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INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

VOLUME TWO

INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

BY

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IN TWO VOLUMES

VOLUME TWO

BOSTON
LITTLE, BROWN, AND COMPANY
1922

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Norwood Press
Set up and electrotyped by J. S. Cushing Co.,
Norwood, Mass., U.S.A.

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LIST OF ABBREVIATIONS

TOGETHER WITH DESCRIPTIONS OF THE PRINCIPAL COLLECTIONS OF DOCUMENTS CITED IN ABBREVIATED FORM

This list does not embrace titles which are sufficiently described when cited in the foot-notes. It is not a bibliography of the several works to which reference is made in the text and foot-notes. Nor does it purport to explain the well known abbreviations of the reports of American and British cases.

Am.	American.
Am. Hist. Rev.	American Historical Review, 1895–
Am. J.	American Journal of International Law. New York, 1907–
Am. State Pap. For. Rel.	American State Papers, Class I, Foreign Relations. Documents Legislative and Executive of the Congress of the United States, 1789–1828. 6 folio vols. Washington, 1832–1859.
American White Book, European War.	United States, Department of State: European War. Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, and Commerce. 4 White Books, May 27, 1915–May 18, 1918.
Am. Law Reg.	See Univ. Penn. Law Rev.
Am. Law Rev.	American Law Review. Boston, 1866–1882, St. Louis, 1883–
Am. Pol. Sc. Rev.	American Political Science Review. Baltimore, 1907–
Alvarez.	Alvarez, Alejandro: *Le droit international américain.* Paris, 1910.
Annuaire.	*Annuaire de l'Institut de Droit International,* 1877–
Arch. Dip.	*Archives Diplomatiques.* Founded in 1861. Three series. Paris, 1861–1913.
Baker.	Sir Sherston Baker: First Steps in International Law. Boston, 1899.
Bluntschli.	Johann Kaspar Bluntschli: *Le Droit International Codifié.* Translated from the German into French by C. Lardy, and preceded by a biography of the author by Alph. Rivier. Fifth edition. Paris, 1895.
Bonfils-Fauchille.	Henry Bonfils: *Manuel de Droit International Public.* Seventh edition by Paul Fauchille. Paris, 1914.

Borchard, Diplomatic Protection.	Edwin M. Borchard: The Diplomatic Protection of Citizens Abroad or the Law of International Claims. New York, 1915.
Brit. and For. St. Pap.	British and Foreign State Papers. Issued by the Foreign Office of Great Britain. London.
Calvo.	Charles Calvo: *Le Droit International théorique et pratique.* Fifth edition. 6 vols. Paris, 1896.
Catalogue of Treaties.	United States, Department of State: Catalogue of Treaties (1814–1914). Confidential document. Washington, 1919.
Cd. or Cmd.	Great Britain, Parliament. Papers issued by command.
Charles' Treaties.	Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other powers: Supplement, 1913, to Senate Document No. 357, Sixty-first Congress, Second Session. Compiled by Garfield Charles. Senate Document No. 1063, Sixty-second Congress, Third Session. Washington, 1913.
de Clercq.	*Recueil des Traités de la France.* Published under the auspices of the Ministry of Foreign Affairs. Compiled by A. J. H. de Clercq and Jules de Clercq. 1864–1907.
Clunet.	*Journal du Droit International Privé et de la Jurisprudence Comparée.* Founded in 1874, and published by Édouard Clunet, and from 1915 (42d year) entitled *Journal du Droit International.* Paris.
Clunet, Tables Générales.	*Tables Générales du Journal du Droit International Privé.* Augmented by several reports and numerous documents concerning international law, 1874–1904. 4 vols. Paris, 1905–1906.
Pitt Cobbett, Cases.	Pitt Cobbett: Cases and Opinions on International Law. Third edition, 2 vols. London, 1909–1913.
Collezione Celerifera.	*Collezione Celerifera delle Leggi, Decreti, Istruzione e Circolari.* Editor: Domenico Scacchi. Rome, 1915–
Cong. Record.	United States: Congressional Record.
Crandall, Treaties.	Samuel B. Crandall: Treaties, Their Making and Enforcement. Second edition. Washington, 1916.
"Cyc."	Cyclopedia of Law and Procedure. Editor-in-Chief, William Mack. 40 vols. New York, 1901–1912.
Davis.	George B. Davis: Elements of International Law. Third edition, New York, 1908.

	Fourth edition edited and revised by Gordon E. Sherman. New York, 1916.
Despagnet.	Frantz Despagnet: *Cours de Droit International Public.* Fourth edition revised and augmented by Ch. de Boeck. Paris, 1910.
Dana's Wheaton.	See Wheaton.
Dip. Cor.	Diplomatic Correspondence of the United States, 1783–1789. 3 vols. Washington, 1837. or, Diplomatic Correspondence of the United States, published by the Department of State for the years 1861–1868. No volume was published for the year 1869.
Evans, Int. Law Cases.	Lawrence B. Evans: Leading Cases on International Law. Chicago, 1917.
Fenwick.	Charles G. Fenwick: The Neutrality Laws of the United States. Washington, 1913.
Field.	David Dudley Field: Outlines of an International Code. Second edition. New York, 1876.
Fiore.	Pasquale Fiore: *Nouveau Droit International Public.* Second edition. Translated into French by Chas. Antoine. 3 vols. Paris, 1885–1886.
Fiore, Code.	Pasquale Fiore: International Law Codified and Its Legal Sanction. English translation from the fifth Italian edition with an introduction by Edwin M. Borchard. New York, 1918.
For. Rel.	United States, Department of State. Papers Relating to the Foreign Relations of the United States, 1870– (The volume for the year 1913 was the latest one published during 1920.)
Foulke.	Roland R. Foulke: International Law. 2 vols. Philadelphia, 1920.
Garner, Int. Law and The World War.	James W. Garner: International Law and The World War. 2 vols. New York and London, 1920.
Hall.	William Edward Hall: International Law. Seventh edition edited by A. Pearce Higgins. Oxford, 1917.
Halleck.	Henry Wager Halleck: International Law or Rules Regulating the Intercourse of States in Peace and War. Third edition by Sir G. Sherston Baker. London, 1893. Fourth edition by Sir G. Sherston Baker, assisted by M. N. Drucquer. 2 vols. London, 1908.
Harv. Law Rev.	Harvard Law Review. Cambridge (Mass.), 1887–
Heffter.	August Wilhelm Heffter: *Das Europäische*

	Völkerrecht der Gegenwart. Eighth edition by F. H. Geffcken. Berlin, 1888.
Hershey.	Amos S. Hershey: The Essentials of International Law. New York, 1912.
Hertslet's Commercial Treaties.	A collection of the Treaties and Conventions, and Reciprocal Regulations, subsisting between Great Britain and Foreign Powers. London, 1820– The original compiler was Lewis Hertslet. The present editors and compilers are Edward Parkes and W. L. Berrow.
Hertslet's Map of Europe by Treaty.	The Map of Europe by Treaty. Showing the various political and territorial changes which have taken place since the general peace of 1814. Compiler, Sir Edward Hertslet. 4 vols. London, 1875–1891.
Higgins, Hague Peace Conferences.	A. Pearce Higgins: The Hague Peace Conferences and other international conferences concerning the laws and usages of war; texts of conventions with commentaries. Cambridge (Eng.), 1909.
Holland, Studies.	Thomas Erskine Holland: Studies in International Law. Oxford, 1898.
Holland, War and Neutrality.	Same author: Letters to *The Times* upon War and Neutrality. Second edition. London, 1914 (with a Supplement to 1916. London, 1917).
Holls.	Frederick William Holls: The Peace Conference at the Hague. New York, 1900.
Hurst and Bray's Russian and Japanese Prize Cases.	Russian and Japanese Prize Cases. (Being a collection of translations and summaries of the principal cases decided by the Russian and Japanese Prize Courts arising out of the Russo-Japanese War, 1904–1905.) Editors: C. J. B. Hurst and F. E. Bray. 2 vols. London. 1912–1913.
Ills. Law Rev.	Illinois Law Review. Chicago, 1906–
Int.	International.
Int. Law Assoc. Reports.	International Law Association (The Association for the Reform and Codification of the Law of Nations), Conferences, 1873–
Jacomet.	Robert Jacomet: *Les Lois de la Guerre Continentale.* Paris, 1913.
Jour. Comp. Leg.	Journal of Comparative Legislation and International Law (prior to 1918 entitled Journal of the Society of Comparative Legislation). London. First Series, 1896–1897; "New Series", 1899–1918; Third Series, 1919–
Kent.	James Kent: Commentary on International Law. Second edition by J. T. Abdy. Cambridge (Eng.), 1878. Cited as Abdy's Kent.

Kleen.	Richard Kleen: *Lois et Usages de la Neutralité d'après le Droit International, Conventionnel et Coutumier des États civilisés.* 2 vols. Paris, 1898–1900.
Lawrence.	Thomas J. Lawrence: Principles of International Law. Third edition, Boston, 1900. Fourth edition, London, 1911. Sixth edition, Boston, 1915.
Lawrence's Wheaton.	See Wheaton.
Law Quar. Rev.	The Law Quarterly Review. London. 1885–
Liszt.	Franz von Liszt: *Das Völkerrecht systematisch dargestellt.* Ninth edition, Berlin, 1913. Eleventh edition, Berlin, 1920.
Lorimer.	James Lorimer: The Institutes of the Law of Nations. 2 vols. Edinburgh, 1883–1884.
Magoon, Reports.	Charles E. Magoon: Reports on the Law of Civil Government under Military Occupation. Washington, 1902.
Maine.	Sir Henry Sumner Maine: International Law. New York, 1888.
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MS. Dom. Let.	United States, Department of State. Manuscript Domestic Letters.
MS. Inst.	United States, Department of State. Manuscript Instructions.
MS. Misc. Let.	United States, Department of State. Manuscript Miscellaneous Letters.
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Martens.	F. de Martens: *Traité de Droit International.* Translated from the Russian into French by Alfred Léo. 3 vols. Paris, 1883–1887.
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Minn. Law Rev.	Minnesota Law Review. Minneapolis, 1917–
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	United States has been a party, together with appendices containing the treaties relating to such arbitrations, and historical and legal notes on other international arbitrations ancient and modern, and on the domestic commissions of the United States for the adjustment of international claims. House Misc. Doc. No. 212, Fifty-third Congress, Second Session. 6 vols. Washington, 1898.
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	Oakes and R. B. Mowat, with an introduction by Sir H. Erle Richards. Oxford, 1918.
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	Nouveaux Supplémens au Recueil de traités, etc. 3 vols. Göttingen, 1839–1842. Compiler: F. Murhard. Cited as *Nouv. Rec. Supp.*
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	Rome, 1906–1910; Second Series, Rome, 1912-
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U. S. Comp. Stat. 1919 Sup.	1919 Supplement to U. S. Compiled Statutes, 1918 Compact Edition. St. Paul, 1919.
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INTERNATIONAL LAW

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

VOLUME TWO

PART V

AGREEMENTS BETWEEN STATES

TITLE A

§ 489. Preliminary. Nature of Contractual Obligations.

Agreements between States are a necessary incident of international intercourse, and increase in number and variety as that intercourse expands and produces a consciousness of mutual dependency. In scope and design such compacts have recorded with precision the changing needs of the international society, reflecting the extent of the progress of individual States on the pathway from isolation to intimacy of association with other nations. The treaties of a State are the milestones which mark its movement in relation to the outside world and which reveal the direction it has chosen.

The disposition of States to contract with each other, and their habitual recourse to such action, have been due to a wide perception of the common advantage derivable from undertakings to limit reciprocally individual freedom of action, and to confidence in the efficacy of such means to fix restraints not otherwise to be established save by the sword. The number of agreements concluded since the beginning of the nineteenth century testifies to the conviction of statesmen that international compacts are capable

of operating as such a deterrent. Because there has been found to be a readiness on the part of States to acknowledge that an obligation of an essentially legal character, possessing the quality which the law familiarly attaches to contracts between individuals, should be deemed to be impressed upon public international agreements, it has proven desirable as well as feasible for nations to negotiate them. Treaties are thus concluded, because in the minds of the contracting parties their undertakings are to be performed, and because the right of non-performance is given up.[1]

That unscrupulous States have shown contempt for valid compacts when it was believed that their provisions could be safely or advantageously ignored, is not proof that enlightened Powers have been or remain generally disposed to act on such a principle. Nor is the absence of a sanction established by law indicative that no burden or restraint of a legal nature is imposed upon a State which consents to bear or respect it. The family of nations has acted upon a different theory. Practice has long revealed the habits of its members to perform from a sense of obligation, to which must be ascribed the character of law, numerous duties not enforcible by judicial process or by the application of

[1] In a conference at the White House, Aug. 19, 1919, between President Wilson and members of the Senate Committee on Foreign Relations, with respect to the pending treaty of peace with Germany, the President declared with reference to Art. X ("to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League") that the undertaking of the United States, should it ratify the treaty, would constitute "a very grave and solemn moral obligation." "But it is a moral, not a legal, obligation," he said, "and leaves our Congress absolutely free to put its own interpretation upon it in all cases that call for action. It is binding in conscience only, not in law." In response to an inquiry from Senator Borah, the President stated that the reason why the obligation expressed in Art. X was simply a moral obligation, was the circumstance that "there is no sanction in the treaty." Thereupon, Senator Borah asked: "But that would be a legal obligation so far as the United States was concerned if it should enter into it; would it not?" The President answered: "I would not interpret it in that way, Senator, because there is involved the element of judgment as to whether the territorial integrity or existing political independence is invaded or impaired. In other words, it is an attitude of comradeship and protection among the members of the League, which in its very nature is moral and not legal." Senate Doc. No. 106, 66 Cong., 1 Sess., 502 and 509. Also *id.*, 515.

Apart from the matter of the interpretation of the Article discussed, it may be doubted whether the reason given by the President for the distinction which he drew has met with general support, or commends itself for adoption. To demand a sanction as a condition precedent for a legal obligation imposed by treaty or otherwise, is to reverse the principle upon which enlightened States embracing the United States have found it necessary to act.

"Every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of International Law in regard to observance of treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by Parlia-

any force applied by the arm of the law.[1] Recognition of legal restraints arising from treaty has thus been a natural consequence of an experience characterized by an acknowledgment of the legal nature of obligations not recorded in definite agreements, and for which, nevertheless, the society of nations has united in demanding observance.[2]

"The contracts of States are not tied to any form."[3] Those expressed in documents vary greatly in kind and formality. Many are not recorded. While the more important international agreements are embodied in treaties, it will be found that the compacts properly so described comprise but a part of the contracts by means of which States have generally undertaken to regulate their conduct with respect to each other.[4]

mentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisal, etc." Award of Tribunal in North Atlantic Coast Fisheries Arbitration, Sept. 7, 1910, G. G. Wilson, Hague Arbitration Cases, 145, 166.

See, also, in this connection, Jean Otételéchano, *De la Valeur Obligatoire des Traités Internationaux*, Paris, 1916, Chap. I.

[1] "Law does not cease to exist merely because it is broken, or even because, for a time, it may be broken on a large scale; neither does the escape of some criminals abolish penal justice. No country is so well ordered that offences are not frequently committed, or that wilful and concerted resistance to the law never occurs. Concerning the law of nations, the wonder is not that it should be broken, but that, down to the present war, it should have been fairly well observed by most nations and ostensibly respected by all, in spite of lacking any defined sanction." Sir Frederick Pollock, in his Introduction to Coleman Phillipson's 5th English edition of Wheaton, xli.

[2] If, at the beginning of the present century, there was real doubt in Europe or America as to the legal nature of the obligation attaching to a treaty, the response of Great Britain and its Allies to the appeal of Belgium in 1914 made clear the fact that a group of enlightened States was committed to a different doctrine.

The Commission of the Peace Conference on the Responsibility of the Authors of the War and on Enforcement of Penalties concluded 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." In a Memorandum presented by the American representatives on the Commission, Messrs. Robert Lansing and J. B. Scott, and annexed to the Report, the opinion was expressed that "these acts should be condemned in no uncertain terms and that their perpetrators should be held up to the execration of mankind." Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Violation of the Laws and Customs of War, Oxford, 1919, 20 and 63. It is to be regretted that the Treaty of Versailles did not, in addition to its provisions for reparation and restoration, give definite expression to these recommendations.

"In fact the war began in order to enforce upon Germany respect for the solemn treaty she had made nearly 80 years before in regard to the neutrality of Belgium." Note of Premiers Millerand and Lloyd George, addressed to the United States, Feb. 17, 1920, in relation to the Fiume controversy, Congressional Record, LIX, 3784, 3785, Feb. 27, 1920.

[3] Westlake, Int. Law, 2 ed., I, 290.

[4] "In diplomatic literature, the words 'treaty', 'convention', and 'protocol' are all applied more or less indiscriminately to international agreements.

The words 'convention' and 'protocol' are indeed usually reserved for agreements of lesser dignity, but not necessarily so. In the jurisprudence of the United States, however, the term 'treaty' is properly to be limited, although the Federal statutes and the courts do not always so confine it, to agreements approved by the Senate. Such an agreement may be and often is denominated a 'convention', and perchance might be called 'protocol'; but it is also, by reason of its approval by the Senate, in the strict sense a 'treaty', and possesses, as the product of the treaty-making power, a specific legal character." J. B. Moore, in *Pol. Sc. Q.*, Sept. 1905, XX, 385, 388.

TITLE B

VALIDITY

1

§ 490. Restrictions of International Law.

If international law obtains among enlightened States, it is not unreasonable to assert that that law may denounce as internationally illegal agreements which are concluded for the purpose of securing the performance of acts acknowledged to be lawless and contemptuous of fundamental principles of justice.[1]

Heretofore, however, statesmen have at times not been deterred from the endeavor to bind the States which they represented to undertakings which paid scant regard for the most solid rights of other powers.[2] While the latter have not, through such action, been deprived of the right to challenge the validity of the agreements, the contracting States have not infrequently, by reason of their united strength and purpose, been able to achieve their designs at the expense of the countries which it was sought to despoil or otherwise injure.[3]

[1] Hall, Higgins' 7 ed., § 108, p. 337, where it is said that "the requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. Thus a treaty is not binding which has for its object the subjugation or partition of a country, unless the existence of the latter is wholly incompatible with the general security; and an agreement for the assertion of proprietory rights over the open ocean would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law." See, also, Bonfils-Fauchille, 7 ed., § 819; Oppenheim, 2 ed., I, §§ 505–506.

[2] It may be noted that the resolution by which the Senate on Feb. 18, 1916, advised and consented to the ratification of the convention with Nicaragua of Aug. 5, 1914, providing for the cession of rights for the construction of a ship canal by a Nicaraguan route, the lease of certain islands, and the right to establish a naval base on the Gulf of Fonseca, declared that advice and consent were given with the understanding that nothing in the convention was "intended to affect any existing rights" of Costa Rica, Salvador and Honduras. See, in this connection, Costa Rica *v.* Nicaragua, Central American Court of Justice, September, 1916, *Am. J.*, XI, 181, 229; Comment on the case by Philip M. Brown, *id.*, 156; Republic of El Salvador *v.* Republic of Nicaragua, Central American Court of Justice, March, 1917, *id.*, 674, 730.

[3] See, in this connection, Ronald F. Roxburgh, International Conventions and Third States, London, 1917, §§ 23, 24, 25, and 71.

As between contracting States it has been difficult to urge the international illegality of an undertaking as a reason for its invalidity. Signatory parties are not disposed to refer to an arbitral tribunal the question whether their compact is at variance with international law. There has been no well-defined process whereby the validity of treaties between ruthless States could be tested, and their provisions, when in defiance of the law of nations, be denounced accordingly. Heretofore, in practice, the mode of rendering inoperative such compacts has been through the intervention of outside States; and that has at times sufficed to thwart the commission of internationally illegal acts pursuant to internationally invalid agreements.[1] Interference, in such cases, appears to have been primarily designed to oppose conduct for which provision was made in treaty, rather than to attack the inherent impropriety of the agreement itself.

It should be observed, however, that any agreement which purports to do violence to the underlying principles of international law, must to that extent be regarded by the family of nations as internationally invalid. This is none the less true even though the contracting parties are not disposed to make such a claim.

§ 491. Restrictions Imposed by a General Convention. The Covenant of the League of Nations.

A group of States may doubtless, through a general convention, prescribe a course of action to be pursued as a condition to the conclusion of binding compacts. Article XVIII of the Covenant of the League of Nations is illustrative of such an attempt. It was there announced that every treaty or international engagement entered into thereafter by any member of the League should be forthwith registered with the Secretariat, and as soon as possible be published by it. It was provided that no such agreement should "be binding until so registered."[2]

[1] See, for example, the action of President Wilson with respect to the reliance of Great Britain and France upon the Treaty of London of 1915, as a basis for the adjustment of the territorial limits of the Serb-Croat-Slovene Kingdom, and set forth in communications sent in his behalf to the British and French Governments, Feb. 10, and Feb. 24, 1920. For the correspondence touching the controversy, see Congressional Record, Feb. 27, 1920, LIX, 3779–3787.

[2] See also Art. XIX by which the Assembly was to be permitted, from time to time, to advise the reconsideration by Members of the League of treaties which might become inapplicable, as well as Art. XX, embracing the agreement of the Members of the League severally, that the Covenant should

The object of this provision was to retard the conclusion of secret agreements designed to frustrate the operation of the League.[1] It should be observed, however, that the Article did not purport to render invalid a treaty which was not registered with the Secretariat, but rather to cause it to be voidable should a party to the agreement appropriately and in season so elect. Thus an engagement not so registered might be fairly deemed to resemble a contract between private individuals, which although not invalid, is rendered unenforcible through the failure of the parties to heed the requirements of a statute of frauds.

3

§ 492. **Capacity to Contract.**

The power of a State to contract a valid engagement with another may be impaired by reason of the dependence of the former upon an independent State.[2] The external control lawfully exercised over the foreign relations of the dependent may preclude the exercise by it of the agreement-making power, or the arrangement fixing the status of dependency may limit the field within which the inferior State is free to contract. Thus Cuba, following its constitutional declaration of June 12, 1901, and its treaty with the United States of May 22, 1903, embodying the so-called Platt Amendment, relinquished capacity to enter into a valid treaty with any foreign power which would impair or tend to impair Cuban independence, or which would permit such power to obtain by colonization, or for military or naval purposes, or otherwise, lodgment in or control over any portion of the island.[3]

Grounds of expediency render it unlikely that an independent State will attempt to conclude a treaty with a dependent or in-

be accepted as abrogating all obligations or undertakings inconsistent with the terms thereof, and the undertaking to refrain from entering into engagements thereafter inconsistent with those terms. The same Article provided that if any Member prior to attaining membership in the League had undertaken any obligations inconsistent with the terms of the Covenant it should be the duty of such Member to secure its release therefrom.

It is not without significance that Article XXI announced that nothing in the Covenant should be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.

[1] See Memorandum approved by the Council of the League of Nations at Rome, May 19, 1920, concerning the registration of treatics as prescribed under Art. XVIII of the Covenant. League of Nations, Official Bulletin, No. 4, June, 1920, p. 154.

[2] Hall, Higgins' 7 ed., § 108.

[3] Arts. I and II, Malloy's Treaties, I, 363. See *supra*, § 19.

ferior State without the consent of its superior, or an agreement which embraces provisions which the inferior State is known to lack the capacity to accept.

In the negotiation of treaties with dependent States the burden rests upon the other contracting parties to ascertain the scope of the agreement-making power retained by the former, as well as the mode by which it is to be exercised. An agreement which did, however, by its terms call for the commission of acts which a dependent State technically lacked the capacity to undertake to perform, might, nevertheless, be regarded as voidable at the election of the superior State, rather than as necessarily void.

4

§ 493. Consent.

States, like individuals, must necessarily consent to the agreements to which they become parties. A man who has been compelled to enter into a contract by reason of unlawful interference with his person or property, is permitted, according to the more modern cases, to avoid his contract because of the motive which induced his acquiescence.[1] Proof of duress will free him from the burden of performance.

There is deemed to be slight opportunity for the application of this principle in the conclusion of agreements between States. Acts which virtually make possible the perfecting of the contractual relationship are rarely committed to negotiators. Thus the forcing of such individuals, through personal intimidation, to sign a treaty, does not possess much significance when the State which they represent retains the right of ratification, and does not purport to bind itself until that right has been exercised. If, however, in a particular case, the right to perfect an agreement in behalf of the State were lodged in a plenipotentiary who was compelled through fear of injury to his person to accept its terms, his principal would doubtless thereby acquire the right to avoid the contract.[2]

The motives which compel a State as a whole to exercise its agreement-making power in such a way as to accept a treaty, are not deemed to affect the validity of the agreement. Thus the desire to end a war, the continuation of which threatens disaster

[1] Harriman on Contracts, 2 ed., 255–256, and cases there cited.

[2] Bonfils-Fauchille, 7 ed., § 818; S. B. Crandall, Treaties, 2 ed., § 5; Hall, Higgins' 7 ed., § 108; Oppenheim, 2 ed., I, §§ 499–500; Dana's Wheaton, § 267; Woolsey, 6 ed., § 104.

to an unsuccessful belligerent, may induce it to agree to burdensome terms of peace. The validity of the agreement is not impaired by the reasons which forced acquiescence. Such appears to be accepted doctrine.

It may be doubted, however, whether the belligerent right is unlimited. It has been observed that since the beginning of the present century, and notably since the outbreak of The World War, the international society has become increasingly reluctant to admit the right of a conqueror to force the cession of territory from an enemy of alien race without the consent of the inhabitants. The United States at the present time vigorously denies such a right.[1] Should a treaty be the instrumentality employed to accomplish what the law of nations might in this regard ultimately denounce, the agreement would to that extent seem to be internationally illegal, or as voidable at the election of the State compelled to make the transfer. Events of The World War, with respect to Alsace-Lorraine and Poland, justify the conclusion of fact that peoples compelled by force to consent to yield their territory to alien rulers long retain the belief that, regardless of the terms of the agreement, no impropriety attaches to the effort to regain their loss. Respect for the sanctity of treaties is not enhanced by engagements which impose terms which the nationals of one contracting party deem it desirable and praiseworthy to defy, whenever a favorable opportunity however long delayed presents itself.

5

§ 494. Constitutional Limitations.

An independent State is deemed to possess the broadest right to enter into international agreements. Its constitution may, however, in various ways limit and regulate the exercise of the right, restricting the conclusion of treaties designed to effect certain objects, or prescribing the method by which the State shall give its consent to certain classes of engagements. An unconstitutional treaty must be regarded as void.[2] The nature and

[1] See Cession, Validity, The Principle of Self-Determination, *supra*, §§ 108–109.

[2] "Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would simply be void." Fuller, C. J., in Downes *v.* Bidwell, 182 U. S. 244, 370. "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." Swayne, J., in The Cherokee Tobacco, 11 Wall. 616, 620.

Also Mr. Blaine, Secy. of State, in For. Rel. 1881, 335, 337. See, also The

extent of the limitations which the document setting forth the fundamental law of the State has imposed, become, therefore, matters of concern to all foreign powers with which it may have occasion to contract.

6

CONSTITUTIONAL LIMITATIONS OF THE UNITED STATES

a

§ 495. Provisions of the Constitution.

The Constitution of the United States declares that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur";[1] also, that "no State shall enter into any Treaty, Alliance, or Confederation";[2] and that "no State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[3] It is announced that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[4]

b

§ 496. Limitations of the Agreement-Making Power of the United States as a Whole.

When the United States came into being it must be assumed that the State as a whole acquired automatically the full power to conclude agreements which was possessed by other independent States. Somewhere in the Union there existed a right in this regard which was no narrower in scope than that enjoyed and exercised by France or Great Britain.

