore, Dig., VII, 825, concerning the violation by Haitian authorities of the treaty of Nov. 3, 1864, in the treatment accorded the ship *Haitian Republic*.

happened that vessels sailed for a port or place belonging to an enemy "without knowing" that it was besieged, blockaded or invested, every vessel "so circumstanced" might be "turned away" from such port or place, but should not be detained, nor the cargo, if not contraband, confiscated, "unless after notice" the vessel should again attempt to enter; and it was to be permitted, moreover, to go to any other port or place it might think proper. According to another but smaller group of treaties, it was declared that in view of the distance between territories of the contracting parties and the uncertainty resulting therefrom in relation to various events which might take place, a merchant vessel belonging to one of the contracting parties, and destined to a port supposed at the time of its departure to be blockaded, should not, however, be captured or condemned for having attempted a first time to enter the port, unless it were proved that the vessel "could and ought to have learned," on its passage, that the place in question continued to be in a state of blockade.⁹ It was provided also that a vessel which, after having been once turned away, should attempt a second time, during the same voyage, to enter the same port of the enemy, while the blockade continued, should be liable to detention and condemnation.

It will be observed that in the former class of treaties the duty to notify the neutral vessel appeared to be based upon the supposition that the ship lacked knowledge of the existence of the blockade. The case where a vessel had by any process learned of that fact was not dealt with. In the latter class it is believed to be significant that the theory of constructive knowledge was regarded as, under certain circumstances, fairly applicable. While the design of both groups was to shield neutral vessels in actual ignorance, and at a time when it was as reasonable to infer ignorance as knowledge, it was doubtless not the purpose of either to protect ships which had through any channels acquired knowledge.

American prize courts, even in applying domestic regulations respecting warning, did not deem it generally necessary for notice to be given a ship possessed of actual knowledge, and did not hesitate, when occasion justified, to infer knowledge from the attending circumstances.¹⁰

§ 834. The Same. With the perfecting of existing means of facilitating the communication of intelligence by radio and otherwise, and of informing ships at

⁹ Art. XIII, treaty with Sweden and Norway, Sept. 4, 1816, Malloy's Treaties, II, 1748; also Art. XIII, treaty with Prussia, May 1, 1828, *id.*, 1500; Art. XVI, treaty with Greece, Dec. 22, 1837, *id.*, I, 853; Art. XIII, treaty with Sardinia, Nov. 26, 1838, *id.*, II, 1606.

¹⁰ *The Hiawatha*, 2 Black, 635, 677; *The Admiral*, 3 Wall. 603, 614-615; *The Herald*, 3 Wall. 768.

In the case of *The Adula*, 176 U. S. 361, actual knowledge on the part of the captured ship of the existence of the blockade established by Admiral Sampson in 1898, at Guantanamo Bay, in Cuba, was deemed to justify the treatment as a blockade runner of the vessel attempting to enter the proscribed waters, although there had been no diplomatic notification to neutrals and no warning given the ship by any naval vessel. See, however, dissenting opinion of Mr. Justice Shiras, with whom concurred Justices Gray, White and Peckham (383).

See Mr. Webster, Secy. of State, to M. de Sartiges, June 3, 1852, MS. Notes to French Legation, VI, 180, Moore, Dig., VII, 823, with respect to the ship *Jeune Nelly*; also, in this connection, *United States v. Guillem*, 2 How. 47.

For text of notification by the United States in 1846, of the blockade of certain Mexican ports, see *Brit. and For. State Pap.*, 1845, 1846, p. 1139.

sea of belligerent operations, old reasons for solicitude as to the treatment of most neutral vessels have ceased to be applicable. At the present time, such vessels destined for a belligerent port the blockade of which has been established and notified to neutral powers, are rarely without actual knowledge of the fact.¹ There may be strong grounds, moreover, why in the particular case the persons controlling the ship should not be permitted to profit by a profession of ignorance.

The Declaration of London made fair response to conditions of maritime warfare supposed to exist in 1909. The liability of a neutral vessel to capture for breach of blockade was declared to be contingent upon its presumptive as well as actual knowledge;² and, "failing proof to the contrary," such knowledge was "presumed" if a vessel left a neutral port after notification of the blockade to the power to which such port might belong, provided the notification was made "in sufficient time."³ This was a marked yielding of continental European opinion, which previously had required notification to neutral ships of the existence of a blockade at the line thereof, and was a broad, although incomplete, concession to views long prevailing in British prize courts.⁴ It may be doubted, however, whether these provisions still afford sure guidance for the future. General international agreements authorizing the derivation of certain inferences from the existence of specified circumstances and yet acknowledging the right of rebuttal, have proven impractical in operation, especially when a conflict between belligerent and neutral claims has thus been sought to be

§ 834.¹ It may be observed that the Department of State in 1909, in responding to an announcement of a blockade or investment by insurgents of the Nicaraguan port of San Juan del Norte (Greytown), declared that the disposition of the United States not to prevent its enforcement would depend upon the observance by the insurgents of the requirements of international law "including warning to approaching vessels." See Mr. Knox, Secy. of State, to Mr. Merry, American Minister, Nov. 21, 1909, For. Rel. 1909, 454, 455. See, also, Mr. Wilson, Acting Secy. of State, to Mr. Pierce, American Minister, July 22, 1910, For. Rel. 1910, 756, 757.

² Art. XIV, Charles' Treaties, 271.

³ Art. XV. According to Art. XVI: "If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log book, and must state the day and hour, and the geographical position of the vessel at the time.

"If, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free."

See report of Mr. Renault in behalf of the drafting committee of the London Naval Conference, Charles' Treaties, 282, 291-292.

⁴ Concerning the British practice see J. A. Hall, *Law of Naval Warfare*, 2 ed., revised, 204-207, and cases cited, especially *The Neptunus*, 2 Ch. Rob. 111; Oppenheim, *Lauterpacht's* 5 ed., II, § 384; W. E. Hall, *Higgins' 8 ed.*, 848-851.

Concerning the continental view see Fauchille, 8 ed., §1656.⁶ See, also, Sir Edward Grey, British For. Secy., to Lord Desart, British plenipotentiary at the London Naval Conference, Dec. 1, 1908, Misc. No. 4 (1909), Cd. 4554, p. 27.

"Certain States which had customarily maintained a position which required notification of the existence of blockade at the line of blockade made concessions to those which, like the United States, had stood for the principle of public notification to the Government whose flag the ship flies." (Report of the delegates of the United States, Rear Admiral Stockton and Prof. Wilson, at the London Naval Conference, to the Secretary of State, March 2, 1909, Charles' Treaties, 332, 333.)

See Naval War College, *Int. Law Situations*, 1933, 36-37, concerning blockades which were "regularly proclaimed in numerous instances during the early years of the World War."

adjusted.⁵ If from the existence of certain circumstances there is but one reasonable inference to be drawn, and a strong probability that any attempt to rebut it will call for the presentation of testimony not calculated to reveal the truth, the danger is remote that the cutting off of the right of rebuttal will produce a miscarriage of justice.

According to the United States Naval Instructions of June 30, 1917, neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of the notification is said to be immaterial. Thus "it may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation or notice of the Government maintaining the blockade, or by common notoriety."⁶ The effect of governmental notification through the diplomatic channel is not otherwise defined. It is declared that if a neutral vessel attempting to enter a blockaded port has had notice of the blockade in any way, "she shall be captured and sent in for adjudication; but should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral." It is added that vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel.⁷ The foregoing provisions are in substance a reproduction of instructions issued by the Navy Department in 1898, during the war with Spain.⁸

In view of the efficacy of means now employed in the communication of intelligence by land and sea, it is believed to be reasonable to lay down a broader and yet more precise rule of constructive knowledge. At the present time there appears to be no trace of harshness in charging a neutral ship with knowledge of the existence of a blockade if the vessel has sailed from a port of its own State whose Government was duly notified, and if prior to sailing, reasonable time elapsed for the communication of that information by that Government to the authorities of such port, or in case the ship has sailed from any foreign port where, at the time of departure, it is shown that the establishment of the blockade was commonly known. A rule of law charging constructive knowledge in both cases would simplify practice in no inequitable way, for it would practically never be applied to persons either in actual ignorance or without fair means of ascertaining the truth, and it would simultaneously close a convenient door to perjury.

⁵ See, for example, the provisions of Art. XXXIV of the Declaration of London, with respect to conditional contraband, Charles' Treaties, 275.

⁶ No. 28. See, also, Art. XXXIX of Stockton's Naval War Code of 1900 (withdrawn in 1904), Naval War College, Int. Law Discussions, 1903, 112.

⁷ No. 30. With respect to notification by a blockading vessel it is said: "The boarding officer shall enter in the log and the document fixing the vessel's nationality the fact of such notice, the extent of the blockade, the date, the geographical position, and the name of the blockading vessel, verified by his official signature; and shall furnish the master with a copy of the blockade proclamation. The vessel is then to be set free. Should she again attempt to enter the same or any other blockaded port as to which she has had notice, she is good prize."

⁸ The Instructions of 1898 contained the following provision which was not embodied in those of June 30, 1917: "Should it appear from a vessel's clearance that she sailed after notice of blockade had been communicated to the country of her port of departure, or after the fact of blockade had, by a fair assumption, become commonly known at that port, she should be sent in as prize. There are, however, treaty exceptions to this rule, and these exceptions should be strictly observed." (For. Rel. 1898, 780, Moore, Dig., VII, 827.)

According to the Harvard Draft Convention on Naval and Aerial War, a blockade, in order to be binding, should be declared and also notified in specified ways. It is said that the declaration of blockade may be made "either by the belligerent or by the naval authorities acting in its name"; and that it should specify (a) the time when the blockade begins; (b) the geographical limits of the coast blockaded and of the blockade zone; and (c) the time to be allowed for the departure of neutral vessels.⁹ It is also said that a declaration of blockade is notified (a) to neutral States, by the blockading belligerent; (b) to the local authorities of the territory covered by the declaration of blockade, by the officer commanding the blockading force.¹⁰

b

§ 835. **Acts Constituting a Breach and Dealt with as Such — Place of Capture.** The question as to what acts constitute a breach of blockade is distinct from that concerning the circumstances when acts seeming to possess such a character are generally deemed to justify capture and condemnation. It has been the tendency of American and British opinion to endeavor to interpret if not mold the law according to the facts by permitting a belligerent to treat as a blockade runner a neutral ship wherever encountered on the high seas, if the evidence showed that the vessel, having the requisite knowledge, was destined to a blockaded port. This opinion has been opposed by a view long prevailing in certain European States. In consequence of maritime wars at a time when neutral ships might well, and doubtless oftentimes did, approach a blockaded port in actual ignorance of its condition, and when the effectiveness of a blockade depended upon a cordon of stationary vessels held in the immediate offing, it was not unreasonable for continental jurists to demand as an incident of effective maintenance, that the exercise of the right of capture should be confined to a place in close proximity to the line of the blockading squadron. The value of the claim was obviously diminished, however, by the disappearance of certain conditions to which its origin was due. It so happened that new facilities for the transmission of intelligence, together with radical changes of method in the maintenance of blockades, attributable both to the potentialities of newly devised instruments of naval warfare and to the safeguarding of those engaged in such service, combined generally to strengthen the Anglo-American position.

At the present time, when a neutral ship destined for a blockaded coast rarely if ever lacks actual or constructive knowledge of the existence of the blockade, unless sailing before that fact was commonly known at the port of departure (and even in that contingency is likely to be apprised of such fact without delay in the course of the voyage), any supposition that a vessel is normally

⁹ Arts. 77 and 78. *Am. J.*, XXXIII, *Supplement Section 2*, 191.

Art. 78 contained the provision that "if the blockading belligerent or the naval authorities acting in its name, fail to establish the blockade in accordance with the declaration, the declaration is void and a new declaration is necessary in order to make the blockade operative."

¹⁰ Art. 79. See also Art. 80, concerning the notification of the voluntary raising of a blockade or of restrictions in the limits of a blockade, *id.*, 192.

See Arts. 44 and 45 of German Prize Law Code of Aug. 28, 1939, *Comparative Law Series*, III, 35, 43.

ignorant ceases to be useful in determining the place or area where capture may be justly effected. Under existing conditions it is hardly reasonable to permit a ship to approach as near as may be to a blockaded port under guise of seeking information whether access thereto is or remains barred.¹

At the Second Hague Peace Conference of 1907, the Italian delegation proposed that a vessel should not be seized as guilty of violation of blockade except at the time when it attempts to break through the lines of an obligatory blockade.² The American delegation proposed that "any vessel which, after a blockade has been duly notified, sails for a port or a place that is blockaded, or attempts to force the blockade, may be seized for violation of the blockade."³ This proposal, which met with the approval of the British delegation, doubtless sought to secure recognition of the system of permitting the seizure of every vessel sailing towards a blockaded place, and even though remote from a supposed line of blockade. The sharp divergence between the Anglo-American and the continental views served in part to suspend discussion and to preclude agreement.⁴

Before the convening, in 1908, of the International Naval Conference at London, the British Foreign Office, after observing that, regardless of the theory involved, there had been no case in which a vessel had been condemned by a British prize court for breach of blockade "except when actually close to or directly approaching the blockaded port or coast," and after noting that under existing conditions of war a blockading force would no longer consist of a single line of ships in close proximity to the enemy's territory, announced a readiness to make certain important concessions. Adverting to the fact that the French Government had shortly before defined the area within which vessels might be seized for breach of blockade to be the "*rayon d'action* of the vessels charged with the duty of insuring the effectiveness of the blockade," Sir Edward Grey, British Foreign Secretary, declared that if the *rayon d'action* were defined as

§ 835. ¹ See *The Cheshire*, 3 Wall. 231; *The Charlotte Christine*, 6 Ch. Rob. 101. See, also, Sir Edward Grey, British For. Secy., to Lord Desart, British plenipotentiary to the London Naval Conference, Dec. 1, 1908, Misc. No. 4 (1909), Cd. 4554, p. 27.

According to Instructions to U. S. Blockading Vessels and Cruisers, General Orders, No. 420, June 20, 1898, For. Rel. 1898, 780, Moore, Dig., VII, 830: "A neutral vessel may sail in good faith for a blockaded port with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. But, in such case, she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure." This instruction, with a modification of the last clause, was reproduced as Art. XLII in Stockton's Naval War Code of 1900 (withdrawn in 1904). See Naval War College, Int. Law Discussions, 1903, 113. It was not, however, incorporated in the Naval Instructions Governing Maritime Warfare of June 30, 1917.

"It is well settled that, in the case of a proclaimed blockade, the neutral vessel may not, with a knowledge of the proclamation, approach the prohibited port, even for the purpose of inquiring from the vessels in occupation whether the blockade was still in existence." (*Dissenting opinion* of Shiras, J., in *The Adula*, 176 U. S. 361, 393.)

² *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 1167, J. B. Scott, Reports to Hague Conferences, 626.

³ *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 1168, J. B. Scott, Reports to Hague Conferences, 626.

⁴ Report of Mr. Fromageot, in behalf of the Fourth Commission to the Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 238, J. B. Scott, Reports to Hague Conferences, 592, 609.

the area of operation of the blockading force, "His Majesty's Government would be disposed to accept a rule to the above effect as fairly representing the actual practice of both the rival systems and therefore capable of being described as of general application."⁵

The Declaration of London gave expression to this idea. It was provided in Article XVII that neutral vessels should not be captured for breach of blockade except within the area of operations of the vessels of war detailed to render the blockade effective.⁶ The American delegation at the London Conference expressed opinion that the radius of action or zone of operations should be defined by the officer in command of the blockading force and that the maximum should be fixed at 1000 miles.⁷ No Article of the Declaration embodied these limitations. The term "area of operations" remained undefined. According to Article XX "a vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected."⁸ Article XIX forbade a belligerent to invoke the doctrine of continuous voyage as a means of establishing a breach of blockade.⁹

§ 836. **The Same.** A neutral ship sailing with intent to break a blockade may be said to make in fact an attempt to do so as soon as it sets sail.¹ Nor it is unreasonable to charge with such an intent a neutral vessel sailing for a blockaded port provided the ship may be fairly deemed to be apprised of the existence of the blockade.² The United States Naval Instructions Governing Maritime Warfare, of June 30, 1917, reflecting the traditional American view, and regardless of the theory of the Declaration of London, declare that the liability of a blockade runner to capture and condemnation begins and terminates with her voyage. "If," it is said, "there is good evidence that she sailed with intent to

⁵ Sir Edward Grey, British For. Secy., to Lord Desart, British plenipotentiary, Dec. 1, 1908, Misc. No. 4 (1909), Cd. 4554, p. 26.

⁶ Charles' Treaties, 271. See, also, report of Mr. Renault in behalf of the Drafting Committee, *id.*, 293; Alexander Holtzoff, "Some Phases of the Law of Blockade," *Am. J.*, X, 53.

⁷ Statement of the American Delegation (Rear Admiral Stockton and Prof. Wilson), appended to their report to the Secretary of State, Charles' Treaties, 340.

⁸ Charles' Treaties, 271.

Declares Westlake: "The effect of these Articles is that there must be a distinct blockading squadron, which must have a definite area of operations assigned to it, but may cruise within that area; and that a capture for breach of the blockade may only be made by a ship of that squadron, and either within that area or in the course of a pursuit commenced within it, provided in the latter case that the absence of the pursuing ships has not reduced the force remaining within the area so far as to raise the blockade by operation of law. There is nothing in the Declaration to prevent assigning line behind line of ships to the blockade, if the blockading power is able to devote so large a naval force to the purpose, and thereby pushing off the limits within which a capture may be made or a pursuit commenced to the extreme distance at which such a power can make the blockade real." (Int. Law, 2 ed., II, 268.)

⁹ Thus it is provided that "whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a nonblockaded port." (Charles' Treaties, 271.)

According to the Maritime Rights Order in Council of July 7, 1916: "The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade." (For. Rel. 1916, Supp., 413, 414.)

§ 836. ¹ The Circassian, 2 Wall. 135; The Galen, 37 Ct. Cl. 89.

² See, in this connection, The Admiral, 3 Wall. 603, Moore, Dig., VII, 829.

evade the blockade, she is liable to capture from the moment she appears upon the high seas."³ No reference is made to the doctrine of continuous voyage.

Many of the American cases touching the question whether the vessel brought in for adjudication was, at the time of capture, sailing for or attempting to enter a blockaded port, arose during the Civil War. The courts evinced a readiness to infer from any probative circumstances either a wrongful intention or sinister conduct.⁴ Bills of lading, letters and papers found on board the captured vessel, acts or words of its owners or charterers or of the shippers of the cargo, as well as spoliation of papers in apprehension of capture, were deemed to be fair sources of evidence of intent.⁵ The approach of a ship to the mouth of a port known generally to have been blockaded, and that for the purpose of inquiry, was sternly dealt with.⁶ A neutral vessel bound for a neutral port in close proximity to a blockaded port was required to be kept, while receiving or discharging cargo, clearly on the neutral side of the blockading line.⁷ The entrance into a blockaded area on grounds of distress was regarded as excusable solely in case of uncontrollable necessity.⁸

The requirement that destination to a port under blockade alone justified seizure and condemnation of vessel and cargo was made clear.⁹ Thus a vessel destined for a neutral port, with no ulterior destination, and none by sea for the cargo to a blockaded place, was not deemed to violate a blockade.¹⁰ As has been elsewhere observed, attentive examination of certain important American cases oftentimes regarded by the commentators as indicating an unfortunate invocation of the doctrine of continuous voyage to establish breach of blockade, reveals the fact that there were in almost every instance other grounds for decision.¹¹ Hence numerous *dicta* in relation to blockade running lack the significance frequently attached to them.¹²

It may be doubted whether at the present time the question concerning the place of capture remains longer one where the equities of neutral interests merit special consideration. The danger of wronging a ship fairly protesting ignorance is not to be anticipated. A vessel designing a breach of blockade suffers no injustice because of seizure at a point remote from its destination, and irrespective of what may be regarded as the actual limits of the area of operations of the blockading force.

³ No. 31.

⁴ See cases collected in Moore, Dig., VII, 828-834.

⁵ *The Circassian*, 2 Wall. 135; *The Baigorry*, 2 Wall. 474; *The Cornelius*, 3 Wall. 214; *The Jenny*, 5 Wall. 183. Compare the situation in *The Sea Witch*, 6 Wall. 242. See, also, *The Newfoundland*, 176 U. S. 97.

⁶ *The Cheshire*, 3 Wall. 231. See, also, *The Josephine*, 3 Wall. 83; *The Coosa*, 1 Newb. Adm. 393; *The Hiawatha*, Blatchf. Prize Cases, 1; *The Empress*, Blatchf. Prize Cases, 175.

⁷ *The Dashing Wave*, 5 Wall. 170; but see, also, the situation in *The Teresita*, 5 Wall. 180.

⁸ *The Diana*, 7 Wall. 354. See, also, in this connection, *The Nuestra Señora de Regla*, 17 Wall. 29.

⁹ *The Bermuda*, 3 Wall. 514. See, also, *The Adela*, 6 Wall. 266.

¹⁰ *The Peterhoff*, 5 Wall. 28.

¹¹ *The Doctrine of Continuous Voyage*, *The Civil War Cases*, *supra*, § 809.

The statement in the text is believed to be true with reference to *The Stephen Hart*, Blatchf. Prize Cases, 387; *The Hart*, 3 Wall. 559; *The Bermuda*, 3 Wall. 514; *The Peterhoff*, 5 Wall. 28; *The Springbok*, 5 Wall. 1.

¹² But see *The Circassian*, 2 Wall. 135; and especially *The Thompson*, 3 Wall. 155.

As Sir William Scott declared in the case of *The Vrouw Judith*, "a blockade is just as much violated by a vessel passing outward as inward."¹³ There are circumstances under which egress from a blockaded port is not regarded as an offense, because of either a requirement deemed to be imposed by the law of nations, or a disposition on the part of the blockading power not to exercise its full rights as a belligerent. The nature of the various ameliorations is observed elsewhere.¹⁴

According to the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, "a belligerent may capture an uncertified neutral vessel for breach of blockade at any time during the vessel's voyage to or from a port or place against which an effective blockade existed at the time when the vessel commenced its voyage, provided that: (a) The liability of a neutral vessel to capture for breach of blockade is contingent on its knowledge, actual or presumptive, of the blockade; (b) Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the State to which such port belongs, if such notification was made in sufficient time."¹⁵ In harmony with the theory of Article XVI of the Declaration of London, the same convention calls for special notification "by an officer of the visiting warship" of the neutral vessel which although otherwise liable to seizure for breach of blockade, "does not know or cannot be presumed to know of the blockade."¹⁶

c

§ 837. **Capture and Penalty — Deposit of Offense.** The United States regards the attempt to break a blockade which is lawfully established and maintained, as a distinct offense exposing the actors to the imposition of "the penalties denounced by the law of nations in that behalf."¹ Thus a vessel attempting

¹³ 1 Ch. Rob. 151, Moore, Dig., VII, 836; Mr. Buchanan, Secy. of State, to Mr. Poussin, French Minister, Jan. 17, 1849, MS. Notes to French Legation, VI, 122, cited in Moore, Dig., VII, 836; Mr. Hunter, Acting Secy. of State, to Mr. de Sartiges, French Minister, July 29, 1852, concerning the case of the *Jeune Nelly*, MS. Notes to French Legation, VI, 188, Moore, Dig., VII, 837. See, also, *United States v. Guillem*, 11 How. 47.

See, also, Westlake, 2 ed., II, 271.

¹⁴ See Ameliorations, *infra*, §§ 838-841.

¹⁵ Art. 81, *Am. J.*, XXXIII, *Supplement Section 2*, 192; also Comment, *id.*, 735-745, where it is observed at page 739, that "an independent examination of the cases fails, indeed, to disclose any decision condemning a vessel captured on one side of an ocean for an attempt to breach a blockade on the other side."

As a rule of prize law, it is declared in Art. 63 (a) that "a vessel which intended to run a blockade, may be condemned together with its cargo." (*Id.*, 188.)

According to Art. 50 of the German Prize Law Code of Aug. 28, 1939: "A vessel is liable to capture and condemnation for breach of blockade, if, while aware of the blockade, it attempts to reach or to leave the blockaded coast. The vessel may be captured only within the area of the blockade or while being pursued out of that area." (*Comparative Law Series*, III, 35, 44.)

¹⁶ Art. 82, *Am. J.*, XXXIII, *Supplement Section 2*, 192. It is also there provided that "a neutral vessel which leaves a blockaded port must be allowed to pass free if, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities or if, in the declaration as notified, no time for departure has been indicated." See also comment, *id.*, 746-750.

§ 837. ¹ President Wilson, Neutrality Proclamation, May 24, 1915, *American White Book*, European War, II, 15, 17.

See, also, Declaration of Neutrality of the Netherlands, Aug. 5, 1914, Art. XVIII, *Naval*

to commit that offense, or sailing with intent to commit it, is deemed to subject itself to capture without regard to the nature of the cargo.² According to the Department of State, neutral property "engaged in" breach of blockade attains the character of enemy property and is subject to seizure by a belligerent and condemnation by a prize court.³

Possibly under certain circumstances, however, neutral property on board of a blockade runner ought not to be regarded as so engaged. Thus, according to the Declaration of London, while the cargo as well as the vessel which is found guilty of breach of blockade is liable to condemnation, the former is entitled to exemption in case it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.⁴

The Instructions to American Blockading Vessels and Cruisers of June 20, 1898, declared that the crews of blockade runners were not enemies and should be treated, not as prisoners of war, but with every consideration. It was stated, however, that any of the officers or crew whose testimony before the prize court might be desired should be detained as witnesses.⁵ Substantially the same provisions were embodied in Stockton's Naval War Code of 1900.⁶ It was not deemed necessary, however, to incorporate them in the Naval Instructions Governing Maritime Warfare, of June 30, 1917.⁷

War College, Int. Law Topics, 1916, 64, citing *Staatscourant*, Special Number, Aug. 5, 1914.

According to rules announced by Denmark, Aug. 6, 1914, for the protection of Danish commerce and navigation during the existing war "It is prohibited the commander of the [Danish] ship to sail for any harbor which is blockaded by one of the belligerent powers. As far as possible, he must ascertain if the harbor to which he intends to sail is free." (Naval War College, Int. Law Topics, 1916, 53, citing *Lovtidende for Kongeriget Danmark*, 1914, a, p. 685.)

² Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 29. See, also, Instructions to United States Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 781, Moore, Dig., VII, 837.

³ See Memorandum on Status of Armed Merchant Vessels, March 25, 1916, For. Rel. 1916, Supp., 244, 247.

Sir Edward Grey, British Foreign Secy., in announcing to Mr. Page, American Ambassador at London, the so-called "retaliatory" order in council of March 11, 1915, declared: "His Majesty's Government have felt most reluctant at the moment of initiating a policy of blockade to exact from neutral ships all the penalties attaching to a breach of blockade. In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral sea-borne commerce, they declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargoes which belligerents have always claimed in respect of breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory." The terms of the order in council were in harmony with this statement. For. Rel. 1915, Supp., 143.

⁴ Art. XXI, Charles' Treaties, 272.

See, also, statement in Moore, Dig., VII, 837, citing Halleck, Int. Law (3d ed. by Baker), II, 208-209, referring to Duer on Insurance, I, 683-685.

⁵ General Orders, No. 492, For. Rel. 1898, 780, 781.

See, also, in this connection, Mr. Seward, Secy. of State, to Mr. Welles, Secy. of the Navy, Dec. 31, 1861, 56 MS. Dom. Let. 133, Moore, Dig., VII, 838.

⁶ Art. XLV, Naval War College, Int. Law Discussions, 1903, 113.

⁷ "But the practice of the several States has differed much concerning the penalty for breach of blockade. According to British and American practice before the World War, confiscation of both vessel and cargo might take place in case the owners of the vessel were identical with those of the cargo. In case vessel and cargo had not the same owners, confiscation of both took place only when the cargo consisted of contraband of war or the owners knew of the blockade at the time the cargo was shipped for the blockaded port. It mattered not whether the captured vessel which carried the cargo had herself actually passed

If a vessel has succeeded in escaping from a blockaded port, liability to capture continues, according to American opinion, until the completion of the voyage; "but with the termination of the voyage the offense ends."⁸ Thus the ship would not appear to effect a deposit of its offense by putting into a neutral port en route to that of final destination.⁹ According to the Declaration of London, a ship which has broken a blockade outwards (as well as one which has attempted to break a blockade inwards) is liable to capture so long as pursued by a ship of the blockading force. If pursuit is abandoned, capture can no longer be effected.¹⁰ The report of Mr. Renault in behalf of the drafting committee declares that the question whether or not pursuit is abandoned is one of fact; and that "it is not enough that the vessel should take refuge in a neutral port." He adds that "the ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended, but not abandoned."¹¹ While this explanation appears to lessen the practical distinction between the requirements of the Declaration of London and those attributable to Anglo-American opinion, there is still room for doubt whether the former indicates the sounder rule.¹² At least it is reasonable to claim that the right of an aggrieved belligerent to deal with an offending neutral ship, for whose conduct its own State dare make no excuse, should not be cut off by the abandonment of pursuit by the restricted agency permitted to effect capture.

4
 AMELIORATIONS

(a)

§ 838. **Vessels in Distress.** The exercise of the right to cut off all intercourse by sea between a blockaded place and the outside world would manifest an abuse of power if a vessel in actual distress were denied an entrance necessary for the safety of the ship and its occupants. According to the Naval Instructions

through the blockaded line, or whether the breach of blockade was effected through the combined action of lighters and the vessel, the lighters passing the line and discharging the cargo into the vessel near the line, or vice versa. The cargo alone was confiscated, according to the judgments of the American Prize Courts during the Civil War in the case of the *Springbok* and in similar cases, when goods ultimately destined for a blockaded port were sent to a neutral port on a vessel whose owners were ignorant of this ulterior destination of the goods." (Lauterpacht's 6th Ed. of Oppenheim, II, 650.)

⁸ Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 31; also Instructions to American Blockading Vessels and Cruisers, June 20, 1898, General Orders, No. 492, For. Rel. 1898, 780, 781; Art. XLIV, Stockton's Naval War Code of 1900 (withdrawn in 1904), Naval War College, Int. Law Discussions, 1903, 113. See, also, Moore, Dig., VII, 839, and documents there cited; The Wren, 6 Wall. 582.

⁹ Concerning the British practice, see J. A. Hall, Law of Naval Warfare, 2 ed. revised, 205-206, and cases there cited, and especially in this connection, The General Hamilton, 6 Ch. Rob. 61.

¹⁰ Art. XX, Charles' Treaties, 271.

¹¹ Charles' Treaties, 294. See, also, Report of the American Delegation at the London Conference (Rear Admiral Stockton and Prof. Wilson) to the Secretary of State, March 2, 1909, *id.*, 332, 333.

¹² It may be observed that in The Memphis, Blatchf. Prize Cases, 260, Moore, Dig., VII, 837, it was declared that capture for breach of blockade might be effected by a vessel not attached to the blockading force.

Governing Maritime Warfare of June 30, 1917, "in circumstances of urgent distress beyond the possibility of relief by the blockading force, a neutral vessel may be permitted to enter a place under blockade and subsequently to leave it under conditions prescribed by the commanding officer of the blockading force."¹ Under such circumstances, the belligerent is believed to lack the right to withhold permission, the yielding of which is not, therefore, to be attributed to grace or courtesy.

This principle finds recognition in the Declaration of London, and in the Report of the Drafting Committee explanatory of it.² Obviously no ship accorded for such reason a right of entrance, is entitled to any privilege, commercial or otherwise, the enjoyment of which would betoken abuse of sojourn within the blockaded area.³

It may be observed that the Government of the United States, after some difficulty, secured from the French Government in 1916, a sufficient relaxation of the blockade of the coast of Syria to permit certain American ships to take medical supplies thereunto.⁴

b

§ 839. Neutral Ships in Blockaded Ports — Days of Grace. (The unreasonableness of subjecting neutral ships in blockaded ports at the time of the establishment of the blockade to the full rigor of the prohibitions of egress, has given rise to a special usage with respect to which, according to Hall, there is no difference of opinion.¹ That usage, which has always found the hearty support of American opinion,² has been said to have assumed the form of "a general rule that while a period is allowed — usually of fifteen days — during which vessels may depart either in ballast or with cargo bought and shipped before the commencement of the blockade, no cargo is permitted to be shipped after the blockade is instituted."³

It may be doubted whether at the present time any generally accepted rule of law has fixed a minimum number of days of grace. The blockading power

¹ § 838. ¹ No. 33. See, also, *The Diana*, 7 Wall. 354.

² Report of Mr. Renault, *Charles' Treaties*, 282, 288.

³ Thus, according to Art. VII of the Declaration of London: "In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there." (*Charles' Treaties*, 270.)

See also Art. 76, *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *Am. J.*, XXXIII, *Supplement Section 2*, 191, and *Comment id.*, 721.

See Lauterpacht's 5 ed. of *Oppenheim*, II, § 386.

⁴ See documents in *For. Rel.* 1916, *Supp.*, 927, 929-930, 935-940.

⁵ § 839. ¹ Higgins' 8 ed., § 262.

⁶ See *Marshall, C. J.*, in *Olivera v. Union Insurance Co.*, 3 Wheat. 183, 194, quoted in *Moore, Dig.*, VII, 849; also note of Wheaton appended to this case, 196, 198, and quoted in *Moore, Dig.*, VII, 835.

See, also, Mr. Seward, Secy. of State, to Baron Gerolt, Prussian Minister, May 2, 1861, *MS. Notes to Prussian Legation*, VII, 109, *Moore, Dig.*, VII, 849.

⁷ The language quoted is that of Prof. Moore, in *Dig.*, VII, 850-851.

See, also, *The Prize Cases*, 2 Black, 635; Circular of Mr. Seward, Secy. of State, Oct. 16, 1861, to the diplomatic corps, *MS. Notes to Netherlands Legation*, VI, 180, *Moore, Dig.*, VII, 850.

Compare Mr. Marcy, Secy. of State, to Mr. Buchanan, April 13, 1854, *H. Ex. Doc.* 103, 33 Cong., 1 Sess., 12, 13, *Moore, Dig.*, VII, 849.

appears to enjoy much latitude. In the blockades instituted by the United States during the War with Spain in 1898, a period of 30 days was allowed for vessels to issue with cargo from blockaded ports.⁴ Stockton's Naval War Code of 1900 (subsequently withdrawn) regarded such an allowance as the normal one "unless otherwise specially ordered."⁵ The Declaration of London made no reference to the matter. The Naval Instructions Governing Maritime Warfare, of June 30, 1917, simply enjoin upon blockading officers the duty to observe the terms of such special rules as the United States may adopt regarding days of grace and conditions of lading.⁶

Inasmuch as the departure with cargo from a blockaded port of numerous vessels of large tonnage may serve to weaken to a perceptible degree the efficacy of the belligerent measure, the existing tendency to diminish the time allowance is not unreasonable.⁷ A blockading power is believed to be well within its rights in forbidding any cargo to be shipped after the blockade has been instituted. The whole matter appears, however, to call for general agreement indicating the extent of any duty with respect to both ships and cargoes, and prescribing the treatment to be accorded each.)

c

§ 840. **Ships of War — Diplomatic Agents.** In the course of the Civil War the Department of State declared it to be the right of "armed vessels of neutral States" to enter as well as depart from blockaded ports.¹ During the War with

⁴ See proclamation of blockade of certain Cuban ports, April 22, 1898, For. Rel. 1898, 769; proclamation of blockade of southern Cuba and San Juan, P. R., June 27, 1898, *id.*, 773; Instructions to American Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, *id.*, 780.

Attention is called to the following statement in Moore, Dig., VII, 851, concerning the conduct of the United States in the course of the War with Spain: "In the first proclamation of blockade by the United States, which was issued April 22, a period of thirty days was allowed for the departure of neutral vessels from the blockaded ports, but nothing was said as to the cargo. The natural inference would therefore have been that no cargo could be taken on board after the blockade was instituted. But in applying the proclamation to the cases that arose under it, the United States construed it as permitting the taking of cargo during the thirty days, and when the next proclamation was issued, the point was expressly covered by a clause in which it was stated that neutral vessels lying in any of the ports to which the blockade was then extended would be allowed 'thirty days to issue therefrom with cargo.' The same rules were applied in the case of the *de facto* blockades established by Admiral Dewey in the Philippines."

⁵ Art. XLIII, Naval War College, Int. Law Discussions, 1903, 113.

⁶ No. 34. "The length of time allowed for the departure of neutral vessels may be fixed at the discretion of the blockading belligerent within the limits of reasonableness. In modern wars, it has varied from one to forty days." (Comment on Art. 78 *c* of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War," *Am. J.*, XXXIII, Supplement Section 2, 728.)

⁷ In Note 2, p. 861, of his 8th edition of Hall, Professor A. P. Higgins states that "in the British blockades in 1915, of German East Africa, of the Cameroons, of the entrance to the Dardanelles and the coast of Asia Minor, and the Bulgarian coast in the Aegean Sea, the periods of grace for neutral vessels were respectively four days, forty-eight hours, seventy-two hours, and forty-eight hours." Citing Man. of Emergency Legislation, Supp. iii, 292-293, Supp. iv, 102, *London Gazette*, 1915, p. 10261.

§ 840.¹ Mr. Seward, Secy. of State, to Baron Gerolt, Prussian Minister, May 2, 1861, MS. Notes to Prussian Legation, VII, 110, Moore, Dig., VII, 852. See same to Lord Lyons, British Minister, circular, Oct. 4, 1861, to the effect that no foreign vessel of war entering or departing from a blockaded port should "carry any person as a passenger, or any correspondence other than that between the Government of the country to which the vessel may belong and

Spain, in 1898, Mr. Day, Secretary of State, in a note to all foreign diplomatic representatives in Washington, suggested that it was desirable that neutral vessels of war wishing to enter or depart from ports blockaded by the United States "should pay due regard to the usual naval observances in such cases." He added that while there was no disposition on the part of the Government "to restrict the courteous permission heretofore accorded to neutral men-of-war to enter blockaded ports," it was advisable that "all risk of error or mischance should be avoided by due attention to the rules prescribed by prudence as well as by courtesy."² Thereupon the German Government took occasion to suggest certain formalities to be observed by neutral ships of war.³ The German suggestions met with the approval of the Department of State and were made the basis of the following rules enunciated by it:

1. That a prerequisite of the entrance of a neutral vessel of war into a blockaded port, unless in a case of exceptional urgency, should be the consent of the Government establishing the blockade, obtained through the usual diplomatic channels.

2. The approach of the blockaded port in such a manner that the senior officer of the blockading squadron would recognize with certainty upon the appearance of a neutral vessel in the blockaded belt her identity with the war vessel of whose coming he had been notified.

3. In such exceptional cases as prevent permission being previously obtained through the usual diplomatic channels, the decision to rest with the senior officer present of the blockading squadron.

4. No special formalities in connection with the departure of neutral vessels of war from a blockaded port are requisite other than may be necessary to identify the vessel leaving the port as a neutral, the arrangements concerning the same to be agreed upon between the commanding officer of the blockading squadron and the commanding officer of the vessel in the blockaded port.⁴

According to the Naval Instructions Governing Maritime Warfare, of June 30, 1917, "vessels of war of neutral powers have not the positive right of entry to a blockaded port." It is said that they should, however, as a matter of courtesy, when practicable, be allowed free passage to and from a blockaded port. It is stated that permission to visit such a port is subject to any conditions as to length of stay or otherwise which the senior officer of the blockade may deem necessary and expedient.⁵

the diplomatic and consular agents of such country at the ports adverted to." Dip. Cor. 1861, 152, Moore, Dig., VII, 852.

² See circular, July 15, 1898, For. Rel. 1898, 1159, Moore, Dig., VII, 853.

³ Mr. von Holleben, German Ambassador at Washington, to Mr. Day, Secy. of State, Aug. 26, 1898, For. Rel. 1898, 1167, Moore, Dig., VII, 853.

⁴ Mr. Adee, Acting Secy. of State, to Mr. von Holleben, German Ambassador, Sept. 28, 1898, For. Rel. 1898, 1168.

See, also, For. Rel. 1898, 974-975, respecting the inquiry by Great Britain shortly after the outbreak of the Spanish-American War whether facilities would be granted to two British vessels of war which there was a desire to send to certain Cuban ports for the purpose of giving necessary advice or assistance to British consular officers.

⁵ No. 32. Also Art. XXXVIII, Stockton's Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 112.

The United States appears to take the position that a neutral diplomatic agent is normally entitled to leave a blockaded place.⁶ Doubtless the blockading power may not unreasonably prescribe the mode of departure, and also take appropriate measures to prevent, if need be, any abuse of his privilege by the departing officer. It is believed that the consent of the blockading Government, obtained through the diplomatic channel, should be a prerequisite to the entrance of such an individual to a blockaded port even though belonging to the State to which he is accredited. In the absence of solid grounds for concluding that his sojourn there would be characterized by unneutral conduct, or that his mode of entrance would disregard a procedure deemed essential, consent should not be withheld.⁷

d

§ 841. **Special Concessions.** There may be, in fact, ameliorations of a blockade of a kind such that the very yielding of them, far from being attributable to any legal duty to a particular neutral, is inconsistent with the general inhibition of intercourse with the blockaded place, and hence at variance with the theory justifying such a means of weakening the enemy. Thus, if a blockading power permits vessels from its own ports to trade with those supposedly blockaded, and to which access for commercial and other purposes is barred to ships issuing from neutral ports, it cannot reasonably claim that the interference with neutral trade is a necessary mode of molesting the enemy.¹ Nor should there be any discrimination favorable to a particular State or group of States the territories of which happen to be in special proximity to a blockaded coast.² In a word, any general limitation of the scope of the operation of a blockade calcu-

According to Art. VI of the Declaration of London: "The commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port." Charles' Treaties, 270.

⁶ See Mr. Seward, Secy. of State, to Mr. Webb, American Minister to Brazil, No. 233, Aug. 17, 1868, Dip. Cor. 1868, II, 298, Moore, Dig., VII, 854.

⁷ "I am aware of no instance in which the right of blockade has been invoked for the purpose of preventing the Government of a neutral and friendly State from communicating with its diplomatic agent accredited to the Government of the blockaded territory. It is believed that safe conducts are rarely, if ever, refused under such circumstances, and when the refusal does take place the aggrieved party has a right to expect sufficient reasons therefor." (Mr. Fish, Secy. of State, to Mr. Kirk, June 17, 1869, MS. Inst. Argentine Republic, XV, 317, Moore, Dig., VII, 854.)

See Moore, Arbitrations, V, 4505-4506, respecting the inability of Mr. Nelson, American Minister to Spain, to enter Cadiz in 1823, on account of the blockade of that port by a French naval force.

§ 841. ¹ See *The Franciska*, 10 Moore, P. C. 56, cited by Mr. Lansing, Secy. of State, in a communication to Mr. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 31-32. See, also, Twiss, Law of Nations, Part II, Rights and Duties in Time of War, 229, *quoting* Dr. Lushington in *The Franciska*, 2 Spinks, 135, Moore, Dig., VII, 845.

See *The Controversy between the United States and Great Britain, 1915-16*, *supra*, §§ 829-831.

² Twiss, Law of Nations, Part II, Rights and Duties in Time of War, 226, Moore, Dig., VII, 845.

Declares J. A. Hall, after quoting *The Franciska*, 10 Moore, P. C. 56: "In other words, special vessels under special circumstances may be given permission to enter or leave, but there must be no general discrimination to the detriment of neutrals as against belligerents, or of one neutral as against others." (Law of Naval Warfare, London, 1914, 84.)

lated to be advantageous to States not engaged in the war, should be made applicable to all neutral powers alike, and be no less favorable than any conceded to shipping emanating from belligerent ports. Failure to respect this requirement must on principle be deemed to clothe the neutral subjected to discrimination with the right to ignore the continued maintenance of the blockade as a lawful belligerent measure.

Doubtless a blockading power may yield a variety of minor concessions without exposing itself to a charge of inconsistent conduct. The United States has not infrequently done so. It has, for example, permitted foreign neutral Governments to remove from blockaded areas property purchased and paid for by them prior to the establishment of the blockade.³ It has, under certain conditions, allowed neutral steamers to enter blockaded ports for the purpose of landing passengers and mail,⁴ forbidding, however, the landing or removal of cargo.⁵ It has accorded special permission to vessels to enter and remove Americans and neutrals desirous of leaving.⁶ It has, in exceptional circumstances, permitted neutral ships to reënter ports from which they had departed on notification of the institution of a blockade, but without knowledge of the terms of days of grace with respect to the loading of cargoes, and there to take on board those previously abandoned.⁷

Through numerous informal arrangements there were some relaxations (of which American nationals were beneficiaries) in the operation of the Anglo-French blockade announced in the Declaration of March 1, 1915.⁸

The issuance of a license to enter or depart from a blockaded port by an officer without authority to grant it is regarded as invalid, and hence insufficient to save a vessel from condemnation on the charge of blockade running.⁹ Obviously, a foreign ship availing itself of a concession in relaxation of a blockade

³ See Mr. Fish, Secy. of State, to Mr. Johnston, U. S. Senator, Feb. 27, 1872, 92 MS. Dom. Let., 587, Moore, Dig., VII, 846.

⁴ See Mr. Day, Secy. of State, to Mr. Cambon, French Ambassador, May 7, 1898, MS. Notes to French Leg., X, 492, Moore, Dig., VII, 847, and statement based thereon by Prof. Moore.

⁵ See Mr. Day, Secy. of State, to Mr. von Holleben, German Ambassador, May 10 and 13, 1898, MS. Notes to German Leg., XII, 132 and 134, Moore, Dig., VII, 847.

See, also, Mr. Day, to Sir J. Pauncefoot, British Ambassador, No. 1016, May 16, 1898, MS. Notes to Brit. Leg., XXIV, 191, Moore, Dig., VII, 847.

⁶ See Mr. Moore, Acting Secy. of State, to Messrs. E. A. Atkins & Co., telegrams, May 3 and May 5, 1898, 228 Dom. Let. 227 and 269, Moore, Dig., VII, 847; Same, to Mr. Manso, May 9, 1898, 228 Dom. Let. 355, Moore, Dig., VII, 847.

⁷ Moore, Dig., VII, 848, and documents there cited relative to privileges extended in the course of the War with Spain in 1898, to the British steamer *Myrtledene* and the Norwegian steamers *Foksjo* and *Uto*.

⁸ See for example, public announcement by the British Embassy at Washington, March 8, 1915, as to cotton consigned to neutral ports only, For. Rel. 1915, Supp., 189.

See also correspondence and informal arrangements regarding the importation of goods from Germany and occupied territory under the British and French Declaration of March 1, 1915, and the orders and decrees for its enforcement, For. Rel. 1915, Supp., 207-268; informal arrangements regarding the importation of goods from Germany and Austria-Hungary, For. Rel. 1916, Supp., 523-584.

See documents concerning arrangements with Great Britain for the importation of goods of German origin detained in the Netherlands, in For. Rel. 1917, Supp., I, 509-517.

⁹ The Sea Lion, 5 Wall. 630, Moore, Dig., VII, 845; also The Ouachita Cotton, 6 Wall. 521, 531.

must be deemed to consent to the terms imposed.¹⁰ Whether a general license to trade with enemy ports is to be construed as conferring authority to enter those under blockade, raises a question of domestic rather than of international law, and one involving primarily examination of the evidence indicative of the scope of what was granted.¹⁷

5

§ 842. Termination. Acts of God, or of the enemy, or of the blockading power itself, may in fact remove the barrier rendering dangerous the attempts of neutral ships to enter a belligerent port. The question presents itself, therefore, to what extent such a consequence, in view of the cause producing it, affects the right of capture. If the blockading vessels be driven away by stress of weather and return thereafter without delay to their station, the continuity of the blockade is not deemed to be broken.¹ In such case the brief though actual period of ineffective maintenance is not believed to terminate the belligerent measure. The existing mode of maintaining a blockade by more than a single line of vessels cruising at remote distances from the hostile coast, diminishes the likelihood that stress of weather will continue to lessen to the same degree as formerly the danger sought to be eluded by the blockade runner.

If the blockading vessels are driven away by the enemy, the blockade ceases to be effective, and neutral ships become thereupon free to disregard it.² At the present time such driving away of the blockading vessels may entail so complicated and vast an undertaking as to render it extremely difficult for a neutral State or ship soon to ascertain whether that achievement has been accomplished. According to the Naval Instructions of June 30, 1917, there is also a cessation of effectiveness, if the blockading vessels voluntarily leave their stations, except for a reason connected with the blockade, as for instance, the chase of a blockade runner.³ In both of the foregoing situations the failure to preserve the con-

¹⁰ *United States v. Dieckman*, 92 U. S. 520, Moore, Dig., VII, 845.

¹¹ Moore, Dig., VII, 844, respecting discussions of the views of Lord Stowell in *The Byfield*, Edwards Admr. 188, and *The Hoffnung*, 2 Ch. Rob. 162.

§ 842. ¹ Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 27.

See, also, Art. IV of Declaration of London, Charles' Treaties, 269; also Report of Mr. Renault in behalf of the Drafting Committee of the Declaration of London, *id.*, 282, 287.

See also Art. 75 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 191.

² See Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 27. Compare language of Instructions to American Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, Moore, Dig., VII, 844.

³ No. 27. "The blockade of Charleston, South Carolina, was carried into effect on May 11, 1861, when the U.S.S. *Niagara* took her position there. Subsequently, the *Niagara* was ordered to be replaced by the steamer *Harriet Lane*, but, owing to some accident, the latter failed to reach the station until a day or two after the *Niagara* had left. Without discussing the effect that this absence of the blockading force might have on any vessel that had entered or departed during that brief time, Mr. Seward maintained that it had not so far impaired the blockade as to render necessary a new notice of its existence." (J. B. Moore, Dig., VII, 843, citing Mr. Seward, Secy. of State, to Lord Lyons, British Minister, May 27, 1861, MS. Notes to Great Britain, VIII, 429.) See criticism of the position of the United States in this case in Hall, Higgins' 8 ed., note 3, p. 855.

See, also, Mr. Wilson, Acting Secy. of State, to Mr. Thompson, American Minister, telegram, July 22, 1910, with respect to the effect of the absence from its station, for long

tinuity and effectiveness of the blockade operates as a suspension of it, necessitating fresh notification to neutral States in case reestablishment is attempted.⁴

While it must be clear that the blockade of a port is terminated by the capture thereof by the blockading power, a military operation by that belligerent, effecting control over territory behind or in the vicinity of such port, which remains, however, still uncaptured, does not serve to raise the blockade of the latter.⁵

A blockade may be terminated by the voluntary act of the belligerent which instituted it. According to the Declaration of London, such action should be notified in the manner prescribed for the notification of a declaration of blockade.⁶

6

§ 843. **Obstruction of Navigable Channels.** A belligerent doubtless possesses the right to obstruct by such means as it sees fit the navigable channels of its own ports, or of those in possession of the enemy.¹ The United States did not hesitate to act on this principle in the course of the Civil War,² or in that of the War with Spain in 1898,³ or as a belligerent in World War I.⁴ The Department

periods, of the ship *Venus*, apparently the only blockading force possessed by the Madriz faction in Nicaragua, and employed to maintain a blockade of the port of Bluefields. For. Rel. 1910, 756, 757.

⁴ Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 27.

According to Art. XII of the Declaration of London: "The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is reestablished after having been raised." (Charles' Treaties, 270.)

⁵ The Supreme Court of the United States acted on this principle in *The Circassian*, 2 Wall. 135. See careful note in Moore, Dig., VII, 841, where attention is called to the fact that an apparent difference of opinion as to the facts was the reason for the award by a majority of the Mixed Commission under the Treaty of Washington, of compensation to the owners of the vessel. See in this connection, Moore, Arbitrations, IV, 3911.

See, also, *The Adula*, 176 U. S. 361, Moore, Dig., VII, 842, affirming 89 Fed. 351.

⁶ Art. XIII, Charles' Treaties, 271.

§ 843. ¹ "It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seek the port either as hostile cruisers or as blockade runners. This was done by the Dutch when attacked by Spain, in the time of Philip II; by England when attacked by the Dutch, in the time of Charles II; by the United States when attacked by Great Britain, in the Revolutionary War and in the War of 1812; by the United States during the late Civil War; by Russia at the siege of Sebastopol; and by Germany during the Franco-German War of 1870." (Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, No. 90, July 28, 1886, For. Rel. 1886, 95, Moore, Dig., VII, 857.)

See, also, Mr. Frelinghuysen, Secy. of State, to Mr. Young, Minister to China, telegram, Jan. 22, 1884, For. Rel. 1884, 64, Moore, Dig., VII, 856; Mr. Gresham, Secy. of State, to Mr. Denby, Jr., Chargé d'Affaires at Peking, Sept. 28, 1894, MS. Inst. China, V, 95, Moore, Dig., VII, 858.

² See Mr. Seward, Secy. of State, to Mr. Adams, American Minister at London, No. 187, Feb. 17, 1862, Dip. Cor. 1862, 36, Moore, Dig., VII, 855.

³ "On the night of June 3, [1898] Lieutenant Hobson, aided by seven devoted volunteers, blocked the narrow outlet from Santiago harbor by sinking the collier *Merrimac* in the channel, under a fierce fire from the shore batteries, escaping with their lives as by a miracle, but falling into the hands of the Spaniards. It is a most gratifying incident of the war that the bravery of this little band of heroes was cordially appreciated by the Spanish Admiral, who sent a flag of truce to notify Admiral Sampson of their safety and to compliment them on their daring act." (President McKinley, Annual Message, Dec. 5, 1898, For. Rel. 1898, xlix, lix.)

The blocking by British naval forces in 1918, of the entrance to the channels at Ostend and Zeebrugge afford recent instances of the exercise of this belligerent right. See A. Laurens, *Le Blocus et la Guerre sousmarine* (1914-1918), Paris, 1924, 162.

⁴ See, for example, executive order of April 5, 1917 (the day before the United States de-

of State announced in 1886, that it was "equally settled by the law of nations" that when war ceases, such obstructions as impede navigation in channels in which great ships are accustomed to pass, must be removed by the territorial authorities.⁵ It should be observed that this statement had reference to the obligation deemed to be imposed upon the Chinese Government to remove obstructions in the Canton River, and serving to close the port of Canton, free access to which in time of peace had, it was declared, been virtually accorded by treaty to American merchantmen.

Any duty on the part of territorial authorities to remove obstructions from navigable channels must, in respect to foreign States, depend upon the right of the latter to enjoy access thereto in time of peace. Thus if a channel within territorial waters merely leads to a port within the domain of the same sovereign, and which it may lawfully close, no obligation would appear to rest upon it to remove the obstructions.⁶ It is not likely, however, that at the present time a State would, after the termination of a war, be disposed to stand upon its rights in such a matter, and so permit such a barrier long to impede its foreign commerce.

It is the obvious duty of a maritime State when war ceases, if not at an earlier time, as upon the termination of hostilities, to remove obstructions which as a belligerent it placed in waters outside of its own territorial limits and in proximity thereto, and which are normally open to navigation generally.⁷

clared war), establishing defensive sea areas, and the regulations for carrying it into effect, Official Bulletin, May 12, 1917, Vol. I, No. 3, pp. 6-7.

See, also, executive order of June 29, 1918, Official Bulletin, July 2, 1918, Vol. II, No. 350.

⁵ Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, No. 90, July 28, 1886, For. Rel. 1886, 95, Moore, Dig., VII, 857.

⁶ It is not understood that Mr. Seward, in his correspondence with Great Britain and France in 1862, admitted such an obligation. See Moore, Dig., VII, 855, and documents there cited. But see Secy. Bayard, in communication above cited, of July 28, 1886, to Mr. Denby, Minister to China.

⁷ See Submarine Automatic Contact Mines. Indication and Removal upon Termination of Hostilities, *supra*, § 719.

TITLE K

NEUTRALITY

1

THE DUTIES OF A NEUTRAL STATE

a

§ 844. **Nature of the Obligation.** At the time when the United States declared its independence the obligations of a State not participating in a war towards others engaged in conflict were roughly understood and variously observed.¹ The eighteenth century had doubtless marked the growth of respect for the principle that a neutral State ought to abstain from giving direct aid to a belligerent. Nevertheless, in 1776, it was by no means agreed that a neutral which, pursuant to an existing agreement, lent military aid to a belligerent, was necessarily guilty of censurable conduct.² Treaties were, however, then being

§ 844. ¹ See generally, *Neutrality, Its History, Economics and Law*, 4 volumes, New York, Columbia University Press, 1935-1936 (I, *The Origins*, by P. C. Jessup and Francis Deák; II, *The Napoleonic Period*, by W. Alison Phillips; III, *The World War Period*, by Edgar Turlington; IV, *Today and Tomorrow*, by P. C. Jessup); Fenwick, *The Neutrality Laws of the United States*, Washington, 1913; same author, *International Law*, 2 ed., 530-547; same author, *American Neutrality: Trial and Failure*, New York, 1940; Hall, Higgins' 8 ed., §§ 208-213; Oppenheim, Lauterpacht's 6 ed., II, 487-626 (with bibliography preceding § 285); David J. Hill, *The Conception and Realization of Neutrality*, Boston, 1902; Carnegie Endowment for International Peace Library, Washington, *Bibliography on Neutrality*, compiled by M. Alice Matthews, Reading List No. 37, Sept. 26, 1938; Alice M. Morrissey, *The American Defense of Neutral Rights, 1914-1917*, Cambridge, 1939; same author, "The United States and the Rights of Neutrals, 1917-1918," *Am. J.*, XXXI, 17; George Cohn, *Neo-Neutrality*, translated from the Danish by Arthur S. Keller and Elinar Jensen, New York, 1939.

See also Charles S. Hyneman, *The First American Neutrality*, Illinois Studies in the Social Sciences, XX, Nos. 1-2, Urbana, Illinois, 1934; C. H. McLaughlin, "Legislative Neutrality in the United States," *Minnesota Law Review*, 1938, XXII, 603-660; Edwin Borchard and William Potter Lage, *Neutrality for the United States*, New Haven, 1937; Charles Callan Tansill, *America Goes to War*, Boston, 1938; James Simsarian, "American Neutrality," *National Lawyers Guild Quarterly*, II, 193.

See in particular, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries*, edited and annotated by Francis Deák and Philip C. Jessup, 2 volumes, Washington, 1939, currently supplemented; Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with Comment, P. C. Jessup, Reporter, Oliver J. Lissitzyn, Assistant Reporter, *Am. J.*, XXXIII, *Supplement Section 2*, 1939; General Declaration of Neutrality of the American Republics, from the Consultative Meeting of Foreign Ministers of the American Republics, Oct. 3, 1939, *Am. J.*, XXXIV, *Supplement, Official Documents*, 8.

² Declares Hall: "It was not until 1788 that the right of a neutral State to give succour under treaty to a belligerent gave rise to serious, if to any, protest. Denmark, while fulfilling in favour of Russia an obligation of limited assistance contracted under treaty, declared itself to be in a state of amity with Sweden. The latter power acquiesced as a matter of con-

concluded which forbade either contracting party so to aid an enemy of the other in case of war. The United States early agreed to such an arrangement by its treaty with Prussia of September 10, 1785.³ The principle that the government of a neutral State should not only remain impartial, but also refrain from even impartial participation in the conflict was so reasonable and expedient from every point of view, that nations were bound to accept it as a canon of international law.⁴ It here suffices to note the fact without attempting to estimate the exact time when they did so.

That a neutral State might well, as a matter of policy if not of duty, exert itself to prevent certain forms of participation in the conflict by persons within places under its control, began also to be acknowledged. Agreements declaring that no citizen, subject or inhabitant of territory of one contracting party should take letters of marque for the arming of a vessel to act as a privateer against the other, from a third power, were not infrequent. Treaties of the United States with France in 1778, with the Netherlands in 1782, with Sweden in 1783, and with Prussia in 1785, contained such provision.⁵ Even if without value as an indication of what the law of nations was at that time deemed to require, these conventions still testify to the view then prevailing that States found it both desirable and feasible to restrain their nationals and others under their control from engaging in certain forms of hostility against nations with which amicable relations were maintained.

Almost simultaneously with the American Revolution statesmen gradually perceived the underlying principle giving rise to the obligations of a neutral State, and which if suggested by the great publicists of an earlier period of the same century, such as Bynkershoek and Vattel, had long remained unclarified. That principle was within a score of years distinctly and impressively enunciated by those in charge of the foreign relations of the United States as the basis of its own policy and law, and as the foundation of its demands upon belligerent powers.⁶

venience in the continuance of peace, but it placed on record a denial that the conduct of Denmark was permissible under the Law of Nations. Probably Sweden stood almost alone in her view as to the requirements of neutral duty." (Higgins' 8 ed., 701.) See, also, in this connection, Dana's Wheaton, § 424, and the comment thereon in Dana's Note No. 203.

³ According to Art. XX: "Nor shall either party hire, lend, or give any part of their naval or military force to the enemy of the other, to aid them offensively or defensively against that other." (Malloy's Treaties, II, 1483.)

See, also, Arts. II and XI of treaty between Oliver Cromwell and Christina, Queen of Sweden, April 11, 1654. General Collection of Treatys of Peace and Commerce, London, 1732, pp. 90 and 102.

⁴ The obligation that rests upon a neutral State to be and remain impartial is well enunciated in Article 4 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, in the following form: "A neutral State, in the exercise of its neutral rights and in the performance of its neutral duties, shall be impartial and shall refrain from discrimination between belligerents." (*Am. J.*, XXXIII, *Supplement Section 2*, 176.)

⁵ Art. XXI, treaty of amity and commerce with France, Feb. 6, 1778, Malloy's Treaties, I, 475; Art. XIX, treaty with the Netherlands, Oct. 8, 1782, *id.*, II, 1239; Art. XXIII, treaty with Sweden, April 3, 1783, *id.*, II, 1733; Art. XX, treaty with Prussia, Sept. 10, 1785, *id.*, II, 1483.

⁶ It may be doubted whether any contribution of the United States towards the formulation of international public law as distinct from policy has thus far been so influential as that which before the close of the eighteenth century it offered in its State papers and domestic

Upon the outbreak of war between England and France in 1793, Mr. Genet, the French Minister to the United States, had asserted the right to fit out and commission privateers in the country to which he was accredited. In response, Mr. Jefferson, Secretary of State, declared that such conduct was "incompatible with the territorial sovereignty of the United States," that it was

the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country.⁷

Herein was disclosed a solid reason for a broad duty of prevention. If a neutral failed to exercise exclusive sovereignty within its own domain by permitting acts in derogation thereof to be committed therein, and that by a belligerent against its enemy, there was a manifest failure in the performance of an obligation towards the latter. Moreover, in case of failure, the neutral was burdened with further duty of making amends to the belligerent which had suffered in consequence of neglect.⁸ While the scope of the duty thus early perceived was wide, the measure of diligence which it behooved a neutral to exert in the fulfillment of it was not fully understood or well defined until a later time. The general test laid down was, however, simple and clear. It indicated the nature of belligerent abuses and of neutral supineness.⁹

§ 845. **The Same.** From the obligation not to permit the commissioning of a

laws dealing with neutrality. See Act of June 5, 1794, I Stat. 381, C. G. Fenwick, *Neutrality Laws of the United States*, 173. The very weakness of the new Republic made imperative the need of avoiding the wars which harassed Europe. This circumstance, together with certain provisions, unwise in purport and unfortunate in phraseology, which were contained in the treaty of amity and commerce with France, of 1778, produced a readiness to espouse a principle which a powerful State, normally a participant in the wars waged around it, might not have been alert to perceive or disposed to advocate.

See, also, in this connection, statement in Moore, Dig., VII, 886-888, *quoting* Hall, 5 ed., 593.

⁷ See communication to Mr. Genet, June 5, 1793, Am. State Pap., For. Rel. I, 150; also Same to Same, Aug. 7, 1793, *id.*, 167; Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister, Sept. 5, 1793, *id.*, 174. For a résumé of this correspondence, see Moore, Dig., VII, 886-888; *id.*, 888-890, for further expressions of the views of Mr. Jefferson.

⁸ Thus on Aug. 7, 1793, Mr. Jefferson advised Mr. Genet that the President regarded the United States "as bound, pursuant to positive assurances, given in conformity to the laws of neutrality, to effectuate the restoration of, or to make compensation for, prizes which shall have been made, of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports." (Am. State Pap., For. Rel. I, 167, Moore, Dig., VII, 887.) A request was made for the restitution of all prizes so taken and brought in subsequent to that date, "in defect of which," it was said, "the President considers it as incumbent upon the United States to indemnify the owners of those prizes, the indemnification to be reimbursed by the French nation."

See, also, Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister, Sept. 5, 1793, Am. State Pap., For. Rel. I, 174, Moore, Dig., VII, 887.

⁹ The discussions with France and England are contained in Vol. I, Am. State Pap., For. Rel., and are reviewed in C. G. Fenwick, *Neutrality Laws of the United States*, 15-26.

See, also, Hamilton's Treasury Circular of Aug. 4, 1793, Am. State Pap., For. Rel. I, 140, 141, Moore, Dig., VII, 890; Rules adopted by the Cabinet as to the equipment of vessels in the ports of the United States by belligerent powers, and proceedings on the conduct of the French Minister, Aug. 3, 1793, Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 891.

vessel of war within the domain of a neutral, it became easy to establish another, imposing upon the neutral the obligation to use at least a certain measure of diligence to prevent the fitting out or arming within and departure from its territory, of a vessel intended and designed to commit hostilities against a belligerent, notwithstanding the circumstance that the ship might not then be commissioned by its enemy or attached to its service.¹ Respect for this obligation was probably not attributable to a conclusion that such conduct within the neutral domain was necessarily to be deemed in derogation of the rights of the territorial sovereign as such, and for that reason to be subjected to repression by it, but rather to a consciousness of the fact that indifference by the neutral would serve to permit the resources of its territory to place within reach of a belligerent an instrument of war capable of direct use and of immediate engagement in hostilities. The reason why such a thing should not be permitted may not have appeared to be identical with that which created the obligation not to permit the commissioning of a belligerent warship within neutral waters. Both reasons sprang, however, from a single root, and that sufficed to call them into being.

It had not been difficult to perceive that the organization of a military expedition by a belligerent on neutral soil was in derogation of the supremacy of the territorial sovereign, and if permitted, exposed it to the charge of neglect of its duty as a neutral. Nor was it beyond comprehension that the setting out from neutral territory of an expedition organized for the purpose of engaging in hostilities against a friendly State, although not in fact organized by a belligerent itself, was something which the neutral should likewise make appropriate effort to thwart. Here again it was the opportunity for direct utilization by a belligerent of a unit of strength emanating from a neutral source, in waging war upon a State with which the neutral was obviously not in conflict, which appeared to require restraint. The test of the duty of prevention was deemed, however, to be dependent upon the immediate availability for service of the group of individuals involved as such, and that in turn upon the fact of their organization. When such was apparent, the obligation seemed to be acknowledged. The neutral was not, on the other hand, believed to be obliged to endeavor to prevent the departure from its domain of persons who, without organization, set forth later to organize and engage in belligerent service.²

§ 846. **The Same.** Again, it became apparent that a neutral should not permit its territory to be employed by a belligerent as a base of military or naval operations. The scope of this obligation varied according to circumstances. If, for example, the belligerent established stores of supplies under its exclusive

§ 845. ¹ Art. VIII of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2359.

² "What have been called expeditions, organized within our limits for foreign service have been only the departure of unassociated individuals. Such a departure, though several may go at the same time, constitutes no infringement of our neutrality laws, no violation of neutral obligations, and furnishes no ground for the arraignment of this Government by any foreign powers." (Mr. Marcy, Secy. of State, to Mr. Escalante, May 8, 1856, MS. Notes to Spain, VII, 79, Moore, Dig., VII, 927.) See *infra*, § 856.

control or protection on neutral soil, and used them according to its convenience for its military or naval forces, there was an assertion of power such as only the territorial sovereign should exercise. A different situation presented itself where a belligerent fleet made constant use of a neutral port for the purpose of adding to its fighting force by supplying its various needs through purchases from private stocks of neutral ownership. Such a case failed to indicate a belligerent usurpation of rights of sovereignty or a wrongful yielding of them by the neutral. The impropriety of tolerance by the latter was due to the direct effect upon the fleet of certain augmentation of its strength. In consequence of the aid received, it might directly attack the enemy, and so at once attain a new offensive power attributable to neutral supply. Such assistance, therefore, it was believed to be the duty of the neutral State to endeavor to withhold.

It may be observed that the several forms of utilization of the territory or resources of a neutral State which the United States since its earliest days has, either as a neutral acknowledged the duty to endeavor to prevent, or as a belligerent has sought to have withheld from its enemy, have been of a kind such that neutral non-prevention or acquiescence would have signified a yielding to a belligerent of sovereign rights, or of such benefits from the national domain as to render it a source of direct and immediate augmentation of belligerent power.

It will be found, however, that in practice States have not been disposed to make full application of the underlying principle giving rise to neutral obligations. Neutral governments, notwithstanding their possession of the requisite power of prevention, appear still to enjoy the right to disclaim responsibility for certain uses of neutral territory and of the resources thereof in direct assistance of a belligerent, when the actors are private individuals. Governmental participation in the conflict is oftentimes not admitted when neutral public agencies lend no aid. It should be borne in mind, however, that rules of tolerance grew out of conditions of warfare prevailing before the beginning of the nineteenth century, when owing to limited means of communication, and to the absence of public vessels propelled by steam, a neutral maritime State would have found it highly difficult, if not impossible, to prevent the departure from its coasts of much that offered substantial aid to a belligerent, and when, moreover, there was no general desire to repress a traffic deemed to offer solid advantages alike to sellers and purchasers.¹ Such a desire has, however, within quite recent years manifested itself in the United States, and to a degree that at times has sufficed temporarily to remold the statutory law.²

§ 846.¹ See, for example, Mr. Jefferson, Secy. of State, to the British Minister, May 15, 1793, Am. State Pap., For. Rel. I, 69, 147, Moore, Dig., VII, 955; also Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, For. Rel. 1915, Supp., 794.

It may be observed that the Second Hague Peace Conference of 1907 manifested approval of certain rules designed to prevent the fundamental principles giving rise to neutral obligations from being so applied as to become an inconvenient obstacle interfering with certain requirements of a belligerent fleet. Neutral powers were thus encouraged to tolerate what might in the particular case serve to transform their territories into bases of belligerent operations. See *infra*, §§ 857-860.

² See Act of May 1, 1937, 50 Stat. 121.

§ 847. **The Same.** The evolution of the law of neutrality was not retarded by the War which began in 1914. That conflict served, however, not only to emphasize the insufficiency of many of the rules previously accepted with complacency, but also to raise the broad question whether the very theory of neutrality, howsoever interpreted, continued to offer to the international society as large safeguards and benefits as might be derivable from general participation in war against the particular belligerent which without reason unsheathed the sword. Before venturing upon any discussion of that issue, it seems important to observe with care, especially in the light of existing conditions, the extent of the variance between the requirements of the acknowledged rules burdening neutral States, and those demanded by logical application of the underlying principle.¹ In the course of that task the inquiry must constantly present itself whether it is the insufficiency of that principle or other considerations which have caused statesmen seriously to propose the abandonment of the theory of neutrality.

b

§ 848. **Governmental Abstention from Direct Participation. Miscellaneous Activities.** A State, embracing the Government thereof, may be strongly inclined to take sides in a war engaging others even when it professes to be neutral to the conflict; and if it does so, it may endeavor to aid the favored cause without acknowledging or desiring loss of its own technical status as a neutral, and without admitting that its conduct is at variance with the requirements of international law. In order to escape the charge that it is itself a participant in the conflict, the neutral State may in fact smooth the way for the inhabitants of its territory to contribute to the cause of the favored belligerent, denying simultaneously any obligation towards its enemy to prevent the departure of their contributions from its domain. The relaxation of the then existing embargo on arms, ammunition and implements of war, through the American Neutrality Act of 1939, is perhaps illustrative.¹ During the first year of the European war initiated in 1939, title to substantial amounts of munitions of war was transferred by the American Government to private entities, and by them in turn yielded to Britain and France.² The pains taken to avoid the

§ 847. ¹ See The Law of Neutrality in the Life of Nations, *infra*, § 889.

§ 848. ¹ See Aspects of The Neutrality Act of 1939, *infra*, § 868A.

See, also, letters by P. C. Jessup and the author to the Editor of the *New York Times*, under dates of Sept. 20 and Oct. 4, 1939, and printed in that newspaper on Sept. 21, and Oct. 5, respectively.

² Declares Mr. Lester H. Woolsey: "It appears from the press of the last few months that pursuant to the policy of the United States Government to aid the cause of the allied belligerents, arrangements have been made whereby old stocks of arms, ammunition, machine-guns and the like left over from the World War in the hands of the War Department have been turned back to the manufacturers as credit on new and improved models, and that the manufacturers have sold them through the Allied Purchasing Agency to the British and French Governments. . . . None of these transactions appear to have been carried on directly between the United States and belligerent countries or their respective agencies. Yet it is clear that the purpose of the United States Government, as announced by the President on several occasions, was to give all possible aid to Great Britain and France in the present war, and these transactions appear to have been carried out in pursuance of that purpose, and as a result of negotiation and concerted action." ("Government Traffic in

charge or intimation that the United States was, through its Government, itself the contributor, suggest that the Government was aware of the obligation which forbade it to become one. With the change in the military situation that developed in Europe in the summer of 1940, the American Government, as is noted elsewhere, essayed to pursue a different course, through a direct contribution to Britain that spelled intervention in the war, and challenged in effect the applicability to the United States of the normal injunction resting upon a neutral to abstain from governmental participation in an existing war.³ What that injunction embraces, however, demands consideration.

On principle, a neutral State is obliged to abstain from all participation, through its government, in the conflict.⁴ Such action is none the less censurable because impartial. The law appears to address its prohibitions to conduct that is essentially public and which manifests itself through the action of an instrument of government. The duty to abstain from giving aid is a broad one and covers a vast field of governmental activities. Some situations in which it is acknowledged to be applicable may be noted. The neutral State must not, for example, permit persons connected with its foreign or other services to furnish aid,⁵ or even give public expression to views that are adverse to the cause of a particular belligerent.⁶

The sale by a neutral government to a belligerent of any form of war material, may be said to be forbidden.⁷ One may find difficulty in reconciling

Contraband," *Am. J.*, XXXIV, 498 and 500, where that writer quotes the following cablegram from the President, of June 15, 1940, to Premier Reynaud: "The Government of the United States has made it possible for the Allied armies to obtain during the weeks that have just passed airplanes, artillery and munitions of many kinds, and this Government, so long as the Allied Governments continue to resist, will redouble its efforts in this direction.")

³ See *infra*, § 848A.

⁴ Declared Oppenheim, in his second edition: "The duty of impartiality today comprises abstention from any active or passive coöperation with belligerents." (II, 382)

According to Art. 5 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A neutral State shall abstain from supplying to a belligerent assistance for the prosecution of the war." (*Am. J.*, XXXIII, *Supplement Section* 2, 176.)

See, also, Arts. 15 and 16 of Habana Maritime Neutrality Convention, Feb. 20, 1928, U. S. Treaty Vol. IV, 4743, 4747.

⁵ See Official Bulletin, Sept. 14, 1917, No. 107, containing translation of a letter from the German Minister to Mexico, to the German Ambassador at Washington, March 8, 1915, concerning the rewarding of the Swedish Chargé d'Affaires at Mexico City, on account of services rendered by him in behalf of Germany, and made public by the Department of State.

⁶ Mr. Porter, American Ambassador to France, to Mr. Day, Secy. of State, No. 267, June 7, 1898, MS. Desp. France, Moore, Dig., VII, 867, respecting the reprimanding by the French Government of the cadets of the *Infanterie de Marine* on account of their having passed and sent to Madrid a resolution expressing sympathy with Spain in its war with the United States.

⁷ Declares Prof. Moore: "It should seem obvious that a neutral government cannot itself sell arms to a belligerent without a flagrant violation of neutrality any more than it can itself supply money to a belligerent without a breach of neutral duty. When France supplied arms and money to the United States in the early days of the American Revolution she showed her sense of the real nature of the transactions by conducting them indirectly through a fictitious commercial firm; and when, in February, 1778, she formally became the ally of the United States she merely avowed her real position." (Dig., VII, 973.)

Compare Report of Mr. Carpenter, from Senate Committee on the Sale of Arms by the Ordnance Department, May 11, 1872, relative to the sale of arms by the United States during the Franco-German War, and declaring that sales might lawfully have been made to either

with this injunction the Anglo-American agreement of June 23, 1939, for the exchange of cotton and rubber, which became operative on August 25, 1939, and was not proclaimed by the President until shortly after the outbreak of the European War.⁸ The sale of public ships, if capable of rendering any belligerent service, is believed to be likewise forbidden.⁹ It is urged with force that the mere consent by a neutral to the sale to a belligerent of vessels privately owned, yet constituting a part of the naval reserve and subject to governmental control, is embraced within the general prohibition.¹⁰ Again, the loaning of money or the extension of credit by a neutral government to a belligerent amounts to participation in the war, and constitutes, therefore, unneutral conduct.¹¹

A neutral State is likewise obliged to abstain from placing its various governmental agencies at the disposal of a belligerent in such a way as to aid it directly or indirectly in the prosecution of the war. Permitting such use of public vehicles of transportation, by land¹² or sea,¹³ or governmental industrial plants,¹⁴ would

belligerent. Senate Report, 183, 42 Cong., 2 Sess., Moore, Dig., VII, 973-974. See, also, in this connection, Hall, 6 ed., 591-592; Brit. and For. State Pap. LXXI, 202; Oppenheim, Lauterpacht's 5 ed., II, 598-603.

According to Art. VI of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden." Malloy's Treaties, II, 2359.

⁸ U. S. Treaty Series No. 947.

⁹ That it is a grave offense against the law of nations for a neutral government to sell a man-of-war to a belligerent, see Mr. Day, Secy. of State, to Mr. Hay, Ambassador to Great Britain, telegram, June 25, 1898, MS. Inst. Great Britain, XXXII, 680, Moore, Dig., VII, 868.

See, also, Circular on Neutrality and Contraband issued by Dept. of State, Oct. 15, 1914, Senate Doc. No. 604, 63 Cong., 2 Sess.

¹⁰ See, in this connection, T. E. Holland, "Neutral Duties in Maritime War," *Proceedings of the British Academy*, 1905-1906, 56, Moore, Dig., VII, 863, concerning the sale of certain German liners to Russia during the Russo-Japanese War; also Takahashi, *Int. Law Applied to the Russo-Japanese War*, 488-489.

¹¹ "With reference to the loan of money which was solicited from the United States by the French Government, in 1798, through the American envoys in Paris, the United States took the ground that such a loan would be a violation of neutrality. This is cited with approval by Chancellor Kent." (Moore, Dig., VII, 978, *citing* Mr. Pickering, Secy. of State, to Messrs. Pinckney, Marshall and Gerry, March 23, 1798, Am. State Pap. For. Rel. II, 200.)

See, also, Mr. Brent, Acting Secy. of State, to Mr. Worthington, April 21, 1817, 2 MS. Desp. to Consuls, 24, Moore, Dig., VII, 978.

"It would seem to be a clear evasion of neutral duty if a State bank in a neutral State extended loans or credits to a belligerent. The principle of neutrality is not affected even if the neutral State's control is exercised through a separately organized corporation. . . . The rule of international law should be, and probably is, that a State when neutral is forbidden to do certain things, no matter in what capacity or through what agency it does them." (Comment by the Reporter on Art. 5 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 238 and 239.)

¹² Oppenheim, 2 ed., II, 433, answers in the negative the inquiry "whether a neutral whose rolling stock runs on the railway lines of a belligerent, may continue to leave such rolling stock there although it is being used for the transport of troops, war material, and the like."

See *Railway Material from Neutral Territory*, *supra*, § 637.

¹³ In refraining from transporting enemy persons on its public ships, the neutral government should broadly refuse conveyance calculated to be of any military or naval benefit whatever to the belligerent, and that irrespective of their connection at the time with its public service.

¹⁴ Moore, Dig., VII, 868, and documents there cited relative to an inquiry from the French Government in 1898, in the course of the Spanish-American War, whether the United States would take exception to the use of the French mint for the coining of Spanish silver pieces.

appear to be unlawful. Accordingly, President Roosevelt, in his general neutrality proclamation of November 5, 1939, properly announced that "no agency of the United States Government shall, directly or indirectly, provide supplies nor effect repairs to a belligerent ship of war."¹⁵ It is believed that the same principle should be applied with respect to means and channels of communicating intelligence. Thus the transmission by a neutral diplomatic officer of a telegram in behalf of such an officer of a belligerent, for communication to his government, and in its cipher, would be censurable.¹⁶

According to the Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land, a neutral power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphic apparatus belonging to it, or to companies or private individuals.¹⁷ A neutral power is, however, acknowledged to possess the right to effect restriction or prohibition.¹⁸ It is believed that these provisions are inadequate in that they fail to recognize and deal appropriately with the duty of abstention which on principle must exist whenever a neutral public agency under governmental operation and control is easily capable of rendering a substantial belligerent service. It should be obvious that a neutral State, as an incident of its general duty of abstention, should not, for example, permit the use by or in behalf of a belligerent of public facilities for the communication of intelligence by means of radio.¹⁹

Shortly after the outbreak of World War I, in 1914, President Wilson, by executive order, declared that all radio stations within the jurisdiction of the United States were prohibited from transmitting or receiving for delivery "messages of an unneutral nature, and from in any way rendering to any one of the belligerents any unneutral service, during the continuance of hostilities."²⁰ In order to insure the enforcement of this order, in so far as it related to the transmission of code and cipher messages by high-powered radio stations within the jurisdiction of the United States, and capable of trans-Atlantic communication, it was declared by executive order, on September 5, 1914, that one or more of such radio stations "shall be taken over by the Government of the United States and controlled and used by it to the exclusion of any other control or use for the purpose of carrying on communications with land stations in Europe including code and cipher messages."²¹

¹⁵ Dept. of State Bulletin, Sept. 9, 1939, 203, 207.

¹⁶ On Sept. 8, 1917, Mr. Lansing, Secy. of State, made announcement that the Department of State had secured certain telegrams from the German Chargé d'Affaires at Buenos Aires, addressed to the Foreign Office at Berlin, which were despatched by the Swedish Legation in the former city as their own official messages, addressed to the Stockholm Foreign Office. The Secretary also made public English translations of the German texts, which had reference to the treatment which the Chargé recommended that his Government accord to Argentine merchantmen, which, under certain circumstances, he advised be sunk "without a trace being left." Official Bulletin, Sept. 8, 1917, Vol. I, No. 102, p. 1.

¹⁷ Art. VIII, Malloy's Treaties, II, 2298.

¹⁸ Art. IX, *id.* See, in this connection, Naval War College, Int. Law Situations, 1932, 44-49; also M. Paillat, *La Radiotélégraphie dans la Guerre Maritime*, Paris, 1938.

¹⁹ See Duties of Prevention, Radio and Certain Other Means of Communication, *infra*, § 856B.

²⁰ For. Rel. 1914, Supp., 668.

²¹ For. Rel. 1914, Supp., 678.

It may be observed that the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, provided that a neutral State may allow belligerent vessels of war to employ its licensed pilots.²² In so far as such employment is incidental to the seeking of a lawful sojourn or asylum by such vessels in neutral waters, the service involved ceases to be objectionable, especially when rendered within the territorial waters of the neutral. The situation is otherwise, however, where a vessel of war on the high seas and not seeking to enter a port or roadstead of a neutral State, makes use of the services of a licensed pilot, if an official of that State.²³

It is not apparent how enlargement of neutral governmental control or ownership of particular activities or things within neutral territory modifies the application of the rule forbidding a neutral State to aid a belligerent cause through its public agencies. It has been properly asserted that "as governments extend their activities in fields of commerce, industry, transportation and communications, they necessarily enhance their neutral responsibilities."²⁴

The duty resting upon a neutral State not to employ its public agencies in aid of a belligerent, and which obviously embraces an obligation not to participate in hostilities, and consequently, not to attempt to thwart military or naval operations outside of its own domain, must be apparent. It is not felt, however, that that obligation is necessarily evaded when the commander of a neutral vessel of war endeavors to rescue from drowning the occupants or former occupants of a belligerent ship which has been subjected to attack, provided that in so doing he makes no attempt to remove them from the control of the captor. Such a service is not to be deemed a military benefit to the State to which the vessel belongs, so long as the neutral makes appropriate effort to deprive that State of the services of the persons rescued throughout the remainder of the war.²⁵

²² Art. XI, Malloy's Treaties, II, 2360.

²³ See, in this connection, Report of Mr. Renault, to the Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 305, 306; A. P. Higgins, Hague Peace Conferences, 469; Oppenheim, Lauterpacht's 6 ed., II, 606.

If a pilot, although licensed by a neutral State in token of fitness for the performance of a public service generally, follows his calling as a private individual, and is not in fact a governmental official, his employment by a belligerent war vessel does not appear to raise a question concerning participation in the conflict by the neutral government.

²⁴ Comment of P. C. Jessup, Reporter, concerning Art. 5 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 244. It is said elsewhere in the same connection: "The problem is raised by the existence in some States of government ownership or control of one or more industries or business activities. The extreme case is presented by the U.S.S.R. where all commercial, financial and industrial activities are those of the State itself. If one applies to the case of the Soviet Government the existing rules of international law, it would seem that the Soviet Government would be compelled as a neutral in time of war to give up all commercial and financial relations with the belligerent. It is obvious that a situation of this kind was not contemplated when this rule of international law developed. Short of the extreme case of the Soviet Union, attention may be called to a situation as in France where the nationalization of the munitions industry is authorized by law and is under way. It would seem that if France or any other country completely nationalized its munitions industry, France or any other such State would be compelled as a neutral to prevent all shipments to a belligerent of products of that industry. One may also call attention to the numerous other cases of State-owned businesses, such as the French potash and tobacco monopolies, the numerous match monopolies, the Italian sulphur monopoly, etc." (*Id.*, 238.)

²⁵ Concerning the action of the British yacht *Deerhound* in picking up Capt. Semmes and

Incidental to the obligation resting upon a neutral State to abstain from employing its governmental agencies for the purpose of aiding a belligerent cause, there appears to be the duty to refrain scrupulously from furthering the efforts of nationals to commit unneutral acts commercial or otherwise, which such State may not be obliged to endeavor to prevent, and yet which the belligerent against which they are undertaken may vigorously and lawfully strive to repress.²⁶

§ 848A. **The Same. The Transfer of Destroyers to the United Kingdom in 1940.** With the outbreak of the European War in 1939, and increasingly thereafter, the Government of the United States was inclined to construe narrowly the normal obligation to abstain from direct participation in the conflict. Assistance to Britain manifested itself in a variety of ways, and, as has been observed, by devices that obscured the American governmental connection with the aid that was rendered.¹

With the collapse of French opposition to Germany in 1940, the entry of Italy into the conflict as a belligerent, and German acquisition of control over wide areas adjacent to the English Channel and the North Sea, the United States regarded the resulting precarious situation of the United Kingdom with grave concern. That concern increased in August and September, 1940, when German aerial bombardments of Britain appeared at times to threaten the downfall of the United Kingdom. American opinion was widespread that such an event, especially if it were accompanied by loss of the British fleet, would be highly detrimental to the United States and dangerous to its own safety. Under such circumstances it was inexorable that the people and Government of the United States should have regarded, as they did, the maintenance of Britain as a matter of major concern.² In that situation the United States yielded to Britain a form

other survivors of the Confederate ship *Alabama* when sunk by the U.S.S. *Kearsarge* off Cherbourg in 1864, and taking them to England where they were set at liberty, see Mr. Seward, Secy. of State, to Mr. Adams, Minister to Great Britain, No. 1035, July 15, 1864, Dip. Cor. 1864, II, 218, 219, Moore, Dig., VII, 949; also T. E. Holland, *Neutral Duties in Maritime War, Proceedings of British Academy*, 1905-1906, 57.

Respecting the rescue by certain neutral naval vessels of the survivors of the Russian ships of war *Variag* and *Koreetz*, sunk in the harbor of Chemulpo in Feb., 1904, see Takahashi, *Int. Law Applied to the Russo-Japanese War*, 462-466.

See, also, Naval War College, *Int. Law Situations*, 1904, 117-128.

Upon the destruction by a German submarine of certain British merchantmen off Nantucket in Oct., 1916, American destroyers were despatched by Rear-Admiral Knight at Newport, to rescue the survivors who had taken to the life boats.

See Shipwrecked, Wounded or Sick Persons, *infra*, § 865.

²⁶ "There is a vast difference between the degree of repressive control which this government may be called upon to exert over its citizens in pursuance of its neutral duties and the extent to which it may be permitted to go in actively aiding them to secure the fulfillment of contracts entered into in aid of a belligerent. For example, it is no offense either against the law of nations or against our neutrality statutes for a citizen of the United States to sell munitions of war to a belligerent; yet it could scarcely be contended that this government would be justified in employing its agents to promote such transactions." (Mr. Rives, Acting Secy. of State, to Messrs. Morris & Fillette, Oct. 13, 1888, 170 MS. Dom. Let. 222, Moore, Dig., VII, 865.)

