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WHAT ACTS OF WAR ARE JUSTIFIABLE?

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ALTHOUGH neither law nor any other human device can make war in itself anything but abominable, the notion that belligerents remain under certain legal obligations to one another has its roots in antiquity and persists today. Experience of the laws of war shows that they do make a certain difference. Moreover the fact that those who break the laws of war generally try to make out a legal case, however flimsy, for their acts shows that the existence and authority of those laws are recognized by the civilized world.

In this pamphlet the Professor of Jurisprudence in the University of Oxford discusses the nature of these laws and their application to the present war. He contrasts the German theory and practice with that of other States, with particular reference to air warfare and blockade, and the position of the civilian population in 'totalitarian' warfare. He also discusses the important question of reprisals.

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WHAT ACTS OF WAR ARE JUSTIFIABLE?

IN the last war Germany torpedoed ships without warning, scattered unanchored mines in the seas, bombarded undefended seaside towns, began the use of poison gas in 1915, killed hundreds of civilians in England and France in indiscriminate air-raids, shot hostages in Belgium, and destroyed the city of Louvain. In each case she claimed that she was acting strictly in accordance with the rules of International Law and morality. In the present war the Germans have again attacked merchant shipping with their submarines, have machine-gunned harmless civilians, have devastated Rotterdam in the most savage air attack in history, and are attempting to do the same to London. Once more they are asserting that their acts are both within the law and morally correct. On the other hand, they claim that Great Britain in enforcing the blockade is acting illegally, and is thereby attempting to murder German women and children. Although each of these problems must be considered separately, they are all part of the larger question, What belligerent acts are justifiable in war? The answer to this depends on whether or not we can say that there are any rules governing the conduct of war, and, if there are such rules, what is their content.

The Laws of War

The pessimistic view is that the phrase 'the laws of war' is a contradiction in terms—'cette monstrueuse association de mots, les droits de la guerre', as a French admiral once put it. 'The laws of war

make one think of the snakes of Ireland' was the equally succinct comment of an English general. This view has, however, been disproved by the experience of past wars in which the laws of war have been recognized by the belligerents to be binding on them. Belligerent States have, of course, violated the law sometimes, just as individuals sometimes violate the civil law, but they have hesitated to challenge its existence and authority. The result has been that the law of war has been of practical importance. Professor Brierly was not putting the claims of International Law too high when he said recently:[1] 'But when all allowances have been made, if we do not pitch our expectations too high by imagining that law or any other human device can make war anything but an utter abomination, experience of the laws of war in operation shows that they do make a certain difference.'

The history of the laws of war goes back to the latter part of the Middle Ages, when the influence of Christianity and of chivalry combined to restrict the cruelty of war. The Thirty Years War was a temporary setback, but the horror which the unrestrained brutality of the soldiers, especially at the siege of Magdeburg, caused throughout Europe brought about a new development. Hugo Grotius in his celebrated work *De Jure Belli ac Pacis* (1625) did much to advance this by his attempt to state the general principles in concrete form. Further progress was made during the eighteenth century, with the result that the unrestrained cruelty of former

[1] *The Background and Issues of the War*, 1940 (Clarendon Press), p. 131.

times was in large part absent from the Napoleonic wars. It was, however, after 1850 that the most striking advance was made by means of various treaties and conventions in which the rules relating to warfare were partially formulated. Thus the Declaration of Paris, 1856, which was signed by seven States, dealt with warfare at sea in so far as it affected the capture of private property at sea and blockade. Almost all the other maritime Powers acceded to it in the course of time. The Geneva Convention of 1864 was concerned with the amelioration of the condition of wounded soldiers, and a further attempt to limit the cruelty of war was the Declaration of St. Petersburg, 1868, which prohibited the use of certain explosive projectiles. Of far greater importance, however, were the two Hague Peace Conferences of 1899 and 1907. At the second Conference the famous Hague Regulations dealing with the rules governing the conduct of land warfare were adopted. They did not purport to give a complete code, leaving all matters not covered by their provisions to be governed by 'the principles of law as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. Some question has been raised as to the binding force of these Regulations as they have not been ratified by all the States, but it cannot be doubted that they are of great authority as a statement of the existing customary rules.

The Laws of War are to be found, therefore, partly in conventions and partly in custom. Their source, as the *British Manual of Military Law* states,

is to be found in 'the dictates of religion, morality, civilization and chivalry'. Rules which began merely as usages of warfare have hardened into rules of law which are regarded as binding by the civilized States.