The inquiry arises as to what extent, through the adoption

Treaty-making Power in Various Countries: a collection of memoranda concerning the negotiations, conclusion, and ratification of treaties and conventions, with excerpts from the fundamental laws of various countries, Department of State, 1919.

[1] Art. II, Section 2, paragraph 2.
[2] Art. I, Section 10, paragraph 1.
[3] Art. I, Section 10, paragraph 3.
[4] Art. VI, paragraph 2.

of the Constitution, the United States as a whole undertook to restrain itself, by any process, from the exercise of the privilege of concluding international agreements. In a broad sense this inquiry does not concern the scope of a particular instrumentality or agency of the nation (such as the President with the aid of the Senate) to contract in its behalf; and it is obviously unrelated to problems respecting the manner and form of contracting. It pertains solely to the effect sought to be produced by the Constitution upon the agreement-making power possessed by the State as a whole. While it may have been the design to entrust all of that power, in so far as it was to be normally exercised, to a particular agency (the National Government), confiding to it the conclusion of all engagements which were to be contracted in behalf of the nation, the preliminary question still presents itself as to the extent to which it was sought, expressly or by implication, to curtail the vast agreement-making power that existed when the Constitution was adopted. There must be general reluctance to impute to the framers of the Constitution a design to fetter the United States in such a way as to deprive it of the power to regulate by convention matters so dealt with by other States as a normal and necessary incident of international intercourse. Such an inference is not lightly to be deduced from a document making provision for the conclusion of agreements, and specifying no classes of them which should be deemed to be forbidden, save in the prohibitions addressed to the States. There appears to have been contemplated no restriction upon the power to contract except when the exercise of it might be at variance with the fundamental principles of the Constitution itself. The exception is doubtless a real one. As Calhoun once declared, the nation "can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution-making power, or which is inconsistent with the nature and structure of the Government."[1] It may be unnecessary to attempt to enumerate or classify agreements which might reasonably fall within such a category. In recognizing the existence of the agreement-making power of the nation as a whole, the Constitution made provision for its exercise with what may appear to have been a singular omission of definite abridgment. The only limitations to be implied were those precluding agreements striking at the very root of the instrument

[1] Works of John C. Calhoun, I, 204.

itself and defying the principles which it ordained.[1] Thus far there have been no attempts through the united effort of the President and the Senate to bind the United States to agreements of such a kind; nor is there reason to believe that such an attempt is to be anticipated.

c

Matters Pertaining Directly to Affairs of States of the Union

(1)

§ 497. The Principle Involved.

The question arises whether, under the Constitution, all agreements which can be validly made in behalf of the whole United States, can be made by the National Government in virtue of its possession of the treaty-making power, even when the compacts concern immediately and to a peculiar degree the affairs of the States of the Union.[2] The question may assume this form:

[1] Declared Clifford, J., in Holden *v.* Joy, 17 Wall. 211, 243: "Inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States." See, also, Taney, C. J., in Holmes *v.* Jennison, 14 Pet. 540, 569.

Declared Field, J., in Geofroy *v.* Riggs, 133 U. S. 258, 266–267: "That the treaty power extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

"It seems fairly obvious that it would not be possible through the exercise of the treaty-making power to unseat a State governor or to alter substantially the machinery of State government. Similarly, it would probably be impossible to violate, even through the plenary treaty-making power, those fundamental and express prohibitions of the Constitution such as the Thirteenth and Eighteenth Amendments; there is little doubt but that a treaty provision introducing slavery into the United States would be void, — municipally if not internationally." Note, *Harvard Law Rev.*, XXXIII, 281, 284, December, 1919.

[2] See, in this connection, Chandler P. Anderson, "The Extent and Limitations of the Treaty-Making Power under the Constitution", *Am. J.*, I, 636; Charles H. Burr, The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States,

May a treaty concerning affairs regarded as local to a State, and which the Congress could not constitutionally control by enactment, be validly concluded by the President with the approval of the Senate, without the consent of the State involved? It is believed that the following considerations point to the answer. First, the provisions of the Constitution conferring the treaty-making power upon the Federal Government did not, expressly or by implication, purport to limit the action of the grantee according to the intimacy of the relationship between the subject matter to be dealt with and the States; secondly, they did not even attempt to regulate by any specific restriction the power which was conferred without reservation upon the Federal Government;[1] thirdly,

Proceedings, American Philosophical Society, LI, No. 206, Philadelphia, 1912; Charles Henry Butler, The Treaty-Making Power of the United States, New York, 1902, II, Chap. XI; C. S. Clancy, "An Organic Conception of the Treaty-Making Power *v.* State Rights as Applicable to the United States", *Mich. Law Rev.*, VII, 19; Samuel B. Crandall, Treaties, Their Making and Enforcement, 2 ed., Washington, 1916, Chap. XVI; Robt. T. Devlin, Treaty Power under the Constitution of the United States, San Francisco, 1908, Chap. VIII; John W. Foster, "The Treaty-Making Power under the Constitution", *Yale Law J.*, XI, 69; James Parker Hall, "State Interference with the Enforcement of Treaties", *Proceedings*, Academy of Pol. Sc., VII, No. 3, Part II, 548; Frank B. Kellogg, "Treaty-Making Power", Am. Bar Assn. (Presidential Address, 1913), *Reports*, XXXVIII, 331; Arthur K. Kuhn, "The Treaty-Making Power and the Reserved Sovereignty of the States", *Columbia Law Rev.*, VII, 172; William E. Mikell, "The Extent of the Treaty-Making Power of the President and Senate of the United States", *Univ. of Penn. Law Rev.*, LVII, 435 and 528; Shackelford Miller, "Treaty-Making Power", *American Law Rev.*, XLI, 527; Elihu Root, "The Real Question under the Japanese Treaty and the San Francisco School Board Resolution", *Proceedings*, Am. Soc. Int. aw, I, 43, also published in *Am. J.*, I, 273; Henry St. George Tucker, Limitations on the Treaty-Making Power, Boston, 1915; Everett P. Wheeler, "The Treaty-Making Power of the Government of the United States in Its International Aspect", *Yale Law J.*, XVII, 151; W. W. Willoughby, The Constitutional Law of the United States, New York, 1910, §§ 210–219; Quincy Wright, "Treaties and the Constitutional Separation of Powers in the United States", *Am. J.*, XII, 64.

See, also, *Proceedings*, Am. Soc. Int. Law, I, Charles Noble Gregory (150), Theodore P. Ion (173), William Draper Lewis (194), W. W. Willoughby (201), and Arthur K. Kuhn (211); Library of Congress, List of References on the Treaty-Making Power, compiled under direction of Herman H. B. Meyer, Chief Bibliographer, Washington, 1920.

[1] According to the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"The question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

"To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, Section 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. . . .

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether

they made no provision for the participation by the States in the conclusion of treaties;[1] fourthly, they lodged and established the treaty-making power with a view to its being exercised. There was no intention to forbid the employment of it with respect to matters which were the usual subjects of international agreement.[2] As soon as it is admitted that the provisions of the Constitution were not designed to thwart the conclusion of agreements affecting matters long deemed to be usual and necessary subjects of regulation by convention, and that those matters necessarily embrace what directly and closely concern the affairs of the individual States, it seems to follow that the National Government is clothed with the requisite power to contract, and that without the consent of the particular States concerned. Otherwise, as has oftentimes been observed, the whole United States would find itself prevented by the terms of its own Constitution from concluding engagements of the most ordinary kinds however advantageous to the nation.[3] In such case the United States would be driven to resort to some essentially extra-constitutional

the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of sharpest exigency for the national well being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not to be lightly assumed that, in matters requiring national action, 'a power which must belong to and reside somewhere in every civilized government' is not to be found." Holmes, J., in Missouri *v.* Holland, 252 U. S. 416, 432, 433.

It is not believed that this Amendment sheds light on the question. "The general terms in which the treaty power is given to the United States seem to delegate, as against the States, the power to act upon any subject-matter within the usages of treaty making, and so the Tenth Amendment by its own terms is inapplicable." James Parker Hall, in *Proceedings*, Academy of Pol. Sc., VII, No. 3, Part 2, 548, 549–550.

See, also, Chandler P. Anderson, in *Am. J.*, I, 636, 656; *Harvard Law Rev.*, Note, XXXIII, 281, 286–287; C. H. Burr, Treaty-Making Power of the United States, *Proceedings*, Am. Philosophical Soc., LI, No. 206, p. 362.

[1] The provision of Art. I, section 10, paragraph 3, forbidding a State, without the consent of Congress, from entering into "any agreement or compact" with a foreign power, doubtless made provision for a contingency when the Federal Government might acquiesce and permit the conclusion by the States of engagements of minor importance. It is not believed that from the provision restraining a State from entering into "any agreement or compact" without the consent of Congress, is to be inferred a design to permit the States normally to have any voice in the conclusion of treaties regulating matters deemed to be local to them.

[2] Crandall, Treaties, 2 ed., § 110.

[3] Thus, for example, Mr. Justice Swayne declared in the course of the opinion of the Court in Hauenstein *v.* Lynham, 100 U. S. 483, 490: "If the national government has not the power to do what is done by such treaties [enabling aliens to take and dispose of lands in the States of the Union], it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const., Art. I, sect. 10."

Also Trieber, J., in United States *v.* Thompson, 258 Fed. 257, 263.

procedure in order to avoid its own paralysis. The obvious one would involve the obtaining of the approval of a State as a condition precedent to the conclusion of a treaty involving its special interests. It cannot be assumed that it was the intention of those who framed the Constitution that a normal and constantly needed exercise of the agreement-making power of the country as a whole should demand the observance of a course for which that document made no provision. Nor has such an assumption been entertained by the executive or judicial departments of the Government. The practice that has been observed is enlightening.

(2)

§ 498. Instances of Treaties Concerning Matters Normally under State Control.

The United States has concluded several treaties which in varying terms permit the nationals of other contracting powers to succeed to and dispose of movable or immovable property within the territories of the several States.[1] These agreements have, whenever occasion so required, been judicially upheld and applied. By Article V of the convention with Switzerland of November 25, 1850, nationals of either party who were successors to real estate in the territory of the other, and who could not, on account of alienage, hold such property in the State or Canton in which it was situated, were permitted to sell the property and to withdraw and export the proceeds thereof.[2] In the course of an opinion concerning the construction of the convention, Mr. Justice Swayne declared that the Supreme Court had no doubt that the convention was within the treaty-making power conferred by the Constitution.[3] That Tribunal announced in 1890, through an opinion by Mr. Justice Field, that it was "clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotia-

[1] Art. IX of the Jay Treaty of Nov. 19, 1794, Malloy's Treaties, I, 597, and in this connection, Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603; also Orr *v.* Hodgson, 4 Wheat. 453; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464.

See Art. VII of convention with France of Sept. 30, 1800, Malloy's Treaties, I, 498, and in this connection, Chirac *v.* Chirac, 2 Wheat. 259; also Geofroy *v.* Riggs, 133 U. S. 258.

[2] Malloy's Treaties, II, 1765–1766.

[3] Hauenstein *v.* Lynham, 100 U. S. 483.

tion and of regulation by mutual stipulations between the two countries." [1]

§499. The Same.

As has been observed, the United States has concluded several conventions conferring upon foreign consular officers important

[1] Geofroy *v.* Riggs, 133 U. S. 258, 266.

"It is not now an open question that the removal of alien disability to inherit and dispose of real property is a proper subject of treaty regulation and within the treaty-making power, and that treaty stipulations to this effect override any inconsistent State legislation. This principle has been asserted not less clearly by the State than by the Federal courts." Crandall, Treaties, 2 ed., 250.

Declared Mr. Elihu Root in 1907: "Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any State, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No State can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No State can say a treaty may grant to alien residents equality or treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the State for the judgment of the President and Senate in exercising a power committed to them and prohibited to the States by the Constitution." *Proceedings*, Am. Soc. Int. Law, I, 41, 54–55.

Mr. Henry St. George Tucker, in his Limitations on the Treaty-Making Power, Boston, 1915, contends that the Government of the United States, having the power to "change the status of an alien in this country", may "give the right of inheritance which would be unavailing to him but for such change." It is contended that "this right is conceded to him by reason of the fact that his status as an alien has been changed to that of native, *quoad* the particular right." It is added that "all of the cases without exception, decided by the Supreme Court, involving the question of inheritance by aliens, are based upon one principle, and that is the power of the United States, under the treaty power to remove the badge of alienage, which is conceded to be a legitimate exercise of power by the Government of the United States." § 128. It is not believed that the distinguished author, notwithstanding his close study of the cases, has reflected the true theory of the treaties. The removal of a disability incidental to alienage as a means of enabling an individual to enjoy a particular privilege does not involve the change of his status as an alien. Such a change has not been attempted by the United States with respect to foreigners in foreign countries. Yet the treaties contemplate the removal of the disability of alienage (in relation to the succession to property) in the case of foreigners outside of the United States and even though they have never entered its domain. Art. VII of the convention with France of Sept. 30, 1800, expressly removes from such persons the obligation to obtain letters of naturalization. See Malloy's Treaties, I, 498–499. J. P. Hall has made the following response to Mr. Tucker's view of the cases: "Plainly the Federal decisions upholding alien treaty rights to inherit land do not go upon the ground that the treaty is merely a circumstance that affects the result only if the State law is given a certain rather violent construction. They assume that the treaty has a legally controlling force of its own which annuls the State law, and which no construction of the latter could avoid. This is explicitly stated in Geofroy *v.* Riggs, and seems the only rational ground of decision." *Proceedings*, Academy of Pol. Sc., VII, No. 3, Part 2, 554.

rights in relation to deceased countrymen, and with respect to matters normally under the control of the States. These privileges have embraced the right of notification of the deaths of fellow-countrymen by local authorities, that of the temporary possession of the assets of an estate, and that of administration.[1] It has been noted that while certain conventions have, by reason of their phraseology, been interpreted by American courts as not conferring a right of administration in conflict with that fixed by the statutory laws of the States, the United States has on more than one occasion concluded treaties which appeared to clothe consular officers with a superior right.[2] Such arrangements may again be incorporated in American treaties.

It has been seen that the United States has concluded treaties embracing provisions designed to secure the nationals of the contracting parties against the operation of discriminatory laws in the country of residence. In adjudications concerning the constitutionality of State statutes discriminating against aliens, the decisions have not infrequently rested upon the ground, either that the particular treaty invoked did not purport to prevent the discrimination which the statute embodied, or that the law violated the Fourteenth Amendment.[3] From such action there is not to be inferred any disposition on the part of the Supreme Court of the United States to question the validity of a treaty which in terms or by necessary implication restricts a State from discriminating against aliens in matters pertaining to their residence or economic life within its borders.

The convention with Italy of February 25, 1913, amending the scope of Article III of the treaty with that country of February 26, 1871, purported to prevent a discrimination against Italian subjects within the United States, by any State statute as well as any act of Congress establishing a "civil responsibility for injuries or for death caused by negligence or fault" and giving to "relatives or heirs of the injured party a right of action."[4] The validity of this convention, which embodies one of the most positive restrictions which the United States has ever by treaty sought to apply to the several States, is not to be questioned.

[1] It has been noted that the consular right of notification frequently embraced in conventions calls for affirmative action by local authorities, and that those authorities, in the estimation of the Department of State, are the agencies of the several States of the Union. See Consuls, Notification of the Deaths of Fellow-Countrymen, *supra*, § 478.

[2] Consuls, Administration of Estates, *supra*, § 480.

[3] Pursuits and Occupations, *supra*, § 204.

[4] Art. I, Charles' Treaties, 442.

§ 500. The Same.

The United States and Great Britain concluded, August 16, 1916, a convention for the protection of migratory birds, in order to prevent the extermination of many species of great value as a source of food, or as a means of destroying insects injurious to forests and crops in both the United States and Canada.[1] To that end it was agreed that closed seasons should be established in certain regions of the United States and Canada with regard to game birds, insectivorous birds, and non-game birds.[2] With respect to specified birds a continuous closed season was established for a period of years.[3] The taking of nests or eggs of migratory game or insectivorous or non-game birds was prohibited, except for scientific or propagating purposes.[4] The regulation of shipping and export was agreed upon,[5] and there was an engagement to propose to the respective appropriate law-making bodies of the contracting parties, the necessary measures for insuring the execution of the convention.[6] The direct purpose of the agreement was to prevent the commission of acts in States of the Union, as well as in certain parts of Canada, deemed to be detrimental to the welfare of both the United States and the Dominion. An Act of Congress of July 3, 1918, gave appropriate effect to the convention.[7] This legislation and the treaty responsible for it were sustained by the lower Federal courts.[8] Their action was affirmed by the Supreme Court in April, 1920.[9] [Footnote 9 is shown on the following page.]

[1] 39 Stat. 1702. [2] Art. II. [3] Art. III.
[4] Art. V. [5] Art. VI. [6] Art. VIII.

[7] Act of July 3, 1918, Chap. 128, 40 Stat. 755.

Concerning the Migratory Birds Act of March 4, 1913, Chap. 145, 37 Stat. 847, and the cases attacking its constitutionality, and the effectiveness of the Act of 1918, in consequence of the convention, see *Harvard Law Rev.*, Note, XXXIII, 281, Dec., 1919; E. M. Borchard, "Treaty-Making Power as Support for Federal Legislation", *Yale Law J.*, XXIX, 445, Feb., 1920.

[8] United States *v.* Thompson, 258 Fed. 257; United States *v.* Samples, 258 Fed. 479; United States *v.* Selkirk, 258 Fed. 775; United States *v.* Rockefeller, 260 Fed. 346.

In the course of his opinion in United States *v.* Thompson, 258 Fed. 257, 263, Trieber, J., declared: "To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of this nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries."

Also opinion of Mr. Griggs, Atty.-Gen., 22 Ops. Attys.-Gen., 214, in which he advised the Secretary of State that the United States could by treaty deprive the riparian States of the power of control and regulation over the fisheries in the waters within their respective jurisdictions coterminal with the boundary between the United States and Canada. He declared that the regulation of fisheries in navigable waters within the territorial limits of the

(3)

§ 501. Cessions of Territory. Boundaries.

The question presents itself whether the treaty-making power conferred upon the Federal Government embraces in its scope the right, under any circumstances, however rare, to agree to the cession of territory belonging to a State of the Union.[1] The undertaking of the United States under the Constitution to guarantee to each State a republican form of government, and to protect it against invasion, is believed by many to justify the denial of such a right.[2] It appears to have been the view of Thomas Jefferson in 1792, and likewise that of Mr. Justice White a century later, that in case of necessity occasioned by war, a treaty of cession might be concluded.[3] Their idea seems to have

several States, "in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction."

Declaring the Migratory Birds Treaty Act to be not retroactive in its operation, see United States *v.* Fuld Store Company, 262 Fed. 836.

[9] Missouri *v.* Holland, 252 U. S. 416. Declared Mr. Justice Holmes in the course of the opinion of the Court: "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Cary *v.* South Dakota, 250 U. S. 118." *Id.*, 435. Mr. Justice Van Devanter and Mr. Justice Pitney dissented.

[1] See documents in Moore, Dig., V, 171–175; Crandall, Treaties, 2 ed., § 99, and documents there cited; C. H. Burr, Treaty-Making Power of the United States, *Proceedings*, Am. Philosophical Soc., LI, No. 206, 300–301.

[2] Constitution, Art. IV, Section 4.

[3] In his instructions to Messrs. Carmichael and Short, commissioners to negotiate a treaty with Spain, under date of March 18, 1792, Mr. Jefferson, Secy. of State, declared: "Suppose that the United States, exhausted by a bloody and expensive war with Great Britain, might have been willing to have purchased peace while relinquishing, under a particular contingency, a small part of their territory, it does not follow that the same United States recruited and better organized, must relinquish the same territory to Spain without striking a blow. The United States, too, have irrevocably put it out of their power to do it, by a new Constitution, which guarantees every State against the invasion of its territory. A disastrous war, indeed, might, by necessity, supersede this stipulation (as necessity is above all law), and oblige them to abandon a part of a State; but nothing short of this can justify or obtain such an abandonment." Am. State Pap., For. Rel. I, 252.

Declared Mr. Justice White, in the course of his opinion in Downes *v.* Bidwell, 182 U. S. 244, 317: "True, from the exigency of a calamitous war or the necessity of settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of."

been merely that if the United States were compelled by an enemy to sacrifice the territory of a State, the nation would be obliged to conclude an appropriate agreement. Even if the law of nations should fail to deprive such a sacrificial agreement of validity, it might be difficult to regard the compact as one contemplated by the Constitution or as concluded in pursuance of it.[1]

There is some evidence that Chief Justice Marshall as well as Mr. Justice Story were of opinion that the treaty-making power did not exclude the exercise of a right of cession if the national safety so required.[2]

If the provisions of the Constitution were not designed to permit the United States to agree to sacrifice the territory of a State under any circumstances, and so did not contemplate the exercise of the agreement-making power of the nation as a whole for such a purpose, it might still be possible through some extra-constitutional (as distinguished from unconstitutional, process, to render available that power on proper occasion, and that by virtue of the consent and approval of the particular State whose territory was sought to be transferred. Such procedure would not be at variance with the principle that the entire treaty-making power of the nation, in so far as it was designed to be rendered operative, was wholly vested in the National Government. It would merely signify that a particular right, the exercise of which was not contemplated by the terms of the Constitution, could, nevertheless, be brought into being and made effectual when needed, if the States for whose benefit it was constitutionally thwarted should

[1] "Treaties made under such compulsion are, except in form, no more the exertion of the ordinary constitutional powers of a State than the yielding of a watch under the pistol of a highwayman is an exercise of the victim's power freely to dispose of his property; and all arguments based upon the assumed effect of such treaties are fallacious." J. P. Hall, "State Interference with the Enforcement of Treaties", *Proceedings*, Academy of Pol. Sc., VII, No. 3, Part 2, 548, 556.

[2] In response to an inquiry from Edward Everett, then Governor of Massachusetts, Mr. Justice Story replied on April 17, 1838: "That he could not admit it to be universally true that the Constitution of the United States did not authorize the government to cede to a foreign nation territory within the limits of a State, since such a cession might, for example, be indispensable to purchase peace, or might be of a nature calculated for the safety of both nations or be an equivalent for a like cession on the other side. The learned justice added that he had some years previously had a conversation on the subject with Chief Justice Marshall. 'He was,' said Mr. Justice Story, 'unequivocally of opinion, that the treaty-making power did extend to cases of cession of territory, though he would not undertake to say that it could extend to all cases; yet he did not doubt it must be construed to extend to some.'" Moore, Dig., V, 173, *quoting* Story, Life of Joseph Story, II, 286–289. The volume cited is The Life and Letters of Joseph Story, edited by his son, W. W. Story, Boston, 1851.

not only waive the right to object, but also be disposed to further its employment.[1]

It has been declared in behalf of the Supreme Court of the United States to be "a sound principle of national law", applicable to the treaty-making power of the Government, whether exercised with a foreign nation or an Indian tribe, "that all questions of disputed boundaries may be settled by the parties to the treaty." "To the exercise of these high functions by the Government, within its constitutional powers," it is said that "neither the rights of a State nor those of an individual can be interposed."[2]

If the adjustment assumes the form of a compromise, either party, in agreeing to yield possession, may in fact cede land to which it has an indisputable title. If, however, a treaty provides for the ascertaining of a boundary of which the nature or direction is a matter of dispute, the line of demarcation finally ascertained, as by a judicial inquiry, may be said to constitute merely a joint recognition of what territory rightfully belonged to each State concerned.[3] Hence a relinquishment pursuant to the award or finding of the tribunal would not indicate the transfer of any legitimate right of property and control which had been

[1] In the settlement of the Northeastern Boundary dispute, the consent of the States of Maine and Massachusetts was secured preliminary to concessions made to Great Britain of lands claimed by those States. See Moore, Arbitrations, I, 147–150. To the treaty of Aug. 9, 1842, describing the boundary line, the United States and Great Britain alone were signatories. That agreement provided in Art. V that the proportion of the so-called "disputed territory fund" due to the States of Maine and Massachusetts, and any bonds or securities appertaining thereto, should be paid to the Government of the United States, and that the latter should receive and pay over to those States their respective portions of the fund, and further, pay and satisfy those States, respectively, "for all claims for expenses incurred by them in protecting the said heretofore disputed territory and making a survey thereof in 1838." The same Article referred to the Government of the United States as "agreeing with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the Government of Her Britannic Majesty." See Malloy's Treaties, I, 654. "Great Britain, however, disclaimed all responsibility for any matters between the United States and the several States." See statement in Moore, Dig., V, 173–174. It should be noted that Mr. Webster, then Secretary of State, declared that although he entertained "not the slightest doubt of the just authority of this government to settle this question by compromise, as well as in any other way, yet in the present position of affairs" he supposed it not to be prudent "to stir, in the direction of compromise without the consent of Maine." See communication to Mr. Kent, Gov. of Maine, Dec. 21, 1841, C. H. Van Tyne's Letters of Daniel Webster, New York, 1902, 248, Moore, Dig., V, 174.

[2] McLean, J., in Lattimer *v.* Poteet, 14 Pet. 4, 14.

"A treaty for the determination of a disputed line operates not as a treaty of cession, but of recognition." Crandall, Treaties, 2 ed., 226.

[3] Chappell *v.* Jardine, 51 Conn. 64; Elphick *v.* Hoffman, 49 Conn. 331.

enjoyed by the relinquisher. Thus it may be contended that the adjustment by arbitration of an international boundary controversy affecting the territory of a State of the Union would not necessarily involve, in the event of an award adverse to the pretensions of that State, any sacrifice of terrritory which the United States was obliged under the Constitution to safeguard.

(4)

§ 502. Certain Conclusions.

What the President and Senate have deemed to be a proper subject of international agreement has never been otherwise regarded by the Supreme Court of the United States, even though the terms of a treaty dealt with matters under State control. When the National Government has deemed it advantageous for the country as a whole to regulate by international agreement a matter affecting economic or other conditions within the several States, it has not been regarded essential to secure their consent as a condition precedent to a valid compact. The principle which seems to have been acted upon is that any treaty or other agreement which the whole United States may lawfully conclude by means of all of the agreement-making power of which the Constitution permits the exercise, may be made by the Federal Government acting alone. The practice of the United States has justified the declaration of Mr. Root that "the treaty-making power is not distributed; it is all vested in the National Government; no part of it is vested in or reserved to the States." [1]

d

Other Problems of Constitutionality

(1)

§ 503. Agreements Calling for Legislative or Other Action.

A treaty of the United States with respect to a matter of which the regulation may be fairly deemed to be within the scope of the agreement-making power of the nation, is not necessarily unconstitutional by reason of the fact that its provisions call for the performance of acts by the legislative or other departments of the Government. Numerous conventions have embraced such demands. They have, for example, necessitated the payment of

[1] *Proceedings*, Am. Soc. Int. Law, I, 41, 49.

money, and in consequence, an appropriation by Congress;[1] they have contemplated the performance of administrative acts by local officials;[2] they have imposed restraint upon the war-making powers of the Government, necessitating by implication the making or refraining from war under certain conditions. Thus the United States has concluded treaties of guarantee imposing a contingent obligation to make war,[3] and, conversely, treaties for the advancement of peace demanding the abstinence from warlike activities prior to the fulfillment of certain conditions.[4]

Such agreements are based upon the theory that the Constitution does not forbid the incurring of a particular obligation merely because performance necessitates the commission of acts which according to that instrument can only be committed by a particular department of the Government such as Congress. In practice, no real difficulty presents itself where the action to be taken in pursuance of a treaty is not abnormal or unusual, such, for example, as the appropriation of money in payment of territory acquired by cession.[5] A much more serious problem arises, however, where the treaty imposes a legal obligation upon the nation to take steps, through Congressional action, which the nation has rarely taken save under gravest necessity. An agreement binding the United States to become, under certain circumstances, a belligerent is of such a character. It is not, however, the validity of the undertaking which is necessarily open to question. It is rather the danger lest popular opinion demand that the Congress refrain from exercising the war-making power,

[1] See convention with Alaska of March 30, 1867, Malloy's Treaties, II, 1521.