See, also, President Washington, *Neutrality Proclamation*, April 22, 1793, Am. State Pap. For. Rel. I, 140, Moore, Dig., VII, 750; President Wilson, *Neutrality Proclamation*, May 24, 1915, American White Book, European War, II, 15, 17.

§ 848A. ¹ See *supra*, § 848.

² Declared Mr. Welles, Under Secy. of State, in an address at Cleveland, Sept. 28, 1940:

of aid which the law of nations, as reflected in the Hague Convention of 1907, definitely forbade a neutral to grant to a belligerent. Through an executive agreement of September 2, 1940, fifty over-age American destroyers were to be given over by the United States to the United Kingdom in exchange for the right to lease important naval and air bases in specified British areas in the Western Hemisphere.³ Obviously, the propriety of the transaction, as tested by international law, was unaffected by the character and extent of the benefits which the United States expected to derive from the acquisition of fresh bases.⁴ The consummation of the arrangement signified, that in the opinion of the American Government the normal international obligation resting upon the United States as a neutral had, under the existing circumstances, become inapplicable as a deterrent.

As is noted elsewhere, a neutral State in making response to the illegal action of a belligerent which has been directed against it, enjoys much latitude, and may not unlawfully have recourse to acts which that belligerent, in consequence of the lawless character of its own conduct, is not in a position to challenge as breaches of legal obligations towards itself.⁵ Must the neutral establish, however, that inherently illegal action has been directed against itself by the belligerent, or threatened so to be taken, before it can properly free itself from restrictions that normally rest upon it? Could Germany rightfully maintain that a victory over Britain was not necessarily to be interpreted as the violation of any German obligation towards the United States, which could serve to release it from its normal duties as a neutral with respect to that country? The United States would not be prepared to admit that a belligerent State could properly contend that acts through which it endangered or threatened to endanger the safety of a neutral could ever be regarded by the latter as lawful in character, or that a belligerent which had recourse to such conduct could be in a position to charge a neutral State with violating legal duties towards itself, when the neutral proceeded appropriately to thwart such conduct on the part of the belligerent. In a word, restraints which the conventional or customary law have

"It is the policy of your Government, as approved by the Congress of the United States, and, I believe, by the overwhelming majority of the American people, to render all material support and assistance, through the furnishing of supplies and munitions, to the British Government and to the Governments of the British Dominions in what we hope will be their successful defense against armed aggression." (Dept. of State Bulletin, Sept. 28, 1940, 243, 249.)

See, also, *supra*, § 83C.

³ See the President's message to the Congress of Sept. 3, 1940, with accompanying documents, embracing exchange of notes between the British Ambassador at Washington and the Secretary of State, of Sept. 2, 1940, Dept. of State Bulletin, Sept. 7, 1940, 199-201.

See opinion of Mr. Jackson, Atty. Gen., Aug. 27, 1940, on the exchange of the destroyers for naval and air bases, *Am. J.*, XXXIV, 728. Cf. Herbert W. Briggs, "Neglected Aspects of the Destroyer Deal," *id.*, 569; Edwin Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," *id.*, 690; Quincy Wright, "The Transfer of Destroyers to Great Britain," *id.*, 680; C. G. Fenwick, "Neutrality on the Defensive," *id.*, 697; Edward S. Corwin, Letter to the Editor (entitled "Executive Authority Held Exceeded in Destroyer Deal"), *New York Times*, Oct. 13, 1940, Section 4, p. 6.

⁴ Concerning the military value to the United States of the bases acquired, see Hanson W. Baldwin, "Destroyers for Bases," *New York Times*, Sept. 4, 1940, p. 14.

⁵ See Aspects of Neutral Responses to Unlawful Treatment by a Belligerent, *infra*, § 888C.

established in order to cause neutral States and the governments thereof to abstain from participation in wars afflicting their neighbors, have not and could not well be interpreted or applied so as to deter those States from satisfying what they conceived to be the requirements of their own defense.⁶

For such reasons the Anglo-American agreement of September 2, 1940, was not seemingly contemptuous of the law of nations. While it may have constituted American intervention in the European War, in so far as it revealed a governmental effort designed in part directly to uphold Britain as against its enemy, that intervention was not necessarily illegal.⁷

Such a conclusion necessarily implies that a State not at war with others which are at war, is not bereft of the right to take steps which the rules attributable to the law of neutrality normally forbid, provided the exigencies of its own defense so require, even though such steps are calculated to uphold a particular contestant as against its foe. In the exercise of that right the non-belligerent actor, although participating in the conflict, and asserting in so doing the inapplicability to itself of the obligation of abstention that rests upon a neutral, does not necessarily enter the arena as a belligerent. Its conduct may in fact, however, cause the offended belligerent to make such actor its foe, and to declare war upon it. The distinction between the breach and the inapplicability of particular rules of neutrality is a real one. It has grown out of the fact that in the course of centuries of contacts between States, countries not professing to be at war with the parties to an armed conflict have not been prepared to acknowledge a duty under all circumstances to abstain from all participation therein, and also out of their conclusion that the obligation of abstinence must be deemed to depend upon the unwavering condition that non-participation is compatible with, and not subversive of, the requirements of self-defense.⁸ Failure to take cognizance of these considerations has at times produced a bewildered notion of what practice has in reality ordained; and that in turn has revealed itself in statements which have not always reflected the requirements of international law. That a neutral may invoke the doctrine of inapplicability capriciously and as a disguise for lawless disregard of obligations

⁶ As Secretary Hull declared in an address before the National Press Club at Washington, Oct. 26, 1940: "As an important means of strengthening our own defense and of preventing attack on any part of the Western Hemisphere, this country is affording all feasible facilities for the obtaining of supplies by nations which, while defending themselves against barbaric attack, are checking the spread of violence and are thus reducing the danger to us. We intend to continue doing this to the greatest practicable extent. Any contention, no matter from what source, that this country should not take such action is equivalent, in the present circumstances, to a denying of the inalienable right of self-defense." (Dept. of State Bulletin, Oct. 26, 1940, 331, 336.)

Also, Mr. Hull, Secy. of State, in statement before the House Committee on Foreign Affairs, Jan. 15, 1941, Dept. of State Bulletin, Jan. 18, 1941, 89, 90.

⁷ See Intervention, Self-Defense, *supra*, § 70; The Transfer of Destroyers to Britain in 1940, *supra*, § 83C.

⁸ Declared Mr. Hull, Secy. of State, in the course of testifying before the House Committee on Foreign Affairs, on January 15, 1941: "Aside from the question of neutrality, which, as I have stated, has proved to be illusory when it has stood in the way of these ambitious aggressors, it is a recognized principle, older than any rule of neutrality, that a State is entitled to defend itself against menaces from without as well as from within. This is the essence of sovereignty. It was definitely recognized by all the signers of the Kellogg-Briand Pact." (Dept. of State Bulletin, Jan. 18, 1941, 89, 90.)

that rest upon it must be acknowledged. Such a possibility does not, however, weaken the strength of the invocation when it is properly made.⁹

It should be observed that on March 11, 1941, through an "Act to Promote the Defense of the United States," commonly known as the Lease-Lend Act, the Congress authorized the production and disposal of so-called defense articles for the benefit of "the government of any country whose defense the President deems vital to the defense of the United States."¹⁰ The theory of the law which obviously contemplated acts of intervention in the existing war, freshly illustrated the conception of the American Government that there might oftentimes be grounds for participation by the United States as a non-belligerent which the law of nations did not forbid.

c

Duties of Prevention

(1)

§ 849. **In General.** The obligation of a neutral State to prevent the commission of any act must be due to the circumstance first, that the commission of it will, unless prevented, amount to participation in the conflict, injurious to one belligerent and favorable to its enemy, and secondly, that the neutral has such control over the actor that failure to check him will constitute connivance at his conduct and participation therein. Control of the actor depends in part upon the right and power of the neutral to control the place where his act is committed or from which commission is attempted. The neutral is deemed to possess both of these with respect to its own domain. Certain consequences follow. Enjoying in theory supreme and necessarily exclusive control therein, the neutral finds itself burdened with a corresponding duty to exercise the full measure of its strength to prevent a belligerent or its agents from there committing any acts which usurp governmental functions. These may not lawfully be relinquished. The moment that there is reason to believe that any act about to be committed on neutral soil will attain such a character, the duty of prevention becomes immediate and grave. Otherwise the aggrieved belligerent may justly deny the claim of the neutral either to respect as a territorial sovereign, or to continued recognition of its status as a non-participant in the war.

Statesmen have found it a more difficult task, however, to perceive the true aspect and exact relation to the conflict of acts committed within neutral territory and which although not deemed to be subversive of the prerogatives of the sovereign, serve, nevertheless, by whomsoever committed, to furnish direct aid to a belligerent. This may have been due to the tendency to disclaim responsibility for acts committed by private individuals in contrast to those com-

⁹ A technically offended belligerent may not in fact make serious protest. The transfer of destroyers to the United Kingdom Government by that of the United States pursuant to the agreement of Sept. 2, 1940, is not understood to have been regarded by the belligerents concerned (whether German or British) as amounting to active participation in the war.

¹⁰ 55 Stat. 31.

mitted by a neutral government or its agencies, and also to the failure to recognize or admit the logical consequence of the possession, by a neutral State, of sufficient power to control occurrences within its own territory. It is believed, therefore, that the scope of the existing duty of prevention requires fresh consideration.

(2)

ACTS OF A BELLIGERENT IN DEFIANCE OF THE RIGHTS OF THE TERRITORIAL SOVEREIGN AS SUCH

(a)

§ 850. **The Origination and Organization of Military and Naval Forces. Enlistments and Commissions.** As has been observed, the United States has long recognized the principle that it is the duty as well as the right of a neutral State to endeavor to prevent the commission within its territory of acts by or in behalf of a belligerent which constitute a usurpation of governmental functions and are thus in derogation of the rights of the territorial sovereign.¹ The origination or organization of military or naval forces possesses such a character and is contrary to the law of nations. Hence the duty of prevention has wide scope.² It is applicable broadly to the attempt to commission, hire, retain or induce, on neutral soil, others of whatsoever nationality, to enter into belligerent service. It is likewise applicable to the retaining, hiring or inducing of others to go outside thereof with the intent to enlist or enter into such service, as well as to the case of the enticement of others by false representations, to go outside of neutral territory with the intent that such persons may there, through inducement or otherwise, enlist or enter into the belligerent service.³ Although the neutrality laws of the United States render unlawful the commission of many of the more important of these acts, the commission of certain others is not prohibited, notwithstanding the fact that they appear to involve a usurpation of governmental functions.⁴

§ 850. ¹ Mr. Jefferson, Secy. of State, to Mr. Genet, June 5, 1793, Am. State Papers, For. Rel. I, 150, Moore, Dig., VII, 886.

See, also, Neutrality, Nature of the Obligation, *supra*, §§ 844-847.

² Mr. Jefferson, Secy. of State, to Mr. Morris, Minister to France, Aug. 16, 1793, Am. State Papers, For. Rel. I, 167, 168, Moore, Dig., VII, 880; President Washington, Neutrality Proclamation, March 24, 1794, Richardson's Messages, I, 149; President Pierce, Annual Message, Dec. 31, 1855, Richardson's Messages, IV, 2860, 2865-2866, Moore, Dig., VII, 882; Mr. Day, Secy. of State, to Mr. Loomis, Minister to Venezuela, June 20, 1898, For. Rel. 1898, 1136, Moore, Dig., VII, 884; President Wilson, Neutrality Proclamation (upon outbreak of war between Italy and Austria-Hungary), May 24, 1915, American White Book, European War, II, 15, 17.

Concerning the cases before the Commission under Act VII of the Jay Treaty with Great Britain, of Nov. 19, 1794, see Moore, Arbitrations, IV, 3967-4027.

³ See President Roosevelt, Neutrality Proclamation, Sept. 5, 1939, Dept. of State Bulletin, Sept. 9, 1939, 203.

It is declared in Art. IV of the Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land, that "corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents," and in Art. V, that a neutral Power must not allow such acts to occur on its territory. Malloy's Treaties, II, 2298.

⁴ § 9, 35 Stat. 1089, Rev. Stat. § 5281; also § 10, 35 Stat. 1089, Rev. Stat. § 5282, 18 U.S.C.A., §§ 21-22. These provisions prohibit the following acts to be done, under penalty,

On principle neither the right nor duty of the neutral is affected by the form of the belligerent service into which it is sought to impress an individual, or by the nature of the place where the attempt is made to enlist or otherwise bring pressure to bear upon him, provided it is within the national domain. The neutrality laws of the United States make, however, an exception which since 1794 has remained unchanged. It is declared in substance that the provisions of the statute are not to be construed to extend to any subject or citizen of a foreign prince, State, colony, district or people, who being transiently within the United States, shall, on board of any vessel of war, letter of marque or privateer, which at the time of its arrival therein was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of such foreign prince etc., who is transiently within the United States, to enlist or enter himself to serve such foreign prince etc., on board such vessel of war, if the United States shall then be at peace with such foreign prince.⁵ While the provisions of a penal statute should not be made applicable to occurrences on board of a foreign public ship, it is clear that a State does not lack the right to prevent the commission of acts within its own territory, even when it may not lawfully punish the actors.⁶ It is the duty as well as the right of a neutral to use the means at its

within the territory and jurisdiction of the United States: accepting and exercising by a "citizen of the United States" a commission to serve a foreign prince, state, colony, district or people, in war by land or sea, against any prince, state, colony, district or people, with whom the United States are at peace; the enlisting or entering oneself, or the hiring or retaining of another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in such service, and that without any specified discrimination as to nationality. As to the deficiencies of these provisions see C. G. Fenwick, *Neutrality Laws of the United States*, 131-135.

In relation to the foregoing laws see *Case of Isaac Williams*, in *Murray v. Schooner Charming Betsy*, 2 Cranch, 64, 82, note, Moore, Dig., VII, 879; *United States v. Louis Kazinski*, 2 Sprague, 7, Moore, Dig., VII, 884; *United States v. Hertz*, 26 Fed. Cases, No. 15,357, Fenwick, *Neutrality Laws*, 62; *Opinion of Mr. Cushing*, Atty. Gen., 7 Ops. Attys. Gen. 367, Moore, Dig., VII, 882; *Opinion of same*, 8 Ops. Attys. Gen. 468 and 476, Moore, Dig., VII, 882.

By an Act of May 7, 1917, § 10, 35 Stat. 1089 was amended so as to read: "Whoever, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district or people as a soldier or as a marine or seaman on board of any vessel of war, letter of marque, or privateer shall be fined not more than \$1000 and imprisoned not more than three years: *Provided*, that this section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or enter the service of a foreign country. Enlistments under this proviso shall be under regulations prescribed by the Secretary of War." (40 Stat. 39, 18 U.S.C.A., § 22.)

See, also, the text of § 2, of the *Neutrality Act of June 5, 1794*, 1 Stat. 381.

⁵ Rev. Stat. § 5291; § 18, 35 Stat. 1091, 18 U.S.C.A., § 30. There is added the declaration that the provisions of the Chapter shall not be construed "to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States."

See President Wilson, neutrality proclamation, May 24, 1915, *American White Book*, European War, II, 15.

See, also, President Roosevelt, *Neutrality Proclamation of Sept. 5, 1939*, Dept. of State Bulletin, Sept. 9, 1939, 203, 204.

⁶ The law of nations furnishes frequent instances of the application of this principle where the territorial sovereign, although lacking the right to exercise jurisdiction over certain individuals such as foreign diplomatic officers, or over certain things such as foreign public vessels, finds itself, nevertheless, possessed of ample and lawful means for the prevention of censurable conduct.

disposal to prevent, within its ports, a belligerent public ship from augmenting its own personnel or from otherwise becoming a recruiting agency. It is believed, therefore, that this limitation upon the operation of the neutrality act is not to be deemed to reflect what is the true extent of the international obligation of a neutral State.⁷ Nor is it responsive to that which the United States has acknowledged in accepting the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War.⁸

§ 851. **The Same.** The calling by a belligerent to its colors of its nationals in neutral territory deserves attention. Where notification of the call is made on neutral soil through a belligerent agent such as a consul, and is addressed to persons who in consequence of actual service in behalf of their country have attained a definite connection with its army or navy as reservists therein, the belligerent attempt to gain the aid of nationals is not necessarily open to objection.¹ There is obviously no endeavor in such a case to induce persons to establish a new connection with the service, as by enlisting therein. Where, however, connection with the armed forces of the belligerent is a constructive one, possibly not coming into being until after the departure from its territory of the individuals who are sought, and obedience to the call is induced by threats of the imposition of a penalty in case of disobedience, a case arises which appears to defy the principle above announced, and to require appropriate measures of prevention. It is not to be admitted that the bare tie of allegiance suffices in itself to establish also such a military connection between the individual summoned and his State as to justify the neutral in regarding him as one already attached to a belligerent service.² It is not understood, however, that the United

See, for example, § 15, 35 Stat. 1091 (Rev. Stat. § 5288), as amended by § 10, Title V, of the Act of June 15, 1917, to punish acts of interference with the foreign relations, neutrality, etc., of the United States. 40 Stat. 223, 18 U.S.C.A., § 27.

⁷ Adverting to the circumstance that this provision was a proviso to Section 2 of the original Act of 1794, Prof. C. G. Fenwick declares "that the framers of that act considered that they were justified in appending to the law against enlistments in the service of a foreign State, an exception in favor of the subjects of such State who owed allegiance to it. That the exception was in keeping with the rules of international law of that day is hardly open to question, but at the present day it would seem to be no longer justifiable. . . . The fact that the troops thus raised should happen to be subjects of the foreign power, and only transiently within the neutral State, would not affect the principle that to enlist them without the consent of the neutral State would be to violate its sovereignty. That a neutral State might not be justified in giving its consent to belligerent powers to enlist even their own subjects in the ports of the neutral State was a question of such little importance in comparison with the prevention of enlistments in general, that it did not apparently occur to the framers of the Act of 1794 that they were making a concession inconsistent with the principles expressed in Section 4 of that act [Revised Statutes, Sec. 5285]." (Neutrality Laws of the United States, 156.)

⁸ Art. XVIII thereof forbids belligerent war vessels to make use of neutral ports, roadsteads or territorial waters for the purpose of "completing their crews." Malloy's Treaties, II, 2361.

The second of the Neutrality Rules of the Treaty of Washington, with Great Britain, of May 8, 1871, provides that a neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters for the purpose of the recruitment of men. *Id.*, I, 703.

See, also, § 5285, Rev. Stat. § 12, 35 Stat. 1090, 18 U.S.C.A., § 24.

§ 851.¹ In such case the belligerent is at least not guilty of originating or organizing a military force on neutral soil.

² Even if it be admitted that a belligerent may on principle without impropriety call

States, while remaining a neutral in World War I, sought to make any distinction between the types of so-called reservists called to the colors by their respective States, or challenged the pretension of any belligerent to demand military service of nationals in American territory, or announced any general objection to inducement by way of threat which accompanied any summons to service.³

It is doubtless the duty of a neutral State not to suffer the departure from its territory of persons there enlisted by a belligerent or otherwise subjected to wrongful attempts by its agents to impress them directly or indirectly into its service. The mere departure, however, from such territory of an individual who, although subjected to no wrongful pressure, leaves the country with the intent to enter a belligerent service, is not in derogation of the rights of the territorial sovereign.⁴ Any solid reason for the existence or establishment of a neutral duty of prevention must, therefore, rest upon a different basis.

The commissioning of a vessel of war by a belligerent within the national domain of a neutral is obviously an act in derogation of the rights of the territorial sovereign as such. The United States has long had occasion to acknowledge and demand recognition of the corresponding duty of prevention.⁵ For much the same reason the fitting out and removal by a belligerent or its agents of a vessel designed to participate in hostilities, even though not commissioned as a public ship, constitutes conduct which a neutral ought also to endeavor to prevent; for such conduct marks the origination or development in neutral territory of a unit of military strength capable of hostile use against the opposing belligerent.⁶ Again, when a belligerent attempts to organize and set in operation from neutral territory a military expedition against the enemy, there is similar defiance of those prerogatives which the neutral State cannot without impropriety yield.⁷

upon its nationals in neutral territory to return home in order to enter the military or naval service with which they have no existing connection, it must be acknowledged that the process of making known that call by a belligerent agency on neutral soil, almost invariably involves the inducing of a person therein to go abroad and enlist or enter himself in the belligerent service, and so constitutes an act in derogation of the rights of the territorial sovereign as such, and one which, therefore, it becomes on principle its duty as a neutral to thwart.

³ Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, in respect to the transshipment of British troops across American territory, For. Rel. 1914, Supp., vii.

⁴ See the Departure of Unorganized Individuals Contemplating Belligerent Service, *infra*, § 870.

⁵ Mr. Jefferson, Secy. of State, to Mr. Genet, French Minister, June 5, 1793, Am. State Pap., For. Rel. I, 150, Moore, Dig., VII, 886.

⁶ Hamilton's Instructions to the Collectors of Customs, Aug. 4, 1793, Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 890; also Cabinet Instructions of Aug. 3, 1793, published as appendage to Hamilton's instructions, Am. State Pap., For. Rel. I, 141, Moore, Dig., VII, 891.

See, also, § 5283, Rev. Stat.; § 11, 35 Stat. 1090, 18 U.S.C.A., § 23.

See, also, Arts. V, VIII and XVIII of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2359 and 2361; also U. S. Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 13.

⁷ According to Art. I of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality." (Malloy's Treaties, II, 2358.)

In a word, every process whereby a belligerent, within the domain of a neutral, attempts to originate, organize or develop its fighting forces, military or naval, or its vessels of war, is open to the same general objection, and, therefore, in each instance gives rise to the neutral obligation of prevention.

(b)

§ 852. **Other Activities of a Belligerent in Furtherance of War.** By numerous other processes both related and unrelated to the augmentation of its military or naval forces a belligerent may also defy the supremacy of a neutral sovereign, and thereby compel it to take appropriate measures of prevention. Such a situation arises when, for example, a belligerent asserts control over a place or area within neutral territory for the purpose of establishing a naval base or depot of supplies.¹ Again, the neutral obligation becomes apparent when the belligerent, undertaking to exercise rights of jurisdiction, sets up prize courts within the neutral domain,² or when it attempts to sell prizes³ or initiate hostile operations therein.⁴

It may be noted that according to the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, the "neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents."⁵ This language is wisely incorporated in the United States Naval Instructions of 1917.⁶ Doubtless no legal duty is

§ 852.¹ Mr. Randolph, Secy. of State, to the Governors of the several States, circular April 16, 1795, Am. State Pap., For. Rel. I, 608, Moore, Dig., VII, 934.

Art. V of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, emphasizes the prohibition against the erection by a belligerent of wireless telegraphy stations or any apparatus for the purpose of communicating with belligerent forces by land or sea. Malloy's Treaties, II, 2359.

² Mr. Jefferson, Secy. of State, to Mr. Morris, American Minister to Great Britain, Aug. 16, 1793, Am. State Pap., For. Rel. I, 167, 169.

"A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters." Art. IV, Hague Convention of 1907, concerning Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2359.

³ Mr. Pickering, Secy. of State, to Mr. Adet, French Minister, May 24, 1796, Am. State Pap., For. Rel. I, 651, Moore, Dig., VII, 936; Mr. Clay, Secy. of State, to Mr. Tacon, April 11, 1828, MS. Notes to For. Leg., IV, 8, Moore, Dig., VII, 936; Same to Mr. Obregon, May 1, 1828, MS. Notes to For. Leg., IV, 22, Moore, Dig., VII, 937. See, also, Moore, Dig., VII, 935-938, and other documents there cited.

See, also, Art. III of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, and the reservation made by the Senate in advising and consenting to ratification, Malloy's Treaties, II, 2359 and 2366.

See Entrance with Prize, *infra*, § 861-862.

⁴ "Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden." (Art. II, Hague Convention of 1907, concerning Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2359.) This Article is reproduced in No. 12 of Naval Instructions Governing Maritime Warfare, of June 30, 1917.

According to Art. 8 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A neutral State shall use the means at its disposal to prevent the commission within its territory by a belligerent of any act of hostility, including visit, search or capture." (*Am. J.*, XXXIII, *Supplement Section 2*, 177.)

See, *infra*, § 887.

⁵ Art. X, Malloy's Treaties, II, 2360.

⁶ No. 2.

In the case of the S.S. "Wimbledon," the Permanent Court of International Justice in its judgment of Aug. 17, 1923, declared: "It has never been alleged that the neutrality of the

imposed upon a neutral to prevent the cruisers of a belligerent from patrolling the high seas adjacent and in close proximity to the territorial waters of the former, and that for the purpose of making the neighborhood a station of observation of the movements of enemy ships.

While the United States as a neutral in 1916 advanced no claims that British vessels of war "cruising off American ports beyond the three-mile limit" were exceeding "their strict legal rights under international law," the Department of State expressed the view that such practice was none the less an inevitable source of annoyance and offense, and made request that such vessels be instructed to withdraw from the vicinity of the territorial waters of the United States and to remain at such distances from American harbors and coasts as would avoid "the annoying and inquisitorial methods" which had compelled the Government to make complaint.⁷

It may be observed that the conduct of a belligerent within neutral territory may so gravely disregard the local law as to emphasize the wrong sustained by the sovereign thereof rather than the obligation imposed upon it to exert itself to effect prevention. Thus the United States, while a neutral in the course of World War I, found the diplomatic and other agents of Germany committing acts in gross violation of the local law, and with the design of injuring their enemy.⁸ In measures of repression the Government was concerned with the injury directed against the United States rather than against any belligerent power. Nevertheless, failure on the part of the former to make use of available means of prevention might have been justly deemed a manifestation of neglect of a neutral obligation, in so far, at least, as the acts of lawlessness were aimed directly against Great Britain and its Allies.

United States, before their entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of-war or by belligerent or neutral merchant vessels carrying contraband of war. . . . It appears clearly established that Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the "Wimbledon" through the Kiel Canal, but, on the contrary, was entitled to permit it." (Publications, Permanent Court of International Justice, Series A, No. 1, 28 and 30.)

⁷ Mr. Lansing, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador, April 26, 1916, concerning the case of the steamship *Vinland*, said to have been followed down the Atlantic coast from Barnegat Lighthouse to a point off Cape May, by a British cruiser, *For. Rel.* 1916, Supp., 762. See, also, correspondence, American White Book, European War, III, 131-141, in which reference was made to the irritation manifested by Great Britain during the Civil War on account of the conduct of American vessels of war under the command of Rear Admiral Wilkes, U.S.N., in patrolling waters in the vicinity of islands near the American coast, and which were used as rendezvous for vessels engaged in running the blockade established over Southern ports.

⁸ See instances set forth in Report of House Committee on Foreign Affairs, No. 1, 65 Cong., 1 Sess., Cong. Record, LV, No. 1, April 5, 1917, 319-320, J. B. Scott, Survey of Int. Relations between the United States and Germany, 305-309.

See statement issued by the Committee on Public Information respecting "Germany's lawless depredations and spying in America since the first declaration of war, in August, 1914," contained in Official Bulletin, No. 118, Sept. 27, 1917, p. 6.

See, also, two telegrams from the German Foreign Office to Count von Bernstorff, Ambassador at Washington, in January, 1916, made public by Mr. Lansing, Secretary of State, in October, 1917, with respect to sabotage in American munition factories, Official Bulletin, I, No. 129, Oct. 10, 1917, p. 1.

(3)

OTHER USES OF NEUTRAL TERRITORY ASSOCIATED WITH THE PROSECUTION OF WAR AND NOT NECESSARILY ATTRIBUTABLE TO A BELLIGERENT GOVERNMENT

(a)

§ 853. **The Fitting Out, Arming and Departure of Vessels Adapted for Hostile Uses.** It must be clear that the duty of prevention resting upon a neutral is not to be tested solely by the connection of the actors with the belligerent whose cause their conduct benefits, and still less by their national character. It is rather the relationship of their acts to the existing conflict and to the territory where they have their origin, which gives rise to the obligation. In the fitting out, arming and removal from neutral territory of a vessel which becomes attached to the service of a belligerent and engages in hostilities in its behalf, this principle finds simple application and wide recognition. Such conduct constitutes participation in the conflict, a result which is due to the removal of an instrument of war from neutral territory. Doubtless the availability of such a vessel for immediate engagement in hostilities serves to accentuate the un-neutral aspect of the series of acts which combine to place the ship within reach of a belligerent. Yet this circumstance is in reality, like a strong lens, merely an aid to the vision, rendering possible a clear perception of the legal significance of what takes place. It is not, however, to be deemed the only test of the participatory character of the acts involved.

In the United States, as doubtless elsewhere, the development of the idea that it was the duty of a neutral to exert diligence to prevent generally the departure or removal from its domain of vessels which it had reason to believe were intended to engage in hostilities with a belligerent, was gradual. The earliest American neutrality laws — those of 1794 — were designed to prevent the fitting out and departure of privateers, vessels the public and belligerent character of which was oftentimes if not generally established before their removal from neutral waters.¹ The sending abroad for sale of vessels adapted for hostile uses was not sought to be thwarted, because it was not believed that there existed a legal duty of prevention.² This may have been due to the circumstance that the military value to a belligerent of such an addition to its naval force was not great.

§ 853.¹ 1 Stat. 381, § 3.

See, also, Act of March 3, 1817, 3 Stat. 370, superseded by the Act of April 20, 1818, 3 Stat. 447.

Mr. Pickering, Secy. of State, to Mr. Adet, French Minister, Oct. 1, 1795, Am. State Pap., For. Rel. I, 633, 634; C. G. Fenwick, Neutrality Laws of the United States, 26 and 108.

See, also, *United States v. Guinet*, 2 Dall. 321, Moore, Dig., VII, 892.

See Charles S. Hyneman, *The First American Neutrality*, Illinois Studies in the Social Sciences, XX, Nos. 1-2, Urbana, Illinois, 1934.

² Thus Mr. Justice Story declared in a *dictum* in *The Santissima Trinidad*, 7 Wheat. 283, 340, that "there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit." Concerning this statement, see *Case of the United States at Geneva*, Papers Relating to the Treaty of Washington, I, 82-83, Moore, Dig., VII, 894-895.

See, also, Mr. Clay, Secy. of State, to Mr. Rivas y Salmon, Spanish Chargé d'Affaires, June 9, 1827, MS. Notes to For. Leg., III, 365, Moore, Dig., VII, 950; C. G. Fenwick, Neutrality Laws of the United States, 113, note 3.

Nor was any trade in vessels of war on a large scale practicable. The Neutrality Act of 1818 did not prohibit such conduct.³ It may be unimportant at this time to attempt to state precisely when American publicists were first agreed as to the necessity of imposing a broader obligation of prevention upon a neutral. It suffices to observe that it was declared in the Neutrality Rules contained in Article VI of the Treaty of Washington with Great Britain of May 8, 1871, that a neutral government is bound

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.⁴

These rules were regarded by the United States as declaratory of international law before the treaty was concluded.⁵ Great Britain, although declining to admit

³ 3 Stat. 447, which as expressed in § 5283 Rev. Stat. provides that "Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years." See slight verbal changes in § 11, 35 Stat. 1090, 18 U.S.C.A., § 23.

Declares Professor Fenwick: "This section does not by its terms make the act of fitting out or arming a vessel to the order of a belligerent a criminal one, provided the undertaking is purely commercial in character. To secure conviction under Sec. 5283, it is necessary to prove that the persons engaged in the fitting out and arming of the vessel had an intent that the vessel should be used for a specific hostile purpose in violation of the neutrality of the United States. Mere knowledge on the part of the person fitting out and arming the vessel that she will probably be used by the purchasers to commit hostilities against a state with which the United States is at peace is not sufficient to constitute such criminal intent, although the attempt has been made, and probably will again be made, to interpret the statute so as to cover such cases." (Neutrality Laws of the United States, 135.)

Concerning the interpretation of this section see *id.*, 65-78, and cases there cited, also *id.*, 135-138; Moore, Dig., VII, 894-906, and cases and other documents there cited; also *The Lucy H.*, 235 Fed. 610.

See, also, Recommendations by Mr. Gregory, Atty. Gen., for legislation amending the criminal and other laws of the United States with reference to neutrality and foreign relations, 1916.

⁴ Malloy's Treaties, I, 703.

⁵ Case of the United States, Geneva Arbitration, Papers Relating to the Treaty of Washington, I, 68-88; Moore, Arbitrations, I, 575-576; J. C. B. Davis, Notes, Treaty Volume (1776-1887), 1363, Moore, Dig., VII, 1004.

See Mr. Bryan, Secy. of State, to Mr. Barclay, British Chargé d'Affaires at Washington,

as much in 1871, agreed, nevertheless, that in the arbitration of the Alabama claims, the Tribunal should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the rules.⁶ In 1914, it was declared by the British Embassy at Washington that "the rules may be said to have acquired the force of generally recognized rules of international law."⁷ They were reproduced in Article VIII of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War.⁸ For the obscure phrase "due diligence," there was substituted, however, in the reproduction, a more scientific description of the measure of exertion demanded of a neutral, by the imposition upon it of the duty to "employ the means at its disposal" to prevent the acts specified.⁹ The existence and scope of the duty of prevention seem to depend in part upon whether the government of the neutral is fairly chargeable with the possession of information concerning the probable use for a belligerent and hostile purpose of the particular ship involved, and sufficient to warrant the belief that such use is contemplated.¹⁰ Such knowledge is obviously not necessarily dependent upon the state of mind of the owner or builder of the vessel.

In order to enable the United States better to respond to the obligation as laid down in the Hague Convention,¹¹ it was declared by the Act of Congress of June 15, 1917, to be unlawful to send out of the jurisdiction of the United States any vessel built, armed or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement

Aug. 19, 1914, For. Rel. 1914, Supp., 599, 602, where it was said that "The United States has always looked upon the Three Rules of Washington as declaratory of international law, and as the necessary and natural consequences of the doctrine of neutrality, proclaimed and enforced by the United States since the wars of the French Revolution, to which Great Britain was a party."

⁶ Statement of British attitude appended to the Rules, Malloy's Treaties, I, 703.

See, also, statement in Moore, Dig., VII, 1067.

For the text of the Geneva Award, see Papers relating to the Treaty of Washington, IV, 49-54, Moore, Dig., VII, 1060. Concerning the arbitration generally, see Moore, Arbitrations, I, 495-682. For the damages sustained by the United States in consequence of the failure of Great Britain to perform its duties as a neutral as set forth in the Neutrality Rules with respect to the Confederate vessels *Alabama*, *Florida* and *Shenandoah*, as well as certain tenders, there was awarded the sum of \$15,500,000.

See, also, The Alabama Claims, *supra*, § 564.

⁷ Mr. Barclay, British Chargé d'Affaires at Washington, to Mr. Bryan, Secy. of State, Aug. 4, 1914, For. Rel. 1914, Supp., 593, 594.

⁸ Malloy's Treaties, II, 2359.

⁹ *Id.*

Concerning the substitution, see Report of Mr. Renault in behalf of the Third Commission to the Second Hague Peace Conference of 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 295, 302; also Mr. Bryan, Secy. of State, to Mr. Barclay, British Chargé d'Affaires at Washington, Aug. 19, 1914, For. Rel. 1914, Supp., 599, 601.

See, also, Moore, Dig., VII, 1067-1076, and documents there cited.

¹⁰ According to Art. 13 of the Draft Convention on Maritime Neutrality, from the International Law Association, 1928: "A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reasonable grounds to believe is destined to cruise or take part in hostile operations against a Power with which that Government is at peace. It is also bound to exercise the same supervision to prevent the departure from its jurisdiction of any vessel destined to cruise or take part in hostile operations and which has been adapted in whole or in part within the said jurisdiction to warlike purposes." (Report of 35th Conference, Warsaw, 202, 204.)

¹¹ See recommendations of Mr. Gregory, Atty. Gen., for legislation amending the criminal and other laws of the United States with reference to neutrality and foreign relations, Department of Justice, 1916, p. 12.

or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer or citizen of such nation, or with reasonable cause to believe that such vessel shall or will be employed in the service of any such belligerent nation, after its departure from the jurisdiction of the United States.¹²

§ 854. **The Same.** It is to prevent the departure from its territory of a vessel concerning whose hostile mission requisite evidence exists, that the neutral is called upon to exercise vigilance. Local prohibitions of preliminary acts preparing a ship for such a mission, or transferring its title to a belligerent agency, and which unless prevented make increasingly difficult the proper performance of the duty of prevention, are, therefore, attributable to domestic policy.¹ The right and power of prevention are not in theory lessened when a vessel is sold and delivered to a belligerent.² Hence it may be doubted whether any international obligation rests upon a neutral to take any particular steps to check the commission of acts within its territory which in themselves fall short of the removal or attempted removal of a vessel therefrom.³

¹² Chap. 30, title V, § 3, 40 Stat. 222, 18 U.S.C.A., § 33. See, also, §§ 2, 6, and 10 of the same title, 18 U.S.C.A., §§ 27, 32 and 36. The provisions of this Act are of much significance with respect not only to the acts denounced as illegal, but also to the powers conferred upon the President to enforce the neutrality of the nation. See Enforcement of Neutral Duties, Executive Action, *infra*, § 878.

§ 854. ¹ The phraseology both of the Rules of the Treaty of Washington and of the Hague Convention of 1907 have obscured this fact because they have been so drafted as to suggest a legal duty on the part of a neutral to prevent the commission of acts antecedent to and other than the departure of a ship. This may have been attributable to the form and language of the Neutrality Act of the United States of 1794, which, as has been observed, was designed against privateering and to frustrate an act of the belligerent government or agency with respect to a ship in neutral territory. The defiance of the rights of the territorial sovereign which takes place when a belligerent State itself undertakes to fit out a ship for its own hostile service, is due in part to the ultimate design of the undertaking which involves the removal of the vessel from neutral territory. It is the achievement of that design which the neutral finds itself obliged to endeavor to prevent. It is believed that the aim of the rules is not more than to lay down a duty of prevention of acts which will in themselves, if not checked, amount to or produce a participation in the conflict. Such a result cannot take place so long as a vessel is not permitted to depart from neutral territory.

As a matter of domestic policy, however, it may be of special importance to the neutral to prohibit the transfer of certain classes of vessels to a belligerent, simply as a means of minimizing the danger of failure in the performance of an acknowledged international obligation.

² See opinions of Count Sclopis and Viscount d'Itajubá, in the Geneva Arbitration, on the special question as to the effect of the commissions held by the Confederate vessels of war which entered British ports, Papers Relating to the Treaty of Washington, IV, 69-74, and 96-98, respectively.

³ Cf. Art. 7 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 176, and comment thereon, *id.*, 249.

The purpose of a domestic law is to assist the neutral in the performance of its international obligations. To that end a statute may be framed with a view to punishing persons committing acts such as the fitting out and arming of vessels designed for a belligerent service, and which, unless thwarted, will tend to result in the commission by possibly other individuals of unneutral acts which the State is burdened with a duty to endeavor to prevent. It is conceivable, however, that every local statute may be violated, and yet the neutral, although its task of prevention is thereby rendered increasingly difficult, be guilty of no censurable conduct because of its success in preventing the departure of a vessel from its waters; for no wrong is done a belligerent so long as the ship is retained therein.

On the other hand, while a belligerent is in theory unconcerned with the scope of the statutory laws of a neutral, the former may, in substantiating its charges of neglect against the latter, adduce proof of its negligence in enforcing its statutes designed to thwart unneutral conduct. Evidence of such neglect in a case where a ship does depart for a belligerent service and engages in hostilities, strengthens the claim of the aggrieved belligerent, inasmuch as it

At the present time difficulty attends the scrupulous observance of the obligation as expressed in the Hague Convention. The ability and disposition of a belligerent to utilize for hostile purposes almost any type of merchant vessel capable of mounting guns, serve to impose upon the neutral the burden of exercising great watchfulness of every vessel constructed within its territory and contemplating departure therefrom for a belligerent port or service. The absence of armament at time of departure is by no means indicative that a vessel may not be specially adapted for hostile operations.⁴ Nor does an apparently innocent structural design necessarily preclude the likelihood of the transformation of the ship into a naval auxiliary.⁵

Again, the equipping in neutral waters of a belligerent merchant vessel with a slight defensive armament, to afford protection against submarine attack, enables the ship to engage in what is difficult to distinguish from offensive operations.⁶ The belligerent merchantman which so arms itself in neutral waters, even though not bent on a hostile mission, and without altering its chief purpose as a vehicle of commerce, serves notice on the territorial sovereign that it will engage at sight any enemy submarine which may be encountered.⁷ For that reason, therefore, the neutral appears to be burdened with the duty to endeavor to prevent the departure from its waters of a belligerent merchantman there acquiring such armament.⁸ There is need, however, of general and precise understanding concerning the types of belligerent vessels respecting the departure of which from its territory a neutral should be held to accountability, and indicating the circumstances when a neutral may be fairly charged with neglect with respect to certain classes of unarmed ships.⁹ It is believed that there should be no relaxation of the vigilance and care to be exercised by such a State in preventing the departure for a probable belligerent destination or service of any vessel armed within its territory for the purpose of committing hostile acts against a belligerent ship.

tends to prove an indisposition on the part of the neutral to employ the means at its disposal to insure the fulfillment of its international duty.

⁴ This was conspicuously true in the case of the *Alabama*, which left English waters unarmed. See Geneva Award, Papers relating to the Treaty of Washington, IV, 51.

⁵ On Jan. 29, 1915, the Department of State, in opposition to the view of the German Embassy at Washington, announced the conclusion that hydroaeroplanes were not to be regarded as war vessels, and that Art. VIII of the Hague Convention was not applicable thereto. For. Rel. 1915, Supp., 780.

⁶ See Private Vessels Defensively Armed, *supra*, § 709.

⁷ Compare Sir Cecil Spring-Rice, British Ambassador at Washington, to Mr. Bryan, Secy. of State, Aug. 25, 1914, For. Rel. 1914, Supp., 604.

⁸ Discussions and declarations by the United States while a neutral in the course of World War I, concerning armed belligerent merchantmen in American waters, dealt with the entrance and sojourn therein of such vessels elsewhere defensively armed, rather than with the equipping of them in those waters and the duty of preventing their subsequent departure therefrom. See correspondence in American White Book, European War, II, 37-40, *id.*, III, 188-193.

⁹ See, in this connection, § 2, title V, Act of June 15, 1917, relative to the enforcement of neutrality, 40 Stat. 221, 18 U.S.C.A., § 32.

See Enforcement of Neutral Duties, Executive Action, *infra*, § 878.

(b)

§ 855. **Neutral Territory as a Base of Belligerent Operations.** In a broad sense neutral territory becomes a base of operations whenever it is a source or station from which a belligerent State as such augments its power of doing harm to the enemy. According to the practice of nations, however, the duty of a neutral to prevent territory subject to its control from attaining such a character is of narrow scope and limited by technical rules.¹ This circumstance accentuates the fact that the term "base of operations" fails in itself to indicate with precision the character or scope of the preventive obligation which is generally acknowledged to rest upon the neutral; for as yet there seems to be no common disposition to impose upon such a State an endeavor to prevent its domain from becoming in numerous situations what, in the light of logic, must cause or permit it to be in fact a direct source of augmentation of belligerent military or naval strength. Thus the phrase hardly reveals a test of the sufficiency of preventive conduct, although it is oftentimes used to refer to the sinister aspect of some belligerent acts which the neutral finds itself obliged to endeavor to prevent when they are committed within its territory, and as the reason why such endeavor should be made.² When therefore, conventional arrangements purport to forbid belligerents to use neutral ports and waters as bases of naval operations against their adversaries, and to impose a corresponding duty of prevention upon the neutral, it remains to ascertain the particular acts which are forbidden and which the neutral should endeavor to thwart; and the normal latitude yielded the belligerent may render difficult the solution

§ 855.¹ In the Case of the United States in the Geneva Arbitration it was declared: "The ports or waters of the neutral are not to be made the base of naval operations by a belligerent. Vessels of war may come and go under such rules and regulations as the neutral may prescribe; food and the ordinary stores and supplies of a ship, not of a warlike character, may be furnished without question, in quantities necessary for immediate wants; the moderate hospitalities which do not infringe upon impartiality may be extended; but no act shall be done to make the neutral port a base of operations. Ammunition and military stores for cruisers cannot be obtained there; coal cannot be stored there for successive supplies to the same vessel, nor can it be furnished or obtained in such supplies; prizes cannot be brought there for condemnation. The repairs that humanity demands can be given, but no repairs should add to the strength or efficiency of a vessel beyond what is absolutely necessary to gain the nearest of its own ports.

"In the same sense are to be taken the clauses relating to the renewal or augmentation of military supplies or arms and the recruitment of men. As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent. If her magazine is supplied with powder, shot, or shells; if new guns are added to her armament; if pistols, or muskets, or cutlasses, or other implements of destruction, are put on board; if men are recruited; even if, in these days when steam is a power, an excessive supply of coal is put into her bunkers, the neutral will have failed in the performance of its duty." (Papers Relating to the Treaty of Washington, I, 71.)

See, also, Mr. Randolph, Secy. of State, to the Governors of the several States, circular, April 16, 1795, Am. State Pap. For. Rel. I, 608, Moore, Dig., VII, 934.

See Exportations of Munitions of War, *infra*, §§ 867-868.

² Declared the Commission of Jurists of 1923, in commenting on Art. 46 of the Rules of Aerial Warfare: "An exception to the principle that a neutral state is under no obligation to prevent the export of arms and war material, is found in the accepted rule of international law that neutral territory must not be utilized as a base of operations by a belligerent government, and that the neutral state must therefore prevent the fitting out or departure from its jurisdiction of any hostile expedition intended to operate on behalf of one belligerent against the other." (Am. J., XXXII, *Official Documents*, 12, 37.)

of the interpretative problem until at least there has been full examination of the evidence that establishes the exact design of the contracting parties.

In maritime warfare an improper situation appears to be acknowledged, that is to say, a condition which should not be tolerated by the neutral, when its territory affords increased strength to a unit of force such as a vessel of war, which in consequence is enabled, without returning to a home port, to engage directly in hostile operations with increased efficiency. Such territory is not, however, commonly regarded a base of operations, in an improper sense, when the aid procured by a belligerent therein does not produce such an effect upon such a unit. Thus the mere freedom with which a belligerent obtains and removes munitions of war from neutral territory for general uses is not deemed to be necessarily indicative of an improper use thereof which the territorial sovereign should endeavor to restrict.³

The existing duty of prevention, although limited in scope, is due to the fact that indifference on the part of the neutral would serve to cause its territory to become a direct means of injuring a State with which friendly relations are maintained, and so mark a participation in the war from within that territory. The perception of such a result is due to the closeness of the relationship between the particular offering of neutral resources and the increased fighting power of the belligerent agency such as a ship.

To become a base of operations in the proscribed sense, neutral territory need not be subjected to belligerent control for the purpose, for example, of establishing depots of supplies. The actors whose conduct suffices to give it such a character may be private individuals of any nationality.

In the case of a belligerent vessel of war the nature and fullness of the aid procured in a neutral port together with frequency of resort thereto, may appear to unite to transform the latter into what is acknowledged to be a base of operations which should not be tolerated. In reality, however, it ought to be clear that a neutral port may attain the character of a base of operations through the single augmentation of the power of a naval vessel.⁴ This circumstance ren-

³ Mr. Bryan, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Dec. 24, 1914, For. Rel. 1914, Supp., 647; cf. Count von Bernstorff to Mr. Bryan, with memorandum, Dec. 15, 1914, *id.*, 646.

According to Art. 3 of the Italian Law of Neutrality approved by royal decree of July 8, 1938: "The territory of the State may not be used as a base for hostile operations." (Deák and Jessup, *Neutrality Laws*, I, 725.)

⁴ Declared Admiral Stockton: "The crucial test of a naval base in these days in a neutral country is not the frequency of resort, but the fullness of the necessary supplies and repairs attained and the length of stay permitted." (Int. Law, *Outlines*, 402.)

See Case of the Confederate ship *Shenandoah*, Geneva Arbitration, Argument of Mr. Evarts for the United States, Papers Relating to the Treaty of Washington, III, 458-464; also Award of the Tribunal, *id.*, IV, 52.

Compare Hall, Higgins' 8 ed., 724, where the suggestion that continued use is above all things the crucial test of a base appears to be inapplicable to a case where, like that of the *Shenandoah*, the augmentation of its crew and of fuel at Melbourne was essentially unlawful. The test of whether the United States had the right to complain that Melbourne had been a base of operations for that vessel, depended merely upon establishing the fact that the *Shenandoah*, in consequence of the aid there wrongfully received, had done injury to American ships.

According to § 12, 35 Stat. 1090, §5285, Rev. Stat.: "Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or

ders arbitrary attempts to prescribe what particular forms of augmentation do or do not serve to transform the place of procurement into what is regarded as a base of an objectionable kind. Such attempts are not conducive to clearness of thought or to precision of conduct; for they test the character of an injunction by a phrase itself calling for explanation rather than by forms of conduct that need to be restrained.

According to the Department of State, the repeated use of a neutral port by belligerent vessels of war, at least within a short interval of time, and for a purpose which, according to existing practice, might justify a single visit, serves to render the port a base of operations. It is said that the ability of such a vessel to return thereto for the purpose, for example, of replenishing an exhausted supply of fuel, would cause the port, if such design were accomplished, to fulfill an improper function.⁵

The duty of prevention was set forth, as has been seen, in the second of the Rules of the Treaty of Washington.⁶ It found expression also in the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, according to Article V of which belligerents are forbidden "to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea."⁷ In Article XVIII, any use of neutral territorial waters for the replenishment or increase of supplies of war material or armament, or for the completion of crews, is forbidden.⁸ The

augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince, or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be fined not more than one thousand dollars and imprisoned not more than one year." (18 U.S.C.A., § 24.)

See particularly *The Santissima Trinidad*, 7 Wheat. 283.

⁵ Mr. Bryan, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Dec. 24, 1914, in which it was said: "The essential idea of neutral territory becoming the base for naval operations by a belligerent is in the opinion of this Government *repeated* departure from such territory of merchant vessels laden with fuel or other supplies for belligerent warships at sea." (For. Rel. 1914, Supp., 647, 648.) See, also, Memorandum of State Department, Sept. 19, 1914, respecting merchant vessels suspected of carrying supplies to belligerent vessels, in which it was declared that "a base of operations for belligerent warships is presumed when fuel or other supplies are furnished at an American port to such warships more than once within three months since the war began, or during the period of the war, either directly or by means of naval tenders of the belligerent or by means of merchant vessels of belligerent or neutral nationality acting as tenders." (*Id.*, 618.)

See Art. XX, Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2361.

See, also, Naval War College, Int. Law Situations, 1912, 153.

⁶ Malloy's Treaties, I, 703.

⁷ *Id.*, II, 2359. Art. V is reproduced in No. 13 of Naval Instructions on Maritime Warfare, of June 30, 1917.

⁸ Malloy's Treaties, II, 2361.

Concerning this Article, see Report of Mr. Renault in behalf of the Third Commission, to the Second Hague Peace Conference of 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 315-318.

See, also, Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 14.

duty of a neutral to use the means at its disposal to prevent such forbidden uses of its territory is also generally announced.⁹

In the early stages of World War I, the United States, while a neutral, in order to prevent the use of its ports or waters as the base of operations for belligerent forces, "contrary to the obligations imposed by the law of nations," by a joint resolution of the Congress, approved March 4, 1915, authorized and empowered the President to direct the collectors of customs under the jurisdiction of the United States to withhold clearance from any vessel, American or foreign, which he had a reasonable cause to believe to be about to carry fuel, arms, ammunition, men or supplies to any warship or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral.¹⁰

On the recommendation of the Attorney General, this resolution was, in June, 1917, repealed, and a law enacted broadening the power of the President, by enabling him, during a war in which the United States is a neutral, to withhold clearance of vessels requiring clearance, and to forbid the departure of American vessels not requiring clearance, whenever there is reasonable cause to believe that fuel, arms, ammunition, men, supplies, despatches or information are to be conveyed by the vessel to any warship, tender or supply ship of a foreign belligerent nation in violation of the laws, treaties or obligations of the United States under the law of nations.¹¹

This enactment and enlargement of the provisions thereof that have since found their way into the statutory law are believed to possess great significance.¹²

⁹ Art. XXV, Malloy's Treaties, II, 2362.

See also Arts. 4 and 26 of Habana Convention on Maritime Neutrality, concluded Feb. 20, 1928, U. S. Treaty Vol. IV, 4743, 4745, 4748.

According to Art. 16 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A belligerent shall not use the territory of a neutral State as a base of operations." (*Am. J.*, XXXIII, *Supplement Section 2*, 178.)

The General Declaration of Neutrality of the American Republics, approved at Panama Oct. 3, 1939, announced that with regard to their status as neutrals, there existed certain standards recognized by the American Republics as applicable in these circumstances, and that in accordance with them they "(a) shall prevent their respective terrestrial, maritime, and aerial territories from being utilized as bases of belligerent operations." (Report of the Delegate of the United States of America to the Meeting of the Foreign Ministers of the American Republics, held at Panama, 1939, Dept. of State Publication 1451, Conference Series 44, p. 54.)

¹⁰ 38 Stat. 1226.

¹¹ Chap. 30, § 1, title V, Act of June 15, 1917, 40 Stat. 221, 18 U.S.C.A., § 31. See also §§ 10 and 11 of same title.

¹² According to Section 10 of the Neutrality Act of 1939:

"(a) Whenever, during any war in which the United States is neutral, the President, or any person thereunto authorized by him, shall have cause to believe that any vessel, domestic or foreign, whether requiring clearance or not, is about to carry out of a port or from the jurisdiction of the United States, fuel, men, arms, ammunition, implements of war, supplies, dispatches, or information to any warship, tender, or supply ship of a State named in a proclamation issued under the authority of Section 1 (a), but the evidence is not deemed sufficient to justify forbidding the departure of the vessel as provided for by Section 1, Title V, Chapter 30, of the act approved June 15, 1917 (40 Stat. 217, 221; U.S.C., 1934 Edition, Title 18, Sec. 31), and if, in the President's judgment, such action will serve to maintain peace between the United States and foreign States, or to protect the commercial interests of the United States and its citizens, or to promote the security or neutrality of the United States, he shall have the power and it shall be his duty to require the owner, master, or person in command thereof, before departing from a port or from the jurisdiction of the United States to give a bond to the United States, with sufficient sureties, in such amount as he shall deem

They reveal acknowledgment that neutral territory may become an improper means or source of military sustenance when a belligerent force gains direct aid therefrom without entering neutral waters and by means of an intermediate agency of transportation. They suggest also the reasonableness of the contention that an obligation of prevention may rest upon a neutral when effort is made to send from its territory military or kindred supplies to any foreign place on sea or land with the design that they may there be given over to a belligerent military force. In both cases neutral territory attains the same relation to the conflict; in both, the resources therefrom are available as a direct aid to a fighting force; in both, therefore, the legal nature of tolerance by the neutral sovereign appears to be the same.

When neutral and belligerent territories are adjacent, a simpler situation presents itself in case the former furnishes a direct supply of war material to a belligerent army across the border. In such event the domain of the neutral is believed to become, in reality, a base of operations as certainly as if the recipient of its aid were a vessel of war similarly augmented.¹³ Although acknowledging the right of the neutral to effect restriction, interested States have not as yet been disposed to impose or accept so broad an obligation of prevention.¹⁴

(c)

§ 856. **Hostile Military Expeditions.** The duty of a State not to permit its territory with the persons who inhabit it to wage war against another State

proper, conditioned that the vessel will not deliver the men, or any fuel, supplies, dispatches, information, or any part of the cargo, to any warship, tender, or supply ship of a State named in a proclamation issued under the authority of Section 1 (a).

"(b) If the President, or any person thereunto authorized by him, shall find that a vessel, domestic or foreign, in a port of the United States has previously departed from a port or from the jurisdiction of the United States during such war and delivered men, fuel, supplies, dispatches, information or any part of its cargo to a warship, tender or supply ship of a State named in a proclamation issued under the authority of Section 1 (a) he may prohibit the departure of such vessel during the duration of the war.

"(c) Whenever the President shall have issued a proclamation under Section 1 (a) he may, while such proclamation is in effect, require the owner, master or person in command of any vessel, foreign or domestic, before departing from the United States, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that no alien seaman who arrived on such vessel shall remain in the United States for a longer period than that permitted under the regulations, as amended from time to time, issued pursuant to Section 33 of the Immigration Act of Feb. 5, 1917 (U.S.C., Title 8, Sec. 168). Notwithstanding the provisions of said section, he may issue regulations with respect to the landing of such seamen as he deems necessary to insure their departure either on such vessel or another vessel at the expense of such owner, master or person in command." (54 Stat. 4, 9.)

¹³ "While discussions of such matters have, as in the *Alabama* claims cases, principally concerned war vessels and expeditions by sea, it cannot be doubted that aid given to an army engaged in actual warfare stands upon the same footing as aid given to a fleet so engaged, since both equally involve a taking part by the neutral in furthering the military operations of the belligerent. Nor should the municipal laws of England and the United States, or of other countries, by principally dealing with such vessels and expeditions, obscure the fact that aid can as well be given to military operations of the belligerent the one way as the other, by proceedings carried on upon the neutral territory." (Opinion of Mr. Knox, Atty. Gen., April 4, 1902, 24 Ops. Attys. Gen. 15, 24.)

See, also, C. G. Fenwick, *Neutrality Laws of the United States*, 147; *The Exportation of Munitions of War*, *infra*, §§ 867-868.

¹⁴ See Arts. VII and VIII, Hague Convention of 1907, Concerning Rights and Duties of Neutral Powers and Persons in War on Land, Malloy's Treaties, II, 2298.

with which it is at peace and maintains friendly relations, seems to be acknowledged.¹ That obligation is violated when an expedition, organized on neutral soil for the purpose of engaging in military operations against a belligerent State, is permitted to depart from the national domain and in consequence causes injury to that State.² Neutral tolerance necessarily signifies connivance, and hence governmental participation in the conflict.³ Hence a duty of prevention must be apparent. In fulfillment of it a State such as the United States may, as a matter of domestic policy, enact laws purporting to render unlawful the commission within its territory of acts which if unrestrained might, through the combination of the actors, be productive of serious international consequences.⁴ The enforcement of such laws may, therefore, prove an effective deterrent and hence a practical safeguard.

§ 856. ¹ Mr. Jefferson, Secy. of State, to Mr. Morris, American Minister to France, Aug. 16, 1793, *Am. State Pap., For. Rel. I*, 167, 168-169, Moore, Dig., VII, 917.

² It should be observed that this broad obligation is not attributable to the law of neutrality. It exists whether the foreign State be at war, or endeavoring to suppress unrecognized insurgents, or enjoying freedom from any internal disturbance. It has not been as a neutral that the United States has most frequently felt the burden of this particular duty. It may be noted that § 8, title V, of the Act of June 15, 1917, 40 Stat. 223, 18 U.S.C.A., § 25, like the earlier law which it amended, is not limited in its operation to occasions when in the course of a war the United States is a neutral.

See also report of the Commission of Jurists of 1923, on Art. 46 of the Rules of Aerial Warfare, *Am. J.*, XXXII, *Official Documents*, 12, 37.

³ See Roy Emerson Curtis, "The Law of Hostile Military Expeditions as Applied by the United States," *Am. J.*, VIII, 1-37, 224-255. To this careful and illuminating discussion of the subject, the author acknowledges great indebtedness. With respect to the principle stated in the text Mr. Curtis declares: "But when viewed positively, the wrongful act of the State appears to consist in complicity in hostile attacks on friendly States. The authorized and direct complicity of the government in the expedition itself has been excluded as actual war. The negligence and carelessness of the State, however, in the prevention of such enterprises amounts to virtual complicity in the undertaking. If there is such an attitude on the part of the government as indicates a disregard of its international obligation, it may be considered as having consented to the attack which is to be made; it may even be regarded as assisting in the hostilities by protecting the persons engaged, and allowing them its territory as a base for organization. If the sovereign has knowingly suffered the harm to be done to another State, it may be said to be an accomplice in the act itself." (*Id.*, 36.)

"A hostile expedition is a combination of individuals, subject to the jurisdiction of a particular State, for the purpose of conducting military operations against another State in its political capacity, the two States being at peace with each other. The idea here conveyed is meant to embrace action by citizens and by aliens, instigated by private persons or by foreign governments. It excludes action by individuals separately; it excludes non-military operations and attacks on private persons as such. Hostile expeditions will not be confused, therefore, with marauding invasions which are undertaken for the piratical ends of rapine and plunder. The concerted action of organized companies is clearly distinguishable also from the recruiting of individuals for the regular forces of a belligerent State. Every individual enlisted is, of course, an element of strength to the party that enlists him, but he is not a unit capable of immediate hostilities. The hostile expedition involves the preparation on friendly soil of a force capable of immediate and independent action against the State, and presumably able to defend itself. The individual recruit is so much material for warfare, but the expedition is itself a warring party." (*Id.*, 8.)

⁴ By § 8, title V, of the Act of June 15, 1917, 40 Stat. 223, § 13, 35 Stat. 1090, was amended and broadened to read as follows: "Whoever, within the territory or jurisdiction of the United States or of any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or State, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000, or imprisoned not more than three years, or both."

Concerning the development and application of the earlier statute, see Moore, Dig., VII, 908-934, and cases and other documents there cited; C. G. Fenwick, *Neutrality Laws of the United States*, 82-87; R. E. Curtis, *Am. J.*, VIII, 238-252. See, especially, *Wiborg v. United States*, 163 U. S. 632.

In the case of a hostile military expedition, there are known elements the presence of which together would tend to expose to a charge of complicity a territorial sovereign which ignored them, in case positive injury to a belligerent ultimately ensued. Thus where men combine in neutral territory, with the definite purpose of going abroad to engage in hostile military operations against a State, there is in existence a movement which the neutral, if cognizant of the facts, needs for the sake of its own safety to endeavor to suppress; for its task of performing its international obligation of prevention may become increasingly burdensome if the movement is permitted to gain headway and those associated with it attempt departure.

As in the case where neutral territory affords a so-called base of operations, or furnishes a vessel of war to a belligerent, it is the direct availability for immediate hostile service of a military expedition — "itself a warring party" — which accentuates the causal connection between territory from which it emanates and the harm which it produces, and so makes obvious the responsibility of the tolerant or unforbidding sovereign of that territory. To constitute a unit of strength possessing such availability, there must be some association or organization of a military character within neutral territory, and a common design there entertained of hostile operations against a friendly State. Where these elements are not present, the United States appears to be unwilling to admit the existence of a military expedition as such, for whose departure from American territory any duty of prevention is to be acknowledged.⁵

(d)

§ 856A. **Obligations with Respect to Certain Aircraft.** Widespread acknowledgment that aircraft used for the military purposes of a belligerent should not enter or fly over neutral territory has been productive of special duties of prevention that rest upon the sovereign of such territory.¹ It is laid down in the Rules of Aerial Warfare prepared by the Commission of Jurists of 1923, that a

⁵ See Mr. Marcy, Secy. of State, to Mr. Escalante, May 8, 1856, MS. Notes to Spain, VII, 79, Moore, Dig., VII, 927; Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador, March 8, 1912, For. Rel. 1912, 740.

See decision of British-American Claims Commission, under Art. XII, treaty of May 8, 1871, disallowing claims arising from St. Albans Raid, Moore, Arbitrations, IV, 4054, Hale's Report, 21.

See Obligations with Respect to Certain Aircraft, *infra*, § 856A.

§ 856A. ¹ Declares Spaight: "The important question whether the laws of neutrality allow belligerent military aircraft to come and go in neutral jurisdiction was answered by the practice of 1914-18 with a firm and unmistakable negative. The unanimity of the answer was remarkable. All the neutral States who had occasion to decide the question decided it in the same general way, and their decision gave rise to no protest on the part of the belligerents concerned, with one single exception, which the subsequent action and compliance of the State making it deprived of all its force." (Air Power, 2 ed., 421.)

"During the early stages of the development of aircraft, there was uncertainty as to the obligations of neutral States in regard to the use of the superjacent air by belligerents. Gradually the absolute prohibition of such use became the accepted rule. Of course, in case of distress an aircraft might seek a landing in neutral jurisdiction but it would be interned with the personnel. Aircraft might be brought within neutral jurisdiction on a vessel which might lawfully be permitted to enter, but they must not be separated from the vessel under liability to internment." (Naval War College, Int. Law Situations, 1936, 80.)

See Art. 40 of Rules of Aerial Warfare of 1923, and comment thereon in the Report of the Commission of Jurists, *Am. J.*, XXXII, *Official Documents*, 34.

neutral government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft, and to compel them to alight if they have entered such jurisdiction.² In the course of the European War initiated in 1939, some European neutral States frequently found their best endeavors to prevent such entry or the escape of the entrants unavailing, and became themselves the innocent victims of belligerent unconcern for the inviolability of their territories.³

The character and extent of the obligation resting upon a neutral to prevent the departure from its territory of aircraft having an existing or prospective connection with a belligerent service deserves attention. According to Article 46 of the Hague Rules of 1923:

A neutral government is bound to use the means at its disposal:

1. To prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a belligerent Power, or carrying or accompanied by appliances or materials the mounting or utilisation of which would enable it to make a hostile attack, if there is reason to believe that such aircraft is destined for use against a belligerent Power.
2. To prevent the departure of an aircraft the crew of which includes any member of the combatant forces of a belligerent Power.
3. To prevent work upon an aircraft designed to prepare it to depart in contravention of the purposes of this article.⁴

Here the duty placed upon the neutral is not merely to endeavor to prevent the departure of an aircraft in consequence of its being fitted out or equipped within its territory and there made a fresh unit of military power adaptable as such to the immediate augmentation of belligerent force, but also to strive to prevent departure in consequence of certain potentialities of the aircraft regardless of the place where they were attained.⁵ The Harvard Draft Convention

² Art. 42, *id.*, 36. According to the same Article: "A neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any."

See Internment of Belligerent Vessels of War and Their Occupants, *infra*, § 864; Shipwrecked, Wounded or Sick Persons, *infra*, § 865.

³ See Inviolability of Neutral Territory, The Duty of the Belligerent, *infra*, § 887.

⁴ *Am. J.*, XXXII, *Official Documents*, 38.

Art. 46 contains also the following important provision: "On the departure by air of any aircraft despatched by persons or companies in neutral jurisdiction to the order of a belligerent Power, the neutral government must prescribe for such aircraft a route avoiding the neighborhood of the military operations of the opposing belligerent, and must exact whatever guarantees may be required to ensure that the aircraft follows the route prescribed."

⁵ "An exception to the principle that a neutral State is under no obligation to prevent the export of arms and war material, is found in the accepted rule of international law that neutral territory must not be utilised as a base of operations by a belligerent Government, and that the neutral State must therefore prevent the fitting out or departure from its jurisdiction of any hostile expedition intended to operate on behalf of one belligerent against the other. Such an expedition might consist of a single aëroplane, if manned and equipped in a manner which would enable it to take part in hostilities, or carrying or accompanied by the necessary elements of such equipment. Consequently, its departure under circumstances which would constitute the despatch of a hostile expedition, must be prevented by the neutral government." (Report of Commission of Jurists on Art. 46 of Rules of Aerial Warfare of 1923, *Am. J.*, XXXII, *Official Documents*, 37-38.)

on Rights and Duties of Neutral States in Naval and Aerial War goes farther, declaring it to be the duty of a neutral State to use the means at its disposal "to prevent subject to Article 94, the flight from its territory of any aircraft which is intended to engage in hostile operations against a belligerent, or which is intended to perform services of a military character for a belligerent."⁶ These may be numerous and varied. If the test of the duty of prevention be deemed to depend upon the capacity or adaptability of an aircraft for an immediate military service of any kind, it would be reasonable to contend that a neutral State should make the requisite endeavor to prevent the flight from its territory for a belligerent destination of any plane adaptable to such use, regardless of what the evidence might disclose as to an intention to use it for a service of military aspect.⁷

It is perhaps not an unreasonable relaxation of the heavy burden resting upon the neutral by way of prevention that permits it to regard aircraft on board vessels of war including aircraft carriers as part of such vessels, and to permit the entry of such aircraft into neutral territory "on the same footing as the warship on board which they rest," provided they remain thereon and commit no act which the latter is not permitted to commit. Hence the declaration in Article 41 of the Rules of Aerial Warfare of 1923, that "aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessels" appears to be unobjectionable.⁸

It is not apparent on principle why a belligerent military aircraft within the territory of a neutral at the outbreak of war should be given a period of grace within which to depart therefrom. At least one recent neutrality decree makes, however, such a concession.⁹

⁶ Art. 99 (b), *Am. J.*, XXXIII, *Supplement Section 2*, 195; also Comment, *id.*, 771, and 223-224.

⁷ The General Declaration of Neutrality of the American Republics, approved at Panama, on Oct. 3, 1939, declared, in harmony with certain existing standards recognized by those Republics: "They shall regard as a contravention of their neutrality any flight by the military aircraft of a belligerent State, over their own territory. With respect to non-military aircraft, they shall adopt the following measures such aircraft shall fly only with the permission of the competent authority; all aircraft, regardless of nationality, shall follow routes determined by the said authorities; their commanders or pilots shall declare the place of departure, the stops to be made and their destination; they shall be allowed to use radio-telegraphy only to determine their route and flying conditions, utilizing for this purpose the national language, without code, only the standard abbreviations being allowed; the competent authorities may require aircraft to carry a co-pilot or a radio operator for purposes of control. Belligerent military aircraft transported on board warships shall not leave these vessels while in the waters of the American republics; belligerent military aircraft landing in the territory of an American republic shall be interned with their crews until the cessation of hostilities, except in cases in which the landing is made because of proven distress. There shall be exempted from the application of these rules cases in which there exist conventions to the contrary." (Dept. of State Publication 1451, Conference Series 44, 1940, 54, 55-56.)

⁸ *Am. J.*, XXXII, *Official Documents*, 35, containing the Report of the Commission of Jurists which is quoted in the text.

⁹ See Art. 31 of Italian neutrality decree of July 8, 1938, where it is announced that: "Belligerent military aircraft which, at the outbreak of hostilities, are within the territory of the State must depart within twelve hours of receipt of notification of the respective order, except that a different period may be fixed by special decision of the aviation authorities, or except in case of *force majeure*. In the latter event, a supplementary period may be fixed." (Deak and Jessup, *Neutrality Laws*, I, 725, 729.)

See also Art. 94 of Harvard Draft Convention on Rights and Duties of Neutral States in

It may be observed that in 1940, the American Government with little regard for the applicability of the principles enunciated in the Hague Rules of 1923, or in the Harvard Draft Convention, permitted military planes to be rolled across, and at times to be flown across, the northern boundary of the United States to belligerent Canada.¹⁰ No sense of a duty of prevention in the case of aircraft to which title had passed to the belligerent public owner while they were in the territory of the United States appears to have been entertained by that Government. This implied that a neutral State was not required by international law to endeavor to prevent the acquisition within, and removal from, its domain of military aircraft by a belligerent State. Such a conclusion signified, moreover, that analogies drawn from obligations resting upon a neutral with respect to vessels of war were not to be taken as necessarily indicative or probative of what that law demanded with respect to aircraft. It failed, however, to meet the contention that "the departure from neutral territory of any aircraft intended for such [military] services is believed to constitute the despatch of a hostile expedition which the neutral State is bound to try to prevent."¹¹

(e)

§ 856B. **Radio and Certain Other Means of Communication.** That a neutral State is not obliged to endeavor to prevent all communications from places within its own control directed to those within that of a belligerent seems to be accepted doctrine.¹ There are, however, some instrumentalities of communication, such as radio, the use of which by or in behalf of a belligerent may be of utmost aid thereto, and which, accordingly, if left unchecked by the neutral may cause its own domain to become a veritable base of military operations.²

Naval and Aerial War. Art. 96 of that Convention declares that "The neutrality of a State is not violated by the passage through its territory of public nonmilitary or unarmed belligerent private aircraft." Art. 97 announces that "The requirements of neutrality do not in general necessitate the closing of neutral aerial frontiers against the passage of aircraft of other neutral States."

¹⁰ See L. H. Woolsey, *Am. J.*, XXXIV, 488.

¹¹ Comment by the Reporter on Art. 99 (b) of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 771. See *Hostile Military Expeditions*, *supra*, § 856.

It should, however, be borne in mind that there was a period, perhaps beginning with the Summer of 1940, during which releases of American military aircraft to Britain were a part of the effort made by the United States, for reasons of self-defense, to thwart a German triumph, and were attributable to the interventionist policy that took concrete form in the transfer of Destroyers to the United Kingdom in September, 1940. See *supra*, § 848A.

§ 856B.¹ The Hague Rules for the Control of Radio in Time of War, prepared by the Commission of Jurists in 1923, announce in Art. 4 that "a neutral power is not called upon to restrict or prohibit the use of radio stations which are located within its jurisdiction, except so far as may be necessary to prevent the transmission of information destined for a belligerent concerning military forces or military operations and except as prescribed by Article 5." (*Am. J.*, XXXII, *Official Documents*, 5.)

According to Art. 8 of the Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land: "A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals." (Malloy's *Treaties*, II, 2298.)

"It seems clear that under international law a neutral State is not under a duty to exercise a general restraint over all means of communication within its jurisdiction." (Comment on Art. 9 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 266.)

² See, in this connection, Governmental Abstinence from Direct Participation, *supra*, § 848.

Thus, at the present time, at the outbreak of war the neutral State finds itself burdened with the duty to use the means at its disposal to prevent at least two distinct things — first, the establishment and use by a belligerent of radio facilities, such as a radio station, within areas or ships or aircraft under its control; and secondly, the transmission therefrom of any information designed or calculated to assist a belligerent and destined to it.³ This general requirement accounts for the disposition of neutral States, freshly manifested since the outbreak of the war in 1939, to suppress or prohibit the use of radio apparatus on board of belligerent ships within neutral territorial waters.⁴ The conduct of the United States was illustrative.⁵

Various considerations which unite to render radio facilities peculiarly susceptible to advantageous uses in behalf of a belligerent have caused the Department of State to intimate on more than one occasion that the neutral duty of prevention in relation to them is perhaps broader than that pertaining to some other agencies for the communication of intelligence such as are available by cable or telegraph.⁶ In the comment on the relevant article of the Harvard Draft

³ These two obligations of prevention are exemplified in the terms of Art. 9 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War. In the final paragraph of this article it is said: "A neutral State is not bound to use the means at its disposal to prevent the transmission from its territory of military information destined for a belligerent by means of postal communication, telecommunications other than radio, messengers or other means of communication not provided for in section (1) of this article." (*Am. J.*, XXXIII, *Supplement Section 2*, 177.)

According to Art. 5 of the Rules for the Control of Radio in Time of War, prepared by the Commission of Jurists in 1923: "Belligerent mobile radio stations are bound within the jurisdiction of a neutral State to abstain from all use of their radio apparatus. Neutral Governments are bound to employ the means at their disposal to prevent such use." (*Am. J.*, XXXII, *Official Documents*, 6.)

See Francis Colt de Wolf, "Telecommunications and Neutrality," *Am. J.*, XXX, 117.

⁴ See proclamation of President Wilson, Nov. 13, 1914, relating to the neutrality of the Panama Canal Zone, Deák and Jessup, *Neutrality Laws*, 1205-1207, 38 Stat. 2039.

See also comprehensive executive order by President Wilson, of Aug. 5, 1914, *For. Rel.* 1914, Supp., 668; also that of Sept. 5, 1914, *id.*, 678.

"On the outbreak of the war in Europe in September 1939 practically all neutral States issued regulations prohibiting belligerent vessels from employing within neutral territorial waters their radio-telegraphic or radio-telephonic apparatus except in case of distress. Many neutral States ordered foreign merchant-vessels generally to close down their radio-telegraphic stations when entering neutral ports, and some neutral States imposed the same restriction upon vessels flying their own flag. In addition, regulations were issued for supervising the activities of wireless stations on land and of wireless apparatus installed on aircraft as well as of broadcasting stations. A number of neutral States prohibited the acceptance of telegrams or radio-telegrams drawn up in a secret language or calculated to affect the neutrality of the country." (Lauterpacht's 6 ed. of *Oppenheim*, II, 610.)

⁵ According to President Roosevelt's general neutrality proclamation of Sept. 5, 1939: "All belligerent vessels shall refrain from use of their radio and signal apparatus while in the harbors, ports, roadsteads, or waters subject to the jurisdiction of the United States, except for calls of distress and communications connected with safe navigation or arrangements for the arrival of the vessel within, or departure from, such harbors, ports, roadsteads, or waters, or passage through such waters; provided that such communications will not be of direct material aid to the belligerent in the conduct of military operations against an opposing belligerent. The radio of belligerent merchant vessels may be sealed by the authorities of the United States, and such seals shall not be broken within the jurisdiction of the United States except by proper authority of the United States." (*Dept. of State Bulletin*, Sept. 9, 1939, 203, 206.)

⁶ See Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, *For. Rel.* 1914, Supp., viii; also memorandum accompanying note from Mr. Polk, Counselor of Dept. of State, to Mr. Fitzgerald, member of Congress, Aug. 18, 1916, *For. Rel.* 1916, Supp., 6. Cf. Mr. Bryan, Secy. of State, in communication of Aug. 11, 1914, *For. Rel.* 1914, Supp., 669. These views are discussed in the Comment on Art. 9 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War,

Convention on Rights and Duties of Neutral States in Naval and Aerial War, it is significantly declared that the survey of international practice in regard to radio is believed to "demonstrate that neutral States have accepted in regard to radio a duty which has not been generally acknowledged in regard to other means of communication."⁷ In harmony with this fact the text of the article proposed for adoption declares that the neutral State shall use the means at its disposal to prevent "the transmission from its jurisdiction of military information destined for a belligerent by radio or by mechanical means of communication."⁸

If a neutral State sees fit to assume control of means of telecommunication within its domain, other than radio, embracing telephone or telegraph or submarine cable facilities, it would seem to accept simultaneously the duty to employ the means at its disposal to prevent their use for the transmission of intelligence which it itself has reason to believe is designed to assist a belligerent in the prosecution of the war, and to be destined to such belligerent. No obligation, however, appears as yet to rest upon the neutral to assume such control and to burden itself with the resulting duty of prevention.

(4)

ASYLUM IN MARITIME WAR

(a)

§ 857. **In General.** Maritime States have not been willing to agree that a belligerent should be cut off from all access to neutral ports or waters, or from all benefits derivable from resort thereto. Out of the effort to prescribe the nature and extent of a permissible sojourn and of the privileges resulting from it, rules have developed which serve to limit the scope of duties of prevention.¹ There has grown up a practice of conceding an asylum which permits a neutral port to offer solid advantages to a belligerent public ship.² These oftentimes

Am. J., XXXIII, *Supplement Section 2*, 269, where attention is called to the fact that Judge Moore was of opinion that "no distinction is to be made between submarine cables and wireless from the viewpoint of the neutral duty to regulate," and citing his *Digest*, VII, 941.

⁷ *Am. J.*, XXXIII, *Supplement Section 2*, 270. See data *id.*, 271-279.

⁸ Art. 9, *id.*, 177. "Mechanical means of communication" are said in the Comment to be designed "to cover such means as heliograph, semaphore and the like." It is added: "No obligation is placed upon the neutral State to control communications by other means such as post, cable, telegraph, telephone, carrier pigeons, or messengers." (*Id.*, 265.)

§ 857.¹ Concerning, however, the lesser requirements of the statutory law of the United States, see *United States v. Tauscher*, 233 Fed. 597; *United States v. Sander*, 241 Fed. 417; *United States v. Chakraberty*, 244 Fed. 287; *United States v. Ram Chandra*, 254 Fed. 635.

² See Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister, Sept. 9, 1793, *Am. State Pap.*, For. Rel. I, 176, Moore, Dig., VII, 983; President Monroe, Annual Message, Dec. 2, 1817, Richardson's Messages, II, 13, Moore, Dig., VII, 983; President Monroe, second inaugural address, March 5, 1821, Richardson's Messages, II, 88, Moore, Dig., VII, 984; Mr. Wheaton, Minister to Prussia, to Mr. Upshur, Secy. of State, No. 233, Aug. 23, 1843, H. Ex. Doc. 264, 28 Cong., 1 Sess. 4, 6, Moore, Dig., VII, 982.

"It appears to be the established rule of international law that warships of a belligerent may enter neutral ports and accept limited hospitality there upon condition that they leave, as a rule, within 24 hours after their arrival." (Memorandum of Department of State on the Status of Armed Merchant Vessels, March 25, 1916, For. Rel. 1916, Supp., 244, 246.)

See President Wilson, Neutrality Proclamation, May 24, 1915, American White Book, European War, II, 15, 16.

appear to be at variance with the principle that neutral waters should not directly minister to the needs of a belligerent fleet; and the variance is accentuated by the potentialities of vessels now employed as instruments of naval warfare.³ It becomes important, therefore, to observe the theory on which the existing practice has been established, and also to ascertain what the United States deems to be the extent of the relaxation of the normal neutral obligation. It is believed to be equally important to note simultaneously the actual relation to the conflict which is assumed by the neutral State whose territory furnishes benefits even acknowledged to be legitimate.

In the formulation of rules some attempt has been made to provide that a belligerent vessel of war should not, in consequence of sojourn, either by means of the duration thereof or through the benefits procured in the course of it, gain in strength or efficiency beyond what is necessary to enable the vessel to reach its nearest home port.⁴ The question constantly presents itself, however, whether at the present time the kind and amount of privileges available within a neutral port do not, in spite of their obvious purpose and limitation, serve in fact to cause the beneficiary to be a stronger antagonist than when it sought asylum. The response thereto may inspire the conclusion that the work of codification as reflected by the terms of the Hague Convention of 1907, concerning

According to Art. IX of the Hague Convention of 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, "a neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes.

"Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads." (Malloy's Treaties, II, 2359.)

See André Pepy, *L'Asile Maritime en Temps de Guerre et la Deuxième Conférence de la Paix* (1907), Paris, 1913.

³ "It may further be said that any place which provides a submarine warship far from its base with opportunity for rest and replenishment of its supplies thereby furnishes such an addition to its powers that the place becomes in fact, through the advantages which it gives, a base of naval operations." (Memorandum from the French Embassy, to Department of State, Aug. 21, 1916, For. Rel. 1916, Supp., 769, 770.) See in this connection *id.*, page 769, note 2, where it is stated that "the translation here printed is that published by the British Government in Parliamentary Papers, Miscellaneous No. 33 (1916) [Cd. 8349], as being more authoritative, since issued by a participating government, than the one made in the Department, which is printed in Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Duties (European War No. 4), p. 125." It was contended by the Allied Governments that submarine vessels should be excluded from the benefit of the rules previously accepted in international law regarding the admission and sojourn of war and merchant vessels in the neutral waters, roadsteads and harbors. "Any submarine of a belligerent that once enters a neutral harbor must," it was said, "be held there." In a memorandum addressed to the French Embassy at Washington, Aug. 31, 1916, the Department of State expressed the view that it was not aware of any circumstances, concerning the use of war or merchant submarines, which would render the existing rules of international law inapplicable to them. The Government of the United States, it was said, reserved its liberty of action in all respects, and would treat such vessels as, in its opinion, became the action of a power "which may be said to have taken the first steps toward establishing the principles of neutrality and which for over a century has maintained those principles in the traditional spirit and with the high sense of impartiality in which they were conceived." (For. Rel. 1916, Supp., 771.)

See, also, Royal Decree of Spain of June 29, 1917, governing the treatment of belligerent submarines in Spanish waters, and exposition of decree of same date, *Am. J.*, XI, Supp., 175-177.

⁴ Case of the United States, Geneva Arbitration, Papers Relating to the Treaty of Washington, I, 71.

the Rights and Duties of Neutral Powers in Naval War, marked a fairly successful endeavor to enable certain prospective belligerents to gain much-desired sustenance for their vessels of war within neutral territory which the sovereign thereof should not be obliged to endeavor to prevent.

The Harvard Draft Convention on Neutrality in Naval and Aerial War has properly announced that "a neutral State may exclude belligerent submarine vessels from its territory, or admit such vessels on condition that they conform to such regulations as may be prescribed."⁵

(b)

§ 858. **The Number, Entrance, Sojourn and Departure of Ships of War.** The number, entrance, length of sojourn and departure of ships of war in neutral waters are matters calling for general international agreement. The Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War,¹ announced regulations which have become the basis of the Instructions for the Navy Governing Maritime Warfare, of June 30, 1917.² It is there declared that in the absence of special provisions to the contrary in the legislation, ordinances or treaties of a neutral power, the maximum number of belligerent war vessels which may simultaneously be in one of its ports or roadsteads shall be three.³

⁵ *Am. J.*, XXXIII, *Supplement Section 2*, 179; comment, *id.*, 432. According to Section 11 of the Neutrality Act of 1939:

"Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States by the submarines or armed merchant vessels of a foreign State will serve to maintain peace between the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine or armed merchant vessel to enter a port or the territorial waters of the United States or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe. Whenever, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation."

It may be noted that on Oct. 18, 1939, the President, pursuant to provisions of Section 8 of the Neutrality Act of 1937 (50 Stat. 127), forbade by proclamation the use of ports or territorial waters of the United States, exclusive of the Canal Zone, by submarines of foreign belligerent States. Appropriate exceptions were announced relative to submarines which might be forced into such ports or territorial waters by *force majeure*. In such situations, submarines were to seek entrance "while running on the surface with conning tower and superstructure above water and flying the flags of the foreign belligerent States of which they are vessels." (Dept. of State Bulletin, Oct. 21, 1939, 396.)

§ 858. ¹ Arts. XI-XVII and XIX, Malloy's Treaties, II, 2360-2361.

Concerning the Convention generally, see Report of Mr. Renault, in behalf of the Third Commission to the Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 295-326; discussions, *id.*, III, 460-485; also, *id.*, III, 569-652, 695-735. See, also, A. P. Higgins, Hague Peace Conferences, 457-483, and bibliography; J. B. Scott, Hague Peace Conferences, I, 620-648.

² Section I, Nos. 4-10. These Instructions superseded and rendered obsolete others dated February, 1917.

³ Instructions, No. 4.

According to the Hague Convention, reference is not made to the ordinances or treaties of a neutral power, as distinct from its legislation.

Three Russian vessels of war, under Admiral Enquist, sought asylum at Manila, in June, 1905, Moore, Dig., VII, 992, and documents there cited.

The wisdom of allowing a neutral to permit more than three vessels of war of a single belligerent to enjoy asylum simultaneously in one port is to be greatly doubted. See discus-

The Naval Instructions of June 30, 1917, announce that the normal period of sojourn shall be limited to twenty-four hours.⁴ Like the Hague Convention,⁵ however, the exceptions or opportunities for extension are so numerous and important as to minimize the significance of such a time limit. Thus the rule is not applicable first, if the neutral, by special provision in its legislation, ordinances or treaties, permits a longer period; secondly, in case of detention occasioned by damage to the ship or stress of weather (departure being demanded, however, "as soon as the cause of the delay is at an end");⁶ thirdly, in the event of the presence simultaneously of vessels of war of opposing belligerents;⁷ and fourthly, if, in accordance with the law of the neutral, the ship is not furnished with "victuals and ship supplies and necessary repairs" within twenty-four hours after arrival. In such event a reasonable extension is allowed.⁸ The scope of these exceptions emphasizes first, the latitude enjoyed by the neutral in establishing a normal limit of sojourn and of modifying its application; and secondly, the fact that in reality the actual test of a permissible sojourn is, within certain implied limits, made dependent upon the time required by the vessel of war to procure the particular form of aid desired.⁹

sion at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 648-650.

⁴ Instructions, No. 5.

⁵ Art. XII, Malloy's Treaties, II, 2360. The strongest reason advanced in favor of this Article was that it expressed a precise rule of conduct always applicable in the absence of special provisions to the contrary adopted by the neutral. See Report of Mr. Renault to the Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 306-309; also comment in *Am. J.*, II, 516-517.

Neither in the United States Naval Instructions nor in the Hague Convention is a distinction made between the case of a belligerent vessel of war seeking asylum in neutral waters in flight from the enemy, and that of such a vessel entering therein when not pursued or when not driven in by stress of weather. In this connection see Westlake, 2 ed., II, 238-239; also Naval War College, *Int. Law Topics*, 1905, 154-170.

⁶ Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 6. See, also, Art. XIV of Hague Convention.

According to Naval Instructions, No. 7: "The regulations as to the limitation of the length of time which belligerent ships of war may remain in neutral ports, roadsteads, or waters do not apply to ships of war devoted exclusively to religious, scientific, or philanthropic purposes." See, also, Art. I of Hague Convention of 1907, for the Adaptation to Naval War of the Principles of the Geneva Convention, Malloy's Treaties, II, 2333; Art. IV of Hague Convention of 1907, Relative to Right of Capture in Naval War, *id.*, II, 2348.

See Mr. Day, Secy. of State, to Mr. Denby, Minister to China, No. 1593, June 7, 1898, MS. Inst. China, V, 566, Moore, Dig., VII, 991, with respect to the continued use in Chinese waters of the U.S.S. *Monocacy*, an antiquated vessel of light draft adapted to river service.

⁷ "When ships of war of opposing belligerents are present simultaneously in the same neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of a ship belonging to one belligerent and the departure of a ship belonging to the adversary.

"The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of the period of stay legally allowed is admissible.

"A belligerent ship of war must not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary." (Naval Instructions Governing Maritime Warfare, of June 30, 1917, Nos. 8, 9 and 10.)