This idea that the belligerents, although at war, remain under certain mutual legal obligations and duties is no modern one. Over two thousand years ago Plato in *The Republic* (Book v) considered the question, How shall our soldiers treat their enemies? He answered that when Greek fought against Greek they must remember that 'still they would have the idea of peace in their hearts and would not mean to go on fighting for ever'. 'And as they are Hellenes themselves,' he said, 'they will not devastate Hellas, nor will they burn houses, nor ever suppose that the whole population of a city—men, women, and children—are equally their enemies.' It is only when the war is fought against barbarians that these rules, which the Hellenes recognize, are not binding.

But the Germans, while occasionally paying lip-service to the accepted rules of International Law, have always preferred the barbarian point of view. Thus von Clausewitz in his monumental work on War speaks of those 'self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed the usages of International Law'. The authoritative German War Manual, *Kriegsbrauch im Landkriege*,[1] prepared by the German General Staff in 1902, warns military commanders against the humanitarian tendencies of the times, and refers to the humane principles of the Hague Conventions

[1] Translated by J. H. Morgan, K.C., *The German War Book*, 1915.

as 'sentimentalism and flabby emotionalism'. Moreover, it accepts the distinctively German doctrine that *Kriegsräson geht vor Kriegsmanier* (necessity in war overrules the ordinary rules of war), i.e. that the laws of war are no longer binding when a violation of them is necessary to escape from danger, and that the duty of observance ceases whenever conformity thereto interferes with the attainment of the objects of the war. This doctrine is a negation of all law, and reduces the rules of warfare into traps by which the honest but unwary opponent may be ensnared. Fortunately it has been rejected by almost all the other States. We can therefore answer the question whether there are any rules governing the conduct of war in the affirmative, although we must always remember that their efficacy depends in large part on the honour and conscience of the belligerents.

The Content of the Rules of War

Article XXII of the Hague Regulations states as a general principle that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'. Like all other general principles this one, while important as a guide to the spirit of the laws of war, does not tell us what the particular rules are. These must be found in the other Articles and in the customary rules which are so important a part of International Law. For the sake of clearer understanding it is convenient to divide these rules into three classes, the first covering belligerent acts against enemy civilians, the second belligerent acts against the enemy combatant forces, and the third

belligerent acts against neutral States and individuals. In the present war it is the first class which has been most under discussion, while in the last war it was the two latter which caused the bitterest controversy, it being the third in particular which led to America's entry into the war.

Belligerent Acts against the Civil Population

In ancient days it was held that the civilian population could be killed or enslaved at will. During the Middle Ages, largely due to the influence of the Church, a milder doctrine was taught, although it was not always practised. Thus Francisco di Vitoria, in his famous *Relectiones* (1532), declared that 'the deliberate slaughter of the innocent is never lawful in itself'. The basis of a just war, he said, was the wrong that had been committed, but as the innocent had committed no wrong it was not permissible to wage war against them. A century later, when the Thirty Years War made Europe realize the horrors of unrestricted warfare, Grotius expressed the contemporary view that war ought not to 'involve innocent persons in destruction'. He laid down particular rules which were applicable to children, women, and men who had not taken up arms, such as priests, farmers, merchants, and artisans. From that period public opinion crystallized rapidly, and Louis XIV's threat to the Dutch during the invasion of their country in 1672, that when the ice melted he would give no quarter to the inhabitants of their cities, met with universal reprobation. It was in the nineteenth century, however, that the distinction between the combatant and the civilian was most

firmly drawn. The majority of the continental writers even went so far as to hold that because war was a relation between States and not between individuals it followed that the subjects of the belligerents were enemies only as soldiers and not as citizens, but this view was rejected as too extreme by British and American jurists. Everyone was agreed, however, on the essential point that the immunity of civilians from direct attack was one of the fundamental rules of International Law. 'Nobody doubts', said Professor Oppenheim in his classic work on *International Law* (6th ed., by Professor H. Lauterpacht, p. 169), 'that they ought to be safe as regards their life and liberty, provided they behave peacefully and loyally; and that, with certain exceptions, their private property should not be touched.'