See, in this connection, a well-considered paper by Quincy Wright on "Treaties and the Constitutional Separation of Powers in the United States", *Am. J.*, XII, 64. That writer declares: "It must always be borne in mind that in most cases powers were given to Congress in pursuance of a scheme of distribution between Congress and State legislatures. Where no distribution between Congress and the treaty-making power was intended, none was made. If a ratified treaty covers a subject-matter appropriate for international negotiation, the fact that it concerns matters within the powers of Congress enumerated by the Constitution does not affect its validity. The only question that can arise is whether or not it is self-executing."

[2] See, for example, Art. XVI of consular convention with Italy of May 8, 1878, imposing a duty upon "the local competent authorities" to give notice to consular officers of the deaths of fellow-countrymen.

[3] See, for example, Art. XXXV of treaty with Colombia (New Granada) of Dec. 12, 1846, Malloy's Treaties, I, 312. Also Art. I of convention with Panama, of Nov. 18, 1903, declaring that "the United States guarantees and will maintain the independence of the Republic of Panama", *id.*, II, 1349.

[4] Art. I of treaty with France of Sept. 15, 1914, for the advancement of peace, U. S. Treaty Series, No. 609.

[5] Legislation Necessary to Performance, *infra*, § 524.

and so subject the nation to the charge of violating its agreement, which operates as a deterrent.[1] The distinction between the practical effect upon Congress of a burdensome duty of performance, and the validity of an engagement under the Constitution, needs constantly to be observed. It is frequently, however, obscured from view by utterances which appear to confuse constitutional requirements as to modes of performance with constitutional limitations as to the power to contract. Even when the distinction is clearly perceived, the President and Senate appear to be reluctant to unite to exercise the treaty power in such a way as to discourage or render problematical the coöperation of any department of the Government which may be called upon, pursuant to the terms of a convention, to effect performance.

(2)

§ 504. Agreements to Refer Differences to International Judicial Tribunals or Commissions.

That the United States may constitutionally agree to refer to an international tribunal future controversies which may not prove to be susceptible of amicable adjustment by direct negotiation, is not to be doubted.[2] If provision is made in an arbitration convention for the adjustment of differences within the limits of a general class, with the understanding that they are justiciable, an engagement that in case of disagreement the tribunal may determine whether a particular dispute falls within such a category, is not believed to be at variance with the Constitution. Any disposition to withhold such authority from such a tribunal would

[1] Declared Mr. Charles E. Hughes in an address before the Union League Club of New York, March 26, 1919, on the proposed Covenant for a League of Nations: "There is nothing in our history to give assurance that Congress would recognize the authority of the treaty power to bind Congress to declare war in a cause that it did not approve. The decision as to the policy, as to the existence of the duty, and as to the power to create the duty, would rest with Congress. Whether or not Congress would feel itself bound to respond, or would take the position that, in so vital a matter as a resort to war, it could not be pledged in advance without its consent, is a question which must be left to the event. . . .

"The point is that Congress would be the judge of its obligation and would determine to its own satisfaction the question whether the treaty power could impose and had imposed upon Congress the duty to act under the provision of the Covenant, although Congress believed that such action would be contrary to the interests of the country. . . .

"It is a very serious matter for the treaty-making power to enter into an engagement calling for action by Congress unless there is every reason to believe that Congress will act accordingly."

[2] See, for example, the arbitration convention with France of Feb. 10, 1908, Malloy's Treaties, I, 549.

seem to be attributable primarily to a sense of expediency; for the exercise of it appears to involve merely the interpretation of the scope of the agreement to arbitrate — a most ordinary judicial function, neither dependent upon, nor implying a delegation of, the treaty-making power by the Federal Government.[1]

The constitutionality of a treaty providing for an appeal from the decisions of the American tribunal of last resort to one of an international character has gravely been doubted in the United States. The International Prize Court contemplated by the Hague Convention of 1907, was preëminently a court of appeal, with full power to review the decision of a national court of justice, both as to facts and as to the law applied, and, in the exercise of its judicial discretion, not only to affirm or reverse, in whole or in part, the national decision from which the appeal was lodged, but also to certify its judgment to the national court for proceedings in accordance therewith.[2] The United States made objection to the convention in its original form because an appeal might be taken from a decision of the Supreme Court of the United States, and the judgment of that Tribunal be modified or reversed on appeal.[3]

[1] See minority report by Mr. Root (for himself and Messrs. Cullom and Burton) from the Senate Committee on Foreign Relations, Aug. 18, 1911, in relation to proposed general arbitration treaties with Great Britain and France, Senate Doc. No. 98, 62 Cong., 1 Sess., 9-10. It was here declared: "The pending treaties also provide that, if the parties disagree as to whether any particular case comes within the description of the class which we have agreed to arbitrate, the question whether that case is one of the cases described shall be submitted to the arbitral decision of a joint commission.

"We see no obstacle to the submission of such a question to decision, just as any other question of fact, or mixed fact and law, may be submitted to decision. Such a submission is not delegating to a commission power to say what shall be arbitrated; it is merely empowering the commission to find whether the particular case is one that the President and Senate have said shall be arbitrated."

See, also, supplemental views of Mr. Burton, *id.*, p. 11, and views of Mr. Rayner, *id.*, 17. See, however, the opposing views expressed in the Committee Report submitted by Mr. Lodge, *id.*, p. 3. It was there stated that the treaty purported to deprive the Senate "of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution", and "that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate." It was said that the Senate had no right to delegate its share of the treaty-making power, and it was assumed or intimated that the treaty made provision for such a delegation.

For the text of the proposed general arbitration treaties with Great Britain, of Aug. 3, 1911, and with France, of same date, see, respectively, Senate Doc. No. 93, 62 Cong., 1 Sess., and Senate Doc. No. 94, 62 Cong., 1 Sess.

[2] The language of the text is that contained in circular note of Mr. Knox, Secy. of State, accompanying communication to Mr. Rives, American Chargé d'Affaires at London, Nov. 3, 1909, For. Rel. 1910, 597, 599.

[3] Mr. Knox, Secy. of State, to the Minister of Nicaragua, Jan. 19, 1911, For. Rel. 1911, 248.

To avoid such a course, which was deemed to be open to constitutional objections, an additional protocol was concluded September 19, 1910, providing for an alternative procedure for States confronted with such constitutional difficulties, and declaring that recourse to the Prize Court could only be exercised against them in the form of an action in damages for the injury caused by the capture.[1] The Prize Court Convention, with the additional protocol of 1910, was not ratified by the United States.[2]

There is little room for doubt that the United States may, without disregarding the Constitution, agree to an inquiry respecting, or an investigation of, a controversy by an international commission, and further agree to withhold action during the period of investigation, and to shape its conduct in relation to its opponent according to the recommendations of the report.[3]

[1] See the Hague Convention of 1907, relative to the creation of an International Prize Court, Charles' Treaties, 249; J. B. Scott, Reports to Hague Conferences, 746; Report to Mr. Renault from the First Commission on the Draft Convention relative to the creation of an International Prize Court, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 180, J. B. Scott, Reports to Hague Conferences, 758; also C. N. Gregory, "The Proposed International Prize Court and Some of Its Difficulties", *Am. J.*, II, 458; Henry Billings Brown, "The Proposed International Prize Court", *id.*, 476; T. R. White, "Constitutionality of the Proposed International Prize Court — Considered from the Standpoint of the United States", *id.*, 490.

See Additional Protocol to the Convention Relative to the Creation of an International Prize Court, Sept. 19, 1910, Charles' Treaties, 262; J. B. Scott, Reports to Hague Conferences, 807; Report of J. B. Scott, American Delegate Plenipotentiary to negotiate additional protocol, to the Secretary of State, *id.*, 811; also For. Rel. 1910, 597–639; For. Rel. 1911, 247–251. Also, in this connection, J. B. Scott, "The International Court of Prize", *Am. J.*, V, 302; Oppenheim, 2 ed., II, 565–579.

See Need of an International Tribunal, American Prize Courts and Procedure, *infra*, § 896.

[2] See Resolution embodying the terms on which the Senate on Feb. 15, 1911, advised and consented to the ratification of the convention of 1907 and the protocol of 1910, Charles' Treaties, 262.

Mr. Quincy Wright has suggested that any constitutional difficulties inherent in the procedure contemplated by the original Prize Court Convention "might have been met by domestic legislation allowing appeal direct from an inferior Federal court to the international court." He adds: "It is clear that 'the judicial power of the United States' cannot refer to the jurisdiction exercised by all courts organized under authority of the national government, for provisions of the Article in reference to the tenure of judges have never been adhered to in territorial or consular courts. The Article evidently applies only to Federal courts within the territory of the States of the Union. . . . Legislation providing that in certain classes of cases appeals should go from inferior Federal courts to an international court instead of to the Supreme Court would seem entirely within the competence of Congress." *Am. J.*, XII, 86 and 88.

[3] *Compare* Arts. XII and XV of the Covenant of the League of Nations.

e

The Manner in Which the United States May Contract. Agreements Other than Treaties

(1)

§ 505. Preliminary.

It has been observed that the Constitution prescribes that the treaties of the United States shall be made by the President by and with the advice and consent of the Senate, and according to conditions specified.[1] That document contains, however, no definition of a treaty. The reference to an "agreement or compact" with a foreign power which it was forbidden that any State of the Union should enter into without the consent of Congress,[2] indicates the familiarity of those who framed the Constitution with the habit of statesmen to contract international engagements of lesser importance than treaties, and which were not regarded as such by the States in whose behalf they were concluded.

It has long been the practice of the United States to contract with foreign powers through the medium of executive agreements which have not assumed the form of treaties. Attention is called to various classes of compacts of which the constitutionality does not appear to have been questioned.[3]

[1] Provisions of the Constitution, *supra*, § 495.

[2] Art. I, Section 10, paragraph 3.

"The use of all of these terms, 'treaty', 'agreement', 'compact', show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection of communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." Taney, C. J., in Holmes *v.* Jennison, 14 Pet. 540, 572.

[3] See, in this connection, documents in Moore, Dig., V, 210–221; Crandall, Treaties, 2 ed., Chaps. VIII and IX; E. S. Corwin, The President's Control of Foreign Relations, Princeton, 1917, 116–125.

See, also, Simeon E. Baldwin, "The Entry of the United States into World Politics as One of the Great Powers", *Yale Rev.*, first series, IX, 399; same writer, "The Exchange of Notes in 1908 between Japan and the United States", *Zeit. Völk.*, III, 456; James F. Barnett, "International Agreements without the Advice and Consent of the Senate", *Yale Law J.*, XV, 18 and 63; John W. Foster, "The Treaty-Making Power under the Constitution", *Yale Law J.*, XI, 69; C. C. Hyde, "Agreements of the United States Other than Treaties", *Green Bag*, XVII, 229; Gaston Jeze, "*Du rôle des chambres dans l'approbation ou l'exécution des traités internationaux*", *Rev. du Droit Public et de la Science Politique*, XXI, No. 3, p. 455; John Bassett Moore, "Treaties and Executive Agreements", *Pol. Sc. Quar.*, XX, 385; W. W. Willoughby, Constitutional Law of the United States, Chap. XXXIII.

(2)

§ 506. Executive Agreements in Pursuance of Acts of Congress.

The President has entered into numerous agreements with foreign States in pursuance of Acts of Congress. Thus he has concluded engagements concerning commerce and navigation, and in the form of reciprocal arrangements for the suspension of duties in return for equitable concessions.[1] The President is deemed in such case to be the mere agent of the legislative department of the Government to ascertain and declare the event upon which its expressed will is to take effect.[2]

The President has made agreements respecting international copyright,[3] and the protection of trade-marks.[4] He has concluded

[1] The history of the legislation pursuant to which such agreements have been made is set forth in Crandall, Treaties, 2 ed., § 62.

Attention is called to § 3, Chap. 1244, of the Tariff Act of Oct. 1, 1890, 26 Stat. 612, and to § 3, Chap. 11, of the Tariff Act of July 24, 1897, 30 Stat. 203. See proclamation of President Roosevelt, Dec. 5, 1907, announcing the conclusion of a commercial agreement with Great Britain under the Act of 1897, Malloy's Treaties, I. 812.

[2] Such was the view expressed by Mr. Justice Harlan in Field *v.* Clark, 143 U. S. 649, 693, with reference to the function of the President under the Tariff Act of 1890.

In the course of the opinion of the Court expressed in 1912, by Mr. Justice Day, in the case of Altman *v.* United States, the following significant statement was made with reference to a commercial agreement with France (30 Stat. 1774) under the authority of the Tariff Act of 1897: "While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President." 224 U. S. 583, 601.

See United States Tariff Commission, Summary of the Report on Reciprocity and Commercial Treaties, Washington, 1919.

[3] § 8(*b*), Chap. 320, Act of March 4, 1909, 35 Stat. 1077, U. S. Comp. Stat. 1918, § 9524. Pursuant to this Act the President has issued numerous proclamations declaratory of the existence of reciprocal conditions in foreign States and permitting the granting of American copyright protection to the nationals thereof. See, for example, proclamation of President Wilson, April 3, 1918, contained in U. S. Comp. Stat. 1918, § 9524, note.

Also § 1 (*e*) of the same Act, 35 Stat. 1075, U. S. Comp. Stat. 1918, § 9517, with respect to copyright controlling the parts of instruments serving to reproduce mechanically musical work. See, for example, proclamation of President Wilson pursuant to this section, Feb. 9, 1917, in relation to New Zealand, 39 Stat. 1815.

Cf. Industrial Property, *supra*, § 208; Copyright Law of the United States of America, Library of Congress, Copyright Office Bulletin, No. 14, 1919.

[4] Act of Feb. 20, 1905, Chap. 592, § 1, 33 Stat. 724 (amended by Acts of May

postal and money order conventions.[1] He has contracted for the acquisition of territory. By means of Congressional action approved by the President, the independent State of Texas was admitted into the Union.[2] The same process was utilized in the acquisition of Hawaii.[3] It was in pursuance of an Act of Congress of March 2, 1901, that agreement was made by the President with Cuba, February 23, 1903, for the lease to the United States of lands in Cuba for coaling and naval stations.[4]

4, 1906, chap. 2081, § 1, 34 Stat. 168, and Feb. 18, 1909, § 1, Chap. 144, 35 Stat. 628). U. S. Comp. Stat. 1918, § 9485.

See, in this connection, Crandall, Treaties, 2 ed., § 64.

See For. Rel. 1905, 169–175, and For. Rel. 1906, I, 228–234, for the texts of a series of agreements for the mutual protection of certain trade-marks in China.

[1] Rev. Stat. § 4028, amended Jan. 30, 1889, Chap. 100, § 1, 25 Stat. 654, U. S. Comp. Stat. 1918, § 7554, providing that the Postmaster-General may conclude arrangements with the post departments of foreign governments with which postal conventions have been or may be concluded for the exchange, by means of postal orders, of small sums of money, not exceeding one hundred dollars in amount.

"In virtue of these provisions, postal and money order conventions have been concluded by the Postmaster-General with the approval of the President without submission to the Senate. Among these are the general postal union convention signed at Berne, October 9, 1874, and the universal postal union conventions signed at Vienna, July 4, 1891, at Washington, June 15, 1897, and at Rome, May 26, 1906." Crandall, Treaties, 2 ed., 132.

See, in this connection, United States *v.* Eighteen Packages of Dental Instruments, 222 Fed. 121; United States *v.* Four Packages of Cut Diamonds, 247 Fed. 354, where Manton, J., declared (358): "The Postal Conventions cannot be deemed treaties, because they are not adopted by the Senate, and they cannot be deemed statutes, because Congress alone has power to adopt statutes, and that power cannot be delegated. They cannot be considered treaties, because the treaty-making power is confined in the President and the Senate by the Constitution. They are but provisions which determine what merchandise may be received in the mail." See, also, Four Packages of Cut Diamonds *v.* United States, 256 Fed. 305.

Concerning agreements with Indian tribes, see Moore, Dig., V, 220–221, and documents there cited.

[2] A treaty for the annexation of Texas, signed April 12, 1844, was rejected by the Senate, June 8, 1844. Brit. and For. State Pap., XXXIII, 258. A joint resolution of the Congress, approved March 1, 1845, announced the terms on which Texas would be received into the Union. 5 Stat. 797. Texas assented to these terms. By a joint resolution approved by the President Dec. 29, 1845, Texas was admitted into the Union as a State. 9 Stat. 108. Objections to the admission of Texas by this process were made in report by Mr. Archer from the Senate Committee on Foreign Relations, Feb. 4, 1845. Reports, Senate Com., For. Rel. VI, 78.

See, also, documents in Moore, Dig., I, 453–457.

[3] "Pending the consideration by the Senate of the treaty signed June 16, 1897, by the plenipotentiaries of the United States and of the Republic of Hawaii, providing for the annexation of the islands, a joint resolution to accomplish the same purpose by accepting the offered cession and incorporating the ceded territory into the Union was adopted by the Congress and approved July 7, 1898." President McKinley, Annual Message, Dec. 5, 1898, For. Rel. 1898, LVII.

Also Moore, Dig., I, 503–512, and documents there cited.

[4] Malloy's Treaties, I, 358. This agreement was signed by the President of Cuba, Feb. 16, 1903.

Also the lease to the United States by Cuba of land and water for naval

(3)

§ 507. Adjustment of Claims against Foreign States. Recourse to Arbitration.

In the conduct of the foreign relations of the nation, the President has frequently exercised the right to adjust international controversies by means of agreements not submitted to the Senate. These have oftentimes provided for recourse to arbitration. Such action has been based on the theory that if the executive possessed the right of adjustment, the mode of its exercise, as by arrangement contemplating a reasonable procedure, involved no implied abuse of power. Thus an agreement to invoke the judicial aid of a joint commission or of an arbitral tribunal, has merely indicated the choice by the President of a particular instrumentality incidental to his broad power to deal with the international controversies of the nation.

In the adjustment of pecuniary claims against foreign States the President has frequently acted alone, and his arrangements have often contemplated arbitration.[1] It is not understood, however, that he has concluded agreements for the adjustment

or coaling stations in Guantanamo and Bahia Honda, signed by plenipotentiaries July 2, 1903, and approved by the President Oct. 2, 1903, Malloy's Treaties, I, 360.

[1] Declared Prof. Moore in 1905: "Pecuniary claims against foreign governments have constantly been settled by the President, and no question as to his possession of such a power, apart from discussions as to its possible limitations, appears ever to have been seriously raised." *Pol. Sc. Quar.*, XX, 385, 403. See, also, *Green Bag*, XVII, 229; Crandall, Treaties, 2 ed., § 57.

By means of an exchange of notes between General D. E. Sickles, the American Minister to Spain, and Señor Don Christino Martos, the Spanish Minister of State, on February 11 and 12, 1871, an arrangement was made with Spain for the settlement by arbitration of claims of American citizens arising from wrongs and injuries committed by authorities of Spain in Cuba. Moore, Arbitrations, 1019–1053. "The settlement was reported to Congress for its information, appropriations were voted to carry on the arbitration, an international commission was organized, and after nearly twelve years of labor, during which 140 cases were examined, awards against Spain were made to the amount of $1,293,450.50 and duly paid to the United States, all this being accomplished by a mere exchange of notes." Report of Mr. Foster, Secy. of State, to the President, Dec. 7, 1892, H. Doc. 471, 56 Cong., 1 Sess., 17, cited in Moore, Dig., V, 216.

The agreement for the adjustment of the so-called Pious Fund claim against Mexico by arbitration before a tribunal at the Hague, was effected by a protocol concluded May 22, 1902, Malloy's Treaties, I, 1194. The arrangements by which the United States, in February and May, 1903, became a party to the arbitral adjustment of the preferential treatment of claims against Venezuela were embodied in protocols. See Malloy's Treaties, II, 1870 and 1872. It was by virtue of a claims protocol of Feb. 13, 1909, that arrangement was perfected for the arbitration of the claim of the Orinoco Steamship Company against Venezuela. *Id.*, 1881.

See also protocol of Dec. 1, 1909, between the United States and Chile, for the arbitration of the Alsop Claim, For. Rel. 1910, 186.

by arbitration of claims against the United States, without the approval of the Senate.[1] Nor has he been disposed to contract for the solution by judicial process of territorial or kindred differences without that consent.[2]

It should be observed that the Senate has been reluctant to consent to general treaties rendering recourse to arbitration obligatory, and contemplating a special agreement or *compromis* as a condition precedent to a particular adjudication, unless provision were made that such agreement should be submitted to that body for its approval.[3] Arrangement for such a submission has been embodied in the terms of the several treaties of general arbitration to which the United States has become a party.[4]

(4)

§ 508. Important Protocols and Other Agreements Concerning Political Affairs.

The President has by executive agreement concluded certain important compacts with respect to political affairs, in some cases establishing the basis of subsequent arrangements. Of such a kind was the protocol signed at Washington August 12, 1898, by the Secretary of State and the French Ambassador, establishing the basis of conditions for peace between the United States and Spain.[5] By means of a protocol signed at Peking

[1] John W. Foster, in *Yale Law J.* (1901), XI, 69, 77.

[2] Thus the agreement providing for the adjustment of the Alaskan boundary by a joint commission, and concluded with Great Britain, Jan. 24, 1903, assumed the form of a convention which was submitted to the Senate. Malloy's Treaties, I, 787.

The special agreement with Great Britain of Jan. 27, 1909, Malloy's Treaties, I, 835, for the submission to arbitration of the controversy respecting the North Atlantic Coast Fisheries, was pursuant to the general treaty of arbitration of April 4, 1908, according to which special agreements on the part of the United States were to be made by the President by and with the advice and consent of the Senate. Malloy's Treaties, I, 814. Therefore, the special agreement of Jan. 27, 1909, was submitted to that body.

[3] This was true with respect to a series of treaties concluded in 1905, and submitted by President Roosevelt to the Senate for its approval. They provided that in each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, should conclude a "special agreement' defining clearly the matter in dispute, the scope of the powers of the arbitrators, the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure. For the word "agreement", the Senate substituted the word "treaty", to indicate the nature of the arrangement required to make provision for each case. The President declined to ratify the treaties as thus amended.

[4] See, for example, arbitration convention with France of Feb. 10, 1908, Malloy's Treaties, I, 549.

[5] Malloy's Treaties, II, 1688.

LIMITATION OF ARMAMENT ON THE GREAT LAKES. By an exchange of notes,

September 7, 1901, the United States joined with Austria-Hungary, Belgium, Spain, France, Great Britain, Germany, Italy, Japan, the Netherlands and Russia, in the agreement with China, fixing the basis for the heavy obligations to be undertaken by that State in consequence of the so-called "Boxer" troubles in 1900.[1]

In the formulation and determination in conjunction with the Allied and Associated Powers of the basis of an agreement on which an armistice should be concluded with Germany in 1918, and in the perfecting of an arrangement appropriate to that end in behalf of the United States, the President acted by executive agreement through notes addressed to the Swiss Legation at Washington in charge of German affairs.[2]

Through an exchange of notes between the United States and Japan, November 30, 1908, an agreement was made declaratory of the policy of the contracting parties in the Far East, embracing among other things an expression of determination to support the independence and integrity of China, and the principle of equal opportunity for the commerce and industry of all nations in that Empire.[3] By the same process, through the so-called Lansing-

April 28–29, 1817, an arrangement was concluded with Great Britain limiting the naval forces on the Great Lakes. Malloy's Treaties, I. 628. "April 6, 1818, President Monroe, apparently out of abundant caution, communicated the correspondence to the Senate. Am. State Pap., For. Rel., IV, 202. The Senate, on the 16th of the same month, by a resolution in which two-thirds of the Senators present concurred, 'approved of and consented to' the arrangement, and 'recommended that the same be carried into effect by the President.' The President proclaimed the arrangement April 28, 1888. (11, Stat. 766.) The proclamation, however, does not appear ever to have been officially communicated to the British government, and no exchange of ratifications took place." Moore, Dig., V, 204–215. See report of Mr. Foster, Secy. of State, to the President, Dec. 7, 1892, Senate Ex. Doc. No. 9, 52 Cong., 2 Sess., published also by Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 2, Washington, 1914. Also J. M. Callahan, Neutrality of the American Lakes, Baltimore, 1898, Chap. IV.

By a protocol signed Dec. 9, 1850, by the American Minister at London, Mr. Abbott Lawrence, and Viscount Palmerston, Great Britain ceded to the United States a portion of the Horse Shoe Reef in Lake Erie, on condition that the latter should maintain a lighthouse thereon. Malloy's Treaties, I. 663. "Congress appropriated money for the erection of a lighthouse which was built; and the United States thus possesses and exercises full jurisdiction over territory acquired by cession from a foreign power without a treaty." Report of Mr. Foster, Secy. of State, to the President, Dec. 7, 1892, and quoted in Moore, Dig., V, 215.

[1] Malloy's Treaties, II, 2006.

[2] See correspondence between the United States and Germany regarding an armistice, in October and November, 1918. *Am. J.*, XIII. Supp., 85–96, especially Mr. Lansing, Secy. of State, to Mr. Sulzer, Swiss Minister at Washington, Nov. 5, 1918.

[3] Malloy's Treaties, I, 1045. See, in this connection, Simeon E. Baldwin, "The Exchange of Notes in 1908 between Japan and the United States", *Zeit. Völk.*, III, 456, 459, where it is stated that there was "no precedent in the history of American diplomacy for such a declaration of an international entente as that found in notes in question", and expressing doubt as to the

Ishii agreement of November 2, 1917, the United States made further agreement with Japan, recognizing that territorial propinquity creates special relations between countries, and declaring that the United States also recognized that Japan had "special interests in China, particularly in the part to which her possessions are contiguous."[1] While there may be room for doubt as to whether these engagements were designed to impose restraints beyond the time when the particular administrations which entered into them should relinquish control of the foreign relations of their respective States, it is not unreasonable to contend that they were not invalid, and served to impose, at least for a certain interval, restraints upon the contracting parties.[2]

(5)

§ 509. Modi Vivendi.

"There is a well defined type of agreement, known as the *modus vivendi*, which has been regarded as falling within the President's

duty of the United States, after the retirement of President Roosevelt, to adhere to the policy marked out in the notes. *Id.*, 465.

It may be observed that executive agreements need not always be expressed in writing. The important understanding effected by Mr. Root, Secy. of State, and the Japanese Ambassador at Washington in 1907, with respect to the limitation and control to be exercised by Japan over the emigration of laborers to the United States, was perfected without the aid of an exchange of notes or the execution of a protocol. See reference to this understanding in declaration by the Japanese Ambassador, Feb. 21, 1911, Charles' Treaties, 82; also in Report of the Commissioner General of Immigration for the year ending June 30, 1907.

[1] Official Bulletin, No. 152, Nov. 6, 1917. See statement of Mr. Lansing, Secy. of State, concerning this agreement at a hearing of the Senate Committee on Foreign Relations, Aug. 11, 1919, Senate Doc. No. 106, 66 Cong., 1 Sess., 223, and following.

[2] To a declaration such as that contained in the Lansing-Ishii agreement, recognizing, on grounds of territorial propinquity, the special interests of Japan in China, great significance might be attached at Tokio. Apart from any question as to the validity of the agreement, or the scope or duration or interpretation of its provisions, such an acknowledgment might be in fact regarded by Japan as an authoritative admission on the part of the United States touching the reasonableness of the Japanese claim to a preponderance of interest in China, and the fairness of the endeavor to resist opposition of other States thereto, even when designed to uphold the territorial integrity of China.