See, also, in this connection, Westlake, 2 ed., II, 235-236.

⁸ Naval Instructions, No. 17. Compare language of Art. XIX of Hague Convention.

⁹ According to President Wilson's Neutrality Proclamation of May 24, 1915, which was based on that of President Grant of October 8, 1870: "If any ship of war or privateer of a belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to

In recent years, however, there has been a growing sense that such latitude should be restricted along certain lines, and that, for example, the permitted sojourn of a belligerent vessel of war within a neutral port for a period of twenty-four hours should not be extended save for the purpose of enabling the ship to remedy a condition of distress resulting from enemy action, and under which the vessel entered;¹⁰ and forbidding, moreover, the repair of damages found to have been produced by the enemy's fire.¹¹ It should be observed, however, that the German battleship *Admiral Graf Spee*, entering the port of Montevideo, on December 14, 1939, and in a damaged condition in consequence of an engagement with enemy vessels of war, was allowed a period of seventy-two hours within which to make needed repairs.¹²

It is not apparent that the length of sojourn to be accorded a belligerent vessel of war should necessarily be measured by the condition in which it enters neutral territorial waters or by the nature of the cause responsible for its entry. Whether such entry be attributable to the distress of the ship produced by

sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in any of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether a ship of war, privateer, or merchant ship of an opposing belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of an opposing belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship of war or privateer of a belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of an opposing belligerent. But if there be several vessels of opposing belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the opposing belligerents, and to cause the least detention consistent with the objects of this proclamation." (American White Book, European War, II, 16.)

¹⁰ See President Roosevelt's general neutrality proclamation of Sept. 5, 1939, Dept. of State Bulletin, Sept. 9, 1939, 203, 205-206.

See Arts. 32-36 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J., XXXIII, Supplement Section 2*, 180-181.

According to the General Declaration of Neutrality of the American Republics, of Oct. 3, 1939, belligerent warships "in any case," shall "not be allowed to remain for more than 24 hours." (Art. 3 *d*, Dept. of State Publication 1451, Conference Series No. 44, p. 55.)

¹¹ See Art. 34 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War.

See, also, Art. IX of Habana Convention on Maritime Neutrality, of Feb. 20, 1928, U. S. Treaty Vol. IV, 4743, 4746.

See, also, President Roosevelt's neutrality proclamation of Sept. 5, 1939, Dept. of State Bulletin, Sept. 9, 1939, 203, 207.

¹² It will be recalled that the *Admiral Graf Spee*, upon the expiration of permitted sojourn within Uruguayan waters, put to sea on December 17, 1939, and was scuttled.

See, in this connection, *The Battle of the River Plate*, an account of events before, during and after the action up to the self-destruction of the *Admiral Graf Spee*, compiled in the British Admiralty, 1940.

Also *Antecedentes Relativos al Hundimiento del Acorazado "Admiral Graf Spee" y a la Internación del Barco Mercante "Tacoma," República Oriental del Uruguay, Ministerio de Relaciones Exteriores*, Montevideo, 1940.

stress of weather, or by the conduct of the enemy, or by any other circumstance, it is not believed that a permitted sojourn should, in consequence of the bare length or duration thereof, suffice and serve in fact to augment the fighting power of the craft. When entry is effected by a belligerent vessel of war which is not in distress the period of permitted sojourn should not serve to produce that result. Hence, there is believed to be solid reason to check the freedom seemingly acknowledged to be enjoyed by the neutral, and to impose upon it a definite obligation calculated to minimize opportunity for any belligerent vessel of war to gain relative advantages over the enemy as a result of sojourn within neutral territory.¹³

Article 35 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War announces that "a neutral State which admits a belligerent warship employed exclusively in a scientific or humanitarian mission may permit such warship to prolong its stay and may permit it to take on the provisions and fuel necessary for the fulfillment of its mission."¹⁴ Here the character of the employment of the vessel serves to excuse the neutral from the charge of impropriety of action when it extends the normal time limit.¹⁵ One may suggest, however, that the potentialities of the belligerent craft, which in the case of a warship must be considerable, should, on principle, always be made the test of the neutral obligation with respect to length of permitted sojourn and kindred matters.

(c)

§ 859. **Food and Fuel Supplies.** The Naval Instructions of 1917, provide, in accordance with the terms of the Hague Convention of 1907, that belligerent ships of war may not revictual in neutral ports or roadsteads except to complete their normal peace supply.¹ The former adds the requirement that such supply is "subject to the approval of the neutral authorities." It has been the policy of the United States when a neutral to permit a belligerent vessel of war to take only such provisions "as may be requisite for the subsistence of her crew."²

¹³ If it be contended that practice as reflected in the Hague conventions has revealed a tendency to develop the law along other lines that have been heedless of the point that is emphasized in the text, it may be observed that that practice as so developed was largely the product of an effort designed, not primarily to promote justice, but rather to smooth the way for the prospective belligerent, regardless of the requirements of logic or principle. It is felt, therefore, that a radical change of approach should be made when examining critically the sufficiency of the law as it is today, and the theory on which modifications should hereafter be molded. In that examination there is needed fresh consideration of the question whether the equities of the belligerent vessel of war that for whatsoever reason enters neutral waters, outweigh those of its adversary when demanding that the neutral State endeavor to prevent any augmentation of belligerent military strength within its territory.

¹⁴ *Am. J.*, XXXIII, *Supplement Section 2*, 180.

¹⁵ See Art. 5 of Habana Convention on Maritime Neutrality, of Feb. 20, 1928, U. S. Treaty Vol. IV, 4743, 4745; also Art. 1 (d) of General Declaration of Neutrality of the American Republics, Dept. of State Publication 1451, Conference Series, No. 44, p. 55.

§ 859. ¹ Instructions, No. 15. See, also, Art. XIX of Hague Convention concerning Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2361.

² President Wilson, Neutrality Proclamation of May 24, 1915, American White Book, European War, II, 16, which in this regard was a reproduction of neutrality proclamations of 1870 and 1904. See For. Rel. 1870, 48; *id.*, 1904, 32; Moore, Dig., VII, 987-989.

See correspondence between the United States and the Netherlands in 1861, relative to the treatment by Dutch authorities at Curaçao of the Confederate cruiser *Sumter*, contained

Such permission doubtless accords with what is said to be a universal allowance.³

It would be unreasonable for a neutral to cause a belligerent vessel of war to put to sea when short of provisions. Nevertheless, when a neutral port furnishes even what the territorial sovereign regards as a reasonable supply, the personnel of the ship thereby attains fresh power for resistance as well as for navigation. In any reconsideration of the existing law, the question, therefore, may present itself, not whether a neutral should be obliged to deny asylum to a belligerent vessel of war with a starving crew, but rather, whether the existing neutral right to permit the taking on of requisite provisions should be supplanted by a neutral obligation to intern the ship and its occupants.

According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, belligerent vessels can take only such fuel "and ship supplies" as are, in the opinion of the neutral authorities, sufficient to enable the vessels to reach the nearest port of their own country. It is declared, however, in accordance with the Hague Convention, that such vessels may fill up their bunkers (properly so-called) when in neutral countries which have adopted that method of determining the amount of fuel to be supplied.⁴ For neutral territory to yield fuel to a belligerent vessel of war is, as Professor Holland pointed out long before the outbreak of World War I, to enable the vessel to seek out the enemy, and to manoeuvre while attacking him.⁵ This has become increasingly obvious by reason of the wide radius of action acquired at the present time by various types of vessels of war when permitted to fill their bunkers or other appropriate receptacles built to carry fuel.⁶ When the supply is limited merely by the capacity of the ship, such territory becomes a direct means of augmentation of military strength for the benefit of a definite unit of belligerent power, and so fulfills the function of a belligerent coaling station.⁷

The excessive license embodied in the Hague Convention of 1907 expressed a compromise representing a Russian modification of a German proposal designed to subordinate duties of prevention to the requirements of a belligerent fleet.⁸ It should be observed that the United States, while a neutral, has shown

in Dip. Cor. 1861, I, Moore, Dig., VII, 986. See especially Baron Van Zuylen, Dutch Minister of Foreign Affairs, to Mr. Pike, American Minister Resident, Sept. 17, 1861, Dip. Cor. 1861, I, 352-358.

³ T. E. Holland, *Neutral Duties in Maritime War*, *Proceedings of British Academy*, 1905-1906, 60.

⁴ No. 16. See, also, Art. XIX of Hague Convention.

⁵ *Proceedings of British Academy*, 1905-1906, 60.

⁶ "From information contained in Jane's 'Fighting Ships,' 1937, it appears that battleships of foreign navies can cruise at least 15,000 miles and cruisers 10,000 miles when bunkers are filled." (Rear Admiral C. P. Snyder, U.S.N., President, Naval War College, to the author, Nov. 1, 1938.)

⁷ See, in this connection, Mr. Day, Secy. of State, to Mr. Newel, Minister at the Hague, telegram, May 17, 1898, MS. Inst. to the Netherlands, XVI, 357, Moore, Dig., VII, 945; also Mr. Day, Secy. of State, to Mr. Townsend, Minister to Portugal, telegram, May 20, 1898, MS. Inst. Portugal, XVI, 146, Moore, Dig., VII, 945.

Concerning the discussion of coal at the Geneva Arbitration, see Moore, *Arbitrations*, IV, 4097-4101; also documents in Moore, Dig., VII, 942-947, with respect to coal supplies generally.

⁸ Report of Mr. Renault in behalf of the Third Commission, to the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 315-319; also observations of Rear Admiral Siegel of Germany, *id.*, III, 633-634. See, also, in this

no disposition to permit its territory to supply large amounts of fuel. According to American neutrality proclamations of the last half century, a belligerent vessel of war, while within the territorial waters of the United States, has been permitted to take on only so much coal as sufficed to carry the vessel, if without sail power, to the nearest port of its own country, and one half of that amount if the ship, although capable of propulsion by steam, was also rigged to go under sail.⁹

The Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War makes admirable provision concerning what the preventive obligation of the neutral should be, in declaring that "the neutral State shall not allow such a warship to take on any supply of fuel or otherwise to augment its fighting strength."¹⁰

That belligerent ships of war which have taken fuel, as well as other supplies, in a port of a neutral power may not within the succeeding three months replenish their supply in a port of the same power is acknowledged in the Naval Instructions, as it is in the Hague Convention.¹¹ In December, 1914, the Department of State had occasion to emphasize the reasonableness of this restriction in correspondence with the German Embassy.¹²

President Roosevelt's general neutrality proclamation of September 5, 1939, revealed as is noted below what, in the opinion of the American Government, a neutral State might within its own domain fairly yield to a belligerent "ship of war" embracing any vessel "operating under public control for hostile or military purposes."¹³

connection, A. P. Higgins, Hague Peace Conferences, 475-477; commentary in *Am. J.*, II, 521-523.

According to Art. 10 of the Habana Convention on Maritime Neutrality of Feb. 20, 1928: "Belligerent warships may supply themselves with fuel and stores in neutral ports, under the conditions especially established by the local authority and in case there are no special provisions to that effect, they may supply themselves in the manner prescribed for provisioning in time of peace." (U. S. Treaty Vol. IV, 4743, 4746.)

⁹ See, for example, President Wilson, Neutrality Proclamation, May 24, 1915, American White Book, European War, II, 16.

Also Joint Resolution, approved March 4, 1915, 38, Stat. 1226, respecting the withholding of clearances of vessels believed to be about to carry fuel as well as other supplies to belligerent warships, and title V of the Act of June 15, 1917, relative to the enforcement of neutrality and repealing the joint resolution of March 4, 1915.

See, also, President Wilson's Proclamation of Neutrality with respect to the Panama Canal Zone, Nov. 13, 1914, For. Rel. 1914, Supp., 552.

¹⁰ Art. 36, *Am. J.*, XXXIII, Supplement Section 2, 181.

¹¹ Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 18; also Art. XX of Hague Convention. It should be observed that the latter appears to confine the limitation to fuel.

See, also, protocol of agreement between the Acting Secretary of State and the Minister of Panama, October 10, 1914, concerning neutrality in the waters of the Isthmus of Panama, For. Rel. 1914, Supp., 556.

¹² Count von Bernstorff, German Ambassador at Washington, to Mr. Bryan, Secy. of State, Dec. 15, 1914, and memorandum enclosed, *id.*, 646; Mr. Bryan to Count von Bernstorff, Dec. 24, 1914, *id.*, 647.

¹³ "No ship of war of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew in amounts necessary to bring such supplies to her peace standard, and except such fuel, lubricants, and feed water only as may be sufficient, with that already on board, to carry such vessel, if without any sail power, to the nearest port of her own country; or in case a vessel is rigged to go under sail, and may also be propelled by machinery, than half the quan-

(d)

§ 860. **Repairs.** It seems to be generally acknowledged that a neutral State may permit belligerent vessels of war to effect certain repairs within its territorial waters. In 1905 the law officer of the Department of State, after considering the requirements of three Russian ships of war which had sought asylum at Manila, expressed opinion that in view of the President's proclamation of neutrality, the repair of damage other than that caused by the sea could not be allowed, and that if the vessels were permitted to renew their fighting strength by the restoration of guns or of armor plate, or to repair any other damage caused by the enemy, the neutral port in which such things were allowed would become a naval arsenal for the belligerent and a base for its hostile operations.¹ Accordingly, as it appeared that the vessels were suffering from damage due to battle, the United States declined to consent to any repairs unless the ships were interned till the close of hostilities. The vessels were interned.²

The Naval Instructions Governing Maritime Warfare of 1917 reproduce the provisions of the Hague Convention of 1907, which declare that in neutral ports and roadsteads belligerent ships of war can carry out such repairs only as are absolutely necessary to render them seaworthy, and cannot add in any manner whatsoever to their fighting force. The authorities of the neutral power are, moreover, allowed to decide what repairs are to be made; and these must be carried out with the least possible delay.³

tity of fuel, lubricants, and feed water which she would be entitled to have on board, if dependent upon propelling machinery alone, and no fuel, lubricants, or feed water shall be again supplied to any such ship of war in the same or any other port, harbor, roadstead, or waters subject to the jurisdiction of the United States until after the expiration of three months from the time when such fuel, lubricants and feed water may have been last supplied to her within waters subject to the jurisdiction of the United States. The amounts of fuel, lubricants, and feed water allowable under the above provisions shall be based on the economical speed of the vessel, plus an allowance of thirty per centum for eventualities.

* * * *

"No ship of war of a belligerent shall effect repairs or receive fuel, lubricants, feed water, or provisions within the jurisdiction of the United States without written authorization of the proper authorities of the United States. Before such authorization will be issued, the commander of the vessel shall furnish to such authorities a written declaration, duly signed by such commander, stating the date, port, and amounts of supplies last received in the jurisdiction of the United States, the amounts of fuel, lubricants, feed water, and provisions on board, the port to which the vessel is proceeding, the economical speed of the vessel, the rate of consumption of fuel, lubricants, and feed water at such speed, and the amount of each class of supplies desired. If repairs are desired, a similar declaration shall be furnished stating the cause of the damage and the nature of the repairs. In either case, a certificate shall be included to the effect that the desired services are in accord with the rules of the United States in that behalf." (Dept. of State Bulletin, Sept. 9, 1939, 203, 206 and 207.)

§ 860.¹ Memorandum of Mr. W. L. Penfield, the Solicitor for the Department of State, June 5, 1905, Moore, Dig., VII, 992-993.

² Moore, Dig., VII, 992-995, and documents there cited.

Concerning the case of the Russian armed transport *Lena*, which entered the harbor of San Francisco in September, 1904, see For. Rel. 1904, 428-430, Moore, Dig., VII, 999-1000, especially Mr. Adee, Acting Secy. of State, to Mr. Takahira, Japanese Minister at Washington, Sept. 15, 1904, For. Rel. 1904, 428.

See, also, Moore, Dig., VII, 997-998, and documents there cited, respecting the treatment accorded the Russian cruiser *Askold* and the Russian torpedo-boat destroyer *Grozovoi*, which had escaped from Port Arthur and sought repairs at Shanghai in August, 1904.

³ Instructions, No. 19, and Art. XVII of Hague Convention, Malloy's Treaties, II, 2361.

In applying these principles while a neutral in the course of World War I, the United States declared that it did not comport with "a strict neutrality or a fair interpretation of the Hague conventions" to allow a belligerent vessel of war, which at the outbreak of war found itself "in a more or less broken down condition, and on the point of undergoing general repairs, but still able to keep the sea," to complete unlimited repairs in an American port.⁴ The German gunboat *Geier*, which, in such a condition, put into the port of Honolulu October 15, 1914, was allowed three weeks in which to make repairs and depart, or yield to internment. The commander chose the latter alternative.⁵ With the *Geier* was also interned the German ship *Locksun* which, through its associations and coöperation with the former, had become stamped with its belligerent character, and was, therefore, treated as a tender or auxiliary.⁶ The German vessel of war, *Prinz Eitel Friedrich*, which entered the harbor of Newport News in March, 1915, was allowed a period of fourteen working days in which to complete repairs necessary to put the vessel in a seaworthy condition, and an additional twenty-four hours in which to leave the territorial waters of the United States. This period proving insufficient, the ship suffered internment.⁷ The German cruiser *Kronprinz Wilhelm*, which entered the port of Norfolk in April, 1915, was allowed six working days within which to make repairs, together with an additional twenty-four hours for departure. The repairs were not, however, to cover damage to the port bow sustained as an incident of the service in which the vessel had been engaged. The ship was interned.⁸

It should be observed that the Hague Convention makes no distinction or limitation with reference to the causes of damage.⁹ A neutral State is thus regarded as free from an obligation to prevent the making of repairs necessitated by the conduct of the opposing belligerent, provided they merely serve to effect seaworthiness. In a strict sense, any repairs productive of seaworthiness, irrespective of the cause of damage, necessarily increase the fighting force of the recipient if it is otherwise capable of engaging in hostilities. To render, for example, an armed submarine fit to keep the sea, or to reach its nearest home

⁴ Mr. Lansing, Counselor of Department of State, to Count von Bernstorff, German Ambassador at Washington, Oct. 30, 1914, For. Rel. 1914, Supp., 584.

⁵ See correspondence, *id.*, 583-598; also XIII.

⁶ "In this connection the Department has the honor to call to your attention the following quotation from the award of the Alabama Claims Commission, which seems to establish this principle regarding the treatment of tenders, although the application of this statement was not made to the exact circumstances of the *Locksun* case: 'And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer* (tenders to the *Florida*), the tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals and be submitted to the same decision which applies to them respectively.'" (Mr. Bryan, Secy. of State, to Count von Bernstorff, German Ambassador, at Washington, Dec. 11, 1914, *id.*, II, 592.)

⁷ *Id.*, 827-833.

⁸ *Id.*, 833.

The internment of the German prize ship *Farn*, which entered the port of San Juan, Porto Rico, in January, 1915, does not appear to have been on account of any failure to make desired repairs within a specified period of time. *Id.*, 821-824, 828.

⁹ See discussion at the Second Hague Peace Conference of 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 315, III, 697; A. P. Higgins, *Hague Peace Conferences*, 473-475.

port, may suffice also to enable the vessel to resume the offensive with the full measure of its strength.

In brief, the existing rules draw a line of distinction which, at the present time, appears to be insufficient to prevent a neutral port that yields permitted and requisite repairs from becoming in fact a base of operations. The question presents itself, therefore, whether in any reconsideration of existing regulations and of the practice growing out of them, maritime States should endeavor to cut down the privileges of repair, and proportionally lessen the opportunity for neutral territory so to augment the fighting power of belligerent ships.¹⁰

If, as the Harvard Draft Convention on Rights and Duties of Neutral States in Naval War proposes, the neutral State should not allow a belligerent vessel of war, either by a supply of fuel or "otherwise to augment its fighting strength," the injunction should embrace the matter of repairs.¹¹

Declared President Roosevelt in his general neutrality proclamation of September 5, 1939; "No ship of war of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, to make repairs beyond those that are essential to render the vessel seaworthy and which in no degree constitute an increase in her military strength. Repairs shall be made without delay. Damages which are found to have been produced by the enemy's fire shall in no case be repaired." ¹²

(e)

§ 861. **Entrance with Prize.** The Naval Instructions Governing Maritime Warfare declare, as do also the provisions of the Hague Convention, that "a prize can be brought into a neutral port only on account of unseaworthiness, stress of weather, or want of fuel or provisions," and that the vessel must leave as soon as the circumstances which justified its entry are at an end.¹ The United States has taken the stand that prizes cannot lawfully be brought into American waters, when neutral, for purposes other than the foregoing.² In rati-

¹⁰ The true solution of this question, like that of others which the deficiencies of the Hague convention concerning the Rights and Duties of Neutral Powers in Naval War have served to magnify, calls for the manifestation of a general disposition and determination on the part of interested powers to effect agreement responsive to fundamental principles of justice, rather than secure compromise expressive of the predominant influence of particular States zealous to preserve their supposed interests as belligerents in the event of war.

¹¹ Art. 36, *Am. J., XXXIII, Supplement Section 2*, 181.

¹² Dept. of State Bulletin, Sept. 9, 1939, 203, 206.

In permitting at the Brooklyn Navy Yard in 1941, extensive repairs and improvements on a certain British destroyer which had suffered injury at the hands of the enemy on the high sea, the conduct of the United States marked an instance of its participatory action as an intervening power in the existing war. See *supra*, § 83C.

Concerning the treatment accorded the German ship of war *Admiral Graf Spee* by the Uruguayan Government in December, 1939, see *supra*, § 858.

§ 861. ¹ Instructions of June 30, 1917, Nos. 20 and 21. See Art. XXI of Hague Convention, Malloy's Treaties, II, 2361, where it is also declared that if a prize does not leave a neutral port as soon as the circumstances which justified its entry are at an end, "the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

According to Art. XXII, "A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article XXI."

² Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washing-

fying the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War the United States declined to accept Article XXIII thereof, which provided that a neutral may allow prizes to enter its ports and roadsteads, whether or not under convoy, when brought there to be sequestered pending the decision of a prize court, and which specified treatment to be accorded a prize crew.³ It has been clearly perceived by both the executive and judicial departments of the Government, that by granting the privilege to a belligerent of sequestering prizes in neutral ports, the sovereign thereof makes itself a participant in the war and has recourse to conduct which does not comport with its obligations as a neutral.⁴ No solid ground for so relaxing that obligation as by permitting such a use of neutral territory appears to be acknowledged by the United States, although denial of the privilege of

ton, April 7, 1916, For. Rel. 1916, Supp., 735; Same to Same, March 2, 1916, *id.*, 729; The Steamship Appam, 243 U. S. 124.

Arts. LVIII–LXII of the International Regulations Concerning Prizes of the Institute of International Law give no sanction to the sequestration of prizes in neutral waters. Art. LXI provides that where a war vessel has taken refuge with a vessel seized by it in a neutral port, because pursued by a superior enemy force, the prize must be released. When, however, according to Art. LX, such a war vessel takes refuge with the vessel seized by it on account of a peril of the sea, both are obliged to quit the port as soon as possible "after the tempest has passed." (*Annuaire*, VI, 223, J. B. Scott, Resolutions, 56–57.)

³ Resolutions of Ratification by the Senate, Malloy's Treaties, II, 2366.

Concerning Art. XXIII, see Report of Mr. Renault in behalf of the Third Commission, to the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 320–321; comment in *Am. J.*, II, 524; A. P. Higgins, Hague Peace Conferences, 478–480.

Declared Mr. Justice Day in his opinion in *The Appam*: "While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes should only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the decision of a prize court." (243 U. S. 124, 151.)

⁴ Report of the American delegates to the Second Hague Peace Conference of 1907, to the Secretary of State, For. Rel. 1907, II, 1144, 1173; Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, April 7, 1916, For. Rel. 1916, Supp., 735–736. *The Appam*, 234 Fed., 389, 396–397.

See, also, Dana's Wheaton, Note No. 186, p. 486; Naval War College, Int. Law Situations, 1908, 53–78, Frederic R. Coudert, in *Am. J.*, XI, 302, 306.

Compare Rule 4 of President Wilson's Neutrality Proclamation concerning the Panama Canal Zone, Nov. 13, 1914, where it is said that "Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents." For. Rel. 1914, Supp., 553. It may be that this statement was intended to be confined in its application to situations specified in the previous paragraph of the same rule which concerned the revictualing and taking on of stores in the Canal by belligerent ships, and their transit through the Canal.

The *Farn* was a British ship carrying some three thousand tons of coal when captured October 5, 1914, by the German cruiser *Karlsruhe*. The *Farn* was thereupon placed under a prize crew and kept at sea continuously for use as a tender to German ships of war until she put into the port of San Juan, Porto Rico, January 12, 1915, for provisions and water. The United States, treating the vessel as a tender, rather than as a prize, interned the ship together with prize officers and crew. In this connection Secretary Lansing declared: "In the opinion of this Government an enemy vessel which has been captured by a belligerent cruiser becomes as between the two governments the property of the captor without the intervention of a prize court. If no prize court is available this Government does not understand that it is the duty of the captor to release his prize, or to refuse to impress her into its service. On the contrary, the captor would be remiss in his duty to his Government and to the efficiency of its belligerent operations if he released an enemy vessel because he could not take her in for adjudication." (Communication to the British Ambassador, March 13, 1915, For. Rel. 1915, Supp., 823.)

sequestration may possibly in a particular case encourage destruction by a belligerent of prizes which it is unable to bring into its own ports.⁵ It should be observed, however, that the position of the United States has not always been clear or uniform.⁶

It may here be observed that, as is noted later, the provisions of Article XXIII of the Hague Convention of 1907, relaxing as they did the rather broad prohibitions laid down in Articles XXI and XXII, by yielding the privilege of sequestration pending the decision of a prize court, marked a fresh and special concession reciprocally applicable to the contracting parties. One may well doubt whether it was regarded as declaratory of a privilege which as tested by existing practices a neutral State was acknowledged to possess.⁷ When the United States adhered to the Hague Convention under reservation of Article XXIII, it acquired the right to claim that the other parties were not thereafter free to invoke the treaty against the United States without accepting its reservation, and that they were not free to apply that article as against American ships, and that consequently a neutral contracting party could not lawfully permit the sequestration within its domain of an American prize, and that the

⁵ See comment in *Am. J.*, II, 524; also Note, *Harv. Law Rev.*, XXX, 161-162.

⁶ In earliest days of the Republic French privateers were permitted to sell prizes in American ports. See Mr. Jefferson, President, to Mr. Gallatin, Aug. 28, 1801, 1 Gallatin's writings, 41, 42, Moore, Dig., VII, 935. In the case of *Consul of Spain v. Consul of Great Britain*, 6 Fed. Cases No. 3138, it was declared by the Court in 1808, that "without doubt, a neutral nation may permit a belligerent to sell [its prizes], without violating its neutrality; treaties apart, it is wholly discretionary. The sovereignty of a neutral power authorizes the exercise of such discretion." In the matter of the Bergen Prizes, Mr. Wheaton, Minister to Prussia, declared in a communication to Mr. Upshur, Secy. of State, Aug. 23, 1843, that in the absence of an appropriate treaty between Denmark and Great Britain, American cruisers "had an unquestionable right to send their prizes into Danish ports." H. Ex. Doc. 264, 28 Cong., 1 Sess. 4, 6, Moore, Dig., VII, 982. It is not known that the effort was made to sequester these prizes. See, also, Moore, Dig., II, 1076-1078, and documents there cited. In 1828, Mr. Wirt, Atty. Gen., was of opinion that a prize might be repaired in an American port and put in a condition to be taken to a port of the captor for adjudication. 2 Ops. Attys. Gen. 86, Moore, Dig., VII, 936. The same year Mr. Clay, Secy. of State, declared that a belligerent cruiser bringing a prize into a neutral port would be required to depart as soon as practicable, and would not be permitted to dispose of the prize in such port. Communication to Mr. Tacon, April 11, 1828, MS. Notes to For. Leg., IV, 8, Moore, Dig., VII, 936. In 1855, Mr. Cushing, Atty. Gen., appears to have concluded that the granting of asylum to belligerent prizes was not wrongful on the part of a neutral, and that, in the absence of previous notification, a belligerent right of asylum might be presumed. He was not confronted, however, with the precise question as to the propriety of permitting sequestration. 7 Ops. Attys. Gen. 122. In 1866, Mr. Seward, Secretary of State, announced to the Peruvian Legation that during the war between Spain and Peru, the United States would observe the neutrality enjoined by its own municipal law and by the law of nations. He said: "No armed vessels of either party will be allowed to bring their prizes into the ports of the United States." (MS. Notes to Peruvian Legation, I, 312, Moore, Dig., VII, 938.)

Declared the President in his general neutrality proclamation of September 5, 1939: "No vessel of a belligerent shall exercise the right of search within the waters under the jurisdiction of the United States, nor shall prizes be taken by belligerent vessels within such waters. Subject to any applicable treaty provisions in force, prizes captured by belligerent vessels shall not enter any port, harbor, roadstead, or waters under the jurisdiction of the United States except in case of unseaworthiness, stress of weather, or want of fuel or provisions; when the cause has disappeared, the prize must leave immediately, and if a prize captured by a belligerent vessel enters any port, harbor, roadstead, or waters subject to the jurisdiction of the United States for any other reason than on account of unseaworthiness, stress of weather, or want of fuel or provisions, or fails to leave as soon as the circumstances which justified the entrance are at an end, the prize with its officers and crew will be released and the prize crew will be interned." (Dept. of State Bulletin, Sept. 9, 1939, 203, 207.)

⁷ See the *City of Flint*, *infra*, § 862A.

captor of such a vessel could not properly seek to effect the sequestration of it in a neutral port.⁸

The Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War embraced the proposal that "a neutral State shall either exclude prizes from its territory or admit them on the same conditions on which it admits belligerent warships."⁹

§ 862. *The Appam*. On January 15, 1916, the British S.S. *Appam* was captured by the German cruiser *Moewe*, on the high seas, off the west coast of Africa, at a point approximately 1590 miles distant from Emden, the nearest German port, 130 miles from Punchello in the Madeiras, the nearest available port, and 3051 miles from Hampton Roads, Virginia. The *Appam*, when captured, was bound for Liverpool, and carried passengers as well as a general cargo. The vessel was placed under the command of Lieutenant Berg of the German Navy, who, with the aid of a small prize crew, navigated the ship to Hampton Roads, arriving at the Virginia Capes January 31, 1916.¹ On February 2, the German Ambassador at Washington informed the Department of State that the commander, pursuant to Article XIX of the treaty between the United States and Prussia of September 10, 1785, intended to stay in an American port until further notice. It was announced that the *Appam* had not been converted into an auxiliary cruiser, was not armed, and had made no prize under Lieutenant Berg.² It was declared that the ship carried the crews of seven enemy vessels taken by the *Moewe*, who had been transferred to the *Appam*, as well as a "locked-up military party" of the enemy. The internment of that party was requested and that also of the members of the *Appam's* crew, on the ground that as the vessel had offered armed resistance when captured,³ those persons should be regarded as combatants and detained as such. On February 22, the Ambassador informed the Department of State that the *Appam* had been libeled by the British and African Steam Navigation Company, Limited, in the United States District Court for the Eastern District of Virginia, and that Lieutenant Berg had been cited to answer the libel. Contending that the treaty mentioned had been violated, the Ambassador declared that as the

⁸ Art. XXIII was in reality amendatory of the operation of the provisions of Arts. XXI and XXII, in the sense that it set forth conditions when they were not to be applicable. With Art. XXIII removed from the Convention, the two preceding Articles stood out in their full prohibitory austerity. Hence parties or adherents which were able to secure acquiescence in their acceptance of the Convention with Art. XXIII eliminated therefrom were able to claim and utilize the benefits of those two Articles as they stood.

⁹ Art. 29, *Am. J.*, XXXIII, *Supplement Section 2*, 180, and *Comment, id.*, 448-458. As is there noted, the privilege of sequestration was omitted from Art. XVII of the Convention on Maritime Neutrality concluded at Habana, Feb. 20, 1928 (U. S. Treaty Vol. IV, 4747), and from Art. 28 of the Draft Convention on Maritime Neutrality emanating from the International Law Association in 1928 (Int. Law Association, Report, Thirty-fifth Conference, Warsaw, 1928, 206).

§ 862. ¹ *The Appam*, 234 Fed. 389, 391; *The Steamship Appam*, 243 U. S. 124. The engine-room staff operated the vessel across the Atlantic; its deck crew kept the ship clean; the ship's crew dropped the anchor at Hampton Roads.

² For. Rel. 1916, Supp., 723, 724. See, also, correspondence, *id.*, 722-745.

³ From the statement of facts in the case of *The Appam*, 234 Fed. 389, it does not appear that the vessel, although carrying a three-pound gun at the stern, resisted capture.

vessel flew the German flag, and belonged to the German Government, possession by the captors in a neutral port was the possession of their sovereign. The Ambassador denied the right of a neutral State or of its courts to take cognizance of the question of prize.⁴ Protesting against the jurisdiction exercised by the Court, he requested that the Attorney General be asked to take steps necessary to cause the prompt dismissal of the libel.⁵ On March 2, Secretary Lansing replied that the Article of the treaty invoked was inapplicable to the case for the reasons, first, that as it was intended to modify the existing practice of nations as to asylum for prizes brought into neutral ports by men-of-war, it was subject to a strict interpretation when relied upon in a given case in modification of the established rule; secondly, that the treaty was applicable only to prizes brought into American ports by vessels of war; thirdly, that clearly the port of refuge was not to be made a port of ultimate destination or indefinite asylum; and fourthly, that the commission of the prize master directed him to bring the *Appam* to the nearest port and "there to lay her up." Without expressing opinion as to the propriety of the assumption of jurisdiction by the Court, it was said that the Attorney General would be requested to instruct the United States District Attorney to present to the Tribunal, as *amicus curiae*, a copy of the Ambassador's note.⁶ It was announced that the Government had concluded that the persons whose internment was sought, should be released from detention on board the *Appam*, together with their personal effects.

On March 31, the British Ambassador at Washington requested that the United States Government, through the Department of Justice, represent to the Court that the detention of the *Appam*, under the circumstances of the case, constituted a violation of the neutrality of the United States, and to "apply to the Court to direct the return of the vessel to her owners upon due proof of their ownership and of the facts constituting the violation of neutrality."⁷ On April 4, the Secretary of State replied that as the vessel "was in American jurisdiction up until the time of the filing of the suit against her," pending consideration of the question as to whether she was entitled to the privileges claimed under the treaty, and as the Government had "reached a decision on that question only after the libel had been filed," he was unable to accept the suggestion that the presence of the *Appam* in American waters, in the circumstances, constituted a violation of the neutrality of the United States. He declined, therefore, to have official representations made to the Court in the sense of the British note.⁸ On July 29, the Court entered a decree in favor of the libellant, as also in a suit by the master of the ship to recover possession of the cargo.⁹

⁴ The opinion of Mr. Cushing, Atty. Gen., April 28, 1855, 7 Ops. Attys. Gen., 122, was cited by the Ambassador in support of his contention.

⁵ For. Rel. 1916, Supp., 728.

⁶ *Id.*, 729-731.

⁷ *Id.*, 733, 734; Memorandum from the British Embassy, Feb. 4, 1916, *id.*, 725-726.

⁸ *Id.*, 734-735.

⁹ The *Appam*, 234 Fed. 389. Concerning the decision of the District Court, see J. B. Scott, "The Case of the *Appam*," *Am. J.*, X, 809. See, also, Arthur Burchard, "The Case of the

From both decrees an appeal was taken to the Supreme Court of the United States. That Tribunal affirmed the decree in each case on March 6, 1917.¹⁰ In so doing the Court declared, through Mr. Justice Day, that the use made by the *Appam* of an American port was a breach of the nation's neutrality under international law;¹¹ secondly, that such use of such a port was not justified by the existing treaty with Germany;¹² and thirdly, that there was jurisdiction in an American admiralty court to condemn the *Appam* and its cargo. In support of its conclusion on the last point, the Court relied upon early American cases where property had been captured in violation of the neutrality of the United States within its territorial waters, or captured on the high seas by a cruiser fitted out or armed in violation of the neutrality of the United States.¹³ It was declared that no difference in principle was perceived between such cases and breaches of neutrality "of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely."¹⁴

In the case of the *Appam* it appeared to be held, therefore, first, that the bringing of a prize into an American neutral port with a view to keeping it there indefinitely constitutes a violation of the neutrality of the United States

Appam and the Law of Nations," *id.*, XI, 270; Note in *Harvard Law Rev.*, XXX, 161; Note in *Columbia Law Rev.*, XVI, 585; Note in *Michigan Law Rev.*, XV, 487, after the decision in the Supreme Court.

¹⁰ The Steamship *Appam*, 243 U. S. 124.

¹¹ In this connection the learned Justice said: "The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such uses were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept." (The Steamship *Appam*, 243 U. S. 149.)

¹² The Court acquiesced in the interpretation placed upon Art. XIX of the treaty by Secretary Lansing in his note to the German Ambassador of March 2, 1916. The text thereof, according to the translation adopted by the State Department, reads as follows: "The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible." (For. Rel. 1916, Supp., 729, 730.)

¹³ The learned Justice cited *Glass v. The Sloop Betsy*, 3 Dall. 6; *The Santissima Trinidad*, 7 Wheat. 283 (the opinion of Story, J., therein being quoted at length); *L'Invincible*, 1 Wheat. 238, 258; *The Estrella*, 4 Wheat. 298, 308, 309, 310, 311; *La Amistad de Rues*, 5 Wheat. 385, 390.

See, also, *Queen v. Chesapeake*, 1 Oldright's Nova Scotia Reports, 769; also Moore, Dig., VII, 937, relied upon in *The Appam*, 234 Fed., 389, 401.

¹⁴ In conclusion it was said: "In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people." (243 U. S. 156.)

See Frederic R. Coudert, "The *Appam* Case," *Am. J.*, XI, 302; Enforcement of Neutral Duties, Judicial Action, *infra*, § 879.

and is, therefore, an internationally illegal act; and secondly, that an admiralty court may order restitution for such violation of neutrality, although that violation is not the proximate cause of the loss to the original owners.¹⁵

¹⁵ See Note in *Harv. Law Rev.*, XXX, 161-164.

The *Appam* case reveals defects in the system of procedure existing in the United States, rather than errors of law. It may be admitted that according to international law, the attempt of the prize master to make use of an American port for the sequestration of the *Appam* was improper. Nor is it believed that the treaty with Prussia justified that effort, or the interpretation placed upon it by the German Government.

Sixteen days elapsed from the arrival of the *Appam* at Newport News until the libel of the vessel. Up to that time the Department of State expressed no opinion as to the propriety of asylum or the interpretation of the treaty. The Department had not then decided that the treaty was being violated. As late as April 4, it declined to accept the suggestion of the British Embassy that the presence of the ship in American waters, "in the circumstances," constituted a violation of the neutrality of the United States (see, in this connection, J. B. Scott, in *Am. J.*, X, 809, 831), and it declined also to have official representations made to the Court in such a sense. The inference is that the Department, having regarded the treaty question as a close one, was not disposed to regard the vessel as a wrongdoer at least for the period of time prior to the Secretary's decision, and in the absence of such decision, up to the moment of the libeling of the ship.

The interval of sixteen days at Newport News broadened the opportunity of the owner to invoke judicial aid. Obviously the libel might have been filed at an earlier date. By starting suit, however, the libellant was able to remove from the executive to the judicial department of the Government the control of the vessel, and to transfer to the Court the burden of deciding the questions concerning the rule of international law and the interpretation of the treaty. With respect to both, however, the Court had the benefit of the Department's final opinion expressed in its correspondence, and happily agreed.

As a natural consequence of the libel the Court was confronted with the difficult question as to jurisdiction to grant restitution. In its decision the Supreme Court was guided by precedents of its own making in cases of an earlier century. That no real distinction was believed to exist between the principle which they established and that deemed applicable to the *Appam* is significant. That a foreign belligerent sovereign ought not to be permitted to claim exemption from jurisdiction in behalf of a public ship as such in neutral waters, when the presence of the vessel therein violates an obligation of that sovereign towards the neutral State, is a proposition which, standing by itself, is not without merit.

On the assumption that the Court, in accordance with an established domestic practice, possessed the requisite jurisdiction to uphold the neutrality of the nation, it was neither illogical nor arbitrary for the Tribunal to denounce as illegal the act of the vessel in entering an American port for indefinite asylum, however much doubt the Department of State may have earlier entertained on that point, or to decree restitution of the vessel and cargo. In view of its conclusions as to the merits of the questions involved the Court found itself without alternative. It could not, as a political department dealing with foreign affairs, cause the vessel to depart from the United States. Any special considerations of equity, due to the peculiar circumstances of the case and attributable in particular to difficulties attending the interpretation of the treaty, became irrelevant. The sole issue was whether restitution should be decreed.

The most unfortunate aspect of the case was the existence of a practice permitting an admiralty court, at the suit of an interested private party, to exercise jurisdiction for purposes of granting restitution. The unwisdom of the practice was perceived and frankly admitted by Chief Justice Marshall sitting as a circuit judge in the case of *The Santissima Trinidad* in 1821, 1 Brockenbrough, 478, 496, and was also noted by Mr. Justice Story in his opinion in the same case before the Supreme Court in 1822, 7 Wheat. 283, 349. He suggested that if inconvenience should grow out of the practice "from reasons of state policy or executive discretion," it was competent for Congress to apply at its pleasure the proper remedy. In the *Appam* case the Department of State in charge of the foreign affairs of the nation found itself deprived of freedom to deal as it saw fit with an international controversy, and that in consequence of the judicial process issuing from another branch of the Government. If the Secretary of State regarded as not unreasonable, although unconvincing, the German interpretation of the treaty and the method of invoking it (and from his note to the British Embassy of April 4, such seems to have been his position), he found himself utterly unable to adjust his policy accordingly. After the ship was libeled the President was powerless to permit or cause the vessel to depart. (Yet § 15 of the Criminal Code empowered him to employ such part of the land or naval forces of the United States, or of the militia thereof, as might be necessary to compel the departure of any foreign vessel in all cases in which, by the laws of nations or the treaties of the United States, "she ought not to remain within the United

§ 862A. *The City of Flint*.¹ On or about October 9, 1939, the American S.S. *City of Flint* was captured by a German cruiser at an estimated distance of some 1,250 miles from New York, with a mixed cargo destined for British ports. The vessel was taken into the harbor of Tromsø, Norway, on October 21, with a German crew and flying the German flag.² After there remaining for a few hours to take water, the ship was ordered by the Norwegian Government to depart and did so. The vessel was taken into the harbor of Murmansk, Union of Soviet Socialist Republics, on October 23.

On October 25, the American Chargé at Berlin reported that the Foreign Office had said at a press conference that the *City of Flint* had been captured by a German vessel and contraband found on board, the captured ship being destined for England; and that it had been added that the ship was unseaworthy in that it did not have navigation charts adequate for bringing the ship into a German port. When the vessel entered the harbor of Murmansk, according to an announcement said to have been presumably from the Soviet Government through the Tass news agency, the naval forces at the port of Murmansk temporarily held the vessel and interned the German prize crew. On October 25, the American Chargé at Berlin reported that the German Foreign Office said, in reference to the seizure of the *City of Flint* that "the German authori-

States." See amendment of this provision in § 10, title V of the Act of June 15, 1917, to enforce neutrality.)

From an international point of view the significant facts of the case are the unmolested sojourn of the *Appam* at Newport News for sixteen days, the uncertainty of the Government during that interval and thereafter, as to the impropriety of the asylum and the applicability of the treaty, and the intervening libel productive of restitution. They reveal an apparent discrepancy in the attitude and conduct of two governmental departments. On February 16, the date of the libel, the Department of State, had it possessed all-sufficient power, could not have restored the *Appam* and cargo to their owners without subjecting itself to charges of inconsistency and arbitrariness. In view of what actually occurred, the grave inquiry presents itself whether the United States should remain content with a practice permitting an admiralty court, at any stage of an international controversy respecting a prize, to deal with the vessel in a way and according to a process which, in view of the circumstances of the case, may be at variance with the stand taken by the Secretary of State. Following the suggestion of Mr. Justice Story, might not an Act of Congress withholding jurisdiction from such a court, in cases where a private individual sought restitution of a ship held as a prize by a belligerent sovereign, and the treatment of which was already a matter of international controversy, serve a useful purpose? The obvious design of such a law would be to minimize the difficulties engendered in one class of international disputes, by lodging exclusive control thereof in that department of the Government established for the purpose of conducting its foreign affairs, and alone made competent to enter into diplomatic correspondence.

§ 862A ¹ This section of the text is taken from an editorial comment by the author in *Am. J.*, XXXIV, 89.

² Concerning the stay of the vessel at Tromsø see statement by the Norwegian Government, November 5, 1939, as set forth in Associated Press despatch of that date, published in *New York Times*, Nov. 6, 1939.

In the course of a statement by broadcast by Captain Joseph A. Gainard, as printed in *New York Times*, Nov. 7, 1939, it was said: "When it was evident that we could take aboard thirty-eight male passengers, the crew of a British ship were placed on board. A total of three officers and eighteen Germans were placed on board as a prize crew. They brought with them sixty hand grenades, twenty revolvers, twenty bayonets, twelve dynamite bombs and one machine gun. They used none of these, however, during the whole voyage, but eventually delivered them to the Norwegian authorities.

"The lieutenant in charge of the prize crew addressed our crew in good English as follows:

"I must tell you we proceed as a prize to Germany, where the Prize Court decides what becomes of your cargo. You are, as usual, to obey your own captain and his officers."

ties were communicating with the Soviet authorities in the matter." On the same day the Tass agency reported that the German crew had been released from internment by the maritime authorities at Murmansk in view of the fact, as had been established, that the vessel had been brought into port for repairs of machinery, and also that the vessel was meanwhile remaining in Murmansk for verification of the exact composition of its cargo. On October 26, the American Chargé at Berlin referring to a memorandum received that day from the Foreign Office, reported that it stated that a prize crew placed on board the *City of Flint* had brought the vessel to the harbor of Murmansk because of "sea damage."³ For some reason then unexplained the German crew was interned at Murmansk in spite of the fact that according to the German authorities they were without charts and had put into Murmansk because they could not proceed to a German port without charts. Later, the members of the crew were released, seemingly under a plea that their entry into Murmansk was required for necessary repairs to defective machinery.⁴

On October 28, the Russian authorities ordered the *City of Flint* to leave the port of Murmansk in the control of the German prize crew; and the vessel thereupon departed from Russian territorial waters.⁵ The ship proceeded around

³ It was added that an official of the German Foreign Office, when transmitting the memorandum, stated to the Chargé that the Foreign Office had no details as to the damage which necessitated taking the ship to Murmansk, but that he had maintained, in response to an inquiry, that the term "damage" would cover the case of a ship lacking charts with which to navigate the waters through which it had to proceed.

⁴ The statement of facts in the text reproduces a statement released by the Department of State Oct. 28, 1939, published in Dept. of State Bulletin of that date, 431.

⁵ Mr. Steinhardt, the American Ambassador at Moscow, reported under date of October 27, a statement by Assistant Commissar of Foreign Affairs Potemkin, in the following words: "The *City of Flint* had come into the port of Murmansk in charge of a German prize crew without any previous knowledge on the part of the Soviet Government and through no act on its part. The reason ascribed by the prize crew for the entry was damaged machinery making the ship unseaworthy. When the Soviet authorities at Murmansk judged that the vessel was again fit to put to sea, and being desirous of preserving its neutrality, the Soviet Government had ordered the vessel to leave the port of Murmansk immediately under the same conditions as those of her entry, namely, with both the German and American crews on board and her cargo intact. He added that the order would be enforced immediately and that the Soviet Government felt that its decision was not only in accordance with the well-recognized principles of international law and consonant with the obligations of a neutral but it was also the correct position to take as between the conflicting claims of the United States and Germany to possession of the vessel and her cargo and that by this he meant 'to send her out in the same status as she had entered one of the ports.'

"He said that his government did not consider that it had the right to turn the vessel and her cargo over to the American crew unless the German prize crew refused to take her out, as in the opinion of his government to do so would be an unneutral act. In reply to a question he stated that the decision of the Soviet Government to permit the German prize crew to take the vessel to sea was final.

"I then asked him who had verified the alleged damage to the machinery, to which he replied that he had no information on this subject, but assumed this had been done by the authorities at Murmansk.

"I again inquired concerning the welfare of the American crew and he said that it was his understanding that they had been on board the ship all of the time and were well.

"I then referred to my difficulties in making contact with the captain or members of the crew, reciting my repeated attempts to get into communication with them by telegram and telephone, as well as my inability to obtain a plane today. He disclaimed any responsibility for these difficulties, passing over the subject lightly by pointing out that the crew being on

the North Cape under German control and continued southward in Norwegian territorial waters where it was accompanied by a Norwegian naval ship. When outside of Sogn (a fiord north of Bergen), the German prize commander reporting a sick man aboard requested permission to stop at Haugesund in order to obtain desired medical treatment for that individual. A doctor sent aboard from the Norwegian naval ship after examining the sick man, reported him to be suffering from an insignificant wound in the leg, a fact which caused the Norwegian authorities to inform the commander of the *City of Flint* that it could not be permitted to anchor at Haugesund. Nevertheless, the ship did there anchor on November 3, in consequence of orders said to have come from the German Government. In accordance with what were conceived to be the requirements of the Hague Convention of 1907 Concerning the Rights and Duties of Neutral States in Naval War, the ship was removed from the control of the German prize crew which was temporarily interned, and the vessel surrendered to its own American crew.⁶ The ship proceeded to Bergen on November 4.

The law of nations does not at the present time permit the captor of a neutral prize to take the vessel into the port of another neutral State and there sequester it pending the decision of a prize court.⁷ On the other hand, as has been recently observed, "if the neutral permits sequestration, it is undoubtedly giving assistance to a belligerent and enabling it to use neutral territory as a base for one form of belligerent activity."⁸ This fact suffices in itself to cause one greatly to doubt whether maritime States generally acknowledged in 1907, when the Hague Conference assembled, that a neutral State possessed the right to permit sequestration; and it suffices also to demand convincing evidence in support of any assertion that it did. There is, however, a paucity of such evidence. No instance has been seen where a local statute or regulation assertive of the rights of a neutral with respect to prizes, and enacted during the century

board the ship in the roadstead, in conjunction with the average delays in long distance telephone communication had probably brought about this 'unfortunate result.'

"I am again endeavoring to complete a telephone connection with the captain of the *City of Flint* at midnight." (Dept. of State Bulletin, Oct. 28, 1939, 430.) In the same report the Ambassador stated that he had vigorously reiterated his indignation at the lack of coöperation by the Soviet Government in withholding information from him while issuing communiqués with respect to the *City of Flint* through the medium of the Tass agency.

⁶ See statement by Norwegian Government of Nov. 5, 1939, contained in Associated Press despatch of that date, as printed in *New York Times* of Nov. 6, 1939.

On Nov. 3, 1939, it was announced that the American Chargé in Berlin had reported the receipt of information from the German Foreign Office that appropriate German naval authorities had been requested to comply with the desire of the United States that all precautions be taken to avoid exposing the members of the American crew of the *City of Flint* to unnecessary danger. Dept. of State Bulletin, Nov. 4, 1939, 458.

On Nov. 27, 1939, the *City of Flint* left Bergen for Haugesund. See *New York Times*, Nov. 28, 1939, p. 3.

⁷ Declared the Dept. of State on Oct. 28, 1939: "A prize crew may take a captured ship into a neutral port without internment only in case of stress of weather, want of fuel and provisions, or necessity of repairs. In all other cases, the neutral is obligated to intern the prize crew and restore the vessel to her former crew." (Dept. of State Bulletin, Oct. 28, 1939, 432.)

⁸ Comment by the Reporter on Art. 29 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J., XXXIII, Supplement Section 2*, 458.

immediately prior to the consummation of the Hague Convention, made specific provision for sequestration.⁹ It is reasonable to conclude that, as is noted elsewhere,¹⁰ when the United States declined to adhere to Article XXIII of the Hague Convention, which permitted as between the contracting parties the sequestration of prizes under conditions that were specified, and by such means sought to protect itself against any relaxation of the normal requirements in relation to prizes, it was endeavoring to safeguard itself against the operation of a fresh privilege yielded by treaty to a neutral State.¹¹ That endeavor was successful. Thereafter, if either Germany or Russia felt that, as in the war initiated in 1939, the Hague Convention was applicable to American ships, they were obliged either to accept the terms on which the United States adhered thereto by acknowledging that the provisions of Article XXIII were not to be utilized against such vessels, or to forego the right to invoke any portions of the treaty as against the United States. They could not cause the United States to burden itself with the convention on terms other than those set forth in its adherence.¹²

It may be observed that Great Britain did not accept (and is not understood as yet to have accepted) the Convention. Inasmuch as Article XXVIII thereof declared that "the provisions of the present Convention do not apply except as to the Contracting Parties, and then only if all the belligerents are parties to the Convention,"¹³ it may fairly be contended that the agreement was not applicable in the instant case. Whether or not, therefore, it was to be regarded as applicable, it is not apparent how either Russia or Germany could properly

⁹ The statutory regulations enacted since that event and prior to the European war initiated in 1939, as revealed in the texts published in Deák and Jessup, *Neutrality Laws*, have been obviously designed to make appropriate provision to harmonize with the Hague Convention, a fact which in some instances has been acknowledged in terms.

¹⁰ See *Entrance with Prize*, *supra*, § 861.

¹¹ It may be noted that the United States did not sign the Convention, but deposited its adherence subsequently, with the reservation and exclusion of Art. XXIII.

¹² It is perhaps, therefore, unnecessary to seek to appraise the significance of acts on the part of Germany or Russia in connection with the negotiation of the Convention or thereafter, which may point to acceptance of the terms of the adherence by the United States. Nevertheless, certain statements that have been made in relation to the matter are of interest.

"With reference to the action taken by the Government of the United States, in its declaration of adherence to the Convention, in reserving and excluding Article XXIII, I have to inform you that it does not appear from the official records of this Government that any formal acknowledgment or acceptance of this reservation was made on the part of any of the contracting parties" (Mr. Charles M. Barnes, Chief, Treaty Division, Dept. of State, to the author, Dec. 18, 1939).

Declares Mr. Hunter Miller:

"It thus appears to have been within the contemplation of the Powers, particularly in view of the very numerous reservations made at signature to the different Conventions of 1907, that a non-signatory Power might make its reservations upon adhesion, at least in the case when such Power has made what may be called a general reservation, such as was made by China, and, as to Convention XIII, by the United States." (David Hunter Miller, *Reservations to Treaties*, Washington, 1919, 152 and 154.)

Mr. Miller also adverts to the fact that the delegation of the United States made an express general reservation in regard to the Convention itself at the eighth plenary session of the Conference on October 9, 1907, *id.*, 153.

It may be noted that in the *Reichs-Gesetzblatt*, 1910 (No. 3715), p. 382, is printed the text of the reservation by the United States, from which may be fairly drawn the conclusion that Germany formally accepted the terms of the American adherence.

¹³ Malloy's *Treaties*, II, 2362.

invoke the privilege of sequestration against the United States. Without the benefit of the treaty they were impotent to do so; by means of the treaty minus Article XXIII they were no better off.

It may be noted that in reported discussions concerning the *City of Flint* there appears to have been no reference to the matter of sequestration of the vessel. It was rather suggested that the ship proceeded to the distant port of Murmansk for other reasons, such as on account of defective machinery or unseaworthiness. In view, however, of the position of the vessel when captured and when it later approached the coast of Europe where Scandinavian ports were nearer at hand and better available to satisfy the legitimate needs of the ship and its occupants, it is not unreasonable to conclude that sequestration was the real end in view when Murmansk was sought and became the destination of the vessel.¹⁴ Such a conclusion finds support, moreover, in data released by the Department of State, on October 28, 1939.¹⁵

It is not sought to be intimated that the *City of Flint* could not have been in need of such succor as Russia might lawfully have yielded when the vessel approached or entered the harbor at Murmansk. The Soviet authorities did not, however, offer to the United States evidence of such a state of facts, or proof that the relatively protracted sojourn of the ship in Russian waters was necessary.¹⁶ Thus, when the vessel was permitted to leave Murmansk in the custody

¹⁴ It may have been realized at Berlin as well as Moscow that sequestration was a dangerous matter to inject into any diplomatic controversy concerning the treatment of the ship. It must have been perceived that the Government of the United States was shrewd enough and likely to be persistent enough to expose the weakness of an acknowledgment that sequestration had been sought by the captor or yielded however briefly by the neutral sovereign at Murmansk. In the circumstances of the case it was more convenient to allege the need of legitimate succor, even though the allegation lacked a solid foundation and was merely to be utilized as a face-saving device.

¹⁵ Declared the Dept. of State in its statement of Oct. 28, 1939: "The conclusion from the foregoing facts and circumstances indicates that when the *City of Flint* entered the harbor at Murmansk, any plea relating to the chart requirements if advanced must have been ignored since the German crew was interned. A second and entirely different reason for entering Murmansk, namely, defective machinery which called for immediate repairs, was not advanced until later. A subsequent cable from the American Chargé d'Affaires at Berlin, also dated October 26, quoted a statement of the Foreign Office at its noon press conference to the effect that the fact that the Russians have freed the German crew indicates that the Soviet authorities have confirmed the view of the prize crew that the *City of Flint* was unseaworthy and it was therefore permissible to take the ship into a neutral harbor. . . . It seems manifest that even if it is assumed that the German crew was proceeding legally prior to the entry of the *City of Flint* into the harbor of Murmansk, the known facts and circumstances support the contention of the American Government that the German crew did not at the time of entry offer any reasonable or justifiable grounds such as are prescribed by international law for taking the vessel into this port, and that therefore it was the clear duty of the Soviet Government to turn the *City of Flint* over to the American crew. This has been the major contention of the American Government.

"In view of the foregoing facts and circumstances, each person can judge for himself the question as to how much light is shed on this entire transaction by the action of the Soviet Government in withholding adequate cooperation with the American Government with respect to assembling and disclosing to the American Embassy in Moscow the essential facts pertaining to the landing, the whereabouts, and welfare of the American crew; by the fact that it was first alleged by the German authorities that the need for charts was the ground for bringing the vessel into port; and by the fact that later this ground seems to have been abandoned and a new ground or theory relating to defective machinery was set up." (Dept. of State Bulletin, Oct. 28, 1939, 432.)

¹⁶ On Oct. 30, 1939, the Department of State announced a Tass agency report, communicated by the American Ambassador at Moscow stating that "on October 28 in the

of the German prize crew, those authorities neither evinced the disposition, nor undertook in fact to make full and reasonable explanation of the privileges yielded to the German captor. Accordingly, there was much ground for the American contention that Russia had failed to indicate the existence of a situation that sufficed to excuse the giving of the succor that was yielded, and that in allowing the vessel to depart in the custody of the prize crew, there was unconcern for an obligation due to the United States, and which assumed the form of the bestowal of an improper benefit upon the captor of an American ship. It was the absence of a showing that the extended sojourn at Murmansk was in fact occasioned or demanded by needs of the *City of Flint* which the neutral territorial sovereign under the customary or conventional law (as exemplified by the provisions of Article XXI of the Hague Convention) could lawfully satisfy, which emphasized the impropriety of the benefit.

The Norwegian Government, in the light of information which it possessed when the *City of Flint* anchored at Haugesund on November 3rd, against the will of the territorial sovereign, is believed to have been warranted in releasing the prize from the captor, and in giving it over to its American crew. By such means, moreover, Norway respected the obligation which it owed to the United States in relation to the ship.¹⁷

Notwithstanding the obscurity surrounding the factual situation which for a time produced confusion of thought and perhaps also subtlety of statement, the case of the *City of Flint* revealed the zeal of the captor, regardless of the applicable law, to seek places of sequestration or succor for its prize, and the readiness of a European neutral State to smooth the way of the captor without much concern for the rights of that other neutral State to which the ship belonged.

(f)

§ 863. **Armed Belligerent Merchantmen.** Whether armed belligerent merchantmen entering American ports were to be restricted in the use thereof as though they were vessels of war, was a problem confronting the United States while a neutral in the course of World War I. As early as September 19, 1914, the Department of State announced that a merchant vessel of belligerent nationality might carry an armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war. It was declared that while their presence raised a presumption that the armament was for offensive purposes, the owner or agent might overcome the presumption by evidence showing that the vessel carried armament solely for defense.¹ On March 25, 1916,

evening the steamship *City of Flint* after the machinery had been repaired, left the port of Murmansk." Dept. of State Bulletin, Nov. 4, 1939, 457.

¹⁷ See report from the American Minister to Norway, released Nov. 3, 1939, Dept. of State Bulletin, Nov. 4, 1939, 458.

§ 863.¹ For. Rel. 1914, Supp., 611. It was announced that the indications that the armament would not be used offensively were:

1. That the caliber of the guns carried does not exceed six inches
2. That the guns and small arms carried are few in number.
3. That no guns are mounted on the forward part of the vessel.

the Department of State expressed its views at great length.² It declared that if an armed merchant vessel of belligerent nationality carried a commission or orders issued by a belligerent government, and directing it "under penalty" to conduct aggressive operations, or if it was conclusively shown to have conducted such operations, it should be regarded and treated as a ship of war. If sufficient evidence was wanting, it was said that a neutral, in order to safeguard itself from liability for failure to preserve its neutrality, might "reasonably presume from the facts" the *status* of an armed vessel which frequented its waters. Attention was called to the absence of a settled rule of international law as to the sufficiency of evidence to establish such presumption, and to the resulting necessity that a neutral government decide for itself as to the sufficiency of the evidence requisite to determine the character of the vessel.³

It was said, by way of summary, that the *status* of an armed merchant vessel in neutral waters might be determined, in the absence of documentary proof or conclusive evidence of previous aggressive conduct, by presumption derived from all the circumstances of the case. It was announced again that merchantmen of belligerent nationality, armed only for purposes of protection against the enemy, were entitled to enter and leave neutral ports without hindrance in the course of legitimate trade. On the other hand, such vessels "under a commission or orders of their Government to use, under penalty, their armament for aggressive purposes," or merchantmen which, without such commission or orders, had used their armaments for aggressive purposes, were not, it was said, entitled to the same hospitality in neutral ports as peaceable armed merchantmen.

It has been observed that armed belligerent merchantmen, even when not under governmental orders to use, under penalty, their armament for aggressive purposes, are disposed to attack at sight enemy submarines as a general measure

4. That the quantity of ammunition carried is small.

5. That the vessel is manned by its usual crew, and the officers are the same as those on board before war was declared.

6. That the vessel intends to and actually does clear for a port lying in its usual trade route, or a port indicating its purpose to continue in the same trade in which it was engaged before war was declared.

7. That the vessel takes on board fuel and supplies sufficient only to carry it to its port of destination, or the same quantity substantially which it has been accustomed to take for a voyage before war was declared.

8. That the cargo of the vessel consists of articles of commerce unsuited for the use of a ship of war in operations against an enemy.

9. That the vessel carries passengers who are as a whole unfitted to enter the military or naval service of the belligerent whose flag the vessel flies, or of any of its allies, and particularly if the passenger list includes women and children.

10. That the speed of the ship is slow.

² Memorandum on the Status of Armed Merchant Vessels, For. Rel. 1916, Supp., 244.

³ In this connection it was said: "For the guidance of its port officers and other officials a neutral Government may therefore declare a standard of evidence, but such standard may be changed on account of the general conditions of naval warfare or modified on account of the circumstances of a particular case. These changes and modifications may be made at any time during the progress of the war, since the determination of the status of an armed merchant vessel in neutral waters may affect the liability of a neutral Government." (*Id.*, 245.)

Cf. Mr. Lansing, Acting Secy. of State, to Mr. Gerard, Ambassador to Germany, Nov. 7, 1914, For. Rel. 1914, Supp., 613; Mr. Lansing, Secy. of State, to the Italian Ambassador at Washington, Dec. 31, 1915, For. Rel. 1916, Supp., 749; same to the British Ambassador at Washington, Jan. 18, 1916, *id.*, 146; same to American Diplomatic Officers in European countries, Feb. 16, 1916, *id.*, 170.

of defense.⁴ There may thus enter neutral ports armed ships devoted to the carriage of passengers or freight, employed on established trade routes, and yet which, in the event of certain contingencies, may be expected to participate in and even initiate hostile operations. It is the possession by such vessels of substantial power to do so, the value of which depends upon the alertness with which it is employed, which appears to render inept the effort of a neutral to regulate its conduct according to a supposition of its own that aggressive purposes are wanting.

The real distinction between the armed merchantman and the vessel of war is the fact that the former, in contrast to the latter, does not normally seek out its prey and endeavor to capture or destroy it. Because it is primarily a vehicle of commerce, the merchantman does not become a source of danger to enemy vessels until it falls in with those of a kind from which it has reason to fear attack.⁵ This circumstance may have been influential in shaping the policy of the Department of State in its attempt to formulate a correct rule of neutral conduct, notwithstanding the failure to take cognizance of the common mode of safeguarding a ship by its own efforts against submarine attack. If it be reasonable for a neutral to discriminate in favor of an armed merchantman under a belligerent flag and of presumably aggressive purposes with respect to enemy submarine vessels of war, the basis of discrimination should depend upon the primary employment of the ship as an instrument of commerce for the transportation of passengers or freight, and upon the absence of grounds for belief that the particular vessel is not in fact bent on an essentially hostile mission. Yet if the law is to be regarded as permitting discrimination even on such a basis, neutral territory is allowed to offer to belligerent vessels capable of engaging in hostile operations and under certain conditions likely to resort thereto, direct aid calculated to increase their fighting power. Unconcern or tolerance on the part of the territorial sovereign may, therefore, seem to betoken indifference as to whether its domain becomes a veritable base of belligerent operations. Such an unsatisfactory situation reveals the difficulty that necessarily besets the attempt to establish a régime or to lay down a rule that shall yield to the armed merchantman privileges that are withheld from vessels of war. An impressive consideration is the fact that both can be fighting ships, and that both will become such when occasion offers. Hence there may be deemed to be good reason to treat both alike, as did the Government of the Netherlands during the course of World War I,⁶ and to effect agreement, as is contemplated in the Har-

⁴ See *Belligerent Forces, Private Vessels Defensively Armed*, *supra*, § 709; *Attack, Armed Merchantmen*, *supra*, §§ 742-743.

⁵ When the Cunard-White Star liners *Aquitania* and *Mauretania* entered the port of New York as armed belligerent merchantmen in September, 1939, the picture presented by their mounted guns failed somehow to convince American opinion that the bearers of them should be dealt with by the United States as vessels of war rather than as instruments of commerce plying between countries that were at peace with each other.

⁶ See correspondence between the Netherlands and British Governments respecting defensively armed British merchant vessels set forth in Misc. No. 14 (1917), [Cd 8690], *Am. J.*, XII, *Supplement, Official Documents*, 196-232; Diplomatic correspondence between the Netherlands and the Entente Allies regarding the admission of armed merchant vessels to Dutch ports, 1914-1917, *id.*, 233-245; Jhr. W. J. M. van Eysinga, "The Netherlands and

vard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, that belligerent surface or submarine vessels, armed for whatsoever purpose, be assimilated, when in neutral ports, to belligerent vessels of war.⁷

(g)

§ 864. **Internment of Belligerent Vessels of War and Their Occupants.** If, notwithstanding notification from neutral authorities, a belligerent vessel of war does not leave a neutral port where it is not entitled to remain, it becomes the duty as well as the right of the neutral to take such measures as it deems necessary to render the ship incapable of taking to sea during the war. The commanding officer of the ship must, moreover, facilitate the execution of such measures.¹ The placing of a vessel of war in such a condition constitutes its internment, and calls for the assumption of control by the neutral.² The character of the vessel as a ship of war, including the function of saluting and the right to receive salutes, is in abeyance during the period of internment and while the ship is in the custody of the neutral.³ The vessel does not, however, lose its distinctive nationality in consequence of internment; nor is the neutral obliged to withhold from it the privilege of flying its national colors.⁴

the Law of Neutrality during the Great War," Grotius Society, *Proceedings*, XVIII, 65. See, however, Netherlands neutrality proclamation of Sept. 1, 1939, announcing, in Art. 3 certain conditions under which defensively armed belligerent merchantmen might be admitted to ports and roadsteads. (Deák and Jessup, *Neutrality Laws*, 823 [3].)

⁷ See Art. 2, *Am. J.*, XXXIII, *Supplement Section 2*, 176. See also Art. 28, *id.*, 180.

See also Art. XII (3) of Habana Convention on Maritime Neutrality of Feb. 20, 1928, U. S. Treaty Vol. IV, 4743, 4747 (which section was not accepted by the United States).

Cf. the conditions when, according to sec. 3 (j) of the General Declaration of Neutrality of the American Republics of Oct. 3, 1939, belligerent armed merchant vessels in neutral waters were not to be assimilated to vessels of war. (Report on the Meeting of the Ministers of Foreign Affairs of the American Republics, Panama, Sept. 23-Oct. 3, 1939, Pan American Union, Congress and Conference Series No. 29, 15.) Also Lauterpacht's 6 ed. of *Oppenheim*, II, 572-573, where attention is called to the foregoing documents.

§ 864.¹ Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 11; also Art. XXIV of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's *Treaties*, II, 2362.

See, also, Arts. III and XXV.

While itself a neutral during World War I, the United States had occasion to cause the internment of several vessels of war seeking asylum in American waters. See the cases of the *Geier* and *Locksun*, For. Rel. 1914, Supp., 583-593; the *Prinz Eitel Friedrich*, *id.*, 1915, Supp., 824-833; the *Kronprinz Wilhelm*, *id.*, 833-835; the *Farn*, *id.*, 821-824, 828. The German converted cruiser *Cormorant*, arriving at Guam, Dec. 14, 1914, was interned Dec. 15, 1914. See *Proceedings*, United States Naval Institute, XLI, 282-283, citing *New York Times*, Dec. 16, 1914.

See *supra*, §§ 859-860.

² Mr. Adey, Acting Secy. of State, to Mr. Takahira, Japanese Minister at Washington, Sept. 15, 1904, concerning the internment of the Russian warship *Lena*, which had arrived at San Francisco, Sept. 11, For. Rel. 1904, 428, Moore, Dig., VII, 999.

According to Art. 30 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A neutral State may intern any vessel violating its rules adopted in accordance with Article 26, 27 or 28. The officers and crew of an interned vessel shall be interned." (*Am. J.*, XXXIII, *Supplement Section 2*, 180. See also Art. 39, *id.*, 181.)

See Recommendation Relative to Internment Submitted to the Governments of the American Republics by the Inter-American Neutrality Committee, approved Jan. 26, 1940, Pan American Union, Decrees and Regulations on Neutrality, Supp. No. 1, Law and Treaty Series No. 13, p. 54.

³ Mr. Hay, Secy. of State, to Count Cassini, Russian Ambassador at Washington, Dec. 14, 1904, For. Rel. 1904, 789.

⁴ Moore, Dig., VII, 994, respecting advice of State Department responsive to an inquiry

In the course of the war initiated in 1939, it is not understood that any belligerent vessel of war or its occupants were interned by the Government of the United States.⁵

When a belligerent ship of war is interned, the neutral is obliged to detain the officers and crew.⁶ They are deemed to be an organized body constituting a part of a belligerent force and to be dealt with accordingly.⁷ The United States has taken the stand that the position of such persons is on principle like that of a military force entering neutral territory and there necessarily to be held by its sovereign. For that reason President Roosevelt felt that he could not, consistently with the neutral course which it behooved him to follow during the Russo-Japanese War, accede to a request for the repatriation of any of the officers or crew of the Russian ship of war *Lena* interned in California in 1904, without at least the consent of both belligerents.⁸

The neutral enjoys some freedom of action with respect to the treatment to be accorded the officers and crew. According to the Hague Convention, they may be left on the ship, or kept either on another vessel or on land, and may be sub-

from Admiral Train, U.S.N., June 24, 1905, in relation to the internment of Russian warships at Manila.

⁵ Such was the case, at least up to August 1, 1941.

In December, 1939, the German merchant ship *Columbus* was scuttled and burned by its occupants some 450 miles east of Cape May, New Jersey. A large number of rescued survivors were brought by the U.S.S. *Tuscaloosa* to Ellis Island, New York. "Upon arrival at the port of New York the crew of the *Columbus* was detained at Ellis Island pending a determination of their status and their right to admission to this country. After some delay it appears that the conclusion was reached by the immigration authorities that the members of the crew could not properly be admitted to the United States. A decision was accordingly made providing for their technical exclusion and for their parole in the custody of the German Consul General in New York. Early in 1940, in pursuance of an agreement reached in negotiations between the Departments of State and Justice and the German Embassy, the members of the crew were transferred to Angel Island in San Francisco Bay. They were quartered there in the quarantine station and the immigration station. A few were returned to Germany with the consent of the interested authorities in this country. A number of plans to return the remaining members of the crew to Germany fell through and finally early in the present year they were transferred to Fort Stanton, New Mexico, where they are at present quartered. The cost of the maintenance of the crew of the *Columbus* has been paid by the Government of Germany." (Mr. D. V. Sandifer, of the Dept. of State, to the author, Oct. 10, 1941.)

⁶ Art. XXIV of Hague Convention.

See § 7, title V, of the Act of June 15, 1917, 40 Stat. 223, 18 U.S.C.A., § 37, respecting the enforcement of neutrality, and providing for the arrest and confinement of a person belonging to the armed land or naval forces of a belligerent nation or belligerent faction of any nation, who, being interned in the United States, "in accordance with the law of nations," leaves or attempts to leave its jurisdiction or the limits of internment in which freedom of movement has been allowed, without proper permission, or who willfully overstays a leave of absence, and providing also for the punishment of any person who, within the jurisdiction of the United States and subject thereto, aids or entices any interned person so to escape or attempt to escape.

⁷ Mr. Lansing, Acting Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Nov. 27, 1914, For. Rel. 1914, Supp., 590. It was here said that the same principle was applicable to officers who separated themselves from a warship after its arrival in neutral waters, but prior to its internment.

⁸ Mr. Loomis, Acting Secy. of State, to Count Cassini, Russian Ambassador at Washington, Sept. 24, 1904, For. Rel. 1904, 788. The President could not, it was said, "take upon himself the function of repatriating the men under parole to return to Russia, for that would be the prerogative of the belligerent and not of the neutral."

jected to the measures of restriction which it may appear necessary to impose upon them.⁹ The neutral should, however, always leave on board a sufficient number of men to look after the vessel.¹⁰

According to the Hague Convention, officers may be left at liberty on giving their word not to quit neutral territory without permission.¹¹ The United States has been disposed to accept the parole of officers for both themselves and their crews.¹² When officers have broken their parole, the United States has demanded their return from the belligerent to whose service they belonged and to whose territory they had returned.¹³

When a belligerent vessel of war, through failure to leave the neutral port where it is not entitled to remain, is, in consequence, interned, it becomes the duty of the neutral to release prisoners of war held as such on board the ship. The United States has acted on that principle.¹⁴

That a neutral State employ the means at its disposal to intern a belligerent military aircraft which is within its territory after having there alighted for any reason whatsoever, together with the crew and passengers, if any, is the logical consequence of the obligation that appears to rest upon such a State to prevent such aircraft from entering or flying over that domain.¹⁵ The duty to intern is thus appropriately laid down in the Rules of Aerial Warfare prepared by the Commission of Jurists in 1923;¹⁶ and it would appear, moreover, to be

⁹ Art. XXIV, Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2362.

¹⁰ *Id.*

¹¹ Art. XXIV.

¹² Mr. Adee, Acting Secy. of State, to Mr. Takahira, Japanese Minister at Washington, Sept. 15, 1904, Moore, Dig., VII, 999, For. Rel. 1904, 428.

¹³ Declared Mr. Lansing, Secy. of State, in a communication to Count von Bernstorff, German Ambassador at Washington, Nov. 16, 1915, relative to the escape of officers and men from German ships interned in the United States: "It will be recalled that during the Russo-Japanese war, when the Russian ship *Lena* was interned by United States authorities on the Pacific coast, three officers of that ship escaped and returned to Russia; and that upon the Government of the United States calling the matter to the attention of the Russian Government, it immediately caused the escaped officers to return to American jurisdiction, where they were interned for the remainder of the war.

"This precedent this Government regards as in accord with the best practice of nations and applicable to the cases which I have had the honor to present in this note." (For. Rel. 1915, Supp., 839, 840.) Also American White Book, European War, III, 349-356.

See, also, correspondence with Russia in For. Rel. 1905, 786-787.

See § 7, title V, Act of June 15, 1917, 40 Stat. 223, 18 U.S.C.A., § 37.

¹⁴ Mr. Bryan, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador at Washington, Feb. 26, 1915, relative to the British officers and crew as well as the Chinese seamen on board the German prize ship *Farn* which entered the port of San Juan, Porto Rico, in January, 1915, For. Rel. 1915, Supp., 822.

See also Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, March 2, 1916, regarding the release from detention of persons held on board the German prize ship *Appam*, *id.*, 1916, Supp., 729, 731.

According to Art. III of the Hague Convention, it is the duty of a neutral to release the prize with its officers and crew, and to intern the prize crew, when a ship has been captured in the territorial waters of such neutral.

¹⁵ See Obligations with Respect to Aircraft, *supra*, § 856A; Shipwrecked, Wounded or Sick Persons, *infra*, § 865.

¹⁶ Art. 42, *Am. J.*, XXXII, *Official Documents*, 36. In the General Report of the Commission of Jurists, it is said: "The obligation to intern belligerent military aircraft entering neutral jurisdiction entails also the obligation to intern the personnel. These will in general be combatant members of the belligerent fighting forces, but experience has already shown that

applicable if the aircraft be associated with either the military or naval service of the belligerent.¹⁷

(h)

§ 865. **Shipwrecked, Wounded or Sick Persons.** A neutral State may afford asylum to shipwrecked, wounded or sick persons belonging to a belligerent. If such persons are taken on board a neutral vessel of war, it seems to be agreed that every possible precaution must be taken that they do not again take part in the operations of the war.¹ If they are brought by the opposing belligerent as its prisoners of war to a neutral port,² and are there landed with the consent of the local authorities, the neutral is obliged, according to the Hague Convention of 1907, for the Adaptation to Naval War of the Principles of the Geneva Convention, so to guard them as to prevent them from again taking part in the operations of the war.

If the work of rescue has been effected by a neutral merchantman which brings the persons rescued into a neutral port, the territorial sovereign is probably not obliged to detain them.³

In case shipwrecked, wounded or sick persons belonging to the naval forces of a belligerent, whether escaping from the control of the opposing belligerent, or without and beyond that of their own State, seek refuge as individuals on neutral soil, it is not believed that the territorial sovereign is obliged to intern them or deal with them as though they constituted a belligerent force to be restrained as such. When a vessel of war has recourse to self-destruction, causing the occupants thereof to take to the boats, possibly as a military force that remains to a certain degree intact, and is in need of deliverance from its temporary place of refuge, and they are duly rescued by neutral public or private

in time of war military aëroplanes are employed for transporting passengers. As it may safely be assumed that in time of war a passenger would not be carried on a belligerent military aircraft unless his journey was a matter of importance to the government, it seems reasonable also to comprise such passengers in the category of persons to be interned." (*Id.*)

Declared the Naval War College in 1931: "In general, aircraft and their personnel entering neutral jurisdiction during the World War were interned. This was the case whether the aircraft entered in distress or flew within neutral jurisdiction. Sometimes aircraft flying within neutral jurisdiction were brought down by gunfire as was the case in Switzerland and the Netherlands. It made no difference even if an aircraft entered neutral jurisdiction in error supposing it was still in belligerent territory. Sometimes notification was given by signal, rocket, or in some other manner, but absence of notification was not a ground for exemption from liability." (*Int. Law Situations*, 1931, 30.)

¹⁷ See discussion in Spaight, *Air Power*, 2 ed., 429-430, of the destruction of aircraft by belligerent airmen in order to prevent internment of the former.

According to Art. 94 of the Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War: "A neutral State shall require a belligerent military aircraft which is in its territory at the time of the outbreak of war, to depart therefrom within twelve hours. The neutral State shall use the means at its disposal to intern belligerent military aircraft found in its territory after the expiration of this period." (*Am. J.*, XXXIII, *Supplement Section 2*, 194.)

§ 865. ¹ Art. XIII of Hague Convention of 1907, for the Adaptation to Naval War of the Principles of the Geneva Convention, Malloy's Treaties, II, 2335.

See, also, Naval War College, *Int. Law Situations*, 1904, 117-128; Assistance of Neutral Vessels, *supra*, § 779.

² Arts. XIV and XV of same Hague Convention.

³ See Lauterpacht's 6th ed. of Oppenheim, II, 595, where it is stated that this conclusion is an indirect inference from Art. XIII of the Hague Convention.

ships which proceed to take them into a neutral port, the obligation, if any, on the part of its sovereign to detain them would depend upon the public or private character of the actual rescuers.⁴

Where the individuals rescued happen to be the victims of a naval action that took place in neutral waters, involving the unlawful attack upon and destruction of their ship therein, it has been impressively suggested that the territorial sovereign into whose port they are brought need not detain the victims even though their rescue was effected by a neutral warship, on the ground that the attack which produced their plight amounted to internationally illegal conduct.⁵ Inasmuch as, however, there may prove to be great difficulty in determining in the particular case which belligerent was at fault in committing hostile acts within territorial waters, one may doubt whether the obligation, if any, to detain the rescued persons should be permitted to depend upon the character of the conduct of the ship to which they belonged.⁶

Notwithstanding the normal obligation resting upon a neutral State to use the means at its disposal to prevent the entry within its domain of a belligerent military aircraft, and to intern such aircraft that for whatsoever reason may have alighted therein, together with the crew and passengers, one may be permitted to doubt whether the neutral may not reasonably claim that that obligation is at times inapplicable with respect to a belligerent aircraft employed exclusively as an instrument of sanitary transportation, such as an air ambulance.⁷ To permit such an aircraft to enter neutral territory, alight thereon, land wounded or sick occupants, and thereupon resume flight and depart the country, would hardly betoken the neglect of a legal obligation, at least in a situation where the plane was unarmed and otherwise not adapted at the time of departure for participation in armed conflict. No general conventional arrangements have as yet, however, registered precise accord concerning the matter.⁸

⁴ Thus in the case of the *Admiral Graf Spee*, destroyed by those controlling it off the coast of Uruguay on Dec. 17, 1939, the occupants, after taking to the boats, were rescued by Argentine public ships and by them taken to Argentine territory where they were interned. The reasonableness of this action was not to be attributed to the fact that the occupants of the German warship placed themselves in a position such as to inspire the rescuers to pick them up, but rather to the public character of the rescuers. Had an organized German naval force made its way as such to Argentine territory and effected a landing there, the Argentine sovereign might well have felt obliged to intern the force.

See Uruguayan Blue Book: The Documents relating to the Sinking of the *Admiral Graf Spee* and the Internment of the Merchant Vessel *Tacoma*, published with the authority of the Government of the Republic of Uruguay, London, 1940.

⁵ See Lauterpacht's 6 ed. of Oppenheim, II, 596.

⁶ See Inviolability of Neutral Territory, The Duty of the Belligerent, *infra*, § 887.

⁷ See Obligations with Respect to Aircraft, *supra*, § 856A; Internment of Belligerent Vessels of War and Their Occupants, *supra*, § 864.

Declares Spaight: "There is one case, and one only, in which a belligerent military aircraft may legitimately enter and depart from neutral jurisdiction under its own power. This is the case of the 'flying ambulance.'" (Air Power, 1933, 433.)

See also Naval War College, Int. Law Situations, 1933, 63.

According to Art. 29 of the Italian Law of Neutrality, approved July 8, 1938: "Belligerent military aircraft may not be permitted to fly over the territory of the State. Permission may be given for flights of sanitary aircraft transporting war wounded or sick, provided there not be on board persons or material not belonging to the sanitary service." (Deák and Jessup, Neutrality Laws, I, 725, 729.)

⁸ According to Art. 17 of the Rules of Aerial Warfare of 1923: "The principles laid down in the Geneva Convention, 1906, and the Convention for the Adaptation of the said Con-

(5)

§ 866. **Asylum to Belligerent Land Forces.** A neutral State is deemed to possess the right to offer asylum within its territory to belligerent troops. In order not to abuse that privilege and become itself a participant in the war, such a State which receives on its territory belligerent troops is obliged to intern them, and that, as far as possible, at a distance from the theater of war.¹ Such troops will naturally be disarmed and placed under the necessary guard, thereby occupying in many respects a position similar to that of prisoners of war.² The neutral is generally free to impose its own terms upon those seeking refuge in its domain. Thus, it may keep them in camps, and even confine them to fortresses or in places set apart for the purpose. It is free to decide whether officers may be left at liberty on giving their parole not to leave the country without permission.³ In case of large bodies of troops seeking refuge in neutral territory, the conditions of internment will usually be stipulated in an agreement concluded between the authorized representative of the neutral power and the senior officer of the troops.⁴

The munitions and stores as well as effects which the interned troops bring with them should be restored to their government at the termination of the war.⁵

In the absence of special agreement to the contrary, the neutral is burdened with the duty of supplying the persons interned with the food, clothing and relief required by humanity, enjoying, however, the right to reimbursement at the conclusion of peace.⁶

The Hague Convention declares that a neutral State which receives escaped

vention to Maritime War (No. X of 1907) shall apply to aerial warfare and to flying ambulances, as well as to the control over flying ambulances exercised by a belligerent commanding officer.

"In order to enjoy the protection and privileges allowed to mobile medical units by the Geneva Convention, 1906, flying ambulances must bear the distinctive emblem of the Red Cross in addition to the usual distinguishing marks." (*Am. J.*, XXXII, *Official Documents*, 20.)

§ 866.¹ See in this connection Arts. XI–XV of Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land, Malloy's Treaties, II, 2298–2299. Concerning the Convention see *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 136–150, III, 57–62; A. P. Higgins, *Hague Peace Conferences*, 292–293; J. B. Scott, *Hague Peace Conferences*, I, 546–549; A. S. de Bustamante, in *Am. J.*, II, 95; R. Jacomet, *Les Lois de la Guerre Continentale*, 94–96; T. E. Holland, *Laws of War on Land*, 64–66; Oppenheim, *Lauterpacht's* 6 ed., II, 579–587.

See in this connection, War Dept. Rules of Land Warfare, 1940, Nos. 383–395.

For a singular application of the Hague Convention to the case of Mexican Federalist troops, who, in April, 1913, after pursuit by Mexican Constitutionalist troops, and to avoid surrender, entered the territory of the United States, see *Ex parte* Toscano, 208 Fed. 938. The result may have been due to the circumstance that in a stipulation of facts it was declared that civil war existed in Mexico and that the United States occupied the position "known in international law as a neutral."

² War Dept. Rules of Land Warfare, 1940, No. 384.

³ Art. XI of Hague Convention.

⁴ War Dept. Rules of Land Warfare, 1940, No. 385. For text of military convention between Gen. Clichant, Commander of the First French Army, and Gen. Herzog, General-in-Chief of the Swiss Confederation, Feb. 1, 1871, for the entry of French troops into Switzerland, see Rules of Land Warfare, 1917, Appendix A, p. 146.

⁵ War Dept. Rules of Land Warfare, 1940, No. 387.

⁶ Art. XII of Hague Convention.

prisoners of war shall leave them at liberty; and that if it allows them to remain in its territory, it may assign them a place of residence. The same rule is made applicable to prisoners of war brought by troops taking refuge in the territory of a neutral power.⁷ These provisions are believed to be of value in preventing neutral territory from offering a distinct form of aid and a direct benefit to the belligerent otherwise capable of interning prisoners therein, and from rendering a service analogous to that which is seen when a belligerent prize is sequestered in neutral waters. It has recently been observed that "a fair construction of the 1907 convention, and one which is not inconsistent with customary rules or with practice in the World War of 1914-1918, would seem to leave four alternatives open to the neutral State: (1) to refuse admission to its territory to escaped prisoners; (2) if it receives them, to expel them under the same conditions as it might expel any ordinary alien; (3) if it receives them, to leave them 'at liberty' in the sense of permitting them to return to their homeland; (4) to detain them for the duration of the war and assign them a place of residence without necessarily 'interning' them in the ordinary manner."⁸

According to the Hague Convention, a neutral power may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war matériel. In such a case, the neutral power is bound to adopt such measures of safety and control as are necessary for the purpose. The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile army, must, it is declared, be guarded by the neutral power so as to insure their not taking part again in the military operations. The same duty is said to devolve upon the neutral State with regard to wounded or sick of the other army who may be committed to its care.⁹ While a neutral power is under no obligation to permit the passage of a convoy of evacuation of sick and wounded through its territory, the granting of permission burdens the neutral with the obligation to see that neither personnel nor matériel other than that necessary for the care of the sick and wounded is carried, and also to accord generally impartial treatment to both belligerents.¹⁰ The Hague Convention indicates no necessity for obtaining the consent of one belligerent for granting authority for the passage of a convoy of its enemy. Such action is deemed advisable, however, especially when the passage of a considerable body of sick and wounded is contemplated.¹¹ The sick and wounded of the belligerent conveying them may be doubtless carried through to their own territory. If, however, they are left in the territory of the neutral, it is declared that they must be there interned so as to insure their not taking part again in

⁷ Art. XIII of Hague Convention.