This clear-cut nineteenth-century division between the civilian and the soldier became less definite during the last war. For one thing the whole male population fit to carry arms was now subject to conscription so that every man became a potential soldier. Even when not enrolled in the army every adult, male or female, was liable to be called on to perform some service in the prosecution of the war. For another, the new weapons developed during the war sometimes made the distinction a difficult one to apply in practice. However anxious the pilot of an aeroplane might be to attack only military objectives, it was only in the most favourable circumstances that he could be certain that his bombs would not destroy civilians. As a result certain writers have taken the extreme view that the

distinction between civilians and soldiers is no longer a valid one, and that the whole structure of rules which has been erected on this foundation must fall to the ground. This counsel of despair has, however, been rejected by most of the authorities. Thus Dr. Lauterpacht, the Whewell Professor of International Law in the University of Cambridge, says that, 'while these factors have had the effect of blurring the established distinction in many respects and of necessitating a modification of some of the existing rules, they have left intact the fundamental rule that non-combatants must not be made the object of direct attack by the armed forces of the enemy'.[1]

Thus, even though the distinction between the soldier and the civilian may have been blurred in recent times, this does not mean that all acts of war committed against the latter are justifiable. That there must be some limits is the answer of the conscience of mankind, but to formulate them in precise terms is not an easy task unless one accepts the harsh German doctrine of totalitarian warfare.

The German Doctrine of Totalitarian Warfare

It was in the last war that the Germans for the first time carried the doctrine of totalitarian warfare fully into practice, although the idea itself was far from novel. In his letter to Professor Bluntschli in 1880 General von Moltke said: 'I am in no sense in accord with the Declaration of St. Petersburg when it pretends that the "weakening of the *military forces* of the enemy" constitutes the

[1] Oppenheim, *International Law*, edited by H. Lauterpacht, p. 172.

only legitimate object of war.' Thus the inflexible German mind, which sees no virtue in moderation, reached the conclusion that as modern war is a war between the people as a whole it follows that any act which injures the people, whether civilians or soldiers, is a justifiable act of war. In accordance with this doctrine it was thought permissible in the last war to shell the undefended seaside towns of Scarborough, Whitby, and Hartlepool, and to deport into Germany French and Belgian men, women, and girls to do forced labour in the fields. It is this last instance which best illustrates the German doctrine. When protests were made by neutrals against these mass deportations, the German Minister of War, General von Stein, said:[1] 'To-day it is not armies alone who face each other, but peoples. One cannot leave among his enemies labourers to carry on agriculture and make munitions of war. We have not deported young girls alone, but all the population capable of working.' To-day the Nazis no longer need a thin veneer of excuses for such acts. They have announced with pride that they have seized 500,000 Poles—men and women—and have carried them off to slavery in Germany. In 1917 the whole civilized world stigmatized this practice as an outrage and as an obvious breach of a fundamental rule of International Law, but to-day the Nazis regard it as a legitimate act of war.

The only restriction on the German doctrine of unlimited force is contained in the rule that violence

[1] See James W. Garner, *International Law and the World War*, 1920, vol. i, p. 319.

which has no relation to the conduct of the war ought to be avoided. Thus the German War Manual provides that 'every means may be employed without which the object of the war cannot be attained; what must be rejected, on the other hand, is every act of violence and destruction which is not necessary to the attainment of this end'. This limitation had some restraining influence on the German armies in the past, but it seems to be completely ineffective at the present time. To-day the primary purpose of Nazi strategy is to undermine the morale of the civilian population by terrorization, and therefore the more brutal an act is the more useful it is in attaining this end. In accordance with this doctrine the devastation of the city of Rotterdam was held by the Nazis to be a justifiable act of war. 'This bombardment', M. van Kleffens, Netherlands Minister for Foreign Affairs, has said,[1] 'was one of the worst crimes of military history. Two groups, each of twenty-seven aeroplanes, systematically bombed the centre of the town with heavy high-explosive and incendiary bombs, leaving not a house intact, hardly a soul alive. Thirty thousand of innocent victims, among whom were scarcely any soldiers, perished during the half-hour this loathsome raid lasted—old men, young men, women and innumerable children. Who, in the face of such facts, is there to speak of "Deutsche Ehre", of "Deutsche Treue"?' We are back again to the German practices of the Thirty Years War because there is now no act which cannot be justified under this doctrine, for the more cruel and brutal an

[1] *The Rape of the Netherlands*, 1940, p. 177.

enemy appears to be the more likely is he to inspire terror. If we accept this view then there are no limits to enemy action against the civilian population because, as M. Bonfils has said,[1] 'If it is permissible to drive inhabitants to desire peace by making them suffer, why not admit pillage, burning, tortures, murder, violation?'