Under the Constitution there appears to be no way in which to deter the political department of the Government from giving expression to a view as to policy or law, which, regardless of the form it assumes, may present a grave obstacle when subsequently, in the course of diplomatic negotiation, or of an arbitral adjudication, the United States deems it of highest importance to pursue a different course. For that reason, it may be fairly doubted whether the present practice whereby the President agrees, without the approval of the Senate, to understandings or declarations of vast import, serving both to further the political aspirations of other States and to weaken proportionally the subsequent influence of the United States as a deterrent, is to be regarded as advantageous to the nation.

powers. As the name indicates, a *modus vivendi* is in its nature a temporary or working arrangement made in order to bridge over some difficulty pending a permanent settlement." [1] Thus pending the consideration by the Senate of a convention with the Dominican Republic, signed February 7, 1905, providing for the collection and disbursement of the customs revenues of that State,[2] the President, through a *modus vivendi* expressed in an exchange of notes March 31, and April 1, 1905, arranged with that Republic for the collection, temporary deposit, and ultimate distribution of Dominican revenues by an American receiver.[3] The Executive has entered into numerous other agreements of the same general character. It was found on several occasions to be feasible to employ them to enable American fishermen to exercise certain fishing privileges within British territorial waters prior to the final adjustment by arbitration of the controversy concerning the North Atlantic Coast Fisheries.[4]

[1] J. B. Moore, in *Pol. Sc. Quar.*, XX, 385, 397.
[2] For. Rel. 1905, 342.
[3] For. Rel. 1905, 365–366.
[4] See, for example, *modus vivendi*, expressed in an agreement effected by an exchange of notes at London, Oct. 6–8, 1906, Malloy's Treaties, I, 805, also renewals, *id.*, 811, 832, and 844.

TITLE C

NEGOTIATION AND CONCLUSION

1

§ 510. Persons Capable of Concluding Agreements.

Any one may be appointed an agent of a State for the purpose of negotiating and signing an international agreement in its behalf. Treaties may be concluded by the heads of States. The compact known as the Holy Alliance, of September 14–26, 1815, was signed by the Emperors of Austria and Russia, and by the King of Prussia.[1] The Treaty of Versailles of June 28, 1919, was signed by President Wilson, "acting in his own name and by his own proper authority", as well as by the Prime Minister of Great Britain, the President of the Council of the French Republic, the Presidents of the Councils of Ministers of Greece, of the Polish Republic, of Roumania and of the Czecho-Slovak Republic, and by numerous other plentipotentiaries of the Principal Allied and Associated Powers.[2]

Ordinarily agreements are signed by the Minister of Foreign Affairs of the State where negotiations are conducted, and by a plenipotentiary (usually the accredited diplomatic representative) of the other contracting party. Not infrequently special commissioners are appointed for such a purpose.[3]

The nationality of the individual who negotiates and signs a treaty is unimportant. He may be a national of the State with

[1] *Nouv. Rec.*, II, 656.
The preliminaries of peace agreed upon at Villafranca, July 11, 1859, were signed by the Emperors of Austria and France. *Nouv. Rec. Gén.*, XVI, Part 2, p. 516.

[2] Preamble of the treaty, as contained in Senate Doc. No. 49, 66 Cong., 1 Sess.
The agreement between the United States and Cuba of Feb. 16, 1903, for the lease to the former of lands in Cuba for coaling and naval stations, was signed by the Presidents of the contracting States. Malloy's Treaties, I, 358.

[3] Thus, for example, President McKinley appointed five commissioners to meet at Paris not later than Oct. 1, 1898, to conclude a treaty of peace with commissioners representing Spain. See instructions to the American Commissioners, Sept. 16, 1898, For. Rel. 1898, 904.

which he seeks to conclude an agreement. On more than one occasion an American citizen has, in behalf of a foreign power, signed a treaty with the United States.[1]

2

§ 511. Full Powers.

It is the practice to confer what are described as full powers upon an agent to whom is confided the responsibility of negotiating a treaty. In early times, when a monarch possessed the entire agreement-making power of the State over which he reigned, he sometimes delegated it to a plenipotentiary who was thus enabled to bind his sovereign by signing a treaty in his behalf.[2] At the present day, however, the constitutional or fundamental law of contracting States oftentimes confers upon the legislative department of their respective governments some share in the agreement-making power, and so prevents the delegation to a plenipotentiary of authority with respect to the more important classes of agreements, such as treaties, to perfect the contractual obligation in behalf of his country.[3] Apart, however, from any constitutional requirements, it is acknowledged to be inexpedient to permit a plenipotentiary to bind his State in respect to numerous matters of large import and yet concerning which international agreement is imperative. Danger of the abuse of authority, and of the magnitude of the harm which might result therefrom, has long been regarded as demanding a limitation of the powers of negotiators. Save for the purpose of concluding agreements of minor character, plenipotentiaries are not commonly empowered to bind the States for which they act. Thus the full powers with which they are clothed are ordinarily those conferring

[1] Thus Mr. Anson Burlingame, an American citizen, who had been formerly in the diplomatic service of the United States, signed, in behalf of China, a treaty concluded with the United States July 28, 1868. Malloy's Treaties, I, 234.

Mr. Herbert W. Bowen, American Minister to Venezuela, was permitted by the United States to act as the Venezuelan plenipotentiary in concluding agreements with the United States at Washington, Feb. 17, and May 7, 1903. Malloy's Treaties, II, 1870 and 1872.

[2] "In the time of Grotius it was thought that a diplomatic representative bound his constituent by whatever agreement he concluded within the terms of his credentials." Westlake, 2 ed., I, 290-291, *citing* Grotius, I, 2, c. 11, § 12.

See, also, Hall, Higgins' 7 ed., § 110.

[3] See Ratification of Treaties: Methods and Procedure in Foreign Countries Relative to the Ratification of Treaties (containing also extracts from the Executive Journal of the Senate relative to proceedings in cases of treaties rejected by the Senate), Senate Doc. No. 26, 66 Cong., 1 Sess.

authority merely to enter into provisional arrangements, to be ratified before they are to become binding.[1]

To facilitate the conclusion of a treaty for submission to the proper authorities of the contracting States, it is customary to confer full powers on the plenipotentiaries who are commissioned to negotiate. "When a diplomatic representative of the United States is entrusted with the negotiation of a treaty or convention, a full power will be given to him." [2] A government may in fact decline to deal with a foreign representative found to be lacking in this regard.[3]

In correspondence with Germany in October, 1918, regarding an armistice, President Wilson declared it to be his duty to say that the world did not and could not trust the word of those who had been the masters of German policy, and to point out that the Government of the United States could not 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." [4] From assurances of the German Foreign Office, the President appeared to be satisfied that the principals who sought to act in behalf of Germany fulfilled this condition.[5]

[1] Hall, Higgins' 7 ed., § 110, p. 340, where it is said: "It was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a State, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognised by Bynkershoek as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign."

[2] Instructions to the Diplomatic Officers of the United States (1897), § 242. "In case of urgent need a written international compact between a diplomatic representative of the United States and a foreign government may be made in the absence of specific instructions or powers. In such case it is preferable to give to the instrument the form of a simple protocol, and it should be expressly stated in the instrument that it is signed subject to the approval of the signer's Government." *Id.*, § 243.

[3] See attitude of Japanese plenipotentiaries in declining to accept the powers of the Chinese plenipotentiaries who met them with a view to concluding peace in 1894, Moore, Dig., V, 179–180, For. Rel. 1894, Appendix I, 97–106.

Concerning the attitude of the United States as to the wisdom of entering into negotiations with Earl Li Hung Chang and Prince Ching as plenipotentiaries of China after the Boxer movement in 1900, see For. Rel., 1900, 212, 291–293. The view of Germany was expressed in a memorial filed with the American Embassy at Berlin, Sept. 22, 1900, *id.*, 336–337; that of Austria-Hungary, *id.*, 306–307; that of Russia, *id.*, 375–376.

[4] See communication of Mr. Lansing, Secy. of State, to Mr. Oederlin, Swiss Chargé d'Affaires *ad interim*, Oct. 23, 1918, *Am. J.*, XIII, Supp., 92.

[5] Communication from the German Government, of Oct. 27, 1918, trans-

3

FORMALITIES

a

§ 512. Language.

"Until about the middle of the eighteenth century treaties between European powers were generally written in Latin, but it has since been customary for negotiators of countries which do not use the same language to prepare their treaties in both languages." [1]

It is customary for States at the present time to execute their written agreements in their own languages wherever those may differ. Such is the practice of the United States.[2] The treaty of peace between Japan and Russia, signed by their plenipotentiaries at Portsmouth, August 23, 1905, was however, expressed in the French and English languages.[3] In order to exclude possible inaccuracies due to errors in translation, it is often provided that a particular version shall be authoritative. Thus in the Treaty of Portsmouth, it was agreed that the French text should govern. According to Article XVII of the treaty between the United States and China of October 8, 1903, set out in both English and Chinese, the English version was to be authoritative.[4]

International conventions and acts to which several States become parties are generally expressed in a single language, which is usually French.[5] The Treaty of Versailles of June 28, 1919, was set forth in the French and English languages. It was declared that both texts were authentic and should be ratified.[6] The treaty of peace with Austria of September 10, 1919, was

mitted to Mr. Lansing, Secy. of State, by the Swiss Chargé d'Affaires *ad interim*, Oct. 28, 1918, *Am. J.*, XIII, Supp., 94.

[1] Mr. Fish, Secy. of State, to Miss Fraser, Nov. 18, 1874, 105 MS. Dom. Let. 221, Moore, Dig., V, 180, note.

[2] Instructions to Diplomatic Officers of the United States (1897), § 245.

[3] For. Rel. 1905, 824.

[4] Malloy's Treaties, I, 269.

[5] See, for example, General Act of the International Conference at Algeciras, of April 7, 1906, Malloy's Treaties, II, 2157. See, also, the several conventions of the Hague Peace Conferences of 1899 and 1907.

General international conventions are frequently set forth in a single copy which, by agreement, is to remain deposited in the archives of a particular government, with the understanding that duly certified copies are to be sent through the diplomatic channel to the contracting parties. See, for example, Art. XCVII of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2245.

[6] Art. 440 of treaty of peace with Germany.

expressed in French, in English and in Italian, and apparently each version was to be ratified.[1]

b

§ 513. The Alternat.

In drawing up international agreements it is the practice of States "to vary the order of naming of the parties, and of the signatures of the plenipotentiaries, in the counterparts of the same treaty, so that each party is first named, and its plenipotentiary signs first in the copy possessed and published by itself." [2] This is known as the principle of the alternat, and is observed by plenipotentiaries of the United States under standing instructions of the Government.[3]

c

§ 514. Protocols.

In the process of making agreements of large scope, requiring numerous conferences of plenipotentiaries, it is common to embody the results of each meeting in a document known as a protocol. The contents of such instruments are read, approved and signed by the several negotiators, and constitute an exact record of the steps leading up to final agreement. They embrace a statement of all the views expressed verbally, or in writing, at each conference. Frequently there are appended to a protocol briefs in support of contentions of law or fact, or in justification of a policy. Protocols may serve to manifest the accord of the negotiators on certain clauses of a convention in process of negotiation. Such partial or temporary bases of agreement are not to be taken as manifesting any duty on the part of the plenipo-

[1] Art. 381. It was here declared that in case of divergence the French text should prevail, except in Parts I (Covenant of the League of Nations) and XIII (Labour), where the French and English texts were to be of equal force.

[2] Mr. Adams, Secy. of State, to Mr. Rush, Minister to Great Britain, Nov. 6, 1817, MS. Inst. U. S. Ministers, VIII, 152, Moore, Dig., V, 182.

[3] Instructions to Diplomatic Officers of the United States (1897), § 244.

"In the case of the Treaty of Ghent, Great Britain took priority over the United States in both copies, and the American plenipotentiaries signed under those of Great Britain. In order that this might not be made a precedent, it was thought proper in the exchange of ratifications to advert to the circumstance and to say that it was not intended to imply any waiver by the United States of the rule that each sovereign should take priority over the other in the copy retained by his government. . . .

"It should be remarked, however, that both in the preliminary and in the definitive treaty of peace with Great Britain of 1782 and 1783, and in the Jay Treaty of 1794, Great Britain was permitted to take rank of the United States in the text of both copies; so also in the convention of March 15, 1798, and of Jan. 8, 1802. In the commercial convention of July 3, 1815, the alternat was observed, as has always since been the case." Moore, Dig., V, 181.

tentiaries to acquiesce in the terms of a convention which gives expression to them.[1]

Protocols of meetings are chiefly important as a means of keeping distinct the several questions confronting the negotiators, and as thus affording opportunity to perceive the precise grounds of any divergence of opinion. In case of subsequent disagreement between the parties, concerning the interpretation of a treaty, the protocols of the plenipotentiaries preliminary to its conclusion may shed light respecting the intention of those individuals as well as of their governments at the time of negotiation.[2]

d

§ 515. Signature. Seal.

Upon agreeing to the terms of a treaty, the negotiators subscribe their names and attach their seals thereto.[3] Upon the completion of these acts the work of those individuals is, in an international sense, accomplished. There is doubtless, however, a domestic obligation imposed upon them to make necessary explanatory reports to their respective governments.[4]

[1] The twenty-two protocols of the conferences at Paris of the American and Spanish Commissioners appointed to conclude a treaty of peace in 1898, are contained in Senate Doc. No. 62, Part 1, 55 Cong., 3 Sess., 12–271.

At the Peace Conference which concluded the Treaty of Versailles of June 28, 1919, the so-called Council of Four, known as the Council of the Principal Allied and Associated Powers (which became five in number when Japan was represented thereon) was in constant session, and recorded its daily action in a *procès-verbal*, which was not read over and compared, but which was preserved. The matters discussed were summarized, and the conclusions reached were so recorded. Copies were distributed within twenty-four hours, and were open to correction by any conferee. President Wilson thought there was serious objection against communicating these *procès-verbaux* to the Senate Committee on Foreign Relations pending the consideration of the treaty by the Senate. See Conference of Senate Committee on Foreign Relations at the White House Aug. 19, 1919, Senate Doc. No. 106, 66 Cong., 1 Sess., p. 521.

[2] Interpretation of Treaties, Sources of Interpretation, *infra*, § 531.

[3] See, in this connection, opinion of Mr. Lee, Atty. Gen., July 23, 1796, where it was declared that the authority of the commissioners appointed in pursuance of Art. V of the treaty with Great Britain (of 1794) could not be duly and legally executed by a majority of them. He said, "They must all agree in their decisions, which must be signed and sealed by them all." It should be noted that this requirement was laid down with respect to the duties of the commissioners to whom was entrusted the task of determining what river was the river St. Croix, intended by the treaty of peace of 1782–1783. Mr. Lee did not purport to announce such a rule with respect to the duties of plenipotentiaries entrusted with the negotiation of a treaty. 1 Ops. Attys.-Gen., 66.

A plenipotentiary, in appending his signature and seal to a treaty, may doubtless annex simultaneously thereto an expression of his views dissenting from the provisions contained in it.

[4] See, for example, Report of the American Delegates to the Second Hague Peace Conference of 1907, For. Rel. 1907, II, 1144.

The exchange of ratifications being a distinct and subsequent transaction is likely to be effected through the medium of other agents.

4

RATIFICATION

a

§ 516. Legal Right to Withhold It.

If an international agreement is of a character such as to call for ratification before the contractual relationship shall have been perfected, it is not perceived how a legal duty to ratify results from the mere signature of the compact.[1] A contracting State must be regarded as legally free to withhold assent until it commits the act (whatever that may be) which is deemed to manifest it. This seems to be obvious in the case of a treaty, which, according to the fundamental law of a contracting State, is not to be ratified save with the approval of the legislative department of the government.[2] Nor is the situation believed to be otherwise in case the agreement is of a kind such that ratification may be effected by the government of a contracting State without legislative approval, so long as the compact purports to require ratification. It is the withholding of the consent of the State prior at least to that event which retards the completion of the contract, and leaves unfettered the right not to agree.[3]

[1] See discussion in Hall, Higgins' 7 ed., § 110; opinions of writers in Moore, Dig., V, 184–188; J. E. Harley, "The Obligation to Ratify Treaties", *Am. J.*, XIII, 389.

"A right of ratification implies a right of refusal. Accordingly, the qualification imposed by some writers, that, when the negotiator has acted within his powers and specific instructions, ratification may be refused only for real and substantial reasons, is of good faith only; and it can have no application unless the powers and instructions of the plenipotentiary are given by the full treaty-making organ of the State." Crandall, Treaties, 2 ed., § 3.

"It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with foreign nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; for, though such treaties, being, on their part, made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation, until approved by the government." President Washington, Special Message, Sept. 17, 1789, Richardson's Messages, I, 61, Moore, Dig., V, 188.

[2] See, in this connection, Mr. Adams, Secy. of State, to Mr. Rush, Nov. 12, 1824, MS. Inst. U. S. Ministers, X, 215, Moore, Dig., V, 191. Also Mr. Evarts, Secy. of State, to Mr. Delmonte, Feb. 19, 1880, MS. Notes to Dominican Republic, I, 41, Moore, Dig., V, 191.

[3] *Compare* the attitude of Mr. Adams, Secy. of State, contained in communication to Mr. Lowndes, Dec. 16, 1819, Am. State Pap., For. Rel., IV, 673, Moore, Dig., V, 189, where it was declared that inasmuch as the King of

It may be that a particular government, whose plenipotentiaries have with its approval signed an agreement embodying terms acceptable to and possibly proposed by itself, has assumed a position such that opposition to ratification according to the constitutional requirements of the country amounts to a breach of faith towards the other signatory State. Even such conduct, however to be deplored, does not appear to deprive the former State as such of the legal right to withhold a consent not previously given in its behalf.[1]

It must be clear that a State may by treaty undertake to agree to a subsequent arrangement, such, for example, as one providing for the adjustment of a dispute by arbitration, and so under-

Spain had solemnly promised "to *approve, ratify,* and *fulfill*" the compact to be concluded by his plenipotentiary with the United States, by the full power given that individual, the King was bound to ratify the treaty of Feb. 22, 1819, "by the principles of the law of nations applicable to the case."

[1] On January 22, 1903, Secretary Hay, in behalf of the United States, and Dr. Herran, Chargé d'Affaires of Colombia, in behalf of his government, signed at Washington an isthmian canal treaty, the ratification of which was duly advised by the Senate of the United States, and given by the President. Secretary Hay on June 2, 1903, instructed Minister Beaupré by telegram: "You should, when the time seems opportune, in so far as you discreetly and properly may, exert your influence in favor of ratification." For. Rel. 1903, 145–146. On June 9, 1903, Secretary Hay telegraphed the Minister: "The Colombian Government apparently does not appreciate the gravity of the situation. The canal negotiations were initiated by Colombia, and were energetically pressed upon this Government for several years. The propositions presented by Colombia, with slight modifications, were finally accepted by us. In virtue of this agreement our Congress reversed its previous judgment and decided upon the Panama route. If Colombia should now reject the treaty or unduly delay its ratification, the friendly understanding between the two countries would be so seriously compromised that action might be taken by the Congress next winter which every friend of Colombia would regret. Confidential. Communicate substance of this verbally to the Minister of Foreign Affairs. If he desires it, give him a copy in form of memorandum." *Id.*, 146. On June 18, 1903, Mr. Rico, the Colombia Minister for Foreign Affairs, replied in part: "The previous requisite of legislative approval is indispensable for the exchange of ratifications, and before this is done the treaty is but a project which, according to the law of nations, has no rights and obligations, and for the same reason, according to that law, to reject or delay its ratification is not cause for the adoption of measures tending to alter the friendly relations between the two countries." *Id.*, 153–154. On August 12, 1903, the treaty was rejected by the Senate of Colombia. *Id.*, 179. General Reyes on a special mission to the United States in behalf of Colombia, in a communication to Secretary Hay, Dec. 23, 1903, after calling attention to the fact that according to its terms, the convention was to be ratified in conformity with the laws of the two countries, said: "It follows that the Congress of Colombia, which is vested according to our laws with the faculty or power to approve or disapprove the treaties concluded by the Government, exercised a perfect right when it disapproved the Hay-Herran convention." *Id.*, 284–285. In reply January 5, 1904, Secretary Hay said: "The Department is not disposed to controvert the principle that treaties are not definitely binding till they are ratified; but it is also a familiar rule that treaties, except where they operate on private rights, are, unless it is otherwise provided, binding on the contracting parties from the date of their signature, and that in such case the exchanging of ratifications confirms the treaty from that date. This rule necessarily implies

take to refrain from exercising the right not to agree to an appropriate arrangement pursuant to the original compact. Numerous other instances must suggest themselves whereby a State may give up the right to withhold acquiescence from a particular engagement. Such cases do not, however, support the contention that by the signature of a treaty in its behalf a State is deprived of the right not to accept the terms of the compact.

It has been observed that States constantly conclude contracts of minor importance such as executive agreements. In so doing it may prove expedient to clothe plenipotentiaries with power to perfect contractual relationships in behalf of their respective States. When they do so in pursuance of the requisite authority, ratification is neither anticipated nor given. By virtue of such procedure a State may be enabled to give its formal consent at a desired time, and under circumstances when indefinite delay entailed by ratification through any process, might cause a rupture of negotiations and render impossible the conclusion of an agreement. The advantage to the United States from the possession by the President of the power to authorize Mr. Rockhill, the American Commissioner, to consent in behalf of the nation to the Final Protocol between the several Powers on the one hand, and China on the other, September 7, 1901, was a real one.[1]

b

Ratification by the United States

(1)

§ 517. The President.

As has been observed, the Constitution confers upon the President "power, by and with the advice and consent of the Senate,

that the two governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation but also to do nothing in contravention of its terms." For. Rel. 1903, 299.

It may well be doubted whether, from the rule as to the date of the operation of treaties, there is to be implied a legal obligation on the part of a State not to oppose the consummation of an unratified convention purporting to require ratification. Doubtless Secretary Hay had especially in mind the attitude of the Government of Colombia rather than that of all those who were possessed of the treaty-making power of that State. It is not perceived how the motives impelling the Government of Colombia to oppose the Hay-Herran convention, or how the relationship which that Government thereby assumed towards the United States by such opposition, affected the legal right of the Republic of Colombia not to ratify an agreement which was not to become binding until ratified.

[1] Malloy's Treaties, II, 2006.

"In such cases the foreign minister of the latter country also has usually

to make treaties, provided two-thirds of the Senators present concur." [1] The power to ratify is thus lodged in him. He may, therefore, and on occasion does, refuse to exercise that power except on such conditions as he deems advisable. He may withhold from the Senate a treaty already signed. He may suggest to that body the incorporation of amendments. He may refuse to ratify a treaty in case the Senate in consenting to ratification imposes conditions of which he disapproves. He may withdraw a treaty from the Senate at his discretion.[2] There appears to be no means by which a treaty can be concluded in behalf of the United States without the approval of the Executive.

Although frequently in consultation with its members, the President has long since ceased to seek and obtain the advice of the Senate preliminary to the negotiation of treaties.[3] He not infrequently, however, makes vigorous effort to secure the approval by that body of a treaty submitted to it, and on such terms as he approves.[4]

(2)

§ 518. The Senate.

The Senate exercises freely its constitutional right in the advising and consenting to treaties submitted to it. It may withhold its approval at will. Thus the Senate may formally reject a treaty or fail to act upon it.[5] It is not uncommon for that body

been a real party to the negotiation, by his despatches addressed to his ambassador and communicated by him to the other side; and the very terms of the notes to be exchanged have usually been settled in that correspondence. The result therefore is that at which the two contracting authorities have already arrived, and there is no need of ratification, nor is such a formality used." Westlake, 2 ed., I, 292.

[1] Art. II, Section 2, paragraph 2.

[2] See numerous instances recorded in Crandall, Treaties, 2 ed., §§ 51–54.

On Jan. 17, 1920, the Senate returned to the President at his request, the convention signed Sept. 2, 1919 (and submitted to the Senate the following day), with Great Britain providing effective measures for the protection, preservation and propagation of the salmon fisheries in the waters contiguous to the United States and the Dominion of Canada, and in the Fraser River system. The withdrawal of the treaty was for the purpose of securing the revision of Art. II. Cong. Rec., Vol. LIX, No. 30, Jan. 17, 1920, p. 1733.

[3] "Gradually the practice of consulting the Senate, by special message, in advance of the negotiation and conclusion of treaties fell into disuse, and it has since the administration of Jefferson only occasionally been resorted to. But it may be superfluous to say that personal consultations, by the President or the Secretary of State, with individual Senators have not been and are not uncommon." Moore, Dig., V, 197.

[4] See, for example, letter of President Wilson to Senator Hitchcock, with respect to Art. X of the treaty of peace with Germany then before the Senate, March 8, 1920, Congressional Record, March 9, 1920, Vol. LIX, No. 76, p. 4354.

[5] Thus on March 19, 1920, the Senate, failing to agree to the resolution of ratification of the proposed treaty of peace with Germany of June 28, 1919

to make amendments,[1] or to declare that its approval is with the understanding that the act of ratification shall be subject to reservations which are prescribed.[2]

c

§ 519. Amendments and Reservations.

Any change, however slight, and of whatsoever form, which is incorporated in a treaty in the course of or pursuant to ratification by a contracting State, constitutes a fresh offer. There can be no agreement until the offer is accepted. What constitutes acceptance will depend, in one sense, upon the nature of the proposal. If it assumes the form of a textual change affecting the duties of each contracting party, it is unlikely that the State or States to which the offer is made will acquiesce without affirmative action manifesting unequivocally that fact. Nor will there be a disposition on their part to resort to conduct from which acceptance can be reasonably inferred, if it is deemed undesirable to yield. Thus the danger lest there be uncertainty as to whether the amended treaty is in fact accepted, would appear remote.[3]

If the change assumes the form of a reservation, designed either

(by a vote recording 49 in favor of the resolution, and 35 against it), agreed to a resolution returning the treaty to the President, and informing him of its inability to obtain the constitutional majority therefor. Congressional Record, Vol. LIX, No. 85, March 19, 1920, pp. 4915, 4916 and 4917. The treaty was returned on March 20, 1920.

See Extracts from the Executive Journal of the Senate relative to proceedings in cases of treaties rejected by that body, contained in Ratification of Treaties, Senate Doc. No. 26, 66 Cong., 1 Sess., 85–280.

[1] Such, for example, was the action taken in regard to the proposed treaty with France of Aug. 3, 1911, extending the scope and obligation of the policy of arbitration adopted in the arbitration treaty concluded with that State Feb. 10, 1908.

[2] See, for example, resolution of the Senate with respect to the ratification of the Algeciras convention of April 7, 1906, Malloy's Treaties, II, 2183; resolution of the Senate April 2, 1908, with respect to the ratification of the Hague Convention of 1907, for the Settlement of International Disputes, *id.*, 2247; resolution of the Senate with respect to the ratification of the Hague Convention of 1907, for an International Prize Court, Charles' Treaties, 262.

[3] This is illustrated by the correspondence between the United States and Great Britain following the amendment by the Senate of the first Hay-Pauncefote convention of Feb. 5, 1900. The British Government was informed of the attitude of the Senate and hope was expressed that the amendments would be found acceptable to that Government. On Feb. 22, 1901, Lord Lansdowne instructed the British Ambassador at Washington to give to Secretary Hay a memorandum indicating the reasons why Great Britain felt unable to accept the convention in its amended form. Diplomatic History of the Panama Canal, Senate Doc. No. 474, 63 Cong., 2 Sess., 6–17.