⁸ Robert R. Wilson, "Escaped Prisoners of War in Neutral Jurisdiction," *Am. J.*, XXXV, 519, 522.

⁹ Art. XIV of Hague Convention; also War Dept. Rules of Land Warfare, 1940, No. 390, where it is said: "Direct repatriation for reasons of health of prisoners of war, hospitalized in a neutral country, is provided for in the annex to the Geneva convention of July 27, 1929 [Relative to the Treatment of Prisoners of War], (model agreement)." This convention is set forth in U. S. Treaty Vol. IV, 5224. *Cf.* Prisoners of War, Repatriation, *supra*, § 674.

¹⁰ War Dept. Rules of Land Warfare, 1940, No. 391.

¹¹ *Id.*, No. 392.

the war.¹² The War Department Rules of Land Warfare of 1940, emphasize the fact that sick and wounded prisoners of war brought into neutral territory as a part of a convoy of evacuation, and granted right of passage through neutral territory, cannot be transported to their own country or liberated, as are prisoners of war escaping into or brought by troops seeking asylum in neutral territory, but must be detained by the neutral power, subject to the provisions contained in the annex to the Geneva Convention of July 27, 1929 (model agreement), Relative to the Treatment of Prisoners of War.¹³

The Hague Convention declares that the Geneva Convention (of 1906) applies to sick and wounded interned in neutral territory.¹⁴ Thus the medical personnel belonging to belligerent forces who have sought asylum and are interned under Article XI of the Hague Convention, may be released by the neutral and permitted to return to their own State or army.¹⁵ Again, medical personnel and matériel necessary for the care of the sick and wounded of a convoy of evacuation, and permitted to pass through neutral territory under Article XIV of that convention, may be allowed to accompany the convoy. The neutral State may, however, retain the necessary medical personnel and matériel for the care of the sick and wounded left with it, and, failing this, may furnish the same, and thereby gain a right of reimbursement from the belligerents concerned upon the termination of the war.¹⁶

From the foregoing Articles and regulations it must be apparent that it is feasible for a neutral to grant an asylum to land forces of a belligerent as well as to the prisoners thereof, without strengthening the military power of either party to the conflict, and without permitting, therefore, neutral soil to become in any sense a base of belligerent operations.

d

Belligerent Acquisition from Neutral Territory of Aid Which the Territorial Sovereign is not Obligated to Check

(1)

§ 867. **The Exportation of Munitions of War.** The United States has long and consistently maintained that the law of nations imposes no duty upon a neutral to endeavor to prevent the exportation from its territory of munitions of war in behalf of a belligerent.¹ American statesmen have been able to cite

¹² *Id.*, No. 393.

¹³ *Id.*, No. 394.

¹⁴ Art. XV, Malloy's Treaties, II, 2299. It should be noted that the Geneva Convention of 1906 was supplanted by the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, U. S. Treaty Vol. IV, 5209. See the Geneva Convention of 1929, *supra*, §§ 681A-687.

¹⁵ War Dept. Rules of Land Warfare, 1940, No. 395.

¹⁶ *Id.*

§ 867. ¹ Mr. Jefferson, Secy. of State, to the British Minister, May 15, 1793, 5 MS. Dom. Let. 105, Moore, Dig., VII, 955; Hamilton's Treasury Circular, Aug. 4, 1793, Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 955; Mr. Pickering, Secy. of State, to Mr. Adet, French Minister, Jan. 20 and May 25, 1796, Am. State Pap., For. Rel. I, 645 and 649, respectively, Moore, Dig., VII, 956; Mr. Clay, Secy. of State, to Mr. Obregon, Mexican Minister, April 6, 1827, MS. Notes to For. Leg., III, 345, Moore, Dig., VII, 956; President Pierce, Annual

the approval of the publicists of every land,² and to rely upon the sanction of a settled practice.³ In the course of World War I the United States is thus believed to have taken an impregnable position, fortified (if it needed fortification)

Message, Dec. 3, 1854, Richardson's Messages, V, 327, 331, Moore, Dig., VII, 956; Mr. Marcy, Secy. of State, to Mr. Buchanan, Minister to Great Britain, Oct. 13, 1855, Brit. and For. State Pap., XLVII, 421, 424, Moore, Dig., VII, 957; Mr. Seward, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 15, 1862, MS. Notes to Mexico, VII, 215, Moore, Dig., VII, 958; Same to Same, Jan. 7, 1863, Dip. Cor., 1863, II, 1138, Moore, Dig., VII, 958; Opinion of Mr. Speed, Atty. Gen., Dec. 23, 1865, 11 Ops. Attys. Gen., 408, Moore, Dig., VII, 958; Mr. Fish, Secy. of State, to Mr. Lopez Roberts, Spanish Minister, April 3, 1869, Senate Ex. Doc. 7, 41 Cong., 2 Sess. 12, Moore, Dig., VII, 959; Mr. Evarts, Secy. of State, to Mr. Sherman, Secy. of Treasury, Nov. 14, 1879, 130 MS. Dom. Let. 472, Moore, Dig., VII, 960; Correspondence in 1885, between Department of State and Colombian Legation, contained in For. Rel. 1885, and adverted to in Moore, Dig., VII, 961-963; Mr. Bayard, Secy. of State, to Mr. Smithers, Chargé d'Affaires at Peking, June 1, 1885, For. Rel. 1885, 172, Moore, Dig., VII, 963; Same to Mr. Preston, Haitian Minister, Nov. 28, 1888, For. Rel. 1888, I, 1000, Moore, Dig., VII, 964; Mr. Blaine, Secy. of State, to Mr. Lazcano, Chilean Minister, March 13, 1891, For. Rel. 1891, 314, Moore, Dig., VII, 964; Mr. Foster, Secy. of State, to Mr. Bolet Peraza, Venezuelan Minister, Sept. 22, 1892, For. Rel. 1892, 645, Moore, Dig., VII, 965; Opinion of Mr. Harmon, Atty. Gen., Dec. 10, 1895, 21 Ops. Attys. Gen., 267, 270-271, Moore, Dig., VII, 965; Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, July 15, 1896, MS. Notes to Spain, XI, 178, Moore, Dig., VII, 965; Mr. Hay, Secy. of State, to Mr. Pierce, Dec. 15, 1899, MS. Notes to Foreign Consuls, IV, 464, Moore, Dig., VII, 969; Note of Dr. Wharton, in Wharton, Dig., III, 516, Moore, Dig., VII, 970.

See, also, statement by J. B. Moore, Dig., VII, 972-973, and also 749-752; statement of Department of State in circular on Neutrality and Contraband of War, Oct. 15, 1914, Senate Doc. No. 604, 63 Cong., 2 Sess.; Mr. Bryan, Secy. of State, to Senator Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, For. Rel. 1914, Supp., VII, X; Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, *id.*, 1915, Supp., 794.

Concerning purchases of war supplies by the United States in Europe during the Civil War, see Moore, Arbitrations, I, 620. Compare case of United States in the Geneva Arbitration, Papers Relating to the Treaty of Washington, I, 125-126.

² Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, For. Rel. 1915, Supp., 794, 798. See *Hamburg-American Steam Packet Co. v. United States*, 250 Fed. 747; also J. W. Garner, in *Am. J.*, X, 749, 751-758.

See, also, Story, J., in *The Santissima Trinidad*, 7 Wheat. 283, 340; *Pearson v. Parson*, 108 Fed. 461.

³ Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, American White Book, European War, II, 194, 195, where it was said: "In this connection it is pertinent to direct the attention of the Imperial and Royal Government to the fact that Austria-Hungary and Germany, particularly the latter, have during the years preceding the present European War produced a great surplus of arms and ammunition, which they sold throughout the world and especially to belligerents. Never during that period did either of them suggest or apply the principle now advocated by the Imperial and Royal Government.

"During the Boer War between Great Britain and the South African Republics the patrol of the coasts of neighboring neutral colonies by British naval vessels prevented arms and ammunitions reaching the Transvaal or the Orange Free State. The allied republics were in a situation almost identical in that respect with that in which Austria-Hungary and Germany find themselves at the present time. Yet, in spite of the commercial isolation of one belligerent, Germany sold to Great Britain, the other belligerent, hundreds of thousands of kilos of explosives, gunpowder, cartridges, shot, and weapons; and it is known that Austria-Hungary also sold similar munitions to the same purchaser, though in smaller quantities. While, as compared with the present war, the quantities sold were small (a table of the sales is appended), the principle of neutrality involved was the same. If at that time Austria-Hungary and her present ally had refused to sell arms and ammunition to Great Britain on the ground that to do so would violate the spirit of strict neutrality, the Imperial and Royal Government might with greater consistency and greater force urge its present contention.

"It might be further pointed out that during the Crimean War large quantities of arms and military stores were furnished to Russia by Prussian manufacturers; that during the recent war between Turkey and Italy, as this Government is advised, arms and ammunition were furnished to the Ottoman Government by Germany; and that during the Balkan wars the belligerents were supplied with munitions by both Austria-Hungary and Germany. While these latter cases are not analogous, as is the case of the South African War, to the situation

by admissions from Germany in 1914,⁴ and dignified by the action of the Second Hague Peace Conference,⁵ that the exportation of even vast quantities of munitions of war for the benefit of Great Britain and its Allies constituted a business the interference with which, according to the existing law, furnished a task for the aggrieved belligerents themselves to accomplish, rather than an obligation imposed upon a neutral.⁶

Both Austria-Hungary and Germany contended, in 1915, that by reason of the magnitude of American exportations of munitions of war, and the circumstance that the United States was the only neutral country from which they could be obtained, it behooved its Government, if imbued with the "spirit of true neutrality," to effect a measure of intervention which would serve to lessen the detriment which the complainants suffered in consequence of inability to utilize the American market.⁷ Surprise was expressed by the Government of the

of Austria-Hungary and Germany in the present war, they nevertheless clearly indicate the long-established practice of the two Empires in the matter of trade in war supplies."

It is not sought to intimate that some neutral States had not endeavored, within the century prior to the outbreak of World War I, to prohibit or restrict the exportation of war material from their territories. At the outbreak of the Spanish-American War in April, 1898, a few States made efforts in that direction. See, for example, circular of Brazilian Government of April 29, 1898, proclamation of the King of Denmark of April 29, 1898, decree of Governor of Curaçao, and neutrality decree of Portugal of April 29, 1898, all of which are contained in Proclamations and Decrees during the War with Spain, and mentioned in Moore, Dig., VII, 751-752. See also the terms of the British Proclamation, for the observance of Neutrality in the War between France and Prussia, Aug. 9, 1870, Brit. and For. State Papers, LX, 437, 442-443.

⁴ In a memorandum enclosed in a note from Count von Bernstorff, German Ambassador at Washington, to Mr. Bryan, Secy. of State, Dec. 15, 1914, it was said: "Under the general principles of international law no exception can be taken to neutral States letting war material go to Germany's enemies from or through their territory. This is in accordance with Article 7 of the Hague convention of October 18, 1907, concerning the rights and duties of neutrals in naval and land war." (For. Rel. 1914, Supp., 646, 647.)

⁵ According to Art. VII of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War: "A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to an army or fleet." Malloy's Treaties, II, 2359. See brief reference to this Article in Mr. Renault's Report to the Hague Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 302. Also, Art. 22, Convention on Maritime Neutrality concluded at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4743, 4748.

See Art. VII of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers and Persons in War on Land, Malloy's Treaties, II, 2298.

⁶ See Circular on Neutrality and Trade in Contraband, issued by Department of State, Oct. 15, 1914, Senate Doc. No. 604, 63 Cong., 2 Sess.; also Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, For. Rel. 1915, Supp., 794, 798.

⁷ Herr von Jagow, German Minister of Foreign Affairs, to Mr. Gerard, American Ambassador at Berlin, Feb. 16, 1915, For. Rel. 1915, Supp., 112; Memorandum from the German Embassy at Washington April 4, 1915, *id.*, 157; Count Burián, Austro-Hungarian Minister of Foreign Affairs, to Mr. Penfield, American Ambassador at Vienna, June 29, 1915, *id.*, 791; Same to Same, Sept. 24, 1915, *id.*, 810.

The German memorandum of April 4, 1915, sought to claim a precedent in favor of its contention that the United States place an embargo on arms, in the conduct of President Wilson in lifting the embargo on arms to Mexico in 1914, *id.*, 157, 158. It may be observed that the United States had not recognized as belligerents either General Carranza or General Huerta, and hence did not assume the burdens of a neutral with respect to the struggle. See, in this connection, J. W. Garner, in *Am. J.*, X, 796-797, where it is said: "It is important to note that the effect of the change of policy through the *lifting* of the embargo in the case of Mexico was different from that which would result from the *laying* of an embargo in the present war. To change the rule by removing a prohibition is not the same thing as changing the rule by establishing a prohibition."

United States at the implication that observance of the strict principles of international law under conditions developing during the war did not suffice. It declined, moreover, to accede to the suggestion that there was any obligation to change or modify "the rules of international usage" on account of special conditions confronting a particular belligerent. It declared that a neutral State was not burdened with the duty of applying a theory of equalization to the utilization of the resources of its territory. According to the Department of State, the only ground justifying a change of the rules, as set forth in the Hague Convention, was the necessity compelling a neutral power to do so in order to protect its own rights. The right and duty to determine when such a necessity existed rested, it was said, with the neutral and not with a belligerent. It was maintained that if, therefore, the neutral power did not avail itself of that right, the belligerent was not privileged to complain, "for in doing so it would be in the position of declaring to the neutral power what is necessary to protect that power's own rights."⁸

The United States, while a neutral, announced, nevertheless, a readiness to check the exportation of cartridges the use of which, by reason of their character, "would contravene the Hague Conventions" regardless of whether it might be the duty of the Government, upon legal or conventional grounds, to take such action.⁹ Again, as has been observed,¹⁰ the clearance was forbidden of ships believed to be about to supply any form of war material or other supplies to belligerent warships, tenders or supply ships.¹¹ Apart, however, from these limitations, the Department of State expressed general approval of the existing law, and disapproval of any change.¹² Secretary Lansing declared that the United States had, from the foundation of the Republic to the time of his note, advocated and practiced unrestricted trade in arms and military supplies, because

⁸ Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, For. Rel. 1915, Supp., 794. See response of the Austro-Hungarian Government contained in communication of Count Burián, Minister of Foreign Affairs, to Mr. Penfield, Sept. 24, 1915, *id.*, 810. Also Mr. Bryan, Secy. of State, to the German Ambassador at Washington, April 21, 1915, *id.*, 160.

The preamble of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, contains the following language: "Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;

"Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in a case where experience has shown the necessity for such change for the protection of the rights of that Power." (Malloy's Treaties, II, 2353.)

⁹ Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, For. Rel. 1914, Supp., VII, XI.

¹⁰ See Neutral Territory as a Base of Belligerent Operations, *supra*, § 855.

¹¹ See joint resolution approved March 4, 1915, 38 Stat. 1226, and more particularly §§ 1 and 8, title V, of the Act of June 15, 1917, for the enforcement of the neutrality of the United States, which title served to repeal the joint resolution, 18 U.S.C.A., § 31. The later Act, although not enacted until the United States became a belligerent, substantially broadened the powers of the Executive. See, also, Section 10 (a) of the Neutrality Act approved Nov. 4, 1939, 54 Stat. 4, 9. See Enforcement of Neutral Duties, Executive Action, *infra*, § 878.

¹² In his discussion of the matter the Secretary of State declared that the Government wished to be understood as speaking with no thought of expressing or implying any judgment with regard to the circumstances of the existing war, but as merely putting very frankly the argument which had been conclusive in determining the policy of the United States. For. Rel. 1915, Supp., 796.

it had never been the policy of the nation to maintain in time of peace a large military establishment or stores of arms and ammunition sufficient to repel invasion by a well-equipped and powerful enemy, and that in consequence the United States would, in the event of attack by a foreign power, be at the outset of the war seriously, if not fatally, embarrassed by the lack of arms and ammunition, and of the means to produce them in sufficient quantities to supply the requirements of national defense. "The United States has always," he said, "depended upon the right and power to purchase arms and ammunition from neutral nations in case of foreign attack. This right, which it claims for itself, it cannot deny to others." He contended that a nation whose policy and principle it was to rely upon international obligations and international justice to preserve its political and territorial integrity, might become the prey of an aggressive nation whose policy and practice it was to increase its military strength during times of peace with the design of conquest, unless the nation attacked could, after war had been declared, go into the markets of the world and purchase the means to defend itself against the aggressor. He declared that the general adoption by the nations of the world of the theory that neutral powers ought to prohibit the sale of arms and ammunition to belligerents would compel every nation to have in readiness at all times sufficient munitions of war to meet any emergency which might arise, and to erect and maintain establishments for the manufacture of arms and ammunition sufficient to supply the needs of its military and naval forces throughout the progress of the war. The application of this theory would result, it was said, "in every nation becoming an armed camp, ready to resist aggression and tempted to employ force in asserting its rights rather than appeal to reason and justice for the settlement of international disputes." Declaring that the adoption of such a principle would give an inevitable advantage to the belligerent which had encouraged the manufacture of munitions in time of peace, and had laid in vast stores thereof in anticipation of war, the Secretary said that the Government of the United States was convinced that the adoption of the theory would force militarism on the world and work against universal peace. Finally, he said that

The principles of international law, the practice of nations, the national safety of the United States and other nations without great military and naval establishments, the prevention of increased armies and navies, the adoption of peaceful methods for the adjustment of international differences, and, finally, neutrality itself are opposed to the prohibition by a neutral nation of the exportation of arms, ammunition, or other munitions of war to belligerent powers during the progress of the war.¹³

¹³ Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, For. Rel. 1915, Supp., 794, 796, 798. On July 8, 1915, Secretary Lansing declared to the President in relation to the prospective note to the Austro-Hungarian Government: "Home consumption would be the real purpose; an answer to Austria the nominal purpose." (Savage, II, Document 100. See, also, *id.*, Documents 109, 110, and 111.)

In 1793, Mr. Jefferson, Secy. of State, in a communication to the British Minister, laid stress upon the economic effect upon American citizens of the imposition of restrictions by their Government. "To suppress their callings," he said, "the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no con-

While Secretary Lansing was correct in denying that the law of nations imposed an obligation upon a neutral State to prohibit the exportation of arms and kindred articles, the policy which he proclaimed to be desirable for his country as a neutral was not always so regarded by the United States in later years.¹⁴

§ 868. **The Same.** The exportation of war material from neutral territory constitutes usually the general strengthening of the sinews of the belligerent behind the transaction, rather than the proximate cause of the augmentation of a unit of military power. Neutral territory is, nevertheless, utilized as a base of belligerent supply as certainly as if a particular force such as a fleet were the direct recipient of aid.¹ To limit, therefore, the duty of the neutral to the case where its territory affords aid to, or is creative of, a unit of military or naval strength capable of engaging in immediate hostile operations, is to raise an artificial distinction which is hardly responsive to principle or to existing conditions of warfare.

Through close and renewed consideration within the past decade of the condition of the law, the effect of contributions of munitions of war from neutral soil upon the belligerent receiving them has become better understood. The

cern, would scarcely be expected. It would be hard in principle and impossible in practice." (5 MS. Dom. Let. 105, Moore, Dig., VII, 955.) It may be observed in this connection that both Germany and Austria-Hungary in 1915 adverted to the new and extensive industries which the exportation of war material from the United States to Great Britain and its Allies had called into being. See Memorandum from the German Embassy, April 4, 1915, For. Rel. 1915, Supp., 157; Count Burián, Austro-Hungarian Minister of Foreign Affairs, to Mr. Penfield, American Ambassador at Vienna, June 29, 1915, *id.*, 791.

See W. C. Dennis, "The Right of Citizens of Neutral Countries to Sell and Export Arms and Munitions of War to Belligerents," *Annals Am. Acad. Pol. and Soc. Sc.*, July, 1915, Vol. LX, 168; J. W. Garner, "The Sale and Exportation of Arms and Munitions of War to Belligerents," *Am. J.*, X, 749; C. N. Gregory, "Neutrality and the Sale of Arms," *Am. J.*, X, 543; W. C. Morey, "The Sale of Munitions of War," *Am. J.*, X, 467; J. Westlake, "Is it Desirable to Prohibit the Export of Contraband of War?" Collected Papers, 362; L. von Bar, "*Observations sur la contrebande de guerre*," *Rev. Droit Int.* 1 series, XXVI, 401-414.

¹⁴ See *infra*, § 868. Also, Neutrality as an Instrument in Restraint of War, *infra*, § 889.

See communication from the author to Mr. Lansing, Secy. of State, Jan. 11, 1916, Senate Rep. No. 955, Part 5, 74 Cong., 2 Sess., 115. Also, in this connection, Charles C. Tansill, *America Goes to War*, Boston, 1938, Chap. II.

See, also, memorandum from the Secy. of Commerce, for the Secy. of State, enclosed in communication of Oct. 23, 1916, on the means of combating foreign restrictions on American commerce, For. Rel. 1916, Supp., 466.

According to Art. 11 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "Subject to the provisions of Art. 4, a neutral State may, for the purpose of conserving its own supplies or of safeguarding its neutrality: (a) place prohibitions upon the shipment or departure from or transit through its territory of arms, ammunition and implements of war; (b) place prohibitions upon the shipment or departure from or transit through its territory of articles or materials other than arms, ammunition or implements of war; (c) place prohibitions upon the granting of loans or credits by persons subject to its jurisdiction." (*Am. J.*, XXXIII, *Supplement Section 2*, 177.)

§ 868. ¹ "A large quantity of military supplies, whether consisting of conditional contraband in the form of food, clothing, etc., or of absolute contraband in the form of guns, munitions, etc., might be collected in the United States and stored in some town near the border of the belligerent country. Agents of the belligerent could be established in this town and could ship the supplies across the border to the belligerent army as directed. By these arrangements the neutral town could, in a very real way, be made a base of operations for the belligerent army, just as a neutral port would become a base of operations if a belligerent war vessel should draw from it frequent renewals of supplies." (C. G. Fenwick, *Neutrality Laws of the United States*, 147.)

directness of the aid afforded a belligerent by the utilization of assets which the government of a neutral State must be assumed to possess the power to control has become increasingly apparent in the United States and elsewhere, and has served to give poignancy to the inquiry whether a neutral government or the State in behalf of which it acts, should not be deemed itself to be a participant in the conflict, as conniving at what occurs, when it fails to use the means at its disposal to effect restriction. Moreover, that very inquiry and the factors responsible for it have also inspired the fear lest the neutral which so fails is likely itself to be drawn into the conflict as a belligerent.² As a result, the conclusion has come into being in some quarters that a neutral State should not avail itself of the latitude which the law (as reflected by the provisions of the Hague Convention of 1907) confers, and should, as a matter of policy endeavor to restrict certain augmentations of sustenance from neutral territory even though they may not in themselves constitute definite units of military strength. Legislation designed to be appropriate to that end was enacted by the Congress in 1935, 1936, and again in 1937.³ Notwithstanding the shortcomings thereof,⁴

² It must be acknowledged that the effect of the law in its present state is to increase the number of belligerents in the particular conflict. Geographical considerations, as well as differences in naval or military power, usually serve to render the resources of neutral territory of unequal value to the States to which they are technically available. The neutral which upon the outbreak of war imposes no restrictions upon exportation, is likely to be regarded as a distinct military obstacle by that belligerent which, through the remoteness of its territory from the source of supply, or the superior naval power of its enemy, finds itself unable to utilize what is offered. The belligerent so circumstanced is thus encouraged to make war upon the neutral, and so cause it to become a belligerent, if by so doing it is believed that the former may destroy or remove the obstacle in the way of its success. Thus if in the judgment of the aggrieved belligerent the continued exportation of supplies from neutral territory threatens to turn the tide of victory against it, the absence of any legal duty on the part of the neutral to restrict the traffic is not likely to be a deterrent. In such case the temptation will be strong if not irresistible, to make no allowance for what the law of nations permits, and to penalize the neutral for tolerating what that law does not compel it to forbid.

³ Joint Resolution approved May 1, 1937, 50 Stat. 121, 22 U.S.C.A., §§ 245a-245i, *Am. J., XXXII, Official Documents*, 147. The Act was amendatory of a Joint Resolution of Aug. 31, 1935, 49 Stat. 1081, as amended by a Joint Resolution of Feb. 29, 1936, 49 Stat. 1152.

According to Section 1 of the Act of May 1, 1937: "(a) Whenever the President shall find that there exists a state of war between, or among, two or more foreign States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to any belligerent State named in such proclamation, or to any neutral State for transshipment to, or for the use of, any such belligerent State.

"(b) The President shall, from time to time, by proclamation, extend such embargo upon the export of arms, ammunition, or implements of war to other States as and when they become involved in such war.

"(c) Whenever the President shall find that a state of civil strife exists in a foreign State and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign State would threaten or endanger the peace of the United States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign State, or to any neutral State for transshipment to, or for the use of, such foreign State.

"(d) The President shall, from time to time by proclamation, definitely enumerate the arms, ammunition, and implements of war, the export of which is prohibited by this section. The arms, ammunition, and implements of war so enumerated shall include those enumerated in the President's proclamation Numbered 2163, of April 10, 1936, but shall not include raw materials or any other articles or materials not of the same general character as those enumerated in the said proclamation, and in the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, signed at Geneva June 17, 1925."

⁴ Under Section 2 of the Act of 1937 provision was made (to be effective until May 1,

the enactments manifested the sense of the Congress of the undesirability of allowing the United States without domestic restriction, to minister directly through resources within its control to the military assets of a belligerent for use against a State with which the United States might be at peace.⁵ It should be observed that the Neutrality Act of 1937 was not to apply to an American Republic or Republics engaged in war against a non-American State or States, provided the American Republic were not coöperating with a non-American State or States in such war.⁶

Early in December, 1936, the United States submitted to the Inter-American Peace Conference at Buenos Aires a proposal that upon the determination of the existence of a state of war between two or more American republics, the parties remaining neutral should not permit, during the continuance of hostilities "the exportation from their respective territories of arms, ammunition, or implements of war to any of the belligerents, or to any neutral country for trans-shipment to, or for the use of, any of the belligerents."⁷ The convention emanating from the Conference, and which purported to deal with the matter, revealed the sharp difference between what was accepted, and what Secretary Hull had desired. According to Article VI the High Contracting Parties agreed that:

In the case of an outbreak of hostilities or threat of an outbreak of hostilities between two or more of them, they shall, through consultation, immediately endeavor to adopt in their character as neutrals a common and solidary attitude, in order to discourage or prevent the spread or prolongation of hostilities.

With this object, and having in mind the diversity of cases and circumstances, they may consider the imposition of prohibitions or restrictions on the sale or shipment of arms, munitions and implements of war, loans or other financial help to the States in conflict, in accordance with the municipal legislation of the High Contracting Parties, and without detriment to their obligations derived from other treaties to which they are or may become parties.⁸

1939) which served to clothe the President with broad authority to restrict the shipment of certain articles or materials in addition to arms, ammunition, and implements of war from the United States to belligerent States, or to a State wherein civil strife existed, if he found such action necessary to protect the security or peace of the United States or to protect the lives of the citizens of the United States. Save under special conditions, and under limitations to be prescribed by the President, the transportation of such articles to specified destinations and for specified uses was forbidden. The Section also provided that no articles placed under the ban of the executive should be exported or taken out of the United States, for specified destinations or uses, until all right, title, and interest therein should have been transferred to some foreign government, agency, institution, association, partnership, corporation, or national. Under certain conditions and subject to executive regulation, the foreign owner of title was not forbidden to remove from the United States articles not embraced within the mandatory provisions of Section 1.

⁵ See, in this connection, James W. Garner, "The United States 'Neutrality' Law of 1937," *Brit. Y.B.*, 1938, 44; Edwin Borchard, "Neutrality," *Yale L.J.*, XLVIII, 37; C. H. McLaughlin, "Legislative Neutrality in the United States," *Minn. Law Rev.*, XXII, 603.

⁶ Section 4.

⁷ Art. VIII of the proposed draft convention, Dept. of State Press Releases, Dec. 12, 1936, 478, 483.

⁸ Convention for the Coördination, Extension, and Fulfillment of Existing Treaties be-

It should be obvious that the impartial withholding by a neutral State of resources within its territory from the use of belligerent States violates no legal obligation towards them despite the circumstance that the consequences of such action may prove to be of unequal effect upon the two or more States embarked upon war. A different situation seemingly presents itself, however, when a neutral State during the course of the conflict, by affirmative action, relaxes a restriction such as one that may have become operative automatically upon the outbreak of the war, and by so doing yields a military or economic advantage to a particular belligerent.

§ 868A. **Aspects of The Neutrality Act of 1939.** Through the Neutrality Act approved November 4, 1939,¹ the United States relaxed the existing embargo on arms, ammunition, and implements of war, which, in consequence of the outbreak of the European war, had become operative by executive action pursuant to the Neutrality Act of 1937.² It was made unlawful to export or transport, or attempt to export or transport, or cause to be exported or transported, from the United States to any State named in a proclamation by the President announcing the existence of a state of war between it and any other foreign State, "any articles or materials (except copyright articles or materials) until all right, title and interest therein shall have been transferred to some foreign government, agency, institution, association, partnership, corporation, or national."³ Thus, the relaxation of the existing embargo manifested itself in permitting such foreign transferee of title to remove its acquisitions from American territory. It was also declared to be unlawful for any American vessel to carry any passengers or any articles or materials to any State named in such a proclamation.⁴ The foregoing prohibitions were, however, subject to important geographical limitations that were specified in detail.⁵ By such means attempt was made to restrain

tween the American States, U. S. Treaty Series, No. 926. See Report of the Delegation of the United States of America to the Inter-American Conference for the Maintenance of Peace, Dept. of State Publication 1088, Conference Series 33, Washington, 1937, 23-25.

§ 868A. ¹ 54 Stat. 4.

See, in this connection, President Roosevelt, Message to the Congress, Sept. 21, 1939, Dept. of State Bulletin, Sept. 23, 1939, 275; also statement by Secy. Hull, *id.*, 280.

² See proclamation of Sept. 5, 1939, concerning the Export of Arms, Ammunition, and Implements of War to France; Germany; Poland; and the United Kingdom, India, Australia and New Zealand, Dept. of State Bulletin, Sept. 9, 1939, 208.

³ Section 2 (c). It was declared that the issuance of a bill of lading under which title to the goods shipped passed to the purchaser unconditionally upon delivery of the goods to the carrier, should constitute a transfer of all right, title, and interest therein within the meaning of the subsection of the Act. (*Id.*) See, also, Section 1 (a).

It should be observed that the provisions of the Act (except Section 12 pertaining to a National Munitions Control Board and the operation thereof) were not to apply "to any American republic engaged in war against a non-American State or States, provided the American republic is not coöperating with a non-American State or States in such war." (Section 9.)

⁴ Section 2 (a).

According to Section 4: "The provisions of Section 2 (a) shall not prohibit the transportation by vessels under charter or other direction and control of the American Red Cross, proceeding under safe conduct granted by States named in any proclamation issued under the authority of Section 1 (a), of officers and American Red Cross personnel, medical personnel, and medical supplies, food and clothing for the relief of human suffering."

⁵ See Section 2 (f), (g), (h) and (l) with special reference to neutral vessels.

American ships from conduct which embraced, among other things, participation in the transportation to particular places of arms, ammunition and implements of war which might be removed from American soil by specified foreign acquirers of title.⁶

The Act further provided that whenever the President should have issued a proclamation under the authority of Section 1 (a), and should thereafter find that the protection of citizens of the United States so required, he should, by proclamation, define "combat areas," and that thereafter it should be unlawful, except under such rules and regulations as might be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area which, moreover, as so defined, might be made applicable to surface vessels or aircraft, or both.⁷ On November 4, 1939, the President, pursuant to the requirements of the Act, defined by proclamation a combat area in the European war zone⁸ which he described in the following terms:

By proclaiming a combat area I have set out the area in which the actual operations of the war appear to make navigation of American ships dangerous. This combat area takes in the whole Bay of Biscay, except waters on the north coast of Spain so close to the Spanish coast as to make danger of attack unlikely. It also takes in all the waters around Great Britain, Ireland and the adjacent islands, including the English Channel. It takes in the whole North Sea, running up the Norwegian coast to a point south of Bergen. It takes in all of the Baltic Sea and its dependent waters.

In substance, therefore, American ships cannot now proceed to any ports in France, Great Britain or Germany. This is by statute. By proclamation they cannot proceed to any ports in Ireland, nor to any port in Norway south of Bergen; nor to any ports in Sweden, Denmark, Netherlands or Belgium, nor to Baltic ports. All neutral ports in the Mediterranean and Black Seas are open; likewise all ports, belligerent or neutral, in the Pacific and Indian Oceans and dependent waters, and all ports in Africa south of the latitude of the Canaries (30° N.).

I have discretion to permit, within the spirit of the law, American shipping to operate in the combat areas, where there is necessity. It is intended by regulation to provide that ships and citizens who are now in combat areas may get out of them; and for the minimum of necessary official, relief and

See Analysis of Requirements of Section 2 (Commerce With States Engaged in Armed Conflict) contained in Dept. of State Bulletin, Nov. 18, 1939, 551.

⁶ The Act did not in terms purport to cause the American ownership of a vessel under a foreign flag to become or be utilized as the basis of a restriction upon the conduct of a ship as such. The term "American vessel" was defined by the Act as "any vessel documented, and any aircraft registered or licensed, under the laws of the United States." (Section 16.) This circumstance inspired the attempt, which was successfully made, to transfer certain American vessels to the flags of other neutral States as a means of enabling American owned vessels under foreign registry to escape prohibitions imposed upon American ships as such. In the course of the enactment of the Act the Congress may not have had in mind situations where in previous legislation it had utilized the American ownership of foreign registered ships as the basis of a jurisdictional claim. See *Offenses Committed on Vessels of the State*, *supra*, § 239.

⁷ Section 3 (a).

⁸ Dept. of State Bulletin, Nov. 4, 1939, 454-455. See P. C. Jessup, "The 'Neutrality Act of 1939,'" *Am. J.*, XXXIV, 95; Francis Deák, "The United States Neutrality Acts," *Int. Conciliation*, No. 358, March 1940.

other similar travel which must go on in such areas. It is also intended to provide that vessels which cleared for combat areas before the act and proclamation became effective shall be allowed to complete their voyages.⁹

(2)

§ 869. **Loans to Belligerents.** The loaning of money to a belligerent in a neutral State enables it to enjoy a credit based upon resources therein and which is capable of direct utilization in the prosecution of war. The international significance of the transaction is due in part to the facility with which the borrower, by virtue of the efficacy of modern banking arrangements, finds it possible to put to immediate use the funds at its disposal in whatever market they are most needed.¹ It is also due to the fact that extension of credit in neutral territory may supplement large purchases of war supplies therein, both as a means of maintaining the rate of exchange on the fiscal centers of the belligerent, and as an aid to continued purchases and removals of articles desired. A loan to a belligerent is none the less the adjunct of such business when the funds raised are expended solely in the neutral country.

In view of the absence of a duty on the part of a neutral, according to the existing law, to endeavor to restrict exportations of war material from its territory,² it is logical that no burden should be imposed to effect the restriction of the loaning of money in neutral territory by the inhabitants thereof. The law of nations as manifested by the practice of States, up to the outbreak of World War I, appears to have established none.³

⁹ Dept. of State Bulletin, Nov. 4, 1939, 455-456.

See Departmental Order Regarding Travel in Combat Areas and on Belligerent Vessels, Dept. of State Bulletin, Nov. 18, 1939, 553.

See, also, the President's proclamation of June 11, 1940, extending the Combat Area to the Mediterranean Zone, C C H War Law Service, ¶26,164; also Regulations applicable to the extension of the Combat Area to the Mediterranean Zone, June 11, 1940, C C H War Law Service, ¶26,165.

[It may be noted that at a time subsequent to the period of events that are discussed in this work — on Nov. 17, 1941 — a Joint Resolution of the Congress was to repeal sections of the Neutrality Act of 1939, relating to commerce with States engaged in armed conflict, relating to combat areas, and relating to the arming of American vessels. See 55 Stat. 764.]

§ 869.¹ The act of loaning money to a belligerent in neutral territory does not itself raise a question in relation to neutrality until the borrower uses the money or credit obtained for the injury of the opposing belligerent. In the case of a loan, it is the removal from neutral territory of the money received, either in the form of specie or by a transfer of credit, or the taking away from such territory of articles purchased with the proceeds of the loan, which possesses international significance. As credit is easily convertible into war supplies, a transfer of it amounts to placing within reach of the belligerent the power to obtain an equivalent in articles of warlike use. A neutral government would find it more difficult to prevent the transfer of credits than the removal from its domain of corporeal movable property such as ships of war or guns. Should it, therefore, be deemed expedient to prevent a belligerent from gaining credit in a local neutral banking center, it would appear necessary to prohibit as a domestic measure the loaning of money to a belligerent by persons within the national domain.

² See Exportations of Munitions of War, *supra*, §§ 867-868.

That a neutral State may "place prohibitions upon the granting of loans or credits by persons subject to its jurisdiction," for the purpose of conserving its own supplies or of safeguarding its neutrality, is properly acknowledged in Art. XI of the Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 177.

³ Moore, *Dig.*, VII, 976-978; Oppenheim, *Lauterpacht's* 6 ed., II, 603-606; Westlake, 2 ed., II, 251-253. See, also, Hall, 8 ed., 710-711, where the following language of Mr. Web-

In the early months of World War I the Department of State expressed disapproval of war loans in the United States, on the ground that they were "inconsistent with the spirit of neutrality." There was said to be a clearly defined difference between a war loan and the purchase of arms and ammunition. The policy of disapproving of war loans affected, it was said, all governments alike, "so that the disapproval is not an unneutral act," while a prohibition of exports would in fact operate unequally upon the nations at war. It was added that the taking of money out of the United States in such a conflict might seriously embarrass the Government, in case it needed to borrow money, and might also seriously impair the Nation's ability to assist neutral powers. Popular subscription to a belligerent loan in the United States was deemed objectionable because of its effect in producing a large number of earnest partisans having a material interest in the success of that belligerent whose bonds they might hold, and because of the danger of dividing the people into groups of partisans "which would result in intense bitterness and might cause an undesirable, if not a serious, situation."⁴

In 1915, and thereafter, while the United States remained a neutral, vast loans were made therein to belligerent powers by private agencies. Great Britain and its Allies were the chief borrowers. The funds raised by them were employed primarily to pay existing indebtedness to American creditors, or to extend purchases of war supplies in American markets.⁵ It is not understood that the United States made objection to these transactions, or to the stimulus thus given to the exportation of munitions of war for the account of the Entente Allies. Doubtless no legal duty rested upon the United States to endeavor to impose restrictions.

Credit is the mainstay of a belligerent. A neutral country extending that form of aid through private agencies strengthens directly the recipient, enabling it to prolong the war and possibly win the victory. It may be admitted that under the existing law no duty rests upon a neutral government to apply restrictions. Nevertheless, it is not apparent how, on principle, a neutral sovereign, itself bound to abstain from loaning funds to a belligerent,⁶ can fairly maintain that it does not connive at such conduct, when it makes no endeavor to prevent those resources of its territory which it has the power to control from being placed within the reach of a party to the conflict.

ster, Secy. of State, in 1842, is quoted with approval: "As to advances and loans made by individuals to the Government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain." (711.) Communication to Mr. Thompson, Ex. Docs. 27 Cong. 1841-1842. Hall adverts to the views of Bluntschli (§ 768), Phillimore (III, § clvii), Calvo (§ 2628), as condemning the negotiation of loans by private individuals.

⁴ See Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, *For. Rel.* 1914, Supp., VII, XII.

⁵ See Stowell and Munro, *International Cases*, II, 321-325.

⁶ Declares Westlake: "If by the law of the neutral State the consent of the executive is required to loans by individuals to foreign powers, or if the executive is in the habit of practically controlling such operations by the exercise of its influence, a loan by individuals to a belligerent which is allowed to slip through the meshes will have an international character not distinguishable from a loan by the State." (2 ed., II, 251-252.)

The policies responsible for the Neutrality Act of May 1, 1937, caused the Congress to incorporate therein restrictions upon financial transactions embracing various forms of fiscal aid to belligerent States or to States wherein civil strife might prevail or to political subdivisions thereof. This legislation was indicative of a change of thinking which had permeated the American mind during the years following World War I,⁷ and which had found expression also in the provisions of a convention proposed by the United States at the inter-American Conference for the Maintenance of Peace at Buenos Aires in December, 1936.⁸

The Neutrality Act of 1939, which served to repeal the Act of 1937, provided that whenever the President should have issued a proclamation under the authority and conditions of Section 1 (a), naming foreign States as involved in a war which was found to exist, it should thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any State named in such proclamation, or of any political subdivision of any such State, or of any person acting for or on behalf of the government of any such State or political subdivision thereof, issued after the date of such proclamation, or to make any loan or extend any credit (other than necessary credits accruing in connection with the transmission of telegraph, cable, wireless and telephone services) to any such government, political subdivision, or person. These provisions were also to apply to

⁷ According to Section 3 of the Act: "(a) Whenever the President shall have issued a proclamation under the authority of section 1 of this Act, it shall thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any belligerent State or of any State wherein civil strife exists, named in such proclamation, or of any political subdivision of any such State, or of any person acting for or on behalf of the government of any such State, or of any faction or asserted government within any such State wherein civil strife exists, or of any person acting for or on behalf of any faction or asserted government within any such State wherein civil strife exists, issued after the date of such proclamation, or to make any loan or extend any credit to any such government, political subdivision, faction, asserted government, or person, or to solicit or receive any contribution for any such government, political subdivision, faction, asserted government, or person: *Provided*, That if the President shall find that such action will serve to protect the commercial or other interests of the United States or its citizens, he may, in his discretion, and to such extent and under such regulations as he may prescribe, except from the operation of this section ordinary commercial credits and short-time obligations in aid of legal transactions and of a character customarily used in normal peacetime commercial transactions. Nothing in this subsection shall be construed to prohibit the solicitation or collection of funds to be used for medical aid and assistance, or for food and clothing to relieve human suffering, when such solicitation or collection of funds is made on behalf of and for use by any person or organization which is not acting for or on behalf of any such government, political subdivision, faction, or asserted government, but all such solicitations and collections of funds shall be subject to the approval of the President and shall be made under such rules and regulations as he shall prescribe.

"(b) The provisions of this section shall not apply to a renewal or adjustment of such indebtedness as may exist on the date of the President's proclamation." (50 Stat. 123-124; 22 U.S.C.A., § 245 a-1.)

⁸ According to Art. IX: "The High Contracting Parties agree to prohibit the flotation within their respective territories of any loans through the issuance of bonds, or other evidences of indebtedness, and the establishment of any credit by or on behalf of the Government of any American Republic in a state of war with another American Republic, as may be determined under the terms of this Convention." (Dept. of State Press Releases, Dec. 12, 1936, 478, 483.)

Cf. Art. 6 of Convention concerning the Coördination, Extension, and Fulfillment of Existing Treaties between the American States, concluded at Buenos Aires, Dec. 23, 1936, U. S. Treaty Vol. IV, 4834.

the sale by any person within the United States to any person in a State named in any such proclamation of any articles or materials listed in a proclamation issued under the authority of Section 12 (i).⁹ The provisions of the Acts of 1937 and 1939 revealed a fresh sense of the undesirability of American fiscal support of belligerent States when the United States was a neutral. Its legislative action marked, however, the assertion of a legal right rather than a response to a legal obligation.¹⁰

(3)

§ 870. The Departure of Unorganized Individuals Contemplating and Entering Belligerent Service. The cause of a belligerent is doubtless aided when neutral territory yields its inhabitants, like any other resources, to the service of a State engaged in war. The process of yielding is seen when men, although without organization, and unsolicited by unlawful influence, depart from neutral territory for the purpose of enlisting under a belligerent flag, and succeed in doing so.

When the territory of the belligerent gaining such adherents is adjacent to that of the neutral, departure from the domain of the latter across the frontier causes the individual to be placed, to a certain degree, within the control of the belligerent. In such case, the possibility of a change of purpose on his part is minimized, and the belligerent, if he remains on its soil, may in fact exact military service from him. A situation not unlike it presents itself when the individual takes passage at a neutral port on a belligerent ship and is transported by it to belligerent territory. In both cases an asset of military value, perhaps closely associated with neutral territory, and also presumably under the control of its sovereign, is transferred to the soil of the belligerent. If military service is rendered, the connection between neutral territory and the belligerent so aided may prove to be as close as in the situation where such territory contributes inanimate objects, such as munitions of war, to a party to the conflict. The opposing belligerent may contend that it suffers as definite harm in the one case as in the other.

The individual whose departure from neutral territory coincides with his entrance into the domain or ship of a belligerent may still, however, change his purpose; and the belligerent may not seek to exact service from him, or it may not permit him to enlist. If his departure from neutral territory causes the individual to enter places not under belligerent control, the relation between that territory and the belligerent whose cause he ultimately espouses is much more remote. In the case of the national of a belligerent who leaves neutral territory in order to respond to the call of his country, the likelihood of his adhering to his purpose until reaching a place subject to the control of his sovereign is

⁹ Section 7 (a). According to Section 7 (b) the provisions of the section were not to apply to a renewal or adjustment of such indebtedness as might exist on the date of such proclamation.

¹⁰ "It is, of course, also true that international law does not now impose upon a neutral State the duty to prevent loans by its nationals to belligerents." (Comment by the Reporter on Art. II (c) of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J., XXXIII, Supplement Section 2*, 311-312.)

greater than in the case of one not bound by any tie of allegiance to a belligerent. Moreover, if his departure coincides with his entering a ship or territory controlled by his country, the opportunity to escape service will, under normal circumstances, be slight.

The law of nations, as manifested by the practice of States and recognized by the United States, imposes no duty of prevention upon a neutral state.¹ As Professor John Bassett Moore declared in 1915: "No act, for example, could be more clearly unneutral than that of a citizen of a neutral country in going abroad and enlisting in the military or naval service of a belligerent; and yet this is an act which a neutral government is not obliged to prevent, and neutral governments do not in fact undertake to prevent it."² No special burden exists by reason of the nationality of the individual or on account of the closeness of neutral territory to that of the belligerent whose forces are augmented. The difficulty of preventing departure, the frequent absence of any apparent causal connection between neutral territory and the injury wrought in consequence of departure and enlistment, the occasional presence of intervening circumstances diverting the individual from his purpose after departure, as well as the slight degree of harm likely to be suffered by a belligerent through the acquisition by its enemy of unorganized individuals from neutral territory, have combined to retard the establishment of a neutral duty of restriction.

Accordingly, the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers and Persons in War on Land, announced that the responsibility of a neutral power is not engaged by the fact of individuals crossing the frontier separately to offer their services to one of the belligerents.³ The War Department Rules of Land Warfare of 1940 declare that individuals crossing the frontier singly or in small bands that are unorganized, create no obligation on the part of the neutral State,⁴ and that nationals of a belligerent are permitted freely to leave neutral territory to join the armies of their country.⁵

§ 870. ¹ Mr. Jefferson, Secy. of State, to the French Minister, Nov. 30, 1793, 4 Jefferson's Works, 86, Moore, Dig., VII, 917; Mr. Marcy, Secy. of State, to Mr. Escalante, May 8, 1856, MS. Notes to Spain, VII, 79, Moore, Dig., VII, 927; *United States v. Louis Kazinski*, 2 Sprague, 7; War Dept. Rules of Land Warfare, 1940, No. 372.

But see Enlistments and Commissions, *supra*, §§ 850-851; The Fitting Out, Arming, and Departure of Vessels Adapted for Hostile Uses, *supra*, §§ 853-854; Neutral Territory as a Base of Belligerent Operations, *supra*, § 855.

² Communication to Hon. Benjamin Strong, Jr., Governor, Federal Reserve Bank, New York City, Aug. 26, 1915, Munitions Industry, Hearings before Special Committee of the Senate Investigating the Munitions Industry, 74 Cong., 2 Sess., Part 25, Exhibit 2141.

³ Art. V, Malloy's Treaties, II, 2298. For the discussion at the Hague Conference see *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 200-204; also report of Col. Borel in behalf of the Second Commission, *id.*, I, 141, in which he said: "It goes without saying that the neutral State must prevent its frontiers being crossed by corps or bands which have been organized on its territory without its knowledge. On the other hand, individuals may be considered as acting in an isolated manner when there exists between them no bond of a known or obvious organization, even when a number of them pass the frontier simultaneously." (Quoted in Rules of Land Warfare, 1917, No. 400, note 1.)

See, also, C. G. Fenwick, *Neutrality Laws of the United States*, 127-131.

⁴ No. 372.

⁵ No. 373. See Rules of Land Warfare, 1917, No. 401, note 1, where attention is called to the fact that "in 1870 the United States permitted large numbers of French and Germans to leave this country under recalls from their Governments. In one case about 1,200 Frenchmen embarked in French ships with 96,000 rifles and 11,000,000 cartridges. The United States held that the men were not officered or in any manner organized, and as the arms and am-

(4)

§ 871. **Belligerent Services by Neutral Nationals on the High Seas.** In a broad sense any form of participation in war by a national of a neutral State constitutes unneutral conduct. When, however, such an individual is in a place subject to the control of a belligerent, his acts in its behalf and at its command possess a legal quality which the national character of the actor cannot affect. With respect to his acts as a participant, his status as a neutral person is lost, and that of a belligerent is impressed upon him. He is no longer deemed to be a neutral, and his acts are not thereafter described as unneutral.¹

When the neutral national takes part in war through acts committed in behalf of a belligerent in places not under its control, as on board or by means of a neutral ship on the high seas, the service rendered is not only not exacted by a belligerent sovereign, but is also in theory not connived at by any other. Participation is thus voluntary, and necessarily discountenanced by the neutral State to which the actor owes allegiance. For that reason the neutral character of the actor, which remains unchanged, emphasizes the inconsistent aspect of his conduct; and this the law of nations also does in branding his acts as unneutral and, therefore, offensive. Offensiveness signifies not merely that the enemy of the belligerent in whose behalf the neutral labors is aggrieved because of obstacles attributable to his conduct, but rather that his acts, on account of the relation of the actor to a neutral State, are, from an international point of view, essentially unlawful.² In a word, the neutral national, unconstrained by belligerent control asserted over him, must not make war upon a State with which his own country is at peace; and when he does, the law of nations regards him as guilty of illegal conduct.³

munition were legitimate subjects of commerce, the issuing of the ships from an American port did not constitute an expedition."

See, also, Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, *For. Rel.* 1914, Supp., VII, X-XI.

It is declared in No. 374 of the War Dept. Rules of Land Warfare of 1940, that "officers of the land forces of neutral powers on the active list should not be permitted to join a belligerent, and having joined such belligerent forces, should be recalled." See, in this connection, the prohibition contained in Rev. Stat. § 5281, and set forth in Act of March 4, 1909, chap. 321, § 9, 35 Stat. 1089, 18 U.S.C.A., § 21.

§ 871.¹ Thus the neutral alien who on belligerent soil is compelled to enter the military service of the territorial sovereign, and fights under its flag on land or sea, is not regarded other than as a belligerent person reasonably acting as such.

According to Art. XVI of the Hague Convention of 1907, Concerning the Rights and Duties of Neutral Powers and Persons in War on Land: "The nationals of a State which is not taking part in the war are considered as neutrals." According to Art. XVII, a neutral person cannot avail himself of his neutrality "if he commits hostile acts against a belligerent"; or "if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties." Malloy's Treaties, II, 2299.

Declared Marshall, C. J., as circuit judge in the case of *The Santissima Trinidad*, 1 Brockenbrough, 478, 487: "The grant of a commission to a neutral, while within the territory of a belligerent, has never been considered as a violation of neutral rights."

² Thus the United States Naval Instructions governing Maritime Warfare declare that "Unneutral service is service rendered by a neutral to a belligerent contrary to international law." No. 35.

See, also, *Indirect Unneutral Service, In General, supra*, § 817.

³ The United States has long recognized the internationally illegal aspect of unneutral conduct on the part of neutral nationals when unconstrained by a belligerent. See Mr. Jefferson, Secy. of State, to Mr. Morris, Minister to France, Aug. 16, 1793, *Am. State Pap.*,

Unneutral acts are frequently committed by persons in charge of a neutral vessel, and cause the ship itself to be dealt with as the guilty party. Thus blockade running by a neutral ship is a distinct offense according to the law of nations, which subjects the vessel attempting to commit it, or sailing with intent to commit it, to capture without regard to the nature of the cargo.⁴ There are various other services which are technically described as unneutral, both of a direct nature, such as the exclusive employment of a ship in transporting belligerent troops, or of an indirect nature, such as the transportation, as a special undertaking, of individual passengers embodied in the armed forces of a belligerent and who are en route to a hostile destination.⁵ Again, the carrying of contraband articles to a hostile destination amounts to participation in the war, and, when undertaken by a neutral ship, constitutes unneutral conduct.⁶

§ 872. **The Same.** According to the existing law, the neutral sovereign is not called upon to forbid generally its nationals from committing unneutral acts outside of its own territory and on the high seas. Nor is it obliged to endeavor to restrain private vessels of its merchant fleet from becoming the vehicles of unneutral traffic. This is true, although both its nationals and the merchantmen sailing under its flag oftentimes if not commonly initiate their unneutral operations in its ports or waters. Nor is a neutral territorial sovereign obliged to prevent the departure from its waters of foreign neutral ships similarly engaged. The burden rests upon the enemy of the belligerent in whose behalf unneutral services are rendered, to prevent by force the undertakings of neutral ships, and to penalize the offenders when captured. Thus, at the present time, neutral States are generally content to notify their nationals and more broadly the inhabitants of their territories of the impropriety of unneutral service. The United States has, when a neutral, from the time of Washington warned American citizens of the impropriety of their participation in war. In his Neutrality Proclamation of April 22, 1793, President Washington declared that whosoever of the citizens of the United States should render himself liable to punishment or forfeiture under the law of nations, "by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations," would not receive the protection of the Government against punishment or forfeiture.¹ According to

For. Rel. I, 167, 168, Moore, Dig., VII, 917. That the law of nations should forbid an individual to commit a particular act or to engage in a special service connected with a war because of his relation to a State abstaining therefrom and maintaining its status as a neutral is not unreasonable. Such a result, however, serves to emphasize the fact not only that the law of nations appears at times to address its prohibitions directly to individuals, and so impress upon them the nature of what it forbids, but also that as the delinquency of the individual is attributable to his connection with a neutral State, there is a ground on which to claim that that State should manifest more than a passive interest in what he does.

See Privileges Accruing to Private Individuals, *supra*, §§ 11B and 11C.

⁴ Naval Instructions on Maritime Warfare of June 30, 1917, No. 29.

See Blockade, Capture and Penalty, *supra*, § 837.

⁵ Naval Instructions on Maritime Warfare of June 30, 1917, Nos. 36-39.

See Indirect Unneutral Service, Penalties for Carriage of Persons and Despatches, *supra*, §§ 822-823.

⁶ See statement by Professor Moore, in Dig., VII, 748-752.

See Contraband, Penalty for Carriage, *supra*, § 815.

§ 872. ¹ Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 750.

neutrality proclamations of President Grant, August 22, 1870,² President Roosevelt, February 11, 1904,³ and President Wilson, in the course of World War I, all citizens of the United States, and all persons residing or being within its territory or jurisdiction, were warned that they could not carry articles known as contraband of war upon the high seas for the use or service of a belligerent, nor could they transport soldiers and officers of a belligerent, or attempt to break any blockade which might be lawfully established and maintained, "without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf."⁴

It should be borne in mind that, as has been noted, the United States through the Neutrality Act approved November 4, 1939, undertook broadly to prohibit American vessels from engaging in certain participatory services as vehicles of transportation.⁵ It also made provision enabling the President to forbid American nationals as well as American ships from proceeding to particular places.⁶ It may be observed that by the General Declaration of Neutrality of the American Republics, approved at Panama on October 3, 1939, those Republics declared: "They shall prevent, in accordance with their internal legislations, the inhabitants of their territories from engaging in activities capable of affecting the neutral status of the American republics."⁷

(5)

§ 873. **The Fitting Out, Transfer and Departure of Vessels not Adapted or Intended Primarily for Hostile Operations.** With respect to the fitting out, transfer within, and departure from its territory of vessels which a neutral government has no reason to believe are intended primarily to cruise or engage in hostile operations against a friendly power, the law of nations does not appear to establish a neutral duty to effect restriction.¹ The mere sale to a belligerent national of such a vessel in neutral waters possesses no international significance. Nor is the departure of the ship from those waters after sale deemed to be an event calling for interference.² It should be observed that the existing law came into being at a time when the transfer and removal to belligerent na-

² For. Rel. 1870, 45, 47.

³ *Id.*, 1904, 32, 35.

⁴ See, for example, proclamation of May 24, 1915, American White Book, European War, II, 15, 17.

Cf. President Roosevelt's general proclamation of neutrality, Sept. 5, 1939, Dept. of State Bulletin, Sept. 9, 1939, 203.

⁵ See Aspects of The Neutrality Act of 1939, *supra*, § 868A.

See also The Exportation of Munitions of War, *supra*, § 868, where reference is made to certain provisions of the Neutrality Act of May 1, 1937, 50 Stat. 121, 122.

⁶ Sec. 3 (a), 54 Stat. 4, 7. See Aspects of The Neutrality Act of 1939, *supra*, § 868A.

⁷ Dept. of State Publication 1451, Conference Series 44, 1940, 54.

§ 873. ¹ Such has long been the attitude of the United States. See, for example, Mr. Clay, Secy. of State, to Mr. Rivas y Salmon, Spanish Chargé d'Affaires, June 9, 1827, MS. Notes to Foreign Legations, III, 365, Moore, Dig., VII, 950; Same to Mr. Tacon, Spanish Minister, Oct. 31, 1827, MS. Notes to Foreign Legations, III, 396, Moore, Dig., VII, 950; Mr. Bayard, Secy. of State, to Mr. Stahel, Consul at Shanghai, April 14, 1885, For. Rel. 1885, 170, Moore, Dig., VII, 951.

² The statement in the text does not purport to cover the case where prior to departure the vessel obtains in neutral territory armament for purposes of defense. See *The Fitting Out, Arming and Departure of Vessels Adapted for Hostile Uses*, *supra*, §§ 853-854.

tionals of neutral tonnage was of slight military significance. The possibility lest the acquisition of a neutral merchantman by a belligerent owner might lead to its transformation by his sovereign into a vessel of war was too remote to justify the establishment of a legal duty of prevention.³ Moreover, the military value of neutral ships for purposes other than fighting the enemy was too slight to evoke much consideration. Attention was directed to the necessity of restricting the fitting out and departure of vessels which there was reason to believe were intended to fulfill primarily the functions of ships of war. When the law sufficed to respond to that need, no further obligation appeared to be required with respect to vessels not adapted or intended for such purposes.

World War I, however, served to emphasize the fact that, at the present time in a conflict between powerful maritime States, the opposing belligerents may be expected to requisition the larger craft of their respective merchant marines for public purposes incidental to the conflict.⁴ Those purposes, although unrelated to hostile operations, are so closely associated with the conduct of the war, as to cause the ships concerned to become actual participants therein. This is obvious when they are employed in the transportation of war supplies, food and men. As long as the power and disposition of a belligerent to destroy the merchantmen of its enemy endangers the very existence of the merchant fleet of the latter, and thereby renders of extraordinary value its acquisition of foreign tonnage, accessions from neutral sources may play an important part in enabling a belligerent to avert its own defeat.⁵ In view of present conditions, therefore, the prolonged power of resistance attributable to the acquisition and unrestricted use of neutral bottoms, though not employed in hostile operations, is such as to cause the territory from which such aid originates to become a distinct source or means of belligerent strength.⁶ Consequently it might not be

³ See statement in Wharton, Dig., III, 525, Moore, Dig., VII, 953.

⁴ In October, 1917, the United States Shipping Board gave notice to all owners of ships registered and enrolled under the laws of the United States that a requisition of American steamers had been made to become operative Oct. 15, 1917, at noon. The ships affected by this requisition and included therein were described as "(a) All cargo ships able to carry not less than 2,500 tons total dead-weight, including bunkers, water, and stores; (b) All passenger steamers of not less than 2,500 tons gross register." (Official Bulletin, Oct. 13, 1917, No. 132, page 1.)

⁵ In consequence of the destruction by enemy submarines of a vast amount of tonnage of the merchant fleets of Great Britain and its Allies, especially after February, 1917, the need of supplying the deficiency became acute. That need was none the less a military one, although the vessels required were not sought for the purpose of engaging in hostile operations. The United States as a belligerent bent every effort to make good the loss through the construction of new ships. Had it, however, maintained its neutral status, and had the augmentation of the British merchant marine been confined to the private efforts of American ship-builders, neutral territory would have presented the spectacle of offering a singular and unprecedented form of aid to a belligerent in dire need of it. Under the existing law, however, it would have been possible for the United States as a neutral to maintain the position that it was guilty of no unneutral conduct in failing to apply measures of restriction. It is doubtless a source of satisfaction to the American people that the aid ultimately furnished by the United States was the offering of a belligerent against a common foe, rather than that of a neutral.

⁶ This is none the less true, although some ships transferred and permitted to depart from neutral waters may not be impressed into a service connected with the prosecution of the war. The significant fact is that the acquisition of neutral tonnage enables the belligerent to save itself from an isolation which may insure its defeat, and that every available vessel will be used where it can most effectively aid in averting the occurrence of such an event.

unreasonable, in case effort were made to modify the existing law, to demand the imposition upon a neutral of a duty further to restrict belligerent augmentations from vessels within its domain and subject to its control.⁷

(6)

§ 873A. **The Passage of Belligerent Public Vessels Through Neutral Waters.** It seems to be accepted doctrine reflected by the provisions of the Hague Convention of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War,¹ and elsewhere,² that a neutral State is not obliged to prevent the passage through its territorial waters of a belligerent public ship. When the neutral State does not assert its seemingly acknowledged right to exclude a belligerent warship from its waters,³ the vessel in availing itself of the unmolested privilege gains a benefit therefrom which in the particular case, may, in consequence of the geographical relationship or proximity of the waters traversed to those of its own country, constitute a relative military advantage not shared by the enemy. That privilege may, moreover, when utilized by a submarine vessel, enable it to gain a form or degree of sustenance which the neutral territorial sovereign should endeavor to prevent a belligerent from enjoying within an area belonging to the former.⁴ Thus, quite regardless of whether the neutral toleration or acquiescence is, in the particular case, improper, the bare

⁷ By proclamation of Feb. 5, 1917, announcing the existence of an emergency owing to an insufficiency of tonnage to carry American products to consumers abroad and within the United States, President Wilson set in operation the provisions of the Shipping Act of Sept. 7, 1916, 39 Stat. Part 1, 728, to the effect that in the event of an emergency declared by the President to exist, no vessel registered or enrolled and licensed under the laws of the United States should, without the approval of the Shipping Board, be sold, leased or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag.

See, conversely, *The Control of Belligerent and Other Foreign Merchantmen in Neutral Waters*, *infra*, § 888D.

§ 873A.¹ According to Art. X: "The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents." (Malloy's *Treaties*, II, 2360.)

² See Art. 25 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 179, and Comment, *id.*, 422.

See, in this connection, judgment in the case of *The S.S. "Wimbledon"*, Publications, Permanent Court of International Justice, Series A, No. 1, 25 and 28.

³ Art. 26 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War properly announces that "A neutral State may exclude from its territory belligerent warships other than: (a) warships entering in distress; and (b) warships employed exclusively in scientific or humanitarian missions" (*Id.*, 179.)

⁴ See documents in *For. Rel.* 1918, Supplement 1, Vol II, 1769-1789, concerning the treatment of belligerent submarines in neutral waters, and the mining by Norway of its territorial waters adjoining the North Sea Barrage. Declared Secretary Lansing, in this connection, in a communication to the American Chargé in Norway, Aug. 27, 1918: "In view of the menace to American interests which will result from the free passage of submarines through the territorial waters of Norway, the Government of the United States believes that the Norwegian Government will realize the obligation which rests upon it to prevent by every means in its power the passage of German submarines through waters within the jurisdiction of Norway. Furthermore it cannot fail to realize that if Norwegian waters are used by belligerent submarines as a rendezvous whence they can freely pass into the Atlantic Ocean for hostile purposes the waters so used may justly be considered a base of naval operations, the establishment of which within Norwegian jurisdiction the Government of the United States believes to be entirely contrary to the will and intention of the Government of Norway." (*Id.*, 1782, 1783-1784.) It will of course be noted that the United States was here urging the Norwegian Government to mine its territorial waters as a means of preventing their *improper* use by German submarines.

fact of the passage of the ship may induce its enemy to offer forcible opposition, and, if need be, to invade neutral waters for that purpose.⁵ This grim consequence shows how the law fails to take cognizance of, or appropriately to respond to, considerations that are bound to influence, and may be decisive of, belligerent conduct. To proclaim, on the one hand, the inviolability of neutral territory, and, on the other, the absence of a duty on the part of the neutral sovereign to endeavor to prevent certain belligerent uses thereof which must inevitably inspire warlike activities therein, is grotesque and unrealistic. It points anew to the extent to which the Hague Convention of 1907 was utilized to smooth the way for prospective belligerents. Accordingly, it is suggested that the passage of belligerent vessels of war through neutral coastal waters should, by general agreement, be greatly restricted, if not entirely forbidden.

It may be observed that in April, 1940, the British Government in an endeavor to close the Norwegian corridor as against the uses to which it was being employed by the enemy, proceeded to mine the territorial waters of Norway, and at a time when the German invasion of Norway is said to have been determined upon and may have been actually under way.⁶

(7)

§ 874. Expressions of Opinion by Private Persons. The United States has long denied that any obligation rests upon it when a neutral to attempt to control expressions of opinion by private persons within its territory and adverse to the cause of any belligerent.¹ It has been declared, moreover, that the Government is without power under the Constitution to interfere with publications in the States criticizing foreign governments or even encouraging revolt against them.²

Upon the outbreak of World War I, in 1914, President Wilson addressed an appeal to citizens of the United States, requesting their assistance in maintaining a state of neutrality during the continuance of the conflict. In this communication the President declared that the effect of the war upon the United States would depend upon what American citizens might say and do. According to his words, he spoke "a solemn word of warning . . . against that deepest, most subtle, most essential breach of neutrality which might spring out of partisan-

⁵ See Case of the *Altmark*, discussed, *infra*, § 887.

⁶ See Statement by the Allied Governments on Their Action in Laying Minefields off the Norwegian Coast, and the Norwegian reply, set forth in Bulletin of International News, Royal Institute of International Affairs, Vol. XVII, No. 8, April 20, 1940, 479 and 480.

See Mr. Winston Churchill, statement in the House of Commons, April 11, 1940, and published in Mr. Churchill's work entitled *Blood, Sweat, and Tears*, New York, 1941, 249.

Cf. Dr. Halvdan Koht (former Foreign Minister of Norway), *Norway Neutral and Invaded*, New York, 1941, 42-44.

¹ § 874. ¹ Mr. Livingston, Secy. of State, to Mr. de Sacken, Dec. 4, 1832, MS. Notes to Foreign Legations, V, 73, Moore, Dig., VII, 980; Mr. Bayard, Secy. of State, to Mr. Valera, Spanish Minister, July 31, 1885, For. Rel. 1885, 776, Moore, Dig., VII, 980-981. See, also, other documents in Moore, Dig., VII, 978-982.

² See Freedom of Speech, *supra*, § 217.

³ Mr. Cass, Secy. of State, to Mr. Molina, Costa Rican Minister, Nov. 26, 1860, MS. Notes to Central America, I, 177, Moore, Dig., VII, 980.

ship, out of passionately taking sides.”³ It is not believed that this utterance was inspired by any sense of legal obligation towards any belligerent.⁴

Expressions of private opinion within a neutral State, adverse to the cause of a particular belligerent, are to be anticipated. Their acuteness and vigor, which are not likely to be greatly mollified by the views or through the efforts of neutral governmental officials, must be expected to depend in large degree upon the extent to which disapproval of the policies or methods of the unfavored belligerent takes hold of the popular mind.⁵ The infliction by a belligerent of seemingly unnecessary injuries or hardships upon the civil and non-combatant population of its foe, may arouse keen indignation within neutral territory and inspire the population thereof to give vent to it in plain fashion. Again, if the people of a neutral State conclude that their own country has been dealt with ruthlessly by an offending belligerent, or that its success is likely to jeopardize the safety of their own sovereign, vigorous expressions of condemnation are bound to be forthcoming, and may even betoken a common desire to participate in the war. The character and unanimity of expressions of private opinion within its domain may thus indicate how near the neutral country is to changing its relationship to the conflict and to becoming a belligerent. They are exact gauges of the popular mind which is likely to be highly sensitive to the factual situation. That mind is not likely to give vent to widespread utterances that point to such a change and serve also in themselves to inspire it, if the unfavored belligerent respects the law of nations as it pursues its foe, and gives neither to its enemy, nor to any other State not desirous of becoming an enemy, reason to complain that it has been subjected to internationally illegal treatment.

When States which are locked in armed conflict do not acknowledge that a condition of war exists between them, private opinion within a non-participating or outside State may be expected to express itself freely and vigorously in opposition to the cause of the particular force-employing country whose conduct is regarded as wrongful. The circumstance that the outside State may not be obliged, under the circumstances, to act as though it were a neutral in a war being waged by the foreign States, lessens in fact restraint of utterance by persons within the domain of the former. Popular manifestations of a taking of

³ See Appeal presented in the Senate by Mr. Chilton, Aug. 19, 1914, For. Rel. 1914, Supp., 551-552.

⁴ The German invasion of Belgium, the methods of the belligerent occupant of that country, together with the destruction of the *Lusitania*, the *Arabic* and the *Sussex*, were events which served steadily and increasingly to force enlightened American opinion to take sides with England and its Allies. This opinion became so strong long before the entrance of the United States in the war as a belligerent, that its complaints as a neutral against Great Britain as a belligerent aroused slight popular interest and weakened in no degree the widespread sympathy for its cause. There was thus a passionate taking of sides, which found expression in vigorous and general denunciation of Germany and its misdeeds. Happily there was no legal duty of restraint on the part of the Government of the United States.

⁵ Declared President Roosevelt in a radio address, Sept. 3, 1939: "This nation will remain a neutral nation, but I cannot ask that every American remain neutral in thought as well. Even a neutral has a right to take account of facts. Even a neutral cannot be asked to close his mind or his conscience." (Dept. of State Bulletin, Sept. 9, 1939, 201, 202.)

See Qualified Neutrality, *infra*, § 875.

sides do not beget a duty of prevention that is likely to be acknowledged by the territorial sovereign.

(8)

§ 875. **Qualified Neutrality.** After the United States became a belligerent in World War I, certain other American States, in full sympathy with its purposes, undertook to lend it coöperation without making war upon its enemy. On April 12, 1917, Costa Rica announced, with great satisfaction, a readiness to permit the use of her ports and waters, "for war needs by the American Navy."¹ On April 28, 1917, upon breaking off diplomatic relations with Germany, Guatemala acknowledged "greatest pleasure in offering the United States of America her territorial waters, her ports and railways, for use in common defense, as also all elements which may be available for the same purposes."² On June 4, 1917, the Brazilian Government informed the United States of the approval of a law "which revokes Brazil's neutrality in the war."³ On June 18, 1917, Uruguay, in modifying its neutrality regulations, made the important decree that no American country which in defense of its own rights should find itself in a state of war with nations of other continents would be treated as a belligerent.⁴ To this conception of benevolent neutrality President Pardo of Peru announced the sympathetic adherence of his Government on June 28, 1917.⁵ It is needless to comment on the moral and actual value of these acts to the United States as a belligerent. The extraordinary problem confronting the United States inspired an extraordinary response from its neighbors of the same continent.⁶

It remains, however, to observe that the law of nations does not contemplate that a State not at war shall fix or alter its obligations as a neutral according to its interest in the success of one belligerent rather than another. When a non-participant undertakes to do so, it must be normally deemed to accept responsibility for the harm which its action inflicts upon the State subjected to discrimination. The United States has vigorously advocated respect for this principle.⁷ It is not, however, invariably applicable. Elsewhere is noted an abnormal situation where the Government of the United States felt that it was not.⁸ Still, it needs to be constantly borne in mind that more than the sheer

§ 875. ¹ Naval War College, Int. Law Documents, 1917, 77.

² *Id.*, 162.

³ Official Bulletin, June 22, 1917, Vol. I, No. 37. It may be noted that this law preceded by almost four months the Brazilian declaration of war against Germany, which occurred on Oct. 26, 1917. *Id.*, Oct. 29, 1917, Vol. I, No. 145.

⁴ Naval War College, Int. Law Documents, 1917, 249. See, also, Official Bulletin, June 20, 1917, Vol. I, No. 35, where the text differs slightly in phraseology from that published by the Naval War College.

⁵ Official Bulletin, Aug. 23, 1917, Vol. I, No. 89.

On Oct. 6, 1917, the Salvadorean Government informed the Department of State that "Salvador considers herself associated with the United States by reason of her sentiments in favor of Pan-Americanism, in the world struggle." (Naval War College, Int. Law Documents, 1917, 210.)

⁶ All of the American States mentioned in the text ultimately became belligerents in World War I.

⁷ See Requisite Measure of Exertion; The Rules of the Treaty of Washington, *infra*, § 882.

⁸ See The Transfer of Destroyers to Britain in 1940, Kindred Acts, *supra*, § 83C; also *supra*, § 848A.

desire or interest of a neutral State is necessary in order to rid it of the normal burdens which the law imposes upon it, and that not until the policy of taking sides and of participating in an existing war manifests the exercise of a legal right fairly to be identified as such, is there to be found a juridical basis for the claim of freedom from the obligation to heed the several restrictions that grow out of the law of neutrality.

When the people and government of a neutral State strongly favor the cause of a particular belligerent, the neutral is tempted to strain every effort which the law of nations does not positively forbid in order to assist that cause. Under such circumstances the neutral becomes, moreover, inclined to minimize in its own thinking, the extent of obligations which that law imposes upon it, and to claim a latitude that obscures the significance of traditional injunctions. A vigorous taking of sides may even cause opinion within the neutral State to doubt the wisdom of deference for well-accepted legal duties, and to encourage a law-defying course as long as it does not seem to be calculated to drag the nation into the war as a belligerent. Such an experiment may in fact be made. The next participatory step may be intervention; and intervention may be the precursor of war. It is equally true, however, that the steps taken by a non-belligerent State which constitute intervention and even lead it to the verge of war may be inspired by decent motives and mark a participation in the conflict that finds ample justification, and may even reveal a commendable effort to overcome lawlessness and to uphold the cause of international law. Whether the action of the non-belligerent State is to be so regarded must, in every instance be tested by those standards of conduct which the international society has accepted, and which happily offer unfailing means of ascertaining the character of the conduct on which the non-belligerent yet participating State has embarked. Realization of the fact that under certain conditions non-belligerent States may be disposed, for good or bad reasons, to ignore what the law of neutrality may normally exact is perhaps of greater importance to the members of the international society than close appraisal of what the law of neutrality as such permits or forbids a neutral to do with respect to the conflict that is waged around it.⁹

It should be borne in mind that according to the Neutrality Act of November 4, 1939, its provisions were not to be applicable (except for section 12) "to any American republic engaged in war against a non-American State or States, provided the American republic is not coöperating with a non-American State or States in such war."¹⁰ The same idea was sought to be reflected in the Neutrality Act of May 1, 1937.¹¹ As the Department of State indicated in a

⁹ In a word, the mental reaction of neutral or non-participating States to the objectives, successes, and methods of belligerent States is bound to be decisive of the conclusion of the former as to whether non-participation in the conflict is necessary or feasible. The international society needs, therefore, to learn what effects upon the neutral mind particular belligerent acts or series of acts are likely to produce; and the relevant law must, in the course of its evolution, take full cognizance of them.

¹⁰ 54 Stat. 4, 8.

¹¹ 50 Stat. 124.

See in this connection C. H. McLaughlin, "Legislative Neutrality in the United States," *Minn. Law Rev.*, 1938, XXII, 603, 625-636.

memorandum of July 1, 1941, addressed to the Government of Uruguay, "there was incorporated in the Neutrality Act of 1939 a provision excepting, subject to certain conditions not here important, American States from the operation of the act when engaged in war against a non-American State or States."¹² In that instrument, the Department appeared to acquiesce in the Uruguayan proposal that the American Republics should not treat as a belligerent any American country which, in defense of its rights might find itself in a state of war with a non-American State. This amounted to a definite claim that the law of neutrality was not applicable in the situation to which reference was made on the ground that the defensive needs of the inter-American community justified their common participation to the extent noted in an inter-continental conflict.¹³

v

Enforcement of Neutral Duties. Some Aspects of American Procedure

(1)

§ 876. **Neutrality Proclamations.** While a neutral State cannot alter or lessen its duties as such towards the belligerents,¹ it is free to devise and apply its own methods in performing those obligations which the law of nations has imposed upon it. In one sense, therefore, the procedure adopted is a matter of domestic rather than of international concern. Inasmuch, however, as the task of enforcing neutral duties is of immediate importance to the parties to the conflict, the processes whereby the neutral endeavors to fulfill its obligations possess more than local significance.

A neutral State may find it expedient if not necessary to exert its power through the several branches of its government. In the United States the task engages the attention of the executive, legislative and judicial departments. Upon the outbreak of war, the executive issues a so-called neutrality proclamation addressed primarily to persons "residing or being within the territory or jurisdiction of the United States." By this means he endeavors to minimize the danger of the commission of acts which, unless retarded, may either expose the Government to the charge of neglect of its acknowledged duties as a neutral, or render their performance more burdensome. To that end the proclamation calls attention (a) to the several acts which the local statutory law prohibits; (b) to the decision of the executive as to the extent and nature of the privileges to be accorded belligerent ships of war within American waters; and (c) to the requirements of the law of nations as well as of the statutes and treaties of the United States, that no person within its territory and jurisdiction "shall take part, directly or indirectly," in the war. The individuals concerned are enjoined,

¹² Dept. of State Bulletin, July 5, 1941, 8.

¹³ See *supra*, § 83C; also *supra*, § 97A.

§ 876. ¹ Case of the United States, Geneva Arbitration, Papers Relating to the Treaty of Washington, I, 47; C. G. Fenwick, *Neutrality Laws of the United States*, 13; Report of Mr. Fish, Secy. of State, to the President, July 14, 1870, S. Ex. Doc. 112, 41 Cong., 2 Sess., Moore, Dig., VII, 1015.

moreover, to commit therein no act contrary to the law whether national or international. A warning is appended as to the impropriety of certain unneutral services on the high seas, and of the risks and penalties to be anticipated in case of capture. American citizens and others claiming the protection of the Government, "who may misconduct themselves in the premises," are informed that they can in no wise obtain any protection from the United States "against the consequences of their misconduct."²

The injunctions set forth by President Roosevelt in his general neutrality proclamation of September 5, 1939, in pursuance of the existing statutory law, announced with fullness and precision what was demanded of persons and ships within American territory, embracing belligerent vessels of war that might enter or be within American waters.³ It should be noted that on that date, which was shortly after the outbreak of the European war, the President issued two proclamations relating to the neutrality of the United States. It was officially announced that the "general neutrality proclamation" which had been issued first, had to do with "our activities under the rules and procedure of international law and those of our domestic statutes in harmony therewith," that this proclamation "would have been made according to customary usage" even if the Neutrality Act of May 1, 1937, had not been enacted; and that it was "in general conformity with neutrality proclamations issued by the United States during previous international conflicts." It was added that the other proclamation was based upon the Neutrality Act of May 1, 1937.⁴

According to the Neutrality Act approved November 4, 1939, whenever the President, or the Congress by concurrent resolution, should find that there

² See, for example, President Wilson, Neutrality Proclamation of May 24, 1915, American White Book, European War, II, 15. This proclamation was substantially a reproduction of that by President Roosevelt of Feb. 11, 1904, For. Rel. 1904, 32, which substantially reproduced the neutrality proclamations by President Grant of Aug. 2, and Oct. 8, 1870. For. Rel. 1870, 45 and 48, Moore, Dig., VII, 1007.

See President Washington's Neutrality Proclamation of April 22, 1793, Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 1002.

In his neutrality proclamation of April 22, 1793, President Washington, adverting to the duty and interest of the United States in the adoption and pursuit of a conduct friendly and impartial towards the belligerent powers, made declaration of the disposition of the United States to observe such conduct. He therefore exhorted and warned his countrymen "carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition." (Am. State Pap., For. Rel. I, 140.)

See compilation of neutrality proclamations and regulations of the United States and other neutral countries, with notes, contained in Naval War College, Int. Law Topics, 1916.

See also British Proclamation, for the observance of Neutrality in the War between France and Prussia, Aug. 9, 1870, Brit. and For. St. Pap., LX, 437, 442-443.

³ Dept. of State Bulletin, Sept. 9, 1939, 203.

⁴ Dept. of State Bulletin, Sept. 9, 1939, 203.

For the text of the general proclamation see *id.*, 203. For the text of the proclamation pursuant to the Neutrality Act of May 1, 1937, see *id.*, 208.

There were omitted from the general neutrality proclamation the provisions set forth in President Wilson's neutrality proclamation of May 24, 1915, announcing that: "while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war,' yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf." (American White Book, European War, II, 17.)

existed a state of war between foreign States, and that it was necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President was to issue a proclamation naming the States involved; and he was, from time to time, by proclamation, to name other States as and when they might become involved in the war.⁵ The issuance of such a proclamation served automatically to render unlawful various forms of conduct pertaining to the uses, destinations and arming of American ships, the conduct of American citizens, the exportation of particular articles, financial transactions, and the solicitation and collection of funds and contributions.⁶ On November 4, 1939, in pursuance of the Act, the President proclaimed the existence of a state of war between Germany and France; Poland; and the United Kingdom, India, Australia, Canada, New Zealand and the Union of South Africa.⁷

No legal duty rests upon a neutral State to proclaim formally through a particular agency its neutrality with reference to an existing war. The President of the United States did not issue a neutrality proclamation during the war between Bolivia and Paraguay when those countries were engaged in their conflict in the Chaco.⁸

(2)

§ 877. Legislative Action. In his annual message of December 3, 1793, President Washington, adverting to the difficulty experienced by the executive in enforcing the duties of the United States as a neutral, recommended the enactment of laws which would simplify the task. To that end he urged that the courts be clothed with appropriate jurisdiction to apply the proper remedies which, he declared, would be well administered by the judiciary "who possess

⁵ Section 1 (b), 54 Stat. 4.

According to Section 1 (b) whenever the state of war which should have caused the President to issue any proclamation under the authority of the Section might cease to exist with respect to any State named in such proclamation, he was to revoke such proclamation with respect to such State.

Cf. provisions of the Neutrality Act approved May 1, 1937, 50 Stat. 121.

⁶ See Aspects of The Neutrality Act of 1939, *supra*, § 868A.

⁷ Dept. of State Bulletin, Nov. 4, 1939, 453.

See also Proclamations and Regulations Concerning Neutrality of the United States in the War between Germany and Norway, April 25, 1940, Dept. of State Bulletin, April 27, 1940, 429; Proclamations and Regulations Concerning Neutrality of the United States in the War between Germany and Belgium, Luxemburg, and the Netherlands, May 11, 1940, Dept. of State Bulletin, May 11, 1940, 489; Proclamations and Regulations Concerning Neutrality of the United States in the War between Italy and France and the United Kingdom, June 10, 1940, Dept. of State Bulletin, June 15, 1940, 639; Proclamations and Regulations Concerning Neutrality of the United States in the War between Italy and Greece, Dept. of State Bulletin, Nov. 16, 1940, 426.

⁸ See, however, the President's proclamation of May 28, 1934, in pursuance of a Joint Resolution of the Congress of that date, serving to render unlawful save under specified limitations and exceptions the sale of any arms or munitions of war in any place in the United States to the countries engaged in the armed conflict in the Chaco. (48 Stat. 1744, No. 2087.)

See in this connection *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304.

See President Roosevelt's neutrality proclamation of Oct. 5, 1935 (No. 2141), pursuant to a Joint Resolution of the Congress, approved Aug. 31, 1935 (49 Stat. 1081), in consequence of the war between Ethiopia and Italy, Dept. of State Press Releases, No. 314, Oct. 5, 1935, *Am. J.*, XXX, *Official Documents*, 63. See also statement by the President, Oct. 5, 1935, Dept. of State Press Releases, No. 314, Oct. 5, 1935.

a long established course of investigation, effectual process, and officers in the habit of executing it." He added that if the executive was to be the "resort" in certain cases, it was to be hoped that he would be authorized by law to have facts ascertained by the courts, when, for his own information, he should request it.¹ In response, Congress, by an Act of June 5, 1794,² made the notable beginning of a series of enactments which took permanent form and became known as the neutrality laws of the United States.³

The provisions of certain of these laws are designed for application not merely when, by reason of the existence of war between belligerents recognized as such, the United States declares its neutrality, but also whenever the acts forbidden by statute are directed against a State, or country, or people with which the United States is at peace.⁴ It thus frequently happens that the neutrality laws are invoked and applied under circumstances when the United States, not having technically attained the status of a neutral, has cause, nevertheless, to prosecute or prevent the activities of persons engaged in uprisings against a friendly State.⁵

The existing statutory law purports both to forbid and to prevent the commission of specified acts. Provision is made for the punishment of those who

§ 877. ¹ Am. State Pap., For. Rel., I, 21. See also President Washington, Annual address to Congress, Nov. 6, 1792, Richardson's Messages, I, 128, Moore, Dig., VII, 1003.

See case of Gideon Henfield, Wharton, State Trials, 49. Concerning the influence of this case upon the executive request for legislation, see C. G. Fenwick, Neutrality Laws of the United States, 24; Syngman Rhee, Neutrality as Influenced by the United States, 29.

² 1 Stat. 381.

"The Act of 1794 was to remain in force for a limited time only. It was extended by the Act of March 2, 1797, and by the Act of April 24, 1800, was continued in force indefinitely. [1 Stat. 497; 2 *id.*, 54.]" (Moore, Dig., VII, 1010.)

"The act of June 5, 1794, declared to be crimes practically all (if not every one) of the acts which the chief executive had forbidden. The fact that it did not make illegal any acts other than those which the president had proscribed is further evidence of complete approval of the policy of the chief executive." (Charles S. Hyneman, *The First American Neutrality*, 155-156.)

³ The neutrality laws of the United States, in so far as they were embodied in the Act of April 20, 1818, 3 Stat. 447-450, were set forth in Rev. Stat. §§ 5281-5291, and were incorporated in the Criminal Code of March 4, 1909, chap. 321, §§ 9-18, 35 Stat. 1089-1091, and which specifically repealed the sections of the Revised Statutes. 35 Stat. 1153, § 341.

The Act of June 15, 1917, chap. 30, 40 Stat. 221, to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes, contained in title V substantial provisions for the enforcement of neutrality. These were partly amendatory of, and largely supplementary to the existing code. § 11 of this title repealed the joint resolution approved March 4, 1915, to empower the President better to enforce and maintain the neutrality of the United States, 38 Stat. 1226.

By an Act of May 7, 1917, 40 Stat. 39, § 10, 35 Stat. 1089, was amended, with reference, however, to its operation when the United States is itself at war.

See, also, Act of March 10, 1838, which by its terms was to continue in force for the period of two years, and no longer. 5 Stat. 212.

See, generally, 18 U.S.C.A. §§ 21-39.

⁴ The Lucy H., 235 Fed. 610, 615. See, also, *The Question of Belligerency*, *infra*, §§ 884-885.

It should be observed, however, that the first four sections of title V of the Act of June 15, 1917, to enforce neutrality, are applicable solely "during a war in which the United States is a neutral nation."

⁵ Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador, March 8, 1912, For. Rel. 1912, 740.

It should be noted that sections 1, 2, 3, 6 and 7 of the Neutrality Act of May 1, 1937, 50 Stat. 121, caused the prohibition of various forms of American sustenance to be applicable under certain conditions in situations when a civil strife existed in a foreign country. See *The Question of Belligerency*, *infra*, § 884.

defy the prohibitions. The task of ascertaining guilt and of imposing penalties (which are defined and limited) is committed to the courts. The work of prevention is lodged with the executive, whose mode of procedure and whose agencies of assistance are, with respect to certain matters, defined; and is also in part confided to the courts. It may be said that the enforcement of the statutory law is entrusted to both the executive and judicial departments.

The expression of the legislative will exemplified in the so-called Neutrality Act of May 1, 1937,⁶ revealed an attempt on the part of the Congress to devise means whereby the United States might better safeguard itself against the danger of being drawn into wars engaging other countries.⁷ The enactment provided for the assertion of rights to be exercised by the nation when a neutral, rather than for the performance of obligations acknowledged to rest upon it when possessed of such a status.⁸ The act was a significant exercise of legislative power contemplating assertions of control over persons and things within the national domain which, if left uncontrolled, might in various ways make it more difficult for the United States to remain a neutral in the course of wars between other States.⁹ The national will as exemplified in the Neutrality Act of November 4, 1939, enacted in the course of the European War, when American sentiment strongly favored the cause of particular belligerents, smoothed the way for them (and theoretically for their enemies as well) to obtain and withdraw from American soil forms of military sustenance which the existing embargo, laid in consequence of the earlier Act, placed beyond their reach;¹⁰ and it also, as is noted elsewhere, imposed restraints designed to prevent American purveyors from becoming exporters, American vessels from becoming vehicles of transportation, and American citizens and vessels from proceeding to particular areas or places.¹¹

(3)

§ 878. Executive Action. Under the existing law the President is empowered to employ such part of the land or naval forces of the United States, or of the militia thereof, as he may deem necessary to compel any foreign vessel to depart from the United States or any of its possessions, "in all cases, in which, by the law of nations or the treaties of the United States, it ought not to remain, and

⁶ Joint Resolution approved May 1, 1937, 50 Stat. 121.