In only one instance have the Germans insisted on the distinction between the civilian population and the armed forces. When the Anglo-French blockade, in the last war and in the present one, restricted the amount of foodstuffs which the Germans could import, they raised the cry that the Allies were attacking the German women and children. The blockade, they contended, was therefore contrary to 'the basic principles of law and humanity'. The answer to this contention will be discussed below.

Civilians Protected by International Law

In sharp contrast to the German practice is the doctrine of International Law that in so far as civilians do not take part in the fighting, they may not be directly attacked and killed or wounded. Professor Hyde, the distinguished American authority, has stated this briefly:[2] 'Deliberate attempts to terrorize the civil population by attacks specially directed against them should always be denounced as internationally illegal conduct.' Even though such an attack might prove to be of advantage to the

[1] *Droit International Public*, § 1222.

[2] *International Law chiefly as interpreted and applied by the United States*, 1922, vol. ii, p. 322.

belligerent by spreading panic he is not justified in adopting this method of warfare. On the other hand, injuries to civilians which are the result of bona-fide military activity are legitimate. Thus, for instance, when a besieged town is bombarded, no violation of the rule has taken place if the inhabitants are injured. But the military operation must be a bona-fide one: there must be a fair balance between the means employed and the purpose to be achieved. An undefended city must not be destroyed even though by doing so a few enemy soldiers may be killed. If this were not so, then there would be no limit to a belligerent's right to ravage and destroy, because even the most peaceful village must contain a potential soldier. To attempt to justify such acts on the ground that they are part of military operations merely adds the contemptible sin of hypocrisy to a brutal and unchivalrous crime.

Although these principles cover all forms of military activity, they are of particular importance at the present time in their relation to air warfare, which we must now consider.

Air Warfare

In 1907 the Second Hague Conference discussed the question of aerial bombardment, although at that time it was balloons and not aeroplanes which were of importance. There was general agreement that while this mode of warfare could not be prohibited it ought to be restricted. The Conference therefore adopted Article XXV of the Regulations which provides that: 'The attack or bombardment *by any means whatever* of towns, villages,

habitations or buildings which are not defended is forbidden.' This rule unfortunately proved of little practical value in the last war because it was always possible for a belligerent to claim that every town was defended. Thus the Germans announced that their bombs had been dropped on 'the fortress of London' and 'the fortified place of Great Yarmouth'. They alleged throughout the war that they were not engaged in indiscriminate bombing. The Allies, with more justification, also claimed that they were only attacking military objectives, although it is fair to point out that a considerable number of German civilians were killed. But whatever the practice may have been, all the belligerents were in agreement that aerial bombardment directed against the civilian population for the purpose of terrorization or otherwise was illegal.

After the war the Washington Conference on the Limitation of Armaments (1922) appointed a commission of jurists to formulate the rules concerning aerial warfare. This commission, under the chairmanship of Professor John Bassett Moore, the leading American authority on International Law, produced in 1923 a code of rules which is known as The Hague Air Warfare Rules. Although this code has never been converted into an international Convention, it is nevertheless of importance in view of the authority of its authors; on occasions some governments have announced that they would act in accordance with its provisions.

The code does not purport to lay down new law, but is an attempt to put into precise form the existing rules. It is based on the fundamental assumption

that a direct attack on non-combatants is an unjustifiable act of war. Its two most essential provisions are as follows:

> *Article* 22: Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.
>
> *Article* 24 (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.

Although some other articles of the code have been the subject of debate, no one has seriously questioned that these two Articles represent accurately the rule of International Law on this point. Deliberately to terrorize or injure non-combatants is no more a proper object of aerial warfare than it is that of land or naval war. Nor is indiscriminate bombing legitimate on the ground that a military objective might possibly be hit—the attack must be directed definitely against that objective. Moreover, that objective must really be of military advantage, and not merely a subterfuge for an otherwise illegal attack on the civilian population.

Judged by these tests, what can be said of the Nazi air-raids on Great Britain? One point is beyond dispute, and this is that the machine-gunning of men, women, and children by German pilots in the streets of London and Southampton is pure terrorization, and is illegal by every conceivable standard. The Nazis have denied the Belgian and French accusations that during the retreat they deliberately machine-gunned the refugees in those

countries, but they cannot deny that they have deliberately shot down women and children in the quiet English streets, because thousands have seen them do it. The 'chivalry' of the German 'knights of the air' has been stressed by the Nazis, but if this is a type of 'chivalry' then, fortunately, the civilized world does not recognize it as such.