The amendment of the Jay treaty of Nov. 19, 1794, by the incorporation of an additional Article, was expressly acquiesced in and noted with approval in the ratification by the King on Oct. 28, 1795. See Great Britain, Parliamentary Register, 1795, 105. This document was called to the attention of the author by Mr. A. P. C. Griffin, Chief Assistant Librarian of Congress.

to give expression to a particular interpretation sought to be attached to certain Articles, or to modify or limit the scope of the burdens undertaken solely by the State making the reservation, acquiescence by the other contracting State or States is said to be inferred from their silence.[1] Upon occasion the United States has ratified treaties under reservations to which the other contracting powers have not been disposed to object, and where the absence of evidence of objection has justified the inference that the terms of the reservation, although technically constituting a fresh proposal, were, nevertheless, accepted.[2] Thus the

[1] At a conference of the President with the Committee on Foreign Relations of the Senate, Aug. 19, 1919, Mr. Lodge, Chairman of the Committee, said: "I take it there is no question whatever, under international law and practice, that an amendment to the text of a treaty must be submitted to every signatory, and must receive either their assent or their dissent. I had supposed it had been the general diplomatic practice with regard to reservations — which apply only to the reserving power, and not to all the signatories, of course — that with regard to reservations it had been the general practice that silence was regarded as acceptance and acquiescence; that there was that distinction between a textual amendment, which changed the treaty for every signatory, and a reservation, which changed it only for the reserving power. In that I may be mistaken, however." Senate Doc. No. 106, 66 Cong., 1 Sess., 509.

See Treaty Reservations, a compilation of reservations made to treaties and conventions by the Senate of the United States, Senate Doc., No. 148, 66 Cong., 1 Sess.

"If a reservation, as a part of the ratification, makes a material addition to, or a substantial change in, the proposed treaty, other parties will not be bound unless they assent. It should be added that where a treaty is made on the part of a number of nations, they may acquiesce in a partial ratification on the part of one or more. But where there is simply a statement of the interpretation placed by the ratifying State upon ambiguous clauses in the treaty, whether or not the statement is called a reservation, the case is really not one of amendment, and acquiescence of the other parties to the treaty may readily be inferred unless express objection is made after notice has been received of the ratification with the interpretative statement forming a part of it." Letter of Mr. Charles E. Hughes to Senator Hale, July 24, 1919, proposing reservations to the Covenant of the League of Nations.

[2] Such appears to have been the case, for example, with respect to the reservation under which the United States ratified the Hague Convention of 1907, concerning the Settlement of International Disputes, Malloy's Treaties, II, 2247.

In the case of a general international convention such, for example, as that concluded at Algeciras April 7, 1906, the reservation embodied in the ratification of a signatory power is noted in the *procès-verbal* respecting the deposit of ratifications of the several signatory States.

There may be difficulty in determining whether a change expressed in the terms of ratification is to be regarded as a mere reservation, and as such, affording the basis for an inference of acquiescence by other non-objecting contracting parties. The problem is one of fact rather than of law, dependent upon the circumstances of the particular case.

It may be observed that according to his proclamation of June 24, 1916, the President announced that the reservation or understanding under which (pursuant to the action of the Senate) the United States conditioned its ratification of the convention with Nicaragua of Aug. 5, 1914, for the construction of a ship canal, had been "accepted by the Government of Nicaragua." 39 Stat. 1664.

In advising and consenting to the ratification of the convention with Den-

choice of the form of a change whereby the United States, for example, in becoming a party to an international convention, seeks to condition its acceptance, is likely to depend upon whether it is sought to limit the burdens to be undertaken solely by itself, rather than those to be imposed upon all parties indifferently. It may be deemed expedient to effect any change, and so offer any proposal, in terms such that the acquiescence of other signatory States be not necessarily deterred.

d

§ 520. Exchange of Ratifications.

In a broad sense the act of ratification by a State of a treaty concluded in its behalf embraces the acts by which it endeavors to express its consent to the other contracting party or parties, and thus to perfect its contractual obligation. In practice, what is known as the act of ratification does not suffice to serve such a purpose. It precedes another step which needs to be taken before the completion of the agreement. It is the exchange of ratifications which produces that effect.[1] Inasmuch as contracting

mark of Aug. 4, 1916, for the cession of the Danish West Indies, the Senate declared that its approval was given with an understanding (as to specified matters) to be expressed as a part of the instrument of ratification, and also to be set forth in an exchange of notes between the contracting parties "so as to make it plain that this condition is understood and accepted by the two governments." In proclaiming the treaty Jan. 25, 1917, the President announced that this condition had been fulfilled. 39 Stat. 1715.

According to the preamble of the resolution of ratification of the proposed treaty of peace with Germany of June 28, 1919 (which failed to receive the approval of the Senate), ratification was not to take effect or bind the United States "until the said reservations and understandings adopted by the Senate have been accepted as a part and a condition of this resolution of ratification by the allied and associated powers and a failure on the part of the allied and associated powers to make objection to said reservations and understandings prior to the deposit of ratification by the United States shall be taken as a full and final acceptance of such reservations and understandings by said powers."

[1] See, in this connection, Davis J., in Haver *v.* Yaker, 9 Wall. 32, 34, cited by Brown, J., in Dooley *v.* United States, 182 U. S. 222, 230; also Baldwin, J., in United States *v.* Arredondo, 6 Pet. 691, 748; also Crandall, Treaties, 2 ed., § 155, *citing* the foregoing cases; Hall, Higgins' 7 ed., § 110, p. 343.

From a letter of President Washington to Gouverneur Morris, March 4, 1796, it appears that the formal ratification by the King of the Jay Treaty of Nov. 19, 1794, had not been received by the United States. There being, however, "sufficient and official evidence of the fact, both from Mr. Deas and the British Chargé d'Affaires", the treaty was proclaimed Feb. 29, 1796, as the law of the land. Writings of George Washington, collected and edited by Worthington C. Ford, New York, 1892, XIII, 172, 173. It should be observed, however, that on March 1, 1796, the President announced to the Congress that the ratifications of the treaty had been exchanged at London, Oct. 28, 1795. Annals of Fourth Cong., 1 Sess., 48. Thus it appears that the note to Mr. Morris had reference merely to the receipt in the United States of the text of the King's ratification.

States, which have separately ratified an agreement between them, commonly exchange ratifications as a matter of course, attention has been generally focused upon the earlier rather than the later acts.

As agreements purporting to require ratification are deemed to necessitate also an exchange of ratifications for the perfecting of the contract, it must follow that prior to such exchange, a signatory State remains free not to agree to the compact. From the circumstance that the treaty-making power has been so exercised as to lodge authority to bind the nation in a particular individual (such as the President of the United States), there does not appear to be necessarily imposed upon the State which he represents a legal duty to take through him the final step necessary to complete the agreement.[1]

e

§ 521. Proclamation.

Following the exchange of ratifications, a treaty is commonly proclaimed by the highest authorities of the signatory States in order that the compact may be made known and observed within their respective territories.[2] In the case of the United States, proclamation is made by the President.[3]

[1] Mr. Olney, Secy. of State, in a communication to Mr. Terrell, Minister to Turkey, Oct. 15, 1896, with reference to the naturalization convention concluded with that country Aug. 11, 1874, and amended by the Senate Jan. 22, 1875, adverted to the fact that when the ratifications of the amended convention were exchanged at Constantinople, April 22, 1875, the protocol of exchange was accompanied by a Turkish memorandum giving to the amended text of Art. II an interpretation believed to be at variance with the intent of the Senate as to the amendment. Secretary Olney declared that "Mr. Fish treated the exchange of ratifications, at Constantinople, as invalid, in view of the construction placed upon the amended text of Article II by the Turkish memorandum, and declared that there had been in fact no real exchange of ratifications. The treaty was, in consequence, not proclaimed." For. Rel. 1896, 933, 934.

"Ratification is given by written instruments, of identical form, exchanged between the contracting parties, and signed by the persons invested with the supreme treaty-making power, or where that power resides in a body of persons, by the agent appropriate for the purpose." Hall, Higgins' 7 ed., § 110, p. 343.

[2] See, for example, proclamation of President Wilson of June 24, 1916, of convention between the United States and Nicaragua, Aug. 5, 1914, 39 Stat. 1664.

[3] "The proclamation of a ratified treaty can be made only by the President of the United States, and cannot be issued by the legation by whom the treaty is negotiated." Moore, Dig., V, 210, *citing* Mr. Blaine, Secy. of State, to Mr. Angell, Oct. 10, 1881, MS. Inst. China, III, 266.

TITLE D

OPERATION AND ENFORCEMENT OF TREATIES

1

§ 522. Date of Taking Effect.

Any arrangement, whether expressed or implied, that a treaty is to take effect for any purposes prior to the completion of the contractual relationship between the signatory parties, is obviously subject to the condition that that relationship be perfected.[1] An agreement which does not purport to require ratification, and which is consummated upon signature, is free from such a provisional aspect.

The parties to an international arrangement may fix at will the time when their compact is to become operative. In the case of a treaty, the terms of the instrument frequently make announcement of the design.[2]

It is laid down as a rule of the law of nations, that in the absence

[1] Mr. Evarts, Secy. of State, to Mr. Fairchild, Minister to Spain, No. 581, Aug. 11, 1880, For. Rel. 1880, 922.

[2] See, for example, Art. VIII of the extradition convention with Belgium of March 19, 1874, announcing that the agreement should "take effect twenty days after the day of the date of the exchange of ratifications." Malloy's Treaties, I, 90.

Art. 440 of the treaty of peace with Germany of June 28, 1919, made the following provision:

"The deposit of ratifications shall be made at Paris as soon as possible.

"Powers of which the seat of the Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible.

"The first *procès-verbal* of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of the Principal Allied and Associated Powers on the other hand.

"From the date of this first *procès-verbal* the treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty.

"In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification.

"The French Government will transmit to all the signatory Powers a certified copy of the *procès-verbaux* of the deposit of ratification."

See, also, Art. 381 of the treaty of peace between the Principal Allied and Associated Powers and Austria, of September 10, 1919.

of special agreement, a treaty upon the exchange of ratifications operates retroactively, as from the date of signature.[1] This is said to be true, however, only so far as the agreement concerns the relations between State and State.[2] With respect to the rights of private individuals, the date of operation, unless otherwise specified, is regarded as simultaneous with that of the exchange of ratifications.[3] A treaty does not operate retroactively so as to affect vested rights acquired before the compact was concluded or signed by the signatory parties.[4]

"A treaty which does not require legislation to make it operative will be executed by the courts from the time of its proclamation." [5]

2

SOME ASPECTS OF PERFORMANCE

a

§ 523. In General.

It may be assumed that the law of nations imposes upon the parties to a treaty the duty to perform faithfully the undertakings

[1] Statement in Moore, Dig., V, 244, *citing* Davis *v.* Police Jury of Concordia, 9 How. 280; Hylton's Lessee *v.* Brown, 1 Wash. C. C. 343; J. C. B. Davis, Notes, U. S. Treaty Vol. (1776–1887) 1228; Mr. Buchanan, Secy. of State, to Mr. Clay, Minister to Peru, Sept. 18, 1847, MS. Inst. Peru, XV, 56. See United States *v.* Reynes, 9 How. 127, 148; Mr. Hay, Secy. of State, to Gen. Reyes, Jan. 5, 1904, For. Rel. 1903, 294, 299.

[2] In Davis *v.* Police Jury of Concordia, 9 How. 280, it was declared at 289: "It is true, that, in a treaty for the cession of territory, its national character continues for all commercial purposes; but full sovereignty for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true, that the exercise of sovereignty by the country ceases, except for strictly municipal purposes, especially for granting lands." See also United States *v.* Reynes, 9 How. 127; The Fama, 5 Ch. Rob. 106; Montault *v.* United States, 12 How. 47.

In the opinion of Attorney-General Knox, the navigable waters of Porto Rico were waters of the United States within the meaning and intent of Section 10 of the River and Harbor Act of March 3, 1899. The date of the treaty of cession of that island to the United States by Spain was Dec. 10, 1898; ratifications were not exchanged until April 11, 1899, 23 Ops. Attys-Gen., 551.

[3] Dooley *v.* United States, 182 U. S. 222, 230; Haver *v.* Yaker, 9 Wall. 32; United States *v.* Arredondo, 6 Pet. 691; Lessee of Hylton *v.* Brown, 1 Wash. C. C. 343; Bush *v.* United States, 29 Ct. Cl. 144; *Ex parte* Ortiz, 100 Fed. 955; J. W. Beam *v.* United States and Sioux Indians, 43 Ct. Cl. 61, 66.

"The principle that a treaty is not to be held to operate retroactively in respect to vested rights does not apply to conventions of extradition. It is a general principle that such conventions apply to offenses committed prior to their conclusion, unless there is an express limitation." Moore, Extradition, I, 99.

[4] Taney, C. J., in Prevost *v.* Greneaux, 19 How. 1.

[5] Moore, Dig., V, 246, *citing* Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 750; Foster *v.* Nielson, 2 Pet. 253, 314; United States *v.* Arredondo, 6 Pet. 691, 725. See also decision of Circuit Court of Appeals, Sixth Circuit, Nov. 23, 1908 in United States *v.* Grand Rapids & I. R. Co., 165 Fed. 297, 301.

which they have agreed to discharge.[1] Before examining the grounds on which a contracting State may reasonably rely by way of excuse for non-performance, attention is called briefly to the mode by which this duty is under normal circumstances fulfilled.

The process by which the parties to a valid compact effect performance and assure respect for it by public agencies or private individuals under their control, is primarily a matter of domestic concern.[2] It is theoretically unimportant, from an international point of view, that the constitution of a contracting State attaches a definite legal value to a treaty as a means of insuring its observance. The United States, Italy, the Netherlands, and Japan are equally bound to perform their contractual obligations, notwithstanding the differing fundamental laws which each may invoke and utilize in the effort to effect performance. The extent and nature of the duties conventionally imposed upon each are not limited by the requirements of those laws, so long as the particular treaty is acknowledged to be not invalid.

b

Legislation Necessary to Performance

(1)

§ 524. Appropriations of Money.

The terms of a treaty may be such as to require legislation by a contracting State to enable it to fulfill its obligation. Treaties calling for the payment of funds in connection with the acquisition of territory are typical.[3]

If it be acknowledged that a treaty is not invalid by reason of the circumstance that performance necessitates the exercise of the legislative function which, under the constitutional law of a contracting State, is confided to the legislative department of the government, it would seem to follow that the duty to effect performance is none the less obligatory.[4] In a word, it is not un-

[1] See award of the Tribunal in the North Atlantic Coast Fisheries Arbitration, J. B. Scott, Hague Court Reports, 146, 167; G. B. Wilson, Hague Arbitration Cases, 145, 166.

[2] The terms of a treaty may, however, specify the mode of performance as well as the extent of the obligation to be undertaken In such case both matters cease to be of solely domestic concern.

[3] See, for example, convention with Russia of March 30, 1867, for the cession of Alaska to the United States, Malloy's Treaties, II, 1521.

[4] "If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is

reasonable to assert that when, for example, the United States concludes a treaty contemplating payment by it for the cession to itself of territory, the nation incurs a legal obligation to make payment, and incidentally agrees that the Congress will not fail to make the requisite appropriation. This means that the treaty serves to render it inequitable for either branch of the Congress to exercise its constitutional power not to take such action. It is significant that the Congress has never failed to appropriate funds in accordance with the terms of a perfected convention.[1]

(2)

525. Certain Other Legislative Requirements.

Treaties of the United States have oftentimes required legislative action other than the appropriation of funds. In such cases the Congress has not failed to respond accordingly. The statutory law of the United States with respect to extradition may be regarded as due in part to the provisions of existing con-

not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these, so they are not to be affected or concluded by them, to their own injury." Dana's Wheaton, Dana's Note No. 250, *citing* Kent, I, 165–166. Heffter, § 84, Vattel, *Droit des Gens*, liv. iv. Ch. 2, § 14. Halleck, 854.

[1] "The House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution, because it pledges the public faith; and no legal power to refuse its execution because it is a law — until at least it ceases to be a law by a regular act of revocation of a competent authority." Alexander Hamilton, Works, edited by H. C. Lodge, New York, 1886, VII, 118. See, also, Writings of Jefferson, Paul Leicester Ford's edition, New York, 1892, I, 191; discussion of debates on the Jay Treaty in Crandall, Treaties, 2 ed., § 76, also *id.*, §§ 74–81. In his conclusions in § 81, that writer declares: "Stipulations involving the payment of money have regularly been made without qualification or reservation as to any action thereon by Congress, and have been ratified by the President upon the advice and consent of the Senate only. When so ratified they have been considered by this Government as also by the other contracting parties as valid and definitely concluded, and Congress has never failed to vote the necessary appropriation."

According to Art. V of the convention with Denmark of Aug. 4, 1916, for the cession of the Danish West Indies, the United States agreed to pay within ninety days from the date of the exchange of ratifications to a representative of the Danish Government the sum of $25,000,000. 39 Stat. 1706, 1711. Ratifications were exchanged Jan. 17, 1917, and the convention was proclaimed Jan. 25, 1917. By an Act of March 3, 1917, Chap. 171, § 7, 39 Stat. 1133, the requisite appropriation was made.

Concerning the controversy between the United States and France in regard to the delay in the payment of the French indemnity under the Claims Convention of July 4, 1831, see Moore, Arbitrations, V, 4463–4468; Mr. Wheaton, American Minister, to Mr. Butler, Atty.-Gen., Jan. 20, 1835, Moore, Dig., V, 231.

ventions.[1] An Act of July 3, 1918, served to render efficacious the agreement concluded with Great Britain August 16, 1916, for the protection of migratory birds.[2] Other legislation has appropriately operated to meet the demands of contractual undertakings.[3]

It has been observed, however, that it is highly inexpedient for those possessed of the treaty-making power of the United States to bind the nation to an engagement calling for legislative action which it is likely or probable that Congress may refuse.[4] Even though the arrangement be not invalid, its scope and purpose may be such as not to impress the Congress with a sense of obligation to lend coöperation. Were it believed that the treaty-making power had been abused, although not exceeded, legislative action might fail.[5]

Such a difficulty may be avoided by conditioning performance upon the acquiescence of Congress, thus preventing the free exercise of its constitutional right from exposing the nation to a charge of bad faith in case that body withholds its approval.[6]

[1] Title LXVI, Revised Stat., U. S. Comp. Stat. 1918, §§ 10110–10128.

It may be observed, as Crandall has noted, Treaties, 2 ed., p. 233, *citing* Castro *v.* De Uriarte, 16 Fed. 93, that the design of the statutory law was to give effect "not only to past treaties but also those thereafter concluded."

[2] Instances of Treaties Concerning Matters Normally under State Control, *supra*, § 500.

[3] See, for example, Rev. Stat. §§ 4079–4081, U. S. Comp. Stat. 1918, §§ 7629–7631, with respect to the jurisdictional powers of foreign consular officers in cases of disputes between seamen of vessels belonging to the States represented by such officers.

See, also, in this connection, Crandall, Treaties, 2 ed., § 102.

[4] Other Problems of Constitutionality, Agreements Calling for Legislative or Other Action, *supra*, § 503.

[5] "The extent to which Congress would regard itself as bound, as a matter of good faith, to enact legislation for the purpose of carrying out treaties has been the subject of debate, from time to time, since the days of Washington. Despite these debates, and notwithstanding its power to frustrate the carrying out of treaties, Congress in a host of instances has passed the necessary legislation to give them effect; and the disposition has frequently been manifested to avoid any basis for the charge of bad faith through a disregard of treaty stipulations. . . . But it is apparent to a student of our history that Congress has not recognized an authority of treaty-making power to place upon Congress the moral duty to carry out any sort of stipulation, and there have been notable remonstrances in the House of Representatives against commitments even with respect to legislation as to commercial regulations." Charles E. Hughes, Address on the Proposed Covenant for a League of Nations, before the Union League Club of New York City, March 26, 1919, 25–26.

[6] On March 15, 1920, the Senate, as in Committee of the Whole and in open executive session, by a vote of 56 to 26, agreed to an amendment proposed by Mr. Lodge in the nature of a substitute, as modified, to a reservation (No. 2) to be attached to the pending treaty of peace with Germany of June 28, 1919, and in the following form: "The United States assumes no obligation to preserve the territorial integrity or political independence of any other country by the employment of its military or naval forces, its resources, or any form of economic discrimination, or to interfere in any way in controversies between

It may be observed that the conventions of the United States contemplating the modification of existing revenue laws have been deemed to be subject to the condition, which it has long been the practice to incorporate in the agreement, that the change should be dependent upon the consent of the Congress.[1] As a careful writer has said: "It appears that whatever may be the *ipso facto* effect of treaty stipulations, entered into on the authority of the President and Senate, on prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, legislation by Congress to give effect to such stipulations; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation has expressly been made dependent upon such action by Congress; and that in the recent Cuban treaty such a clause was inserted on the initiative of the Senate."[2]

c

Judicial Action

(1)

§ 526. Province of the Courts in the United States.

The fundamental law of a State may greatly facilitate respect for the treaties to which it is a party by appropriate declarations defining the legal quality of international agreements, binding the judiciary to give heed to them, and conferring jurisdiction in controversies pertaining to them.

The provisions of the Constitution that all treaties "made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land",[3] and that "the judges

nations, including all controversies relating to territorial integrity or political independence, whether members of the League or not, under the provisions of Article 10, or to employ the military or naval forces of the United States, under any Article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall, in the exercise of full liberty of action, by act or joint resolution so provide." Cong. Rec., March 15, 1920, Vol. LIX, No. 81, p. 4649. See, also, resolution of ratification which failed to receive the requisite majority of votes of the Senate, March 19, 1920, Cong. Rec., March 19, 1920, Vol. LIX, No. 85, p. 4915.

[1] Thus, according to Art. XI of the commercial convention with Cuba, of Dec. 11, 1902, Malloy's Treaties, I, 353, 356–357, the agreement was not to take effect until it should have been approved by the Congress. See, in this connection, United States *v.* American Sugar Refining Co., 202 U. S. 563.

[2] Crandall, Treaties, 2 ed., § 89; *id.*, §§ 82–88.

[3] Art. VI, paragraph 2.

in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding", have been of vital aid both in securing judicial respect for such compacts, and in removing doubts which might otherwise prevail as to the invalidity of opposing State laws.[1] That "a treaty, constitutionally concluded and ratified, abrogates all State laws inconsistent therewith" is necessarily accepted doctrine.[2] Again the declaration in that document extending the judicial power of the United States to all cases, in law and equity, arising under the "treaties made, or which shall be made" under the authority of the United States, has been of value in fixing the basis of jurisdiction.[3]

By virtue of the foregoing provisions private alien litigants have constantly invoked the aid of the courts for the purpose of securing recognition of rights claimed under treaties of the United States, and with full assurance that the supremacy of such agreements over any inconsistent local enactments would be recognized.[4] The terms of the Constitution appear to have justified in numerous cases the demands of the Department of State expressed in diplomatic correspondence, that aggrieved

[1] Ware *v.* Hylton, 3 Dall. 199; Chirac *v.* Chirac, 2 Wheat. 259; Swayne, J., in Hauenstein *v.* Lynham, 100 U. S. 483, 488–490.

[2] J. C. B. Davis, Notes, U. S. Treaty Vol. (1776–1887) 1227, Moore, Dig., V, 371.

[3] Art. III, Section 2, paragraph 1.

According to the Judicial Code of the United States, the district courts are given original jurisdiction of all suits of a civil nature, at common law or in equity, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars", and arises under a treaty, Act of March 3, 1911, Chap. 231, § 24, 36 Stat. 1091, U. S. Comp. Stat. 1918, § 991, 1; also of all suits brought by an alien for a tort only, in violation of the law of nations or of a treaty of the United States. § 24, par. 17, of same Act, U. S. Comp. Stat. 1918, § 991, 17.

See, also, § 237 of the Judicial Code, as amended Sept. 6, 1916, Chap. 448, § 2, 39 Stat. 726, U. S. Comp. Stat. 1918, § 1214, with reference to appeals to the Supreme Court of the United States by writ of error, from final judgments or decrees in suits in the highest courts of a State, where there is drawn in question the validity of a treaty, and the decision is against its validity; or where there is drawn in question the validity of a statute of or an authority exercised under any State, on the ground that it is repugnant to a treaty, and the decision is in favor of the validity of the former.

According to the same section, the Supreme Court may, in such cases, by certiorari or otherwise, acquire the same power and authority and with like effect as if the cause were brought up by writ of error. This right is, moreover, expressly conferred upon that Tribunal, where "any title, right, privilege, or immunity is claimed" under any treaty, and the decision is either in favor of or against such claim.

[4] In minor cases before judges not familiar with judicial problems arising from treaties, the language of the Constitution, and the decisions of the Supreme Court interpretative of it, prove to be a constant and invaluable means of obtaining justice in behalf of alien litigants, and serve to minimize occasions for appeal.

aliens complaining of local infringement of treaty rights should exhaust their judicial remedies.[1]

Asserting with confidence that the Supreme Court of the United States will interpret correctly the provisions of any treaty which become the subject of adjudication before it, the Department of State refrains from diplomatic discussion of a question of construction pending before that court,[2] and regards itself without power to act upon any construction at variance with one which has been adopted by that tribunal.[3] Notwithstanding this attitude, another contracting State, complaining of the infraction of a treaty, is believed to be justified in declining to admit that its rights under the agreement can be ultimately determined by a foreign local court without the consent of each party to the agreement. Thus in response to a suggestion from Secretary Hay that the controversy between the United States and China as to the correct construction of the immigration treaty of March 17, 1894, be ascertained by recourse to the United States courts, Mr. Wu, the Chinese Minister, replied, January 25, 1899:

> While I have the highest estimate of the ability and impartiality of the Supreme Court of the United States, and for that reason would have confidence it would place the same construction upon the treaty which is maintained by my Government, at the same time the questions submitted by me to you in my note of November 7 last were of a diplomatic character, involving the construction of conventions entered into between two equal and sovereign Governments, and I could

[1] See, for example, Mr. Bayard, Secy. of State, to Baron Fava, Italian Minister, Dec. 18, 1888, MS. Notes to Italy, VIII, 315, Moore, Dig., V, 238; Mr. Hay, Secy. of State, to Signor Carignani, Italian Chargé d'Affaires, Aug. 24, 1901, For. Rel. 1901, 308, Moore, Dig., VI, 672.

When an alien residing in the United States invokes the aid of the courts in order to secure recognition or enforcement of a privilege alleged to have been accorded him by a treaty with his country, his action possesses, in one sense, merely a domestic character. He simply attempts to obtain respect for the law of the land wherein the provisions of the treaty, like those of an act of Congress, are supreme. He calls upon a local court to enforce a local law which is necessarily that of the place where the tribunal administers justice. It is not until the contracting State of which he is a national interposes and challenges through the diplomatic channel the local (and possibly judicial) construction applied to the treaty involved, that the question attains international significance.

[2] The Department is understood to take the same stand when such a question is pending in the lower Federal courts. See Mr. Lansing, Secy. of State, to the German Ambassador April 7, 1916, American White Book, European War, III, 342, 343; Same to Same, March 2, 1916, *id.*, 335, 337.

[3] Mr. Seward, Secy. of State, to Mr. Bancroft, Minister to Prussia, Aug. 18, 1868, MS. Inst., Prussia, XV, 2, *citing* Frederickson *v.* Louisiana, 23 How. 445, Moore, Dig., V, 237; Mr. Blaine, Secy. of State, to Mr. Comly, American Minister, June 30, 1881, For. Rel. 1881, 624, 625, Moore, Dig., V, 238.

not, by any action on my part, recognize the competency of a domestic tribunal of one of the parties to take such action as would irrevocably bind the other party to the convention.[1]

The United States appears at times to have advanced a like argument respecting adjudications before foreign domestic tribunals.[2]

Reasons of policy doubtless oftentimes impel contracting States to refrain from permitting the construction of a treaty, especially in so far as the question concerns the scope of the rights of their respective nationals, from developing into or producing international controversy. Thus other States, in matters pertaining to treaties with the United States, seem at times disposed to pursue such a course in view of the fact that its tribunals are not only accessible to individual litigants, but also because those who appeal to its court of last resort will in all probability obtain thereby the full benefits to be derived from the correct construction of the agreement involved.