⁷ The act dealt with the exportation of arms, ammunition, and implements of war; the exportation of other articles and materials; financial transactions; a national munitions control board; the prohibition of American vessels from carrying arms to belligerent States; the use of American ports as bases of supply; the treatment of submarines and armed merchant vessels; travel on vessels of belligerent States; the prohibition of arming American merchant vessels; regulations, penalties, definitions and kindred matters.

⁸ The act was doubtless also designed to facilitate the fulfillment by the United States of obligations resting upon it as a neutral under the law of nations.

See *The Exportation of Munitions of War*, *supra*, § 868.

⁹ The provisions of the Act are set forth in U.S.C.A. in Title 22, Chap. 5, concerning "Preservation of Friendly Foreign Relations Generally," and are not embraced in Title 18, Chap. 2, concerning "Offenses Against Neutrality."

¹⁰ 54 Stat. 4.

¹¹ See Aspects of The Neutrality Act of 1939, *supra*, § 868A.

to detain or prevent any foreign vessel from so departing in all cases in which, by the law of nations or the treaties of the United States, it is not entitled to depart.”¹

During a war in which the United States is a neutral nation, the President, or any person authorized by him, may withhold clearance from any vessel required by law to secure clearance before departure from port or from the jurisdiction of the United States, or, by service of formal notice upon the owner, master or person in command or having charge of any domestic vessel not required by law to secure clearance before so departing, may forbid its departure from port or from the jurisdiction of the United States, “whenever there is reasonable cause to believe that any such vessel, domestic or foreign, whether requiring clearance or not, is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations.” Thereupon it is declared to be unlawful for such vessel to depart.²

Again, during a war in which the United States is a neutral, the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdic-

§ 878.¹ § 10, Title V, of Act of June 15, 1917, chap. 30, 40 Stat. 223, 18 U.S.C.A. § 27. For the text of Section 10 of the Neutrality Act of November 4, 1939, extending the scope of these provisions, see *supra*, § 855, p. 37, footnote 3.

² § 1, Title V, Act of June 15, 1917, chap. 30, 40 Stat. 221; 18 U.S.C.A. § 31.

The following somewhat loosely drawn provisions appear in § 14, 35 Stat. 1090, “In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.” (18 U.S.C.A. § 26.)

tion of the United States, or, having left that jurisdiction, upon the high seas.³

The statutory law imposes a special duty upon collectors of customs, who may be regarded in this connection as an arm of the executive department. It is declared that the several collectors shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, or any place subject to the jurisdiction thereof, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens or property of any foreign prince or State, or of any colony, district or people with whom the United States is at peace, until the decision of the President is had thereon, or until the owner gives specified bond and security that the vessel shall not be so employed.⁴

Under the existing law, in the event of a war in which the United States is a neutral, every master or person having charge or command of any vessel, domestic or foreign, whether requiring clearance or not, before the departure of such vessel from port, is obliged to deliver to the appropriate collector of customs a statement duly verified by oath, that the cargo or any part thereof is or is not to be delivered to other vessels in port or to be transshipped on the high seas, and, if it is to be so delivered or transshipped, to make a specified statement as to the articles concerned and the name of the person, corporation, vessel or government to whom delivery or transshipment is to be made; and the owners, shippers or consignors of the cargo of such vessel are obliged in the same manner and under the same conditions to deliver to the collector like statements under oath as to the cargo.⁵ If it appears that the vessel is not entitled to clearance, or if there is reasonable cause to believe that the foregoing statements are false, the collector of customs for the district in which the vessel is located may, "subject to review by the Secretary of Commerce," refuse clearance to any vessel, domestic or foreign, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required, forbid its departure from the port or jurisdiction of the United States. Thereupon it becomes unlawful for the vessel to depart.⁶

³ § 2, Title V, Act of June 15, 1917, chap. 30, 40 Stat. 221; 18 U.S.C.A. § 32.

See, also, § 16, 35 Stat. 1091, 18 U.S.C.A. § 28, respecting the exaction of bonds from armed vessels sailing out of the ports of or under the jurisdiction of the United States.

⁴ § 17, 35 Stat. 1091; 18 U.S.C.A. § 29.

See *Hendricks v. Gonzalez*, 67 Fed. 351, where a collector of customs was not deemed to be justified in refusing clearance. See also Mr. Bayard, Secy. of State, to the Acting Secy. of the Treasury, July 3, 1886, 160 MS. Dom. Let. 639, Moore, Dig., VII, 1034.

⁵ § 4, Title V, of the Act of June 15, 1917, chap. 30, 40 Stat. 222; 18 U.S.C.A. § 34. It should be noted that this section makes requirements additional to the facts required by §§ 4197, 4198 and 4200, Rev. Stat., to be set out in the masters' and shippers' manifests before clearance will be issued to vessels bound to foreign ports, each of which sections is declared to be continued in full force and effect.

⁶ § 5, Title V, of Act of June 15, 1917, chap. 30, 40 Stat. 222, 18 U.S.C.A. § 35.

According to § 6, of the same title, whoever in violation of any of its provisions "shall take, or attempt or conspire to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than \$10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States." (18 U.S.C.A. § 36.)

When information with reference to alleged violations of the neutrality laws of the United States is furnished the Department of State by foreign governments through their diplomatic representatives at Washington, the Department conceives it to be its duty, generally speaking, merely to act as a transmitting medium in communicating the information to the appropriate authorities for such action as may by them be deemed advisable.⁷ It has been declared that when it is charged that such laws have been or are being violated, the Department is disposed to encourage the officials of the foreign government possessed of the necessary information to cooperate directly with the appropriate United States District Attorney, with a view to instituting criminal proceedings by complaint under oath.⁸

It may be observed that in the case of the *Appam*, where a belligerent government protested against the exercise of jurisdiction over the vessel by a Federal court, and urged that the Attorney General be asked to take steps to secure the prompt dismissal of the libel thereof,⁹ the Secretary of State saw fit to request that the appropriate District Attorney appear in the case as an *amicus curiae*, and present to the court a copy of the note of complaint.¹⁰

The terms of the statutory law of the United States, as exemplified by provisions of the Neutrality Act of 1939, which supplanted the Act of 1937, imposed upon the President the burden, and also clothed him with authority, designed to make him an active and decisive instrumentality through which the nation may assert its rights and fulfill its duties when a state of war comes into being between foreign countries.¹¹ Elsewhere is noted the part which neutrality proclamations play in the exercise of the executive function, as well as the conditions under which the issuance of them becomes mandatory, together with consequences that flow from such issuance.¹² It will be found that the Chief Executive is utilized as the means by which the position of the United States as a neutral is to be announced, and by which its course as a neutral is to be directed.

According to § 1 of the Act of March 28, 1940, 54 Stat. 79, amendatory of the Act of June 15, 1917, as amended, the violator was to be punished by imprisonment for not more than ten years, and might, in the discretion of the court, be fined not more than \$10,000.00.

⁷ The author is indebted to a communication from the late Honorable A. A. Adeë, then Second Assistant Secretary of State, Jan. 30, 1918, for the statement in the text.

See For. Rel. 1887, 1026-1029, as basis of statement in Moore, Dig., VII, 1022. See, also, Moore, Dig., VII, 1025-1026, with respect to the success of preventive measures frustrating a hostile expedition designed against Honduras in 1899, For. Rel. 1899, 364-371.

Concerning the early practice of the President in calling upon the governors of States to aid in enforcing neutrality laws, see Moore, Dig., VII, 1018-1019, and documents there cited.

⁸ See Mr. Bayard, Secy. of State, to Mr. Preston, Minister of Haiti, Oct. 29, 1888, For. Rel. 1888, I, 990, Moore, Dig., VII, 1023; Mr. Adeë, Acting Secy. of State, to Mr. Bolet Peraza, Venezuelan Minister, Sept. 12, 1892, For. Rel. 1892, 640-641, Moore, Dig., VII, 1023. Compare Mr. Fish, Secy. of State, to Mr. Lopez Roberts, Spanish Minister, Dec. 28, 1870, For. Rel. 1871, 785, 787, Moore, Dig., VII, 1019.

⁹ Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secy. of State, Feb. 22, 1916, For. Rel. 1916, Supp., 728.

¹⁰ See Mr. Lansing, Secy. of State, to Count von Bernstorff, March 2, 1916, *id.*, 729, 731. See, also, *The Appam*, *supra*, § 862.

Compare Mr. Adeë, Acting Secy. of State, to Mr. Bolet Peraza, Venezuelan Minister, Sept. 12, 1892, For. Rel. 1892, 640-641, Moore, Dig., VII, 1023.

¹¹ See Act of May 1, 1937, 50 Stat. 121; Act of Nov. 4, 1939, 54 Stat. 4. See in this connection Aspects of The Neutrality Act of 1939, *supra*, § 868A.

¹² See Neutrality Proclamations, *supra*, § 876.

(4)

§ 879. **Judicial Action.** The statutory law expressly declares that the district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.¹ The district courts exercise jurisdiction in cases where the statute provides a punishment if specified acts are committed.²

As early as February, 1794, the Supreme Court of the United States declared through Chief Justice Jay, that every district court in the United States possesses all the powers of a court of admiralty, "whether considered as an instance or as a prize court."³ The practice has been established from early days for such courts to exercise jurisdiction to grant restitution in cases not only where prizes have been captured in American waters, but also where capture has been made on the high seas by a ship illegally fitted out or augmented within American territory.⁴ The theory has been that while no statute may have expressly conferred jurisdiction or provided for restitution by judicial process, the violation of the law of nations by the initial acts in neutral territory, together with the American statutory law denouncing such acts as illegal, serves to make it the function of the courts to vindicate the sovereignty of the nation. In so doing the judges have laid stress upon the law of nations in justification of restitution, as well as upon the policy of the United States expressed in the statutory law.⁵

§ 879. ¹ § 14, 35 Stat. 1090; 18 U.S.C.A. § 26.

For cases illustrating the application of the statute, see *id.*, p. 55.

² § 340, 35 Stat. 1153; 18 U.S.C.A. § 546.

³ *Glass v. The Sloop Betsey*, 3 Dall. 6, 16.

⁴ *The Nancy, Bee*, 73; *The Betty Cathcart, Bee*, 292; *Talbot v. Janson*, 3 Dall. 133; *The Brig Alerta*, 9 Cranch, 359; *L'Invincible*, 1 Wheat. 238, 258; *The Estrella*, 4 Wheat. 298; *La Amistad de Rues*, 5 Wheat. 385; *La Concepcion*, 6 Wheat. 235; *The Santissima Trinidad*, 1 Brock. 478; *The Santissima Trinidad*, 7 Wheat. 283; *The Gran Para*, 7 Wheat. 471; *The Arrogante Barcelones*, 7 Wheat. 496.

In the case of *La Nereyda*, 8 Wheat. 108, 169, it was said: "But where, as in the present case, the capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation, neutral to them, has authority to impugn, unless for the purpose of vindicating its own violated neutrality."

In the case of *La Amistad de Rues*, 5 Wheat. 385, 389, Mr. Justice Story declared that "this court have never yet been understood to carry their jurisdiction, in cases of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses, during the pendency of the judicial proceedings. We are now called upon to give general damages for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages, to the same extent as in the ordinary cases of marine torts. We entirely disclaim any right to inflict such damages; and consider it no part of the duty of a neutral nation, to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents."

Concerning the very early practice of restitution by the Executive, see President Washington, Annual Message, Dec. 3, 1793, Am. State Pap., For. Rel. I, 21; also Mr. Jefferson, Secy. of State, to the British Minister, Nov. 14, 1793, 5 MS. Dom. Let. 346, Moore, Dig., VII, 1037.

⁵ See, for example, *Talbot v. Janson*, 3 Dall. 133, 161; *The Brig Alerta*, 9 Cranch, 359, 365; *The Estrella*, 4 Wheat. 298, 310-311; *La Amistad de Rues*, 5 Wheat. 385, 389, where Mr. Justice Story declared that "the doctrine heretofore asserted in this court is, that whenever a capture is made by any belligerent, in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done, upon the footing of the general law of nations; and the doctrine is fully recognized by the act of Congress of 1794."

Much more recently the Supreme Court of the United States has sanctioned the exercise of jurisdiction by a district court to grant restitution in the case of a prize lawfully captured by a foreign belligerent on the high seas and navigated to an American neutral port for an indefinite stay therein.⁶

It may be observed that the right of jurisdiction is not regarded as lost by reason of the obtaining of a commission from a belligerent by a ship which previously had been fitted out in violation of the neutrality laws of the United States, and after being commissioned, captured a prize which was brought into American waters.⁷

The numerous provisions of the statutory law, such as that set forth in section 15 of the Neutrality Act of 1939,⁸ imposing a penalty upon one who is convicted as a violator of the law, illustrate the effort and expectation of the Congress to utilize the judicial branch of the Government as a normal instrumentality for the enforcement of relevant legislative enactments pertaining to the neutrality of the United States.

(5)

§ 880. **Extraterritorial Pursuit.** When a neutral has not failed in its duty with respect to the prevention of departure from its territory of vessels of any kind or under any flag, the law of nations does not impose upon such a State an obligation thereafter to endeavor, by extraterritorial pursuit, to check hostile operations or unneutral services in which such vessels may engage.¹ The United States has, under circumstances indicating no previous neglect on its part, disclaimed responsibility for the conduct of American merchantmen which, in foreign neutral waters, have been fitted out for hostile purposes against a belligerent.²

⁶ The Steamship Appam, 243 U. S. 124, 156; also The Appam, 234 Fed. 389, 398-399. See The Appam, *supra*, § 862.

⁷ The Gran Para, 7 Wheat. 471, 487; The Bello Corrunes, 6 Wheat. 152.

See, also, Opinion of Mr. Wirt, Atty. Gen., 1 Ops. Attys. Gen., 231, Moore, Dig., VII, 1042; Mr. Adams, Secy. of State, to Mr. Thompson, Secy. of the Navy, May 20, 1819, 17 MS. Dom. Let. 304, Moore, Dig., VII, 1042.

It may be noted that in the Geneva Arbitration it was contended by the United States in its Case that under the first rule of the Treaty of Washington, the subsequent commissioning by a belligerent of a ship especially adapted for hostile operations within a neutral port, imposed a duty upon the neutral to seize and detain the vessel upon its return to waters within the control of the neutral. In its award, the Tribunal expressed the opinion that in such case the neutral would have the right to effect detention; but it did not intimate that the neutral was obliged to make detention. See Report of Mr. Davis, Agent of the United States, in the Geneva Arbitration, Papers Relating to the Treaty of Washington, IV, 10-11, Moore, Dig., VII, 1043-1044.

See, also, Moore Arbitrations, I, 576-578, 612; also *id.*, IV, 4082-4097. For the text of the Geneva Award in this connection see *id.*, I, 655, Papers Relating to the Treaty of Washington, IV, 50.

⁸ 54 Stat. 11.

§ 880. ¹ See statement in Moore, Dig., VII, 1045, adverting to the views of Mr. Justice Story in *La Amistad de Rues*, 5 Wheat. 385, 390, and in *The Marianna Flora*, 11 Wheat. 142, and to the views of Sir W. Harcourt in *Historicus*, 158.

² See Mr. Seward, Secy. of State, to Mr. Sullivan, Minister to Colombia, No. 17, Sept. 27, 1867, MS. Instructions, Colombia, XVI, 238, Moore, Dig., VII, 1046; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, No. 16, Oct. 13, 1869, MS. Instructions, Haiti, I, 158, Moore, Dig., VII, 1047; Mr. Bayard, Secy. of State, to Mr. McGarr, Consul at Guayaquil, No. 20, July 14, 1886, 118 MS. Instructions, Consuls, 399, Moore, Dig., VII, 1047; Same to Mr. Hall,

In case a neutral is neglectful of its duty to prevent the departure of vessels from its territory, the obligation to make reparation to an aggrieved belligerent depends upon the injury, if any, actually sustained by it in consequence of the delinquency. To prevent the accruing of damages, the neutral may in fact undertake the pursuit and arrest on the high sea of vessels which it wrongfully permitted to depart. It may be greatly doubted, however, whether any special obligation rests upon the neutral to take such steps. The question of law involves rather the extent of the right of the neutral to pursue and arrest the ship. It is believed that the nature of the claim of the territorial sovereign whose laws have been violated is such as to remove just cause of complaint from any foreign State under whose flag the fleeing vessel sails, when, at least, pursuit is begun either before the ship is outside of the territorial waters of the neutral, or within a reasonably short interval after departure therefrom, and when the vessel is not a ship of war.³

(6)

§ 881. **Duties Resulting from Extraterritorial Jurisdiction.** A neutral power exercising extraterritorial jurisdiction seems to be burdened with a duty to exert a measure of preventive control over its nationals within the country where such privileges are enjoyed. Whether the neutrality laws of the State possessed of such rights of jurisdiction are applicable to the conduct of any individuals, such as its own nationals, within foreign territory, is obviously a matter of domestic law, and one unrelated to any general duties of prevention which may rest upon the neutral as such.

If, within the so-called extraterritorial country, a national of the neutral State is not subject to prosecution or preventive control save by virtue of the laws of his own State as enforced by its tribunals, that country finds itself in a serious predicament if the neutral State remain an indifferent spectator of the unneutral conduct of its nationals therein. Again, if the extraterritorial country is a belligerent, its efforts to prevent the commission of acts hostile to itself by neutral nationals must be seriously impaired if their own State applies no measures of prevention.¹

It is to be observed that the Act of Congress, conferring judicial authority upon American officers in certain countries where extraterritorial privileges of jurisdiction are enjoyed, grants jurisdiction to the Minister of the United States in capital cases of insurrection against the local government by citizens of the

Minister to Central America, No. 325, Feb. 6, 1886, For. Rel. 1886, 51, Moore, Dig., VII, 1048.

See, also, Mr. Sherman, Secy. of State, to Mr. Merry, No. 66, March 25, 1898, MS. Instructions, Central America, XXI, 293, Moore, Dig., VII, 1049.

³ See Rights of Jurisdiction, The High Seas, Hot Pursuit, *supra*, § 236.

§ 881.¹ See, in this connection, comment in Moore, Dig., VII, 1051, on communication of Mr. Bayard, Secy. of State, to Mr. Young, Minister to China, No. 407, March 11, 1885, For. Rel. 1885, 160, in response to the inquiry whether the Minister should forbid American pilots to serve French warships in the existing war between France and China.

See, also, Mr. Frelinghuysen, Secy. of State, to Mr. Young, Minister to China, No. 382, Feb. 2, 1885, MS. Inst. China, III, 686, Moore, Dig., VII, 1051. Also Moore, Dig., VII, 1049-1050, and documents there cited, concerning the control exercised by the American Legation in Japan in 1868, over the ironclad ram *Stonewall*.

United States. The Minister is also empowered to issue all manner of writs, to prevent the citizens of the United States from enlisting in the military or naval service of the extraterritorial country "to make war upon any foreign power with whom the United States are at peace, or in the service of one portion of the people against any other portion of the same people." The Minister is also authorized to carry out his power by a resort to such forces belonging to the United States as may at the time be within his reach.² This enactment does not appear to contemplate preventive measures in respect to American citizens who, within the extraterritorial country, endeavor to participate in the war without entering the service of such country, and possibly by adherence within its domain to the cause of a belligerent. The neutrality proclamations of the President are commonly addressed to all persons within the jurisdiction of the United States, which might possibly embrace American citizens in extraterritorial countries.³ It is believed that a neutral State claiming privileges of jurisdiction should either endeavor to exert such control over its nationals in the extraterritorial country as would be imposed upon them if they were abiding within the territory of the former, or yield to that country the requisite jurisdiction to enable it to fulfill without embarrassment its own duties when a neutral, or to safeguard its rights when a belligerent.⁴

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The Requisite Measure of Exertion

(1)

§ 882. **The Rules of the Treaty of Washington.** "Due Diligence." In establishing a test of the extent of the endeavor which a neutral should make in the performance of its duties of prevention, it is necessary to preclude such a State from determining by its own local standards the scope of the efforts which it ought to put forth.¹

² Act of June 22, 1860, chap. 179, § 24, 12 Stat. 77, 22 U.S.C.A., § 166. See, in this connection, Mr. Olney, Secy. of State, to Moustapha Bey, Turkish Minister, Nov. 11, 1896, For. Rel. 1896, 926, 927, Moore, Dig., VII, 1052.

The same statute gives the Minister jurisdiction in cases "for offenses against the public peace amounting to felony under the laws of the United States."

³ See, for example, Neutrality Proclamation of President Wilson, May 24, 1915, American White Book, European War, II, 15, 17.

⁴ On Dec. 8, 1917, the author made inquiry of Dr. Koo, Chinese Minister at Washington, whether in the course of then existing war and before China had become a belligerent, neutral states had exerted control over their respective nationals in China in order to prevent them from committing unneutral acts. In response, Dr. Koo, in a communication of April 22, 1918, stated that he had ascertained from a friend in the Chinese Foreign Office that "citizens and subjects of neutral countries have not, as a result of the influence exerted by their respective consuls, committed on any occasion such unneutral acts as to cause a complaint from the representative of a belligerent."

§ 882.¹ In order to minimize the burdensome features of its duties, especially under circumstances when the sympathies of its people with one belligerent were so strong as to discourage and weaken restrictions calculated to impede its success, a neutral State might be disposed to set up for itself a standard wholly unresponsive to the essential demands of the law of nations. Declared Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister to the United States, Sept. 5, 1793: "We are bound by our treaties with three of the belligerent nations, by *all the means in our power*, to protect and defend their vessels and effects in our

The test laid down in the rules of the Treaty of Washington, and which purported to guide the arbitrators before whom was to be adjudicated the existing controversy between the United States and Great Britain, expressed an attempt to heed the conflicting equities of belligerent and neutral. It was there announced that a neutral government is bound to use "due diligence" to prevent certain specified acts.² In its award, the arbitrators declared that the diligence referred to in the rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents might be exposed, from a failure to fulfill the obligations of neutrality on their part.³ In applying this test to the treatment of the *Alabama*, it was declared that it clearly resulted from all the facts relative to the construction of the ship (then designated as number "290") at Liverpool, and its equipment and armament in the vicinity of Terceira, through the agency of vessels despatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the vessel, to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable. It was said that despite the violations of the neutrality of Great Britain committed by the ship, it was on several occasions freely admitted into British colonial ports, "instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found." The British Government could not, it was said, "justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."⁴ With respect to the *Florida*, it was said to result from all the facts relative to the construction of the ship (then

ports or waters, or on the seas near our shores, and to recover, and restore the same to the right owners, when taken from them. If all the means in our power are used, and fail in their effect, we are not bound by our treaties with those nations to make compensation.

"Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule, which, under this article, was to govern us with the other nations, and even to extend it to the captures made *on the high seas*, and brought into our ports, if done by vessels which had been armed within them.

"Having, for particular reasons, forbore to use *all the means in our power* for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th June, and *before the date of that letter*, yet, where the same forbearance had taken place, it was, and is his opinion, that compensation would be equally due." (Am. St. Pap., For. Rel., I, 174.)

² Malloy's Treaties, I, 703, Moore, Dig., VII, 1059.

³ Papers Relating to the Treaty of Washington, IV, 50, Moore, Dig., VII, 1060.

⁴ Papers Relating to the Treaty of Washington, IV, 51, Moore, Dig., VII, 1060-1061. Four of the arbitrators, for the reasons assigned in the award, and the fifth (Sir Alexander Cockburn) for reasons separately assigned by him, were of opinion that Great Britain had failed in the case of the *Alabama*, by omission, to fulfill the duties prescribed in the first and the third of the Rules.

According to the views of four of the arbitrators: "After the escape of the vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred."

known as the *Oreto*) in the port of Liverpool, and to its issue therefrom, which facts failed to induce the British authorities to resort to measures adequate to prevent the violation of the neutrality of that nation notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's Government had "failed to use due diligence to fulfill the duties of neutrality." With respect to the *Shenandoah*, it was said to result from all the facts connected with its stay at Melbourne, and especially on account of the augmentation of its force, that there was negligence on the part of the local authorities.⁶

The Tribunal doubtless correctly applied the test which the rules established. Liability was found thereunder to be attributable to Great Britain because it had not employed the power which it possessed to restrict the commission of acts the unneutral aspect of which was brought home to its attention. Under such circumstances, it is believed that the State failed to exercise the measure of prevention which the law of nations imposed upon it.⁶

Nevertheless, the term "due diligence" was open to objection as a test of the extent of the efforts to be put forth by a neutral, because it failed in itself to point out the basis of the distinction between sufficient and insufficient acts of prevention.⁷ The obscurity of a phrase that called for an authoritative explanation of the signification to be attached to it made clear the necessity of a simpler and more enlightening statement of the requisite diligence to be demanded of a neutral.

(2)

§ 883. **The Hague Convention of 1907.** The Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, rejected the expression "due diligence" because of its obscurity, and substituted the requirement that a neutral should be bound "to employ the means at its disposal" to fulfill certain specified duties of prevention.¹ The test thus laid down serves to free the neutral from the danger of being chargeable with the fulfillment of a burden to be deemed excessive because incapable of performance. On

⁶ Papers Relating to the Treaty of Washington, IV, 51-52, Moore, Dig., VII, 1061-1062. Four of the five arbitrators were of opinion that Great Britain had failed in the performance of its duties with respect to the *Florida*, while three of the arbitrators concluded that Great Britain had also failed in the performance of its duties respecting the *Shenandoah* after its entry into Hobson's Bay, and was, therefore, responsible for all acts committed by that vessel after departing from Melbourne.

⁶ See discussion of "due diligence" in the Case of the United States, Geneva Arbitration, Papers Relating to the Treaty of Washington, I, 64-67; Case of Great Britain, *id.*, I, 236-238; Counter Case of Great Britain, *id.*, II, 228-231; Argument of the United States, *id.*, III, 154-158; Argument of Great Britain, *id.*, III, 268-269; British Supplemental Argument by Sir Roundell Palmer, *id.*, III, 389-395; Supplemental American Argument by Mr. Evarts, *id.*, III, 480-481; Report of Mr. J. C. B. Davis, Agent of the United States, *id.*, IV, 8-9. See, also, Moore, Arbitrations, IV, 4057-4081.

⁷ See discussion in Moore, Dig., VII, 1067-1076, in which attention is called to the Rules adopted by the Institute of International Law in 1875, *Annuaire*, I, 139, the text of which, as well as an English translation, is appended. The text is also contained in J. B. Scott, *Resolutions*, 12-14.

§ 883. ¹ Art. VIII, Malloy's Treaties II, 2359. See also Report of Mr. Renault to the Hague Conference in behalf of the Third Commission, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 302.

the other hand, it does not encourage belief that a neutral may invoke inherent weaknesses in its local institutions and laws in justification of failure to respond to international obligations. It calls for a measure of exertion proportional to the power of the territorial sovereign to combat what, in the particular case, will otherwise amount to unneutral conduct. It assumes that the neutral possesses at all times either the requisite machinery of justice, or the power to establish it and set it in operation. At the present time the means at the disposal of a neutral State are usually such as to enable it to thwart such unneutral conduct as it is known to be obliged to endeavor to prevent. For that reason, the test expressed in the Hague Convention, without imposing an excessive burden, demands of a neutral a measure of exertion calculated to be effective as a practical deterrent of what it is agreed that such a State should make the attempt to thwart.²

It may be observed that the relevant article of the Harvard Draft Convention on Neutrality in Naval and Aerial War, "cast in general terms to express the general standard by which a neutral State's fulfillment of its neutral duties is to be measured," declares that "a neutral State shall use the means at its disposal to prevent within its territory the commission of any act the toleration of which would constitute a nonfulfillment of its neutral duty; the use of force for this purpose shall not be regarded as an unfriendly act."³

When evidence is submitted to a neutral government by a belligerent justifying suspicion that the latter is threatened with injury by persons within the control of the former, and by acts on their part which a neutral is obliged to endeavor to prevent, it behooves that government to go further than merely to present to a grand jury evidence of violation of local statutory laws, and to become itself the active investigator and prosecutor of persons charged with a violation thereof.⁴ In a word, the neutral should use the means at its disposal to effect prevention, when it has reason to believe that acts being committed will, unless thwarted, tend to subject the State to the charge of participation in unneutral conduct.⁵

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§ 884. **The Question of Belligerency.** The existence of war between two States suffices in itself to cause a third State not participating in the conflict to be deemed a neutral, and to be burdened as such with special and equal obligations towards both belligerents. A domestic uprising of whatsoever kind or magnitude is not, however, necessarily productive of such an effect. Until the foreign State recognizes the insurgents as belligerents, it does not technically

² See, in this connection, Mr. Bryan, Secy. of State, to Mr. Barclay, British Chargé d'Affaires at Washington, Aug. 19, 1914, For. Rel. 1914, Supp., 599; also Mr. Barclay to Mr. Bryan, Aug. 4, 1914, *id.*, 594.

³ Art. 6, *Am. J.*, XXXIII, *Supplement Section 2*, 176, and Comment, *id.*, 247.

⁴ Mr. Fish, Secy. of State, to Mr. Akerman, Atty. Gen., Nov. 20, 1871, 91 MS. Dom. Let. 356, Moore, Dig., VII, 1056.

⁵ See, in this connection, §§ 1-4, Title V, of the text of the Act of June 15, 1917, to enforce neutrality, 18 U.S.C.A., §§ 31-34.

become a neutral.¹ Thus, prior to that event, it may permit vessels of war to be fitted out within its territory and to depart therefrom as the instruments of the titular government for use against those who resist its authority.² As long as recognition is withheld, the outside State appears to find itself burdened with the obligation to make endeavor not to permit the insurgents to commit any acts within, or make any use of, its territory which that State could not properly tolerate were it a neutral in a war between foreign countries. The obligation of prevention in relation to a military expedition about to depart from the national domain is perhaps illustrative.³ In such situations the titular or *de jure* government of the State where the insurrection exists is identified with that State; and so it is that such government becomes the recipient of benefits accruing from obligations that are essentially inter-State and which, accordingly, the outside State owes to that other which is torn by insurrection.⁴ This circumstance, coupled with the fact that no obligation is acknowledged to rest upon the outside State to accord recognition to insurgents as belligerents at any particular time even after they have attained a degree of success that would justify their recognition,⁵ enables that State to continue, if it so desires, to make itself in fact the ally of the titular government by furnishing it with aid which is simultaneously withheld from its adversaries, and thus insidiously to

§ 884.¹ "Prior to such recognition, if the parent State does not recognize the existence of war, the foreign State is largely judge of its relations to and conduct toward the parties to the domestic conflict. There may be political, commercial, geographical, or other conditions which make it inexpedient for a foreign State to recognize an insurgent party as a belligerent." (Naval War College, Int. Law Situations, 1912, 13.)

See, also, Mr. Bayard, Secy. of State, to Mr. Valera, Spanish Minister, July 3, 1885, For. Rel. 1885, 776-777, Moore, Dig., VII, 1079.

Antoine Rougier, *Les Guerres Civiles et le Droit des Gens*, Paris, 1903; Paul Sadoul, *De la Guerre Civile en Droit des Gens*, Nancy, 1905; Carlos Wiesse, *Le Droit International Appliqué aux Guerres Civiles*, Lausanne, 1898.

² See, for example, Mr. Bayard, Secy. of State, to Mr. Gibbons, July 3, 1885, 156 MS. Dom. Let. 174, Moore, Dig., VII, 1079; opinion of Mr. Hoar, Atty. Gen., 13 Ops. Attys. Gen. 177, Moore, Dig., VII, 1079; Mr. Sherman, Secy. of State, to Mr. Rodriguez, Minister of Central America, April 20, 1897, For. Rel. 1897, 331, Naval War College, Int. Law Situations, 1904, 49.

³ Roy Emerson Curtis, "The Law of Hostile Military Expeditions as Applied by the United States," *Am. J.*, VIII, 1, 5.

"It is especially forbidden for any third Power to allow a hostile military expedition against an established and recognized government to be organized within its domain." (Art. 2, Section 3, Regulations of the Institute of International Law respecting the Relations of Foreign Governments to Insurrections, *Annuaire*, XVIII, 227, J. B. Scott, Resolutions, 157.)

⁴ According to Art. 1 of the Convention on Duties and Rights of States in the Event of Civil Strife, concluded at the Sixth International Conference of American States at Habana, Feb. 20, 1928: "The contracting States bind themselves to observe the following rules with regard to civil strife in another one of them: (1) To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife. (2) To disarm and intern every rebel force crossing their boundaries, the expenses of internment to be borne by the State where public order may have been disturbed. The arms found in the hands of the rebels may be seized and withdrawn by the government of the country granting asylum, to be returned, once the struggle has ended, to the State in civil strife. (3) To forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied. (4) To prevent that within their jurisdiction there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favor of the rebellion." (U. S. Treaty Vol. IV, 4727.)

⁵ See Recognition of New Governments, Some Conclusions, *supra*, § 45D.

pursue a course of intervention.⁶ Conversely, that State, by according recognition to the insurgents as belligerents, may strengthen their cause by transforming itself into a neutral with respect to the conflict. It is not here sought to discuss tests of the propriety of either course, but rather to accentuate the latitude enjoyed by the outside State in preventing a situation from coming into being that will automatically burden it with duties towards both contestants that are attributable to the law of neutrality as such. The larger question is, however, whether the outside State may in the performance of its obligations towards that other within whose domain insurrection prevails take sides in the contest and assist the cause of a favored participant. The solution must be sought in the law pertaining to intervention.

The statutory laws of the United States in relation to neutrality doubtless found their origin in attempts to solve problems that early confronted the nation as a neutral. For a long period, however, the application of numerous provisions thereof has not been limited to occasions when the United States attained such a status.⁷ In 1896, the Supreme Court of the United States declared that while the Act of April 20, 1818, was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, its operation was not necessarily dependent upon the existence of such state of belligerency.⁸ A statute may, however, in fact, be confined in its operation to occasions when the sovereign is a neutral. Certain provisions of the Act of June 15, 1917, for the enforcement of neutrality were made applicable solely in case a war exists "during which the United States is a neutral nation."⁹ Some provisions of the Neutrality Act of May 1, 1937, were likewise so limited in their applicability.¹⁰

A significant feature of the Neutrality Act of May 1, 1937, which is no longer in force, was the legislative endeavor to prohibit various transactions calculated to minister to the needs of a foreign country where a state of civil strife might exist.¹¹ It was the finding by the President that such a strife did exist in a foreign State and that it was of such magnitude or was being conducted under

⁶ See Westlake, 2 ed., I, 55-56; Hans Wehberg, "Civil War and International Law" (translated from the German by J. L. Mowat), *The World Crisis* (Symposium of Studies published on the occasion of the Tenth Anniversary of the Graduate Institute of International Studies), London, 1938, 160, 169-170.

⁷ See *Wiborg v. United States*, 163 U. S. 632.

⁸ *Wiborg v. United States*, 163 U. S. 632, 647; *The Three Friends*, 166 U. S. 1, 51-52; *Opinion of Mr. Harmon*, Atty. Gen., Dec. 10, 1895, 21 Ops. Attys. Gen., 267, 270, Moore, Dig., VII, 1081.

"The term 'neutrality' forms no part of the statute itself, the obvious purpose of the law being to prevent the commission of certain acts designed to disturb the peace of friendly nations, and not merely to prevent the commission of unneutral acts after a state of public war had actually been established. It could hardly have been the intention of the legislature to make the United States a safe place for the getting up of expeditions to start and help along insurrections in friendly countries till the point of public war and recognized belligerency should be reached, and then to make it a penal offense to render aid thereafter." (Statement by J. B. Moore, Dig., VII, 1080, commenting on *United States v. Trumbull*, 48 Fed. 99) See also the *Lucy H.*, 235 Fed. 610.

⁹ §§ 1-4, Title V, Act of June 15, 1917, 40 Stat. 221; 18 U.S.C.A. §§ 31-34.

See, also, the language of the joint resolution of March 4, 1915, 38 Stat. 1226.

¹⁰ See Sections 7 and 8, 50 Stat. 126 and 127; 22 U.S.C.A. §§ 245 d and 245 e.

¹¹ See Sections 1 (c), 2, 3 (a), 6 and 10.

such conditions that the exportation of particular articles thereto "would threaten or endanger the peace of the United States," that made it mandatory upon the President to proclaim such fact, and to set in operation after his proclamation the prohibition of the exportation of those articles.¹² It should be observed that the operation of the several prohibitions pertaining to foreign countries in which a condition of civil strife existed was not declared to be dependent upon the relationship of the United States to a particular party to the conflict, but was made the consequence of findings of fact as specified in the enactment.

No legal duty towards a State within which such a condition exists obliges an outside State to minister to the military needs of either contestant or to permit the resources within the national domain to be so employed. The statutory laws of the United States have at times taken cognizance of this fact.¹³

When a State, although unwilling to recognize the insurgents within a foreign country as belligerents, nevertheless admits the fact of insurgency, there is no enlargement of its international obligations.¹⁴ Thus when, in 1895, President Cleveland, although declining to recognize the Cuban insurgents as belligerents, issued a so-called neutrality proclamation, he merely recognized the condition of political revolt in Cuba and the existence of war in a material rather than a legal sense.¹⁵ By so doing he sought to increase respect for the laws of the United States by persons within its territory, and thereby to facilitate and simplify the task of the Government in performing the duties which it owed to the sovereign of that island.¹⁶

¹² See Section 1 (c) where it was declared that upon such an event it should be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign State.

Compare the somewhat differing conditions laid down in Sections 2 (a) and 3 (a).

¹³ See Proclamation by the President, May 1, 1937 (No. 2236), *Am. J.*, XXXI, *Official Documents*, 156, serving to make operative a prohibition of the export of arms, ammunition, and implements of war to Spain.

See Arnold D. McNair, "The Law Relating to the Civil War in Spain," *Law Quar. Rev.*, LIII, 1937, 471, 472-473.

According to a Joint Resolution approved Jan. 8, 1937: "During the existence of the state of civil strife now obtaining in Spain it shall, from and after the approval of this Resolution be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to Spain or to any other foreign country for transshipment to Spain or for use of either of the opposing forces in Spain." (50 Stat. 3.) On March 21, 1938, Secy. Hull declared that the Joint Resolution was still in force, implying that it had not been supplanted by provisions of the Act of May 1, 1937. See Dept. of State Press Releases, March 26, 1938, 398.

See in this connection Hackworth, *Dig.*, I, §§ 52-53, and documents there cited.

¹⁴ "The admission of this fact is by such domestic means as may seem expedient. This admission is made with the object of bringing to the knowledge of citizens, subjects, and officers of the State such facts and conditions as may enable them to act properly. . . . The admission of insurgency does not place the foreign State under new internal obligations as would the recognition of belligerency, though it may make the execution of its domestic laws more burdensome. It admits the fact of hostilities without any intimation as to their extent, issue, righteousness, etc." (G. G. Wilson, *Insurgency*, 16; Naval War College, *Int. Law Situations*, 1902, 71-72.) See, also, G. G. Wilson, "Insurgency and International Maritime Law," *Am. J.*, I, 46, 60.

¹⁵ See proclamation of June 12, 1895, *For. Rel.* 1895, II, 1195, Moore, *Dig.*, VII, 1081.

¹⁶ *The Three Friends*, 166 U. S. I, 63-66; also Naval War College, *Int. Law Situations*, 1912, 10-11.

See Acts Falling Short of Recognition of Belligerency, *supra*, § 50.

§ 885. **The Same.** The progress of an insurrection may serve to deprive the titular government of control over particular areas constituting the national domain, and even render extremely doubtful the prospect of its retention of control over any portion thereof. During the period of uncertainty the outside State which has refrained from recognizing the insurgents as belligerents (and has also refrained from acknowledging them to constitute the government of the country) is still unburdened with the performance of the duties of a neutral as such. This is true although the existence of a condition of insurgency may have been acknowledged by that State. Its obligations with respect to the country in which the condition of civil strife exists remain, however, unchanged. Until at least circumstances arise which by virtue of international law excuse intervention, it is felt that the outside State should, with the special aid of its domestic laws strive to perform those obligations in such a way as to prevent its territory from ministering directly to the military needs of either contestant.¹ Here again, it should be noted that notwithstanding the magnitude of successes of the insurgents which might suffice to justify their recognition as such (prior to their final triumph), the outside State may long continue to interpret its obligation as those which accrue solely for the benefit of the titular government.

§ 885.¹ Declared President Cleveland in his annual message of Dec. 3, 1888: "I announce with sincere regret that Hayti has again become the theater of insurrection, disorder, and bloodshed. The titular government of President Salomon has been forcibly overthrown, and he driven out of the country to France, where he has since died.

"The tenure of power has been so unstable amid the war of factions that has ensued since the expulsion of President Salomon, that no Government constituted by the will of the Haytian people has been recognized as administering responsibly the affairs of that country. Our representative has been instructed to abstain from interference between the warring factions, and a vessel of our Navy has been sent to Haytian waters to sustain our minister and for the protection of the persons and property of American citizens.

"Due precautions have been taken to enforce our neutrality laws and prevent our territory from becoming the base of military supplies for either of the warring factions." (For. Rel. 1888, I, xiv, Moore, Dig., VII, 1080.) See also Mr. Blaine, Secy. of State, to the Atty. Gen., March 18, 1889, 172 MS. Dom. Let. 228, Moore, Dig., I, 201.

President Taft, by virtue of the power conferred upon him, by a joint resolution approved March 14, 1912, finding conditions of violence to exist in an American country which were promoted by the use of arms or munitions of war procured from the United States, proclaimed the fact as applicable to Mexico, and thereby rendered it unlawful to export such articles to that country except under such limitations and exceptions as the President might prescribe. See 37 Stat. 630 and 1733; 22 U.S.C.A. §§ 236-237. President Wilson, by proclamation of Feb. 3, 1914, announced an essential change in conditions in Mexico, and raised the embargo on arms. See President Wilson's State Papers and Addresses, edited by Albert Shaw, New York, 1917, 55. On Oct. 19, 1915, the President announced by proclamation the renewal of conditions of domestic violence in Mexico, promoted by the use of arms or munitions of war procured from the United States, and thereby applied the earlier restrictions of 1912, For. Rel. 1915, 772. On the same day, however, he ordered that an exception be made in favor of the *de facto* government of General Carranza. The purpose was to enable that government, through arms obtainable in the United States, to offset the advantage possessed by the opposing forces of General Huerta in obtaining such supplies from other foreign sources. The design of the President seems to have been to facilitate the efforts of the Carranza government, as supposedly representative of the people of Mexico, to overcome the military despotism set up by General Huerta with "hardly more than the semblance of national authority." *Id.*, 771. See President Wilson, Annual Message, Dec. 2, 1913, *id.*, 1913, ix, x; Same, proclamations of Feb. 3, 1914, and Oct. 19, 1914, *id.*, 55-57; Same, special message, April 20, 1914, *id.*, 59-63; Same, Annual Message, Dec. 7, 1915, *id.*, 1915, ix, x-xi; Same, address before Press Club, New York City, June 30, 1916, *id.*, 276, 277-278; Same, address accepting renomination at Long Branch, N. J., Sept. 2, 1916, *id.*, 302, 310-314. The action on the part of the United States was for the avowed purpose of enabling the popular and liberal movement in Mexico to enjoy free opportunity to realize its aspirations.

See Recognition of New Governments, The Position of the United States, *supra*, § 44.

It is, nevertheless, unsatisfactory, in point of reason, to permit that State through the instrumentality of a non-recognition policy that is contemptuous of the fact of insurgent achievement, to determine for itself whether and to what extent the relatively unsuccessful party to the foreign domestic conflict shall continue to benefit by its aid, and to permit that State by such process to participate in the fight for the reins of government.² The problem is, however, one which, as has been observed elsewhere, pertains to intervention.³

When a third State recognizes insurgents as belligerents, it attains at once, as is noted elsewhere, the status of a neutral, and assumes all of the burdens incidental thereto in relation to both parties. This is doubtless true irrespective of the failure or unwillingness of the titular government of the State wherein civil strife exists to accord such recognition.⁴ That government may, however, yield such recognition to the insurgents before it is accorded by an outside State. That action, although not obliging the latter to take such a step,⁵ may in fact impel it to do so. In the interval prior to its according of recognition, the outside State is probably not obliged to accept the normal burdens of a neutral in its dealings with the titular government. The latter, after its own act of according recognition, might, however, be deprived of reasonable grounds for complaint if the privileges yielded to it by the outside State and within the bounds thereof, were confined to those which a neutral as such could properly extend to a belligerent.⁶

h

§ 886. **Effect of Armistice.** While the conclusion of an armistice does not terminate a war, nor serve to alter or lessen the duties of a neutral State towards the belligerents, such a State may, in a particular case, regard such an agreement as indicative of more than a temporary cessation of hostilities, and as amounting to a practical termination of the conflict. In consequence, there may be in fact yielded to belligerent ships of war or other forces privileges which normally a neutral could not lawfully grant.¹ In such case, however, the neutral appears to take the risk that hostilities will not be renewed. Should there be a resumption of them, such a State would seem to be responsible for injuries sustained by the enemy of the belligerent whose naval or military forces were

² See Recognition of New Governments, Some Conclusions, *supra*, § 45D. Also, *supra*, § 884.

³ *Supra*, § 884.

⁴ See Recognition of Belligerency, In General, *supra*, § 47. See Naval War College, Int. Law Situations, 1913, 13.

⁵ "A third Power is not bound to recognize insurgents as belligerents merely because they are recognized as such by the government of the country in which a civil war has broken out." (Art. 5, Section 1, Regulations of the Institute of International Law respecting the Relations of Foreign Governments to Insurrections, *Annuaire*, XVIII, 228, J. B. Scott, Resolutions, 158.)

⁶ See, in this connection, Oppenheim, Lauterpacht's 6 ed., II, § 298.

§ 886. ¹ Mr. Hay, Secy. of State, to Mr. Newel, Minister to the Netherlands, No. 195, Feb. 8, 1899, MS. Inst. Netherlands, XVI, 401, Moore, Dig., VII, 1086.

See, also, For. Rel. 1898, 1002, respecting permission granted by Great Britain in August, 1898, to Admiral Dewey to dock, clean and paint the bottoms of vessels under his command at Hong Kong, Moore, Dig., VII, 1085; also Mr. Buck, Minister to Japan, to Mr. Day, Secy. of State, No. 190, Sept. 6, 1898, MS. Despatches Japan, Moore, Dig., VII, 1085.

aided, and to that extent for the harm directly attributable to the augmentation of strength procured within the neutral domain.² It may be observed that the privileges requested by the United States while a belligerent in 1898, yet subsequent to the conclusion of an armistice with Spain, and which were yielded by neutral powers, were for the most part of a character such that had hostilities been resumed, the consequential injuries to Spain would in all probability have been slight, if not fanciful.

The Armistice between the Allied and Associated Powers and Germany, of November 11, 1918, made provision for notification to neutrals that freedom of navigation in all territorial waters was given to the naval and mercantile marines of those Powers, "all questions of neutrality being waived."³

2

INVIOABILITY OF NEUTRAL TERRITORY

a

§ 887. **The Duty of the Belligerent.** The principle demanding respect for the supremacy of the territorial sovereign within its own domain serves to render it unlawful for a belligerent to commit hostilities against another within neutral territory, or to undertake any other warlike activity therein.¹ This obligation does not, as Mr. Renault has pointed out, result from war, "any more than the right of a State to the inviolability of its territory results from its neutrality." "The one is," he declares, "an obligation, and the other a right, which are inherent in the very existence of States."² The duty of the belligerent has long been apparent to the United States as well as to other powers.³ Definite prohibitions have found expression in the Hague Conventions of 1907,⁴ as well as in the Naval Instructions of the United States Governing Maritime Warfare of 1917,⁵ and in the War Department Rules of Land Warfare of 1940.⁶ They

² See, in this connection, President Taylor, Annual Message, Dec. 4, 1849, Richardson's Messages, V, 10, Moore, Dig., VII, 1084.

³ Section 20, U. S. Treaty Vol. III, 3310. See, also, Section I, of Naval Conditions of protocol of conditions of the armistice between the Allied and Associated Powers and Austria-Hungary, of Nov. 3, 1918, *id.*, 3143.

§ 887. ¹ Opinion of Mr. Cushing, Atty. Gen., 7 Ops. Attys. Gen. 367, Moore, Dig., VII, 1089.

² See report in behalf of the Third Commission, to the Second Hague Peace Conference of 1907, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 295, 297.

³ See Mr. Jefferson, Secy. of State, to Mr. Ternant, French Minister, May 15, 1793, concerning the capture of the British ship *Grange* by a French frigate within the waters of the Delaware, Am. State Pap., For. Rel., I, 147; opinion of Mr. Randolph, Atty. Gen., May 14, 1793, *id.*, 148; Mr. Madison, Secy. of State, to Mr. Monroe, Nov. 25, 1806, MS. Inst. U. S. Ministers, VI, 367, Moore, Dig., VII, 1088; Mr. Clay, Secy. of State, to Mr. Everett, Minister to Spain, Jan. 15, 1827, MS. Inst. U. S. Ministers, XI, 237, Moore, Dig., VII, 1089; Mr. Seward, Secy. of State, to Mr. Tassara, May 21, 1863, MS. Notes to Spain, VI, 378, Moore, Dig., VII, 1089; Same to Mr. Welles, Secy. of Navy, Aug. 8, 1862, Blue Book, North America, No. 5 (1863), 3, 4, Moore, Dig., VII, 1089; Mr. Evarts, Secy. of State, to Mr. Foster, No. 395, June 21, 1877, For. Rel. 1877, 413, Moore, Dig., VII, 1091.

⁴ Arts. I-IV, Convention concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2358-2359; Arts. I-IV, Convention concerning the Rights and Duties of Neutral Powers and Persons in War on Land, *id.*, II, 2297-2298.

⁵ Section I, Nos. 1-22.

⁶ Nos. 362-379.

are seen also in the Convention on Maritime Neutrality concluded at Habana, February 20, 1928,⁷ and in the Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War.⁸ Thus it is declared that all acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent ships of war in the territorial waters of a neutral power, constitute a violation of neutrality and are strictly forbidden.⁹ Again, belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.¹⁰ It is likewise forbidden to erect thereon a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea.¹¹ It has been observed that the prohibition extends to the origination and organization of military and naval forces within neutral territory.¹²

The duty imposed upon the belligerent is one due to the neutral rather than the enemy.¹³ Professor Garner has observed, however, that there is a divergence of judicial opinion concerning the legal effect of capture made within recognized territorial waters of a neutral power; and he has adverted to the fact that "the prize tribunals and sometimes the prize regulations of States (for example, Germany and France) treat such captures as absolutely illegal irrespective of whether the neutral power in whose waters the capture was made, intervenes or not."¹⁴

The obligation resting upon the belligerent with respect to the neutral is not of unlimited scope. Circumstances may arise when the belligerent is excused

⁷ Art. 3, U. S. Treaty Vol. IV, 4743.

⁸ Arts. 15-17, *Am. J.*, XXXIII, *Supplement Section 2*, 178, and Comment, *id.*, 335-343.

⁹ No. 12, Naval Instructions Governing Maritime Warfare; also Art. II, of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War. According to Art. I, thereof: "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality." This Article is reproduced in No. 1 of the Naval Instructions of the United States.

¹⁰ See Art. II of Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers and Persons in War on Land. Art. I thereof declares that "the territory of neutral Powers is inviolable."

Concerning the law as to the right of belligerent passage through neutral territory in so far as it was manifested in the writings of early publicists, and the gradual change of opinion resulting in the common denial of such a right, see J. W. Garner, "The Violation of Neutral Territory," *Am. J.*, IX, 72, 80-83. See, also, T. Baty, *Int. Law in South Africa*, 73.

¹¹ See War Dept. Rules of Land Warfare, 1940, No. 381, citing Art. III of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers and Persons in War on Land. See, also, Duties of Prevention, Radio and Certain other Means of Communication, *supra*, § 856B.

¹² See Acts of a Belligerent in Defiance of the Rights of the Territorial Sovereign as Such, *supra*, §§ 850-851.

¹³ See *The Anne*, 3 Wheat. 435, 447, Moore, Dig., VII, 1089; *The Lilla*, 2 Sprague, 177; *The Sir William Peel*, 5 Wall. 517, 536; *The Adela*, 6 Wall. 266.

"No proposition in international law is clearer, or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State and not as to the enemy." (Sir Samuel Evans, in *The Bangor*, 2 Brit. and Col. Prize Cases, 206, 209, and citing the foregoing cases.) See, also, *The Düsseldorf*, 3 Brit. and Col. Prize Cases, 664; *The Pellworm*, *id.*, 1053.

¹⁴ Garner, *Prize Law*, Sec. 162. See, also, *id.*, Sec. 163, in which reference is made to the decision of the German Supreme Prize Court in the case of the *Ambiorix*, Fauchille et De Visscher, *Juris. All.*, 131.

from disregarding the prohibition. If a neutral possesses neither the power nor disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein. In naval warfare such a situation may arise through the presence of vessels of war of opposing belligerents simultaneously in the same neutral port or roadstead. If, for example, one vessel is threatened with instant destruction by the enemy's ship, the use of force by way of defense would not be without justification, even though the vessel about to be attacked should fire the first shot, and that before invoking the protection of the territorial sovereign.¹⁵ If no instrumentalities whatever outside of its own guns afford a means of defense, their use for such a purpose would seem to be excusable, and hence not indicative of a violation of a duty with respect to the neutral.¹⁶ It is

¹⁵ See the case of the American privateer *General Armstrong*, which was destroyed by British warships in the harbor of Fayal in 1814. Moore, *Arbitrations*, II, 1071-1132. "The United States claimed indemnity from Portugal on account of the failure of protection. Louis Napoleon, to whom the case was referred as arbitrator, disallowed the claim on the ground that, before the fight took place, the commander of the privateer omitted to invoke the protection of the colonial authorities." (Moore, *Dig.*, VII, 1088.)

See, also, Dana's *Wheaton*, Dana's Note No. 208; Oppenheim, *Lauterpacht's* 6 ed., II, § 361; *Am. J.*, II, 507, 509.

Concerning the case of the Russian destroyer *Ryeshitelni*, captured by Japanese warships at Chefoo and towed out, in August, 1904, see Takahashi, *Int. Law* applied to the Russo-Japanese War, 437-444. See, also, T. E. Holland, "Neutral Duties in Maritime War," *Proceedings of British Academy*, 1905-1906, 55, 57; *For. Rel.* 1904, 139, Moore, *Dig.*, VII, 1091.

"On Sept. 11, 1916, the Philippine steamer *Cebu* was held up by a British destroyer within one and a half miles of Carabao Island, within Philippine territorial waters. The object of the destroyer was to capture a German reservist who with other Germans had been using Manila as a headquarters for activities against the British government in India. The German was not found on board. On Sept. 20, the British government expressed regret for the incident, explaining that when the *Cebu* was boarded the land was hidden by fog." (*Proceedings*, U. S. Naval Institute, XLII, 2078.)

¹⁶ In such case, moreover, the harm done the neutral, even though regarded as an indignity, might be deemed to possess less gravity or magnitude than that sustained by the belligerent whose vessel, if refraining from the use of force, would itself be destroyed.

On March 14, 1915, the German warship *Dresden* was attacked and destroyed by the British cruiser *Glasgow* in company with two other British vessels, near Juan Fernandez Island, within the territorial waters of Chile. In response to a protest from Chile, the British government on March 30, 1915, expressed a readiness "to offer a full and ample apology." Sir Edward Grey, British Foreign Secretary, said, however, that the information possessed by his Government pointed to the fact that the *Dresden* had not accepted internment and had had her colors flying and her guns trained. "If this was so," he declared, "and if there were no means available on the spot and at the moment for enforcing the decision of the Chilean authorities to intern the *Dresden*, she might obviously, had not the British ships taken action, have escaped again to attack British commerce." He added, "It is believed that the island where the *Dresden* had taken refuge is not connected with the mainland by cable. In these circumstances, if the *Dresden* still had her colors flying and her guns trained, the captain of the *Glasgow* probably assumed, especially in view of the past action of the *Dresden*, that she was defying the Chilean authorities and abusing Chilean neutrality, and was only awaiting a favorable opportunity to sally out and attack British commerce again. If these really were the circumstances, His Majesty's Government cannot but feel that they explain the action taken by the captain of the British ship; but in view of the length of time that it may take to clear up all the circumstances and of the communication that the Chilean Government have made of the view that they take from the information they have of the circumstances, His Majesty's Government do not wish to qualify the apology that they now present to the Chilean Government." (*Am. J.*, X, *Supplement*, 75; also note of Mr. Edwards, Chilean Minister at London, to Sir Edward Grey, March 26, 1915, *id.*, 72.) See discussion in Garner, *Int. Law and World War*, II, § 562.

See, also, in this connection, Beltran Mathieu, Ambassador of Chile at Washington, "The

believed, however, that resort to force, in order to prevent contemplated attack, should not be had when there is opportunity to request local protection, unless the territorial sovereign is positively known to lack the means and disposition to accord it.¹⁷

During the night between February 16 and 17, 1940, the British warship, *Cossack*, within Norwegian territorial waters grappled the German public ship, *Altmark*, attacked the crew causing the death of seven members thereof, and released some 300 British persons held as prisoners.¹⁸ This action was sought to be justified on the ground that Norway itself had been remiss in permitting the ship to enjoy passage through its waters when possessed of those prisoners, a fact which, it was contended, Norwegian authority had had the power and opportunity to ascertain, and which if ascertained imposed a duty upon the territorial sovereign to release the prisoners or to cause the departure of the ship from territorial waters.¹⁹ The soundness of this contention depended upon establishing that Norway owed a duty to the United Kingdom to make appropriate endeavor to search as well as visit the *Altmark*, and in consequence of so doing, to prevent the passage of the ship through Norwegian territorial waters while a carrier of a substantial number of prisoners. It may be greatly doubted whether the law of nations imposed such a burden upon Norway. That State lacked the right to search a public belligerent vessel such as the *Altmark* whose immunity from the local jurisdiction embraced immunity from search.²⁰ If Norwegian authority had reason to doubt the truth of statements from the Commander of the *Altmark* as to the contents of his ship, it could have reasonably demanded the departure of the vessel from Norwegian waters. Such action would, however, have merely revealed the assertion of a Norwegian right rather than the performance of a Norwegian duty towards the enemy of Germany. The territorial sovereign, even if apprised of the relevant facts as to the pres-

Neutrality of Chile during the European War," *Am. J.*, XIV, 319, where there is a discussion (334-338) of the violations of the neutrality of Chile by certain belligerents.

¹⁷ The importance of reliance upon the strong arm of the territorial sovereign to prevent the commission of hostile acts within its own domain is so great, and the danger likewise so great that a naval commander may, when in doubt, take the law into his own hands, that a belligerent should take pains to impress the officers of its fleet with a sense of the extraordinary nature of the circumstances which should concur in order to excuse a resort to force in neutral waters.

¹⁸ See *New York Times*, Feb. 18, 1940, pp. 1 and 37, embracing the texts of British and Norwegian statements.

See, also, statement by Dr. Koht, Norwegian Foreign Minister, of Feb. 19, 1940, *New York Times*, Feb. 20, 1940, p. 4; statement by the Norwegian Legation at Washington, Feb. 25, 1940, *id.*, Feb. 26, 1940, p. 2.

See discussion in Lauterpacht's 6 ed. of Oppenheim, II, 554-557.

¹⁹ See views of Lord Halifax as set forth in cablegram from Raymond Daniell in *New York Times*, Feb. 19, 1940, pp. 1 and 34.

²⁰ "The extritoriality which, according to a universally recognized rule of International Law, men-of-war enjoy in foreign ports, obtains even in time of war during their stay in neutral ports. Therefore, for example, prisoners of war on board do not become free by coming into the neutral port, so long as they are not brought on shore." (Lauterpacht's 5 ed. of Oppenheim, II, § 345, citing opinion of Mr. Cushing, United States Attorney General, April 28, 1855, in the case of the "*Sitka*," 7 Op. Atty. Gen., 122, 131.)

See P. C. Jessup, "In Fairness to Norway," *New York Herald Tribune*, Feb. 22, 1940, p. 26; Dr. Halvdan Koht (former Foreign Minister of Norway), *Norway Neutral and Invaded*, New York, 1941, 37-40.

ence of prisoners on board of the *Altmark*, was not necessarily obliged to deny passage to the ship through the coastal waters, or to make the privilege of further passage contingent upon the release of prisoners.²¹

It was intimated that toleration by Norway of repeated and improper uses of its waters by the enemy of Great Britain as a means, for example, of enabling it to gain direct military sustenance and renewed strength for offensive operations justified the claim that Norway was not in a position to demand respect for the inviolability of its territory by British naval craft which were suffering in consequence of neutral supineness. The legal value of this assertion depended upon solid proof of the failure of Norway to maintain its supremacy within its own waters as by preventing such improper belligerent uses thereof. It may be greatly doubted whether the British Government was able to adduce convincing proof of such belligerent abuses, or was able in fact to establish that the attack upon the *Altmark* could be regarded by the impartial mind as an excusable response to Norwegian neglect of its duties as a neutral.²² In the treatment of that ship British authority seemingly yielded to the strong temptation to rescue from the clutches of the enemy prisoners whom it was zealous to set free, regardless of the injunction of international law which that authority regarded as inapplicable. The case was a fresh illustration of the fact that a belligerent State, as is noted elsewhere,²³ is likely to be contemptuous of a duty to abstain from interference with its enemy within neutral waters, when that enemy in making use of the same for purposes of transit, thereby gains a distinct or relative military advantage.

Reasonable excuse for the violation of neutral territory in land warfare doubtless may, under extraordinary conditions, be found. The usual absence of any belligerent armed force within the domain of the neutral, in contrast to the situation frequently arising in maritime warfare, when belligerent naval vessels enjoy lawful sojourn in neutral waters, tends to minimize the reason for anxiety on the part of a belligerent lest its enemy occupy such territory for a military end. When, however, that enemy does in fact, regardless of the law, send an army therein, or otherwise engage in hostile operations within the neutral domain, the opposing belligerent may under some circumstances, on grounds of self-defense, find adequate excuse for pursuing a like course, should the neutral territorial sovereign be unable or indisposed to vindicate its rights or perform its duties as such.²⁴ The belligerent obligation towards the neutral not to under-

²¹ According to Art. X of the Hague Convention of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War: "The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents." (Malloy's Treaties, II, 2360.) The convention contained no intimation that the propriety of passage was conditioned upon the circumstance that the war-ship concerned carried no prisoners.

²² Declared Doctor Koht, on Feb. 19, 1940: "After the *Altmark* had been called by the Norwegian torpedo boat it was detected that she used her wireless sender, which is not allowed on foreign ships within Norwegian territory. When this was pointed out the *Altmark's* captain expressed regret and said he did not know it, and later the wireless sender was not heard." (*New York Times*, Feb. 20, 1940, p. 4.)

²³ See The Passage of Belligerent Public Vessels Through Neutral Waters, *supra*, § 873A.

²⁴ According to the War Dept. Rules of Land Warfare, 1940: "Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of

take such a movement would, for the time being, appear to be inapplicable by reason of its own weakness or indifference. It is believed, however, that deference for the principle respecting the inviolability of neutral territory is of utmost importance to the family of nations, and that, accordingly, the mere fear entertained by a belligerent lest its enemy may wrongfully utilize neutral territory for a strategic end should rarely, if ever, be deemed to excuse an anticipatory invasion designed to forestall a contemplated and hostile movement. The danger exists lest an unscrupulous belligerent may, on loose grounds unwarranted by the circumstances of the particular case, occupy or move its forces through neutral territory as a means of attacking the enemy at a weak point, under the pretext that such conduct is necessitated by the known designs of its adversary. The law of nations does not fail to brand as lawless the conduct of a belligerent which, merely in order to gain a strategic advantage, invades the territory of an unoffending neutral power. Hence no opportunity should be open to the belligerent guilty of such action to shield its wrongdoing under the cloak of an excuse the legal value of which depends upon the weakness or indifference of the territorial sovereign.²⁵

It should be observed that in a Joint Declaration, released to the Press on May 19, 1940, the American Republics announced that "in accord with the principles of international law and in application of the resolutions adopted in their inter-American conferences," they considered "unjustifiable the ruthless violation by Germany of the neutrality and sovereignty of Belgium, Holland and Luxemburg."²⁶ This action was subsequent to the proclamation by the President of the United States of the existence of a state of war between Germany and those countries.²⁷

one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory." (No. 366)

²⁵ Official correspondence appears to reveal Germany as a belligerent which, irrespective of the limitations of any contractual obligations assumed by it, invaded Belgium in August, 1914, not primarily to forestall a hostile movement therein by French troops, but rather for the purpose of gaining a strategic advantage over the enemy. The allegations of fear of a French violation of Belgian territory seem to have been advanced as a mere pretext for a military movement into the domain of a friendly and unoffending State. See, especially, Mr. Davignon, Belgian Minister for Foreign Affairs, to the Belgian Ministers at Berlin, Paris and London, July 31, 1914, *Belgian Grey Book* (No. 1), No. 9, J. B. Scott, *Diplomatic Documents Relating to the Outbreak of the European War*, I, 364; Same to Same, No. 12, July 31, 1914, *id.*, 366; Same to Same, No. 15, Aug. 1, 1914, *id.*, 369; Note presented by Mr. von Below Saleske, German Minister at Brussels, to Mr. Davignon, Aug. 2, 1914, No. 20, *id.*, 371; Response of Mr. Davignon to the German Minister, Aug. 3, 1914, No. 22, *id.*, 373; Mr. Davignon to Belgian Diplomatic Representatives, Aug. 3, 1914, No. 24, *id.*, 375; Note of Mr. von Below Saleske, German Minister at Brussels, to Mr. Davignon, Aug. 4, 1914, No. 27, *id.*, 377; Sir E. Goschen, British Ambassador at Berlin, to Sir E. Grey, British Foreign Secretary, July 31, 1914, *British Blue Book* (No. 1), No. 122, *id.*, II, 983; German Foreign Secretary, to Prince Lichnowsky, German Ambassador at London, Aug. 4, 1914, No. 157, *id.*, 1004; Sir E. Goschen to Sir E. Grey, Aug. 8, 1914, No. 160, *id.*, 1006.

See, also, Ch. de Visscher, *Belgium's Case, A Juridical Enquiry* (translated from the French by E. F. Jourdain), London, 1916, 18-57; J. W. Garner, in *Am. J.*, IX, 72-83; Same author, *Int. Law and World War*, II, §§ 431-452; Louis Renault, *The First Violations of the Law of Nations by Germany: Luxemburg and Belgium*, Paris, 1917; Ruth Putnam, *Luxemburg and Her Neighbors*, New York, 1918, 1-19.

²⁶ Dept. of State Bulletin, May 25, 1940, 568. Such action had been proposed by the Uruguayan Government. See *id.*, May 18, 1940, 541-542.

²⁷ See Neutrality Proclamation of May 11, 1940, Dept. of State Bulletin, May 11, 1940,

The United States, when a belligerent, has hitherto rarely occupied neutral territory.²⁸ American troops did, however, enter the Grand Duchy of Luxemburg in the advance to the Rhine of the 3rd Army (of occupation) November 20, 1918. In February, 1919, approximately 50,000 American troops were established in occupation of the Grand Duchy. The reason for this measure was said to be the necessity for American troops to pass through Luxemburg and to establish the lines of communication of the 3rd Army through that territory.²⁹ Luxemburg was not, however, regarded as a belligerent but as a neutral. The American troops exercised no influence on the revolution which occurred in November, 1918; and they assumed generally an attitude of non-interference beyond the strictly military needs of keeping open the lines of communication.³⁰ It will be noted that the American occupation was subsequent to the Armistice and was the normal incident of following up the retiring forces of an enemy which had itself lawlessly invaded Luxemburg in its offensive operations; and that it was unopposed by the territorial sovereign.

The belligerent whose forces have, in contempt of the law, violated neutral territory, is bound on principle to make reparation for the wrong done to the sovereign thereof. That wrong is an essentially public one. Reparation should, therefore, manifest an appropriate expression of national regret that the neutral sovereign was treated with indignity. The special salute of its national emblem at the place where its territory was invaded, and the formal censure or other punishment of officers responsible for the affront, as well as an apology conveyed through the diplomatic channel, would seem to be obvious modes of convincing the aggrieved neutral of the sincerity of the regret which such a violation of the law of nations inspired in the belligerent.³¹ Adequate requital

489; also Reports of American Service Officers concerning the German invasion of those countries, *id.*, 485.

²⁸ In December, 1917, the American Chargé d'Affaires at Berne presented to the Swiss Government the following memorandum: "In view of the presence of American forces in Europe engaged in the prosecution of the war against the Imperial German Government, the Government of the United States deems it appropriate to announce for the assurance of the Swiss Confederation and in harmony with the attitude of the cobelligerents of the United States in Europe, that the United States will not fail to observe the principle of neutrality applicable to Switzerland and the inviolability of its territory, so long as the neutrality of Switzerland is maintained by the Confederation and respected by the enemy." (Official Bulletin, Dec 11, 1917, p. 1.) See, also, response of the Swiss Government, Dec. 12, 1917, *id.*, Dec. 17, 1917, p. 2.

²⁹ The lines of communication of the 3rd Army ran through the Grand Duchy, so that the 5th and 33rd Divisions were assigned to furnish the necessary guards, military police, etc., therefor and to guard war material abandoned by the enemy in accordance with the terms of the Armistice.

³⁰ The foregoing statements of fact were contained in a communication from an authoritative source to Miss Ruth Putnam, June 9, 1920, and which the latter was good enough to place before the author.

See, also, Col. I. L. Hunt, American Military Government of Occupied Germany, 1918-1920, Vol. I, in mimeographed form, March 4, 1920, 22-24. Also, *supra*, § 701B.

³¹ In October, 1864, the U.S.S. *Wachusett* at Bahia, Brazil, fired upon and captured in Brazilian waters the Confederate cruiser *Florida*, which was brought to Hampton Roads. "The Brazilian government demanded (1) a 'solemn and public declaration by the Government of the Union that it was surprised by the unusual action of the commander of the *Wachusett*, which it highly rebukes and condemns, regretting that it should have occurred'; (2) the 'immediate dismissal of said commander, followed by the commencement of proper process'; and (3) 'a salute of 21 guns to be given in the port of the capital of Bahia by some vessel of war of the United States, having hoisted at her masthead during such salute the

would appear to demand also the complete restoration of any persons and property captured within neutral territory in so far as it lies within the power of the captor to make restoration, as well as the payment of damages resulting from capture.³² In the case of a ship captured in neutral waters, the vessel should be delivered to the offended sovereign, and all of the occupants thereof should be set at liberty. Where the restoration of captured property has become impossible through its subsequent destruction or loss, it is believed that pecuniary compensation therefor should be made to the aggrieved neutral.

The obligation resting upon a belligerent to respect the inviolability of neutral territory is obviously applicable to such aircraft as may be employed by it during the conflict. Thus, according to the Rules of Aerial Warfare of 1923: "Belligerent aircraft are bound to respect the rights of neutral Powers and to abstain within the jurisdiction of a neutral State from the commission of any act which it is the duty of that State to prevent."³³ This statement is followed by an injunction forbidding belligerent military aircraft "to enter the jurisdiction of a neutral State."³⁴

It should be observed, however, that flagrant violations of neutral territory by belligerent aircraft took place shortly after the outbreak of the European war in September, 1939. The Danish town of Esbjerg was subjected to bombardment on September 4.³⁵ On or about September 8, Belgian planes battled with, and are understood to have brought down, two British craft returning from a

Brazilian flag.' The Brazilian Government also claimed, 'as reparation, full liberty to the crew and all individuals who were on board the *Florida* when she was captured; and the delivery of the vessel to the Government of the Emperor' in one of its ports.

"Mr. Seward, Dec. 26, 1864, replied that the President disavowed and regretted the proceedings at Bahia; that he would suspend the commander of the *Wachusett* and direct him to appear before a court-martial, that the consul, as he admitted that he advised and incited the commander, would be dismissed, and that the flag of Brazil would receive from the United States Navy the honor customary in the intercourse of friendly maritime powers. This answer, said Mr. Seward, rested exclusively upon the ground that the capture of the *Florida* was 'an unauthorized, unlawful, and indefensible exercise of the naval force of the United States, within a foreign country, in defiance of its established and duly recognized Government.' As to the captured crew of the *Florida*, it was stated that they would be set at liberty to seek refuge wherever they could find it, with the hazard of recapture when beyond the jurisdiction of the United States. With reference to the demand for the return of the *Florida* to Bahia, Mr. Seward stated that the vessel, while anchored in Hampton Roads, sank on the 28th of November, owing to a leak which could not be seasonably stopped." (Statement by J. B. Moore, Dig., VII, 1090-1091, citing Mr. Barboza da Silva, Brazilian Chargé d'Affaires, to Mr. Seward, Dec. 12, 1864, MS. Notes from Brazil; Mr. Seward, Secy. of State, to Mr. Barboza da Silva, Dec. 26, 1864, MS. Notes to Brazilian Legation, VI, 173; Same to Same, Dec. 15, 1864, *id.*, 319; Same to Mr. Webb, Minister to Brazil, No. 146, June 15, 1865, MS. Inst. Brazil, XVI, 115.)

³² See opinion of Sir Leoline Jenkins in 1675, respecting the case of the Dutch ship *Postillon*, given in Moore, Dig., VII, 1097-1098, citing Life of Sir Leoline Jenkins, II, 777.

³³ Art. 39, *Am. J.*, XXXII, *Official Documents*, 1, 34.

See, also, Art. 100, Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 195.

³⁴ Art. 40, *Am. J.*, XXXII, *Official Documents*, 1, 34. In the General Report of the Commission of Jurists it is said with respect to this article: "The principle that belligerent military aircraft should not be allowed to enter or circulate in neutral jurisdiction met with ready acceptance. It is in conformity with the rule adopted by the European States during the recent war." (*Id.*)

³⁵ The British Minister at Copenhagen was instructed to express the profound regret of his Government in case it is proved to be established that the damage had been caused by a British plane.

reconnaissance and flight over German territory.⁸⁶ Again, the Netherland Government found occasion to complain to the Governments of both Germany and the United Kingdom on account of the activities of belligerent planes within the territorial limits of the Netherlands.⁸⁷ As the war progressed invasions of the air superjacent to neutral territory occurred with increasing frequency. Late in February, 1940, a German military plane is understood not only to have violated Netherland territory, but also to have fired upon a Netherland patrol plane which was guarding that territory from attack.⁸⁸ Again, in the course of the armed conflict between Finland and Russia, Russian aircraft, on February 21, 1940, bombed the Swedish town of Pajala, located at a considerable distance north of the Gulf of Bothnia, and about six miles from the Finnish border.⁸⁹ Subsequently, when Italy became a belligerent, British planes on more than one occasion passed over Swiss territory on their way to the Italian domain.

A belligerent State must be deemed to be responsible for all injuries inflicted by its aircraft upon subjacent neutral territory, regardless of the circumstances which may in fact serve to cause flights over that territory. If the incident at Esbjerg, referred to above, is illustrative of the practical difficulty that may be encountered by a pilot in determining the position of his plane with reference to the neutral or hostile character of the subjacent land, it accentuates also the circumstance that bombings must never be perpetrated or tolerated within neutral territory (when unoccupied by the enemy), and that the sharpest penalties need by some process to be visited upon the belligerent whose aircraft unintentionally or otherwise are heedless of the general prohibition and cause injury within the domain of the neutral.

b

§ 888. The Duty of the Neutral. The nature and extent of the duty of a neutral to prevent the commission of acts in defiance of its sovereignty within its own domain by a belligerent have been observed.¹ The measure of exertion required by international law has also been noted. It has been seen that a neutral is not deemed to be guilty of a delinquency for which it is chargeable with responsibility, when it employs the means at its disposal to prevent unlawful activities within its territory.²

⁸⁶ See Associated Press Despatch, *New York Times*, Sept. 9, 1939. The British Ambassador at Brussels was duly instructed to make an appropriate expression of regret, and to announce the desire of his Government to repair every damage.

⁸⁷ According to an Associated Press Despatch of Sept. 9, 1939, appearing in the *New York Times*, Sept. 10, 1939, the Netherland Minister at Berlin was duly instructed to make complaint of a flight of German war planes over Netherland territory in the vicinity of Limburg Province.

The Netherland Government also made protest against the aerial bombardment of its territory with so-called propaganda leaflets.

⁸⁸ See Associated Press despatch in *New York Times*, Feb. 26, 1940, p. 6.

⁸⁹ See *New York Times*, Feb. 22, 1940, p. 1. It should be noted, however, that this attack was seemingly regarded in Sweden as due to error on the part of the bombing planes as to their position when the attack was made.

¹ See Duties of Prevention, Acts of a Belligerent in Defiance of the Rights of the Territorial Sovereign as Such, *supra*, §§ 850-851.

² See Requisite Measure of Exertion, The Hague Convention of 1907, *supra*, § 883.

See, also, in this connection, Mr. Jefferson, Secy. of State, to the British Minister, Sept. 5, 1793, 5 MS. Dom. Let. 248, Moore, Dig., VII, 1102.

In case it appeared that a belligerent suffered harm through the neglect of a neutral to prevent the violation of its own territory by the opposing belligerent, the value of the claim to reparation might be weakened if, notwithstanding such neglect, the conduct of the aggrieved belligerent was the proximate cause of the acts committed by its enemy. The belligerent claimant should show clean hands as a condition precedent to its exaction of indemnity. In case, however, its conduct were without fault, indicating no disregard of duty towards the neutral, either through invasion of its territory, or through conduct so threatening an invasion as to cause the enemy to send its forces therein, the claimant would seem to be entitled to damages commensurate with the loss directly attributable to the laches of the neutral.

3

§ 888A. **Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy.** It is a sound proposition that the illegal conduct of its enemy in prosecuting a war does not excuse a response by the offended belligerent which, in so far as it returns like for like, or otherwise marks a departure from the requirements of the law, involves an impairment of obligations normally due to unoffending and non-participating powers. It would be a harsh doctrine that permitted a belligerent State to curtail the rights of a neutral that had done it no wrong, and which proclaimed that the character and scope of obligations due to the neutral were dependent upon the nature of the conduct or methods employed by the enemy of that belligerent.¹ Such a doctrine should find no support in the United States or elsewhere.²

It should be recalled, however, that in the course of World War I, both Great Britain and Germany, following precedents that had fallen into disuse after the Napoleonic Wars,³ invoked the alleged illegal conduct of the enemy as a ground for the employment of methods of warfare which necessarily involved relaxations of obligations towards neutral States and which appeared to be contemptuous of their rights as such.⁴ It is perhaps unnecessary here to

§ 888A.¹ See Intervention, Self-Defense, *supra*, § 70.

² Nor did it find support in the relevant article (23) of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 179, to the effect that "a belligerent is not relieved of its duty to respect the rights of a neutral State as provided in this Convention, even when engaged in acts of reprisal or retaliation for illegal acts of its enemy." The author acknowledges his indebtedness to the illuminating comment on this article (*id.*, 392-419) which, according to the Reporter, Professor Jessup, was written by the Assistant Reporter, Mr. O. J. Lissitzyn.

³ Declared Mr. Madison, Secy. of State, to Mr. Erskine, March 25, 1808: "Retaliation is a specific or equivalent return of injury, for injury received; and where it is to operate through the interests of a third party, having no voluntary participation in the injury received, the return ought, as already observed, to be inflicted with the most forbearing hand. This is the language of common sense and the clearest equity. As the right to retaliate results merely from the wrong suffered, it cannot, in the nature of things, extend beyond the extent of the suffering. There may often be a difficulty in applying this rule with exactness, and a reasonable latitude may be allowable on that consideration. But a manifest and extravagant departure from the rule can find no apology." (*Am. St. Pap., For. Rel.*, III, 210, 211.)

⁴ See War Zones and Areas of Hostilities, *supra*, § 720; Submarine Craft—the Controversy with Germany, *supra*, §§ 747-749; Blockade, Controversy between the United States and Great Britain, *supra*, §§ 830-831.

discuss the character of the excuses that were offered in diplomatic correspondence with the United States.⁵ It is an impressive fact that the British prize courts themselves approved of the belligerent stand as taken by their own country and seemed to be of opinion that the rights of neutrals were to be subordinated to the military exigencies of a belligerent if the illegal conduct of its enemy compelled it to respond with retaliatory or other conduct that normally was proscribed, provided the measures taken constituted, in the particular circumstances, a reasonable response.⁶

It is these occurrences of World War I that stand out with startling significance. They took place in the face of neutral protests that were unavailing.⁷ If they constituted violations of the law of nations,⁸ they were also prophetic

⁵ In the course of a memorandum, accompanying a note from the British Ambassador at Washington to the Secretary of State, April 24, 1916, it was said: "It is true that these measures were occasioned and necessitated by the illegal and unjustifiable proclamation issued by the German Government on the 4th February 1915, constituting the waters surrounding Great Britain, including the whole English Channel, a 'war zone,' into which neutral vessels would penetrate at their peril, and in which they were liable to be sunk at sight. This proclamation was accompanied by a memorandum alleging that the violation of international law by Great Britain justified the retaliatory measures of the German Government owing to the acquiescence of neutrals in the action of this country. The legitimacy of the use of retaliatory measures was thus admitted by the Germans, although His Majesty's Government and their allies strongly deny the facts upon which their arguments were based. But although these measures may have been provoked by the illegal conduct of the enemy, they do not, in reality, conflict with any general principle of international law, of humanity, or civilization; they are enforced with consideration against neutral countries, and are, therefore, juridically sound and valid." (For. Rel. 1916, Supp., 368, 377.)

⁶ See Lord Parker of Waddington in *The Zamora*, 2 A.C. 1916, 77, 98; *The Stigstad*, 5 Lloyd's Prize Cases, 361, 384; judgment of the Judicial Committee of the Privy Council in same case, *id.*, 388, 391-392; judgment of Sir Samuel Evans in *The Leonora*, 7 Lloyd's Prize Cases, 262, 331; Lord Sumner in judgment of the Judicial Committee of the Privy Council in same case, *id.*, 351, 358; Lord Sumner in judgment of the Judicial Committee of the Privy Council in *The Noordam* (No. 2), 3 Brit. and Col. Prize Cases, 599, 606.

See Garner, *Prize Law*, Sections 251-257.

⁷ "The United States had maintained that retaliatory measures which affected neutrals were essentially illegal and that the claim or pretext of retaliation could not be invoked to abridge the rights of neutrals. . . . The entry of the United States into the war led to no sacrifice of American views upon retaliation, for this country took no belligerent action based upon this claim of right." (Alice M. Morrissey, "The United States and the Rights of Neutrals, 1917-1918," *Am. J.*, XXXI, 17, 23-24.)

"It will be seen that in the World War no neutral admitted the right of belligerents to affect neutral rights by inter-belligerent retaliation. Of the belligerents, there is no record of resort to such measures, affecting neutral rights, except by Great Britain, France, Portugal, Germany, Austria-Hungary, and perhaps Italy. The case of Italy is very dubious; Great Britain, France, and Austria-Hungary seemingly preferred to base their measures, if possible, on other grounds, while maintaining the right to retaliate through the sides of the neutrals; while Germany admitted responsibility for neutral losses caused by its retaliatory measures against the enemy. It was frequently asserted by belligerents that acquiescence by a neutral in the illegal measures of a belligerent justifies the other belligerent in restricting the rights of such neutral by measures of inter-belligerent retaliation. The neutrals did not directly contest this argument, but denied that they had ever been guilty of such acquiescence, considering diplomatic protests against illegal measures as disproving acquiescence therein." (Comment on Art. 23, Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, 418.)

⁸ In the case of *The Cysne*, Portugal v. Germany, 1930, it was said: "But reprisals are not admissible against neutrals. There is no legal justification for reprisals except when they have been provoked by an act contrary to international law. This means that they are not admissible except against the State held guilty of the original violation of international law." (Lauterpacht, *Annual Dig.*, 1929-1930, Case No. 287.)

As has been noted elsewhere (*supra*, § 749), Germany, on Feb. 16, 1916, announced a readiness to make reparation, by payment of a suitable indemnity, on account of the loss of lives of American citizens resulting from the sinking of the *Lusitania*, recognizing a liability growing out of an act regarded by Germany as one of retaliation against the enemy.

of the repetition of like conduct and of like excuses in subsequent conflicts. At the present time, therefore, it is perhaps less important to accentuate the inadequacy of those excuses than to take cognizance of the fact that in all probability they will be renewed and pressed by belligerents in future wars, when a participant therein finds that its success is jeopardized by what it conceives to be the persistently illegal measures employed by its enemy. Under such conditions it is improbable that the offended and endangered belligerent will resist the temptation so to act regardless of the effect of such conduct upon obligations due to non-participating States, unless some powerful deterrent projects itself. The bearing of this upon the law and the development thereof must be obvious.⁹

The invocation of bad precedents in order to support the belligerent assertion, and the very making of that assertion must serve to weaken the influence of existing prohibitions. If defiance of them be persisted in without effective restraint, the achievement will gradually banish them from the law. If, therefore, prohibitions that leave no room for the invocation of the retaliatory plea (and pleas of kindred tenor) by way of excuse for interference with neutral rights are to remain as a part of the law and as acknowledged checks upon belligerent freedom, it is of utmost importance that no belligerent State should itself embark upon illegal conduct and so tempt its adversary to do likewise; and also that the international society should on its own account be quick to perceive the consequences of the conduct of the temptor as well as the character of its action.¹⁰ If, however, in wars to come a participant proceeds to deal lawlessly with its enemy through measures employed against it, and the latter to return illegality for illegality at the expense of unoffending neutral States, the preservation of their rights as such may be expected to depend upon the price which they are prepared to pay for the maintenance of the law. Thus, it may be that in the relative strength of such States, and in their power and disposition to make dangerous the way of the transgressor are to be found both the means and assurances of preserving and retaining in the law the body of belligerent obligations towards non-participants.¹¹

⁹ Since the words in the text were written British Orders in Council of November 28, 1939, and July 31, 1940, invoked the so-called retaliatory plea, as did also the German announcement of Aug. 17, 1940, in reference to "the complete blockade of the British Isles." See The British Blockade Policy Developed in 1939 and 1940, *supra*, § 832A. Herein was manifested the recrudescence of a belligerent policy which paid scant heed to the rights of neutrals.

¹⁰ Opinions may be expected to differ as to the extent to which neutral States should themselves take the initiative in acting upon or protesting against the initial acts of lawlessness committed by a belligerent as against its foe. The question of policy that is involved is a delicate one. Objections to the character of belligerent action when addressed to a particular State are calculated to inspire the belief that they reflect a taking of sides against it. Nevertheless, the common interest of neutral States in the deference paid by belligerents to the requirements of the law of nations in the course of their conflict with each other is so considerable as to encourage a common effort on the part of non-participating States, while disclaiming all partiality, to dissuade by friendly means a lawbreaking belligerent from persisting in a course of illegal action.

See, in this connection, Art. 6 of Convention on Coördination, Extension, and Fulfillment of Existing Treaties between the American States, concluded at Buenos Aires, Dec. 23, 1936, U. S. Treaty Vol. IV, 4834.

¹¹ Such, however, must be acknowledged to be a hope rather than an expectation, save in respect to minor conflicts or to those in particular areas where non-belligerent States happen to possess a great preponderance of power.

4

§ 888B. **Neutral Protective Zones. The Declaration of Panama.** A neutral State may reasonably demand that belligerent operations at sea be conducted at such a distance from its territory as may be necessary in order to safeguard it from injury or interference.¹ Again, such a State may fairly regard a belligerent as abusive of its normal privileges when it proceeds to maintain hovering patrols along sea lanes adjacent to neutral waters.² May the neutral go farther, and, possibly in conjunction with other neutral States, properly challenge the right of belligerents to conduct hostile operations within a defined area of wide dimensions on the high seas, surrounding or adjacent to neutral territorial waters? Such a challenge was made by representatives of the several American Republics in conference at Panama, in October, 1939.

In a statement known as the Declaration of Panama, the Governments of the American Republics announced that the nature of the existing war in Europe, in spite of its lamentable proportions, would not justify any obstruction to inter-American communications which, engendered by important interests, called for adequate protection; and that this fact required the demarcation of a zone of security including all the normal maritime routes of communication and trade between the countries of America. To that end it was said to be "essential as a measure of necessity" to adopt immediately provisions based upon precedents from the World War³ for the safeguarding of such interests, in order to avoid a repetition of the damages and sufferings sustained by the American nations and their citizens in the war of 1914–1918. There was said to be no doubt that the Governments of the American Republics must foresee those dangers, and as a measure of self-protection, insist that the waters to a reasonable distance from their coasts, remain free from the commission of hostile acts or from the undertaking of belligerent activities by nations engaged in a war in which those Governments were not involved. Accordingly, it was declared that

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the com-

§ 888B.¹ See The Marginal Sea, Certain Acts Not Assertive of Territorial Claims, *supra*, § 144.