Concerning the bombardment of London the Nazis have given two contradictory explanations. The first is that the bombardment is directed against military objectives. If this is true, then the aim of the Nazi pilots has been singularly inaccurate. In the last war bombing, especially at night, had to be more or less haphazard, so that it was difficult to hit a precise target, but to-day it requires more than lack of skill to hit the residential district of Hampstead when aiming at the London docks. This explanation has, moreover, been belied by the Nazi pilots themselves. In a series of broadcasts they have described their attacks on London. They spoke with considerable exaggeration of the destruction of military objectives, but their real enthusiasm was reserved for the description of how the homes of the people had been destroyed. Thus one pilot described his joy when he saw a block of flats crumble under the explosions of his bombs.

The second explanation given by the Nazis is that these raids are a reprisal for the alleged British attacks on German civilians. This explanation, in flat contradiction to the first, recognizes that these bombing attacks are directed against the civilian population, and that they are therefore a breach of

International Law, but they are excused on the ground that the British did it first. This excuse has been repeated in the case of every German violation both in the last war and this, and is in accordance with Hitler's dictum that if only a lie is repeated often enough it will finally be believed.

The German air-raids in so far as they are directed against the civilian population and are intended to act *in terrorem* are therefore illegal by their own standards. That they have proved ineffective for this purpose is not the fault of the Nazis.

The Food Blockade[1]

The problem of the British food blockade is closely connected with that of aerial bombardment because the Germans have claimed that they are entitled to bomb the civilian population of Great Britain as a reprisal against the food blockade which, they say, is an attack on the German women and children. This argument was put forward in the Soviet Government's note of 25 October 1939, protesting against the Allied blockade. It said in part:

> 'It is known that the universally recognized principles of international law do not permit the air bombardment of the peaceful population, women, children, and aged people.[2]
>
> 'On the same grounds the Soviet Government deem it not permissible to deprive the peaceful population of foodstuffs, fuel, and clothing, and thus subject children,

[1] See Oxford Pamphlet, No. 24, *Blockade and the Civil Population*, by Sir W. Beveridge; and No. 38, *Britain's Blockade*, by R. W. B. Clarke.

[2] This was written before the Soviet Air Force bombed Helsinki.

women, and aged people and invalids to every hardship and starvation by proclaiming the goods of popular consumption as war contraband.'

From this it will be seen that the Soviet Government has the courage of its convictions because it insists that fuel and clothing as well as food must be let through the blockade. Thus coal for the household stoves, and petrol which is necessary for the distribution of food, must not, according to this view, be kept out of Germany, because otherwise the civilian population will suffer hardship. At first sight this contention seems to be a persuasive one, and it has appealed to some sympathetic persons both here and abroad. Why then was it rejected both by the Allies and the United States in the World War, although they were in agreement that attacks on the civilian population of a belligerent were contrary to the rules of International Law? The answer is that the blockade is not an attack, direct or indirect, on the women and children. No one will deny that as an incident of such a blockade the civilian population may suffer hardship, but such incidental injury is part of every legitimate act of war. International law has always drawn a distinction between the act which has a legitimate war aim, even though it may incidentally injure the civilians, and an act the sole purpose of which is to injure them. If this division were not made then all acts of war would be illegal because all of them might affect civilians. The distinction is one which becomes clear as soon as we test the act by the purpose with which it is done. When a bomb is deliberately dropped on civilians, the intent is to kill

those civilians. It is their death which is the direct and essential purpose, because it is hoped that in this way the morale of the country will be destroyed. On the other hand, the purpose of the food blockade is not to kill the women and children, but to deprive the enemy of essential war material. 'An army, like a serpent, travels on its belly', is Frederick the Great's best-known aphorism, and, unlike many other aphorisms, it is true. By reducing the amount of available food in Germany the efficiency of the army will be directly affected. The Germans have spoken much about women and children, but they seem to have forgotten that the English phrase 'women and children first' means that these should be saved first. If they remember this, then it will be the army and the men working in the armament factories, and not the women and children, who will have to be satisfied with reduced rations. From another standpoint, the problem of foodstuffs is also of direct military importance because fats are essential to the manufacture of explosives. There are sufficient fats in Germany and the countries occupied by her to satisfy the essential needs of every person there. It is only because Germany has used this fat for explosives that there is so serious a shortage. The direct result of sending fats to Germany is therefore, not that a German baby will be kept from starvation, but that a bomb will be manufactured which may kill English women and children.

The German contention that a blockade instituted for such a purpose is illegal cannot be supported by reference to any authority on International Law (except, of course, the recent German books on the

subject). It is noteworthy that the British Government made no such claim when the Germans attempted to blockade Great Britain during the last war: it was the method of the blockade, by submarines and mines, and not its purpose which was challenged.