(2)

§ 527. Political Questions.

In lending their aid to secure performance of treaties, the courts of the United States feel bound to respect the attitude of the political department of the Government with regard to politi-

[1] For. Rel. 1899, 195.

[2] Mr. Blaine, Secy. of State, in a communication to Mr. Comly, American Minister to Hawaii, said, June 30, 1881: "I am not aware whether or not a treaty, according to the Hawaiian constitution is, as with us, a supreme law of the land, upon the construction of which — the proper case occurring — every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated and carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government, of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling." For. Rel. 1881, 624, 625, Moore, Dig., V, 238.

See, also, Mr. Blaine, Secy. of State, to Mr. Shannon, Minister to Central America, April 6, 1892, For. Rel. 1892, 34–36, Moore, Dig., VI, 683; Case of C. A. Van Bokkelen *vs.* Haiti, Moore, Arbitrations, II, 1807–1853.

"A construction of a treaty, also, by the courts of one of the contracting sovereigns can only have municipal operation; nor can such construction be set up, even by the sovereign by whose courts it is pronounced, as an authority when conducting negotiations with the other sovereign as to the meaning of the treaty. That meaning is a matter of international settlement. If the parties cannot agree in reference to it, it must be referred to arbitration

cal questions.[1] Thus whether a treaty is still in force is regarded as one to be determined by that department; and it is declared that "whether power remains in a foreign State to carry out its treaty stipulations is in its nature political and not judicial."[2] It has been intimated, however, in behalf of the Supreme Court of the United States, that in a case involving private rights, that Tribunal might be obliged, if those rights were dependent upon the construction of a treaty, and the case turned upon a question public in its nature, which had not been determined by the political department in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment.[3]

(3)

§ 528. Absence of Necessary Legislation.

In the case of a treaty requiring a legislative enactment in order to make its provisions effective, the courts of the United States do not regard the agreement as one to be enforced by them until the requisite legislative action is taken.[4] This principle is also

or, as the last resort, to war. Nor can the judiciary control the actions of the executive in either the construction or the application of a treaty." Wharton, Dig., II, 673.

[1] "It is said, however, that the King of Spain, by the constitution under which he was then acting and administering the government, had not the power to annul it [the grant] by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the Cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.

"But these are political questions and not judicial. They belong exclusively to the political department of the government.

". . . It would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered." Taney, C. J., in Doe *v.* Braden, 16 How. 635, 657.

[2] Terlinden *v.* Ames, 184 U. S. 270, 288.

The decision of the political department as to the extent of territory acquired under the terms of a treaty appears to be regarded as one not to be reviewed by the courts. See Marshall, C. J., in Foster *v.* Nielson, 2 Pet. 253, 309. Also In re Cooper, 143 U. S. 472, 502–503; Garcia *v.* Lee, 12 Pet. 511; United States *v.* Lynde, 11 Wall. 632, 643; United States *v.* Reynes, 9 How. 127; Daigle *v.* United States, 237 Fed. 159.

[3] Chief Justice Fuller, in In re Cooper, 143 U. S. 472, 503. Cordova *v.* Grant, 248 U. S. 413, where it was held that the case did not involve the validity or construction of a treaty.

[4] Foster *v.* Neilson, 2 Pet. 253, 314; United States *v.* Percheman, 7 Pet. 51; Haver *v.* Yaker, 9 Wall. 32.

See, also, statement in Moore, Dig., V, 223, concerning the view of Mr. Justice Story as to the impossibility of the execution by judicial process of Art. X of the treaty between the United States and Prussia of 1828, without the aid of an Act of Congress.

observed with respect to parts of treaties proclaimed and acknowledged to be in force, and calling for legislation without which the courts find it impossible to lend their judicial aid.[1]

(4)

§ 529. Acts of Congress at Variance with Treaties.

Inasmuch as "the laws of the United States which shall be made in pursuance thereof", are, like its treaties, declared by the Constitution to be the supreme law of the land,[2] it has frequently been declared that the courts are bound to sustain an Act of Congress which is at variance with the terms of an existing treaty. The enactment is regarded as superseding the prior agreement.[3] Conversely, it is doubtless true that a treaty would be deemed to supersede a prior Act of Congress if clearly in contravention of the agreement.[4]

It should be observed, however, that the Supreme Court is wisely reluctant to construe an Act of Congress as in violation of an existing treaty in the absence of convincing proof that such was the design of that body. There appears to be no disposition to impute to it a readiness to disregard the terms of the international agreements of the United States.[5] There is like reluctance on

[1] Consuls, Notification of the Deaths of Fellow-Countrymen, *supra*, § 478.

[2] Art. VI, paragraph 2.

[3] The Cherokee Tobacco, 11 Wall. 616; The Head Money Cases, 112 U. S. 580; Whitney *v.* Robertson, 124 U. S. 190; Chae Chan Ping *v.* United States, 130 U. S. 581; Fong Yue Ting *v.* United States, 149 U. S. 698; United States *v.* Lee Yen Tai, 185 U. S. 213, 220–222; Hijo *v.* United States, 194 U. S. 315; Taylor *v.* Morton, 2 Curtis, 454; Ropes *v.* Clinch, 8 Blatchf. 304; The Clinton Bridge, 1 Woolworth, 150; In re Ah Lung, 18 Fed. 28; The James and William, 37 Ct. Cl. 303.

Declared Chief Justice White in Rainey *v.* United States, 232 U. S. 310, 316: "Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty." See, also, Wadsworth *v.* Boysen, 148 Fed. 771; United Shoe Machinery Co. *v.* Duplessis Shoe Machinery Co., 155 Fed. 842.

[4] Mr. Cushing, Atty.-Gen., 6 Ops. Attys.-Gen., 291; Moore, Dig., V, 370; Davis *v.* Concordia, 9 How. 280; The Clinton Bridge, 1 Woolworth, 150; Whitney *v.* Robertson, 124 U. S. 190, 194; opinion of Mr. Knox, Atty.-Gen., Oct. 10, 1901, 23 Ops. Attys.-Gen., 545; Putnam, J., in United Shoe Machinery Co. *v.* Duplessis Shoe Machinery Co., 155 Fed. 842, 845.

[5] Ex parte Webb, 225 U. S. 663, 683; Chew Heong *v.* United States, 112 U. S. 536, 539; Lem Moon Sing *v.* United States, 158 U. S. 538; United States *v.* Mrs. Gue Lim, 176 U. S. 459.

the part of that Tribunal to construe a treaty as repealing a prior Act of Congress.[1]

It must be clear that while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement.[2] The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States.[3]

[1] United States *v.* Lee Yen Tai, 185 U. S. 213, 221–222.

[2] "It is true that the Supreme Court has held that an Act of Congress may repeal a treaty; but such repeal would only be effective so far as our domestic law is concerned. The other nation would still have a right to consider us bound by our contract, and if the contract was broken on our part, it might lead to a declaration of war." Hon. Shelby M. Cullom, in *North Am. Rev.*, CLXXX, No. 2, 335, 345.

"However much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation, or the judgment of a domestic tribunal, can release a government from its solemn treaty obligations." Mr. Wu, Chinese Minister, to Mr. Hay, Secy. of State, Jan. 25, 1899, For. Rel. 1899, 195.

[3] Marquis of Salisbury to Mr. Welsh, Nov. 7, 1878, For. Rel. 1878, 323; Mr. Chang Yen Hoon, Chinese Min ter, to Mr. Blaine, Secy. of State, July 8, 1889, For. Rel. 1889, 132, 133; Mr. Caleb Cushing, Minister to Spain, to Mr. Fish, Secy. of State, Jan. 13, 1877, For. Rel. 1877, 492. See, also, the French Minister to the American plenipotentiaries, Aug. 26 and Aug. 11, 1800, concerning the Act of Congress approved July 7, 1798, abrogating the treaties between the United States and France, Am. State Pap., For. Rel., II, 330, 331.

"It is an essential principle of the law of nations that no power can free itself from the engagements of a treaty, nor modify the stipulations thereof, except with the assent of the contracting parties by means of an amicable arrangement." Protocol entered into by plenipotentiaries of Austria-Hungary, Germany, Great Britain, Italy, Russia and Turkey, January 17, 1871, prior to signing the Treaty of London. Brit. and For. State Pap., LXI, 1198.

Declared Mr. Bryce, British Ambassador at Washington, Feb. 27, 1913, in a communication to Mr. Knox, Secy. of State, in relation to the Act of Congress of Aug. 24, 1912, and the effect thereof upon the Hay-Pauncefote treaty: "His Majesty's Government . . . conceive that international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those same rights in a concrete instance has been taken, which in the present instance would, according to your argument, seem to mean, until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted." Diplomatic History of the Panama Canal, Senate Doc. No. 474, 63 Cong., 2 Sess., 101.

TITLE E

THE INTERPRETATION OF TREATIES

1

§ 530. The Nature of the Problem.

The interpretation of treaties is a part of the procedure of carrying out or realizing the act of contracting. The method of interpretation consists in finding out the connection made by the parties to an agreement, between the terms of their contract and the objects to which it is to be applied.[1] This involves two steps. One is to ascertain what has been called the "standard of interpretation"; that is, the sense in which various terms are employed. The other is to learn what are the sources of interpretation; that is, to find out where it is possible to turn for evidence of that sense.

It is important to observe that various standards of interpretation are available. The contracting States are free to adopt any one they choose. Thus they may employ words in a technical sense, or in one known only to themselves, or in one that is purely colloquial.[2] In this regard they are fettered by no restriction. In seeking, therefore, to ascertain what has in fact been the standard of their choice, there must necessarily be greatest reluctance to resort to a presumption in favor of one rather than another, until at least the search for evidence has proved to be in vain.[3] Nor should any technical rule of construction be permitted

[1] J. H. Wigmore, Law of Evidence, IV, § 2458, and following, where the principles applicable to the interpretation of documents are fully enunciated. To Prof. Wigmore's illuminating exposition, the author acknowledges his debt. See also H. M. Adler, "The Interpretation of Treaties", *Law Mag. & Rev.*, XXVI, 62 and 164; P. Pic, "*De l'interprétation des traités internationaux*", *Rev. Gén.*, XVII, 5; J. H. Ralston, Arbitral Law and Procedure, Chap. II.

[2] The common law does not permit such latitude in the interpretation of legal acts. The rule prohibiting reliance on a sense "disturbing a clear meaning" is illustrative. Wigmore, Evidence, IV, § 2462. It seems important to observe that the restrictions of that law are, by reason of their origin and purpose, not to be taken as decisive of the rights of States in their conclusion of international agreements.

De Lemos Case, Ralston's Report, Venezuelan Arbitrations of 1903, 302, 309.

[3] It should be noted that not infrequently the courts conclude that particular terms are to be deemed to have been given a signification in harmony

to interfere with proof that the terms of a treaty were used in a special sense.[1]

It is rare that proof is beyond the reach of the parties, at least when the problem of interpretation pertains to a treaty not antedating the nineteenth century. Even when evidence extrinsic to the document is wholly lacking, caution must be exercised in applying any rule in the nature of a presumption. It is only the single reasonable inference which must be deduced from the conduct of both of the contracting parties which may be safely relied upon. Grounds for such an inference may exist. Should it appear, for example, to have been unreasonable if not inconceivable for a contracting State to agree to any but a particular signification of terms employed, the inference that it had acted reasonably or prudently would doubtless prevail.[2]

with their plain meaning because, in the light of all the circumstances of the case, it would be wholly unreasonable to infer an opposing design. Such a conclusion may be thus a necessary deduction from the evidence presented. See, for example, Award in North Atlantic Coast Fisheries Arbitration, interpreting the words "in common with British subjects", under Question I, *Proceedings*, North Atlantic Coast Fisheries Arbitration, I, 78–79.

[1] The *dicta* of courts must not be taken as indicative of a rule constraining tribunals, national or international, not to respect the freedom of choice possessed by the parties to a treaty, or to close the door to evidence of that choice. The declaration of Field, J., in the case of Geofroy *v.* Riggs, 133 U. S. 258, 271, to the effect that in the construction of treaties "words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended", hardly warrants a different conclusion. In that case the question concerned the sense in which the words "States of the Union" had been employed in the convention with France of 1853. The conclusion that these words meant "all the political communities exercising legislative powers in the country", embracing the District of Columbia, was based upon the general reciprocal purposes in the Article concerned, as indicative of the design of the parties. This conclusion, involving an apparent departure from the plain or ordinary meaning of the words used, revealed a singular readiness on the part of the Supreme Court to respect the standard adopted by the contracting States, whatever it might entail. In the light of what was decided the language of Mr. Justice Field is far from indicative of any restrictive rule.

[2] So-called Rules of Interpretation, *infra*, § 535.

See the opinion of Mr. Pinkney, commissioner, July 1, 1797, case of the *Betsey*, Furlong, master, commission under Article VII, treaty between the United States and Great Britain, November 19, 1794, as to whether the commission, according to the treaty establishing it, was bound by the decision of the Lords Commissioners of Appeal affirming a sentence of condemnation by the Vice-Admiralty of Bermuda. Moore, Arbitrations, III, 2291, 3180. In the course of his opinion Mr. Pinkney said: "Are we, then, to uphold an interpretation of this instrument which is not only unauthorized by its language, but is unsuitable to the subject of it, and at variance with the undoubted rights of one party and the duties of the other? What Great Britain could not properly demand, we are to *suppose* she did demand, what the United States ought to have insisted upon, we are to *suppose* they abandoned, and is this to be done not only without evidence, but in direct contradiction to the declarations of the parties?" *Id.*, 3203–3204.

Opinion of Sir Edward Thornton, umpire in the case of Don Rafael Aguirre

It is not, however, inconsistent with the principles stated to require that a contracting State be not permitted to enjoy recognition of a standard of interpretation known only to itself. It is the signification which both or all the parties have, or are to be regarded as having, attached to the words of their agreement which is alone the subject of investigation.[1]

2

§ 531. Sources of Interpretation.

The ascertaining of the sense in which terms have been employed in a treaty involves a search for sources of interpretation. These may be found in what is extrinsic to the agreement. The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said: "The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilised world." [2]

It must, however, be borne in mind that the final purpose of seeking the intention of the contracting States is to ascertain the sense in which terms are employed. It is the contract which is the subject of interpretation, rather than the volition of the parties.

v. The United States, No. 131, convention between the United States and Mexico of July 4, 1868, as to the scope of the release given the United States by Mexico in Article II of the Gadsden Treaty of December 30, 1853. Moore, Arbitrations, III, 2444.

Mr. Ralston, umpire in the Sambiaggio Case, Italian-Venezuelan Claims Commission, under protocol of February 13, 1903, Ralston's Report, 666, 688.

Opinion of Pinkney, commissioner, case of the *Betsey*, Furlong, master, commission under Article VII treaty between the United States and Great Britain of November 19, 1794, concerning the power of the arbitrators under the treaty to determine their own jurisdiction. Moore, Arbitrations, III, 2291; also opinion of the same commissioner in the case of the *Sally*, Hayes, master, *id.*, III, 2306.

[1] "When a treaty is executed in more than one language, each language being that of a contracting party, each document, so signed and attested, is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively." Moore, Dig., V, 252, *citing* United States *v.* Arredondo, 6 Pet. 691, 710; also Little, Commissioner, in United States-Venezuelan Arbitration, under convention of Dec. 5, 1885, Case No. 18, Moore, Arbitrations, IV, 3616, 3623.

[2] Westlake, 2 ed., I, 293.

"Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words — that is, their associations with things." Wigmore, Evidence, IV, § 2470.

It may be that while certain expressions are used in a particular sense, a contracting State has in fact given its consent with the design of accomplishing a purpose hostile thereto. Proof of such an intention is not decisive of the rights of the parties under the agreement. As has been tersely said: "Interpretation as a legal process is concerned with the *sense* of the word used, and not with the *will* to use that particular word." [1]

The demands which a State may make upon another at the time of entering into their contract, the facts known to the plenipotentiaries, the correspondence or interchange of views leading up to and forming a part of the final negotiations, may all be important. Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal charged with the duty of interpretation.[2]

3

CERTAIN CASES

a

§ 532. The Aroa Mines Case.

An instructive case was decided by the umpire of the British-Venezuelan Commission, under the protocol of February 13, 1903, providing for the arbitration of British claims before a mixed commission. Article III of that instrument declared that

> The Venezuelan Government admit their liability in cases where the claim is for injury to or wrongful seizure of property, and consequently the questions which the mixed commission will have to decide in such cases will only be: (*a*) Whether the injury took place and whether the seizure was wrongful, and (*b*) if so, what amount of compensation is due.[3]

[1] Wigmore, Evidence, IV, § 2458. Also Scott's Cases Int. Law, 426, note by the Editor.

[2] Cameron Septic Tank Co. *v.* Knoxville, 227 U. S. 39. See Mr. Justice Day in Sullivan *v.* Kidd, Supreme Court of the United States, No. 65, October Term, 1920, Jan. 3, 1921.

[3] Ralston's Report, Venezuelan Arbitrations of 1903, 292.

According to the convention of Jan. 24, 1903, between the United States and Great Britain for the settlement of the Alaskan boundary dispute before a joint tribunal, it was agreed that the court should consider certain Articles of the Russian-British treaty of Feb. 28/16, 1825, and of the Russian-American treaty of March 30/18, 1867, and that "the tribunal shall also take into consideration any action of the several governments or of their respective representatives preliminary or subsequent to the conclusion of said treaties so far as the same tends to show the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under and by

In behalf of Great Britain it was contended that Venezuela had thus assumed liability for injury to or wrongful seizure of property by forces of unsuccessful insurgents. Venezuela, however, asserted that liability was admitted only for such claims as were "just" according to international law, and that there was no assumption of liability for acts of revolutionary troops without proof of fault on the part of the titular government. In support of the British interpretation it was urged that the circumstances attending the signing of the protocol, particularly the fact that Venezuela entered into the arbitration agreement as a condition precedent to the lifting of the blockade of its ports by Great Britain and its allies, proved conclusively that the words of the compact should be given their broadest colloquial sense, and that therefore the admitted liability should cover acts of revolutionary as well as of governmental forces.

In his search for sources of interpretation the umpire made a careful review of the circumstances leading up to the agreement. The diplomatic correspondence between the two Governments was rigidly examined. His conclusion was that "President Castro

virtue of the provisions of said treaties." For. Rel. 1903, 488, 491. It was further agreed that seven specified questions as to the interpretation of the Russian-British treaty should be answered and decided by the tribunal. In the course of his instructive opinion on the fifth question Lord Alverstone, the President of the tribunal, said: "It is in my opinion correctly pointed out, on behalf of the United States, that the word 'coast' is an ambiguous term, and may be used in two, possibly more than two, senses. I think, therefore, we are not only entitled, but bound to ascertain as far as we can from the facts which were before the negotiators the sense in which they used the word 'coast' in the treaty. Before considering this latter view of the case, it is desirable to ascertain as far as possible from the treaty itself what it means, and what can be gathered from the language of the treaty alone. . . . This consideration, however, is not sufficient to solve the question; it still leaves open the interpretation of the word 'coast' to which the mountains were to be parallel." *Proceedings of the Alaskan Boundary Tribunal*, I, Part I, 36, 37, 39. See the opinions of the American members of the tribunal, Messrs. Root, Lodge and Turner, *id.*, I, Part I, 43, 48–49; opinion of Sir L. Jetté, *id.*, I, Part I, 65–79; Rules of Construction and Interpretation presented in argument of the United States, *id.*, V, Part I, 6–11; evidence to be considered in the American case *id.*, V, Part I, 11. It was said in the United States counter-case that "the United States asserts that the intention of the parties to the treaty is vital to its true interpretation; that such intention between nations is the very essence of the agreement; and that any material variance from the intention must give place to an interpretation in accordance with it." *Id.*, IV, Part I, 40. In the counter-case of Great Britain it was said that "the function of the tribunal is to interpret the Articles of the convention by ascertaining the intention and meaning thereof, and not to recast it. Any considerations showing that the words of the treaty must have been intended to bear a particular meaning, being a meaning which they are in themselves capable of bearing, may, of course, be legitimately presented." *Id.*, IV, Part III, 6. See, also, argument of Great Britain, *id.*, V, Part II, 37; oral argument of Mr. Taylor, *id.*, VII, 578–579; Mr. Robinson, *id.*, VII, 501–502, 506–507, 514–516; Mr. Watson, *id.*, VI, 363–364; Mr. Dickinson, *id.*, VII, 731–732.

understood he was admitting the liability of his Government only for such claims as were just, that Mr. Bowen (representing Venezuela) understood he was submitting to arbitration only the matters contained in the ultimatum of each of the allied powers"; that in none of the correspondence or conferences of the allies with Venezuela was there "a sentence, a phrase, or a word directly or indirectly making claim to indemnity for losses suffered through acts of insurgents or directly or indirectly making allusion thereto"; that while the British Government thought the terms of the agreement broad enough to include such claims, it could not invoke a construction which Venezuela neither knew of, nor had reason to know of, and to which it had, therefore, never assented. Hence the umpire held that "Venezuela did not specifically agree in the protocols to be subject to indemnities for the acts of insurgents." [1]

§ 533. The North Atlantic Coast Fisheries Arbitration.

In the North Atlantic Coast Fisheries Arbitration the Tribunal, as has been observed, was confronted with the problem (under Question V) of interpreting the language of the treaty of 1818, and

[1] Ralston's Report, Venezuelan Arbitrations of 1903, 344, 350, 383. See, also, the Crossman Case, *id.*, 298, and the De Lemos Case, *id.*, 302, both also decided by the umpire of the British-Venezuelan Commission.

Similar expressions in the Italian-Venezuelan protocol of the same date were given a like interpretation by Mr. Ralston, umpire of the Italian-Venezuelan Commission, in a well-considered and instructive opinion in the Sambiaggio Case, *id.*, 666, 679. But see the interpretation of the German-Venezuelan protocol by the umpire, General Duffield, in the Kummerow Case, *id.*, 526, 549; that of the Spanish-Venezuelan protocol by the umpire, Mr. Gutierrez-Otero, in the Padrón Case, *id.*, 923, and in the Mena Case, *id.*, 931.

Note also the following cases involving the interpretation of international agreements:

Case of Joseph Chourreau before the French and American Claims Commission, under the convention between the United States and France of January 15, 1880, and the decision of Mr. Frelinghuysen, Secretary of State, as to the interpretation of the terms "territory" and "territorial jurisdiction" employed in the convention. Moore, Arbitrations, II, 1145, 1146, *citing* H. Ex. Doc. 235, 48th Cong., 2 Sess., 16; also Boutwell's Report, 134.

Opinion of the umpire, Sir Frederick W. A. Bruce, in the Capitation Tax Case, as to the power of the commission under the convention between the United States and Colombia of February 10, 1864, to determine whether a certain tax imposed by Panama was in violation of Articles II, III, and XXXV of the treaty between the United States and New Granada of Dec. 12, 1846, Moore, Arbitrations, II, 1412.

Opinion of Mr. Alexander S. Johnson, American commissioner of the joint commission under the British-American treaty of July 1, 1863, in the case of the Puget's Sound Agricultural Company, concerning the interpretation of Article IV, treaty of June 15, 1846, between the United States and Great Britain. Moore, Arbitrations, I, 266.

Sentence and award of Mr. C. A. Logan, arbitrator in the matter of the

of determining the mode of measurement of the "three marine miles of any of the coasts, bays, creeks, or harbours" mentioned in Article I, and within which the United States had renounced forever liberties previously enjoyed.[1] It is significant that the Tribunal declined to accede to the contention of the United States that the so-called three-mile rule should afford a test of the measurement of what had been renounced, because, as it declared, "it has not been shown by the documents and correspondence in evi-

Chilean-Peruvian Alliance of December 5, 1865, under the Chilean-Peruvian protocol of March 2, 1874. Moore, Arbitrations, II, 2086.

Opinion of Mr. John Little, commissioner in the case of William H. Aspinwall, executor of G. G. Howland and others *v.* Venezuela, No. 18, United States and Venezuelan Claims Commission, under convention of Dec. 5, 1885, as to whether bonds of Venezuela were included among the claims to be submitted to arbitration before the commission, Moore, Arbitrations, IV, 3616; also opinion of Mr. John V. L. Findlay, commissioner, *id.*, 3642.

Decision of Mr. John Little, commissioner of the United States and Venezuelan Claims Commission, under convention between the United States and Venezuela of Dec. 5, 1885, as to the character of the proceedings under the treaty. Moore, Arbitrations, II, 1677.

In the course of an elaborate opinion in the Manica arbitration between Great Britain and Portugal, under the *Acte de Compromis* of Jan. 7, 1895, the arbitrator, Signor Paul Honoré Vigliani, said: "In our case the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who have arranged it and the most favorable to the aim of the contract, obliges us to give to the word 'plateau' the broadest possible signification — that is to say, to require only the minimum normal altitude — so as to be able to affirm its existence as far as the Save, as the high contracting parties had supposed, and so as thus to render possible the application of the text of Article II of the treaty." Moore, Arbitrations, V, Appendix, 4985, 5011.

In the case of Marryatt *v.* Wilson, 1 Bosan. & Puller, 435, 436, Chief Justice Eyre said: "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states." Mr. Morse, the arbitrator in the Van Bokkelen Case, said that "Marryatt *v.* Wilson is strong authority for the proposition that the municipal tribunals of the country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction." Moore, Arbitrations, II, 1840.

Opinion of the arbitrator, Mr. Alexander Porter Morse, in the case of Charles Adrian Van Bokkelen, under the protocol between the United States and Haiti of May 24, 1888, concerning the interpretation of the treaty between those States, Nov. 3, 1864. Moore, Arbitrations, II, 1813.

Case of Lewis S. Hargous before the United States and Mexican Claims Commission, under convention of April 11, 1839, concerning the scope of the powers of the commission, and the nature of claims for which liability was assumed. Moore, Arbitrations, II, 1267.

Note the language of His Imperial Majesty the Emperor of Russia, interpreting Art. I of the Treaty of Ghent, Dec. 24, 1814, as arbitrator under Article V of the convention between the United States and Great Britain, October 20, 1818; also the reasons given for the method of interpretation employed. Moore, Arbitrations, I, 359, 360.

See, also, Goetze *v.* United States, 103 Fed. 72; Schultze *v.* Schultze, 144 Ill. 290; Adams *v.* Akerlund, 168 Ill. 632; Tucker *v.* Alexandroff, 183 U. S. 424.

[1] Bays, The North Atlantic Coast Fisheries Arbitration, *supra*, § 147.

dence here that the application of the three-mile rule to bays was present to the minds of the negotiators in 1818, and they could not reasonably have been expected either to presume it or to provide against its presumption." [1] In view of this conclusion the Tribunal found itself unable to be influenced by other considerations, such as the subsequent conduct of the parties during the decades that followed the treaty.[2]

4

§ 534. Declarations of Negotiators.

Declarations on the part of the negotiators of a treaty at the time of its conclusion, or by plenipotentiaries exchanging ratifications, indicating the understanding of the parties as to the sense in which particular terms were employed are useful as sources of interpretation and should not be disregarded. Nor are the declarations of negotiators even long subsequent to the perfecting of an agreement without value.[3] The reason why, according to the common law, declarations of intention could not be given in aid of the interpretation of documents, save under certain exceptional circumstances, was that they were considered as dangerous for a jury, who, not being expert in such matters, might attach to them too great weight.[4] This objection is not applicable to adjudications concerning the interpretation of agreements between States. Declarations of their plenipotentiaries, in so far as they indicate the sense in which terms were employed, are valuable, not merely because they are enlightening, but also because they may be safely entrusted to the consideration of judges or arbitrators, or to ministers of State.[5] The Department of State has appreciated

[1] Award, North Atlantic Coast Fisheries Arbitration, *Proceedings* (Senate Doc. No. 870, 61 Cong., 3 Sess.), I, 94–95.