Also Art. 18 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 178, and comment, 343.

² See Other Activities of a Belligerent in Furtherance of War, *supra*, § 852.

Also Art. 19 of Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *Am. J.*, XXXIII, *Supplement Section 2*, July, 1939, 178, and comment, 348.

³ It was said in this connection: "During the World War of 1914–1918 the Governments of Argentina, Brazil, Chile, Colombia, Ecuador and Peru advanced, or supported, individual proposals providing in principle a declaration by the American Republics that the belligerent nations must refrain from committing hostile acts within a reasonable distance from their shores." (Dept. of State Bulletin, Oct. 7, 1939, 332.)

mission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.⁴

Such waters were defined within specified limits (excepting the territorial waters of Canada and of the "undisputed colonies and possessions of European countries" within those limits). The reserved waters embraced a zone from Passamaquoddy Bay southward around Cape Horn and northward in the Pacific to the Canadian-American boundary in the Strait of Juan de Fuca. They constituted an area enveloping the domain of the American Republics, and which extended on the high seas for hundreds of miles beyond territorial waters.

It was added that the Governments of the American Republics agreed to endeavor, through joint representation to such belligerents as might then or in the future be engaged in hostilities, to secure the compliance by them with the provisions of the Declaration, "without prejudice to the exercise of the individual rights of each State inherent in their sovereignty." It was further declared that those Governments, whenever they considered it necessary, would consult together to determine upon the measures which they might make individually or collectively undertake, in order to secure observance of the provisions of the Declaration. Moreover, it was announced that the American Republics, during the existence of a state of war in which they were not involved, might undertake, whenever they might determine that the need therefor existed, "to patrol, either individually or collectively, as may be agreed upon by common consent, and in so far as the means and resources of each may permit, the waters adjacent to their coasts within the area above defined."⁵

The Declaration of Panama reflected the sense of need felt by the American Republics for defensive measures that called for more than could be achieved by action confined to territorial waters. It revealed the fact that there was a community of interest which might in particular situations justify preventive neutral action on the high seas.⁶ The Declaration could not, however, modify standards or tests of the propriety of belligerent action as laid down by the law of nations. One may be permitted to doubt, therefore, whether within the full

⁴ See Final Act of the Meeting of the Foreign Ministers of the American Republics for Consultation under the Inter-American Agreements of Buenos Aires and Lima (Panama, Sept. 23-Oct. 3, 1939), Dept. of State Bulletin, Oct. 7, 1939, 321, 332.

See, also, Declaration of the Brazilian Government on Continental Waters, *id.*, 333; Declaration of the Argentine Delegation, *id.*, 333; Declaration of the Minister of Foreign Affairs of Guatemala, *id.*, 333-334.

⁵ *Id.*, 332-333.

See, in this connection, "Interpretation of the Declaration of Panama," made available at the Dept. of State, Nov. 3, 1939, Dept. of State Bulletin, Nov. 4, 1939, 463.

See C. G. Fenwick, "The Declaration of Panama," *Am. J.*, XXXIV, 116; W. E. Master-son, "The Hemisphere Zone of Security and the Law," *Am. Bar Ass. Jour.*, XXVI, 860; Margaret P. Goddu, "The Declaration of Panama," Master's essay, Columbia University, 1941; Willard B. Cowles, "International Law and the Monroe Doctrine," *Am. Bar Ass. Jour.*, June, 1941, XXVII, 342.

⁶ In a statement from the British Admiralty issued Oct. 13, 1939, in relation to the Declaration of Panama it was said: "It is now generally recognized that no country can properly claim jurisdiction over large areas of ocean nor the right to control or exclude the movements of foreign ships on the high seas. This applies equally to belligerent operations, though a belligerent can of course restrict his operations of his own free will if he so wishes." (*New York Times*, Oct. 14, 1939.)

and broad limits of the ocean area sought to be reserved from belligerent operations the American Republics could by their common effort or proclamation lawfully forbid a European belligerent vessel of war from engaging an enemy ship which it might there encounter.⁷ The Naval War College appears to share this view.⁸

It will be recalled that on December 13, 1939, the British cruisers *Ajax*, *Achilles* and *Exeter* were in conflict with the German battleship *Admiral Graf Spee* off the coast of Uruguay, at times within sight of land, and that they caused the German vessel to take refuge in the harbor of Montevideo.⁹ On December 17, 1939, that ship when in a position about six miles south-west of Montevideo, was scuttled. The American Republics, through the President of the Republic of Panama, duly lodged with the Governments of France, Great Britain, and Germany, protest against this and certain other engagements.¹⁰ The replies of the several belligerents, released to the American press on February 23, 1940,¹¹ were alike in the assertion that the American Republics were proposing a modification of international law which could not be imposed upon the former without their consent.¹² The responses differed, however, as was nat-

⁷ Declared Mr. Sumner Welles, Under Secretary of State, in a radio address, Nov. 13, 1939: "I wish to emphasize that while the American republics thus declare their rights as they have defined them, the second article of the Declaration makes it equally apparent that they are solely obligated to endeavor to obtain assurances, by means of joint representations, from the belligerents that these rights will be respected. . . . There is no implication in this agreement of a determination on the part of any American republic to undertake to exercise force in order to procure observance of its terms." (Dept. of State Bulletin, Nov. 18, 1939, 560, 563.)

⁸ In the International Law Situations for 1939, it is declared: "The Declaration of Panama is not a part of international law. Neutral jurisdiction for defense purposes over a part of the ocean extending 300 miles from the coast is without precedent and has not been generally accepted. There is agreement probably upon the principle but not upon its application to such a tremendously wide belt. Great Britain, France, and Germany were acting within their legal rights when they refused to recognize the binding nature of the Panama Declaration." (80.)

Cf. "Recommendation on The Security Zone Created by the Declaration of Panama," submitted to the Governments, Members of the Pan American Union, by the Inter-American Neutrality Committee, April 27, 1940, Pan American Union, Law and Treaty Series, No. 14, Supplement No. 2, p. 38.

⁹ See "The Battle of the River Plate," an account of events before, during and after the action up to the self-destruction of the *Admiral Graf Spee*, compiled in the British Admiralty, London, 1940.

See also Dept. of State Bulletin, Dec. 16, 1939, 697; *id.*, Dec. 23, 1939, 723.

¹⁰ See text of statement in Dept. of State Bulletin, Dec. 23, 1939, 723. Reference was made to belligerent acts within "American waters," with the seeming implication that those waters were not confined to the territorial waters of the interested neutral States.

¹¹ Dept. of State Bulletin, Feb. 24, 1940, 199.

¹² Declared His Majesty's Government in the United Kingdom: "It will be apparent, in the first place, that the proposal, involving as it does the abandonment by the belligerents of certain legitimate belligerent rights, is not one which on any basis of International Law can be imposed upon them by unilateral action, and that its adoption requires their specific assent." (*Id.*, 200.)

Declared the French Government: "It interprets the steps taken in the name of the American Governments both on December 23rd and also by the preceding communication of the Declaration of Panama as implying that in the minds of those Governments the constitution of such a zone, involving a renunciation by the belligerent States of the exercise, over wide areas, of rights well established by international custom, could result only from an agreement among all the States interested." (*Id.*, 202.)

Declared the German Government: "Besides, the German Government cannot recognize the right of the Governments of the American Republics to decide unilaterally upon measures in a manner deviating from the rules hitherto in effect, such as are to be taken under con-

ural, as to the terms on which such consent might be forthcoming; and they intimidated, moreover, that in the absence of common agreement there could be no expectation of a relinquishment of what was conceived to be the belligerent right to engage an enemy on the high seas.¹³

As the war progressed the waters within the zone described by the Declaration of Panama frequently became the scene of belligerent operations, a circumstance which inspires doubt whether the effort registered in that declaration was proving an actual deterrent of undesired conduct.¹⁴

It should be borne in mind that the Declaration of Panama was the product of representatives of the Governments of the American Republics which were united in a profession of interest in and concern for their neutral status at the beginning of a European war,¹⁵ and that the principal assertion set forth in the instrument was conditioned upon the maintenance by those Republics of their neutrality.¹⁶ It was not adapted to a situation where one of them, as the war progressed, ceased, without becoming a belligerent, to be neutral in point of fact, and intervened in the conflict by espousing the cause and lending military aid to a favored contestant.¹⁷ Thus it came about that disregard by Britain of the Security Zone (within at least certain areas thereof) became a matter of less concern to the United States than the failure of a British vessel of war to encounter and vanquish an enemy ship therein. Nevertheless, the unified American effort which was revealed in the Declaration of Panama pointed to the power of the American Republics in a contest to which all were neutral, to cause the non-American participants to make certain relaxations of acknowledged belligerent rights when the exercise thereof might prove to be both injurious and obnoxious to those Republics because of the proximity to their shores of areas where such rights were exercised. Such power was seen in the ability of offended neutrals to withhold from belligerents the enjoyment of particular privileges within neutral waters which no requirement of conventional or customary international law obliged them to concede to States engaged in war with each other.

sideration by the American Governments against the ships of the belligerent countries which have committed acts of war within the waters of the projected security zone, according to the telegram of December 24th of last year. (*Id.*, 204.)

¹³ See British suggestions, *id.*, 200-201; French suggestions, *id.*, 202-203; German suggestions, *id.*, 204-205.

¹⁴ An Associated Press Despatch of Dec. 1, 1940, appearing in New York newspapers on Dec. 2, 1940, reporting the removal by a British auxiliary cruiser of German persons from the Brazilian coastal passenger ship *Itape*, some eighteen miles off the Brazilian coast, announced protest by the captain of that ship on the ground that his vessel was within the American neutrality zone and was making a coastal run. See *New York Herald-Tribune*, Dec. 2, 1940, p. 3. See *supra*, § 819. Some days later, the British cruiser, which proved to be the *Carnarvon Castle*, was subjected to attack by a German warship off the coast of Brazil and when within the neutrality zone, and forced to put into Montevideo for repairs on Dec. 7, 1940.

On Dec. 7, 1940, the German freighter *Idarwald* when within the American neutrality zone off the coast of Cuba was subjected to attack and capture by the British cruiser *Diomedé*. See *New York Times*, Dec. 9, 1940, p. 1.

¹⁵ At the very beginning of the Declaration of Panama it was said that "the Governments of the American Republics meeting at Panama, have solemnly ratified their neutral status in the conflict which is disrupting the peace of Europe."

¹⁶ See Art. I.

¹⁷ See *supra*, § 83C; also *supra*, § 848A.

The Declaration of Panama signified something more. It suggested a method whereby the American Republics might, without compromising their neutral status, unite to vindicate their neutral rights when the same were violated by the conduct of any belligerent whose internationally illegal acts would, if unopposed, also jeopardize the safety of the neutral victims.¹⁸ On grounds of self-defense, a State may doubtless go far in order to safeguard itself against the lawless action of any other.¹⁹

5

§ 888C. **Aspects of Neutral Responses to Unlawful Treatment by a Belligerent.** If a State not participating in a war is the victim of internationally illegal conduct at the hands of a belligerent, it is not shorn of the privilege of vindicating its rights by measures of self-help; and it need not become a belligerent in order to avail itself of them.¹ If those measures prove to be detrimental to the cause of the offending belligerent, that result may be merely an incident of the action or procedure which its own conduct inspired, and is not, therefore, necessarily indicative of wrongful conduct on the part of the aggrieved actor. Nevertheless, if that actor proceeds to employ armed force against the public agencies of the belligerent, war is likely to ensue as between them. Thus, recourse to particular forms of self-help may be expected to bring the offended State into the conflict as a belligerent. This circumstance may serve to dissuade that State from resorting to armed force, and may impel it to rely upon protest through the diplomatic channel as a means of obtaining relief. Yet this milder procedure is not to be taken as revealing the full extent of the right of the aggrieved State.²

Whether a neutral State in responding to what it regards as lawless conduct, is, in consequence of the mode by which it endeavors to maintain its rights, taking a stand that is inconsistent with professions of neutrality, really dis-

¹⁸ See Recommendation on the Security Zone created by the Declaration of Panama, submitted to the Governments, members of the Pan American Union, by the Inter-American Neutrality Committee, April 27, 1940, Pan American Union, Law and Treaty Series No. 14, Supp. No. 2, 38. This Committee, provided for in Art. 5 of the General Declaration of Neutrality of the American Republics, approved at the Panama Conference, Oct. 3, 1939, and to be composed of seven experts in international law, to be designated by the Governing Board of the Pan American Union before Nov. 1, 1939, was duly appointed. Prof. Charles G. Fenwick was the representative of the United States thereon.

See in this connection, Willard B. Cowles, "International Law and the Monroe Doctrine," *Am. Bar Ass. Jour.*, XXVII, 342.

¹⁹ See Self-defense, *supra*, § 70. See Aspects of Neutral Responses to Unlawful Treatment by a Belligerent, *infra*, § 888C.

§ 888C. ¹ See in this connection Charles S. Hyneman, *The First American Neutrality, 1934*, 24-27, 63-66.

See Efforts to Restrict Freedom to Embark upon War, The Briand-Kellogg Pact, *supra*, § 596A.

See Neutral Protective Zones, The Declaration of Panama, *supra*, § 888B.

See Lauterpacht's 6th ed. of Oppenheim, II, 444-445.

² It may be noted that by an Act approved Sept. 8, 1916, (§ 805, 39 Stat. 799; 15 U.S.C.A. § 76) the Congress authorized the prohibition, during the existence of a war in which the United States was not engaged, of imports from a belligerent country which "contrary to the law and practice of nations" was found to be excluding the importation of articles which were the product of the soil or industry of the United States.

See in this connection, Charles C. Tansill, *America Goes to War*, Boston, 1938, 541-547.

appears from sight, and is engulfed in the larger question whether the acts committed in opposition to the offending belligerent violate legal obligations due to the latter.³ The correct answer is believed to depend upon the character of the belligerent conduct sought to be opposed or thwarted, rather than upon whether the response of the non-belligerent marks a deviation from well-defined injunctions attributable to the law of neutrality. When that conduct is internationally illegal and also productive of grave injury to the aggrieved neutral, its response may take the form of a deviation that is not, in the circumstances, to be regarded as unlawful. This implies that when a non-belligerent State finds itself the victim of belligerent lawlessness, it is not confined in its choice of protective measures by the limits which normally hedge about the neutral, and may, if need be, go beyond them, on the ground that in the circumstances of the particular case, they have ceased to be applicable.⁴ Such a doctrine needs to be applied with care, and never invoked as a cloak for obvious attempts to evade injunctions which the law lays down. Nevertheless, if the belligerent expects of the neutral deference for duties of abstention or of prevention in the course of the conflict, the former must, as a most practical matter, desist or abstain from conduct which pays scant regard for the rights of non-participating States. To put it differently, the rules or injunctions growing out of the law of neutrality are elements of a delicately balanced system, and require, for the sake of their influence as deterrents of undesirable conduct, faithful effort by both belligerents and non-belligerents to maintain the basis of it.⁵

Whether restraint by the use of neutral force is to become the normal response to belligerent acts which appear to be contemptuous of neutral rights may in the future prove to be dependent not merely upon the sense of outrage experienced by the victims of wrongdoing, but equally upon their possession of both the power and disposition to maintain their rights in the face of belligerent opposition.⁶ The military or naval strength of neutrals, collectively or individually, is thus likely to be influential in restraining belligerent conduct of which

³ According to Art. 14 of the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War: "A neutral State shall not be deemed to have violated Article 4 of this Convention [enjoining impartiality and a refraining from discrimination between belligerents] by resorting to acts of reprisal or retaliation against a belligerent because of illegal acts of the latter." (*Am. J.*, XXXIII, *Supplement Section 2*, 178; also *Comment*, *id.*, 329-334.)

⁴ It is always reasonable and perhaps necessary to enquire whether the neutral response to the conduct of an offending belligerent is, under the circumstances, fitting and appropriate, rather than one revealing an abuse of power. It must be borne in mind that the aggrieved neutral may be strong enough to inflict upon the belligerent vast and grievous injury which may be disproportionate to the harm sustained in consequence of the illegal conduct of the latter. The fact is merely illustrative of the difficulty to be encountered in balancing the equities between opposing States whenever one of them undertakes by its own strong arm to vindicate its rights against another.

See *Attacks on Neutral Vessels*, *supra*, §§ 750-751.

⁵ See Mr. Hull, Secy. of State, in statement before the House Committee on Foreign Affairs, Jan. 15, 1941, *Dept. of State Bulletin*, Jan. 18, 1941, 89, 90.

⁶ With reference to the power of the United States as a neutral in the course of World War I, Viscount Grey in his *Twenty-five Years, 1892-1916*, did not hesitate to say in 1925: "The United States was able to do whatever it felt to be right or desirable without fear of the consequences. It was a factor so potentially important that its attitude might be decisive in deciding the war in favour of either set of belligerents." (*II*, 168. See also *id.*, 107-110.)

complaint is made.⁷ It remains to be seen, however, whether the actual uses of neutral force rather than the possession of the means of making it effective, are to serve in fact as deterrents of illegal belligerent conduct.

6

§ 888D. The Control of Belligerent and Other Foreign Merchantmen in Neutral Ports. According to American opinion a State may, under certain conditions of emergency, exercise wide control over foreign as well as domestic vessels within its territorial waters and in so doing regulate their anchorage and movements, inspect such craft at any time, place guards thereon, and, if necessary to secure such vessels from damage or injury, or to prevent the damage or injury to the territorial waters, or to secure the observance of the rights and obligations of the territorial sovereign, take full possession and control of such vessels, and remove therefrom officers and crews. Again, according to that opinion a State may properly forbid the officers or crews or other persons, while such vessels are within its territorial waters, wilfully to cause or to permit the destruction or injury of such vessels, or knowingly to permit their use as a place of resort for persons conspiring or preparing to commit offenses against the State or in violation of its treaties or obligations under the law of nations, or knowingly to permit such vessels to be used in violation of the rights and obligations of the State under the law of nations.

The statutory law of the United States is assertive of such a claim and imposes penalties involving the seizure and forfeiture of such vessels as well as the personal punishment of the actors in case of the commission of prohibited acts.¹ In pursuance of that law, the Government of the United States, in March, 1941, asserted control over numerous Italian, German and Danish ships in American waters, as well as of their officers and crews. This action followed the discovery that serious acts of sabotage had been committed by the occupants of the Italian ships and of at least one German ship.² The Government of the United States, moreover, instituted criminal proceedings against certain of the actors.

When the several foreign vessels concerned entered the territorial waters of the United States, those who controlled the ships must be deemed to have had knowledge of the existing statutory law and of what it prohibited. Accordingly, the foreign States under whose laws the ships were registered were not in a position to deny the right of the United States to enforce that law, as by penalizing the violators of it, or the owners of the vessels that were seized.³

⁷ Declared Charles Warren in 1940: "At present, a neutral nation possesses practically no rights on the high seas unless it is ready and able to fight for them. A neutral nation seeing its rights persistently violated has only the choice of protest without avail, or of becoming a party to the war." (*Foreign Affairs*, XVIII, 440.)

§ 888D. ¹ Secs. 1 and 3, title II, of the Espionage Act of June 15, 1917, 40 Stat. 217, 220. See also *supra*, § 765.

² See *New York Times*, March 31, 1941, p. 1.

³ See the argument of Chief Justice Marshall, in 1812, in the case of *The Schooner Exchange v. McFadden* (7 Cranch 116, 144 and 146) in acknowledging the duty of his country to accord exemption from the local jurisdiction of certain foreign public ships that had entered its territorial waters. See *supra*, § 252.

In the case of the Danish ships, on board of which it did not appear that acts of sabotage or other violations of the local law had been committed, the United States may have been and probably was justified, by reason of the relationship which Germany had attained with respect to Denmark in the existing war, to take possession of and appropriately guard the ships concerned. It is believed, however, that the use by the United States (or by any other country in consequence of any transfer or release to it by the United States) of the Danish vessels in any service, necessitated the payment of compensation to the owners.⁴ The circumstance that Germany was the belligerent occupant of Danish soil did not serve to place the Danish ships in the category of belligerent vessels, at least in the case of such of those ships as were both outside of German control and acknowledged no obligation to respect commands emanating from the Reich.

During the existence of a national emergency duly proclaimed to exist, a State may, for purposes of its own defense, take over foreign shipping within its ports, by purchase, requisition or charter, provided that arrangement for compensating the owners be adequately made, and that due deference be paid in the procedure followed in the treatment of vessels owned, used and operated for essentially public purposes by a foreign State. Under such conditions, the United States through an enactment of June 6, 1941, made provision for the exercise of such a right.⁵

By the terms of the enactment the President was authorized during the period of the emergency (but not after June 30, 1942) to purchase, requisition, for any period during such emergency, charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he should direct, any foreign merchant vessel which was lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which was necessary to the national defense. This was subject

In a note of April 3, 1941, to the German Chargé d'Affaires at Washington, Secretary Hull declared: "I know of no principle of international law which permits the masters or crews of vessels of a country which have sought refuge in or entered the ports of another country, to commit acts of destruction in disregard of local law and of the hospitality which they have been permitted to enjoy; nor is there any provision in the treaty between our two countries which lends even color of support to any such argument. It would indeed be unthinkable that any civilized nation would become a party to a treaty containing any such provision or that it would subscribe to any so-called principle of international law which would permit foreign vessels to be brought to its harbors and roadsteads and there wilfully damaged and wrecked in violation of law and to the detriment of navigation and even the safety of its harbors without restraint or hindrance by the local sovereign." (Dept. of State Bulletin, April 5, 1941, 419.) In a note of the same day, from Secretary Hull to the Italian Ambassador at Washington, it was said: "Of the twenty-seven Italian vessels in ports of continental United States, twenty-five of them were so badly damaged that extensive repairs in shipyards will be necessary to render possible their navigation. These concerted and widespread acts of destruction on the part of officers and crews in violation of specific provisions of the statutory laws of the United States, and at a time when the vessels were enjoying the hospitality and protection of our ports cannot be viewed with equanimity. The Italian Ambassador must have overlooked the gravity of the situation when in his communication of March 31 he registered a protest against the action on the part of the Federal authorities with respect to 'Italian properties and nationals.'" (*Id.*, 420.)

⁴ See *The Right of Angary*, *supra*, §§ 633-635.

⁵ 55 Stat. 242. See in this connection, Lester H. Woolsey, "The Taking of Foreign Ships in American Ports," *Am. J.*, XXXV, 497.

to the condition, among others, that "just compensation" should be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act of 1936, as amended.⁶ This action, taken at a time when the United States, although a non-belligerent, was, nevertheless, an actively intervening participant in the existing war, marked in general a reasonable exercise of the privilege of control over vessel property to be found within the domain of a territorial sovereign. That privilege which was merely incidental to the supremacy of such a sovereign therein, was thus not to be attributed to the character of its relationship to the conflict that was being waged. The circumstance that a national emergency affecting the common defense was declared to be the cause of the statutory enactment, served as a precise and special ground to warrant conduct that was seemingly of novel character.

7

§ 888E. The Freezing of Foreign Assets in an Emergency Growing out of a Condition of War between Foreign States.¹ In a national emergency such as one attributable to the events of war being waged abroad, a State may see fit to assert control over assets within its own domain that are owned by certain belligerent States or their nationals, or by persons closely associated with those States through domicile or residence within their territories, and likewise assets which have a kindred connection with particular countries (or persons closely associated with them) which are themselves being subjected to political or military pressure by such belligerent States. The assertion of control may assume the form roughly described as a "freezing of assets." The reasons for such action may be varied. It may be inspired by a desire to pre-

⁶Sec. 1. That section also contained the following significant provisions: "That if the Maritime Commission, after consideration by it of evidence submitted to it within ten days after the approval of this Act, shall find that on September 3, 1939, and continuously thereafter, any vessel was exclusively owned, used and operated for its exclusive sovereign purposes by a sovereign nation making claim therefor, such vessel may be taken under this section only by purchase or charter; and in determining said ownership, use and operation the Commission shall disregard (1) all contributions made in whole or in part at any time to the construction, repair, reconditioning, equipping or operation of said vessel, (2) all such matters, in nature similar to or dissimilar from, the foregoing clause as in the opinion of the Commission are immaterial or irrelevant to the determination of such ownership. Use of such vessel at any time since September 3, 1939, in commercial trade shall be presumptively deemed to show that said vessel is not owned, used and operated by a sovereign nation for its sovereign purposes. The final determination by the Maritime Commission shall be conclusive: *Provided further*, That if any vessel shall be found under the proviso next preceding to be exclusively owned, used and operated by any sovereign nation so that it can only be chartered or purchased, and such vessel shall be chartered or purchased, then the cash to be paid for said charter or purchase, to the extent that may be necessary, after payment of existing claims and liens of creditors against said vessel, shall be held for application upon such debt, if any, as may be due to the United States from the sovereign nation so found to have exclusive ownership to said vessel: *Provided further*, That the Maritime Commission and the Department of Justice are authorized to make just provisions out of funds provided in section 2 of this Act for employees displaced by the taking of any ship hereunder and report to the Congress their action within thirty days after the enactment of this Act."

¹§ 888E. This section is placed where it is, not to illustrate the exercise of a privilege possessed by a neutral State as such, but rather because the conduct of the United States to which reference is made was occasioned by events growing out of a war to which it was not a party.

vent the flight of capital as a response to the economic needs of the freezer, as may be the case where measures are taken to control foreign exchange,² or by a wish to protect the interests of the owners as against the anticipated conduct of an enemy or of an invader which may become one; or by a sense of need of self-protection as against a particular belligerent which may otherwise be expected to utilize the property concerned in a way that is highly detrimental to the State in whose domain it happens to be.

The freezing of assets by the territorial sovereign is not necessarily confiscatory conduct, and should never be allowed so to degenerate. It is to be differentiated from the takings of property which not only divest the owners of title, but also manifest no sense of obligation to compensate them for the pecuniary loss sustained in consequence of such action.³ Because it does not savor of such a deprivation, the freezing of assets in case of an emergency is a form of action which the foreign owners thereof may be fairly regarded as having contemplated when they brought or acquired their property within the territory of the State concerned. Hence, there is no room for the charge that when that State had recourse to such action it was guilty of bad faith. The commercial treaties of the United States do not appear to have checked the freedom of the contracting parties to freeze foreign assets within areas subject to their control when grave emergencies inspire recourse to such action.⁴

By virtue of authority vested in the President by the Trading with the Enemy Act of October 6, 1917, as amended,⁵ and of such other authority as he possessed, and by virtue also of the existence of a period of "unlimited national emergency," and finding that his action was in the public interest and was "necessary in the interest of national defense and security," that officer through a series of executive orders between April 10, 1940, and June 14, 1941, proceeded to freeze assets within American territory in so far as they belonged to particular groups of European countries or their nationals, or to persons resident or domiciled within their respective territories.⁶ This procedure was effected and elaborated through the Executive Order of June 14, 1941, by prohibiting specified transactions, except as specifically authorized by the Secretary of the Treasury, if they were by, or on behalf of, or pursuant to the direction of any foreign country designated in the order or any national thereof, or if such transactions involved the property in which any foreign country designated in the order, or any national thereof, had at any time or since the effective date of the order had any interest of any nature whatsoever, direct or indirect.

The transactions embraced the following: "A. All transfers of credit between

² See S. A. Lourie, "Freezing of Foreign Assets in the United States," Master's essay, Columbia University, 1941.

³ Cf. The Expropriation of Immovable Property belonging to Aliens, *supra*, § 217A.

⁴ The comprehensive provisions of the treaty between the United States and Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, did not purport to do so.

⁵ See Trading with the Enemy Act of Oct. 6, 1917, 40 Stat. 411, as amended by Acts of Sept. 24, 1918, 40 Stat. 966, of March 9, 1933, 48 Stat. 1, and Joint Resolution, of May 7, 1940, 54 Stat. 179.

⁶ Executive Order No. 8785. See also Federal Reserve Bank of New York, Circular No. 2222, June 14, 1941, embracing certain Treasury Department regulations as of that date. See also Executive Order No. 8389 of April 10, 1940, as amended.

any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States); B. All payments by or to any banking institution within the United States; C. All transactions in foreign exchange by any person within the United States; D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States; E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.”⁷

By such action the United States asserted in the course of a national emergency arising when it was at peace in the course of World War II a broad right capable of expansion and application when it might itself become a belligerent, and one which in such event might well mold or influence the character of fresh legislative action with respect to alien enemy property.

8

§ 889. **The Law of Neutrality in the Life of Nations.** Widespread acceptance of the principle that warring States owed special duties to others that were non-participants in the conflict, and that the latter owed special duties to the former, produced the gradual development of a body of law that addressed its injunctions to both classes of States. It was an achievement of utmost benefit to the life of the international society.¹ It grew out of the community of interest which existed between belligerent and non-belligerent States, and which rendered it highly expedient for both to yield to certain reciprocal restraints upon

⁷ Executive Order No. 8785, in Section 2 of which the following transactions were prohibited except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise: “(1) The acquisition, disposition or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this Order or a notarial or similar seal which by its contents indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may, at any time, have been stamped, imprinted, affixed or attached thereto; and (2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States.”

See *Commission for Polish Relief, Ltd. v. Banca Nazionale, etc.*, 176 N. Y. Misc. 1070; *id.*, 262 N. Y. App. Div., 543; and (since the period covered by this work) *id.*, 288 N. Y. 332, where it was declared that the Executive Order (No. 8389 of 1940, as amended by No. 8565 of 1940) was a check upon trading with the enemy; that its prime purpose was to stop such uses of foreign property rights as might imperil national defense; but that it did not forbid attachment of the conceded interests of the defendant in the credits upon which certain levies had been made. *Cf.* dissenting opinion of Finch, J., *id.*, 339.

§ 889.¹ The law of neutrality could not have attained the elaborate development which practice yielded to it with the beginning of the present century, had not the common benefits that grew out of it been widely appreciated and duly appraised. This circumstance is one of the many that have served to render highly useful the study embodied in the Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War and the Comment accompanying it, published in 1939.

their freedom. A variety of opposing forces had made the resulting law of neutrality what it was when World War I broke out. That law had then been molded into a form and had reached a stage which made it possible to point with confidence to tests of the propriety of State conduct. Nevertheless, in the course of that conflict, the sufficiency and character of those tests were constantly challenged by belligerent powers. Neutral opposition, even on the part of the United States before it became a belligerent, was at times unimpressive and ineffectual. Recourse to conduct which, in American opinion, betokened belligerent lawlessness, was, accordingly, to be the precursor of, and utilized as a precedent for, like conduct in the war that broke out in 1939. It should be recalled, however, that the failure of Germany in its use of submarines for purposes of attack, to heed what the United States conceived to be the legal duties of a belligerent towards itself as a neutral, proved to be a major reason why the latter became a belligerent in 1917.²

Events of the two principal wars between 1914 and 1941, have accentuated (and more impressively in the later than in the earlier conflict) the following facts which speak for themselves:

- (a) the unwillingness of belligerent States to refrain from responding to the illegal acts of the enemy by measures which were contemptuous of normal obligations towards neutrals;
- (b) the failure of belligerent States to respect the inviolability of neutral territory when a sufficient military advantage was to be gained by disregarding the normal prohibition;
- (c) the impotence of relatively small neutral States to deter strong belligerent States from subjecting the former to illegal treatment;
- (d) the relative indifference of some large neutral States, and notably of the United States, to some forms of belligerent lawlessness of which they themselves were the victims, when they favored the cause of the lawless actor; and
- (e) the unwillingness of a State not at war to admit that it was burdened with a duty to abstain from, or to prevent, the aiding of a favored belligerent whose maintenance was deemed to be essential to, or closely associated with the self-defense of such non-belligerent.

These facts offer food for thought. They point to reactions to be anticipated by both belligerent and neutral States when certain conditions confront them. They suggest, moreover, the price to be paid for the maintenance of the law of neutrality in any system contemplating the detachment from an existing war of States that profess to be non-belligerent. In general, they indicate that belligerent States are not likely to be respectful of some obligations towards neutrals which both reason and practice appeared as late as August, 1914, to ordain, unless neutral States are themselves prepared, collectively, or otherwise, to penalize the offenders. On the vigor and success of neutral opposition seemingly depends, therefore, the maintenance of some neutral rights. The real diffi-

² In so acting the United States revealed what the effect of a violation of international law with respect to a neutral might prove to be when the latter smarted sufficiently under the treatment to which it was subjected.

culty is, however, the fact that the relative power of strong belligerent States, in consequence of the acquisition of modern implements of war, has vastly increased, and to a degree such that in the two most recent major conflicts neutral States found themselves practically impotent to offer what in earlier wars might have proved to be effective deterrents. This renders academic the inquiry as to what might have been achieved only a few decades back, had neutral States been alert to utilize their better position to unite both for purposes of peace and for the maintenance of existing tests of belligerent obligations.

It seems clear also that the disposition of a neutral State to take sides in a particular war, and to participate for some purposes therein, can not be restricted by agreement or by domestic fiat. Again, no obligation to refrain from aiding a favored belligerent will be acknowledged when the maintenance of that belligerent is deemed to be vital for the defense of the interested neutral, and the downfall of that belligerent to menace the security of that neutral. Under such circumstances the inapplicability of some injunctions that normally are addressed to it will surely be claimed. The United States may be expected to take such a stand when a neighbor of the Western Hemisphere becomes involved in war with a non-American State.³

There may, nevertheless, be wars in the outcome of which one or more neutral States evince relatively slight concern, and where, accordingly, the temptation to assist a favored belligerent may not be difficult to resist. It is with respect to such conflicts, whether frequent or infrequent, that non-participating States may find it highly advantageous to heed principle, and where, moreover, full deference for what it enjoins may even serve to reduce the length of the struggle. Heretofore the members of the international society professing to be neutral in wars afflicting their neighbors, have not generally been willing to go far in that direction. The profits of ministrations on the one hand, and the zeal of prospective belligerents to find easy access to needed supplies on the other, have been thorns which have choked the seeds of principle, preventing their ripening into a sound practice. Conventions emanating from The Hague in 1907, and from Habana in 1928, are sadly illustrative. Thus it is that the vast power of outside and professedly neutral States to localize and minimize the effect of hostilities between belligerents has never been fully exercised. Distinctions have been so drawn between neutral duties of abstention and those of prevention in the enunciation of rules that have been widely accepted as to permit a real participation by neutral countries whose governments as such were guilty of no legal fault. There has been no common disposition to respect the full obligations of prevention as logically and consistently drawn from the underlying principle. That principle is, that what a neutral State claims the right exclusively to control, such as its own territory, it must possess the power and, therefore, under-

³ See memorandum from the Dept. of State to the Government of Uruguay, made public in Montevideo on July 2, 1941, in response to a memorandum from the Uruguayan Government of June 21, 1941, suggesting an inter-American understanding that the American Republics would not treat as a belligerent any American country which, in defense of its own rights, should find itself in a state of war with nations of other continents. (Dept. of State Bulletin, July 5, 1941, 8.)

take the duty so to control as to prevent it from being a source of direct aid to one belligerent and of injury to its enemy.

As has been noted elsewhere, the United States, at the Inter-American Peace Conference at Buenos Aires, in 1936, proposed the acceptance by the American Republics of a convention designed to prohibit the exportation of specified forms of military and other aid to American belligerent countries by their neutral American neighbors; ⁴ and also that in lieu thereof a convention was concluded which although lacking provisions which would render such action obligatory, contained, nevertheless, the declaration that the parties might consider taking it.⁵ The significant feature of this convention was the agreement that in case of an outbreak of hostilities or threat of such outbreak between two or more of the parties, they should "through consultation, immediately endeavor to adopt in their character as neutrals a common and solidary attitude, in order to discourage or prevent the spread or prolongation of hostilities."⁶ The convention revealed also that in the mind of America, both South and North, the neutral status of Republics which held aloof from war was not inconsistent with, and might even facilitate, affirmative efforts within a wide field designed to bring about the resumption of peace. These efforts, whether mediatory or embargo-producing, were not, however, according to the convention, to savor of intervention.⁷ Thus it may be that the theory and character of the solidarity of the American Republics will, as the years go on, so express themselves as to exert a powerful influence in support of the law of neutrality, at least, as applied to inter-American armed conflicts. The point to be emphasized is that a group of States, small or large, in or out of the Americas, may, through acts which do or do not savor of intervention, effect the prevention or cessation of war without taking sides, and without relinquishing in the slightest degree an impartial spirit.

It is unnecessary here to stress the interventional aspect of conduct whereby a State not professing to be at war, takes sides against an unfavored belligerent and proceeds directly or indirectly to assist its adversary; nor is it necessary here to discuss the conditions when such interference may be excused.⁸

If belligerent activities are generally deemed to be highly offensive to non-participants, as by threatening their downfall, or the disintegration of the existing international order, united action against the actors must be acknowledged to be the price to be paid for the vindication and maintenance of the law. In a word, the law of neutrality presupposes the existence of an international legal system imposing restrictions upon belligerents and non-belligerents alike, demanding deference by both for the injunctions which it lays down. If, therefore, either belligerents or non-belligerents habitually fail to yield it, the foundations

⁴ See *supra*, § 868; also in this connection, the Neutrality Act of May 1, 1937, 50 Stat. 121, which was repealed by the Neutrality Act of Nov. 4, 1939.

⁵ U. S. Treaty Vol. IV, 4831, 4934.

⁶ *Id.*, Art. 6.

⁷ See also General Declaration of Neutrality of the American Republics in the Final Act of the Consultative Meeting of Foreign Ministers of the American Republics, at the City of Panama, Oct. 3, 1939, Dept. of State Bulletin, Oct. 7, 1939, 321, 326, *Am. J.*, XL, *Supplement*, *Official Documents*, 9.

⁸ See *supra*, § 83C.

of that law crumble.⁹ The international society has not, however, yet concluded that such habitual failures are invariably to be anticipated. Nevertheless, it must constantly be borne in mind that the maintenance of neutrality by non-belligerent States, with the several attending implications growing out of such a status has not thus far proved to be an effective means of abating war or of discouraging recourse to it. Such maintenance has become an increasingly difficult task. Of late it has at times been abandoned when reasons for the taking of sides have made strong and persistent appeal to non-fighting States.

Proportional to the vigor and resoluteness of the effort of the international society to avert war and smother it when it once arises there must be anticipated general unwillingness, in many situations to limit interference by methods that are consecrated to deference for impartiality. This outstanding fact, moreover, broadly suggests the change of front which hereafter may characterize the attitude of civilization as it proceeds to realize itself.¹⁰ Its intolerance of war itself is bound to breed a system of collective interference designed both to prevent the outbreak of armed conflict, and to cause its abatement by active measures that may not always exact impartial action, and never demand it as against a belligerent whose conduct is deemed to be offensive to the organized international society.¹¹

⁹ See Mr. Hull, Secy. of State, in statement before the House Committee on Foreign Affairs, Jan. 15, 1941, Dept. of State Bulletin, Jan. 18, 1941, 89, 90.

¹⁰ See *infra*, § 923.

¹¹ See *infra*, § 923.

TITLE L

AMERICAN PRIZE COURTS AND PROCEDURE

1

§ 890. **Courts.** In time of war the courts of a State, whether belligerent or neutral, are instrumentalities by which it performs certain duties of jurisdiction, and also avails itself of certain rights thereof. With the aid of its prize courts a belligerent fulfills its obligation to neutral States and their nationals to adjudicate as to the propriety of the seizure of vessels and cargoes in which they claim an interest, and as to the right to appropriate what has been captured.¹ This obligation is the natural consequence of conditions of maritime war which permit capture on grounds of suspicion and under circumstances when it may be impossible for the captor to determine whether the vessel and cargo encountered, or either of them, are justly subject to appropriation. An adjudication in which both the captor and the owner appear as litigants, and in which each party is given reasonable opportunity to maintain its own cause, strengthens the claim of the belligerent in case of condemnation, that it is entitled to appropriate what has been seized in its behalf.

It has been seen that a neutral State may utilize its courts of admiralty as an instrumentality through which to defend and preserve its neutrality and as a means of effecting the release of prizes brought by the captor within its territorial waters.²

Satisfaction of the requirement that an adjudication establish the basis of condemnation is not met if a so-called prize court decrees forfeiture by mere arbitrary power without any trial or hearing, and without recourse to such forms of procedure as are deemed requisite among civilized States as a safeguard against the miscarriage of justice in a judicial inquiry.³ A reasonable procedure designed to promote the ends of justice for all concerned, and capable of easy utilization by the claimants of property, is essential to a decree of condemnation entitled to respect abroad.⁴ A belligerent is not permitted to set up prize courts

§ 890. ¹ See Neutral Prizes — Their Destruction, *supra*, §§ 757-758; Enemy Prizes — Their Destruction, *supra*, § 756. Dana's Wheaton, Dana's Note No. 186.

² See Neutrality, Asylum in Maritime War, Entrance with Prize — *The Appam*, *supra*, §§ 861-862. Enforcement of Neutral Duties, Some Aspects of American Procedure, Judicial Action, *supra*, § 879.

³ *Sawyer v. Maine Fire & Marine Ins. Co.*, 12 Mass. 291, 3 Beale's Cases on Conflict of Laws, 294; *compare* *The Helena*, 4 Ch. Rob. 3.

See, also, Mr. Bayard, Secy. of State, to Mr. Preston, Haitian Minister, Nov. 28, 1888, *For. Rel.* 1888, I, 1001, Moore, Dig., VII, 586.

⁴ It will be seen that in spite of the reasonableness of the procedure established, and the opportunity afforded claimants to protect their interests, there may still be a miscarriage of justice unless the law applied by the tribunal is not at variance with that prescribed by the law of nations.

in places not under its control, and, as has been observed, it is forbidden to do so within neutral territory.⁵

In the choice or creation of tribunals to be clothed with the requisite powers of prize courts, the territorial sovereign is generally restricted by no limitations other than those prescribed by its own constitution and laws.⁶ It may be deemed wise, however, to specify by treaty the nature of the tribunals which are to exercise such functions.⁷

As has been noted elsewhere, the United States did not invoke the aid of prize tribunals as an agency for the vindication of its rights with respect to enemy merchant ships which it seized in its harbors as it became a belligerent in the World War in April, 1917.⁸ Inasmuch as the United States made no captures of vessels at sea as a belligerent in that conflict, no tribunals established under its authority had occasion to adjudicate as prize courts. Thus it was that no opportunity presented itself for the American judicial mind to apply itself to the solution of questions which a belligerent sovereign frequently finds occasion to submit to such agencies.⁹ Hence the light that still comes from the conclusions

⁵ Mr. Jefferson, Secy. of State, to Mr. Ternant, French Minister, May 15, 1793, Am. State Pap., For. Rel. I, 147, Moore, Dig., VII, 586.

See, also, *Glass v. The Sloop Betsey*, 3 Dall. 6, 16; *Wheelright v. Depeyster*, 1 Johns. 471, 481.

See *Neutrality, Duties of a Neutral State, Nature of the Obligation*, *supra*, §§ 844-847; *Duties of Prevention, Other Activities of a Belligerent in Furtherance of War*, *supra*, § 852.

⁶ "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

"The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize." (Taney, C. J., in *Jecker v. Montgomery*, 13 How. 498, 515.)

Sustaining the authority of the President to establish courts during the Civil War in insurgent territory occupied by the Federal forces, see *The Grapeshot*, 9 Wall. 129.

Concerning the power of the Court of Appeals in prize cases erected by the Continental Congress to revise and correct the decrees of State courts of admiralty, see *United States v. Judge Peters*, 5 Cranch, 115; also statement of Mr. Brown, Chief Clerk, Department of State, to Mr. Wing, Chief Clerk, Department of Justice, July 24, 1879, 129 MS. Dom. Let. 208, Moore, Dig., VII, 585.

⁷ The United States has concluded numerous conventions with Central and South American States, embodying the following provisions comprising Art. XXII of the convention of peace, commerce, and navigation with France of Sept. 30, 1800: "It is further agreed that in all cases the established courts for prize causes, in the country to which the prizes may be conducted, shall alone take cognizance of them. And whenever such tribunal of either of the parties shall pronounce judgment against any vessel or goods, or property claimed by the citizens of the other party, the sentence or decree shall mention the reasons or motives on which the same shall have been founded, and an authenticated copy of the sentence or decree, and of all the proceedings in the case, shall, if demanded, be delivered to the commander or agent of the said vessel, without any delay, he paying the legal fees for the same." (Malloy's Treaties, I, 503.)

⁸ See *supra*, §§ 754A and 765.

⁹ In view of the stand taken by the political department of their country as a neutral in

of American courts of prize must be derived from decisions that antedated the present century.

The public policy of a State as interpreted by its tribunals may cause them to attach no value to the decree of a prize court set up by an insurgent government in territory subject to its control.¹⁰

2

JURISDICTION

a

§ 891. **To Adjudicate.** The power of a particular court to exercise jurisdiction in a prize case depends upon the local laws, and, in the United States, upon the Constitution¹ and the appropriate acts of Congress. The Judicial Code of the United States provides that the District Courts shall have original jurisdiction "of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."² The willingness with which a belligerent State may clothe its prize courts with a wide jurisdiction, and with freedom in the exercise of it to apply the law of nations, may render obscure the

the course of World War I, it may be greatly doubted whether American tribunals acting as courts of prize, when the United States again finds itself a belligerent, will be disposed to accept the guidance of foreign prize courts as expressed in numerous decisions growing out of belligerent seizures in the course of that conflict.

¹⁰ Declared Sprague, J., in the case of *The Lilla* in 1862: "Most assuredly I shall not recognize the Southern Confederates as a nation, or as having a government competent to establish Prize Courts. No proceedings of any such supposed tribunals can have any validity here, and a sale under them would convey no title to the purchaser, nor would it confer upon him any right to give title to others. But it is argued, that, under the Queen's proclamation, recognizing the Confederates as belligerents, a British court would hold a sale to be valid. What the decision of a British court might be upon that question, we do not know, it never having been there litigated. But such a decision, if made, would be no more binding upon our courts than the political views of the British government would be upon the President or the Congress." (2 Sprague, 177, 186-187.)

In the brief report in the case of *The Nueva Anna* and *The Liebre*, 1821, it is said: "The Court stated, that it did not recognize the existence of any court of admiralty, sitting at Galveston, with authority to adjudicate on captures, nor had the government of the United States hitherto acknowledged the existence of any Mexican republic or state, at war with Spain; so that the court could not consider as legal, any acts done under the flag and commission of such republic or state. But, as the record, in this case, stated the capture to have been made under the flag of Buenos Ayres, it became necessary to send back the case, in order to ascertain under what authority it was in fact made." (6 Wheat., 193-194.)

§ 891. ¹ Constitution, Art. 3, Section 2, paragraph 1.

"Judicial cognizance of prize cases is derived from that Article of the Constitution which ordains that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; and the district courts for many years exercised jurisdiction in such cases without any other authority from Congress than what was conferred by the 9th section of the Judiciary Act, which gave those courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including the seizures therein mentioned, the rule adopted being that prize jurisdiction was involved in the general delegation of admiralty and maritime cognizance, as conferred by the language of that section. *Glass v. The Betsey*, 3 Dall. 6; *The Admiral*, 3 Wall. 603; *Jennings v. Carson*, 1 Pet., Adm. 7; 1 Kent, Com. (12th ed.), 355; 2 Stat. 781, Sec. 6." (Clifford, J., in *United States v. Ames*, 99 U. S. 35, 39.)

² Judicial Code, § 24, par. 3, 36 Stat. 1091, 28 U.S.C.A. § 41 (3).

See, also, § 238 of the Judicial Code, 28 U.S.C.A. § 345, conferring upon the Supreme Court of the United States jurisdiction of appeals taken direct thereto from final sentences and decrees in prize causes.

fact that that law is not itself a source of jurisdiction. Regardless of the places to which such a court is permitted to turn in its search for the law which is to govern its conclusions, it remains necessarily a domestic tribunal whose authority to act is derived exclusively from the will of the sovereign which created it.

"The exclusive cognizance of prize questions belongs in general to the capturing power, and the courts of other countries will not undertake to redress alleged marine torts committed by public armed vessels in assertion of belligerent rights. This applies to privateers, duly commissioned."³ This statement does not signify that a foreign State is obliged under all circumstances to respect the decrees of the prize courts of the captor. The courts of the United States note a relaxation from such an obligation where a vessel has been fitted out in violation of American neutrality;⁴ and the exception forms the basis of an important group of cases noted elsewhere.⁵

According to American opinion a prize court of a belligerent is not necessarily deprived of jurisdiction to adjudicate by reason of the circumstance that the property concerned is not within its custody. Thus it is deemed to be empowered to enter a decree of condemnation when a captured ship is carried into a neutral port and there held in the custody of the captor,⁶ or in case the captor has been obliged to sell, or otherwise dispose of, or to destroy the prize.⁷ The Supreme Court of the United States has, however, declared that the court of the State of the captor cannot oust the jurisdiction of a neutral American tribunal, and defeat its judgment, when the vessel is in the possession of the latter and charged with the violation of neutral rights.⁸

When a court of the United States has taken jurisdiction in a case of maritime capture, the political department of the Government is not disposed to enter into diplomatic arrangements relative to the matter until the judiciary has finally

³ Statement in Moore, Dig., VII, 588, citing *L'Invincible*, 1 Wheat. 238. See also *United States v. Richard Peters*, 3 Dall. 121.

⁴ See the *Estrella*, 4 Wheat. 298; the *Santissima Trinidad*, 7 Wheat. 283; the *Gran Para*, 7 Wheat. 471; *Hernandez v. Aury*, Fed. Cases, No. 6, 413.

⁵ See *Neutrality, Asylum in Maritime War, Entrance with Prize*, *supra*, § 861; *The Appam*, *supra*, § 862; *Enforcement of Neutral Duties, Some Aspects of American Procedure, Judicial Action*, *supra*, § 879.

⁶ *Hudson v. Guestier*, 4 Cranch, 293; *Williams v. Armoyd*, 7 Cranch, 423; *Jecker v. Montgomery*, 13 How. 498, 515-516; Halleck (Sir S. Baker's 3 ed.), II, 405, quoted in Moore, Dig., VII, 591; *The Zaralla*, Fed. Cases, No. 18203.

⁷ See *Naval Instructions Governing Maritime Warfare*, June 30, 1917, Section XIII, respecting the destruction of prizes, and the procedure prescribed in accordance with § 4615, Revised Statutes, providing in part that "If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings or adjudication may be commenced."

See *Effect of Capture Upon the Vessel and its Cargo, Enemy Prizes — Their Destruction*, *supra*, § 756; *Neutral Prizes — Their Destruction*, *supra*, §§ 757-758.

It should be clear that the right of the court of the captor to adjudicate as to the question of prize or no prize does not depend upon the propriety of the conduct of the captor in destroying or for other reasons failing to bring in what has been seized. See, in this connection, *Dana's Wheaton*, *Dana's Note No. 186*, p. 486.

For the decisions of the Belgian Prize Court at Antwerp in November, 1919, in certain cases where jurisdiction was exercised with respect to vessels interned in neutral waters, see *Brit. Y.B.*, 1921-1922, 183-192; also discussion in *Garner, Prize Law*, §§ 66-67.

⁸ *The Appam*, 243 U. S. 124, 156, citing *The Santissima Trinidad*, 7 Wheat. 283, 355. See, in this connection, *Frederic R. Coudert*, "The *Appam* Case," *Am. J.*, XI, 302.

performed its functions.⁹ The Department of State has not, however, been unwilling on appropriate occasion to request the Attorney General to instruct a United States district attorney to appear in a case as *amicus curiae*, and present to the court a copy of a note from the diplomatic representative of an interested foreign State complaining of the exercise of jurisdiction.¹⁰

b

§ 892. **To Award Damages.** The function of a prize court as an agency in the performance of duties of jurisdiction is impaired unless the tribunal is empowered to award damages to the owners of property unlawfully captured when the demands of justice require something more than restitution or the payment of the proceeds of what may have been sold. The prize courts of the United States do not lack such powers.¹

There is deemed to be ground for damages in the case of capture without probable cause, that is to say, where the circumstances are such as not to war-

⁹ Opinion of Mr. Bates, Atty. Gen., Oct. 20, 1864, 11 Ops. Attys. Gen. 117, 119.

"Moreover, inasmuch as the *Appam* has been libeled in the United States District Court by the alleged owners, this Government under the American system of government, in which the judicial and executive branches are entirely separate and independent, could not vouch for a continuance of the *status quo* of the prize during the progress of the arbitration proposed by the Imperial Government. The United States Court having taken jurisdiction of the vessel, that jurisdiction can only be dissolved by judicial proceedings leading to a decision of the court discharging the case—a procedure which the executive cannot summarily terminate." (Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, April 7, 1916, For. Rel. 1916, Supp., 735, 736.)

¹⁰ See Same to Same, March 2, 1916, *id.*, 729, 731.

§ 892. ¹ Declared Story, J., in *The Amiable Nancy*, 3 Wheat. 546, 558: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them." See also, Gray, J., in *Cushing v. Laird*, 107 U. S., 69, 82.

Declared Story in his Notes on the Principles and Practice of Prize Courts: "When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow, as has been already observed, prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; and in proper cases will decree the parties to pay over the proceeds, with interest upon the same for the time they have been in their hands. It may also enforce its decrees against persons having the proceeds of prizes in their hands notwithstanding no stipulation, or an insufficient stipulation has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy on the stipulation; and in these cases the Court may proceed upon its own authority *ex officio*, as well as upon the application of parties; nor is the Court *functus officio* after sentence pronounced, for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject matter.

"The Prize Court has also exclusive jurisdiction as to the question who are the captors and joint captors entitled to share in the distribution, and its decree is conclusive upon all parties. It has the same exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures, and though a mere maritime tort unconnected with capture *jure belli* may be cognizable by a Court of Common Law; yet it is clearly established that all captures *jure belli*, and all torts connected therewith, are exclusively cognizable in the Prize Court.

"And the Prize Court will not only entertain suits for restitution and damages in case of wrongful capture, and award damages therefor; but it will also allow damages for all personal torts, and that upon a proper case laid before the Court as a mere incident to the possession of the principal cause. And in such a case it will not confine itself to the actual wrong-doer; but will apply the rule of *respondet superior*, and decree damages against the owners of the offending privateer; and where the captured crew have been grossly ill-treated, the Court will award a liberal recompense." (Pratt's ed., London, 1854, 30-32.)

rant, in the case of a neutral vessel, a reasonable ground of suspicion that it was engaged in an illegal traffic.² If without sufficient cause the captor has sold the property seized and has been guilty of unjust and offensive conduct, "the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor, although the seizure as prize was originally lawful, or made upon probable cause."³ If the captured property be lost through the fault and negligence of the captor, it has been held that the value of the vessel and the prime cost of the cargo, with all charges and the premium of insurance, where it has been paid, with interest, are to be allowed, in ascertaining the damages sustained.⁴ It has been declared that while in a suit against the original wrongdoers guilty of gross and wanton outrage, it might be proper "to visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct," the owners of the offending ship — a privateer — should not be liable for punitive damages.⁵

It is said to be a settled principle in the law of prize that probable cause will not merely excuse, but even in some cases justify a capture. "If there be probable cause, the captors are entitled as of right," according to Mr. Justice Story, "to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet further, and gives the captors their costs and expenses in proceeding to adjudication."⁶

It has long been the practice in the United States to file all libels in prize causes in its name. This being true, damages for unlawful capture are not awarded against the naval captors. "On the contrary, the practice, since 1861, has been to award damages against the United States alone, or, in cases where the captors have intervened before condemnation and asked to be made co-libellants, against the United States and the naval captors jointly."⁷ The Supreme Court of the United States has recognized the impossibility of entering

² The Thompson, 3 Wall. 155, 162-163; The Paquete Habana, 175 U. S. 677, 714; also The Teresita, 5 Wall. 180.

See Dana's Wheaton, Dana's Note, No. 186, p. 484; Award of the Arbitral Tribunal at the Hague, in the case of the *Carthage*, under convention between France and Italy of March 6, 1912, J. B. Scott, Hague Court Reports, 330, 336.

³ Taney, C. J., in *Jecker v. Montgomery*, 13 How. 498, 516.

⁴ Marshall, C. J., in *The Anna Maria*, 2 Wheat. 327, 335.

⁵ The Amiable Nancy, 3 Wheat. 546, 558-559; The Santa Maria, 10 Wheat. 431.

⁶ The Apollon, 9 Wheat. 362, 372-373. The learned Justice observed, however, that the case was far different in respect to municipal seizures. "Probable cause has never been supposed," he declared, "to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must refund in damages for the marine tort, unless he can shelter himself behind the protection of some statute." (373)

See, also, The Thompson, 3 Wall. 155, 162, where Mr. Justice Davis relied upon the views of Story, J., in *The George*, 1 Mason, 24, and upon Story's Notes, by Pratt.

See *The Buena Ventura*, 175 U. S. 384, 395.

In the case of *The Dashing Wave*, 5 Wall. 170, the Supreme Court of the United States in affirming the decree of the District Court restoring the vessel and cargo, apportioned the costs and expenses consequent upon the capture between the vessel and a shipment of coin on board, exempting from contribution the residue of the cargo. It had been held that the evidence did not warrant the condemnation of the specie, but did justify the capture.

⁷ Argument for Claimants in *The Paquete Habana*, 189 U. S. 453, 461, where attention was called to the prize acts of Aug. 6, 1861, 12 Stat. 319; March 3, 1863, 12 Stat. 759; and June 23, 1864; Rev. Stat. §§ 4613 and 4652.

a decree against the captors in a case where there was no formal intervention by them, and where the United States appeared to adopt the acts of capture as its own.⁸

3

JURISPRUDENCE

a

§ 893. **In General.** A prize court created and maintained by a single territorial sovereign is necessarily a domestic tribunal. The law enunciated, and applied, regardless of its nature or origin, is essentially the local law, because it obtains where the court sits. Inasmuch, however, as the problems for adjudication, such as the question of prize or no prize, concern the lawfulness of acts committed on the high seas under belligerent flags, and affect the rights of foreign States and their nationals, the court must be guided by the principles of the law of nations, if its conclusions are to be heeded abroad.¹ It should be borne in mind, however, that the freedom of a tribunal to accept such guidance is invariably attributable to the will of the State to which the court owes its life. Bereft of that freedom the conclusions of prize courts would manifest an attempt of the State in behalf of which they acted to shield its policies as a belligerent, regardless of their character in the light of the law of nations, under a cloak of purely local judicial approval.²

⁸ See opinion of Mr. Justice Holmes in *The Paquete Habana*, 189 U. S. 453, 464-465, where it was said: "The libels were filed by the United States on its own behalf, praying a forfeiture to the United States. The statutes in force seemed to contemplate that form of procedure, Rev. Stat. § 4618, and such has been the practice under them. The libels alleged a capture pursuant to instructions from the President. The captures were by superior force, so that there was no question that the United States was interested in the proceeds, Rev. Stat. § 4630. The modification of the decrees in regard to damages, on motion by the United States, imported a recognition of the interest of the United States in that matter, and its submission to the entry of decrees against it. The agreements to which we have referred had a similar import, although they indicated an awakening to a determination to argue the form of the decree. In the case of *Little v. Barreme*, 2 Cr. 170, conversely to this, the United States was not a party and the captor was. All that was decided bearing upon the present point was that instructions from the President did not exonerate the captor from liability to a neutral vessel. As to even that the Chief Justice hesitated. But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued. *Lamar v. Browne*, 92 U. S. 187, 199; and as to ratification, *Buron v. Denman*, 2 Exch. 167, 187, 189; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moo P. C., 22, 86."

§ 893.¹ Declared Story, J., in *The Schooner Adeline*, 9 Cranch, 244, 284: "The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."

Declared Gray, J., in *The Paquete Habana*, 175 U. S. 677, 708: "This rule of international law [respecting the exemption of coast fishing vessels from capture] is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."

See, also, *The Zamora*, [1916] 2 A. C. 77; Opinion of Mr. Speed, Atty. Gen., April 2, 1866. 11 Ops. Atty. Gen., 445, 449, citing Wheaton, part iv. chap. 11.

² "The instant that a court sitting to administer international law recognizes either governmental orders or proclamations setting forth governmental policy as constituting rules of that code, at once that court ceases in fact to administer in its purity that law which it pretends to administer. . . . The function of the tribunal has undergone a change which is

In ascertaining what the requirements of international law prescribe, a prize court is necessarily influenced by the views of the executive, judicial and legislative departments of its own government. Unofficial utterances of local jurists and commentators doubtless have weight. Much importance may be attached to the judicial decisions of another country whose jurisprudence finds root in the same soil as that of the State of the forum.³

It is accepted opinion in the United States and England that a prize court is subject to legislative restrictions respecting the law to be applied, as well as the jurisdiction to be entertained.⁴ It has not been, however, the disposition of Congress to render prize adjudications abortive by restrictive legislative enactment.

Executive regulations, such as those declaratory of belligerent rights, in the form, for example, of orders in council, exercise vast influence upon judicial opinion even when the lawfulness of such regulations is challenged and the court deems itself free to denounce them if contrary to what it conceives to be the law of nations.⁵ Thus the technical right of a neutral claimant to obtain in a local forum an impartial adjudication respecting the propriety of the action of the political department of the government may prove to be of slight practical value, notwithstanding the integrity and learning of the court; for the tribunal may heartily acquiesce in the soundness of belligerent theories of action which its sovereign invokes. If the only redress available to a claimant be a further appeal to an international tribunal established after the termination of the conflict, the belligerent is enabled to persevere in applying those theories of action with substantially slight interference by any judicial body. This circumstance may serve to ruin all neutral trade opposed to the pretensions of the belligerent capable of enforcing its will. For that reason aggrieved neutral States find justification for interposition when the practices of a belligerent in the course of a maritime war, although deemed to be sharply at variance with the requirements of international law, are, nevertheless, known to be regarded by its prize courts without disapproval.

justly and inevitably fatal to its weight and influence with foreign powers. It is not only a degradation of the court itself, but it is a mischievous injury to the government which has destroyed the efficiency of an able ally." (*Am. Law Rev.*, V, 255, Moore, Dig., VII, 648)

³ Marshall, C. J., in *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 198, concerning the respect to be entertained for British prize decisions by American courts.

See James Nevins Hyde, "The Law of Blockade — The Influence of Lord Stowell on the Supreme Court in the Civil War Cases," Report, Columbia University, 1934.

See Charles Noble Gregory, Abstracts of Cases contained in Lloyd's Reports of Prize Cases, Vols. 1-4, Dept. of State, 1919.

⁴ "It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature." (Lord Parker, in the judgment in *The Zamora*, [1916] 2 A. C. 77.)

See, also, Gray, J., in *The Paquete Habana*, 175 U. S. 677, 700.

⁵ "If Great Britain followed, as she declares that she did, the course of first referring claimants to local remedies in cases arising out of American wars, it is presumed that she did so because of her knowledge or understanding that the United States had not sought to limit the jurisdiction of its courts of prize by instructions and regulations violative of the law and practices of nations, or open to such objection." (Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, *For. Rel.* 1915, Supp., 578, 586-587.)

b

§ 894. **Grounds of Foreign Complaint. The Discussion between the United States and Great Britain during World War I.** The differences between the United States and Great Britain between 1914 and 1917, respecting the rights of the latter as a belligerent and those of the former as a neutral, embraced the question whether the American owners of captured vessels and cargoes should be left to pursue their remedies in the British courts, or should be regarded as having claims justifying diplomatic interposition and discussion. Great Britain maintained that its prize courts were empowered to deal not only with captures, but also with claims for compensation;¹ that when an effective mode of redress was open to neutral claimants in the courts of a civilized country, by which they might obtain adequate satisfaction for any invasion of their rights contrary to the law of nations, the only course consistent with sound principle was that they should be referred to that mode of redress, and that no diplomatic action should be taken until their legal remedies had been exhausted and they were in a position to show *prima facie* denial of justice.² Sir Edward Grey, British Foreign Secretary, declared that the principles applied by the prize courts of Great Britain and the United States appeared to be identical inasmuch as in both countries such tribunals, while subject to the instructions of their own sovereign, were, in the absence of such instructions, governed by the "public law and the practice of nations."³ He maintained that it was open to any American citizen, whose claim was before the prize court, to contend that any order in council which might affect his claim was inconsistent with the principles of international law and, therefore, not binding upon the court. He added that if the prize court declined to accept that contention, and if after such a decision had been upheld on appeal by the Judicial Committee of the Privy Council, and the United States considered the decision incorrect, it was open to the latter to claim that the decision should be subjected to review by an inter-

§ 894.¹ Sir Edward Grey, British Foreign Secy., to Mr. Page, American Ambassador at London, Feb. 10, 1915, For. Rel. 1915, Supp., 324, 330, where it was said: "Order V, rule 2, of the British prize court rules, provides that where a ship has been captured as prize, but has been subsequently released by the captors, or has by loss, destruction, or otherwise ceased to be detained by them, without proceedings for condemnation having been taken, any person interested in the ship (which by Order I, rule 2, includes goods), wishing to make a claim for costs and damages in respect thereof, shall issue a writ as provided by Order II; and writ so issued will initiate a proceeding, which will follow its ordinary course in the prize court."

² *Id.*, where it was added: "The course adopted by His Majesty's Government during the American Civil War was in strict accordance with this principle. In spite of remonstrances from many quarters, they placed full reliance on the American prize courts to grant redress to the parties interested in cases of alleged wrongful capture by American ships of war, and put forward no claims until the opportunities for redress in those courts had been exhausted. The same course was adopted in the Spanish-American War, when all British subjects who complained of captures or detentions of their ships were referred to the prize courts for relief." (330.)

See, also, British memorandum of June 17, 1915, contained in telegram of Mr. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, *ad interim*, June 22, 1915, For. Rel. 1915, Supp., 443.

³ See memorandum from Sir Edward Grey, contained in telegram of Mr. Page, to Mr. Lansing, Secy. of State, July 31, 1915, *id.*, 496, in which the case of *The Amy Warrick*, 2 Sprague, 123, was cited, and the views of Lord Stowell in *The Fox*, Edw. 311, and of Sir Samuel Evans in *The Zamora* were quoted.

national tribunal.⁴ Somewhat later the British Government emphasized the point that the prize court of their country had jurisdiction to pronounce a decision on the point whether an order or instruction to the British naval forces was inconsistent with those principles of international law which the court should apply, and that it even had jurisdiction to pass upon the validity of the so-called retaliatory order in council of March 11, 1915. It was declared that while each country determines for itself the procedure which its prize courts shall adopt, the substantive law which such tribunals apply as between captor and claimant "consists of the rules and principles of international law, and not the municipal legislation of the country."⁵ It was, therefore, contended that as there was an effective mode of redress open to aggrieved individuals in the British courts by which they could obtain adequate satisfaction for any invasion of their rights, "recourse must be had to the mode so provided before there is any scope for diplomatic action."⁶

⁴ Attention was called to the fact that the principle that the decisions of the national prize courts may properly be subjected to international review had been conceded by Great Britain in Article VII of the Jay Treaty of 1794, and by the United States under the Treaty of Washington of 1871. It was observed that the same principle had been accepted by both the United States and Great Britain in 1907, in connection with the proposed establishment of an international prize court. It was added: "It is clear, therefore, that both the United States Government and His Majesty's Government have adopted the principle that the decisions of a national prize court may be open to review. If it is held in the prize court and in the judicial committee of the Privy Council on appeal that the orders and instructions issued by His Majesty's Government in matters relating to prize are in harmony with the principles of international law, and should the Government of the United States, unfortunately, feel compelled to maintain a contrary view, His Majesty's Government will be prepared to act in concert with the United States Government in order to decide upon the best way of applying the above principle to the situation which would then have arisen."

Concerning the jurisdiction of the British-American Claims Commission, under the treaty of May 8, 1871, to review decisions of American prize courts, see Moore, *Arbitrations*, III, 3209.

Declared Professor Garner: "It does not appear that the decisions of any Prize Court during the late war were submitted to review by an international tribunal. But instances were not lacking in which vessels or cargoes condemned by the Prize Courts were upon the demand of interested governments released or compensation made for the goods thus condemned." (*Prize Law*, 33, to which he added in a footnote: "As is well known the British government compensated in large measure the owners of the cargoes on the *Kim* and other vessels, although they had been condemned by the Prize Court as good and lawful prize. In fact, 90 per cent of the proceeds of the condemned cargoes, in some cases 95 per cent, were paid to them. *The American Meat Packers' Agreement*, VIII Lloyd 473.")

See also Arrangement effected by Exchange of Notes between the United States and Great Britain, for the disposal of certain pecuniary claims arising out of the recent war, signed May 19, 1927, U. S. Treaty Vol. IV, 4256. See, in this connection, Edwin M. Borchard, "The Neutrality Claims against Great Britain," *Am. J.*, XXI, 764.

⁵ See memorandum from the British Embassy at Washington, accompanying note of Sir Cecil Spring-Rice, British Ambassador, to Mr. Lansing, Secy. of State, April 24, 1916, *For. Rel.* 1916, Supp., 368, 378-379.

⁶ In this connection it was said: "His Majesty's Government attach the utmost importance to the maintenance of the rule that, when an effective mode of redress is open to individuals in the courts of a civilised country by which they can obtain adequate satisfaction for any invasion of their rights, recourse must be had to the mode of redress so provided before there is any scope for diplomatic action. This is the course which His Majesty's Government have always themselves endeavored to follow in previous wars in which Great Britain has been neutral, and they have done so because it is the only principle which is correct in theory and which operates with justice and impartiality between the more powerful and the weaker nations. To that principle His Majesty's Government propose to adhere now that they are themselves the belligerent, and that it is against them that the claims are advanced." (*Id.*, 379.)

Almost simultaneously the Judicial Committee of the Privy Council in the case of the *Zamora* declared that the idea that King in Council or indeed any branch of the Executive, had power to prescribe or alter the law to be administered by courts of law in the realm was out of harmony with the principles of the British Constitution.⁷ It was said, however, that a British prize court would act on Orders in Council in every case in which they amounted to a mitigation of the Crown rights in favor of the enemy or a neutral, and that such court would take judicial notice of every order in council material to the consideration of matters with which it had to deal, and would give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law.⁸

In July, 1915, the Department of State declared that in view of differences understood to exist between the Governments of the United States and Great Britain as to the principles of law applicable in prize court proceedings in cases involving American interests, the former would insist upon the rights of American citizens "under the principles and rules of international law as hitherto established," without limitation or impairment by orders in council or other municipal legislation by the British Government, and would not recognize the validity of prize court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international

Concerning the practice which prevailed in cases of cargoes detained and placed in the Prize Court, see Mr. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, Feb. 19, 1916, *id.*, 353.

⁷ [1916] 2 A.C. 77, 90. It was added, however, that it could not be disputed that a prize court like any other court was bound by the legislative enactments of its own sovereign State; and that "a British Prize Court would certainly be bound by the Acts of the Imperial Legislature." (*Id.*, 93.)

The British memorandum although communicated by the British Embassy to the Department of State subsequent to the judgment of the Privy Council in the case of *The Zamora*, which was delivered April 7, 1916, had doubtless been prepared and forwarded prior to that date.

For the decision of Sir Samuel Evans as President of the Prize Court in the same case, see *The Zamora*, [1916] P. 27. See also the opinion of the Judicial Committee of the Privy Council in *The Proton*, 34 Times L. R. 309.

⁸ Declared Lord Parker who delivered the judgment: "Thus an Order declaring a blockade will *prima facie* justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, and therefore unlawful. An Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established. (See Wheaton, *International Law*, 4th English ed., 1916, pp. 25 and 26.)" ([1916] 2 A. C. 77, 97-98.)

The learned Judge also stated that in their Lordships' opinion the dictum of Lord Stowell in the case of *The Fox*, Edw. 311, to the effect that the King in Council possessed legislative rights over a court of prize analogous to those possessed by Parliament over the courts of common law was, "with all due respect to so great an authority," erroneous. *Id.*, 95.

See C. M. Picciotto, *The Relation of International Law to the Law of England and of the United States of America*, London, 1915, chap. II; H. Reason Pyke, "The Law of The Prize Court," *Law Quar. Rev.*, XXXII, 144.

law.⁹ In October following, Secretary Lansing protested against the unwillingness of the British Government to deal with individual cases through the diplomatic channel. He declared that British prize courts, appearing to be bound by the laws and regulations under which seizures and detentions were made, and which claimants alleged to be in contravention of the law of nations, were powerless to pass upon the real ground of complaint or to give redress for wrongs of such a nature. He stated that during the Civil War Great Britain had in several instances demanded through diplomatic channels damages for seizures and detentions of British ships alleged to have been made without legal justification.¹⁰ He added:

There is, furthermore, a real and far-reaching injury for which prize courts offer no means of reparation. It is the disastrous effect of the methods of the Allied Governments upon the general right of the United States to enjoy its international trade free from unusual and arbitrary limitations imposed by belligerent nations. Unwarranted delay and expense in bringing vessels into port for search and investigation upon mere suspicion has a deterrent effect upon trade ventures, however lawful they may be, which cannot be adequately measured in damages. The menace of interference with legal commerce causes vessels to be withdrawn from their usual trade routes and insurance on vessels and cargoes to be refused, while exporters for the same reason are unable or unwilling to send their goods to foreign markets, and importers dare not buy commodities abroad because of fear of their illegal seizure or because they are unable to procure transportation. For such injuries there can be no remedy through the medium of courts established to adjust claims for goods detained or condemned. For specific injuries suffered by private interest prize courts, if they are free to apply the law of nations, might mete out an adequate indemnity, but for the injury to the trade of a nation by the menace of unwarranted interference with its lawful and established pursuit there can manifestly be found no remedy in the prize courts of Great Britain, to which the United States citizens are referred for redress.¹¹

The Secretary protested also against the manner in which British prize courts obtained jurisdiction through the operation of municipal enactments so applied

⁹ Telegram of Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, July 14, 1915, For. Rel. 1915, Supp., 472.

See, also, Lord Lansdowne, British Foreign Secy., to Sir C. Hardinge, British Ambassador at St. Petersburg, June 1, 1904, Parl. Papers, Russia, No. 1 (1905), 9-10, Moore, Dig., VII, 651; Mr. Hay, Secy. of State, to Mr. McCormick, American Ambassador at St. Petersburg, No. 143, Aug. 30, 1904, For. Rel. 1904, 760, Moore, Dig., VII, 688.

¹⁰ Mr. Lansing, Secy. of State, to Mr. Page, Oct. 21, 1915, For. Rel. 1915, Supp., 578, 586-588.

Mention was made of the cases of *The Magicienne*, *The Don Jose*, *The Labuan* and *The Saxon*. In its memorandum of April 24, 1916, the British Government denied that these cases strengthened the position of the United States. For. Rel. 1916, Supp., 379. An appendix to the memorandum dealt at length with what occurred in relation to them. *Id.*, 380.

See argument of Mr. Wheaton, American Minister to Denmark, in communication of Nov. 24, 1829, to the Danish Government respecting the conclusiveness of the sentences of Danish prize courts which had condemned American vessels and cargoes, Moore, Arbitrations, V, 4555-4557.

See Davis, J., in *Gray, Admr. v. United States*, 21 Ct. Cl. 340, 402, Moore, Dig., VII, 644.

¹¹ For. Rel. 1915, Supp., 578, 587.

to neutral ships on the high seas as to compel them to submit to British domestic laws and regulations.¹² Under these circumstances he declared that the United States Government could not be reasonably expected to refrain from pressing the claims of American citizens directly through diplomatic channels.¹³

In November, 1916, Secretary Lansing declared that "without admitting that even individual rights when clearly violated by orders in council must be maintained by resort to local tribunals," the United States had no intention to resort to British courts for the maintenance of such of its "national rights" as might be infringed by orders in council.¹⁴

§ 895. **The Same.** The judgment in the case of *The Zamora* seemingly fortified the technical position of the British Government with respect to the treatment of individual cases. Nevertheless, the limitations announced by the Judicial Committee of the Privy Council with respect to the applicability of the principle which it laid down, together with the inclination of the prize court to agree with the attitude of the Crown as to the propriety of belligerent acts and policies, served to render it improbable that a neutral claimant could successfully maintain in a British tribunal that the theory and operation of certain orders in council, such as that of March 11, 1915, were violative of international law regardless of what might be the fact.¹ When the British prize court was prepared to acquiesce in the theory that the rights of neutrals might reasonably be subordinated to the military exigencies of a belligerent if the illegal conduct of the enemy compelled it to respond with retaliatory acts that were normally proscribed, it ceased to be a place where the neutral claimant could successfully challenge the soundness of that theory.² It is not to be intimated

¹² *Id.*, 587-588.

¹³ *Id.*, 588.

Secretary Lansing added: "This Government is advised that vessels and cargoes brought in for examination prior to prize proceedings are released only upon condition that costs and expenses incurred in the course of such unwarranted procedure, such as pilotage, wharfage, demurrage, harbor dues, warehousing, unloading costs, etc., be paid by the claimants or on condition that they sign a waiver of right to bring subsequent claims against the British Government for these exactions." (*Id.*) He protested against such action, and the reasonableness of his position was acknowledged by the British Government in their memorandum of April 24, 1916, where it was said: "In general, however, they realize that, in cases where goods are released and it transpires that there were no sufficient grounds for their seizure, no dues or charges should fall upon the owner. The statement that waivers of the right to put forward claims for compensation are exacted as a condition of release is scarcely accurate, but they are prepared to concede that such waivers would be a hardship to the owners of the goods released. In these circumstances His Majesty's Government will abstain from exacting any such undertakings in future, and will not enforce those which have already been given." (*Id.*, 1916, Supp., 368, 379.)

¹⁴ Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Nov. 24, 1916, *id.*, 485. See, also, Same to Chargé Laughlin, Sept. 18, 1916, *id.*, 446.

Concerning the unwillingness of the Government of the United States to acknowledge that its claim against Germany growing out of the destruction of the American vessel *William P. Frye* in 1915, was dependent upon the action of a German prize court, see *supra*, § 758.

§ 895. ¹ See *The Stigstad*, 5 Lloyd's Prize Cases, 361, 384; same case, *id.*, 388, 391-392; *The Leonora*, 7 Lloyd's Prize Cases, 262, 331; same case, *id.*, 351, 358.

See views expressed by Sir Boyd Merriman, P., in *The "Pomona"*, Jan. 9, 1940, Lloyd's Prize Cases, 2 Series, 1, 1, 4.

² See *Impairment of Neutral Rights by Belligerent Responses to Illegal Conduct of an Enemy*, *supra*, § 888A.

that the agreement of the judicial with the political department of the Government was necessarily open to criticism; it was merely indicative of the futility of appeals to a tribunal which regardless of its freedom to administer the law of nations, found itself in accord with the thought of the King in Council.

The contention that the British courts failed to offer a means of reparation for the violation of such national rights of the United States as might have been infringed is believed to have been unanswerable. With respect to American claims both individual and national, direct and indirect, the real source of grievance was the fact that there existed no domestic tribunal in the British Empire (and there could have existed none) prepared and alert to deal impartially with the British theories of belligerent rights, and disposed, at an early stage of the conflict, to denounce authoritatively such of them as might be at variance with international law.³

It should be observed that Great Britain was far from denying "the principle that the decisions of prize courts are not internationally conclusive as to the doctrines applied, and that a claimant injured by a wrongful decision may seek indemnity through the action of his government."⁴ The controversy with the United States related rather to the stage of the proceedings when such action might appropriately be taken.

c

§ 896. **Need of an International Prize Tribunal.** Should there be a general agreement defining and codifying the scope of belligerent rights, States engaging in war might thereafter increasingly refrain from adopting policies fairly to be deemed illegal by neutral powers. Such a result would doubtless diminish the likelihood of grave controversy. It should be clear, however, that so long as there remains an unrestricted tendency on the part of belligerents to shape their

³ It is far from the purpose of the author to intimate that the conditions stated in the text reflected adversely upon the courts and judicial system of Great Britain. The opinion of Lord Parker of Waddington in the case of *The Zamora* will long remain a monument to the integrity and aspiration of a great tribunal, and will enjoy the full respect of the American bar as well as of that of the British Empire. If English courts were disposed during World War I to agree with the theories of belligerent right asserted by the Crown, so also were the Federal tribunals during the Civil War in hearty sympathy with the principles applied by the political department of their own Government. It is the impotence of a domestic court of any belligerent, especially in the existing state of the law of maritime warfare, to overcome the influence of local regulations and policies, and to make rigid application of the law of nations, as manifested in the generally accepted practices of States, which is the pregnant fact to be reckoned with. No scheme of adjudications which ignores it is believed to be capable of preventing frequent miscarriages of justice.

⁴ The language quoted is that of Prof. Moore in Dig., VII, 651, where it is added: "The right to indemnity in such cases was demonstrated in the remarkable opinion delivered by William Pinkney, as one of the commissioners under Article VII of the Jay Treaty, under which large amounts were paid by the British Government to citizens of the United States as indemnity for captures and condemnations under orders in council violative of the rights of neutral trade. Similar indemnities were obtained from France for wrongful captures and condemnations during the Napoleonic wars, as well as from Spain, Naples, and Denmark. In the case of Denmark, the question of international finality of prize sentences gave rise to a long discussion, which was conducted on the part of the United States by Henry Wheaton, as Minister to Denmark. Indemnities were also obtained by British subjects from the United States in certain prize cases under Article XII of the Treaty of Washington of May 8, 1871." (Citing Moore, Arbitrations, I, 336; III, 3209, 3210; V, 4555; opinion of Mr. Pinkney in the case of *The Betsey*, *id.*, III, 3180.)

conduct according to distinctive theories expressed in local regulations, the only judicial safeguard for neutral States is in the establishment of some authoritative and actual deterrent *immediately* available upon the outbreak of the conflict. No international appellate tribunal can serve such a purpose, because of the interval which must elapse during the period of local adjudications before its aid may be invoked.¹ An adequate judicial remedy might be found in an arrangement permitting an aggrieved State to challenge a belligerent regulation deemed illegal directly upon its promulgation, by recourse to an existing international tribunal in constant or permanent session, and clothed with jurisdiction to decree abatement in case the views of the complainant were sustained.

4

SOME ASPECTS OF AMERICAN PROCEDURE

a

§ 897. **In General.** The procedure established in the prize courts of the United States is based upon rules obtaining in the British courts long before the American Revolution.¹ These rules were the product of the civil rather than the common law.² Neutral claimants were protected by close restrictions respecting the nature of the evidence and the mode of its presentation. Proceedings were in the nature of an inquisition conducted by the State of the captor itself, in order to ascertain whether captured property should be condemned.³ There developed

§ 896. ¹ See Agreements between States, Agreements to Refer Differences to International Judicial Tribunals or Commissions, *supra*, § 504; also *infra*, § 900. See Simeon E. Baldwin, "An Anglo-American Prize Tribunal," *Am. J.*, IX, 297.

It is not apparent why an international tribunal, not exercising the functions of an appellate court, might not be empowered to adjudicate in an action for damages for the injury caused by an alleged wrongful capture. It is believed, moreover, that such a court might be empowered to pass upon such a question at an early stage of the conflict, and enabled to render a decree or judgment operating at once upon the parties litigant and upon every agency of government acting in behalf of either.

§ 897. ¹ See letter of Sir W. Scott and Sir J. Nicholl, to Mr. Jay, Minister to Great Britain, Sept. 10, 1794, *Am. State Pap.*, For. Rel. I, 494, Moore, Dig., VII, 603; Note on the Practice in Prize Causes, 1 Wheat. Appendix, 494; Additional Note, 2 Wheat. Appendix, 1; Joseph Story, Notes on the Principles and Practices of Prize Courts, edited by Frederic Thomas Pratt, London, 1854; David Roberts, Treatise on Admiralty and Prize, New York, 1869; Francis H. Upton, Law of Nations Affecting Commerce during War, New York, 1863; Erastus C. Benedict, The American Admiralty Jurisdiction and Practice, 4 ed., by Edward Grenville Benedict, Albany, 1910, chap. XLI.

² See *The Adeline*, 9 Cranch, 244, 284, where it was said by Story, J.: "No proceedings can be more unlike than those in the courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose."

³ "The true nature of a prize tribunal may be described by a phrase for which, indeed, I find no precedent, but which is, nevertheless, appropriate,—*an inquest by the State*. . .

"Certain modes of conducting this inquest have been long in use, and are now recognized by nations as satisfactory. The inquest, in the beginning, is summary, and by no means in the nature of litigation *inter partes*. Neither is it *ex parte*. It is, in fact, an inquiry by the government, through its commission, into the facts, there being no parties litigant. . . .

"When the prize is brought within the custody of the court, notice is given to all the world, that any person having an interest in the prize may appear and claim it. This is, of course, though not in terms, confined to citizens or neutrals. An enemy cannot make claim. If the property is ostensibly not hostile, it is usually claimed by the master or supercargo,

a practice fairly responsive to the demands of justice at a time when there was no more expeditious mode of transporting persons and property or of communicating intelligence by sea than was afforded by sailing vessels. How far the rules evolved from the early procedure remain applicable to existing conditions is a matter of dispute.

b

§ 898. *Examination in Preparatorio.* It is said to be the established rule in courts of prize, that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured ship. The following authoritative statement from Mr. Justice Story, in behalf of the Supreme Court of the United States, in 1817, illustrates the practice:

On this account it is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken before the district judge or commissioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and the examinations, taken *in preparatorio*, that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile, or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of further proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject.¹

That the hearing before the district court is to be exclusively upon the proofs taken *in preparatorio* has been declared to be "not a mere matter of practice or form," but rather "of the very essence of the administration of prize law."² The correct administration thereof has been deemed to require that the regular modes of proceeding be observed with the utmost strictness.³

or, in their absence, by the consul of the neutral. The claim is simply a statement of the nature and extent of the claimant's property, and a denial of all enemy's interest, supported by an oath, called the *test affidavit*. The affidavit is required to declare that the claimant has property and right of possession solely for himself, and to disclaim or disclose all fiduciary or other interests behind him. The object of this is not only to disclaim hostile interest, but to enable the court to learn who are the real, ultimate, and equitable, as well as the ostensible and legal owners. There is nothing in the nature of what are technically called *pleadings*—*i.e.*, allegations and denial or admission of facts—*inter partes*. The captors or the government, in their libel, make no allegation of any fact necessary to condemn the property, or even of the cause of capture. The libel is only a petition to the court to hold its inquest, for the purpose of ascertaining the facts, and whether there are any objections to condemnation; and should properly contain only a description of the prize, with dates, etc., for identification and the fact that it was taken as prize of war, by the cruiser and brought to the court for adjudication,—*i.e.*, of facts enough to show that it is a maritime cause of prize jurisdiction, and not a case of municipal penalty or forfeiture." (Dana's *Wheaton*, Dana's Note No. 186.)

¹ § 898.¹ The *Dos Hermanos*, 2 Wheat. 76, 79–80, Moore, Dig., VII, 611–612.

² See Note in 1 Wheat. Appendix, 495, 498–499; also Story, J., in the opinion of the Court in the case of *The Pizarro*, 2 Wheat. 227, 240.

³ See Story, J., in *The Dos Hermanos*, 2 Wheat. 76, 80, where he observed that it was "a great mistake to allow common law notions, in respect to evidence or practice, to prevail in proceedings which have very little analogy to those at common law."

"The prize court examines the vessel and cargo, and all the papers on board, and then

In 1915 the Department of State declared that such had been the practice of the United States courts during the War of 1812, the American Civil War, and the Spanish-American War, as was evidenced by the reported decisions, and had also been the practice of the British prize courts for over a century.⁴

C

§ 899. **Order for Further Proof.** Further proof is not a matter of course. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith.¹ If upon the evidence at the first hearing the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or on motion and proper grounds shown, to introduce additional evidence under the requisite order.² Such an order is always made, according to the Supreme Court of the United States, with extreme caution, and only when the ends of justice clearly require

examines for itself, by its own interrogatories, the persons found on board the prize, the captors taking no part, any more than the captured. This examination is conducted by the court or its officers, in the absence of all parties. The captors are not examined, nor any other witnesses, whatever may be their knowledge. The persons on board are examined privately, and without opportunity to confer with the parties interested in the prize, or with counsel; and for that purpose, the law of nations allows the court to use the necessary restraint. The evidence so obtained, as well as the papers found on board, is sealed and kept secret until it is completed. It is then opened and may then be inspected by the parties interested, for the purpose of being heard by counsel before the court. With this official inquest upon the vessel, cargo, papers, and persons found on board, ends the regular and ordinary function of the court, so far as evidence is concerned. Arguments by counsel for parties interested are allowed. If this examination presents a clear case for condemnation, the court makes a decree accordingly. The evidence taken in this summary hearing is called the evidence *in preparatory*, which means, not preparatory to a fuller examination, but preparatory to the decision of the court. The decision of the court upon this evidence is to be considered as, in ordinary cases, all that can be expected of the court. It is its complete and regular function." (Dana's Wheaton, Dana's Note No. 186.)

See, in this connection, Thomas Baty, "Prize Law and Modern Conditions," *Am. J.*, XXV, 625, 627-628. Cf. J. W. Garner, "Violations of Maritime Law by the Allied Powers During the World War," *id.*, 26, 28-31; Oppenheim, *Lauterpacht's* 6 ed., II, § 434.