Inhabitants in Enemy-Occupied Territory

The rules of International Law are not limited to protecting the non-combatant against intentional attacks by the enemy military forces; they also protect him when the enemy has occupied his country. The view that the victor might enslave and pillage the vanquished was rejected both in theory and practice during the eighteenth and nineteenth centuries. This principle, accepted by all civilized countries, was stated in Article XLVI of The Hague Regulations which reads: 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.' That the Nazis have completely disregarded every provision of this Article by their actions in Poland, they themselves have stated with some pride. They have deported hundreds of thousands of the inhabitants, they have pillaged their property, and have destroyed their churches. No attempt to justify these acts from the standpoint of International Law or morality can be made: they can only be explained by the primitive doctrine that the conqueror may destroy the conquered. *Vae victis!*

Acts of War against the Combatant Forces

The laws of war include a large number of rules

which deal with the methods of warfare which one combatant is entitled to use against the other. Thus there are provisions concerning the killing of an enemy who has surrendered, the use of flags of truce, the constitution of the armed forces, spying, &c. In the last war the most disputed question in this branch of the law concerned the nature of the weapons which a belligerent was entitled to use, and as it may arise again in this war it is necessary to deal with it briefly.

The first attempt to limit the type of weapons to be used in war was made in 1868, when the Declaration of St. Petersburg prohibited the use of certain explosive projectiles. In 1899 the First Hague Conference prohibited the use of expanding bullets. It also adopted a Declaration stipulating that the signatory Powers would abstain from the use of projectiles the sole object of which was the diffusion of asphyxiating or deleterious gases. This was not intended as a new rule but merely put into precise form the customary rule prohibiting the use of poison, a rule which has been described as 'one of the oldest and most generally admitted rules of warfare'. In 1907 The Hague Regulations stated in Article XXIII (e) the general principle that 'it is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering'.

What is the test of 'unnecessary suffering'? The German doctrine, as Professor Garner has emphasized,[1] is that 'any instrument or method, the employment of which will contribute to the speedy attainment of the object of war, is permissible

[1] Op. cit., vol. i, p. 280.

whatever may be said against it on humanitarian grounds'. Thus the Imperial German Chancellor stated in the *Reichstag* (March 1916) that 'when the most ruthless methods are considered best calculated to lead us to victory, and a swift victory, they must be employed'. The same genial view was expressed by Field-Marshal von Hindenburg. 'One cannot', he said, 'make war in a sentimental fashion. The more pitiless the conduct of the war, the more humane it is in reality, for it will run its course all the sooner.'

This absolute doctrine has not been accepted by the other nations. They hold that the legality of an instrument of war must be judged from two standpoints: (1) its efficacy, and (2) its humanity. If the efficacy is not sufficient to offset its inhumanity then it must not be employed.

This question became of practical importance when the Germans used flame projectors for the first time in 1915. They claimed that these were not illegal as they served a war purpose, but the Allies took the position that this practice was unlawful because it caused unnecessary suffering. The use of flame throwers was abandoned owing to the strong counter-measures taken by the Allied soldiers.

Of far greater importance was the question of poison gas, which the Germans first used in 1915. This came as a complete surprise to the Allies as this method of warfare was recognized as being unlawful both under The Hague Declaration of 1899, and The Hague Regulations, 1907, and under the general principles of International Law. The German defence, in characteristic fashion, included

the following points: (1) that the Allies had been the first to use poison gas, (2) that The Hague Declaration only prohibited projectiles while the German gas came from cylinders, (3) that the gas used was not poisonous and did not inflict permanent injury on those who inhaled it, (4) that it was necessary for the Germans to use it.

The bitterness which the Allies felt at the use of this method of warfare was increased by the feeling that the Germans had deliberately broken a rule of law which they themselves had taken a part in framing. It is a sound instinct that makes people realize that there is a radical distinction between killing within the law and killing outside the law which is murder.[1] To keep the law is a form of good faith, but the Germans have never recognized that there is any duty to keep faith if this is against the interests of their country. Hitler expressed this view when he said that 'he could conclude any pact and yet be ready to break it the next day in cold blood if that was in the interests of the future Germany'.[2]

In this instance breach of law and breach of faith did not pay Germany because the Allies, as a reprisal, used gas in their turn, and by the end of the war it proved to be one of their most efficient weapons.