The Tribunal also declared it to be "a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose." *Id.*, 96.

[2] Award, *id.*, 94.

[3] A commission under Article V of the Jay Treaty of Nov. 19, 1794, between the United States and Great Britain, was established to decide what river was the River St. Croix mentioned by the treaty of 1782–1783, as forming a part of the boundary between the United States and New Brunswick. There was at that time no river known as the St. Croix. The depositions of John Adams and John Jay, surviving negotiators of the treaty of 1782–1783, as well as a letter of Benjamin Franklin, also a negotiator of that treaty, were received in evidence as declarations concerning the original negotiations and the agreement itself. Moore, Arbitrations, I, 18–22.

[4] *Compare* reasoning in Crandall, Treaties, 2 ed., § 166.

[5] Prior to the exchange of ratifications of the Clayton-Bulwer treaty of 1850, Sir Henry Bulwer, the British Minister, made a declaration at the Department

the significance of such statements.[1] Courts of arbitration have accepted them.[2]

5

535. So-called Rules of Construction.

As no principle of law deters contracting States from employing the terms of their agreement in any sense they choose, or

of State that his Government did not understand the engagements of that convention to apply to the British settlement at Honduras, or to its dependencies. Mr. Clayton, Secretary of State, in reply acknowledged that he understood British Honduras was not embraced in the treaty, at the same time declining to deny or affirm British title to the territory in question. The Secretary adverted to the fact that he had been informed by the Chairman of the Senate Committee on Foreign Relations, Mr. W. R. King, "that the Senate perfectly understood that the treaty did not include British Honduras." H. Ex. Doc., 34th Cong., 1 Sess., 119, Moore, Dig., III, 136–137. Lord Clarendon, in the course of a note to Mr. Buchanan, May 2, 1854, said: "It was never in the contemplation of Her Majesty's Government, nor in that of the Government of the United States, that the treaty of 1850 should interfere in any way with Her Majesty's settlement at Belize or its dependencies." Brit. and For. State Pap., XLVI, 267; Moore, Dig., III, 138. The statements of Sir Henry Bulwer and Messrs. Clayton and King were clearly evidence of the fact asserted. For that purpose, and for that alone, they were entitled to consideration. It must be obvious that these gentlemen did not possess the power to amend a treaty between the United States and Great Britain. Owing, however, to their official positions they necessarily had precise knowledge of the fact in question. The evidential quality of their declarations in regard to it could not be ignored.

See, also, Mr. Marcy, Secy. of State, to Mr. Buchanan, Dec. 30, 1853, Correspondence in Relation to the Proposed Interoceanic Canal (Washington, 1885), 247, Moore, Dig., III, 137; Lord Granville to Mr. West, Minister at Washington, Dec. 30, 1882, For. Rel. 1883, 484; Memorandum of Mr. Olney, Secretary of State, 1896, on the Clayton-Bulwer Treaty, Moore, Dig., III, 203, 207; The Diamond Rings, 183 U. S. 176.

[1] The treaty between the United States and Switzerland of November 25, 1850, provided for most-favored-nation treatment "in the importation, exportation, and transit" of their respective products. In 1898, the Swiss Government claimed that by virtue of Articles VIII, IX, X, and XII, it was entitled to demand for Swiss importations into the United States such concessions as were accorded French importations under a reciprocity agreement between the United States and France of May 28, 1898. Mr. Pioda, Swiss Minister, to Mr. Day, Sec. of State, June 29, 1898, For. Rel. 1899, 740. Mr. Day, Secy. of State, pointed out "that a reciprocity treaty is a bargain and not a favor, and that it therefore does not come within the scope of the most-favored-nation clause." *Id.*, 740. It was urged, however, by the Swiss Minister that according to the understanding of the signatory parties in 1850, expressly shown by the American plenipotentiary, Mr. Mann, who negotiated the treaty, no limitation was to be attached to the most-favored-nation clause. *Id.*, 742. Mr. Hay, Secretary of State, in a note of November 21, 1898, admitted that the American Minister who conducted the negotiations agreed to the interpretation advanced by Switzerland, and that the treaty was ratified in both countries with the distinct understanding that it should apply to reciprocity treaties. He, therefore, concluded "under these circumstances we believe it to be our duty to acknowledge the equity of the reclamation presented by your Government. Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." *Id.*, 747–748.

[2] See stress laid by the Arbitrators in their Award in the North Atlantic Coast Fisheries Arbitration on the correspondence between Mr. Adams and

prevents those charged with the task of interpretation from giving heed to all circumstances probative of the choice actually made, it may be doubted whether the enunciation of technical rules of construction serves a useful purpose.[1] It is the freedom of such States, and likewise of tribunals interpreting their acts, which rather deserves emphasis; and there must be intolerance of whatever serves to obscure perception of it.

Doubtless certain rules may be explained as merely illustrative of forms which the application of the principles already noted may assume. Thus the recurring statement that the general purposes of a convention prevail over a conflicting signification sought to be attached to any particular terms,[2] appears merely to signify that the considered expression of those purposes in a treaty affords convincing proof of the design of the parties. Respect therefor is merely a mark of deference for the standard of their choice.[3]

That the courts of a contracting State, such as those of the United States, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness,[4] and not to "provide the means of perpetrating or protecting frauds",[5] that their agreement should be interpreted "in a spirit of *uberrima fides*, and in a manner to carry out its manifest

Lord Bathurst in 1815, in dealing with the solution of Question II, *Proceedings*, North Atlantic Fisheries Arbitration, I, 89. It will be observed that this correspondence antedated the treaty concerned which was concluded Oct. 20, 1818.

[1] Among the systems of rules formulated for the interpretation of treaties, see those of Vattel, Book II, Chap. XVII; Phillimore, 2 ed., II, Chap. VIII; Hall, Higgins' 7 ed., §§ 111–112; Woolsey, 6 ed., 173–174; Wharton, Dig., II, § 13[illegible].

[2] Note the respective contentions of the United States and Great Britain concerning Article I, treaty of June 15, 1846, providing for the San Juan water boundary, and the award of the arbitrator, William I, German Emperor, under Articles XXXIV–XLII, treaty of May 8, 1871. Moore, Arbitrations, I, 213–214, 219–221, 229–231.

See, also, the frequently cited case of the interpretation of Article IX of the Treaty of Utrecht of 1713, between Great Britain and France, providing for the destruction of the port and fortifications at Dunkirk, given by Phillimore, II, § 73, and Hall, Higgins' 7 ed., 347.

See interpretation of Art. I of the convention of Sept. 10, 1857, between the United States and New Granada by Mr. Upham, umpire of the United States and New Granada Joint Commission, with respect to the presentation of and liability for riot claims. Moore, Arbitrations, II, 1375–1378.

[3] The language of Field, J., in In re Ross, 140 U. S. 453, 475, suggests no opposing theory.

With respect to rules of construction which are said to be applicable in the case of a treaty between the United States and the American Indians, see Mr. Justice McKenna, in United States *v.* Winans, 198 U. S. 371, 380, and cases there cited; also United States *v.* Seufert Bros. Co., 233 Fed. 579, 584.

Ubeda *v.* Zialcita, 226 U. S. 452, 454.

[5] Story, J., in The Amistad, 15 Pet. 518, 595, where he added: "But all the provisions are to be construed as intended to be applied to *bona fide* transactions."

purpose",[1] and that its terms should be liberally construed,[2] manifests simply an imputation of good faith and high purpose to the executive branch of the Government and to that of other contracting powers. It is recognition of the only intelligible theory on which enlightened States could be deemed to conclude treaties with each other.

The courts may wisely hesitate to indulge in the presumption that the terms of a treaty were given a signification such as to entail a peculiar sacrifice by one party and involving undertakings beyond the requirements of international law.[3] Such reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such a sense.[4] It does not imply any denial of the right of the parties so to agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude must be regarded as more salutary than one evincing readiness to presume that the contracting States did not attach to the terms of a treaty a signification which they might not unreasonably have adopted.[5] When

[1] Mr. Justice Brown, in Tucker *v.* Alexandroff, 183 U. S. 424, 437. See also Mr. Justice Day in Sullivan *v.* Kidd, Supreme Court of the United States, No. 65, October Term, 1920, Jan. 3, 1921.

[2] "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." Field, J., in Geofroy *v.* Riggs, 133 U. S. 258, 271. See, also, the language of the same Justice in In re Ross, 140 U. S. 453, 475.

See, in this connection, Crandall, Treaties, 2 ed., § 170.

[3] Aroa Mines Case, mentioned above; also Marshall, C. J., in United States *v.* Percheman, 7 Pet. 51, 88; Muscat Dhows Case, Award by the Tribunal at the Hague, Aug. 8, 1905, J. B. Scott, Hague Court Reports, 95, 97. All of these cases are cited in Crandall, Treaties, § 170.

[4] Thus in the Award in the North Atlantic Coast Fisheries Arbitration, with respect to Question I, it was said: "Considering that the right to regulate the liberties conferred by the treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States (viz., that the right to regulate does not reside independently in Great Britain, the territorial sovereign) must fall on the United States." *Proceedings*, North Atlantic Coast Fisheries Arbitration, I, 74. It may be observed that in the estimation of the Tribunal, the United States failed to sustain this burden. *Id.*, 76.

[5] In the case of Rocca *v.* Thompson, 223 U. S. 317, the Supreme Court of the United States, in concluding that under the treaty with the Argentine Confederation of July 27, 1853, a consular officer was not accorded the right to original administration of the estate of a deceased national to the exclusion of one authorized by local law to administer the estate, was careful not to assert that there was any presumption against the conferring of such a right, even though it was declared in the opinion that that right was "primarily committed to state law."

In the case of Faber *v.* United States, 221 U. S. 649, Mr. Justice Lamar

that signification is one involving no engagement which the law of nations as reflected by the practice of States regards as excessive, there would be slight ground to regard the choice of it as unreasonable.

Contracting States have at times, during the years following the conclusion of an agreement, placed a definite construction on the terms thereof; and this circumstance has been controlling in the minds of arbitrators in construing the compact.[1] In such a case the tribunal has in reality not undertaken strictly to solve any problem of interpretation, regarding the action of the parties as precluding such a task.[2] A court might even feel obliged to sustain their construction of a treaty differing widely from that which it was in fact possible to prove to have been the design of the parties at the time when the agreement was concluded.

declared that the words "other country", in the Cuban treaty of 1903, should be "presumed" to have been used "according to their known and established interpretation", and that "both in the light of our own legislation and in view of the generally accepted interpretation of the word 'imports', the eighth Article of the treaty cannot be construed to have been intended to give to Cuba an advantage over shipments of merchandise coming into the United States from a port of its own territory where the collections were in part made as a means for raising revenue for the support of the government of the Philippine Islands." It is to be observed that the Cuban treaty was concluded some time subsequent to the decisions of the Supreme Court in the *Insular Cases* to the effect that Porto Rico and the Philippine Islands were not foreign countries, but territory of the United States. It was reasonable, therefore, to conclude that the United States in contracting with Cuba did not consent to treat them as foreign, or to permit Cuba to enjoy advantages over the United States in essentially domestic shipments from one portion of its territory to another. Thus the case is one in which there was solid evidence from which to derive the significance attached to the terms of the treaty.

[1] See instances contained in Crandall, 2 ed., § 167.

[2] See, for example, holding of a majority of the arbitrators (Messrs. Lafleur and Mills), June 15, 1911, in the Chamizal Case (concerning the interpretation of the treaties of 1848 and 1853), under convention with Mexico of June 24, 1910, *Am. J.*, V, 785, 805, where it was said: "It appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary."

See, also, Rule 10 of principles adopted by Spanish Treaty Claims Commission, April 28, 1903, Special Report by William E. Fuller, 23.

In his award in the Reserved Fisheries Arbitration under Article I of the reciprocity treaty between the United States and Great Britain of June 5, 1854, the umpire, Mr. John Hamilton Gray, said: "But might it not also be assumed that where a country had, by a long series of public documents, legislative enactments, grants, and proclamations, defined certain waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions

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THE MOST-FAVORED-NATION CLAUSE

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§ 536. Reciprocal Commercial Concessions.

Treaties frequently provide in substance that in what concerns navigation and commerce the contracting parties shall concede to each other such privileges as are yielded to the most favored nation.[1] The forms which such pledges assume greatly vary.[2]

"Both the executive and the judicial departments of the American Government have consistently interpreted the favored nation pledge as conditional and contingent upon the offering and acceptance of compensation." [3] Thus the United States has long taken the stand that reciprocal commercial concessions are not gratuitous privileges, but given for a valuable consideration, and, therefore, not within the scope of the most-favored-nation clause.[4]

previously used, and adopted, would be mutually binding in interpreting the treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might." Moore, Arbitrations, I, 449, 458.

[1] See generally, United States Tariff Commission, Reciprocity and Commercial Treaties, Washington, 1919; documents in Moore, Dig., V, 257–319.

Giuseppe Cavarretta, *La Clausola della Nazione Più Favorita*, Palermo, 1906; Crandall, Treaties, 2 ed., § 172; R. A. Farra, *Les Effets de la Clause de la Nation la plus Favorisée*, Paris, 1910; François Hepp, *Théorie Générale de la Clause de la Nation la plus Favorisée en Droit International Privé*, Paris, 1914; J. R. Herod, Favored Nation Treatment, New York, 1901; Stanley K. Hornbeck, The Most-Favored-Nation Clause in Commercial Treaties, Madison, 1910 (appearing also in *Am. J.*, III, 395, 619 and 797), with extensive bibliography; John A. Kasson, Information Respecting Reciprocity and the Existing Treaties, Washington, 1901; A. H. Washburn, "The American Interpretation of the Most-Favored-Nation Doctrine", *Virginia Law Rev.*, I, 257.

[2] See analysis of the various forms contained in J. R. Herod, Favored Nation Treatment, 5–7; also that contained in Report of United States Tariff Commission on Reciprocity and Commercial Treaties, 1919, 451.

[3] United States Tariff Commission, Report, 1919, 37.

"The general design of the most-favored-nation clauses, as they are expressed in various treaties, is to establish the principle of equality of treatment. . . . The test of whether this principle is violated by the concession of advantages to a particular nation, is not the form in which such concession is made, but the condition on which it is granted. The question is whether it is given for a price, and whether this price is in the nature of a substantial equivalent, and not of a mere evasion." J. B. Moore, "Opinion upon the question whether Congress can pass a special tariff act for Cuba, without violating the most-favored-nation clause in treaties with other countries," Jan. 14, 1902, p. 4, *citing* opinion of Mr. Olney, Atty.-Gen., 21 Ops. Attys.-Gen., 80, 82, 83.

[4] Mr. Adams, Secy. of State, to Mr. Hyde de Neuville, French Minister, Dec. 23, 1817, Am. State Pap., For. Rel. V, 152, and following: Mr. Sherman, Secy. of State, to Mr. Buchanan, Minister to Argentine Republic, No.

There have been, however, exceptional statements in conflict with the American view.[1] The attitude of the United States has been at variance with that of the principal commercial States of Europe, which changed "first from the unconditional to the conditional, and then back to the uniform use of the unconditional" construction.[2] Thus Great Britain has taken the position that concessions granted for a consideration may be fairly claimed under the most-favored-nation clause.[3]

According to American opinion, the political or geographical relations between two States may be such as to afford a reasonable basis of reciprocal commercial concessions which other countries may not justly claim the right to share through the operation of the most-favored-nation clause. Geographical and commercial (and possibly also political) relations were deemed by the United States to be accountable for, and to justify the special terms of its reciprocity treaty with the Hawaiian Islands of January 30, 1875.[4] Subsequently, the exceptional relations between the United States and Cuba were regarded as of a character such as to enable the former to enact a special tariff act with respect to the latter, without violating the most-favored-nation clause in treaties between the United States and other States.[5]

303, Jan. 11, 1898, and No. 336, April 9, 1898, MS. Inst. Arg. Rep., XVII, 306, 337, Moore, Dig., V, 277; Mr. Adee, Acting Secy. of State, to Russian Chargé d'Affaires *ad interim*, July 30, 1895, For. Rel. 1895, II, 1121, Moore, Dig., V, 276. For further diplomatic correspondence indicating the view of the United States, see documents contained in Moore, Dig., V, 257–288.

See, also, Bartram *v.* Robertson, 122 U. S. 116; Whitney *v.* Robertson, 124 U. S. 190; Thingvalla Line *v.* United States, 24 Ct. Cl. 255.

[1] See, for example, Mr. Fish, Secy. of State, to Mr. Garcia, Argentine Minister, May 14, 1869, MS. Notes to Argentine Legation, VI, 71, Moore, Dig., V, 262. See, also, other instances contained in Appendix C of United States Tariff Commission's Report on Reciprocity and Commercial Treaties, 1919, p. 453.

Appendix B of this Report embraces an exhibit of the various most-favored-nation pledges of the United States.

[2] Stanley K. Hornbeck, The Most-Favored-Nation Clause, 54; also Report of Tariff Commission, 1919, 37–38.

[3] Earl Granville, Secy. of State for Foreign Affairs, to Mr. West, British Minister, Feb. 12, 1885, Blue Book, Commercial No. 4 (1885), 21–22, Moore, Dig., V, 270; Mr. Frelinghuysen, Secy. of State, to Mr. Bingham, Minister to Japan, June 11, 1884, MS. Inst. Japan, III, 253, Moore, Dig., V, 267, note. See, also, Sir Thomas Barclay, "The Effect of the Most-Favoured-Nation Clause in Treaties," *Yale Law J.*, XVII, 26.

[4] Malloy's Treaties, I, 915. Also United States Tariff Commission, Report on Reciprocity and Commercial Treaties, 1919, 418–420; documents in Moore, Dig., V, 263–267; Mr. Adee, Acting Secy. of State, to Mr. Somow, Russian Chargé d'Affaires *ad interim*, July 30, 1895, For. Rel. 1895, II, 1121, Moore, Dig., V, 276; Bartram *v.* Robertson, 122 U. S. 116; Whitney *v.* Robertson, 21 Fed. 566.

[5] "We have in the case of the United States and Cuba a remarkable example of those special and exceptional relations, physical and political, which, not

Even a discrimination of a geographical character, such as one manifested by a law providing for the levying of a lower rate of tonnage dues on vessels sailing from certain foreign places, appears to have been judicially regarded in the United States as not at variance with the most-favored-nation clause in conventions with States whose ports were outside of the privileged area.[1]

It was declared by Mr. Gresham, Secretary of State, in 1894, that the payment by a State of a bounty on the exportation of an article produced or manufactured in its territory, could not on principle justify another country into the territory of which the article was imported, in levying an additional or countervailing duty, when the commerce between such States was to receive, pursuant to convention, the most-favored-nation treatment. "It is understood," he said, "when treaties against discriminating duties are made, that governments reserve the right to favor (by duties or by bounties) their own domestic production or manufacture."[2] A different position was, however, taken by Mr. Olney, Attorney-General, in 1894, and by Mr. Sherman as Secretary of State, in 1897, concerning the effect of countervailing duties utilized in tariff acts of August 27, 1894, and of July 24, 1897.[3]

It is important to observe that the question concerning the application of the most-favored-nation clause to special reciprocal

being estimable simply in terms of commerce, are universally recognized as the surest foundation for the mutual exchange of exclusive advantages; relations, moreover, which are expressed in valid public acts, whose legal effect all nations have acknowledged." J. B. Moore, in opinion cited, 14.

See The Five Per Cent. Discount Cases, 243 U. S. 97.

[1] North German Lloyd S. S. Co. *v.* Hedden, 43 Fed. 17; also opinion of Mr. Maury, Acting Atty.-Gen., Sept. 19, 1885, 18 Ops. Attys.-Gen., 260.

Compare Report of Mr. Bayard, Secy. of State, to the President, Jan. 14, 1889, concerning operation of acts of Congress of June 26, 1884, and June 19, 1886, H. Ex. Doc. 74, 50 Cong., 2 Sess., Moore, Dig., V, 288.

Correspondence between the United States and Colombia as to whether a proclamation of President Harrison of March 15, 1892, suspending the free admission into the United States of certain articles produced in or exported from Colombia, in accordance with Section 3 of the McKinley Act of October 1, 1890, should be regarded as a violation of the treaty between the United States and New Granada of December 12, 1846, For. Rel. 1894, Append. I, 451–503; For. Rel. 1894, 198–199.

[2] Report of Mr. Gresham, Secy. of State, to the President, Oct. 12, 1894, For. Rel. 1894, 236; German Memorandum concerning additional duty on German sugar, July 16, 1894, *id.*, 234; President Cleveland, annual message, Dec. 3, 1894, *id.*, IX–X.

[3] Opinion of Mr. Olney, Atty.-Gen., Nov. 13, 1894, 21 Ops. Attys.-Gen., 80, 82; also Mr. Sherman, Secy. of State, to the German Chargé d'Affaires *ad interim*, Sept. 22, 1897, For. Rel. 1897, 178. In relation to the Act of Congress of July 24, 1897, 30 Stat. 205, see Downs *v.* United States, 187 U. S. 496.

See, also, in this connection, S. K. Hornbeck, Most-Favored-Nation Clause in Commercial Treaties, 70–75, United States Tariff Commission, Report on Reciprocity and Commercial Treaties, 1919, 433.

commercial agreements is one where the traditional policy of a contracting party is regarded as decisive of its stand and as governing its attitude at the time of negotiation. This circumstance removes to a large degree the general problem of construction and the method of its solution from the field of pure interpretation. Thus the effort to ascertain as by judicial process the sense which both parties to a treaty sought to attach to a particular pledge, has given way to attempts to fortify constructions relied upon by reference to their relation to well-known national policies.[1]

As the United States Tariff Board has pointed out, the practice of making reciprocity treaties requires the conditional construction of the most-favored-nation clause, and that construction must be expected to occasion, as it has heretofore, frequent controversies whenever the clause is incorporated in a convention with a State which is committed to an opposing theory.[2] For that reason it must be clear that in each convention in which the most-favored-nation clause is employed, the contracting States should make determined effort to reach a definite agreement as to the signification of the pledge, and that by explanations eliminating reasons for future controversy.[3] Certain treaties have set forth the understanding of the parties in this regard.[4] According to Article 267 of the Treaty of Versailles, of June 28, 1919, every favor, immunity or privilege in regard to the importation, exportation or transit of goods granted by Germany to any Allied or Associated State or to any other foreign country whatever, was "simultaneously and unconditionally, without request and without compensation", to be extended to all the Allied and Associated States.[5]

[1] Thus it might be contended in behalf of the United States that its traditional stand, well known to other contracting powers, was not one from which it could admit that it had in fact departed in concluding a reciprocity treaty.

[2] Report on Reciprocity and Commercial Treaties, 40.

[3] "If the clause is to be retained, it should be possible for the nations either to agree by common stipulation upon the meanings to be attached to each of the various forms and types of the clause, or to adopt one standard form whose phraseology shall be unequivocal and whose function shall be clearly defined. . . . There are without question circumstances in which special treatment is warranted; this is recognized in relation to certain circumstances in the favored-nation practices of all nations. But in the absence of special circumstances or special relations, special treatment inevitably creates unwarranted distinctions and tends to perpetuate discriminations." *Id.*

[4] See, for example, Art. III of treaty between the United States and Nicaragua of June 21, 1867, Malloy's Treaties, II, 1280; also convention between Great Britain and Uruguay, July 15, 1899, Brit. Treaty Series, No. 15, 1900, *Nouv. Rec. Gén.*, 2 ser., XXX, 266.

[5] Senate Doc. No. 49, 66 Cong., 1 Sess., 118.

Art. II of the treaty between the United States and Tonga, of Oct. 2, 1886, declared that: "The citizens of the United States shall always enjoy, in the

b

§ 537. Consular and Other Privileges.

Numerous conventions of the United States employ the most-favored-nation clause in referring to the scope of privileges to be exercised by consular officers of the contracting States. According to the weight of American judicial opinion, a consular officer of a foreign State whose treaty with the United States makes such provision, is entitled to enjoy the privileges, embracing those pertaining to the administration of estates, which are specifically yielded in American conventions with other countries.[1] In a word, the clause is regarded as unconditional. The advantages to be derived from according uniformity of treatment to foreign consular officers, and the essential difficulty in dealing with privileges yielded them on the same basis as reciprocal commercial concessions, warrant such a construction. The courts appear to have acted on such a theory without deeming it necessary to seek or make rigid scrutiny of evidence indicative of the design of the contracting parties.

The most-favored-nation clause is not regarded as embracing in its scope engagements pertaining to the extradition of fugitives from justice.[2] Nor does it necessarily entitle a contracting party

dominions of the King of Tonga, and Tongan subjects shall always enjoy in the United States, whatever rights, privileges and immunities are now accorded to citizens or subjects of the most-favored nation; and no rights, privileges or immunities shall be granted hereafter to any foreign State or to the citizens or subjects of any foreign States by either of the High Contracting Parties, which shall not be also equally and unconditionally granted by the same to the other High Contracting Party, its citizens or subjects; it being understood that the Parties hereto affirm the principle of the law of nations that no privilege granted for equivalent or on account of propinquity or other special conditions comes under the stipulations herein contained as to favored nations." Malloy's Treaties, II, 1781.

[1] See, for example, In re Wyman, 191 Mass. 276; Austro-Hungarian Consul *v.* Westphal, 120 Minn. 122; In re D'Adamo's Estate, 212 N. Y. 214; cases in Crandall, Treaties, 2 ed., § 173. See Consuls, The Most-favored-nation Clause, *supra*, § 482.

Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, Sept. 26, 1895, and Oct. 11, 1895, claiming by virtue of the most-favored-nation clause of Article XIX of the treaty between the United States and Spain, of Oct. 27, 1795, the benefit of Article IX, of the Spanish-German consular treaty of Feb. 22, 1870, For. Rel. 1895, II, 1210 and 1212; Mr. Speed, Atty.-Gen., June 26, 1866, 11 Ops. Attys.-Gen., 508.

It is stated in the Regulations of the Consular Service of the United States, 1896, paragraph 78, that in those countries, which are specified, with which the United States has entered into consular treaties containing the most-favored-nation clause, "consuls of the United States are entitled to claim as full rights and privileges as have been granted to consuls of other nations."

Compare Mr. Buchanan, Secy. of State, to the Chevalier Hülsemann, May 18, 1846, MS. Notes to German States, VI. 130, Moore, Dig., V, 261.

[2] "Engagements of extradition, whether of fugitives from justice or from

to enjoy the benefits of a special arrangement with a third State concerning the nature and limits of contraband.[1] A law of a State of the United States exempting from pilotage American coastwise vessels has been construed to establish no discrimination of which a foreign State could justly make complaint by virtue of a convention providing that no higher charges should be imposed on its vessels than those payable in the same ports by vessels of the United States.[2]

There may be difficulty in determining whether a particular privilege conferred by treaty is essentially a reciprocal concession given for a valuable consideration, and, according to the traditional American view, beyond the operation of the most-favored-nation clause.[3] Diplomatic discussions oftentimes reveal a conflict of opinion among statesmen representing the United States. When the clause is used to describe the varying and flexible scope of privileges of which the value is incapable of nice measurement, and without reference to a commercial bargain, such as those incidental to the right accorded foreign nationals to reside within the territory of a contracting State, there is doubtless ground for the claim that the pledge was designed to be unconditional. Such is at least a reasonable inference, even though it may fail to warrant a presumption. It ought always, however, to be permitted, upon a proper showing, to establish a different design.[4]

service, stand in each case on particular stipulations of treaty, and are not to be inferred from the 'favored-nation' clause in treaties." Mr. Cushing, Atty.-Gen., Oct. 14. 1853, 6 Ops. Attys.-Gen., 148, 156. The words quoted are from the caption of the opinion.