⁴ See Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, *For. Rel.* 1915, Supp., 578, 580, where it was said: "It will be recalled that when a vessel is brought in for adjudication courts of prize have heretofore been bound by well-established and long-settled practice to consider at the first hearing only the ship's papers and documents, and the goods found on board, together with the written replies of the officers and seamen to standing interrogatories taken under oath, alone and separately, as soon as possible and without communication with or instruction by counsel, in order to avoid possibility of corruption and fraud.

"Additional evidence was not allowed to be introduced except upon an order of the court for 'further proof,' and then only after the cause had been fully heard upon the facts already in evidence or when this evidence furnished a ground for prosecuting the inquiry further."

§ 899.¹ The *Dos Hermanos*, 2 Wheat. 76, 80; The *Frances*, 8 Cranch, 348; The *Grotius*, 8 Cranch, 456; The *Adeline*, 9 Cranch, 244; The *Samuel*, 1 Wheat. 9; The *Anne*, 3 Wheat. 435, 445, where it was declared by Story, J.: "It is certainly true, that upon the original hearing, no other evidence is admissible than that of the ship's papers, and the preparatory examinations of the captured crew. But, upon an order for further proof, where the benefit of it is allowed to the captors, their attestations are clearly admissible evidence. This is the ordinary course of prize courts, especially where it becomes material to ascertain the circumstances of the capture; for in such cases the facts lie as much within the knowledge of the captors as the captured; and the objection of interest generally applies as strongly to the one party as to the other. It is a mistake to suppose that the common law doctrine, as to competency, is applicable to prize proceedings. In courts of prize, no person is incompetent merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility."

² See The *Sir William Peel*, 5 Wall. 517, 534; The *Adula*, 176 U. S. 361, 381, and the cases there cited. Also The *Newfoundland*, 176 U. S. 97.

it.³ If the evidence taken *in preparatorio* makes a clear case for condemnation an order for further proof will be denied.⁴ Nor will it be granted if the evidence satisfies the court that the property ought to be restored.⁵

"If the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character."⁶ Thus intentional suppression of papers has been deemed a ground for refusing such proof.⁷

d

§ 900. **Discussion with Great Britain during World War I.** In 1915, the Department of State made complaint of the change of practice manifested by the British prize court rules of 1914, whereby there was no longer a first hearing on the evidence derived from the ship, and the court no longer precluded from receiving extrinsic evidence for which a suggestion had not been made in the preparatory evidence. It was declared that as a result innocent vessels or cargoes were seized and detained on mere suspicion, while efforts were made to obtain evidence from extraneous sources to justify the detention and the commencement of prize proceedings.¹ In response, Great Britain pleaded that changed conditions had rendered the old rules obsolete, that the practice and procedure adopted in prize courts were not settled or regulated by international law, but determined by each nation for itself, that the Anglo-American system evolved in the British courts and adopted by the United States had never been followed in the prize courts of France or of any other continental nation, and that no requirement of international law restricted a belligerent in changing its procedure, provided the practice followed should afford a fair hearing to all claims put forward by neutrals.²

³ See *The Gray Jacket*, 5 Wall. 342, 368, where the claimant was deemed to have forfeited all right to ask for an order for further proof by "guilty concealment in his first affidavit, and in his subsequent affidavit and claim." See, also, *The Adula*, 176 U. S. 361, 381.

⁴ See *The Pedro*, 175 U. S. 354, 368; *The Adula*, 176 U. S. 361.

⁵ See Note on Practice in Prize Causes, 1 Wheat. Appendix, 494, 504, where it is said: "And where the case is perfectly clear, and not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiry. *The Romeo*, 6 Ch. Rob. 351."

See *The Freundschaft*, 3 Wheat. 14, 49, where in consequence of further proof respecting certain claims, an order of restitution was deemed a necessary consequence of its admission.

⁶ *The Dos Hermanos*, 2 Wheat. 76, 80. Concerning generally the effect of fraudulent conduct, and what is to be deemed such, see Story, J., in *The Pizarro*, 2 Wheat. 227, 241, Moore, Dig., VII, 633; also cases collected, *id.*, 631-635.

⁷ See *The St. Lawrence*, 8 Cranch, 434. It was also observed in this case that where a non-production of papers was to be imputed to accident or mistake, further proof might be allowed.

§ 900.¹ See Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, For. Rel. 1915, Supp., 578, 580, where it was added: "The effect of this new procedure is to subject traders to risk of loss, delay, and expense so great and so burdensome as practically to destroy much of the export trade of the United States to neutral countries of Europe."

² See memorandum from the British Embassy at Washington, communicated to Mr.

A belligerent enjoys latitude in regulating the procedure and practice to be observed in its prize courts. Internationally, the question is a constant one whether, through the process of regulation, the substantive rights of neutral States are impaired either by enlargement of grounds for capture and detention as well as condemnation, or by restriction of reasonable opportunities for impartial adjudications. The objections of the United States raised such an issue, and on both grounds. The procedure complained of was regarded as an instrumentality facilitating the operation of a series of belligerent practices deemed by the Department of State to be unlawful. Therefore, the departure from the established Anglo-American system of procedure was not believed to increase the respect normally due to the sentences of British prize tribunals.³

If a belligerent be not obliged to continue to respect the procedure which has grown up in the use and operation of its prize courts, it is to be expected to take advantage of opportunities to modify the same in such a way as to simplify the task of the judicial agency as one of the means by which it consolidates military successes, and attempts to fortify itself against neutral opposition. The work of modification is likely to be, at the present time, one of the series of devices whereby the courts find themselves, perhaps unwittingly, transformed into instruments of political achievement by the belligerent sovereign to whom their life is due. The fact of transformation distorts and renders fantastic the assertion that the judicial agency of the belligerent as exemplified in the functioning of its prize courts offers to the outside world a substantial barrier against lawless action. An American citizen may, however, be expected to cherish the hope that that assertion may not be inaccurate when the United States as a participant in a war yet to be fought shall permit its prize courts to pass judgment upon the propriety of its activities at sea.⁴ Nevertheless, the point needs to be emphasized that if in wars to come belligerent excesses are to be challenged and denounced by judicial means, the courts to be utilized for such

Lansing, Secy. of State, April 24, 1916, *id.*, 1916, Supp., 368, 371-372. It was said in this connection: "The division of prize court proceedings into two distinct phases, the first hearing and the hearing on further proof, under the early British and American practice, was merely a rule of procedure. Similarly the exclusion of extraneous evidence until the making of an order for further proof was only a rule of procedure. His Majesty's Government were, therefore, not only at liberty but felt bound to alter these rules so soon as they were advised that the rules were obsolete and might work injustice.

"The old practice and procedure had become archaic in form and belonged to days long before the modern improvements in legal procedure were developed, days when, for instance, the parties interested were prevented from giving any evidence as witnesses in actions which affected their rights. The alterations in the prize court practice and rules were conceived and made in the spirit of those improvements. The objects with which the old practice was abolished were to prevent delay, to eliminate technicalities, and to enable the parties to prove all the true and material facts, and to place their respective cases fully before the court."

See Viscount Tiverton, *Principles and Practices of Prize Law*, London, 1914, 91; R. J. Wickham Hurd, *Prize Court Practice and Procedure*, London, 1914. Also E. S. Roscoe, "Prize Court Procedure," *Brit. Y.B.*, 1921-1922, 90; Garner, *Prize Law*, § 89.

³ See Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Oct. 21, 1915, *For. Rel.* 1915, Supp., 578.

⁴ The views of the Supreme Court of the United States expressed in the *Peterhoff*, 5 Wall. 28, 57 (with respect to blockade), and in the *Paquete Habana*, 175 U. S. 677, 700, furnish cause for such a hope.

purpose must generally be international tribunals clothed with authority, among other things, to produce and develop a procedure designed to promote the administration of justice rather than the special interests of the captors.⁵

e

§ 901. **Concerning Rules of Evidence.** It is important that no technical rules of a prize court with respect to the sources and nature of evidence, or concerning the matter of burden of proof, should override any substantive principle of the law of nations.¹ There must be danger of such a consequence so long as there remains disagreement in regard to the law of contraband and blockade, as well as other belligerent rights. For that reason it may be doubted whether the attempt to lay down any comprehensive plan or code of rules can serve a useful purpose until there is general understanding among interested States concerning these broader and kindred problems. International agreement designed to afford a solution of them must incidentally suggest and possibly prescribe rules of evidence necessary to facilitate the application of principles deemed to be fundamental. Such an achievement will simplify the task confronting a particular belligerent and its prize courts; and for an international tribunal, it will minimize the danger of sanctioning a miscarriage of justice. In a word, the procedural aspects of the law of prize, in so far as they concern matters of evidence, are so closely interwoven with the whole series of events on which a belligerent must rely in order to justify the appropriation of captured property, as to demand a codification of the law of maritime warfare with a view to securing uniformity of action by prize courts generally and that in harmony with what may be accepted as the requirements of justice. That demand may not, however, be regarded as comparable in importance with the effort to avert war and to remove from the horizon the danger of its initiation. Hence States are not to be expected to manifest lively interest in effecting such a codification.

5

CONDEMNATION

a

§ 902. **Neutral Prizes.** The mere fact of capture of a neutral ship does not effect a transfer of title. Until there is a decree of condemnation or restitution the captured vessel is held by the government in trust for those who, by a judicial decree, are found to be entitled to it.¹ The reasons for this requirement are discussed elsewhere.²

⁵ See Need of an International Prize Tribunal, *supra*, § 896.

§ 901.¹ Mr. Hay, Secy. of State, to Mr. McCormick, American Ambassador at St. Petersburg, No. 143, Aug. 30, 1904, For. Rel. 1904, 760, Moore, Dig., VII, 688.

See cases in Moore, Dig., VII, 621-623, on the competency and weight of evidence, and on the burden of proof, in American tribunals.

§ 902.¹ See *dictum* in *The Nassau*, 4 Wall. 634, 640-641. It is not apparent, that neutral rather than enemy prizes were here had in contemplation.

b

§ 903. **Enemy Prizes.** As long as the law of maritime war permits a belligerent to appropriate generally enemy ships and enemy property thereon, both private and public, the State of the captor would seem to be justified in claiming that the fact of capture vests title in itself as against the enemy.¹ No duty to the latter presents an obstacle save where the vessel or its cargo is for some special reason exempt from capture. It is not understood that the law of nations opposes such a belligerent claim, or that the Supreme Court of the United States has ever held that it does.² This is true because the right of appropriation is based simply upon the hostile character of what is seized, rather than upon any particular uses to which the property is put. If such a character be known there is no reason, at least with respect to the enemy, to make the judicial inquiry to prove uses such as those which are a condition precedent to the lawful appropriation of neutral prizes.³

To establish, however, an indefeasible title to an enemy prize as against the legitimate claims of neutral States or persons, condemnation is regarded as necessary.⁴ This circumstance together with other practical considerations render it highly expedient that enemy prizes should always be made the subject of adjudication with a view to condemnation. The United States observes generally such a practice.⁵ It should be noted, however, that according to the Naval In-

See, also, *The Nuestra Señora de Regla*, 108 U. S. 92, 103; Mr. Seward, Secy. of State, to Lord Lyons, British Minister at Washington, Dec. 26, 1861, Brit. and For. State Pap., LV, 627, Moore, Dig., VII, 626. Mr. Bayard, Secy. of State, to Mr. Godoy, Chilean Minister, April 11, 1885, MS. Notes to Chilean Legation, VI, 337, Moore, Dig., VII, 630.

² See Effect of Capture, Neutral Prizes — Their Destruction, *supra*, §§ 757-758.

§ 903.¹ "As between the belligerents, the capture, undoubtedly, produces a complete divestiture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not mere individual outrage." (Johnson, J., in *The Adventure*, 8 Cranch, 221, 226.) In 1814, when these words were uttered, the practices of privateers and even of pirates were doubtless such as to render important the inquiry whether seizure was in fact "the act of sovereign authority."

See Story, J., in *The Star*, 3 Wheat. 78, 86; Effect of Capture, Enemy Prizes — Their Destruction, *supra*, § 756.

² Close examination of utterances of that tribunal respecting the necessity of condemnation, or intimating that capture does not effect a transfer of title, will reveal the fact that either there was no attempt to distinguish between enemy and neutral prizes (see *The Nassau*, 4 Wall. 634, 641), or when enemy prizes were had in contemplation, the statements made were dicta. See *Oakes v. United States*, 174 U. S. 778, 786; also *Oakes v. United States*, 30 Ct. Cl. 378, 401.

³ An obvious exception is, however, apparent when an enemy ship, normally exempt from capture by reason of its occupation or service, is seized on the ground that the right of exemption has been forfeited.

See Effect of Capture, Neutral Prizes — Their Destruction, *supra*, §§ 757-758.

⁴ Thus in the case of *The Steamship Appam*, 243 U. S. 124, no rights of the captor with respect to the uncondemned prize were permitted to deter judicial inquiry whether the act of bringing the vessel into the waters of the United States constituted a violation of American neutrality, or to prevent restitution when it was once determined that such conduct was to be so regarded. See, in this connection, Supplemental Memorandum of Authorities submitted by Messrs. Coudert, Munroe Smith, Kingsbury, Hughes, and Bullowa, Counsel for Appellee in the Case of *The Appam*.

⁵ Rev. Stat. § 4615; also *The Santo Domingo*, 119 Fed. 386, 390.

See Effect of Capture, Enemy Prizes — Their Destruction, *supra*, § 756.

structions Governing Maritime Warfare of June 30, 1917, the fact of capture of "a public vessel in the military service of the enemy" vests title immediately in the government of the captor, the vessel thereby becoming a public vessel of the latter and subject to its disposal. It is said to be "unnecessary to send a captured public vessel into port for adjudication."⁶

⁶ No. 99, where it is also said: "The vessel may be immediately converted to the use of the captor and sent into any port at his convenience, as a public vessel of the United States. The captured personnel shall be made prisoners of war, except the religious, medical, or hospital staff of the ship."

See Garner, Prize Law, p. 2, note 2.

TITLE M

TECHNICAL ASPECTS OF THE TERMINATION OF WAR

1

MODES OF TERMINATION

a

§ 904. **Cessation of Hostilities.** A cessation of hostilities may precede or follow the termination of a war. Even if simultaneous therewith, the former event is rarely, however, to be regarded as marking the end of a conflict, or as indicative of a mode of the termination thereof, because there is not revealed with sufficient clearness the immediate designs of either contestant. Cessation may be followed by an early resumption of hostilities. Unless, therefore, it be accompanied or closely followed by conditions affording solid reason for the conclusion that there will be no resumption for an indefinitely prolonged period of time, no certain or enlightening inference is to be drawn. Belligerents have in practice demanded such conditions, and are not, at the present time, disposed to allow the sharp differences between a state of war and one of peace to be determined by such vague and equivocal forms of conduct.¹

A cessation of hostilities together with the withdrawal of military forces from hostile territory may, when followed by a sufficient lapse of time, be regarded as marking the termination of a war.² Difficulties due to uncertainty as to the nature of the relationship prevailing between the opposing States during the interval immediately succeeding such cessation and withdrawal, suffice to ren-

§ 904. ¹ Declared Mr. Bayard, Secy. of State, in a communication to Mr. Muruaga, Spanish Minister, Dec. 3, 1886: "I have yet to learn that a war in which the belligerents, as was the case with the late civil war, are persistent and determined, can be said to be closed until peace is conclusively established, either by treaty when the war is foreign, or when civil by the proclamation of the termination of hostilities on one side and the acceptance of such proclamation on the other. The surrender of the main armies of one of the belligerents does not of itself work such termination; nor does such surrender, under the law of nations, of itself end the conqueror's right to seize and sequester whatever property he may find which his antagonist could use for a renewal of hostilities." (For. Rel. 1887, 1015, 1019, Moore, Dig., VII, 337.)

See *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 167-168.

² Declared Mr. Seward, Secy. of State, in a communication to Mr. Gofii, Spanish Minister, July 22, 1868: "It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances." (Dip. Cor. 1868, II, 32, 34, Moore, Dig., VII, 336.) For instances of wars so terminated, see Fauchille, 8 ed., § 1693; Oppenheim, *Lauterpacht's* 5 ed., II, § 262.

der the procedure inadequate.³ Belligerent powers do not appear to be content to terminate their conflicts by such methods.

A successful belligerent is not likely to be disposed to permit its enemy to gain the technical or substantial benefits accruing from the resumption of peace, through the mere abandonment of hostilities and the demobilization of military forces, or by other acts falling short of agreement.⁴

b

§ 905. Formal Declaration by One Party. It is greatly to be doubted whether any principle of international law prevents the termination of war by the appropriate act of one party thereto, provided the other party to the conflict does not resume hostilities or otherwise decline to recognize the act as possessing the significance which its enemy attaches to it. Thus following an armistice productive of not only a cessation of hostilities, but also of the virtual surrender of the weaker party, such as that accepted by Germany, November 11, 1918,¹ and when, after the lapse of a protracted period of time, no circumstance impelled that country to resume hostilities or otherwise make objection, the door was open to the United States to declare that the war was at an end, and by such process to endeavor to cause its termination. The Congress of the United States acted on that principle in its attempt by joint resolution passed on May 15, 1920, to terminate the existing war with Germany.² Recourse to such procedure was not

³ Concerning the difficulties resulting from such procedure, with respect to the claims of the opposing States, see Coleman Phillipson, *Termination of War and Treaties of Peace*, New York, 1916, 5-7.

⁴ On Feb. 10, 1918, the Russian Soviet Government, denouncing the treaty of peace proffered by Germany and its Allies at Brest-Litovsk during negotiations under an armistice, made formal announcement that "in refusing to sign a peace of annexation, Russia declares, on its side, the state of war with Germany, Austria-Hungary, Turkey, and Bulgaria as ended." Thereupon Germany resumed military operations on Feb. 18, compelling the Soviet authorities to announce on Feb. 21 a willingness to accept the conditions dictated by the Quadruple Alliance. Accordingly, negotiations were reestablished, and a treaty of peace was signed at Brest-Litovsk on March 3, 1918. See Proceedings of the Brest-Litovsk Peace Conference, Dept. of State, Confidential Doc., 1918, 171-187.

For the text of the armistice of Dec. 15, 1917, and for that of the so-called treaty of peace of March 3, 1918, see Texts of the Russian "Peace," Dept. of State, Confidential Doc., 1918, 1 and 13, respectively. See Baron Boris Nolde, "*La Fin de la Guerre en Russie*," *Rev. Droit Int.*, 3rd series, IV, 395.

§ 905. ¹ See The Armistice with Germany of Nov. 11, 1918, *supra*, § 647.

See Charles C. Tansill, *Termination of War by Mere Cessation of Hostilities*, *Law Quar. Rev.*, XXXVIII, 26.

"So also on September 3, 1919, the Parliament of China resolved that a state of peace between Germany and China had been restored, and this was followed by a treaty between Germany and China on May 20, 1921 (L.N.T.S., 9, p. 272)." (Oppenheim, *Lauterpacht's* 5 ed., II, p. 467, footnote 1.)

See *In re Zabita*, Lauterpacht, *Annual Dig.*, 1929-1930, Case No. 288.

² *Cong. Record*, May 15, 1920, *Am. J.*, XIV, 419. The resolution was vetoed by the President, May 27, 1920.

See, in this connection, Editorial Comment by Chandler P. Anderson, *Am. J.*, XIV, 400.

Declared Senator Knox in the Senate May 5, 1920, with respect to the joint resolution providing for the termination of war with Germany: "As a matter of law and of fact we are, as I have already shown, at peace with Germany, first, because of the terms of the armistice of November 11, 1918, its amendments and renewals; second, because of the 'silent ceasing' of hostilities; third, because of the disappearance, the extinction of the Government against which we declared war; and, fourth, because of the negotiation by us and our allies or associates in the war, with the people who were lately our enemies, and the ratification by our allies or associates and our enemies, of a treaty of peace which specifically provided both

due to unwillingness by that State to accept any particular terms demanded in behalf of the United States, but rather to the circumstance that the treaty of peace signed at Versailles, June 28, 1919, by representatives of the United States as well as of the other Allied and Associated Powers, had failed to receive the requisite approval of the Senate.³

In view of possible differences of opinion concerning the legal effect of the resumption of peace upon numerous rights of the opposing belligerents in relation to each other, and especially upon the property rights of their respective nationals, a State which by its unilateral act undertakes to terminate a war, should make clear in so doing, and before technically ceasing to be a belligerent, what it claims as such. By that process it may prevent the vesting of rights in opposition to itself, and which otherwise, after the renewal of peace and prior to any arrangement with its former enemy, it might encounter difficulty in opposing. In a word, if war is sought to be terminated by any process falling short of agreement, utmost care is required in order to prevent the resumption of peace from operating advantageously, in an international sense, to the opposing party, as by ridding it of a duty subsequently to agree to demands to be made of it, and from serving to deprive the State resorting to the unilateral method of the right when at peace to assert as against its former foe or the nationals thereof claims for which as a belligerent it could have obtained recognition in a treaty of peace.⁴

The substitution of a condition of peace for one of war between the United States on the one hand, and Germany on the other (and likewise as between the United States and what had been Austria-Hungary, under the régime of the Dual Monarchy), after the first world conflict, was wrought by a Joint Resolution approved July 2, 1921, according to the terms of which the United States made reservation of numerous important rights.⁵ The value of this action in legal contemplation in producing a cessation of the war was subject to the condition subsequent that the enemies of the United States did not challenge its

for the termination of hostilities to be followed by a resumption of diplomatic relations, and also for the status that should exist during our future peace-time intercourse; which treaty is now in force and observed everywhere except in the United States, and has in fact and in international law brought peace to the whole world, including ourselves.

"Having thus in law and in fact international peace, having nothing left but a domestic status of war created by a legislative declaration of war, with no hostilities heretofore or now existent or possible in the territory over which this paper-war status exists, it is not only legally sound, but economically, morally, and patriotically necessary and indispensable that we at once repeal the declaration of war." (*Cong. Record*, May 5, 1920.)

³ See, in this connection, Geo. A. Finch, "The Treaty of Peace with Germany in the Senate," *Am. J.*, XIV, 155.

⁴ If a condition of peace is to supplant one of war between the opposing States without agreement, a consequence of the resumption may be to rob either of them of particular privileges as against the other, unless definite and vigorous effort be made (as by the more successful of the antagonists) to preserve them in connection with, or as a part of, its effort to bring about a termination of the conflict. The endeavor to preserve them may exemplify a policy of the State which seeks by its own efforts to restore peace. It should be observed, however, that such endeavor marks the assertion of a legal right, and that in the absence of such assertion the resumption of peace may have the legal effect of freeing the State from which those privileges might have well been claimed before that resumption, of a legal obligation to yield or heed them.

⁵ 42 Stat. 105.

sufficiency, as by denying that it was productive of a condition of peace. They were far from doing so. They later acquiesced in what had been done, and in treaties restoring friendly relations, concluded with Germany on August 25, 1921,⁶ with Austria, on August 24, 1921,⁷ and with Hungary on August 29, 1921,⁸ there was embodied appropriate textual reference to the provisions of the Joint Resolution declaring the war to be at an end and setting forth the reservations of specified rights.⁹

The series of acts by which a belligerent after the cessation of hostilities and possibly after the conclusion of an armistice relaxes restrictions pertaining to various forms of communication or intercourse with the enemy are not necessarily indicative of the termination of the war, and are not to be confused with acts whereby one or more or all of the parties thereto endeavor to effect the cessation of the condition of war. The former acts reveal the termination of the consequences attributable to that condition with respect to the activities to which they refer. They are in themselves in no sense war-terminating or peace-producing.¹⁰ Hence, it is unfortunate to refer to them as if they were.¹¹

⁶ U. S. Treaty Vol. III, 2596.

⁷ *Id.*, III, 2493.

⁸ *Id.*, III, 2693.

⁹ Declared Mr. Hughes, Secy. of State, to the American Chargé in Germany, Nov. 26, 1921: "Executive Proclamation of Peace with Germany reads in part as follows 'The war between the United States and Germany terminated on July 2, 1921.'" (For. Rel. 1921, II, 35.) That statement, embraced in the President's proclamation of the treaty with Germany (under date of Nov. 14, 1921, U. S. Treaty Vol. III, 2600) that had been concluded Aug. 25, 1921, revealed the fact that in the mind of the Government of the United States the cessation of the war with Germany did not await the consummation of the treaty restoring friendly relations.

¹⁰ See Certain Effects of the Termination of War, *infra*, § 921.

¹¹ Declared Mr. Justice Brandeis Dec. 15, 1919, in delivering the opinion of a unanimous Court, in the case of *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 159-160: "To establish that the emergency has passed, statements and acts of the President and of other executive officers are adduced; some of them antedating the enactment of the statute here in question. There are statements of the President to the effect that the war has ended and peace has come; that certain war agencies and activities should be discontinued; that our enemies are impotent to renew hostilities and that the objects of the act here in question have been satisfied in the demobilization of the army and navy. It is shown that many war-time activities have been suspended; that vast quantities of war materials have been disposed of; that trade with Germany has been resumed; and that the censorship of postal, telegraphic and wire communications has been removed. But we have also the fact that since these statements were made and these acts were done, Congress, on October 28, 1919, passed over the President's veto the National Prohibition Act which in making further provision for the administration of the War-Time Prohibition Act, treats the war as continuing and demobilization as incomplete; that the Senate, on November 19, 1919, refused to ratify the Treaty of Peace with Germany; that under the provisions of the Lever Act the President resumed, on October 30, 1919, the control of the fuel supply which he had relinquished partly on January 31, 1919, and partly on February 20, 1919; that he is still operating the railroads of which control had been taken as a war measure; and that on November 18, 1919, he vetoed Senate Bill 641, because it diminished that control; that pursuant to the Act of March 4, 1919, c. 125, 40 Stat. 1348, he continues to control, by means of the Food Administration Grain Corporation, the supply of grain and wheat flour; that through the United States Sugar Equalization Board, Inc., he still regulates the price of sugar; that in his message to Congress on December 2, 1919, he urgently recommended the further extension for six months of the powers of the Food Administration; that as commander-in-chief he still keeps a part of the army in enemy occupied territory and another part in Siberia; and that he has refrained from issuing the proclamation declaring the termination of demobilization for which this act provides."

Cf. Manley O. Hudson, "The Duration of the War Between the United States and Germany," *Harv. Law Rev.*, XXXIX, 1020, 1045.

¹¹ See *United States v. Hicks*, 256 Fed. 707.

c

§ 906. **Public Proclamation in Relation to a Civil War.** In the case of a rebellion where the *de jure* government subjects to control those who took up arms against it, regaining the territory within which its authority may have been suspended, the military achievement followed by a cessation of hostilities, betokens the end of resistance, and hence signifies more than in the case of a foreign war. In such a situation the implication is strong that the conflict is at an end. It is appropriate, moreover, for the *de jure* government to make announcement of that fact. At the close of the Civil War, the President by proclamation designated the time when the conflict was at an end in the particular sections of the United States,¹ and the courts regarded his action as authoritative.² Internationally, however, the value of such a proclamation depends upon the precision or accuracy with which it marks the time when resistance was so completely overcome or abandoned as to compel the conclusion that the party in rebellion had submitted. A proclamation announcing such a war to be at an end at a time when hostilities are raging and resistance maintained, must fail to merit the respect of foreign States which have accorded rights of belligerency to the insurgents or have recognized a condition of insurgency to exist.

d

§ 907. **Subjugation.** It may be in fact possible for a belligerent to occupy the entire domain of its enemy, and after having overcome all resistance, to destroy its life as a State and to appropriate its territory as the fruits of victory.¹ Peace may ensue as the direct consequence of the act of subjugation, and perhaps be fairly attributable to it. In such case the termination of the war is marked both by the acquisition by the conqueror of the right of sovereignty, and by the actual submission to his will of every hostile interest.² The treatment by Italy in 1936, of the territories and people belonging to Ethiopia seemed at the time to be illustrative.³ Subsequent events showed, however, that Italian successes had not

§ 906. See Mr. Bayard, Secy. of State, to Mr. Muruaga, Spanish Minister, Dec. 3, 1886, with reference to the executive proclamations relative to the termination of the Civil War, For. Rel. 1887, 1015, 1019, Moore, Dig., VII, 337.

² Brown v. Hiatts, 15 Wall. 177; Adger v. Alston, 15 Wall. 555; Batesville Institute v. Kauffman, 18 Wall. 151. Also The Protector, 12 Wall. 700.

§ 907.¹ Where the territory occupied and appropriated by the conqueror constitutes but a part of the domain of the enemy, there is no necessary inference that resistance is crushed or the conflict ended.

² Declares Oppenheim: "Subjugation may, therefore, be correctly defined as *extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated.*" Lauterpacht's 6 ed., II, 467.

³ See Royal Decree of May 9, 1936, placing Abyssinia under Italian sovereignty, in which it was declared in Art. 1: "The territories and the peoples that belonged to the Empire of Ethiopia are placed under the full and entire sovereignty of the Kingdom of Italy. The title of Emperor of Ethiopia is assumed for himself and for his successors by the King of Italy." (Docs. Int. Affairs, Royal Institute, 1935, II, 472.)

In a telegram signed by "Haile Selassie I, Emperor" addressed to the Secretary-General of the League of Nations, May 10, 1936, it was declared: "We have decided to put an end to the most sweeping, the most unjust, and the most inhuman war of modern times by leaving the country in order to avoid the extermination of the Ethiopian people, and to be able to devote ourselves freely and peacefully to the preservation of the age-old independence

in fact robbed a State of its life, or furnished an instance of subjugation in its technical sense.

Absence of evidence of an intention on the part of the victor to acquire a right of sovereignty by some unequivocal process such as annexation might justify the inference that the conflict was not deemed to be terminated. Again, the attempt to make formal acquisition, while hostilities were unchecked and resistance unabating, would not indicate the conclusion of peace. It is to be observed that proclamations of annexation issued under such conditions may not purport to do so.⁴ Recourse to subjugation is to be regarded as terminating a war only when the measure has itself been successful and the power to make effectual resistance stamped out.

It may be noted that disapproval in the United States and elsewhere of the endeavor of a belligerent occupant to resort to subjugation has been directed against the mode of effecting a change of sovereignty rather than against that of terminating a war. The ending of a conflict by virtue of such procedure is a mere incident of conduct itself to be deplored.⁵

e

§ 908. **Agreement.** At the present time the common mode of terminating a war is by an agreement which assumes the form of a treaty of peace between the opposing States. Such was the method employed by the Principal Allied Powers in their endeavor to bring World War I to a close.¹

of Ethiopia and the principles of collective security and the sanctity of international obligations, all of which are threatened by Italy." (*Id.*, 473.)

⁴ See, in this connection, the proclamation of Lord Roberts, May 24, 1900, announcing the annexation by Great Britain of the territories of the Orange Free State, Brit. and For. State Pap., XCII, 548, and the comment thereon in Coleman Phillipson, *Termination of War and Treaties of Peace*, 23-24.

⁵ See Conquest, *supra*, § 106; also Cession, Validity, Principle of Self-Determination, *supra*, §§ 108-109E.

§ 908. ¹ See, for example, the Treaty of Versailles with Germany concluded June 28, 1919, U. S. Treaty Vol. III, 3331. In the Preamble thereof it was said: "From the coming into force of the present Treaty the state of war will terminate. From that moment and subject to the provisions of this Treaty official relations with Germany, and with any of the German States, will be resumed by the Allied and Associated Powers." (*Id.*, 3335.)

According to Art. 1 of the Treaty of Peace with Turkey, signed at Lausanne, July 24, 1923: "From the coming into force of the present Treaty, the state of peace will be definitely reestablished between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State of the one part, and Turkey of the other part, as well as between their respective nationals." (British Treaty Series No. 16 (1923), Cmd. 1929, 13.)

The termination of the war between Bolivia and Paraguay growing out of their controversy in the Chaco Boreal was in one sense the product of agreement between the opposing belligerents because they were acquiescent members of the Peace Conference which as an entity decided to declare and did declare the war between those Republics to be at an end. The Peace Conference, embracing representatives of the States at variance as well as of six so-called mediating States, was authorized by the opposing belligerents through the provisions of Art. III, paragraph 4, of a protocol signed on June 12, 1935, to declare, under certain conditions, the war to be at an end. (Dept. of State, Treaty Information Bulletin No. 69, June 30, 1935, 33.) On October 25, 1935, the Conference announced that whereas the state of war had ceased to exist "owing to the final cessation of hostilities and the impossibility of their resumption," it was decided to declare the war between the Republics of Bolivia and Paraguay at an end; and such action was taken. (League of Nations Official Journal, Dec., 1935, 1651.) According to a protocol signed by the representatives of the

Recourse to such procedure implies in the case of each contracting party, a continuance of State life, and a freedom of power to exact or yield such terms as may be deemed to be expedient or necessary, respectively, in order to bring the conflict to an end. While it is clear that the agreement-making power of each belligerent must be exercised with careful regard for the requirements imposed by its fundamental or constitutional law respecting the mode of obtaining and manifesting the national consent, it is equally clear that the belligerent which purports to be independent does not lack capacity to agree to yield whatever the exigencies of the hour may cause it to desire to give up.² Otherwise wars could not well be terminated by treaty, and practice would tend to encourage a belligerent to rely upon its strong arm, not only to attain the victory afield, but also by prolonged occupation of hostile territory and by kindred processes to work out and obtain for itself desired conditions of peace.

Such would also be the tendency if belligerents commonly distrusted the disposition of an enemy to respect covenants employed as the instruments of terminating war. The value of a treaty for such purpose obviously depends upon the good faith of the contracting parties. It is, therefore, of no small significance that warring States have found it feasible and expedient to contract with each other, and to rely even upon a bitter enemy to fulfill undertakings essential to peace.

Doubtless as an assurance for the execution of the onerous terms of a treaty a successful belligerent may exact the right to occupy for a prolonged period portions of the territory of the enemy.³ The policy pursued in this regard is likely to be governed according to the extent of the burden imposed upon the vanquished State and according also to whether that State has previously proved to be unfaithful to its promises.⁴ It should be observed, however, that belligerent

opposing States together with the representatives of the mediating States, on January 21, 1936, there was agreement to resume diplomatic relations as soon as possible and a confirmation of obligations resulting from the protocol of June 12, 1935. (League of Nations Official Journal, March, 1936, 280.) "In execution of the undertaking to concert the definitive peace which both republics assumed in the Peace Protocol of June 12, 1935, and in the Protocolized Act of January 21, 1936," the opposing States agreed through a so-called Treaty of Peace, Friendship, and Boundaries, signed at Buenos Aires, July 21, 1938 (and of which ratifications were exchanged Aug. 29, 1938), to an arrangement for the adjustment of their territorial dispute in relation to the Chaco. (Dept. of State Press Releases, July 23, 1938, No. 460, and Sept. 3, 1938, No. 466.) That dispute survived the resumption of peace.

See Arrangements between Bolivia and Paraguay, 1933 and 1935, *supra*, § 647A. Also *supra*, § 109D.

² See Agreements Between States, Validity, Constitutional Limitations, *supra*, § 494; Cessions of Territories, Boundaries, *supra*, § 501. See also, in this connection, Mr. Hackworth, the Solicitor for the Dept. of State, to the Solicitor General, Mr. Mitchell, July 19, 1928, Hackworth, Dig., V, 488.

³ See, for example, the provisions of the Treaty of Paris, of Nov. 20, 1815, between Great Britain, Austria, Prussia and Russia, on the one side, and France, on the other, Brit. and For. State Pap., III, 280.

See, also, Arts. 428-433, of the Treaty of Versailles with Germany, concluded June 28, 1919.

⁴ "The German Delegation observe in their remarks on the Conditions of Peace: 'Only a return to the immutable principles of morality and civilization, to sanctity of treaties, would render it possible for mankind to continue to exist.'

"After four and a half years of war which was caused by the repudiation of these principles by Germany, the Allied and Associated Powers can only repeat the words pronounced

powers are constantly disposed to trust each other with respect to the fulfillment of obligations essential to the proper termination of their conflicts. Such a practice is due to the fact that States are collective moral beings or entities, normally disposed and qualified as such to respond to their contractual obligations.⁵ Nevertheless, it should be borne in mind that when a treaty of peace accepted under compulsion by a defeated belligerent calls for sacrifices which it must be expected to evince no disposition to respect when they may be safely ignored, the victor must rely upon its own strong arm in order to make the arrangement effective.⁶

It may be that the reins of government of a particular belligerent are tenaciously held by groups of individuals whose methods and aspirations shatter the confidence of the enemy, and upon whose bare covenants it, therefore, hesitates to rely. In such event the conclusion of the war by agreement necessitates either that the distrusted individuals while retaining their control offer solid guarantees of fidelity to their undertakings, or that the enemy decline to enter into the first stages of negotiations until the government be confided to trustworthy hands.⁷ Such a declination is not unreasonable, for it constitutes merely a demand that the State with whose authorities negotiations are withheld become worthy of itself by resuming a position calculated to inspire and demand the confidence of the outside world.

The termination of war by agreement enables the opposing States to dispose immediately of numerous questions born of the conflict and calling for earliest settlement, and such also as might otherwise give rise to controversies jeopardizing the continuance of peace.

by President Wilson on September 27, 1918: "The reason why peace must be guaranteed is that there will be parties to the peace whose promises have proved untrustworthy." (Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, accompanying letter of M. Clemenceau to the President of the German Delegation, June 16, 1919, Misc. No. 4, 1919, Cmd. 258, p. 66.)

⁵ See Preamble of Declaration of Rights and Duties of Nations, adopted by American Institute of International Law, at Washington, Jan. 6, 1916, *Am. J.*, X, 124, 125.

⁶ The attitude of Germany with respect to the Treaty of Versailles of June 28, 1918, is illustrative. See Agreements Between States, Preliminary, *supra*, § 489; Compulsion, *supra*, § 493; Denunciation by One Party, *supra*, § 546.

⁷ In the course of correspondence with Germany concerning an armistice, Secretary Lansing declared in a communication to the Swiss Chargé d'Affaires *ad interim* at Washington, in charge of German interests in the United States: "Feeling that the whole peace of the world depends now on plain speaking and straightforward action, the President deems it his duty to say, without any attempt to soften what may seem harsh words, that the nations of the world do not and cannot trust the word of those who have hitherto been the masters of German policy, and to point out once more that in concluding peace and attempting to undo the infinite injuries and injustices of this war the Government of the United States cannot deal with any but veritable representatives of the German people who have been assured of a genuine constitutional standing as the real rulers of Germany. If it must deal with the military masters and the monarchical autocrats of Germany now, or if it is likely to have to deal with them later in regard to the international obligations of the German Empire, it must demand, not peace negotiations, but surrender. Nothing can be gained by leaving this essential thing unsaid." (For. Rel. 1918, Supp., I, Vol. I, 381, 382.)

See assurances by way of response, contained in communication from the German Government of Oct. 27, 1918, and transmitted the following day to the Department of State by the Swiss Legation at Washington, *id.*, 395.

2

PROCEDURE PECULIAR TO THE NEGOTIATION
OF A TREATY OF PEACE

a

§ 909. **The Public Exchange of Views of Responsible Statesmen.** Statesmen responsible for the foreign affairs of a belligerent may through public utterances endeavor to enlighten the enemy with respect to terms of peace which there is a desire to obtain or a willingness to accept. Existing means of facilitating the communication of intelligence through neutral channels encourage such attempts. In the course of World War I they were made with frequency. Proposals were offered, principles enunciated and suggestions put forward and publicly answered.¹ The United States, through the President and other belligerents, through premiers or chancellors or ministers of foreign affairs, had recourse to such procedure.² The propriety of such action was not to be questioned, inasmuch as the law of nations does not prescribe the mode by which a belligerent may impart its views to the enemy.

Such utterances in the course of World War I, in sharp contrast to the reticence formerly observed by statesmen with respect to possible terms of peace, indicate a greater regard for public opinion than was previously entertained in relation to such matters. This response to the fresh and increasing influence of the popular voice in the control of foreign affairs, and particularly with respect to those pertaining to the termination of war, needs to be reckoned with by the lawyer as well as the diplomat. To both, however, it must be apparent that a procedure involving the public enunciation of concrete demands while hostilities are raging, is attended with certain dangers which it requires the exercise of consummate skill to avoid. Any utterance defining or suggesting at such a time the nature or limits of a particular demand, needs to be so expressed as not to convey to the enemy any intimation of a readiness to forego the benefits of a subsequent and decisive military achievement.³ Otherwise it will tend to relax

§ 909.¹ Nor do the views of such individuals expressed without publicity and communicated through confidential agencies, fail to receive the scrutiny of the enemy.

² See, for example, address of President Wilson to the Congress, Jan. 8, 1918, announcing fourteen points as the basis of a peace program, *Official Bulletin*, Jan. 8, 1918, Vol. II, No. 202, *For. Rel.* 1918, *Supp.*, I, Vol. I, 12.

See correspondence between the United States and Austria-Hungary in September and October, 1918, regarding an armistice, *For. Rel.* 1918, *Supp.*, I, Vol. I, 306-310, 341, 368, 404, 429-430; *Am. J.*, XIII, *Supplement*, 73-79; also correspondence between the United States and Germany in October and November, 1918, regarding an armistice, *For. Rel.* 1918, *Supp.*, I, Vol. I, 337-338, 343, 357-359, 379-383, 395, 461, 468; *Am. J.*, XIII, *Supplement*, 85-96.

³ With reference to the statement of President Wilson in his address of Jan. 8, 1918, to the effect that "the peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity of autonomous government," Secretary Lansing said on Oct. 19, 1918, in a note for communication to the Austro-Hungarian Government through the Swedish Legation at Washington: "Since that sentence was written and uttered to the Congress of the United States the Government of the United States has recognized that a state of belligerency exists between the Czecho-Slovaks and the

belligerent energies at home, and to inspire proportionally the foe. A statement may, however, if free from such defect, give so exact and full a portrayal of existing conditions and national designs as to encourage the disposition of the enemy to treat of peace. Doubtless the greatest danger of a public utterance is not that it voice excessive demands, but rather lest it express an admission or acknowledge a limit which may weaken if not frustrate the later endeavor of the negotiators of a treaty to maintain a position or win recognition of a principle then regarded as vital. Such possible consequences necessitate a caution which, without impairing the candor of a statesman, tend to limit the scope of his utterance and to deter him from discussing details. The value to his own country of the views expressed by an executive or other responsible officer in the course of a war depends, therefore, not merely upon their potency in hastening the day of peace, but also upon their influence in shaping the terms ultimately agreed upon. As that influence must depend in part upon the labors of individuals charged with the task of final negotiation, every preliminary statement should have regard for their special needs.

b

§ 910. **Preliminary Negotiations.** A mutual desire for peace may cause opposing belligerents to avail themselves of any favorable opportunity to attempt to agree to put an end to the conflict, and that without preliminary conditions respecting final terms. The existence of such an opportunity may, moreover, be brought to the attention of both contestants through the exercise of good offices by a neutral State or head thereof.¹ It is not unreasonable, however, for a belligerent to decline to enter into negotiations until assured that the enemy is sincerely disposed to treat of peace, or to accept a definite basis therefor.² In

German and Austro-Hungarian Empires, and that the Czecho-Slovak National Council is a *de facto* belligerent government clothed with proper authority to direct the military and political affairs of the Czecho-Slovaks. It has also recognized in the fullest manner the justice of the nationalistic aspirations of the Jugo-Slavs for freedom.

"The President is, therefore, no longer at liberty to accept the mere 'autonomy' of these peoples as a basis of peace, but is obliged to insist that they, and not he, shall be the judges of what action on the part of the Austro-Hungarian Government will satisfy their aspirations and their conception of their rights and destiny as members of the family of nations." (For. Rel. 1918, Supp., I, Vol. II, 368.)

§ 910.¹ See, for example, the suggestion made by President Roosevelt in June, 1905, to both Japan and Russia with respect to a meeting of plenipotentiaries to see if it were not possible for such representatives of those powers to agree to terms of peace, and set forth in a communication of Mr. Loomis, Assistant Secy. of State, to Mr. Meyer, American Ambassador at St. Petersburg, June 8, 1905, For. Rel. 1905, 807, Moore, Dig., VII, 21.

See, also, Good Offices and Mediation, *supra*, §§ 552-556.

² On September 16, 1918, the Swedish Legation at Washington communicated to the Department of State a proposal addressed to the Governments of all of the belligerent States, "to send to a neutral country, upon a previous agreement as to the date and place, delegates who would broach a confidential non-binding conversation over the fundamental principles of a peace that could be concluded." It was said that "the delegates would be commissioned to communicate to one another the views of their respective governments on the aforesaid principles and very freely and frankly interchange information on every point for which provision should be made." (Official Bulletin, Sept. 17, 1918, II, No. 414; For. Rel 1918, Supp., I, Vol. I, 306, 309.) On the same day, the Secretary of State announced that he was authorized by the President to state that the following would be the reply of the Government of the United States: "The Government of the United States feels that there is only one reply which it can make to the suggestion of the Imperial Austro-Hungarian Government

either case there must be certain preliminaries of negotiation. These embrace, for example, inquiries for terms of peace,³ proposals of conditions,⁴ or of negotiations without conditions, as well as arrangements designed to facilitate the use of agencies deemed capable of negotiating final terms or of establishing a temporary condition of affairs less unfavorable to the conclusion of peace than exists while hostilities continue unchecked. Thus it may be found expedient to agree merely to appoint plenipotentiaries to attempt to conclude a treaty, or it may prove feasible to conclude a general armistice as a useful preliminary to negotiations.⁵ It should be observed, however, that an armistice convention, although a potent means of removing certain obstacles to peace, is oftentimes the tardy successor of an agreement fixing the preliminary or even final terms of accord. In such case the arrangement for the cessation of hostilities is not to be regarded as a preliminary negotiation.⁶

Manifestation of willingness to accept terms of peace offered to it may be expressed informally by the offeree, and in such a way as to indicate that the opposing States are in substantial accord even before the conclusion of an agreement.⁷ A belligerent may, however, informally yet adequately accept proffered

It has repeatedly and with entire candor stated the terms upon which the United States would consider peace, and can and will entertain no proposal for a conference upon a matter concerning which it has made its position and purpose so plain." (Official Bulletin, Sept. 17, 1918, II, No. 414.) See, also, Mr. Lansing, Secy. of State, to Mr. Ekengren, Swedish Minister in charge of Austro-Hungarian Interests, Sept. 17, 1918, *id.*, Sept. 20, 1918, II, No. 417, p. 4; For. Rel. 1918, Supp., I, Vol. I, 309, 310.

³ See, for example, message of the Spanish Minister of State, to President McKinley, July 22, 1898, respecting terms of peace, For. Rel. 1898, 819.

⁴ See, for example, communication of Mr. Day, Secy. of State, to the Duke of Almodovar del Rio, Spanish Minister of State, July 30, 1898, For. Rel. 1898, 820.

⁵ See Arrangements Between Bolivia and Paraguay, 1933 and 1935, *supra*, § 647A.

⁶ See Armistices, General Requirements, *supra*, § 646.

⁷ The steps preliminary to the conclusion of peace between the United States and Spain, in 1898, deserve examination. On July 22, 1898, the President received from the French Ambassador, Mr. Cambon, a message from the Spanish Minister of State, inquiring in behalf of the Spanish Government on what basis terms of peace could be had. On July 30, Mr. Day, Secy. of State, announced, in response, the terms which would be accepted by the President "subject to the approval of the Senate of the United States." It was added that if these terms, embraced under three general heads, should be accepted in their entirety, commissioners would be named by the United States to meet similarly authorized commissioners on the part of Spain "for the purpose of settling the details of the treaty of peace, and signing and delivering it under the terms indicated." On August 9, the French Ambassador communicated to the President a message from the Spanish Minister of State and which purported to convey the acceptance by the Spanish Government, "subject to the approval of the Cortes of the Kingdom," of the proffered terms. Inasmuch as this message was, doubtless owing to transformations which it had undergone "in the course of its circuitous transmission by telegraph, and in cipher," not deemed to be "entirely explicit," in the form in which it reached the President, Mr. Day proposed that the terms on which the negotiations for peace were to be undertaken should be embodied in a protocol for signature by himself and the French Ambassador, as representatives of the opposing States. Accordingly, on August 10, the former submitted to the latter the draft of a protocol setting forth the precise terms tendered to Spain in the note of July 30, and adding provisions for certain other matters, including an arrangement for the suspension of hostilities. On August 12 the President authorized the Secretary of State to sign the protocol. On that day the French Ambassador informed the Secretary of State of the receipt of a telegram from Madrid under date of August 11, announcing that the Spanish Government had conferred upon the Ambassador full powers for the purposes of signature, and authorizing him without other formality or delay to sign the protocol. On that day Messrs. Day and Cambon signed the protocol in the presence of the President. The President thereupon immediately issued a proclamation suspending hostilities in accordance with the appropriate stipulation of the protocol. On Aug. 30, Mr. Cambon having just received the "full powers" conferred upon him by the Queen

terms, and thereby perfect an international agreement. In such event the offerer would seem to be precluded from exacting more than what it demands as the price of peace. Care should be taken, therefore, in preliminary negotiations designed to be productive of the earliest contractual relationship, that any offer susceptible to acceptance by the enemy embrace all that is to be exacted of it in a definitive treaty, or that, as an alternative, proposals should be offered merely as tentative suggestions not available, without discussion or elaboration, for acceptance by the offeree as the final basis of accord.

At the present time the termination of a war may call for a series of distinct contractual undertakings, manifested first, in the acceptance of the preliminary basis (possibly an ultimatum) for the negotiation of so-called preliminaries of peace, secondly, in the conclusion of those preliminaries, developing formally yet simply the terms of the existing accord and making provision for the negotiation of a definitive treaty, and thirdly, in the conclusion of that treaty.⁸ The various acts, whether or not marking the completion of a contractual relationship between the opposing belligerents, and preceding the conclusion of preliminaries of peace, may be fairly described as preliminary negotiations.

c

§ 911. Agreements Preliminary to Peace. Any agreement, irrespective of its form or scope, and relating to terms of peace between the contracting belligerents, is in a broad sense a preliminary thereof. The words "preliminaries of peace" or their equivalent have long been employed, however, to describe provisional compacts setting forth the basis of definitive treaties remaining to be concluded, and making arrangement for their negotiation. Such preliminary agreements are not only highly useful, but may become indispensable in hastening the termination of a war.¹

The practice of belligerents since the middle of the nineteenth century manifests lack of uniformity with respect both to the use of such instrumentalities,

Regent of Spain under date of August 11, sent the document to Mr. Day. For. Rel. 1898, 819-830. See, also, telegram of Mr. Day, Chairman of American Peace Commissioners, to Mr. Adee, Acting Secy. of State, Nov. 18, 1898, *id.*, 955.

⁸ In the process of the termination of the war between the United States and Spain in 1898, such a series of contractual arrangements is seen. First, there was the note of the Spanish Minister of State, of August 8, communicated to the President on the following day, stating that the Spanish Government accepted the proffered terms, which was followed by the statement of the French Ambassador on August 12, that he was authorized to sign the proposed protocol. Secondly, there was the conclusion of the protocol of agreement on that day. Thirdly, there was the conclusion of the treaty of peace.

§ 911.¹ No "preliminaries of peace" preceded the negotiation of the Treaty of Ghent, concluded between the United States and Great Britain, Dec. 24, 1814, or the negotiation of the Treaty of Guadalupe Hidalgo, concluded between the United States and Mexico, Feb. 2, 1848.

On Nov. 30, 1782, provisional Articles were signed in behalf of the United States and Great Britain. These were "to be inserted in, and to constitute the Treaty of Peace proposed to be concluded between the Crown of Great Britain and the said United States"; but that treaty was not to be concluded until terms of a peace should be agreed upon between Great Britain and France. Miller's Treaties, II, 96. Preliminary Articles were signed in behalf of France and Great Britain, Jan. 20, 1783. Malloy's Treaties, I, 585. On the same day declarations for a suspension of arms and cessation of hostilities were made by Messrs. Adams and Franklin, as Ministers Plenipotentiary of the United States. Miller's Treaties, II, 108. The definitive treaty of peace between the United States and Great Britain was concluded Sept. 3, 1783. *Id.*, 151.

and to the scope of those employed. No such agreements preceded the treaties bringing to an end certain conflicts of the twentieth century, such as the Russo-Japanese War, the Turco-Italian War and the Balkan Wars. The preliminaries of Villafranca of July 11, 1859,² signed by Napoleon III and Francis Joseph, expressed in briefest form the substance of what was then agreed upon, and did not in terms refer to the conclusion of the definitive treaty of peace which was actually signed at Zurich, November 10, 1859.³ The latter made provision for numerous matters not touched upon in the earlier agreement. The "preliminaries of peace" signed at Nikolsburg, July 26, 1866,⁴ in behalf of Austria and Prussia, and providing for the conclusion of the definitive treaty signed at Prague, August 23, 1866,⁵ and the preliminaries signed in behalf of France and Germany at Versailles, Feb. 26, 1871,⁶ arranging for the negotiation of the final treaty which was signed at Frankfort on May 10, 1871,⁷ set forth with greater detail, especially in the case of the convention of Versailles, the basis of the terms of peace. Neither preliminary agreement made provision, however, for all of the matters settled in the subsequent treaty; and that of Frankfort did not adhere fully to the terms of the basis on which it rested. The so-called preliminaries of peace signed in behalf of Russia and Turkey at San Stefano, February 19, March 3, 1878,⁸ was an elaborate document of twenty-nine articles, setting forth in detail provisions commonly found in a treaty of peace, and designed, upon ratification, "to be invested with all the solemn forms usually observed in treaties of peace." The Treaty of Berlin concluded in behalf of Great Britain, Russia, France, Austria-Hungary, Italy, Germany and Turkey, July 13, 1878,⁹ proved, however, to be an obstacle, productive of the abrogation or modification of certain stipulations of San Stefano. Those not so abrogated or modified were "permanently settled" by the Treaty of Constantinople, between Russia and Turkey, of January 27, February 8, 1879.¹⁰

§ 912. **The Same.** The protocol of agreement signed in behalf of the United States and Spain, at Washington, August 12, 1898, comprised six articles providing for the relinquishment of sovereignty over and title to Cuba, the cession of the island of Porto Rico and an island in the Ladrões to the United States, the occupation by the United States of the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which should "determine the control, disposition, and government of the Philippines," the immediate evacuation by Spain of Cuba, Porto Rico and other Spanish West Indian islands, as well as

² Brit. and For. State Pap., XLIX, 93.

³ *Id.*, 364.

⁴ *Id.*, LVI, 1029.

⁵ *Id.*, 1050.

⁶ *Id.*, LXII, 59.

⁷ *Id.*, 77.

⁸ U. S. For. Rel. 1878, 866; Brit. and For. State Pap., LXIX, 732.

⁹ Brit. and For. State Pap., LXIX, 749.

¹⁰ Brit. and For. State Pap., LXX, 551.

For a discussion of the preliminaries of peace mentioned in this paragraph of the text, see Coleman Phillipson, *Termination of War and Treaties of Peace*, Part II, Chap. III. Appendices of the same work contain texts (in English) of each of these agreements.

the appointment of commissioners to arrange for such evacuation, the meeting of commissioners at Paris to negotiate a treaty of peace, and the suspension of hostilities.¹ The definitive treaty of peace concluded December 10, 1898, comprised seventeen articles, and made provision for numerous matters not settled (as that relating to the Philippines) or not touched upon in the protocol.²

The successful employment of preliminaries of peace calls for the exercise of great care lest they prove to be an obstacle rather than an aid to the terms of peace ultimately desired. A party to such an agreement is obviously bound to impose no severer terms upon its adversary than are set forth therein. Hence the failure to secure the incorporation in the basic convention of any concession deemed essential to peace, would destroy the likelihood of its being later granted, unless a special sacrifice were made therefor, or unless the grantor did not regard a yielding of it as adverse to its interests.³ Nor does it appear to be unreasonable for a belligerent to decline to treat of any matters not specified in the preliminary convention unless they are so essential to peace as to be necessarily embraced in any treaty designed to terminate the war.

If, therefore, a successful belligerent deems it expedient to demand acceptance by the enemy of basic terms of peace as a condition precedent to the negotiation of any treaty, the value of such action may be greatly enhanced by causing the preliminaries of peace to be fully responsive to the whole extent of existing accord, and to afford guidance also for the conclusion of a treaty designed to make provision as well for matters respecting which there may be at the time no oneness of mind. This twofold function of the preliminary articles — to mark and define terms on which agreement has been reached, and also to pave the way for future agreement where none exists, — needs to be constantly borne in mind.⁴

§ 912. ¹ Malloy's Treaties, II, 1688.

² *Id.*, 1690.

³ The United States experienced difficulty in obtaining the cession by Spain in the treaty of peace of Dec. 10, 1898, of the Philippine Islands, because such a disposition of them was not definitely fixed by the preliminary protocol of August 12. It will be recalled that Art. III of the treaty, which made provision for the cession, contained also an undertaking on the part of the United States to pay to Spain the sum of twenty million dollars within three months after the exchange of ratifications of the treaty. Malloy's Treaties, II, 1691. See, also, Correspondence with American Peace Commissioners at Paris, 1898, For. Rel. 1898, 904-966, especially, 942-949.

⁴ See *supra*, § 910.

That preliminaries of peace may attain their greatest efficacy as an instrumentality to be employed in the termination of war, it is believed that the endeavor should be made to incorporate in them the following classes of Articles:

a. Articles of a general character, such as those providing for the meeting of plenipotentiaries to negotiate and conclude a treaty of peace subject to ratification; arrangements for the ratification (when such action is deemed to be required by the fundamental law of a contracting belligerent) of the preliminaries of peace; provisions for the termination of hostilities; provisions relative to the release, restoration and maintenance of prisoners of war and interned civilians; grants of amnesty.

b. Articles embodying all known concessions to be demanded by either belligerent, and respecting which agreement can be had. If these embrace changes of sovereignty by cession or relinquishment, the principles to govern the establishment of new boundaries should be enunciated, and when possible lines should be specified according to authoritative maps; and the effect of changes of sovereignty, with respect at least to public fiscal obligations, should, if possible, be fixed rather than left to the negotiators of the definitive treaty.

If restoration of territory under belligerent occupation is contemplated, not only should

§ 912A. **The Pre-Armistice Agreement with Germany in 1918.** The pre-Armistice Agreement in 1918 was the product of diplomatic correspondence between the United States and Germany, as registered in a series of notes in October and November of that year.¹ These pertained to the conditions on which an armistice could be had, the character and scope of an armistice, and the terms of peace. The final and formal offer in behalf of the Allied and Associated Powers was embraced in a note in behalf of President Wilson of November 5, 1918.² "This offer, it is conceived, was accepted by Germany by the act

the time and mode of evacuation be fixed, but also the nature and extent of reparation to be demanded of the occupant on account of any abuses of its rights as such should be established.

If it is designed to convert subject-nations or races normally occupying definite territorial areas into States of international law, their position as such, whether of dependence or independence, the nature of the fiscal and other obligations to be borne by them, together with the mode of establishing claims of allegiance over prospective nationals, should be fixed.

If pecuniary indemnities are to be exacted, the basis thereof, and the method of computing principal and interest, and if possible, the time and mode of payment, should be settled.

The nature of any guarantees to be exacted for the performance by the enemy of any act on its part, or the plan of a belligerent to assure itself through its own strong arm or otherwise, of compliance with the terms of peace, should be specified.

c. Articles expressing recognition of principles agreed upon for the adjustment of matters remaining unsettled, and referred to the negotiators. These may concern, for example, questions of nationality, the restoration of public and private enemy property and the rights generally of private individuals and the treatment of their pecuniary claims.

d. Articles relating to specific matters concerning which no agreement of any kind has been reached, and yet for which it is deemed important that the definitive treaty should make provision. This class, which knows no limits, may embrace, for example, arrangements for the renewal of former treaties, the fresh basis for the reestablishment of commercial and economic relationships, and the definition or recognition of political interests, as well as the formulation of plans designed to prevent the recurrence of war between the contracting parties.

§ 912A.¹ See German note requesting an armistice and peace negotiations, on the basis of the President's addresses, presented to President Wilson by the Swiss Chargé, at Washington, Oct. 6, 1918, For. Rel. 1918, Supp., I, Vol. I, 337; Mr. Lansing, Secy. of State, to the Swiss Chargé, at Washington, Oct. 8, 1918, *id.*, 343; second German note, Oct. 12, 1918, transmitted Oct. 14, 1918, through the Swiss Chargé, at Washington, *id.*, 357; Mr. Lansing, Secy. of State, to the Swiss Chargé, at Washington, Oct. 14, 1918, *id.*, 358; third German note, Oct. 20, 1918, transmitted through the Swiss Chargé, at Washington, Oct. 22, 1918, *id.*, 380; Mr. Lansing, Secy. of State, to the Swiss Chargé, at Washington, Oct. 23, 1918, *id.*, 381; fourth German note of Oct. 27, 1918, transmitted through the Swiss Chargé, at Washington, Oct. 28, 1918, *id.*, 395; Mr. Lansing, Secy. of State, to the Swiss Minister, at Washington, Nov. 5, 1918, transmitting a memorandum of observations by the Allied Governments on the correspondence had with Germany, *id.*, 468.

See also Mr. Lansing, Secy. of State, to the Italian Ambassador, at Washington, (and likewise to the diplomatic representatives of other Allied Powers), Oct. 23, 1918, *id.*, 383.

² It was here announced that the President was in receipt of a memorandum of observations by the Allied Governments on the correspondence between the United States and Germany, which was as follows: "The Allied Governments have given careful consideration to the correspondence which has passed between the President of the United States and the German Government. Subject to the qualifications which follow they declare their willingness to make peace with the Government of Germany on the terms of peace laid down in the President's address to Congress of January, 1918, and the principles of settlement enunciated in his subsequent addresses. They must point out, however, that clause 2, relating to what is usually described as the freedom of the seas, is open to various interpretations, some of which they could not accept. They must, therefore, reserve to themselves complete freedom on this subject when they enter the peace conference.

"Further, in the conditions of peace laid down in his address to Congress of January 8, 1918, the President declared that invaded territories must be restored as well as evacuated and freed, and the Allied Governments feel that no doubt ought to be allowed to exist as to what this provision implies. By it they understand that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air." (*Id.*, 468.)

For the text of President Wilson's address to the Congress of Jan. 8, 1918, setting forth a program of peace exemplified in his statement of fourteen points, see *id.*, 12, 15-16.

of sending representatives through military channels, to meet Marshal Foch for the purpose of arranging an armistice. By the acceptance of the offer a solemn Agreement was reached which served, both morally and legally, as the basis of the armistice convention and the treaty of peace."³ The scope and significance of the agreement could only be ascertained by reference to the terms of the antecedent correspondence and to those of numerous documents embracing not only President Wilson's address to the Congress of January 8, 1918, announcing fourteen points as a program of world peace, but also excerpts from his subsequent addresses.⁴ This fact revealed the unfortunate aspect of the method utilized by the victors as a means of laying down terms which when accepted were to indicate the full extent of the obligations of the opposing States as they terminated a world war. It opened the door to diverse interpretations of what was agreed upon; and a sharp divergence ensued.⁵ The loose form of commitments which Germany had accepted in the pre-Armistice arrangement permitted its adversaries to demand acceptance of a treaty which, in German estimation called for concessions that were at variance with the terms of the previous agreement.⁶ In a technical sense, the acceptance by Germany, even under compulsion, of the Treaty of Versailles weakened the later value of this contention.⁷ Nevertheless, the terms of the treaty were such as to convince the German mind that it constituted a breach of faith on the part of those who were responsible for its provisions; and this circumstance together with the fact that the arrangement was accepted under compulsion, doubtless inspired the defeated party to break down and repudiate certain provisions of the arrangement when favorable opportunity for so doing presented itself.⁸

³ Temperley, I, 382.

On the night of Nov. 6-7, 1918, the German Supreme Army Administration, by command of the German Government, informed Marshal Foch by radio that particular individuals had been appointed plenipotentiaries who requested notification by radio as to the place where they could meet him; that they would be accompanied by commissioners and interpreters as well as by subordinates and would arrive by automobile at the place to be designated; and also that the German Government would welcome it, in the interest of humanity, if, upon the arrival of the German delegation at the Allied front, a temporary cessation of hostilities could take place. See Germany, *Waffenstillstandskommission*, 1918-1919, *Der Waffenstillstand*, 1918-1919, I (Berlin, 1928), 20-21. This document was brought to the attention of the author by Dr. Philip M. Burnett, June 26, 1940. It indicated a design to accept, rather than actual acceptance of, the offer of the Allied and Associated Powers which is not believed to have taken place prior to the actual sending of representatives to meet Marshal Foch.

⁴ For extracts from President Wilson's speeches in 1918, see *id.*, appendix III.

See Memorandum on President Wilson's Speeches as a Basis of Negotiation, by Colonel Wiseman, Political Intelligence Department, British Foreign Office, Oct. 12, 1918, Miller's Diary, Document 11.

⁵ The signature of the Armistice Convention on Nov. 11, 1918 (U. S. Treaty Vol. III, 3307), being in part performance of previous undertakings, was one of the preliminaries of peace.

⁶ See Conditions of Peace with Germany, Senate Doc. No. 149, 66 Cong., 1 Sess. This document contains the texts and summaries of notes exchanged between the Allied and Associated Powers, on the one hand, and the German Delegation, on the other, respecting the conditions of peace presented to Germany on May 7, 1919. See particularly German observations of May 29, 1919, with accompanying letter, *id.*, 79-96; Response of the Allied and Associated Powers, June 16, 1919, with accompanying letter, *id.*, 96-155.

See discussion in Temperley, II, Chap. VI.

⁷ See Agreements between States, Manifestation of Assent, Compulsion, *supra*, § 493.

⁸ See Arnold J. Toynbee, "A Turning Point in History," *Foreign Affairs*, 1939, XVII, 305, 316-317.

See Achievements in Termination of War, *infra*, § 923.

It is not sought to discuss the soundness of the German claim, but rather to take cognizance of the grim consequences that must be attributed to the method by which the Principal Allied and Associated Powers saw fit to hold out terms of peace. It ought now to be obvious that when a successful belligerent purports to offer such terms to its enemy they should, if possible, be fully set forth in a single document, and enunciated with such simplicity and clearness as to minimize the danger of controversies such as those which the pre-Armistice arrangement with Germany was bound to foster.

d

The Conclusion of a Definitive Treaty

(1)

§ 913. **In General.** It is the function of those charged with the conclusion of a definitive treaty to build a superstructure founded upon the terms of the preliminaries of peace, when such have been agreed upon, and, under their guidance, to secure accord respecting matters concerning which the absence of formal agreement would be detrimental to the interests of the contracting parties. Questions as to the effect of war or of the termination thereof upon the rights of the opposing States in relation to each other may give rise to problems the solution of which is beset with grave difficulties. In order, therefore, to reduce the number and kind of issues likely to make rough and insecure the path of peace which the belligerent powers profess a desire to follow, the treaty concluded should be fully responsive to the requirements laid down in the preliminaries of peace, and should make provision also for the final adjustment, by amicable means, of differences proving incapable of immediate solution at the peace conference.¹

To leave no room for divergent interpretations of any provisions of the treaty, the work of drafting the terms proposed and agreed upon should be undertaken with utmost care. The simplest and most unequivocal terms should be employed. Clearness of form and accuracy of statement should be the chief design, from which it is believed that no departure, for the sake of concealing the nature of a concession or of saving the face of a grantor, should be per-

§ 913.¹ The negotiators of neither party should, however, be encouraged to attempt to refer to any other body the solution of a question which by the terms of the preliminaries of peace was to be settled by those of the definitive treaty. It would, for example, be highly unfortunate for a difference of opinion as to the interpretation of the preliminaries to delay the conclusion of a treaty until, as a result of arbitration, an authoritative decision were had. See proposal of Spanish Peace Commissioners in 1898, for an agreement to propose to the Governments of the United States and Spain an arbitration to determine the true sense in which Articles III and VI of the preliminary protocol of August 12, 1898, should be taken, and as set forth in telegram of Mr. Moore, Secy. of American Commission, to Mr. Hay, Secy. of State, Nov. 18, 1898, For. Rel. 1898, 951, 954; also response of the American Commissioners, Moore, Dig., I, 373.

It seems important that a definitive treaty of broad scope, and involving the interests of several States, should make provision for the adjustment by adjudication before a tribunal of specified character, of all differences proving incapable of settlement by diplomacy and arising with respect to the interpretation or application of any of the Articles agreed upon. See, in this connection, Art. XVII of the Turco-Bulgarian treaty concluded at Constantinople, Sept. 29, 1913, also Annex No. III, Brit. and For. State Pap., CVII, 706.

mitted. Obviously any attempt to incorporate in the treaty vague expressions for the purpose of implying acquiescence in a compromise where none was effected, or of fomenting later controversy, should be thwarted.

In order to simplify the accomplishment of a task essentially complex, and which may be in fact either enhanced or diminished by the terms of the preliminaries of peace, arrangement as to the procedure to be observed should, if not previously made, receive earliest attention.

The negotiations that were finally productive of the conclusion of a treaty of peace between the Allied Powers and Turkey, at Lausanne on July 24, 1923, were there entered into on November 20, 1922, and continued until February 4, 1923, when by reason of lack of accord they were interrupted or suspended until April 23 of that year, when they were resumed and continued until the signature of the treaty. During the period of suspension the legal position of Turkey was fundamentally modified. There was found to be abundant reason why certain views in behalf of Great Britain during the first phase of the negotiations could not be regarded as properly interpretative of the treaty as it was finally consummated.²

(2)

PROCEDURE OF A PEACE CONFERENCE

(a)

§ 914. **Presiding Officer.** Where negotiations are conducted by representatives of but two opposing States, it is not necessary that any individual preside over the conferences.¹ When, however, numerous States are participants both in the war and in the negotiations of a definitive treaty of peace, the situation is otherwise, even though all of the parties concerned may be so aligned as to constitute but two opposing sides.

Whether the conference take place on neutral or belligerent soil, and regardless of whether or not its convening is due to the mediatory proposals of a neutral State or head thereof, it seems desirable, for sake of efficiency of service, that the functions of a presiding officer be lodged in a single individual. Reasons of courtesy rather than of law have been deemed to demand that he be a representative of the State on whose territory the conference is held.²

(b)

§ 915. **The Mode of Presentation and Discussion of Propositions.** The conclusion of a definitive treaty is facilitated by adherence to a procedure de-

² See Advisory Opinion No. 12 of the Permanent Court of International Justice, Nov. 21, 1925, concerning Art. 3, Paragraph 2 of the Treaty of Lausanne, Publications, Permanent Court of International Justice, Series B, No. 12, pages 10, 13, and 23.

§ 914. ¹ Thus there was no officer who presided over the conferences of the American and Spanish Peace Commissioners at Paris in 1898.

² M. Clemenceau, as is well known, was the President of the Peace Conference which negotiated and concluded the Treaty of Versailles with Germany, of June 28, 1919.

Lord Curzon presided over the Peace Conference at Lausanne, that was productive of the treaty of July 24, 1923.

Dr. Saavedra Lamas, of Argentina, was President of the Conference at Buenos Aires

signed to make clear, and therefore useful, the scope of any existing bases of agreement, and to make equally clear the nature and limits of differences which appear to be insurmountable. By avoidance of methods breeding confusion of thought, diversity of opinion respecting particular issues may not attain undue significance. Moreover, the very perception of the exact nature of and the real reasons for such diversity may serve in itself to banish grounds of controversy.

A peace conference may witness endeavors to protract discussion or thwart agreement. Some already recorded give warning of what may be anticipated unless, at the outset, a definite procedure be fixed. Thus, for example, the representatives of one belligerent may, preliminary to any discussion of a treaty, demand that those of their adversary join them in a declaration that the government of the latter should follow a particular course of action respecting occupied territory, although the assumption of such an advisory function by the plenipotentiaries was not contemplated by the preliminaries of peace.¹ Again, the attempt may be made to confuse or prolong the discussion of a concession simply and definitely fixed by those preliminaries, through proposals as to extrinsic although related matters not referred to in any existing agreement.² After the provisional acceptance of definite Articles, there may be an attempt to renew discussion of matters pertaining to them and supposedly waived by such acceptance.³ Numerous unrelated proposals regarding matters not touched upon in the preliminaries of peace or at variance with the terms thereof, may in fact be simultaneously offered, and that before the plan of any treaty in accordance with those terms has been tentatively agreed upon.

§ 916. The Same. A belligerent State should doubtless enjoy a large freedom in offering proposals respecting the terms of a final treaty, and in seeking also

which on October 25, 1935, announced its decision to declare the war between the Republics of Bolivia and Paraguay at an end.

§ 915.¹ See proposal of Spanish Peace Commissioners to those of the United States, Oct. 1, 1898, and referred to in telegram of Mr. Day, Chairman of the American Commission, to President McKinley, Oct. 1, 1898, For. Rel. 1898, 916; also Same to Mr. Hay, Secy. of State, Oct. 3, 1898, *id.*, 917.

² See, for example, telegrams from Mr. Day, Chairman of American Peace Commissioners at Paris, to Mr. Hay, Secy. of State, Oct. 8, 1898, and Oct. 12, 1898, For. Rel. 1898, 924 and 927, respectively, concerning proposals of the Spanish Peace Commissioners in regard to the so-called Cuban debt, and the theory of the American response.

³ Although the Spanish Peace Commissioners accepted on Oct. 27, 1898, provisionally, draft Articles proposed by the American Commissioners in the exact language of the preliminary protocol, as to Cuba, Porto Rico, and Guam, and without reference to the so-called Cuban debt previously discussed (see For. Rel. 1898, 937), there was apparent renewal of the question as to that debt in a Spanish memorandum of Nov. 4, 1898, dealing with the American demand for the Philippine Islands. See, in this connection, telegram of Mr. Day, Chairman of the American Commission, to Mr. Hay, Secy. of State, Nov. 9, 1898, *id.*, 943; also telegram of Mr. Moore, Secy. of American Commission, to same, Nov. 18, 1898, respecting a Spanish memorandum received the previous day, *id.*, 951, in which the Spanish Commissioners denied having withdrawn their acceptance of the Articles on Cuba, Porto Rico, and Guam, and declaring that such acceptance was, however, conditional upon agreement on the whole treaty, and was given for compensation which might be obtained in other Articles for sacrifices on the part of Spain as to debts. The Spanish Commissioners observed that while they would have been justified in insisting on claims as to the transmission of colonial obligations and debts, they had confined themselves to contradicting affirmations to which they could not assent.

to have those of the preliminaries of peace developed along lines favorable to itself. There may be reasonable differences, moreover, concerning what may be fairly claimed under the provisions of an antecedent compact.¹ Nevertheless, adherence to a procedure which limits the opportunity to attempt to alter the scope or nature of basic terms already agreed upon, even if it checks freedom of discussion and entails observance of a conventional orderliness, simplifies the task of negotiation and increases the likelihood that the treaty finally concluded will respond to the requirements and reflect the spirit of the preliminaries of peace.

A conference of the representatives of numerous belligerents even though aligned so as to constitute but two opposing sides, presents special procedural problems. There may be a marked lack of interest on the part of the representatives of one belligerent in particular proposals advocated by an ally, and relating to concessions of special benefit to it. Equality of interest on the part of numerous allies or associates in the success of any one proposal may not in fact exist, but the degree to which it may be approximated is proportional to the extent to which acquiescence by a common enemy will be productive of a like effect upon its several adversaries. Thus a proposal designed to regulate methods of maritime warfare, or to check the rights of a conqueror, or otherwise according recognition to principles of universal application, arouses a more intense and uniform interest in every belligerent on either side than the attempt, however just, to gain a particular boon for a single State. This circumstance should doubtless have a bearing on the procedure to be observed by a peace conference. Thus a proposal made to or by a group of allies concerning, for example, the evacuation of territory belonging to one of them, would appear

§ 916. ¹ See *supra*, § 912A. There may be difficulty in determining whether a particular proposal may be fairly made as incidental to a provision contained in the preliminaries of peace. It ought to be clear that when the preliminaries specify that certain matters shall be dealt with by the peace conference, a proposal respecting any one of them, regardless of its scope or purpose, does not necessarily violate the antecedent agreement. Thus the demand by the American Peace Commissioners at Paris in 1898, that Spain cede the Philippine Islands, violated no procedural requirement, because the preliminary protocol left the determination of the control, disposition, and government of those islands to the peace conference. Moreover, earlier negotiations showed that the United States had never forfeited the right to make such a demand. See memorandum presented by the American Commissioners, Nov. 9, 1898; also telegram of that date from Mr. Day, Chairman of the American Commission, to Mr. Hay, Secy. of State, For. Rel. 1898, 943, Same to Mr. Adee, Acting Secy. of State, Nov. 18, 1898, *id.*, 955. The question was a different one, however, whether for any reason the Spanish Commissioners had cause to reject that demand. Obviously the right to make a proposal and the right to insist upon compliance with it were not identical.

Where the preliminaries of peace deal in barest terms with matters concerning, for example, the cession or relinquishment of territory, referring merely to the transfer of sovereignty, a grave question presents itself as to what may be reasonably demanded by the grantor or relinquisher by way of limiting what it is called upon to yield, or of protecting rights affected by the transfer. It may not be easy to distinguish between a proposal designed merely to be declaratory of the general obligations imposed by international law upon the new sovereign as such, and a proposal burdening it with those not so imposed and not previously agreed to be undertaken. The American Peace Commissioners in 1898 deemed the Spanish proposals as to the so-called Cuban debt to be of the latter kind, and hence, in view of the silence of the preliminary protocol, improper appendages to any Article providing for the relinquishment of claims of sovereignty over and title to Cuba. See telegram of Mr. Day, to Mr. Hay, Oct. 8, 1898, For. Rel. 1898, 924. The proposals and discussions during the Spanish-American Peace Conference illustrate, however, the usefulness (for the purpose of facilitating work) of more detailed provisions than were embodied in the peace protocol of August 12, 1898.

to demand consideration, discussion and presentation or refusal, primarily by plenipotentiaries of the State immediately concerned, and in coöperation with those of its allies which may be both able and disposed to render strongest aid. Moreover, the actual task of negotiation may be most effectively accomplished by conferences between such individuals and those of the enemy whose governments are likewise peculiarly concerned. In a word, through the agency of committees of representatives of groups of opposing States specially interested, bases of final accord may be capable of ascertainment, and utilization more expeditiously and intelligently than by any other process.² Effective recourse to such procedure requires, however, entire harmony between each committee and the other representatives of the several belligerents associated together, as an obvious condition to final agreement with the common enemy. This necessitates formal deliberations of the several allied plenipotentiaries by themselves or as a single body, and careful organization as such, designed to regulate the scope and nature of the powers of committees, the relation of conclusions of the latter to their side as a whole, and the mode of selecting individuals to act as spokesmen on the floor of the conference.

It may be observed, generally, that any system which a particular belligerent deems it advisable for a contemplated conference to follow should be proposed before the convening thereof to its several allies, as a means of obtaining their early approval of the plan for proposal to the enemy at the very beginning of final negotiations, and possibly prior thereto. It is believed that the acquiescence of hostile States may be expected to depend not only upon the essential worth of the scheme of procedure that is offered, but also upon whether the terms of the preliminaries of peace are so comprehensively and skillfully drawn as to remove or minimize any special advantage to be derived from opposition.

(c)

§ 917. **The Procedure of the Conference of Paris of 1919.** The large number of belligerents aligned against Germany in World War I, together with the differing effects of the conflict upon each of them and the variety of interests resulting from it, rendered of primary importance the organization of a Peace Conference in such a way as to present a solid front in submitting a final treaty to the common enemy.¹ The five Great Powers which had borne the brunt of

² See, in this connection, the procedure followed in the negotiation of the Treaty of Bucharest concluded July 28-Aug. 10, 1913, and the account thereof in Coleman Phillipson, *Termination of War and Treaties of Peace*, 149-154, citing B. Stambler, *Les Roumains et les Bulgares*, Paris, 1914, 140 *et seq.*, E. J. Dillon, in *Contemporary Review*, Sept. 1913, 416, *et seq.*

§ 917. ¹ See, generally, Charles H. Haskins and Robert H. Lord, *Some Problems of the Peace Conference*, Cambridge (Mass.), 1920, chap. 1; Temperley, Vol. I, chap. VII; Robert Lansing, *The Peace Negotiations*, Boston, 1921, especially chap. XVII; also George A. Finch, "The Peace Conference of Paris," *Am. J.*, XIII, 159.

See speech of M. Clemenceau, President of the Conference, at second plenary session of Preliminary Peace Conference, Jan. 25, 1919, Senate Document No. 106, 66 Cong., 1 Sess., 295-298.

See Miller's *Diary*, Documents 4, 5, 7, 10, 14, 18, 19, 69, 159, 170, 178, 185, 191, 192, 197, 198, and 199.

the military and naval effort productive of victory, were not disposed to relinquish control of the procedure which should develop a treaty, and still less of the terms which such an instrument should embody. Those Powers early devised, therefore, a plan indicating to what extent their associates should participate, fixing the number of delegates allotted to each State, and how its voice should be heard in plenary sessions and through membership on Commissions.² Final decisions were retained or reserved by the five Great Powers through the medium of the so-called Council of Ten,³ which was ultimately reduced to the Council of Four, composed of the chiefs of the delegations of the United States, France, Great Britain and Italy, and which became in fact a Council of Five whenever the representative of Japan was present,⁴ but which was further

See also Nina Almond and Ralf Haswell Lutz, *An Introduction to a Bibliography of the Paris Peace Conference*, Hoover War Library Bibliographical Series II, Stanford University, California, 1935; James T. Shotwell, *At the Paris Peace Conference*, New York, 1937.

See documents in *For. Rel.* 1919, I, 1-35, concerning representation of the United States in the Peace Conference and Related International Bodies.

² "The rules of the Conference, drawn up by the representatives of the five Great Powers in advance of its opening, divided the Allied and Associated Governments into three groups for purposes of representation and participation in the Conference. The first group comprised the belligerent Powers with general interests, namely, the United States of America, the British Empire, France, Italy, and Japan, whose delegates were entitled to attend all sessions of the Conference and Commissions. The second group included the belligerent Powers with special interests, namely, Belgium, Brazil, the British Dominions and India, China, Cuba, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Poland, Portugal, Roumania, Serbia, Siam, and the Czecho-Slovak Republic, whose delegates were entitled to attend sessions at which questions concerning them were discussed. The third group was made up of Powers which had broken off diplomatic relations with the enemy Powers, namely, Bolivia, Ecuador, Peru, and Uruguay. The delegates of these Powers were likewise entitled to attend the sessions at which questions concerning them were discussed. Provision was made that neutral Powers and States in process of formation should, on being summoned by the Powers with general interests, be heard, either orally or in writing, at sessions devoted especially to the examination of questions in which they were directly concerned, and only in so far as those questions were concerned.

"The number of delegates allowed to each of the foregoing Powers was as follows: Five each to the United States, the British Empire, France, Italy, and Japan; three each to Belgium, Brazil and Serbia; two each to Australia, Canada, China, Greece, the Hedjaz, India (including the native States), Poland, Portugal, Roumania, Siam, South Africa, and the Czecho-Slovak Republic; one each to Bolivia, Cuba, Ecuador, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, and Uruguay, making seventy in all. Montenegro was allowed one delegate, but the manner of his appointment was not to be decided until the political situation of that country became clear." (George A. Finch, in *Am. J.*, XIII, 159, 165.)

See, also, proceedings of plenary session of Jan. 25, 1919, Senate Doc. No. 106, 66 Cong., 1 Sess., 277-279.

³ "One of these meetings [of the Council of Ten] was reported at length in the Paris papers, and it was alleged that undue publicity, as well as undue prolixity, was responsible for the sudden change on March 24. After that date the Council of Ten ceased to meet." (Haskins and Lord, *Problems of the Peace Conference*, 27.)

It is stated in Temperley, Vol. I, 247, that the Council of Ten "was in reality a continuation of the Supreme War Council, which had been formed during the War, and in fact when its military advisers were present it assumed that name from the first, while its methods of organization and its Secretariat were simply a continuation of those employed by that body."

⁴ "The name that we ourselves used was very much more pretentious; we called ourselves the Council of the Principal Allied and Associated Powers." (President Wilson, in statement at conference with the Senate Committee on Foreign Relations, Aug. 19, 1919, Senate Document No. 106, 66 Cong., 1 Sess., 521.)

The matters discussed by this body were summarized and the conclusions reached were daily recorded in a *procès-verbal* and distributed to the conferees. The several *procès-verbaux* which recorded numerous important undertakings, such as those of Japan with respect to Shantung, were kept secret. President Wilson declined to produce them for the Senate Com-

reduced to a Council of Three during the interval when the Italian Delegation temporarily withdrew from Paris.⁵ Thus it came about that this small body of responsible statesmen with the aid of the several agencies which they established, found it possible to develop the treaty which was finally submitted to the German Delegation.

At an early stage five Commissions were appointed by the Conference, and charged with the duty of examining the following questions: 1, The League of Nations; 2, Responsibility of the Authors of the War and Enforcement of Penalties; 3, Reparation for Damage; 4, International Legislation on Labor; 5, International Control of Ports, Waterways and Railways.⁶ Numerous other Commissions were from time to time appointed for specific purposes such as, for example, those assigned to the study of various territorial claims advanced by some of the smaller States.⁷

The officers of the Conference, embracing the President, the Vice-Presidents and the Secretariat General, together with the Committee on Credentials and the Drafting Commission, constituted what was known as the Bureau.⁸

In a broad sense no requirement of international law restricted the mode by which a number of co-belligerents undertook to reach agreement respecting terms for submission to their enemy. The assertion, however, by a small Council, representing a few strong States, of the right to arrange provisions for their associates of lesser magnitude in matters of direct and peculiar interest to them, raised sharply a question of a legal nature. The partial representation of the smaller States on Commissions whose recommendations the Council acknowledged no obligation to accept and frequently disregarded, and the various opportunities for oral presentation of special claims, did not remove the danger of injury to those States where the governing body was influenced by considerations of expediency as well as law, and was possessed of power to enforce its will.⁹

mittee on Foreign Relations. He said in this connection: "The reason we constituted a very small conference was so that we could speak with the utmost absence of restraint, and I think it would be a mistake to make use of those discussions outside." (*Id.*) He declared, however, that he regarded his own "copies of the *procès-verbaux* as a 'public trust,' that they would not be destroyed, and that he would leave them where they could be made accessible." (*Id.*, 523.)

⁵ "Meanwhile another machine had been created, which also played an important part. The Foreign Ministers excluded from the 'Council of Four' were formed into another body called the 'Council of Five,' for on this body Japan was represented. This body was able to relieve the 'Council of Four' of some of the minor problems which were pressing for settlement, especially those needing immediate action. It maintained the procedure of the old 'Council of Ten,' and circulated formal minutes." (Temperley, Vol. I, 267.)

⁶ Senate Document No. 106, 66 Cong., 1 Sess., 280. There was partial representation of the smaller States on these Commissions.

⁷ It should be observed that the Supreme Council early established a subsidiary body of great importance in the Supreme Economic Council, for the purpose of dealing with matters of finance, food, blockade control, shipping and raw materials. Concerning the work of this Council see Temperley, Vol. I, Chap. VIII.

⁸ The American delegates at the Conference were President Wilson, Secretary Lansing, Mr. Henry White, formerly Ambassador at Rome and Paris; Col. Edward M. House, and General Tasker H. Bliss, Military Representative of the United States on the Supreme War Council. The legal advisers of the American Delegation were Mr. David Hunter Miller, and Maj. James Brown Scott.

⁹ "No control was exercised by the Central body over the Commissions while they were engaged in their work, and the experts who sat on them were therefore not expressing the

That the smaller States, especially those born of the conflict, yielded generally to provisions established for rather than by them, was doubtless oftentimes due to the futility of persistent opposition rather than to any other circumstance.¹⁰

The Principal Allied and Associated Powers appear to have acted on the theory that certain of their associates of lesser influence and strength should be relegated to a subordinate position in the work of formulating terms of peace for submission to the common and defeated enemy.¹¹ Possibly the adoption of such a course, apart from any question touching its reasonableness, served to render insignificant the procedure by means of which it was undertaken. It should be observed, however, that the problems closely affecting the lesser States varied greatly in kind, and were such as to lend themselves to differing methods of treatment even by the single body holding the reins of power. It, therefore, behooved the Council to adjust its method so as to accord not merely due consideration to the merits of particular claims, but also in such a way as to acknowledge the inherent right of the individual State in matters of special concern to itself and not affecting the application of general principles, to have a voice and perhaps the decisive voice in the final decision.¹²

§ 918. **The Same.** Negotiation with the enemy preliminary to its acceptance of the treaty raised other questions. The document was submitted to the German Delegation on May 7, 1919, when it was announced by M. Clemenceau that no oral discussion would take place, and that observations of the German Delegation would have to be in writing.¹ German protests resulted in some slight modification of the terms imposed.² As has been noted elsewhere,³ a sharp issue arose

ideas of their chiefs, who often ultimately refused to be bound by their conclusions. The result was that much of the work of the Commissions was wasted, that the compromises of the Council of Four were substituted for their conclusions, and that the latter were often made in haste and without reference to those most able to give an important judgment. This failure of the principal statesmen to make adequate use of the body of expert knowledge assembled at Paris is one of the main causes why parts of the settlement are not only unjust but unworkable. . . .