[1] It was for this reason that the Nazis attempted to prove that the 'blood bath' of 1934 was legal on the ground that Hitler, as supreme law-giver, had decreed the death of his former associates. Thus Professor Karl Schmitt wrote (The *Times*, July 28, 1934): "The Führer in virtue of his leadership protected the law from the gravest abuse by directly creating law as supreme law lord."

[2] See Oxford Pamphlet, No. 37, *War and Treaties*, by Arnold D. McNair, p. 9.

In June 1925 a number of States, including the Great Powers, met at a conference convened by the League of Nations and signed a Protocol in which they agreed to the prohibition in war of 'asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices'. In September 1939 Germany announced that she would observe the Protocol of 1925 subject to reciprocity. So far she has done so.

Reprisals

The essence of reprisals is that if one belligerent deliberately violates the accepted rules of warfare then the other belligerent, for the sake of protecting himself, may resort by way of retaliation to measures which, in ordinary circumstances, would be illegal. Thus a soldier who shoots at the enemy who is attacking him is not committing an act of reprisal because it is always lawful to shoot the enemy: on the other hand, the destruction of a village because a soldier has been killed in it by a civilian is an act of reprisal, as such destruction would not otherwise be justifiable.

It has occasionally been said that no acts of reprisal are ever justifiable because two wrongs cannot make a right. The answer is that one wrongful act can make the other act rightful. International Law is therefore correct when it speaks of the *right* to reprisal. This right has been exercised by nearly all belligerents in nearly all wars, so that, whether we like it or not, we cannot close our eyes to its existence.

In the last war the British Government exercised the right of reprisal on three major occasions. In

1915 it announced that it would use gas as the Germans had adopted this type of warfare. The Archbishop of Canterbury wrote to the Prime Minister (*The Times*, 17 May 1915) urging him not to use 'the same infamous weapon'. 'Most earnestly do I trust,' he said, 'that we shall never anywhere be induced or driven to a course which would lower us towards the level of those whom we denounce.'

Mr. Asquith replied:

> 'The new developments on the part of our enemy, to which you refer, in the scientific organization of barbarism . . . have aroused in our people a temper of righteous and consuming indignation, for which—I believe—there is no precedent or parallel in our national history.
>
> ' "Let not the sun go down upon your wrath" is a precept which rebukes the petty, personal, unreasoning quarrels of social and national life. But it has no application when the issue is such that freedom, honour, humanity itself is at stake.'

The next day Earl Kitchener announced (*The Times*, 19 May 1915) in the House of Lords that 'our troops must be adequately protected by the employment of similar methods so as to remove the enormous and unjustifiable disadvantage' under which they now suffered. No further protests were made against this reprisal, except by the Germans.

The second British reprisal concerned the German submarine campaign. On 2 February 1915 Germany declared her intention to destroy without warning all enemy merchant vessels which might be found in the waters around the United Kingdom. The British Government thereupon issued the famous Reprisals Order in Council of 11 March

1915 which announced that all goods of enemy destination, origin, or ownership would be detained. This involved a far-reaching extension of the right to seize contraband, but was justified as a reprisal. As Mr. Balfour said in an article in *The Times* (29 March 1915): 'If the rules of warfare are to bind one belligerent and leave the other free, they cease to mitigate suffering; they only load the dice in favour of the unscrupulous.'

The third British reprisal was the air raid upon Freiburg i. Br. on 14 April 1917, in which a number of civilians were killed. This was announced to be a reprisal for the torpedoing of the hospital ships *Gloucester Castle* and *Asturias*. 'It was intended,' Lord Curzon explained in the House of Lords on 2 May 1917, 'as a deterrent to prevent the enemy from repeating his crimes against humanity.'

Of these three reprisals it may be said that the two first were essential steps in winning the war. If Germany had been allowed to carry on her poison-gas and submarine warfare without retaliation by Great Britain, she would thereby have obtained an advantage which would have made the difference between defeat and victory. Whether or not the third reprisal proved of any practical value is doubtful.

The threat of reprisals was also exercised by the British Government on a number of other occasions. Thus when the Germans executed Captain Fryatt in 1915, the Prime Minister's statement that retaliatory steps would be taken in the future if the Germans continued such acts was sufficient to stop further judicial murders. Similarly when in 1917

the Germans threatened that British aviators, who were captured while dropping propaganda leaflets over the enemy lines, would be sentenced to death, the threat of reprisal caused a change in the German attitude.