"More serious were the complaints of the Small Powers that on many vital points they were not even given an opportunity to state their views and much less were they allowed to enforce them. The procedure of the 'Council of Four' deprived them of any real knowledge of what was going on and drove them to intrigue and to agitation." (Temperley, Vol. I, 276, 277.)

It may be observed that the text of the treaty of peace was not communicated to smaller States until shortly before it was submitted to the German Delegation.

¹⁰ A sense of outrage with regard to Articles pertaining to Shantung caused the Chinese Government to restrain its representatives from signing the treaty finally concluded on June 28, 1919.

See Robert Lansing, *The Peace Negotiations*, Boston, 1921, 243-267.

¹¹ See *Certain Minor Impairments of Independence through the Medium of the League of Nations*, *supra*, § 27.

¹² The matter of procedure was so intimately connected with that concerning the right of the Great Powers to decide the conditions on which their lesser associates should enjoy the full privileges of independent statehood or continue the free exercise of those already possessed, as to render it impossible to discuss the former as a separate and unrelated question.

§ 918. ¹ See *Conditions of Peace with Germany*, Senate Doc. No. 149, 66 Cong., 1 Sess., 9. This document contains the texts and summaries of notes exchanged between the Allied and Associated Powers, on the one hand, and the German Delegation, on the other, respecting the conditions of peace presented to Germany on May 7, 1919.

² On May 10, 1919, M. Clemenceau announced that the Allied and Associated Govern-

whether the treaty was in compliance with the conditions on which the Armistice Convention was concluded on November 11, 1918. German counter-proposals vigorously assailed the treaty as an abandonment of the basis of negotiation.⁴ The Allied and Associated Powers emphatically repudiated these suggestions, declaring that the principles agreed upon had guided their deliberations leading to the formulation of conditions of peace.⁵ The procedure whereby Germany was compelled to accept the treaty signed on its behalf at Versailles on June 28, 1919, marked the decisive progress of its adversaries in developing and completing the victory which seemed to be won when the pre-Armistice Agreement together with the Armistice Convention had been concluded the previous year.⁶

(d)

§ 919. Arrangements for the Prosecution and Punishment of Persons Charged with Offenses against the Laws of War. The Conference of Paris of 1919. The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offenses.¹ Inasmuch as the views of the two American members of the Commis-

ments could admit no discussion of their right to insist on the terms of the peace as substantially drafted, and could consider only such practical suggestions as the German plenipotentiaries might have to offer. In response to a German communication of the previous day declaring that on essential points the basis of the peace agreed upon had been abandoned and that the promises held out to Germany had been rendered illusory, he declared that the terms of the treaty had been formulated with constant thought of the principles on which the armistice and negotiations for peace had been proposed. *Id.*, 13.

⁴ See The Pre-Armistice Agreement with Germany in 1918, *supra*, § 912A.

⁵ See, for example, communication of Count Brockdorff-Rantzau, to the President of the Peace Conference, May 29, 1919, and Observations of the German Delegation appended thereto. Conditions of Peace with Germany, Senate Doc. No. 149, 66 Cong., 1 Sess., 79-96. Protest was here lodged against the forbidding of oral discussion. There was declared to be no "precedent for the conduct of such comprehensive negotiations by an exchange of written notes only." (*Id.*, 82.) See, also, communication from the German Delegation of June 22, 1919, *id.*, 162.

⁶ See communication of M. Clemenceau to the German Delegation, June 16, 1919, together with reply of the Allied and Associated Governments appended thereto. *Id.*, 97-155.

⁷ Concerning the deposit of the German ratification at Paris on July 10, 1919, see communication from the German Delegation of that date, and reply of M. Clemenceau, July 11, 1919. *Id.*, 170.

§ 919.¹ It may be observed that the Commission, in the exercise of its functions, reached the conclusion that "the war was premeditated by the Central Powers, together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable"; also that "Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war"; and further, that "the neutrality of Belgium, guaranteed by the Treaties of the 19th April, 1839, and that of Luxemburg, guaranteed by the Treaty of the 11th May, 1867, were deliberately violated by Germany and Austria-Hungary." The American representatives on the Commission not only concurred in these conclusions, but also added four important documents in support thereof, and expressed opinion that the acts pertaining to the violation of the neutrality of Belgium and of Luxemburg "should be condemned in no uncertain terms and that their perpetrators should be held up to the execration of mankind."

The Commission also reached the conclusion that "The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of human-

sion² were, on important points, at variance with those expressed in the Report of that body, and yet influential in the formulation of the Articles which found place in the treaty, the conflicting opinions deserve attention.

The general problem was of a threefold nature, involving inquiry concerning first, what persons or classes of persons were punishable; secondly, for what acts penalties could be inflicted upon the actors; and thirdly, what tribunals or other agencies could reasonably exercise jurisdiction for the application of penalties.³ On the first point the Commission concluded that all persons belonging to enemy countries, however high their position might have been, without distinction of rank, and including Chiefs of States, were punishable. Such a conclusion contemplated that the former Kaiser should be subjected to prosecution. The American members dissented on the ground that he was not criminally responsible for his conduct to any authority other than that of his own country.⁴

ity"; and that "A commission should be created for the purpose of collecting and classifying systematically all the information already had or to be obtained, in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the German Empire and its Allies, on land, on sea and in the air, in the course of the present war." With a reservation as to the invocation of the "principles of humanity," the American representatives were in substantial accord with the Commission.

For the text of the Report of the Commission, and the dissenting memoranda of the American representatives, as well as the reservations of the Japanese Delegations, see Carnegie Endowment for International Peace, Division of International Law, Pamphlet 32, entitled "Violation of the Laws and Customs of War," Oxford, 1919, published also in *Am. J.*, XIV, 95.

See, also, Memorandum Regarding the Responsibility of the Authors of the War and for the Crimes Committed in the War by Messrs. David Hunter Miller and James Brown Scott, Miller's Diary, Document 213.

² The American members of the Commission were Secretary Lansing (who was also its Chairman) and Dr. James Brown Scott, a technical delegate of the United States.

³ It should be noted in this connection that the Commission reached also the following conclusions:

"1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

"2. On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

"3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts

"4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law." (*Id.*, 120)

The American representatives concurred in the first two of the foregoing conclusions, but dissented from the third on the ground that if the acts in question were criminal in the sense that they were punishable under law, it was not apparent why the report "should not advise that those acts be punished in accordance with the terms of the law" If, on the other hand, there was no law making them crimes or affixing a penalty for their commission, the American representatives declared that they were "moral, not legal crimes," and that it was not perceived how it was advisable or appropriate to create a special organ to deal with the authors of such acts. In any event, it was said that such an organ should not be a judicial tribunal. With the fourth conclusion the American representatives announced their substantial concurrence.

⁴ Reference was made to the opinion of Chief Justice Marshall in the case of *Schooner Exchange v. McFaddon*, 7 Cranch, 116. It may be observed that the learned Chief Justice in discussing the reasons for the immunity from local jurisdiction of a foreign sovereign, addressed himself to the inquiry why in fact States had waived their right of jurisdiction,

It was contended in substance that according to international law as tested by the practice of States there was no warrant for the criminal prosecution of such an individual before a foreign court of justice, inasmuch as the acts of a Chief of State, however much to be deplored and however associated with or responsible for those unlawfully committed in the course of belligerent operations, were, nevertheless, to be deemed acts of State and, as such, possessed of an essentially political character rendering them unadaptable to an adjudication before a foreign judicial tribunal.⁵ It is believed that this position was sound and not weakened by the circumstance that William II, upon ceasing to be the chief of a State, relinquished also the right to claim, with respect to acts committed thereafter, his former privileges of immunity from foreign jurisdiction.⁶ In a word, the political quality impressed upon whatever he had done as German Emperor established the safeguard in his behalf. If such was the law of nations, the American representatives did well to point it out.⁷ It will be seen, however, that the provisions of the treaty did not fully respect these views.⁸

That persons in the German services charged with acts in violation of the laws and customs of war should be placed within the reach of and subjected to criminal prosecution by the Allied and Associated Powers, and that regard-

rather than to one touching the question whether the acts of such an individual were essentially non-justiciable.

⁵ Compare F. Larnaudé and A. de Lapradelle, "*Examen de la responsabilité pénale de l'empereur Guillaume II d'Allemagne*," *Clunet*, XLVI, 131. See, also, James W. Garner, "Punishment of Offenders Against Laws and Customs of War," *Am. J.*, XIV, 70, 90-93.

⁶ See *Hatch v. Baez*, 7 Hun, 596, 599, 600.

⁷ "It was by no means an easy task to deal with the question of expressing properly mankind's condemnation of the individual whose inordinate vanity and greed were chiefly responsible for the dreadful misery and waste which the world has endured and from the effects of which it will suffer for many years to come. It was difficult to subordinate the natural feeling of indignation and the instinct to do vengeance to a cold, dispassionate consideration of the character of the Kaiser's acts and their relation to law and justice. Yet one of the reasons that our country entered the war was to bring lawlessness to an end. We believed that an undeviating respect for law is essential to the prosperity and happiness of society and that the rigid maintenance of law, however distasteful it may be, is an imperative duty. It was with a determination to follow these precepts, to treat impersonally and judicially the submission of the Conference, and to avoid being influenced by our own desires or by the pressure of public sentiment that we performed our duties as the American members of the Commission on Responsibilities and filed our reservations to the report of the Commission." (Robert Lansing, "Legal Questions of the Peace Conference," *Reports of American Bar Association*, XLIV, 238, 255.)

If the former Kaiser was not, according to international law, subject to criminal prosecution for acts chargeable to him while the Chief of a State, it is not apparent how any trial before a tribunal set up by the Allied and Associated Powers, and rendered competent to impose a penalty such as might be decreed in a criminal case, could take place without manifesting an abuse of power.

⁸ It would not, however, have been unreasonable for those Powers, if themselves convinced of the international lawlessness of acts chargeable directly to the former Kaiser, to assert the right to control his future movements, and, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of his person. Recourse to such procedure would have involved neither an adjudication respecting the nature of his conduct nor the imposition of a criminal sentence by a non-judicial body. The treatment accorded Napoleon I offered a precedent. See Lord Rosebery, *Napoleon: The Last Phase*, New York, 1900; John H. Rose, *Life of Napoleon I*, New York, 1902, Vol. II, Chap. XLI; William M. Sloane, *Life of Napoleon Bonaparte*, New York, 1910, Vol. IV, Chap. XIX. The right to prevent the commission of illegal acts by persons not amenable to the local jurisdiction has been observed in connection with the treatment of diplomatic officers. See *Diplomatic Intercourse of States, The Rights and Duties of Ministers, Jurisdictional Immunities*, supra, §§ 433-435.

less of the rank of the alleged offenders, was agreed upon.⁹ In asserting the general right to prosecute in such cases, no reference was made in the treaty to the validity of excuses setting up obedience to a higher military or other command as a ground of defense.¹⁰

Concerning the second problem, touching the nature of conduct for which penalties could be justly imposed by judicial process upon the actors, the American representatives were of opinion that no individual was subject to criminal prosecution who might not be charged with the commission of an act which was contrary to international law. Thus they dissented sharply from the opinion of their colleagues to the effect that persons of whatsoever rank, and embracing the Chief of a State, were subject to criminal prosecution on account of offenses against international morality if they were not also, according to accepted practice, offenses against international law.¹¹ It is believed that the American position was sound. If the design of the Allied and Associated Governments was to inspire respect for international law by a foe which had violated it, there was solid reason to make no demands for the surrender of individuals to be

⁹ Declared the report of the Commission: "Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of cases." (Carnegie Endowment for International Peace, Pamphlet No. 32, above cited, p. 23; *Am. J.*, XIV, 121.)

¹⁰ According to the War Dept. Rules of Land Warfare of 1940, No. 347: "Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

See good discussion of principle by J. W. Garner, in *Am. J.*, XIV, 70, 82-88. See, also, Hugh H. L. Bellot, "War Crimes: Their Prevention and Punishment," *Proceedings*, Grotius Society, II, 31; C. A. Hereshoff Bartlett, "Liability for Official War Crimes," *Law Quar. Rev.*, XXXV, 177. Both of these papers are cited by Prof. Garner.

In the case of *Dow v. Johnson*, 100 U. S. 158, 163, the question was, according to Mr. Justice Field, who delivered the opinion of the Court, "whether an officer of the army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war." It was held that he was not. The question of jurisdiction does not appear to have been dependent upon whether the act complained of was in fact in accordance with the usages of civilized warfare. Compare reference to the case by Mr. Justice Miller, in *Freeland v. Williams*, 131 U. S. 405, 416.

See, also, Geo. A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes," *Am. J.*, XIV, 218.

¹¹ Thus in the American memorandum of reservations, it was said: "the American members declared that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offenses were justiciable and liable to trial and punishment by appropriate tribunals, but that moral offenses, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions."

"While this principle seems to have been adopted by the Commission in the report so far as the responsibility for the authorship of the war is concerned, the Commission appeared unwilling to apply it in the case of indirect responsibility for violations of the laws and customs of war committed after the outbreak of the war and during its course. It is respectfully submitted that this inconsistency was due in large measure to a determination to punish certain persons, high in authority, particularly the heads of enemy States, even though heads of States were not hitherto legally responsible for the atrocious acts committed by subordinate authorities." (Carnegie Endowment for International Peace, Pamphlet No. 32, above cited, p. 59; *Am. J.*, XIV, 128.)

punished criminally on account of the commission of acts which were not internationally illegal. The American views obtained in the Council, at least with respect to the treatment of individual offenders other than the former Kaiser. "No jurisdiction was conferred upon any tribunal over offenses against 'the laws of humanity.'"¹² There appears to have been general agreement that acts constituting violations of the laws and customs of war were such as to subject the actors to criminal prosecution. It is believed to have been reasonable to refrain from laying down particular restrictions as to the places where such offenses should have been committed in order to justify demands for the surrender of accused persons. It was a just assumption that in each case the wrongful act was directed against one of the States at war with Germany, regardless of whether committed at sea, or in the air, or on land, and irrespective of whether it took place, for example, on Belgian or French or German or Chinese soil.¹³

Concerning the third problem, relating to the nature of the tribunals to exercise jurisdiction in behalf of the Allied and Associated Powers, there were also differences of opinion. If the American Commission had shown the impropriety of subjecting the former Kaiser to criminal prosecution before a judicial tribunal and on account of acts not in violation of international law, it failed to prevent the Council from demanding through the treaty his surrender "for a supreme offence against international morality and the sanctity of treaties,"¹⁴ and his trial before a special tribunal, which was not, however, deemed to be technically of a judicial character.¹⁵ For the trial of offenders whose surrender it was agreed should be demanded, the American representatives objected to the employment of a mixed Commission as was suggested by their colleagues,¹⁶ proposing instead that individuals whose acts affected the persons or property of one of the Allied or Associated Governments should be tried by a military tribunal thereof; that individuals whose acts were directed against more than one country should be tried by a tribunal made up of either the competent

¹² Robert Lansing, *Reports of American Bar Association*, XLIV, 255.

¹³ In a memorandum appended to the American reservations it was declared that "the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offense was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offense is of the same nationality as the military tribunal." (Carnegie Endowment for International Peace, Pamphlet No. 32, above cited, p. 70; *Am. J.*, XIV, 141.)

¹⁴ Art. 227.

¹⁵ See Reply of the Allied and Associated Governments to the German Delegation, June 16, 1919, Misc. No. 4 (1919), Cmd. 258, p. 30.

See Art. 227 of Treaty of Versailles, U. S. Treaty Vol. III, 3413, where it was declared that the tribunal would be constituted, assuring the accused of guarantees essential to the right of defense, and would be composed of five judges, one to be appointed by each of the following Powers: the United States, Great Britain, France, Italy and Japan. The decision of the tribunal would be guided, it was declared, "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." Its duty was said to be to fix the punishment which it might consider should be imposed. It was added that the Allied and Associated Powers would address a request to the Government of the Netherlands for the surrender of the former Kaiser in order that he might be put on trial.

As is known, the Netherlands Government declined to honor the request for his surrender.

¹⁶ The plan of the Commission contemplated an international High Tribunal. See Carnegie Endowment for International Peace, Pamphlet No. 32, above cited, 25; *Am. J.*, XIV, 139.

tribunals of the countries affected, or of a Commission thereof possessing their authority.¹⁷ This view prevailed in the Council.¹⁸

§ 920. **The Same.** The provisions of the treaty gave expression to a compromise. While persons to be surrendered for criminal prosecution before military tribunals were confined to individuals charged with offenses against the laws and customs of war,¹ in the case of the former Kaiser, the German Government was obliged to yield to its enemies acquiescence in his surrender for trial before a special tribunal for the abuse of his powers as the Chief of a State, and on account of acts in addition to those denounced as internationally illegal. It is difficult, for reasons above indicated, to harmonize the theories thus applied.

The problem confronting both the Commission and the Council to which it reported was beset with more than technical obstacles in the way of solution. These were due to the insufficiency of international law, and attributable to the previous reluctance of the international society to establish a practice permitting the prosecution of an individual on account of his acts as Chief of a State. That society may obviously at will change its stand, and possibly, in consequence of World War I, make clear a disposition not merely to hold a country responsible for the conduct of its highest authorities, but also to subject to criminal prosecution before a domestic or international tribunal, one who as the head of a State commits particular acts declared to be contemptuous of international law. If such an individual is in fact guilty of conduct as injurious to the welfare of the family of nations as that of the pirate who is the enemy of its every member, the former, like the latter, may for the same reason be ultimately

¹⁷ See Pamphlet No. 32, 75; *Am. J.*, XIV, 146-147, where it is added that "It seemed elementary to the American representatives that a country could not take part in the trial and punishment of a violation of the laws and customs of war committed by Germany and her Allies before the particular country in question had become a party to the war against Germany and her Allies; that consequently the United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed upon American persons or American property, and that the United States could not properly take part in the trial and punishment of persons accused of violations of the laws and customs of war committed by the military or civil authorities of Bulgaria or Turkey."

¹⁸ According to Art. 228 of the treaty, the German Government recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of offenses against the laws and customs of war. Such persons who might be found guilty were to be sentenced to punishments "laid down by law," and notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. Germany agreed to surrender accused persons specified by name, or rank, or office, or by the employment which they had held under German authority.

Art. 229 embodied the provisions relative to the tribunals to be employed. It was declared that in every case the accused should be entitled to name his own counsel.

The German Government undertook also, through Art. 230, "to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders, and the just appreciation of responsibility."

See Oppenheim, Lauterpacht's 5 ed., II, 454, footnote 1.

§ 920. ¹Yielding to German request, the Allied Powers in February, 1920, agreed that accused persons be tried by German judicial authority.

See, The Dover Castle (Germany), 1921, Williams and Lauterpacht, *Annual Dig.*, 1923-1924, Case No. 231; The Llandovery Castle (Germany), 1921, *id.*, Case No. 235.

See George A. Finch, "Superior Orders and War Crimes," *Am. J.*, XV, 440; also Oppenheim, Lauterpacht's 5 ed., II, 254, footnote 2.

recognized as the enemy of each and entitled to no immunity from prosecution. It needs to be observed that if the act charged against the offender is one which can be regarded as violative of international law, the propriety of prosecution abroad merely calls for agreement designed to cut off the jurisdictional immunity which he enjoys in consequence of his relationship to, or official rank within, his own country.

3

§ 921. **Certain Effects of the Termination of War.** The termination of a war produces certain effects directly attributable to the cessation of the artificial condition of affairs formerly and necessarily subsisting between the opposing States. These effects are distinct from those produced by the instrumentality employed to bring the conflict to an end, such as a treaty of peace. The latter are the immediate consequences of agreement, while the former result from the principles of international law. These principles, which become operative as soon as peace is concluded, contemplate the resumption of a normal relationship between the States which were previously enemies. Accordingly, they are restrictive of conduct at variance with that relationship. Again, they serve to lessen the value of some pretensions which may have antedated the conflict; and they strengthen possessory claims growing out of military achievements during the war, without either belittling the illegal aspect of belligerent excesses, or minimizing the consequences of them.

The conclusion of peace renders illegal the subsequent commission of warlike acts, notwithstanding ignorance on the part of the actors that the conflict is ended.¹ Thus, as Hall declares, the effects actually produced by such acts "must be so far as possible undone, and compensation must be given for the harm suffered through such effects as cannot be undone."² Termination of the war

§ 921.¹ It should be observed that the operation of this principle may be modified or restricted by the preliminaries of peace or definitive treaty thereof, so as to cause the cessation of lawful hostilities to depend on actual notification of the commanders of military or naval forces concerned, rather than on any other circumstance such as the final conclusion of peace. See the provision in Art. VI of the peace protocol concluded in behalf of the United States and Spain, Aug. 12, 1898, Malloy's Treaties, II, 1689. See, in this connection, note of the Duke of Almodovar, Spanish Minister of State, communicated through the French Embassy to the Dept. of State, Sept. 11, 1898, and response of Mr. Day, Secy. of State, Sept. 16, 1898, For. Rel. 1898, 813-815; also further correspondence, *id.*, 815-817, Moore, Dig., VII, 322-326.

According to Art. CXVI of the Oxford Manual of Naval War: "Acts of hostility must cease upon the signing of the treaty of peace.

"Notice of the end of the war shall be communicated by each government to the commander of its naval forces with as little delay as possible.

"When hostile acts have been committed after the signing of the treaty of peace, the former status must, as far as possible, be restored.

"When they have been committed after the official notification of the treaty of peace, they entail the payment of an indemnity and the punishment of the guilty." (*Annuaire*, XXVI, 641, 671, J. B. Scott, Resolutions, 174, 200.)

² Higgins' 8 ed., § 202, p. 678, where it is added: "Thus, territory which has been occupied must be given up; ships which have been captured must be restored; damage from bombardment or from loss of time or market, etc., ought to be compensated for; and it has been held in the English courts, with the general approbation of subsequent writers, that compensation may be recovered by an injured party from the officer through whose operations injury has been suffered, and that it is for the government of the latter to hold him harmless. It is obvious, on the other hand, that acts of hostility done in ignorance of peace

gives rise to the obligation to remove military forces from territory belonging to the former adversary and retained by it, as well as to restore prisoners of war, and to release persons taken into custody and interned as alien enemies.³ In a word, the resumption of peace seems to render unlawful the commission of any act or the continuance of any form of conduct for which the existence of a state of war offers sole justification.

The law of nations does not, however, as a consequence of the termination of war, forbid the retention of what was acquired by a belligerent by virtue of its strong arm, unless seizure or confiscation was itself an illegal act. Unless the treaty of peace makes provision to the contrary, the termination of the war will serve to confirm the right of a participant to retain generally public movable and immovable property seized by it as a belligerent, and to assume the sovereignty over formerly hostile territory still held in possession.⁴ This circumstance renders obvious the importance of definite agreement in case it is desired to bring about a different result.⁵

What the law permits the victor to retain at the close of a war is frequently referred to as attributable to a principle or doctrine known as that of *uti possidetis*.⁶ It is perhaps unfortunate that the Latin phrase has found a place in the nomenclature of international law even for the purpose of pointing to a situation where the fact of possession endows the belligerent possessor with distinctive privileges. Nevertheless, the phrase has at least the merit of referring

entail no criminal responsibility." Citing Halleck, ii, 341-343, Phillimore, iii, § lxviii, Bluntschli, § 709, Calvo, § 3155, also The Mentor, 1 Ch. Rob. 183.

³ It is greatly to be doubted, however, whether, in the absence of agreement, a State is obliged to extend any immunity from criminal prosecution to persons who within places under its control sought to overthrow its authority as an incident of the conflict, and were unattached to the military and naval forces of the enemy. Nor would there seem to be a legal duty to remit a penalty imposed during the war on an enemy person found guilty of violating the local criminal law, for a public or a private end, and duly prosecuted therefor. It is believed that on principle the bare termination of a war gives rise to an obligation to grant an amnesty solely to such enemy persons as, by reason of their connection with belligerent forces, were either held as prisoners of war, or who in case of their apprehension, prior to the conclusion of peace, should have been so regarded. Any mutual disposition of the opposing States to yield a broader immunity would seem, therefore, to call for express agreement.

See, in this connection, Art. VI of treaty between the United States and Great Britain, Sept. 3, 1783, Malloy's Treaties, I, 589; Art. VI, of treaty between the United States and Spain, of Dec. 10, 1898, *id.*, II, 1692.

⁴ Declares Oppenheim. "Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all moveable State property, as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent remain his property, as likewise do the fruits of immoveable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is nowadays usual, although not at all legally necessary, for the conqueror desirous of retaining conquered territory to secure its cession in the treaty of peace." (Lauterpacht's 5 ed., II, § 273.)

⁵ See the provisions of Art. I, of the Treaty of Ghent, Dec. 24, 1814, Malloy's Treaties, I, 613.

⁶ See Hall, Higgins' 8 ed., § 198, p. 673; Halleck, Sir S. Baker's 3 ed., I, 316; Davis, 3 ed., 344; Wilson, 2 ed., 424; Fenwick, 2 ed., 580. Sometimes authors make their most definite statements in marginal descriptions of textual matter. See, for example, Dana's Wheaton, § 545, p. 716. Dana, in his 6th edition of Wheaton, referred to "the principle of *uti possidetis*," in a footnote on p. 440.

Grotius, in discussing belligerent rights resulting from the possession of enemy property, did not make use of the phrase. See *De Jure Belli ac Pacis*, Book III, Chap. VI, §§ 4, 5, and 6.

to a practice which seems to have begotten a rule of law. To that extent it serves a more useful purpose than when it is employed to refer, as oftentimes has been the case in another connection, to a course of conduct which when followed has not been pursued from a sense of legal obligation, and from which no rule of law can be shown to have developed.⁷

It would hardly be reasonable to claim that the doctrine or principle referred to as that of *uti possidetis* should be so applied as to enable a State to profit by its internationally illegal acts committed as a belligerent, and to enjoy immunity from inquiry as to the extent of the harm done and as to any obligation to make reparation. It is not believed that the termination of war, although weakening and possibly destroying the significance of contested claims which precipitated the conflict,⁸ deprives a former party thereto of the right to insist upon redress for wrongs chargeable to the excesses of the enemy, and manifesting contempt for restraints imposed by international law.⁹ Such a right may, nevertheless, prove to be in fact worthless, unless the treaty of peace recognizes the principle upon which it rests, and prescribes accordingly a mode through which it may be applied.

The termination of a war, by removing the insuperable obstacles which, while the conflict lasted, precluded the maintenance of friendly intercourse between the opposing belligerents, paves the way for the resumption of diplomatic relations between the States which have ceased to be enemies. The conclusion of peace does not itself, however, effect such a resumption, but simply renews the opportunity therefor, which may be, and is commonly, utilized without delay.¹⁰ Moreover, a treaty of peace may provide for the resumption of diplomatic or official relations.¹¹

Shortly after the termination of the war between the United States and Germany by virtue of the Joint Resolution approved by the President July 2, 1921, the Government of the United States made it clear to that of Germany that the resumption of diplomatic relations which was "in the discretion of the President," as well as "any further steps with respect to the relations between the United States and Germany," would largely depend on the attitude taken by the German Government in permitting certain rights, interests and advantages set forth in the Treaty of Versailles, to be secured for the benefit of the United States, having in mind the reservations in Section 2 of the Joint Reso-

⁷ See The Doctrine of *Uti Possidetis*, *supra*, § 151C.

⁸ See Hall, Higgins' 8 ed., § 200.

⁹ It will be recalled that Art. III of the Hague Convention of 1907, Respecting the Laws and Customs of War on Land, declares that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." (Malloy's Treaties, II, 2278.) See, also, Additional Article appended to Section IX of Oxford Manual of Naval War, *Annuaire*, XXVI, 641, 672, J. B. Scott, Resolutions, 200.

¹⁰ See, for example, President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxx, Moore, Dig., VII, 336.

¹¹ See, for example, preamble of the Treaty of Versailles with Germany, concluded June 28, 1919, U. S. Treaty Vol. III, 3331.

See, also, Art. IX of Protocol signed by representatives of Bolivia and Paraguay, together with those of the so-called mediating States, Jan. 21, 1936, League of Nations Official Journal, March, 1936, 279, 281.

lution. It was added that the United States would not enter into any treaty which failed to secure the same.¹² The treaty restoring friendly relations that was concluded on August 25, 1921, registered German acquiescence.¹³

The bringing to an end of a state of war destroys the reason for the continued suspension of any contractual relationships between the former belligerents of which the outbreak of the conflict did not mark the dissolution.¹⁴ Thus any compact deemed to have survived the shock of war is doubtless revived without further ado, and the applicability of its provisions at once renewed. It seems to be of great practical importance, however, that the contracting parties should indicate, if possible, in a treaty of peace or a kindred arrangement, what agreements are to be regarded as of such a kind, as well as the basis on which fresh compacts should supplant those dissolved in consequence of the war.¹⁵

With the termination of a war the reason forbidding the communication of intelligence, or the holding of commercial or other intercourse between the territories of the former opposing belligerents disappears. Moreover, as a consequence of termination there is a removal of impediments barring the maintenance of actions by persons who were previously alien enemies residing on hostile soil. As has been noted elsewhere, the termination of the war between the United States and Germany which was not effected until July 2, 1921, was preceded by relaxations of restrictions concerning various forms of communication or intercourse with the enemy.¹⁶

Through close perception of the legal effects generally deemed to be directly attributable to the termination of war, it becomes possible for the opposing belligerents at each stage of their endeavor to agree to conclude a treaty of peace, either to accord distinct and intelligent recognition to principles which, in the absence of agreement, may be expected to apply, or to prevent definitely the operation of those which it is desired to thwart. It ought to be clear that full understanding of the exact significance of any proposal from opposing plenipotentiaries requires thorough knowledge of the rights, as well as a careful estimate of the extent of probable pretensions, of both parties respecting the matter involved, in case the treaty in process of negotiation should make no provision therefor. Inasmuch as controversies concerning the effect of the terms of a treaty of peace are less difficult of solution than those concerning the bare effect of the termination of war, there seems to be much reason for the attempt to confine the future differences likely to arise between the opposing States in consequence of a conflict, to questions of contractual origin.

¹² See Mr. Hughes, Secy. of State, to the American Commissioner at Berlin, July 5, 1921, For. Rel. 1921, II, 5. See documents *id.*, 1-35.

See Modes of Termination, Formal Declaration by One Party, *supra*, § 905.

¹³ U. S. Treaty Vol. III, 2596.

¹⁴ See Outbreak of War between Contracting Parties, *supra*, §§ 547-551.

¹⁵ By such process there is minimized the danger of controversy whether a particular provision in a former treaty has survived the conflict. It will be recalled that the bearing of the War of 1812 upon rights and privileges accorded American fishermen by Art. III of the treaty between the United States and Great Britain, of Sept. 3, 1783, was long a subject of dispute partly by reason of the lack of any provision in the Treaty of Ghent respecting the rights of the parties.

¹⁶ See Modes of Termination, Formal Declaration by One Party, *supra*, § 905.

§ 922. **The Doctrine of Postliminium.** The so-called doctrine of postliminium marks the attempt which has been made to attribute the operation of a certain principle of international law concerning the suspension and resumption of rights of property and sovereignty during war, to the *jus postliminii* of the Roman law.¹ Without venturing upon discussion of the extent to which knowledge of the latter was influential upon those who as statesmen and publicists were responsible for the development of the law of nations, it may be observed that reliance upon the doctrine is increasingly regarded as unnecessary as a means of describing the practice to which it refers, or the effect which that law attaches to certain achievements.²

The doctrine of postliminium signifies broadly that the mere possession in the course of war of property or territory of the enemy does not suffice generally to transfer title or sovereignty as the case may be, as against the enemy owner or sovereign which regains possession during the conflict. It doubtless emphasizes the fact that the rights of that owner or sovereign as such are suspended rather than destroyed by temporary loss of possession. The principle involved finds frequent room for application, as where, for example, an invader is driven out of the territory which his forces have occupied, or when a vessel is recaptured from the enemy. Even where the enemy taker of possession has also acquired title, as in the case of movable public property seized by it as the occupant of a territorial area, the resumption of control thereof by the belligerent

§ 922.¹ "The *jus postliminii* of the Romans implied certain principles of their private law, as well as conceptions derived from the fœtal institution appertaining to the declaration of war and conclusion of peace. It referred to the right by which persons or things captured in war regained their former condition on their return to the country to which they belonged; so that, by a juridical fiction a Roman prisoner of war, for example, might avoid the ordinary consequences of captivity. The doctrine applied to Roman citizens, slaves, immovables, and certain movables, e.g. trained horses, pack-mules, transport vessels; everything else captured by the enemy became his permanent booty—notably arms, which it was thought could not be lost without dishonor. The doctrine did not apply to deserters, to those who yielded to the enemy through cowardice, or were formally surrendered to the enemy, or preferred to reside with the enemy, and to certain others." (Coleman Phillipson, *Termination of War and Treaties of Peace*, 230-231; citing same author, *Int. Law and Custom of Ancient Greece and Rome*, II, 266; quoting, *Dig.*, XLIX, 15, 19, pr.)

See, generally, Attilio Focherini, *Il Postliminio nel Moderno Diritto Internazionale*, Modena, 1908 (with bibliography); Luigi Sertorio, *La Prigionia di Guerra e il Diritto di Postliminio*, Turin, 1915 (with bibliography); "Postliminium in International Law," *Solicitors' Journal and Weekly Reporter* (London), Feb. 19, 1921, LXV, 324; Oppenheim, *Lauterpacht's* 6 ed., II, §§ 279-284, and bibliography; Dana's Note No. 169, Dana's *Wheaton*, p. 441; Fauchille, 8 ed., § 1710.

² Declares Hall: "In effect, the doctrine of postliminium amounts to the truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law." (Higgins' 8 ed., § 162, p. 578.)

See the Polish cases of *Kulakowski and Others v. Szumkowski*, 1928, McNair and Lauterpacht, *Annual Dig.*, 1927-1928, Case No. 375, and *Usycka v. Polish State Treasury*, 1930, Lauterpacht, *Annual Dig.*, 1929-1930, Case No. 289. Declares Lauterpacht in connection with these cases: "Polish courts and writers have, in the period after the World War, applied the conception of *postliminium* in order to assert the continuity of present-day Poland with the pre-partition Polish State and to explain the nullity of at least some of the legislative and executive acts of Russia in respect of her Polish provinces." (6 ed. of Oppenheim, II, p. 484, footnote 2.) It should be observed, however, that the two cases here cited do not, as reported in the *Annual Digest*, contain specific judicial reference to the doctrine of *postliminium*.

territorial sovereign enables it both to regain possession and to re-acquire title to the property concerned.³

It may be doubted, however, whether the doctrine affords any sure indication of the direct effect of the termination of war upon the rights of the participants with respect to each other. It serves partly to indicate the legal value of acts of force committed during the conflict by way of dispossessing a conqueror or captor, and which pave the way for the application of a principle analogous to that of *uti possidetis*. When in consequence of a treaty of peace there is a restoration of occupied territory or of other enemy property, that result must be taken as due to the agreement rather than to any principle described by the phrase borrowed from the Roman law.

5

§ 923. **International Organization for Peace.**¹ It has taken two wars of the present century, of which one is still being waged, to teach civilization first, that schemes for regulated warfare according to rules that reason as well as former practices ordained will not be respected by strong belligerents so long as they are enabled by the possession of sufficient strength by air and land and sea to defy them with impunity; secondly, that the waging of war by belligerents so equipped is absolutely incompatible with the welfare of the several members of the international society whatever be their relation to the existing conflict; thirdly, that by no means short of organized intervention will States bent on achieving their ends by the sword be deterred from so doing; fourthly, that the removal or eradication of zeal in any quarter for achievements that beget war is an indispensable bulwark of peace; and fifthly, that no general treaty of peace can really be such a bulwark unless deference of its provisions makes strong appeal to all concerned. Finally, the United States has learned a lesson all its own — that participation in a general organization for peace is essential to its welfare.

To expect that aerial bombardment by land or sea,² or the use of submarines,³ or the methods of a blockader⁴ will be restrained by deference for principle or standards hitherto set up, or that the theory of retaliation will not be grotesquely invoked to silence neutral opposition or to ignore it regardless of its merit, is fantastic because it is unsupported by evidence that offers a fair prospect of better things, where at least strong belligerents are not lacking the requisite means of achieving their ends. Moreover, the vast enlargement of the power attainable at the present time by the strongest States which aspire to, and do in fact unmolestedly, become belligerents, enhances proportionally the danger

³ See *Belligerent Occupation*, *supra*, § 690.

§ 923.¹ This section, revised in September, 1944, long after the manuscript of the entire book had gone to press, is designed to show how the conduct of the United States and its Allies in organizing for peace at the present time is bound up with the distant future, and how a vision of that future is needed for the practical solution of current problems.

² See *supra*, § 663.

³ See *supra*, §§ 749A and 749B.

⁴ See *supra*, § 832B.

to smaller countries which can not compete with them and which must rely for protection (perhaps in vain) upon the decency of their own conduct, or upon the friendly professions or actions of powerful neighbors. It is not sought to be intimated that all wars are world wars, or that there may not be conflicts in certain quarters such as the Americas, where the relative strength of non-participating States may suffice to hold in leash others which despite all efforts to avert war, have become belligerents and seek to battle by the sword. In such cases, as suggested elsewhere,⁵ the organized efforts of the non-participants to withhold impartially military aid may serve to lessen the duration of the conflict and hasten its termination.

In general, however, the fact of war must be seen in its true light — as the exemplification of a lawlessness of action which is contemptuous of supposedly existing standards and threatens to break them down beyond repair. It is harmful to belligerents who win as well as to those who lose; it does irreparable injury to non-participants regardless of the propriety of their conduct. The non-combatant may suffer as grievously as the combatant. The welfare of the whole international society is challenged whenever war breaks out in any quarter. The need of prevention, and also of abatement, cries out from every corner of the globe. That need can only be met by international organization for peace.

Interference by or in behalf of the international society is the obvious and necessary mode of thwarting war. Such action in order to be constantly effective demands in theory the creation of a permanent international agency or body designed to be stronger in a military sense than any which it may be obliged to oppose.⁶ Technically representative of those who create it, extraordinary effort should be made to detach it from the influence of the national policies of the individual States responsible for its very life. The resourcefulness of its makers should be taxed to enable it to act on its own, automatically, according to a flexible procedure devised to insure the impartiality of decisions, and the power to inflict penalties. To that end it would need to be possessed of the most powerful instrumentalities of which, at least in the ideal situation, its every potential antagonist should be shorn. The relative strength of the interferer should not be sapped away by the allowance of military accessions to a prospective belligerent.

To cause the several participants in the present war individually and collectively to share the view that the infliction of penalties, and the use of military force against an offending country be the sole and unhampered function of a single international entity whose power none should aspire to rival, and to

⁵ See *supra*, § 889.

⁶ Declared Secretary Hull on July 23, 1942, a date subsequent to the period covered by this work: "It is plain that some international agency must be created which can — by force, if necessary — keep the peace among nations in the future. There must be international co-operative action to set up the mechanisms which can thus insure peace. This must include eventual adjustment of national armaments in such a manner that the rule of law cannot be successfully challenged and that the burden of armaments may be reduced to a minimum.

"In the creation of such mechanisms there would be a practical and purposeful application of sovereign powers through measures of international cooperation for purposes of safeguarding the peace. Participation by all nations in such measures would be for each its contribution toward its own future security and safety from outside attack." (Dept. of State Bulletin, July 25, 1942, 639, 645.)

which should be confided the war-making and law-enforcing functions of the international society, may seem to be beyond the realm of possibility within the lives of persons now living. Yet that day may come. Before it dawns States possessed of the requisite power, such as the victors in the present war, find themselves obliged to unite to maintain by force what they have won by force, in their struggle to uphold a common front. They have no alternative. They must plan to do together through their own action what they dare not entrust to an international agency, and what, moreover, they cannot themselves, without organization, expect severally to achieve.

Thus the immediate results of the present conflict may give little intimation of what is ultimately to come. The United States with its three strongest Allies may not be expected soon to relinquish the military strength regarded as necessary to hold in leash their defeated foes. Through the Declaration of Moscow of October 30, 1943, the former announced "that they will take all measures deemed by them to be necessary to provide against any violation of the terms imposed upon the enemy."⁷ Declared President Roosevelt on December 24, 1943: "As long as these four nations with great military power stick together in determination to keep the peace there will be no possibility of an aggressor nation arising to start another world war." He said that those nations "must be united with and cooperate with all the freedom-loving peoples of Europe and Asia and Africa and the Americas," and "that the rights of every nation, large or small, must be respected and guarded as jealously as are the rights of every individual within our own republic," and that the doctrine of the enemies that the strong should dominate the weak was rejected. "But," he added, "at the same time, we are agreed that if force is necessary to keep international peace, international force will be applied — for as long as may be necessary."⁸ These words are prophetic of the fact that the United States with Britain, Russia, and China will exercise the power and claim the right to decide how peace is to be maintained and their own security safeguarded as against their principal foes. If in so doing an international organization be employed as a convenient instrument of collective action, it is not likely to be endowed with the means of acting on its own as a supreme peace-maintaining body. Still less will it be permitted to become a lever whereby other States can, by united effort, compel the four Principal Allied Nations to take affirmative action at variance with their common aim. Where ultimate decisions as to the mode of maintaining peace with respect to defeated foes, as well as the full measure of military strength to quell opposition are retained by four victors such as the United States, Britain, Russia and China, agreed to act together for their common weal, there looms on the horizon a quadruplicate arrangement, under whose dominance within a certain broad area lesser States must set their course.

They may in fact consent to do so, and thus agree, subject to appropriate reservations concerning the treatment of their own territories as they shall have been released from the occupational grip of an enemy, that the peace-main-

⁷ Dept. of State Bulletin, Nov. 6, 1943, 308, 309.

⁸ *Id.*, Jan. 1, 1944, 3, 5.

taining office is lodged in the four States which essay to control it, with respect at least to Germany and Japan and their satellites. The problem concerning Germany and Japan is, however, unique and special. Methods applied to them under a quadruplicate or triplicate scheme are not likely for a long time to be identical with those deemed applicable to States generally. Thus, except for the solution of questions pertaining to those two States (and possibly their satellites), the four Principal Allied Powers have every reason to seek the coöperation of other entities, whether or not associated with them as belligerents in the great conflict. "The necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security" was happily recognized in the Declaration of Moscow.⁹ Much hangs upon the success of that achievement. It suffices here to observe that the Moscow plan and what it envisions must not be confused with the immediate scheme of coöperation or organization whereby peace is to be preserved with respect to Germany and Japan. That scheme must for a protracted period envision the possession and use of military force so applied as to render negligible the danger of aggression where it may normally be anticipated. During that period the four victors will be taxed sorely to maintain a oneness of mind and effort that shall continually produce the requisite safeguard. The very burden of that effort may convince them that lasting freedom from dangers from their former enemies must be wrought in different fashion, and sought elsewhere. Accordingly, the victors, if aware of their own interests, must be expected to realize that while they are in the saddle they should make utmost endeavor to get their former enemies fit for the day when it may be safe to relegate or transfer protective armaments to a solitary international body. No one now living may see that fitness attained. It calls for a spiritual transformation that today seems remote — the instilling of an overwhelming conviction into two peoples of differing races and traditions, that militarism and conquest are false gods, that recourse to the sword is a national error, and that compensations for past blunders are not to be had outside of the domain of peace. Yet that transformation, however remote, is not impossible, if a sufficiently visible reward be held out even to countries about to be subjected to stern penalties on account of their belligerent action. Visibility may, however, long be deferred if, as will be observed later, types of penalties are imposed that inspire revenge, outrage sensibilities, and cause repudiation of accepted peace terms to shine as the vindication of national honor. Hence provisions of a final settlement should not furnish mental fuel for prolonged and sullen opposition blinding defeated foes from a sight of the final goal. To make clear to Germany and Japan that penalties imposed upon either or both exemplify solely what the demands of justice rigidly exact seems imperative. Moreover, realization by those countries that the United States, Britain, Russia and China are unitedly resolved — if such be the case — not to aspire to military

⁹ *Id.*, Nov. 6, 1943, 308, 309. See also Senate Resolution 192, as modified, known as the Connally Resolution, of Nov. 5, 1943, Cong. Record, Nov. 5, 1943, Vol. LXXXIX, 9329.

affluence or ascendancy over other States, save as a temporary post-war necessity, and are prepared ultimately to relinquish national armaments and allow an international entity to be the controller and maintainer of peace would dampen ardor for military achievement and might in time destroy it.

In the light of the foregoing principles it is necessary for the United States to set its course and exert its influence. In so doing the two parallel tasks—the adjustment of terms of peace with Germany and with Japan, and the development of the international organization contemplated at Moscow must to a large degree be kept apart. With reference to both certain concrete suggestions are offered. If, or so long as, the four principal Allied Powers are committed to the task of preventing by force a renewal of aggressions by Germany and Japan, it is obvious that the international organization derived from Moscow can not be permitted to control or limit the size of armaments of those Powers. This grim fact must render difficult the conclusion of consistent provisions endowing the organization with power to frustrate the action of any treaty-breaker (including in theory one of those Powers), when certain parties to the arrangement are tacitly acknowledged to enjoy freedom to retain and acquire a military strength limited only by what they conceive to be the common danger confronting them. It serves to accentuate the point that two distinctly differing types of war-producing dangers must be envisioned, and that they can not be dealt with at the present hour in the same way. It does not, however, indicate that in dealing with one, and perhaps the lesser of them, the Allied Powers generally may not be prepared to coöperate in a scheme for the application of force that emphasizes the importance, and gradually enlarges the operation and influence of the international body. Such an achievement would be of practical and psychological importance. It would increase confidence of the lesser States in the professions of the larger ones, and renew faith in the Atlantic Charter, the sixth hope or pledge of which was, it will be recalled, to await “the final destruction of the Nazi tyranny.”¹⁰

¹⁰ *Declaration of Principles, Known as the Atlantic Charter, by the President of the United States of America and the Prime Minister of the United Kingdom, August 14, 1941*

“Joint declaration of the President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty’s Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

“First, their countries seek no aggrandizement, territorial or other;

“Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

“Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;

“Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

“Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security;

“Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries,

In the fresh attempt to weld together peace-loving States in a plan for the amicable adjustment of international disputes, the propensities and inclinations, as well as the fears of disputants, should be borne in mind. Thus, the appeal of mediatory or other efforts designed to prevent international issues from ripening into war is greatly enhanced when the opposing States are urged, first of all, to have recourse, after direct negotiation may have been ineffectual, to joint commissions of their own devising, which are empowered to decide as well as to recommend.¹¹ The achievement of the Alaskan Boundary Tribunal is still illustrative of what may be possible.¹² It is only when such instrumentalities fail or remain unused that the international society should, under normal circumstances, exact the employment of a procedure of its own, such as an adjudication before an arbitral or other type of tribunal. Nor should conciliation, with all that it implies, be forced upon States at variance when they prefer to make trial of a joint commission, possibly composed exclusively of their own nationals with power to decide when, or if, a majority of the members are of one mind. This does not imply that recourse to arbitration or to adjudications before a tribunal such as the Permanent Court of International Justice should not be strongly encouraged, and under certain contingencies be made compulsory, but merely that such an exaction should be the consequence of failure of the States at variance to follow a simpler path.

Yet there are more serious situations where the agency of an organized international society should be authorized to proceed in sterner fashion, by both taking sides and by exacting a rigid procedure. It is seen where a State goes to war, despite its agreement not to do so, or where it commits an act acknowledged by agreement (or even by the customary law) to be wrongful, such as a well-defined act of aggression both defined and forbidden by the terms of a special compact.¹³ In a word, when the general peace is jeopardized by acts which are to be deemed *prima facie* illegal and wrongful to the entire international society, it should be enabled to act quickly through an instrumentality possessed of power both to thwart and to penalize the offender. It should not over-tax the resourcefulness of the victors in this war to evolve a system or scheme where this would be possible, although the preponderance of power and influence were retained by the four Powers possessed of the mightiest strength. Even in the grave situations

and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;

"Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;

"Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments." (Dept. of State Bulletin, Aug. 16, 1941, 125.)

¹¹ See *supra*, § 584.

¹² See *id.*

¹³ See definition of the word "Aggression" in Art. I (c) of Harvard Draft Convention on Rights and Duties of States in Cases of Aggression, *Am. J., XXXIII, Supplement Section III*, 827.

here visualized, a contracting State charged with violation of a serious offense against the international organization or a particular member thereof, should be enabled by appropriate process to defend itself against the imposition of an undeserved penalty. Machinery for defensive procedure should and can be developed without interference with the application of needed preventive or even punitive measures.

If, or when most of the members of the international society are able to unite in enjoining the commission of acts which are deemed to be essentially harmful to the welfare of the individual State, in every quarter, regardless of its size or influence, there is a real inducement to every State concerned to heed the injunction. Thus, when through a general arrangement the possessors of predominant power agree to forbid the aggrandizement of the strong at the expense of the weak, opposition may be expected to be confined to those who essay to break down the existing system that stands for the political independence of the several members of the international society and to substitute for it the domination of a self-made super-State. Such opposition, because of its inherent character, is not calculated to make a widespread or permanent appeal; and the influence of it is bound in the long run to succumb to the worth, in a popular sense, of what it attacks. These obvious factors enhance the confidence and quicken the resourcefulness of States which in contemplating organization for peace, maintain their steadfastness to principles of international law. That steadfastness must, as is suggested at the outset of this work,¹⁴ be the common and distinctive possession of States that have the preponderance of power throughout the world. The fate of civilization as it struggles to free itself from the shackles of war depends in large degree upon this fact.

Organization by the principal victors for the establishment and maintenance of peace with Germany and Japan calls for the solution of military and political problems of first order. They involve agreement as to the occupation of former enemy territories for a prolonged period, the treatment of war criminals, the character of indemnities to be exacted and sources from which they are to be derived, methods of demarcation of boundaries, the disposition of territorial areas detached from former sovereigns, as well as the nature and scope of social and commercial intercourse to be yielded to defeated foes. Accord between the victors on these matters should, and doubtless will, precede the imposition of united exactions upon the latter to be registered in the usual conventional way. From an American point of view it is highly important that this accord so shape itself that when fashioned in a treaty for submission to Germany or Japan, the danger be minimized lest political revolt in the United States prevent the latter from formally acquiescing in the arrangement.

Technical and other aspects of steps leading to peace merit attention because of their bearing upon subsequent achievements. Thus, responses to inquiries addressed to the victors by the enemy for terms of peace should be set forth with fullness and precision, so that if they be accepted, as by pre-armistice agreements, they minimize the danger of divergent interpretations that might en-

¹⁴ See *supra*, § 5A.

courage the offeree to claim that the final terms of a proffered treaty marked a departure from what had earlier been agreed upon.¹⁵ Again, in order to avoid later cause of umbrage, opportunity to demand, as of legal right, negotiations looking to the revision of particular provisions should be yielded under terms that recognize the possible inequitableness of continued performance in the event of specified changes of conditions.¹⁶

The organized effort to safeguard society against a war-renewing Germany or a war-renewing Japan for a long period may so greatly differ from that made to safeguard it from the war-producing acts of other countries that the common goal may for the time being disappear from the horizon. Yet the practical task from day to day, and year to year, and decade to decade, is really to unify that effort so that eventually the bond of peace is upheld by a single process for a united world. In a word, the amassing of Allied military force that shall be wrought in time of peace to keep Germany and Japan from renewing the conflict may, despite the length of its duration, be in reality a temporary makeshift of ever diminishing significance as the minds of those countries become disaffected, and abandon lust for conquest. That change of thinking, as is suggested above, may be accelerated as or if it is realized that the victors in the war are ultimately prepared to surrender military controls to an appropriate international entity. Conversely, those victors may have to undergo a radical change of thinking and of policy before relinquishing the sole custody of instruments of war to the control of a single international agency. As a condition thereto they must be convinced that relative military or strategic advantages are not to be weakened, that normal barriers are not to be shattered, and that fresh and solid benefits of inestimable worth are within reach. It is here that the success of a security organization such as that inspired at Moscow may exercise a beneficent function; for it is capable of inspiring confidence in its capacity to administer and control, and in its special fitness to make decisions with impartiality and singleness of purpose, as an agency for the common good. With the achievement of that success, the principal victors may gradually clothe the organization with vastly greater authority, preparing it for its final task in behalf of society.

A major problem confronting the United States and its Allies in terminating the present war is to imbue its enemies in their defeat with a desire for lasting peace, and to accustom itself and its friends to habits that promote it. The two things are bound together. As has been suggested above, terms of settlement that lash those enemies into fury, not only destroy such a desire, but also weld together subtle forces that set afire entire nations with lasting zeal for vengeance, and so nourish militarism in places where it is sought to be stamped out. Again, States that preach peace to their enemies, and will not follow it zealously in their conduct towards their putative friends, destroy the confidence of their foes in the durability of amicable relationships. The immediate and twofold question is thus, whether it is possible to restrain Germany and Japan by military force for a long period, and simultaneously obliterate the war aims of both; and also

¹⁵ See *supra*, § 912A.

¹⁶ See this author in *Hungarian Quarterly*, 1937, II, 203.

secondarily, whether the successful operation of a post-war security organization among States generally may, during that period, somehow assist in that obliteration. It is believed that an affirmative answer may be made if the victors rather rigidly adhere to the following course: (a) by making it clear to their foes that the imposition of all penalties, however severe, is the direct and necessary consequence of internationally illegal conduct in initiating and carrying on the present war; (b) by developing their post-war security organization in such a way as to make it gradually and ultimately the residuary of full power to control States bent on aggression; and (c) by holding out to the defeated foes reasonable hope not only of an ultimate transfer of such power, but also of participation in the régime to be developed by the organization, even prior to that transfer, when they shall have become "peace-loving" nations. By such process, which is in full harmony with the Declaration of Moscow, the United States and its Allies may be able to say of the final settlement — "*Deus nobis haec otia fecit.*"

EXPLANATORY STATEMENT

What follows is an explanation of contents in which reference is made to groups of problems and to the places where they are considered. It is heedless of the plan followed in the structure of the book, and it does not purport to make comprehensive reference to all matters that are examined.

The daily contacts between State and State have produced accord as well as conflict on a variety of matters. These contacts at times directly affect the private individual and concern his relationship to the State whose domain he may seek to enter, or within which he may live or own property, or at whose hands he may suffer wrong. They have begotten law. As the mecca of aliens from the very beginnings of its life as a State, the United States has long made clear its sense of freedom to decide what classes or types of such individuals should be allowed to enter its territory,¹ and when also it may properly have recourse to expulsion.² It has had frequent occasion to pass upon the occupational privileges of resident aliens,³ and upon the right of a State in that special connection to discriminate against them,⁴ or to subject them or their property to taxation⁵ or even to double taxation,⁶ or to exact military⁷ or other services of them.⁸ These matters are examined.

In a variety of situations, with respect to property that is tangible and intangible, and both movable and immovable, the alien owner finds himself in contact with the State within whose territory his acquisitions happen to be, or to belong, or to be located. Its right to fix the terms of acquisitions and devolutions needs examination.⁹ It is necessary also to observe the efforts of the State in seasons of peace and war to control, or freeze,¹⁰ or utilize what is within its reach, as well as the conditions on which it may divest the owner of title. In

¹ §§ 59–60C.

² §§ 61–64.

³ §§ 203–204.

⁴ §§ 204 and §§ 266–269.

⁵ §§ 205–206.

⁶ § 206A.

⁷ §§ 625–627.

⁸ § 628.

⁹ §§ 203, 208, 209–210A. Also § 211.

¹⁰ *Id.*; also § 888E.

fairly recent diplomatic correspondence with the Mexican Government will be found the succinct views of that of the United States as to the terms on which a State may lawfully have recourse to expropriation.¹¹

Its attitude concerning the confiscation by a belligerent of enemy private property must also be noted.¹² Again, the measures by which a State, although disclaiming confiscatory action, may, nevertheless, so utilize its control over alien enemy property as to cause losses on account of which the owners find no practicable means of reimbursement, need observation.¹³ Still again, conditions under which in the course of military operations a belligerent may take or devastate or destroy enemy private property,¹⁴ and in the special situation where the belligerent finds the property within hostile territory of which it has become the occupant,¹⁵ require examination. The requisitioning of neutral property within belligerent territory needs attention,¹⁶ embracing the special situation where, in virtue of the law of angary, vessel property is taken over.¹⁷

The supremacy of a State within its own domain justifies its demand that the alien who enters it obey the local law.¹⁸ In the exercise of what are called rights of jurisdiction such individuals feel the full pressure of that demand. Conversely, the State owes them, in virtue of obligations to their country, numerous duties — among them being so-called duties of jurisdiction.¹⁹ It will be seen that the territorial sovereign is not always free to treat aliens as it does its own nationals and that there have grown up certain international standards which test the propriety of its dealings with them.²⁰ Thus in prosecuting or neglecting aliens, the State finds itself, in American opinion, constantly face to face with these requirements of international law.²¹

The vicissitudes of aliens as the objects of criminal prosecution, or as the victims of neglect, have produced a mass of materials on what may be fairly described as the law of the responsibility of States.²² Sharp questions arise whether the conduct of a State in relation to an alien is to be deemed internationally illegal, and even if it is, whether his own State may properly demand reparation in his behalf through the diplomatic channel;²³ and also whether, and to what extent, the alien may by agreement with such State, deprive his own country of the right of interposition. It is here that the so-called Calvo Clause enters the picture.²⁴ The circumstances when a State is to be deemed responsible for the consequences of the wrongful acts of private individuals applied against alien life or property, and the theory on which damages are accorded need close examination.²⁵ Moreover, the inquiry also arises whether or under what circumstances the contractual delinquencies of a State are in practice differentiated from those sounding in tort, and are not regarded as necessarily indicative of internationally illegal conduct.²⁶ In this connection there is also to be

¹¹ §§ 217A-217C.

¹² §§ 621-623A.

¹³ §§ 618-619; also § 295A; §§ 298-299A.

¹⁴ § 657.

¹⁵ §§ 691-694.

¹⁶ § 632; also §§ 630-631.

¹⁷ §§ 633-636.

¹⁸ §§ 199 and 218.

¹⁹ §§ 266-269.

²⁰ § 266.

²¹ §§ 269, 285, 286-288.

²² *Id.*, also § 289A; also § 269A.

²³ §§ 269A-270; §§ 281-285.

²⁴ § 305.

²⁵ §§ 289-289A.

²⁶ §§ 269A-270; also §§ 303-304.

noted the scope of claims conventions to which the United States has been a party,²⁷ the matter of public bonds of a delinquent State,²⁸ and the collection of public debts by force.²⁹ The contracts between private individuals and others residing abroad, or calling for performance abroad, produce problems of international concern when war ensues and the parties find themselves alien enemies, or within territories of opposing belligerents, and performance involves communications between them. The rights of those belligerents in thwarting performance, and also in forbidding the establishment of fresh contractual ties between individuals so situated are sought to be observed,³⁰ and in the special light of assertions made by the United States.³¹

The technique pertaining to the presentation of claims in behalf of nationals against foreign States is dealt with at length,³² and with special regard to various phases or aspects of State delinquency, in seasons of both peace³³ and war.³⁴ The responsibility of a State arising from acts of insurgents is examined.³⁵

Whether international law addresses its injunctions to the private individual as such, and whether, conversely, he is clothed by that law with privileges which he himself may directly invoke as against a foreign State or even against his own country, present questions which are increasingly confronting the international society and are, therefore, considered.³⁶

It will be noted that a State is not always free to exercise jurisdiction over a person or thing within its limits.³⁷ The foreign diplomat accredited to itself,³⁸ and the foreign vessel of war,³⁹ are good examples. Whether other types of foreign public ships, such as those engaged in commerce, are entitled to exemption from jurisdiction, is a question on which American judicial opinion has expressed itself.⁴⁰ Particular States for special reasons have at times by agreement yielded rights of jurisdiction over foreign nationals. Thus, there has loomed up a conventional law pertaining to extraterritorial jurisdiction, the gradual relinquishment of which is as impressive as the broad scope of what some treaties once conceded.⁴¹ At times the United States has appeared as a willing relinquisher.⁴² It should be noted also that conventions, embracing some to which the United States is a party, continue to clothe consular officers with a limited jurisdiction with respect to minor offenses committed by their fellow countrymen who are seamen on ships of their country.⁴³

When a State essays to exercise jurisdiction over aliens by reason of their acts committed abroad, as for example, on board of a foreign ship on the high seas, grave difficulties arise in determining whether such action manifests an abuse of power. What, in American opinion, international law appears to ordain, is sought to be noted in a variety of situations.⁴⁴ It will be seen that for

²⁷ § 306.

²⁸ §§ 307-308.

²⁹ § 309. Also § 309A.

³⁰ §§ 608-609.

³¹ § 610.

³² §§ 271-285.

³³ §§ 286-293; also §§ 303-309A.

³⁴ §§ 294-299A.

³⁵ §§ 299B-302.

³⁶ §§ 11A and 11B.

³⁷ §§ 244-245.

³⁸ §§ 433-435.

³⁹ §§ 251-253.

⁴⁰ §§ 256-257.

⁴¹ §§ 259-265.

⁴² § 265.

⁴³ § 483.

⁴⁴ § 227; §§ 235-235B; §§ 241-243.

purposes of its own defense a State may not unreasonably vindicate its rights as against the alien actor whenever he has made direct endeavor from any quarter to attack it.⁴⁵

Upon the outbreak of war, the private individual finds himself hedged about by various restrictions imposed by the belligerent State within whose domain he happens to be, and that regardless of his nationality. These oftentimes seem to spring directly from local statutes or decrees or from the local common law, rather than from the prohibitions of international law, which, however, yields latitude to the restricter.⁴⁶ Thus the belligerent will be seen to assert the right to cut off his intercourse with enemy territory,⁴⁷ or to prevent him from entering into or performing a contract necessitating any communication therewith,⁴⁸ or from freely using his assets in a variety of ways.⁴⁹ Moreover, if he be an enemy alien, his person⁵⁰ as well as his property,⁵¹ may be subjected to special and differing degrees of control and disposition.

The place of the corporation in the law of nations calls for constant examination in a variety of situations. The State which creates such a body will be seen to regard it for many purposes as a national, and on occasion to espouse its cause as though it were one.⁵² In the course of so doing, that State may, however, be reluctant to be the cat's-paw for foreign dominating interests exemplified in the ownership of stock or bonds. The United States has been confronted with the problem.⁵³ Conversely, a State may be alert to protect the interests of its own nationals in foreign corporations whenever they are sufferers from the wrongful treatment of the corporate entity.⁵⁴ In seasons of war difficulties arise in determining whether, despite its creation by a neutral State, a particular corporation has by any process attained such a relationship to a belligerent that its foe may deem it to possess an enemy character.⁵⁵ The problem becomes complex when the property of the neutral corporation is a ship which, regardless of its neutral flag, is alleged for any reason to possess such a character.⁵⁶ The right of a State to prescribe conditions under which a foreign corporation may operate within its territory is noted.⁵⁷

Women are coming to their own in the international life. Effort is increasingly made by treaty to protect them and to prevent discrimination against them.⁵⁸ There is noted how, in the development of the statutory law of the United States, marriage is not permitted to affect the nationality of a woman, as by causing her expatriation (if as an American she marries an alien),⁵⁹ or by clothing her with American nationality (if as an alien she marries an American national).⁶⁰ There are noted also the conditions under which the American woman citizen may pass on to her child born abroad to an alien father the privilege of American citizenship.⁶¹ Again, her power to smooth the way for her alien husband who seeks to enter and remain within the domain of the United States, or to become naturalized therein needs attention,⁶² as well as the sim-

⁴⁵ § 242.

⁴⁶ §§ 605-606.

⁴⁷ § 606.

⁴⁸ §§ 608-610.

⁴⁹ § 888E and § 888D. Also §§ 632-637A.

⁵⁰ §§ 616-617.

⁵¹ §§ 618-623A.

⁵² § 278.

⁵³ *Id.*

⁵⁴ §§ 279-280.

⁵⁵ §§ 794-796A.

⁵⁶ § 784.

⁵⁷ § 204A.

⁵⁸ § 500A; also § 533F.

⁵⁹ §§ 365-365A.

⁶⁰ §§ 366-366A.

⁶¹ § 345.

⁶² § 360.

plified conditions confronting the alien wife of an American citizen who seeks by naturalization to acquire the nationality of her husband.⁶³

Problems concerning the nationality of individuals have long confronted the United States and have at times produced perplexity. They are examined in their place. The recent Nationality Act of 1940 clears the air, at least by exemplifying the position of the nation with respect to a variety of matters concerning, for example, the acquisition of its nationality (as distinct from, or accompanied by, American citizenship) by birth,⁶⁴ or by naturalization,⁶⁵ and the loss of that nationality.⁶⁶ There is observed the distinctive view of the United States as to the effect of American naturalization upon the prior nationality of the individual concerned,⁶⁷ and with respect to that of prolonged residence abroad upon the nationality of the American naturalized citizen.⁶⁸ The American thought on the doctrine of dual allegiance, and its inapplicability under certain conditions to adult persons is noted.⁶⁹ Attention is drawn to categories of persons who are not eligible to American naturalization,⁷⁰ also to the effect of parents' naturalization upon the nationality of infants,⁷¹ and especially where there is a change of the parents' American nationality.⁷² The conventional arrangements of the United States concerning naturalization are considered.⁷³ Situations are noted where an American national may in a domestic sense forfeit by his conduct the protection of his country, even though he retains its nationality.⁷⁴

From the beginning to the end of its life, a State is confronted with legal problems associated with what are called rights of political independence. At the outset they grow out of the claim of a political entity to be recognized as a State, or as the government of one. The conditions on which the United States has seen fit to recognize both new States,⁷⁵ and new governments,⁷⁶ are examined in their place. The extent to which a country may deal with those who control the territory of another without according recognition is observed;⁷⁷ and certain aspects of non-recognition — a matter oftentimes eluding close observation — are discussed.⁷⁸ So-called *de facto* recognition,⁷⁹ and the recognition of insurgents as belligerents,⁸⁰ present problems that have demanded consideration.

There are States and States. They greatly differ with respect to freedom from external control,⁸¹ or to their structure and composition.⁸² Then there are backward countries that aspire to statehood,⁸³ and some whose territories find themselves under the operation of the mandatory system.⁸⁴ Of special interest are the State members of the British Empire,⁸⁵ as well as the State of the City of the Vatican.⁸⁶ The relationships that have grown up between the United States and certain of its neighbors — Cuba,⁸⁷ Panama,⁸⁸ the Dominican Republic,⁸⁹ Haiti,⁹⁰

⁶³ §§ 357 and 360.

⁶⁴ §§ 344-347.

⁶⁵ §§ 353-359.

⁶⁶ §§ 382-387.

⁶⁷ §§ 376-379.

⁶⁸ § 384.

⁶⁹ §§ 372-375A.

⁷⁰ § 354.

⁷¹ § 367.

⁷² § 375.

⁷³ §§ 361-364.

⁷⁴ §§ 388-394A.

⁷⁵ §§ 39-42.

⁷⁶ §§ 44-45D.

⁷⁷ § 46.

⁷⁸ § 46B.

⁷⁹ § 46A.

⁸⁰ §§ 47-50.

⁸¹ §§ 12-18A.

⁸² §§ 30-32.

⁸³ §§ 25 and 33.

⁸⁴ §§ 26-26C.

⁸⁵ § 18B.

⁸⁶ § 10B.

⁸⁷ §§ 19-19B.

⁸⁸ § 20.

⁸⁹ §§ 21-21A.

⁹⁰ §§ 22-22A.

and Nicaragua⁹¹ — demand attention. Neutralized States need to be observed.⁹²

International coöperation, revealing the fruits of policy has a bearing upon the law pertaining to State life. Cognizance must be taken of it.⁹³

Once a State has come into being, its freedom to live its own life in its own way — its right to political independence — is likely to become its chief problem. The United States has done valiant work, together with its neighbors of the same hemisphere in proclaiming the extent of that freedom and the conditions on which it may be enjoyed.⁹⁴ On the inherent soundness of their proclamation and on the deference for it by the international society rests the character of the law that is to obtain throughout this century and probably the next. Simultaneously, however, the interferer or intervener has entered the picture, either challenging what that society has supposedly decreed, or seeking on respectable grounds to excuse its action. What the United States has done needs, of course, to be noted.⁹⁵ Its present alignment with its American neighbors in disclaiming the right to intervene in the domestic affairs of an American Republic reflects a notable inter-American attitude of self-restraint.⁹⁶ The resolute stand of the United States as an intervener in the present war⁹⁷ and before becoming a belligerent, is, nevertheless, eloquent as an example of how a State may be expected to react to foreign conduct that is deemed to jeopardize its own safety.

The outstanding American application of the claim of right to intervene is exemplified by the Monroe Doctrine. The full measure of what the United States asserts the legal right to do is sought to be portrayed.⁹⁸ Of special significance is the increasing readiness of the nation, revealed in the fruits of recent inter-American arrangements, to share with its American neighbors some part of the task of safeguarding the American continents against non-American interference, thereby acknowledging the existence of a common burden resting upon all, and conversely, its caution not to commit itself to take certain affirmative steps that might be appropriate to that end.⁹⁹ In this connection there is noted the bearing of the alignment of the United States with certain countries of non-America upon the ultimate influence of the distinctive American hemispheric differentiation.¹⁰⁰

Problems concerning the extradition of fugitives from justice, and the applicable procedure under the treaties and statutory law of the United States are considered in a chapter devoted to the subject.¹⁰¹ The matter of passports is dealt with in the special light of American laws and regulations.¹⁰² The duties and privileges of diplomatic officers are treated at length, and with appreciation of the broader and harder tasks that now confront them.¹⁰³ The work of consular officers, which like that of diplomatic officers is largely, in the case of the United States, made the object of executive regulation, is observed.¹⁰⁴ Attention

⁹¹ §§ 23-23A.

⁹² § 29.

⁹³ §§ 33A-34E.

⁹⁴ §§ 11 and 13.

⁹⁵ §§ 76-83A.

⁹⁶ § 83B.

⁹⁷ § 83C.

⁹⁸ §§ 90 and 93.

⁹⁹ §§ 94A, 94 B, 97A.

¹⁰⁰ § 97A.

¹⁰¹ §§ 310-341.

¹⁰² §§ 399-406B.

¹⁰³ §§ 407-459.

¹⁰⁴ §§ 460-488.

is called particularly to the more recent treaties of the United States, the provisions of which comprehensively deal with the functioning of such officers.¹⁰⁵ The special tasks of American consular officers in relation to immigration are noted,¹⁰⁶ and also with respect to the administration of the estates of deceased intestate countrymen,¹⁰⁷ and to privileges of,¹⁰⁸ or immunities from,¹⁰⁹ jurisdiction.

Importance is attached to international agreement-making and the consequences of it. The validity of treaties is examined from various angles.¹¹⁰ Thus the bearing of compulsion upon validity is scrutinized.¹¹¹ Whether a treaty lacks validity because it is at variance with requirements of the local fundamental law, presents a problem that cannot be evaded.¹¹² Search has been made for the ultimate test of the constitutionality of treaties of the United States.¹¹³ As an incidental constitutional problem, the extent of the freedom of the President to bind his country by executive agreements not submitted to the Senate for its approval, is discussed.¹¹⁴ The matter of the interpretation of treaties has called for a study of methods which is deemed to be of utmost importance. Those used by the Supreme Court of the United States are examined with care,¹¹⁵ together with the somewhat contrasting ones employed by the Permanent Court of International Justice. Some deductions are sought to be drawn.¹¹⁶ The interpretative problem growing out of the most-favored-nation clause in various types of conventional arrangements and for widely differing purposes, is discussed.¹¹⁷ The matter of the termination of treaties is studied in the light of practice.¹¹⁸ In this connection stress is laid upon the importance in every case of making close inquiry as to the design of the contracting parties at the time of contracting, and upon the value of deductions therefrom.¹¹⁹ The significance of the so-called doctrine of *rebus sic stantibus* as the foundation of a claim of freedom from a duty to perform is examined.¹²⁰ The general right of a contracting State under certain conditions to terminate unilaterally a treaty, and the views of the American Government thereon are explored.¹²¹ The bearing of war between the contracting parties upon their existing agreements of various types is considered at length.¹²² In this connection the question is raised whether war between those parties ever in itself serves as a matter of law to put an end to the treaties subsisting between them.¹²³ The special problem touching the relationship of war to multi-partite treaties is dealt with.¹²⁴ Some complicated questions growing out of reservations to treaties are discussed at length.¹²⁵ Certain aspects of the performance of treaties have called for special consideration.¹²⁶ The matter as to

¹⁰⁵ §§ 464, 464A, 469, 474-476, 483-485, 486-487.

¹⁰⁶ §§ 60A and 60B; § 488.

¹⁰⁷ § 480.

¹⁰⁸ § 483.

¹⁰⁹ §§ 474-476.

¹¹⁰ §§ 490-494.

¹¹¹ § 493.

¹¹² § 494.

¹¹³ §§ 500A and 502.

¹¹⁴ §§ 505-509.

¹¹⁵ §§ 533B-533E.

¹¹⁶ §§ 533F-533H.

¹¹⁷ §§ 536-537.

¹¹⁸ §§ 538-551.

¹¹⁹ §§ 538, 541 and 547.

¹²⁰ § 541.

¹²¹ § 546.

¹²² §§ 547-551.

¹²³ § 547.

¹²⁴ § 550A.

¹²⁵ §§ 519-519A.

¹²⁶ §§ 523-529.

the freedom of an independent State from an obligation to enter into an agreement which it elects to decline is noted.¹²⁷

How rights of sovereignty come into being,¹²⁸ are transferred,¹²⁹ and become extinct,¹³⁰ are given attention. In that connection it becomes necessary to observe what acts were from the earliest days of exploration in the western hemisphere deemed to suffice to bring into being rights of sovereignty, and how the relevant law has gradually undergone modification.¹³¹ Correct conclusions have a bearing, moreover, upon the solution of the question as to the steps to be taken at the present time for the acquisition of rights of sovereignty over polar regions.¹³² Methods of transfer of rights of sovereignty are scrutinized, and with particular reference to the matter of so-called self-determination and its place, if any, in the law of nations.¹³³ Aspects of the legal effects of changes of sovereignty are considered,¹³⁴ with awareness of the influence that exact appreciation of them may have upon those responsible for the terms of settlement of the present war. Losses of rights of sovereignty, that mark the extinction thereof are noted.¹³⁵

The extent of the domain of a State with respect to the areas of land, water and air, which it may reasonably claim as its own is dealt with at length.¹³⁶ Conventions for the regulation of aerial navigation are examined.¹³⁷ The matter of boundaries is considered from various angles;¹³⁸ and also incidentally the significance of the confusing term *uti possidetis*.¹³⁹ When and how the doctrine of *thalweg* became expressive of a principle of international law is noted.¹⁴⁰

The matter of limitations of the right of control by a State over what pertains to its territory is dealt with in a variety of situations. Thus, problems relating to so-called servitudes are noted.¹⁴¹ Others concerning the marginal seas,¹⁴² straits,¹⁴³ the navigation of rivers,¹⁴⁴ the diversion of waters,¹⁴⁵ bays,¹⁴⁶ lakes and enclosed seas,¹⁴⁷ and access to ports¹⁴⁸ are considered; the control of radio, embracing conventional arrangements in relation to it, is observed.¹⁴⁹ The matter of transit by land is noted,¹⁵⁰ as well as the protection of areas by neutralization and other processes.¹⁵¹

Note is taken of various amicable processes of adjusting international disputes. Attention is called to the potentialities of direct negotiation,¹⁵² as well as to the applicability of good offices and mediation.¹⁵³ The distinctive functions of bodies or commissions of inquiry,¹⁵⁴ as well as those of conciliation,¹⁵⁵ are discussed. The matter of arbitration is examined, and its character as an instrument of judicial settlement is noted.¹⁵⁶ The special value of joint commissions¹⁵⁷ as such instrumentalities is stressed. The use of them by the United States is examined.¹⁵⁸ Moreover, its wide experience in attempting to adjust its inter-

¹²⁷ §§ 11 and 13.

¹²⁸ §§ 98-106.

¹²⁹ §§ 107-117A.

¹³⁰ §§ 118-119.

¹³¹ § 99.

¹³² §§ 104A-104E.

¹³³ §§ 108-109F.

¹³⁴ §§ 120-133A.

¹³⁵ §§ 118 and 119.

¹³⁶ §§ 134-150; also §§ 188-191C.

¹³⁷ §§ 189C-191B.

¹³⁸ §§ 151-151C.

¹³⁹ § 151C.

¹⁴⁰ § 138.

¹⁴¹ §§ 152-153.

¹⁴² § 154.

¹⁴³ §§ 155-158A.

¹⁴⁴ §§ 159-182.

¹⁴⁵ §§ 183-184A.

¹⁴⁶ § 185.

¹⁴⁷ § 186.

¹⁴⁸ § 187.

¹⁴⁹ §§ 192-193F.

¹⁵⁰ §§ 194-196A.

¹⁵¹ §§ 197-198B.

¹⁵² § 552.

¹⁵³ §§ 553-556.

¹⁵⁴ §§ 557-558.

¹⁵⁵ §§ 558A and 558B.

¹⁵⁶ §§ 559-561.

¹⁵⁷ § 584.

¹⁵⁸ *Id.*

national controversies by amicable (embracing judicial) processes, is observed.¹⁵⁹ The facilities offered by the Permanent Court of Arbitration at the Hague are discussed.¹⁶⁰ The important and distinctive place of the Permanent Court of International Justice is examined.¹⁶¹ The powers and functions of arbitral tribunals,¹⁶² the payment and distribution of awards,¹⁶³ the barring of unrepresented claims,¹⁶⁴ the applicability of the rule of *res judicata*, rehearings and revisions,¹⁶⁵ and awards outside of limits of submission,¹⁶⁶ as well as unconscionable awards,¹⁶⁷ are scrutinized and discussed. Provisions that might find appropriate place in conventions contemplating recourse to arbitration are suggested.¹⁶⁸ In participating in general arrangements concerning the amicable adjustment of future controversies, the United States has displayed conservatism. It will be seen, however, that some suggestions springing from John Jay in 1785, and resuscitated by Richard Olney a century later, point the way to recourse to amicable settlements by obligatory, yet flexible processes, of utmost value as deterrents of conflict, and which, therefore, merit close examination.¹⁶⁹

The work of the United States as a coöperator with the League of Nations in efforts to adjust controversies pertaining to the Far East deserves attention.¹⁷⁰

The use of non-amicable modes of settling international controversies or of obtaining redress for grievances is, of course, notorious. Recourse to various forms of self-help, described at times by labels designed to explain or excuse what is done, must be noted. They embrace the withdrawal of diplomatic relations,¹⁷¹ acts of retorsion,¹⁷² and retaliation,¹⁷³ as well as reprisals,¹⁷⁴ pacific blockade,¹⁷⁵ embargo,¹⁷⁶ and non-intercourse.¹⁷⁷ The bearing of the increase or decrease of national armaments upon the disposition of States to wage war is sought to be appraised.¹⁷⁸ The Briand-Kellogg Pact of August 27, 1928, for the Renunciation of War as an Instrument of National Policy is studied, and its influence as a deterrent of war is considered.¹⁷⁹

The thing called a state of war is observed and discussed. It raises the question whether a party to an armed conflict may reasonably claim privileges which normally accrue to a belligerent as such, so long as that party denies that it is at war with its foe.¹⁸⁰ Insurrection, civil war and rebellion require attention;¹⁸¹ and also what has been described as private war.¹⁸² Both the processes of initiation of war,¹⁸³ and the extent of any needed warning to a prospective foe, in the special light of the Hague Convention of 1907,¹⁸⁴ are dealt with.

The effect of war upon the normal relations between States that have become opposing belligerents is considered in a variety of situations.¹⁸⁵ Much will be seen to grow out of the rule productive of the general suspension of intercourse

¹⁵⁹ §§ 562-565.

¹⁶⁰ §§ 568-571.

¹⁶¹ §§ 573-576.

¹⁶² §§ 577-578.

¹⁶³ § 579.

¹⁶⁴ § 580.

¹⁶⁵ § 581.

¹⁶⁶ § 582.

¹⁶⁷ § 583.

¹⁶⁸ § 583A.

¹⁶⁹ § 584.

¹⁷⁰ § 585A.

¹⁷¹ § 587.

¹⁷² § 588.

¹⁷³ §§ 588 and 888A; also § 667.

¹⁷⁴ §§ 589-591A.

¹⁷⁵ § 592.

¹⁷⁶ §§ 593-594.

¹⁷⁷ § 595.

¹⁷⁸ § 595A.

¹⁷⁹ § 596A.

¹⁸⁰ § 597.

¹⁸¹ § 600.

¹⁸² § 601.

¹⁸³ § 602.

¹⁸⁴ § 603.

¹⁸⁵ §§ 605-624.

and communication with enemy territory.¹⁸⁶ In this connection the broad subject of contracts is dealt with;¹⁸⁷ also that of judicial remedies,¹⁸⁸ the statute of limitations,¹⁸⁹ suits against persons in enemy territory,¹⁹⁰ the cessation of interest,¹⁹¹ and interference with means of communication.¹⁹² As is suggested above, the control of enemy persons and property within the national domain is examined,¹⁹³ and likewise the matter of the prohibition of exports.¹⁹⁴ The treatment of neutral persons¹⁹⁵ and property within belligerent territory is observed in its various aspects.¹⁹⁶ The pacific intercourse of belligerents which practice seems to have ordained is given consideration.¹⁹⁷ In dealing with land warfare the Rules of the War Department, as of 1940, are observed as special guides touching American military opinion, and as interpretative of certain of the Hague Conventions of 1907. In the course of observing what are deemed to be the requisite qualifications of belligerent forces,¹⁹⁸ and in noting the usual distinction between the combatant and non-combatant members thereof, there is considered the further matter as to the fate of persons, who although not members of those forces, participate in certain activities against the enemy.¹⁹⁹ Is, for example, the fisherman not connected with a belligerent force who off the coast of his country, when it is at war, gives warning by radio of the approach of enemy aircraft, entitled to treatment as a prisoner of war if later captured by the enemy? The problem is discussed.²⁰⁰

What military necessity signifies, in American opinion, needs careful examination.²⁰¹ A variety of belligerent measures, such, for example, as sieges and bombardments,²⁰² the seizure, destruction and devastation of enemy property,²⁰³ measures of concentration,²⁰⁴ and stratagems²⁰⁵ require scrutiny.

The uses of both old and new instruments of destruction come into the picture. Thus, expansive, explosive and other bullets,²⁰⁶ asphyxiating or deleterious gases,²⁰⁷ and especially uses of aircraft for aerial bombardment,²⁰⁸ need attention. After examination of current practices the reader may well doubt whether there is or can be any law which will in fact serve to restrain belligerents possessed of some of these weapons from employing them as they desire.²⁰⁹ Does the law of nations forbid a belligerent to deny quarter to an enemy soldier,²¹⁰ or to exact some services from him,²¹¹ or to incite him to desertion or insurrection or treason?²¹² The American view-point is sought to be revealed. The place of so-called retaliation in war needs careful attention,²¹³ and especially in situations where it is invoked as an excuse for the non-observance by belligerents of normal obligations towards neutral States.²¹⁴ The treatment of pris-

¹⁸⁶ § 606.

¹⁸⁷ §§ 608-610.

¹⁸⁸ §§ 611-612.

¹⁸⁹ *Id.*

¹⁹⁰ § 613.

¹⁹¹ § 614.

¹⁹² § 615.

¹⁹³ §§ 616-623A.

¹⁹⁴ § 624.

¹⁹⁵ §§ 625-629.

¹⁹⁶ §§ 630-637A.

¹⁹⁷ §§ 638-647A.

¹⁹⁸ §§ 648-652.

¹⁹⁹ §§ 653-654.

²⁰⁰ *Id.*

²⁰¹ § 655.

²⁰² § 656.

²⁰³ § 657.

²⁰⁴ § 658.

²⁰⁵ § 659.

²⁰⁶ § 661.

²⁰⁷ §§ 662-662A.

²⁰⁸ § 663.

²⁰⁹ *Id.* Also § 923.

²¹⁰ § 664.

²¹¹ § 666.

²¹² § 665.

²¹³ § 667.

²¹⁴ §§ 888A and 888C.

oners of war,²¹⁵ and also that of the sick and wounded²¹⁶ needs examination in the light of the most recent conventional arrangements.

Problems growing out of the occupation by a belligerent of hostile or other territory call for close observation.²¹⁷ They differ sharply from those confronting an army in the field that has not reached its goal and is fighting to gain it.²¹⁸ The rights of the occupant as administrator of the area concerned are examined in their various aspects.²¹⁹ The matter of martial law, of course, needs examination.²²⁰

Maritime war presents special problems concerning belligerent forces,²²¹ and belligerent measures and instrumentalities.²²² Thus the defensive arming of private vessels,²²³ and the effect of such action upon the immunity of such vessels from attack²²⁴ deserve close observation. The matter of bombardment has a special place in maritime war.²²⁵ The use of submarine mines,²²⁶ the establishment of war zones,²²⁷ the employment of torpedoes,²²⁸ and also the cutting of submarine cables²²⁹ need attention. Study of the practice of visit and search — a right entrenched in the law — reveals the increasing lawlessness of belligerent powers in following convenient procedures.²³⁰ In this connection there must be noted the treatment of mail steamers and mail.²³¹ Various aspects of attack need to be dealt with.²³² The use of submarines in two major conflicts and the lessons drawn from that experience call for review.²³³ The matter of capture and exemptions from capture demand scrutiny in a variety of situations.²³⁴ Enemy character in relation to property at sea, with respect to both ships²³⁵ and cargoes,²³⁶ is a subject which raises distinctive and at times difficult problems for consideration.

Contraband of war — the grand excuse for belligerent interference with some forms of neutral trade — calls for an examination of old practices before the legal significance of recent ones can be apprehended. That significance needs full appreciation.²³⁷ Moreover, incidents of it, or of kindred activities involving, for example, the interception of enemy persons on neutral ships merit attention.²³⁸ The story of blockade is a grim one, revealing the increasing disposition of strong belligerents to break down legal restraints or to remove some of them from the law.²³⁹ Such action inspires inquiry as to the character of blockade in the future, and as to the agencies through which the international society may be expected ultimately to insist that blockade be applied.²⁴⁰

The matter of neutrality needs as close examination today as ever before. The story of its development is a tragedy. Both principle and logic have lost in the fight with expediency.²⁴¹ It will be observed that neutral States not welded together in any determined effort to withhold military sustenance from bel-

²¹⁵ §§ 668-679; 773-775.

²¹⁶ §§ 680-687; 776-782.

²¹⁷ §§ 688-702A.

²¹⁸ § 688.

²¹⁹ §§ 690-701.

²²⁰ § 702.

²²¹ §§ 703-709.

²²² §§ 710-723.

²²³ § 709.

²²⁴ §§ 742-743.

²²⁵ §§ 711-712.

²²⁶ §§ 713-719.

²²⁷ §§ 720-721.

²²⁸ § 722.

²²⁹ § 723.

²³⁰ §§ 724-735.

²³¹ §§ 729-730A.

²³² §§ 736-746.

²³³ §§ 747-751A.

²³⁴ §§ 752-772.

²³⁵ §§ 783-788.

²³⁶ §§ 789-796A.

²³⁷ §§ 797-823.

²³⁸ §§ 818-820.

²³⁹ §§ 824-843.

²⁴⁰ § 832B.

²⁴¹ §§ 844-889.

ligerent powers have never exercised their full might to deter armed conflict or lessen its duration.²⁴² Moreover, in the two most recent major conflicts, States remaining neutral in spirit or conduct have become relatively impotent to vindicate their rights or penalize belligerent offenders.²⁴³ All this has raised the great question yet to be answered whether a taking of sides rather than an attitude of impartiality is hereafter to be the normal rôle of outside States when war ensues,²⁴⁴ and whether also the international society is prepared so to organize itself as to thwart armed conflict and prevent its coming into being.²⁴⁵

The work of American prize courts, in relation both to the matter of the jurisprudence²⁴⁶ and procedure is discussed.²⁴⁷ This embraces the matter of the condemnation of both neutral and enemy prizes.²⁴⁸

Technical aspects of the termination of war are of singular importance.²⁴⁹ Equally so is the procedure peculiar to the negotiation of a treaty of peace.²⁵⁰ Both matters are discussed. Close observation is made of agreements preliminary to peace, by virtue of which maximum terms to be exacted by a victor are sought and given and accepted.²⁵¹ The conclusion of a definitive treaty of peace and the procedure of the conference that produces it are dwelt upon.²⁵² Certain effects of the termination of war are examined.²⁵³ Suggestions for international organization for the peace that shall succeed the present conflict are offered.²⁵⁴

²⁴² §§ 867-868A.

²⁴³ §§ 888A and 888C.

²⁴⁴ § 889.

²⁴⁵ § 923.

²⁴⁶ §§ 893-895.

²⁴⁷ §§ 897-901.

²⁴⁸ §§ 902-903.

²⁴⁹ §§ 904-908.

²⁵⁰ §§ 909-920.

²⁵¹ §§ 911-912A.

²⁵² §§ 913-920.

²⁵³ § 921.

²⁵⁴ § 923.

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