These various instances illustrate the grounds on which retaliation may be justified. The first is that, as a deterrent, it may induce the enemy to give up his illegal conduct. The second is that it will prevent him from obtaining an unfair advantage in the prosecution of the war. The third is that it is an expression in action of the righteous indignation of the people. The demand for just retribution must be distinguished from the desire for revenge. On this point Sir John Salmond wrote (*Jurisprudence*, 9th ed., p. 147):

> 'Indignation against injustice is, moreover, one of the chief constituents of the moral sense of the community, and positive morality is no less dependent on it than is the law itself. It is good, therefore, that such instincts and emotions should be encouraged and strengthened by their satisfaction. . . . There can be little question that at the present day the sentiment of retributive indignation is deficient rather than excessive, and requires stimulation rather than restraint.'

In times of war this sentiment of retributive indignation can only find expression in the form of reprisals.

This does not mean that all reprisals are justified. There are two conditions which must be fulfilled. The first is that the illegal conduct of the enemy must be clearly proved, and the second is that the action which the retaliating State takes is proper as a measure of reprisals. The violation of both these

conditions is illustrated in the infamous destruction of Louvain by the Germans in the last war. Although they claimed that this was a justifiable reprisal for the shooting of German soldiers by Belgian civilians, their action evoked protests throughout the civilized world. This was due to the realization that in the first place it was more than doubtful whether any Belgian civilians had fired on the Germans, and that in the second the reprisal was out of all proportion to the injury suffered. It was therefore accepted by the world as an example of German *Schrecklichkeit* which was intended to overawe the inhabitants by its brutality.

In view of these various considerations the determination whether or not retaliation is justifiable under particular circumstances is frequently a matter of difficulty. But even when it has been decided that retaliation is justified, a Government may hesitate to engage on a course which is likely to lead to a competition in brutalities. The United States *Rules of Land Warfare* therefore prescribe that retaliation shall only be taken as a last resort:

> 'Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.'

Belligerent Acts against Neutrals[1]

The problem of neutral rights during a war has given rise to great difficulty because it involves an

[1] See Oxford Pamphlet, No. 17, *The Blockade 1914–1919*, by W. Arnold-Forster.

inevitable conflict. The position of the neutral is that, as he is not concerned with the war, it is the duty of the belligerents to do nothing which may interfere with his normal rights, while on the other hand each of the belligerents claims that it is his legitimate right to destroy the enemy's commerce even though this may interfere with the neutral's trade. International law has therefore worked out a series of compromises which are embodied in the rules relating to blockade, contraband, and unneutral service.

In the last war the United States protested that both Great Britain and Germany were violating her rights as a neutral, Great Britain by an unjustifiable extension of the doctrine of contraband and Germany by her unrestricted submarine warfare. Why then, if she claimed that both the belligerents were guilty of violations, did the United States ultimately enter the war on the side of the Allies? The answer can be given in Professor Hyde's words:[1]

> '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. 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.

President Wilson expressed this same view in his *Lusitania* note of 7 May 1915:

> '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

[1] Op. cit., p. 427.

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 behalf of those under its care and authority.'

It was because the German Government refused to recognize these rights of humanity that the United States finally declared war. In this instance, therefore, the German doctrine that the justification for acts of war depends on their efficacy alone and is not affected by their inhumanity received its condign answer. Frightfulness does not always pay.

After the war the maritime Powers wished to make it certain that unrestricted submarine warfare would never again take place. They therefore entered into the London Naval Treaty of 1930 which provided that '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'. In 1936 Germany acceded to this Protocol. On Monday, 4 September 1939, one day after the present war began, a German submarine torpedoed without warning the passenger-vessel *Athenia* with the loss of 400 lives.

Conclusion

This summary of some of the laws of war shows that they have been recognized as binding by the nations, and that 'they do make a certain difference'. The most important of them is the rule that non-combatants must not be made the object of direct attack by the armed forces of the enemy. In his well-known work *War Rights On Land* Dr. J. M.

Spaight said (p. 37): 'The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable'. The Nazis in their indiscriminate aerial bombardment and unrestricted submarine warfare have disregarded this distinction, but this need not make us despair for the future. International Law as recognized by the civilized nations will not cease to exist merely because one State has deliberately violated its provisions. It is true that in the last war Germany broke many of these rules, but it is equally true that this disregard contributed materially to her ultimate defeat. In the present war she has again broken the laws of war, but this is hardly surprising as they are based on 'the dictates of religion, morality, civilization and chivalry'. It is to re-establish these in a world threatened with barbarism that this war is being fought.