[1] The James and William, 37 Ct. Cl. 303, 307, where the terms of the most-favored-nation clause in the treaty with France of 1778 were not deemed to be such as to entitle that State to the benefits of the Jay treaty of 1794, respecting contraband. Declared Nott, C. J.: "The definition of what should be regarded as contraband or not contraband was not a favor, but a mutual and reciprocal obligation."

[2] Mr. Justice White in Olsen *v.* Smith, 195 U. S. 332, 344.

[3] See, for example, Mr. Olney, Secy. of State, to Mr. Dun, Minister to Japan, Nov. 12, 1896, For. Rel. 1896, 429, Moore, Dig., V, 314.

[4] Baker *v.* City of Portland, 5 Sawy. 566.

TITLE F

TERMINATION OF TREATIES

1

§ 538. Preliminary.

In examining the processes by which treaties and other international agreements are terminated, it becomes important to ascertain whether a particular act or occurrence has served to put an end to the compact, or has merely given one of the parties the privilege of doing so. The right of a State to terminate a treaty must not be confused with its power to effect such an achievement. Exercise of the right, whenever it is found to exist, can never afford just ground of complaint. Exercise of the power is to be regarded as lawful only when it is within the limits of the right. When it is unlawful in the sense that it violates the contractual obligation towards another State, the termination of the compact does not serve to free the covenant-breaker from the consequences of the breach.

2

§ 539. Notice Pursuant to Agreement.

Treaties frequently provide in substance that after a specified lapse of time, either contracting State shall have the right to give notice to the other of an intention to terminate the agreement, and that after the expiration of a designated interval following such notice, the treaty shall "wholly cease and determine." [1]

Notice of a design to terminate a treaty must, in order to be effectual, be clearly expressed. It is not to be implied from an inquiry merely suggesting negotiations for a new agreement.[2] Precise indication of particular Articles sought to be terminated (when a part rather than the whole of a convention is to be de-

[1] Art. XIX treaty between the United States and Japan, of Nov. 22, 1894, Malloy's Treaties, I, 1035.

[2] Correspondence between Mr. Fish, Secy. of State, and Mr. Perez, Colombian Minister, 1871, For. Rel. 1871, 243, 246, 247.

nounced) must be given, and in strict conformity with the requirements of the agreement.[1]

Notice may doubtless be withdrawn prior to the date when the treaty would otherwise have been terminated by virtue of the notice and through its operation.[2]

In behalf of the United States, notice of termination is given by the President, commonly in pursuance of a joint resolution of the Congress; and it has followed the unanimous resolution of the Senate.[3] According to instructions from President Taft, December 15, 1911, the American Ambassador at St. Petersburg gave to the Russian Government on December 17, 1911, official notification whereby the operation of the treaty with that State of December 18, 1832, would terminate, in accordance with its terms, on January 1, 1913.[4] A joint resolution ratifying this action was approved by the President December 21, 1911.[5]

3

§ 540. Later Agreement Superseding Earlier One.

Such Articles of a treaty as are incorporated in a later one are thereby superseded or revoked.[6] A treaty is superseded by a subsequent agreement between the parties covering all of the same

[1] Correspondence between the United States and Guatemala in 1888, concerning the denunciation of certain Articles of the treaty between those States of March 3, 1849. For. Rel. 1888, 149–151, Moore, Dig., V, 326; Mr. Olney, Secy. of State, to Mr. Young, Minister to Guatemala, July 30, 1896. For. Rel. 1895, II, 775, Moore. Dig., V, 327.

Concerning the question whether Article XXIX of the treaty between the United States and Great Britain of May 8, 1871, was terminated by the notice of termination of Articles XVIII to XXV, and of Article XXX, given to the British Government July 2, 1883, see Moore, Dig., V, 327–335, and documents there cited.

Regarding the notification given by the Turkish Government to terminate the treaty of Commerce and Navigation with the United States, of Feb. 25, 1862, see Davis' Notes, U. S. Treaty Vol. (1776–1887) 1371, and documents there cited, Moore, Dig., V, 795–801.

[2] Report of Gen. Foster, Secy. of State, to the President, Dec. 7, 1892, concerning the withdrawal by Mr. Seward, Secy. of State, March 8, 1865, of a previous notice for the termination of the agreement between the United States and Great Britain of April 28–29, 1817, House Doc. No. 471, 56 Cong., 1 Sess., Moore, Dig., V, 323.

[3] See instances contained in Moore, Dig., V, 322–335; also in Crandall, Treaties, 2 ed., § 184.

[4] For. Rel. 1911, 695–699; also House Report No. 179, 62 Cong., 2 Sess., containing Report from House Committee on Foreign Affairs, Dec. 12, 1911, recommending passage of joint resolution 166, introduced Dec. 4, 1911, by Mr. Sulzer, which was not acceptable to the administration.

[5] 37 Stat. 627.

[6] In re Ross, 140 U. S. 453, 465–467, Moore, Dig., V, 363; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, No. 181, Jan. 7, 1886, MS. Inst. Great Britain, XXVII, 640, Moore, Dig., V, 364.

subject matter.[1] The effect of the later convention or of particular articles thereof upon the former or upon portions of it, is sometimes definitely announced.[2]

4

CHANGED CONDITIONS

a

§ 541. In General.

It is not easy to determine what changes in conditions confronting the parties to a treaty serve to permit either of them to free itself from the burdens of the compact. The term "changed conditions", unless given a somewhat narrow signification, fails to indicate the basis of a definite legal right. Nor does it reveal the precise grounds on which a contracting State may fairly rely in justification of abrogation. A diplomat may anticipate, with reason, that a particular State, as soon as the development of its power suffices, will attempt to rid itself of inconvenient obligations imposed by a treaty concluded at a time when military or political weakness rendered acquiescence imperative. It requires, however, something more than the sheer power of a contracting State to disregard with impunity the terms of a valid treaty, in order to establish a legal right to do so.[3] Reliance, therefore, on a change of conditions which refers merely to the development of the power of such a State to a point where it may safely ignore the terms of its agreement, is an appeal to force rather than to law.[4]

[1] La Republique Française *v.* Schultz, 57 Fed. 37.

[2] The Hay-Pauncefote convention of Nov. 18, 1901, announced in Art. I, that it superseded the Clayton-Bulwer Treaty of April 19, 1850; but it was declared in the preamble of the later convention that the design thereof with respect to facilitating the construction of a ship canal to connect the Atlantic and Pacific Oceans, was "without impairing the 'general principle' of neutralization" established in Art. VIII of the earlier agreement. Malloy's Treaties, I, 782.

[3] Validity, Consent, *supra*, § 493.

The statement in the text has no reference to situations where a State finds itself obliged to accept a treaty which the law of nations would denounce as internationally illegal, or as one voidable at the election of the State compelled to acquiesce in its terms, such as a convention whereby a conqueror forces its enemy to agree to the cession of territory inhabited by a race alien to the grantee and in contempt of the principle of self-determination.

[4] In the course of discussions between the United States and Great Britain, relating to the Clayton-Bulwer Treaty of April 19, 1850, Mr. Blaine, Secretary of State, in a note of instruction to Mr. Lowell, Minister at London, Nov. 19, 1881, said that the "treaty was made more than thirty years ago, under exceptional and extraordinary circumstances which have long ceased to exist — conditions which at best were temporary in their nature and which can never be reproduced." For. Rel. 1881, 554. For that reason, he sought a revision of its terms. His successor, Mr. Frelinghuysen, in 1882 and

The German invasion of Belgium in 1914, regardless of the terms of the treaties of 1839, will, in view of the pleas of German statesmen, long be deemed to be the most impressive modern illustration of such an appeal.[1]

If changed conditions confer upon a contracting State the right to free itself from duties prescribed in a treaty, it is because those conditions refer to the existence of a new order of things not contemplated at the time of the conclusion of the agreement, and which render inequitable a demand for performance. It will be doubted whether rules may be safely enunciated which point to the several applications of this principle. It may be enlightening, however, to observe what is deemed to be the effect of certain political and other changes which a contracting State may undergo subsequent to the conclusion of a treaty.

b

Political Changes

(1)

§ 542. Changes in Form of Government.

It is accepted doctrine in which the United States has long acquiesced, that a change in the form of the government of a contracting State does not serve to terminate its treaties, or necessarily justify the attempt of any party to terminate them. Thus, Mr.

1883, maintained that the compact was no longer binding on the United States, asserting that for various reasons it was at least "voidable." He did not, however, expressly refer to changed conditions. For. Rel. 1882, 271; *id.*, 1883, 418, 477. Lord Granville, in behalf of Great Britain, vigorously opposed these contentions. For. Rel. 1882, 302, 305; *id.*, 1883, 484, 529. In a memorandum addressed to the President in 1896, Mr. Olney, Secretary of State, after reviewing the attitude of Messrs. Blaine and Frelinghuysen, concluded that "upon every principle which governs the relations to each other, either of nations or individuals, the United States is completely estopped from denying that the treaty is in full force and vigor. If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter." Moore, Dig., III, 203, 209. For a full abstract of the discussions relating to the Clayton-Bulwer Treaty, 1881–1883, see Moore, Dig., III, 189–197; concerning negotiations preliminary to the conclusion of the Hay-Pauncefote treaty of Nov. 18, 1901, *id.*, III, 210–219. But see, also, Hon. J. W. Foster, The Practice of Diplomacy, 303, *citing* Report of Senate Committee on For. Rel. Jan. 10, 1891, contained in Reports of Com. on For. Rel., U. S. Senate, 1789–1901, IV, 187, 191.

[1] See the reference to the violation of the treaty of 1839, in Art. 232 of the Treaty of Versailles of June 28, 1919; Ch. de Visscher, Belgium's Case, A Juridical Enquiry, London, 1916, Chap. III.

Jefferson, as Secretary of State on April 28, 1793, advised President Washington in response to his inquiry as to whether the United States should consider itself still bound to respect its treaties with France, in view of the change in the form of the government of that State, that the treaties between the two countries "were not the treaties between the United States and Louis Capet, but between the two nations of America and France, and the nations remaining in existence, though both of them have since changed their form of government, the treaties are not annulled by these changes." [1]

(2)

Changes in the Identity of a State

(a)

§ 543. Loss of State Life through Absorption by Another State.

When a State relinquishes its life as such through incorporation into or absorption by another State, the treaties of the former are believed to be automatically terminated. Thus Mr. Sherman, as Secretary of State, informed the Japanese Minister at Washington, June 25, 1897, with reference to the proposed annexation of the Hawaiian Islands by the United States, that

> the history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other States. It needs no stipulation in a formal annexation treaty to work this result, for it attends *de facto* annexation however accomplished. The forcible incorporation of Hanover into the Prussian kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas to Statehood in our Union by joint resolution extinguished the treaties of the independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption, that determines treaties. It does not even follow that the existing treaties of the absorbing State extend to the acquired territory. The treaties of the German

[1] Writings of Jefferson, P. L. Ford's ed., VI, 219, 220, Moore, Dig., V, 335–336; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Feb. 21, 1877, MS. Inst. Haiti, II, 91, Moore, Dig., V, 337.

Empire are held not to apply to the ceded French provinces of Alsace and Lorraine.[1]

The treaties of a State whose identity is lost may be replaced by those of the annexing State. Thus, it was declared in the joint resolution, approved July 7, 1898, providing for the annexation of the Hawaiian Islands, that "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations." [2]

It may be doubted whether the duty on the part of a State which has absorbed another to deal equitably with States whose treaties with the latter have been terminated requires that the

[1] MS. Notes to Jap. Leg. I, 521, *citing* Halleck's Int. L., Ch. 18, sec. 35, and Dana's Wheaton, sec. 275, Moore, Dig., V, 349.

Concerning the treaty between the United States and the Netherlands of Oct. 8, 1782, see Davis' Notes, U. S. Treaty Vol. (1776–1887), 1235, Moore, Dig., V, 344; concerning the treaty between the United States and Hanover and Nassau, see Davis' Notes, 1234.

Mr. Marsh, American Minister to Italy, in a communication to Mr. Seward, Secretary of State, May 6, 1864, said: "I am told that the Italian Government regards all treaties between foreign States and the kingdom of the Two Sicilies as abrogated, at least for most purposes, by the annexation of that kingdom to Sardinia, and considers the treaties between these States and Sardinia, as now extending to the whole kingdom." *Dip. Cor.* 1864, IV, 334. In reply, Mr. Seward, June 15, 1864, authorized Mr. Marsh to negotiate with the Italian Government a new treaty of commerce to take the place of the existing treaties between the United States and the Kingdoms of Sardinia and the Two Sicilies. *Id.*, 327.

Concerning the effect of the cession by Spain to the United States of the Zulu Archipelago on certain protocols of Spain with Germany and Great Britain, conceding exceptional trade privileges to vessels of those countries, see Magoon, law officer, division of insular affairs, War Department, Oct. 8, 1900, Magoon's Reports, 316, Moore, Dig., V, 351, 352.

See Case of absorption of Loochoo by Japan and its effect on the treaties between the United States and Loochoo of July 11, 1854, Moore, Dig., V, 346.

[2] 30 Stat. 750.

When France, in 1896, declared Madagascar and the neighboring islands to be a French colony, the French Government informed the United States that the passage of the law producing this result implied the abrogation of conventions formerly signed by the Hova Government of Madagascar, for which was substituted the system of conventions in use in the French colonies, and that it had the effect of extending to Madagascar the whole of the conventions concluded between France and the United States. Moore, Dig., V, 347–348, and documents there cited.

Also declaration of the Japanese Government, Nov. 22, 1905, respecting its taking charge of the foreign relations of Korea pursuant to an agreement with that country of Nov. 17, 1905, and announcing an undertaking by Japan of "the duty of watching over the execution of the existing treaties" of Korea, and of seeing that they were "maintained and respected." For. Rel. 1905, 613.

See, also, P. Pic, "*Influence de l'Établissement d'un protectorat sur les traités antérieurement conclus avec des puissances tierces par l'état protégé*", *Rev. Gén.*, III, 613.

treaties subsisting between those States and the absorbing State be utilized as a substitute for agreements no longer in force. Much must depend upon the circumstances of the particular case. There may be, for example, solid grounds for objection to the extension of particular privileges of a commercial character to certain areas by reason of their geographical relation to the territories of one of the contracting States.[1] On the other hand, it would doubtless be agreed that the annexation by the United States of a country contiguous to its continental territory, and its admission as a State of the Union, should cause the extension to it of the existing treaties of the United States.[2] Apart from the question of obligation, it may be deemed advantageous to all concerned that the conventions of an annexing or absorbing State replace so far as possible those of the country which has ceased to exist as a State and whose territory has been acquired.[3]

(b)

§ 544. Where Identity of a State Has not Been Wholly Lost.

Where a State, although uniting with or becoming a part of another, does not wholly lose its identity or suffer complete loss of its State life, retaining "a territorial identity with full power of action over a subject-matter of a treaty previously concluded",[4]

[1] Both Great Britain and the United States regarded the reciprocal privileges contained in Article XXI of the treaty of May 8, 1871, providing for the free entry of the produce of the fisheries of the United States and the Dominion of Canada or Prince Edward's Island into those countries, as inapplicable to British Columbia upon the admission of that province into the Dominion of Canada. See Earl of Derby to Sir E. Thornton, British Minister, Aug. 11, 1875. Brit. and For. State Pap., LXVI, 963, 968, Moore, Dig., V, 353.

See, also, Case of Charles E. Heinzeman, with reference to unwillingness of Germany to extend to Alsace and Lorraine the Bancroft naturalization treaties of 1868, For. Rel. 1892, 177, 179, 180; but see Mr. Fish, Secy. of State, to Mr. Bancroft, Minister to Germany, April 14, 1873, For. Rel. 1873, I, 279, 281.

[2] "The former Republic of Texas, upon its admission as a State into the Union on terms of equality with the other States, undoubtedly became bound and privileged by all the treaties of the United States, of which it had become an integral part." Crandall, Treaties, 2 ed., § 179, p. 429.

[3] In the case of the cession of territory, the agreement may announce how the treaties of the contracting parties shall be applied with reference to the area which undergoes a change of sovereignty. According to Art. X of the convention between the United States and Denmark, providing for the cession of the Danish West Indies, of Aug. 4, 1916: "Treaties, conventions and other international agreements of any nature existing between Denmark and the United States shall *eo ipso* extend, in default of a provision to the contrary, also to ceded islands." U. S. Treaty Series No. 629, *Am. J.* XI, Supp., 53, 59.

[4] Crandall, Treaties, 2 ed., § 179, p. 431.

there is reason to claim that the agreement is not terminated by the Union.

Thus Germany, in 1889, admitted that as extradition laws and treaties binding upon all States of the German Empire had not been made, the several States thereof "were not hindered from regulating extradition by treaties with foreign States or by laws enacted for their own territory", and that with the United States extradition continued to be regulated by treaties with Prussia, Bavaria and Baden, concluded long before the formation of the Empire.[1]

(c)

§ 545. Formation of a New State by Separation from Another.

When a new State is formed out of territory formerly belonging to another, as Panama or the Republic of Texas, or when a State comes into being as the result of separation from another, as in the case of Sweden and Norway, the treaties of the old State are regarded as still binding upon the new one, at least in so far as they relate to matters of peculiarly local concern. Thus, Mr. Adams, Secretary of State in 1823, with reference to the inquiry whether Colombia in its war of independence was bound by the treaty of 1795, between the United States and Spain, said:

> To all engagements of Spain with other nations, affecting their right and interests, Colombia, so far as she was affected by them, remains bound in honor and in justice. The stipulation now referred to is of that character.[2]

[1] Moore, Dig., V, 355–356; Terlinden *v.* Ames, 184 U. S. 270, 282–286.

Concerning the requirements made by the United States in 1896, in according recognition to the Greater Republic of Central America, comprising Honduras, Nicaragua and Salvador, see For. Rel. 1896, 370, 390.

[2] Communication to Mr. Anderson, Minister to Colombia, May 27, 1823, Brit. and For. State Pap., XIII, 480, Moore, Dig., V, 341; Opinion of Mr. Hassaurek, Commissioner, in case of the Atlantic & Hope Insurance Companies *v.* Ecuador, United States and Ecuadorean Claims Commission under Convention of Nov. 25, 1862, Moore, Arbitrations, III, 3220, 3223.

Concerning the duty of Texas to regard as in force Articles V and VI of the treaty between the United States and Mexico of April 5, 1831, see Moore, Dig., V, 343, and documents there cited.

The Republic of Panama, by Art. XX of its convention with the United States of Nov. 18, 1903, agreed that if by virtue of any existing treaty, in relation to the territory of the Isthmus of Panama, whereof the obligations should descend to or be assumed by the Republic of Panama, there should be "any privilege or concession in favor of the Government or the citizens and subjects of a third power relative to an interoceanic means of communication which in any of its terms may be incompatible with the terms of the present convention", to cancel or modify such treaty in due form. It was declared

Upon the dissolution of the union of Norway and Sweden in 1905, the Norwegian Chargé d'Affaires at Washington, in the course of a communication to the Secretary of State, said:

> One of the direct consequences of the dissolution of the union between Norway and Sweden is the cessation of any community between the two States as regards the conventions and international agreements jointly concluded by them with one or several other States. If these conventions and agreements could be heretofore considered as involving the joint responsibility of Norway and Sweden for the obligations placed upon each thereby, the Norwegian Government then deems itself from this time responsible only for the obligations in the said joint conventions and agreements which concern Norway. This likewise applies to the international conventions to which Norway and Sweden have jointly adhered. As for the conventions and agreements concluded separately by Sweden during the union and adhered to by Norway, the Norwegian Government holds that it cannot be considered to be responsible for the fulfillment of obligations thereby placed upon Sweden.
>
> On the other hand, the Norwegian Government is of the opinion that all the conventions and international agreements concluded by Norway with one or several other States, either jointly with Sweden, or separately, or as an adhering party, continue in full force and effect, as heretofore, between Norway and the other contracting party or parties without any change in their provisions being effected by the dissolution of the union.[1]

The treaty of peace with Austria of September 10, 1919, made provision that the multilateral treaties, conventions and agreements of an economic or technical character concluded by the former Austro-Hungarian Monarchy, and specifically enumerated, should alone be applied as between Austria and those of the Allied and Associated Powers which were parties to the agreement.[2] It was also declared that each of the Allied or Associated Powers, "being guided by the general principles or special provisions of the present treaty", should notify Austria of the bilateral agreements

that in case an existing treaty contained no clause permitting its modification or annulment, the Republic of Panama would procure its modification or annulment in such form that there should not exist any conflict with the stipulations of the convention with the United States. Malloy's Treaties, II, 1355.

Also declaration of Berlin Conference of 1878, with respect to Servia, Brit. and For. State Pap., LXIX, 934, 961.

[1] Mr. Hauge, to Mr. Root, Secy. of State, Dec. 7, 1905, For. Rel. 1905, 873; also Mr. Gripp, Swedish Minister, to Mr. Root, Nov. 20, 1905, *id.*, 872.

[2] Art. 234. See, also, Art. 282 of treaty of peace with Germany, of June 28, 1919.

of all kinds which had been in force between such Powers and the former Austro-Hungarian Monarchy, and which the Power desired to place in force as between itself and Austria.[1] Notification was apparently to serve normally to reëstablish the agreements desired. In case, however, of a difference of opinion (implying a divergence of view on the part of Austria as to the requirements of the treaty of peace), the League of Nations was to be called upon to decide.

5

§ 546. Abrogation by One Party.

That circumstances may justify a contracting State in freeing itself by its own act from the burdens of a treaty, as by abrogating the agreement, is not at variance with the principle imposing upon such a State a legal duty normally to respect scrupulously its contractual obligations. Greatest difficulty arises, however, in determining whether in the particular case grounds of justification are at hand. Obviously the decisions of domestic courts sustaining legislative or other action effecting abrogation are indecisive of the question whether there has been a violation of a legal duty towards another contracting party.[2]

It may be futile to attempt to enunciate rules pointing decisively to the circumstances when abrogation by one party is to be excused. It is to be acknowledged, however, that failure of a contracting State to observe a material stipulation of its agreement is deemed to justify another party to take such a step.[3] Disagreement be-

[1] Art. 241. It was here declared that the Allied and Associated Powers undertook among themselves not to apply as between themselves and Austria any agreements which were not in accordance with the terms of the treaty of peace.

These provisions appear to have had reference to two distinct problems: (*a*) the revival of treaties terminated by the war, and (*b*) the determination of what classes of agreements of the dual Monarchy which were to be revived should be imposed upon and accepted by Austria. There seems to have been no definite test laid down as to the mode of solution of the latter problem. Art. 241 of the Austrian treaty followed closely Art. 289 of the treaty of peace with Germany of June 28, 1919. In dealing with the latter State the same problem did not arise, because, notwithstanding losses of territory, no dissolution of Germany resulted from the war.

See, in this connection, letter of Allied and Associated Powers to the President of the Austrian Peace Delegation, Sept. 2, 1919, Senate Doc. No. 121, 66 Cong., 1 Sess., p. 30.

[2] Acts of Congress at Variance with Treaties, *supra*, § 529.

[3] "It is useless to endeavor to tie the hands of dishonest states beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the

tween the parties concerning the interpretation of a treaty may give rise to controversy as to whether such a stipulation has been broken. Thus the very existence of conditions sufficing to justify repudiation may be sincerely questioned by the party whose conduct is regarded by another as warranting such action.[1] Should there be habitual recourse to arbitration, either through the voluntary or constrained action of the parties, in cases involving the interpretation of a treaty where no other amicable means sufficed to bring about accord, the resulting practice would check the success of the effort of dishonest States to utilize colorable grounds as a pretext for disregarding their contractual obligations.[2]

It may be observed that the Covenant of the League of Nations imposes sharp penalties upon a member which resorts to war in disregard of certain specified undertakings pertaining to the adjustment of international disputes.[3] It is significant that the check upon recourse to such a mode of self-help is designed to leave little room for the contention of a contracting State that circumstances have justified its abrogation of obligations under the Covenant.

It may be difficult to determine whether a State has in fact taken steps appropriate to terminate its obligations under a treaty. Notwithstanding the persistence and vehemence of its charges that the compact has been violated by another contracting party, the aggrieved State may not in fact abrogate the agreement. Thus

main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract." Hall, Higgins' 7 ed., § 116, p. 362.

[1] The Congress, by an Act approved July 7, 1798, which was enacted on account of what it deemed to be repeated violations by France of its treaties with the United States, declared the United States to be of right free and exonerated from its treaties and consular convention with that State, and that they should not, therefore, "be regarded as legally obligatory on the Government or citizens of the United States." France did not, however, admit that this enactment put an end to these agreements. It was subsequently contended that by the convention of Sept. 30, 1800, with France, the United States purchased its release from the previous conventions. See Moore, Arbitrations, V, 4429–4432; Moore, Dig., V, 357–359, and documents there cited; Am. State Pap., For. Rel. II, 344–345.

Concerning the attempt of Russia, in 1870, to free itself from the operation of certain provisions of the treaty of Paris of 1856, in relation to the Black Sea, see Hall, Higgins' 7 ed., § 116. See, also, comment of Mr. Higgins, *id.*, 366–368, concerning the action of Prince Ferdinand of Bulgaria in announcing the independence of Bulgaria, Oct. 5, 1908, and of Austria-Hungary in announcing the annexation of Bosnia and Herzegovina Oct. 7, 1908, in the light of the provisions of the treaty of Berlin of 1878.

[2] See jurisdiction conferred upon the proposed Permanent Court of International Justice by Art. 34 of the original Draft Scheme presented to the Council of the League of Nations by the Advisory Committee of Jurists. 1920.

[3] See Art. XVI with respect to a disregard of undertakings under Arts. XII, XIII or XV.

in March, 1917, after diplomatic relations with Germany had been severed, the United States, in declining to accept the German proposal for an interpretative and supplementary agreement as to Article XXIII of the treaty of 1799 (revived in the treaty of 1828 with Prussia), made vigorous complaint of the violation by Germany of its contractual obligations. Secretary Lansing, while declaring that the Government was seriously considering whether or not the treaty of 1828 and the revived Articles of earlier conventions had "not been in effect abrogated by the German Government's flagrant violations of their provisions", did not declare that the United States regarded those provisions as no longer in force, and did not indicate that the Government saw fit to avail itself of rights which German misconduct had served to confer upon it.[1]

Cases have arisen where the right to abrogate a treaty was doubtless lost by reason of the failure of an aggrieved State for a long period of time to avail itself of the misconduct of another contracting party. The United States is believed to have felt the restriction of this principle, when it failed seasonably to avail itself of the right which any acts on the part of Great Britain between 1850 and 1860 might have conferred upon it, to put an end to the Clayton-Bulwer Treaty.[2]

[1] Mr. Lansing, Secy. of State, to the Swiss Minister in charge of German interests in America, March 20, 1917, American White Book, European War, IV, 415, 417, where he added: "It would be manifestly unjust and inequitable to require one party to an agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities." See Jesse S. Reeves, "The Prussian-American Treaties", *Am. J.*, XI, 475, 501–507.

See Memorandum of Mr. Knox, Secy. of State, Dec. 9, 1910, concerning the existing extradition convention with Italy, For. Rel. 1910, 654, 656.

[2] The conduct of the United States in succeeding years manifested reliance upon the continued existence of the convention, and indicated abandonment of any right of termination which could have been based on the action of Great Britain in earlier years. This was emphasized by Mr. Olney, Secy. of State, in his memorandum of 1896, on the Clayton-Bulwer Treaty, contained in Moore, Dig., III, 203, 207, 208. See, also, Lord Granville to Mr. West, British Minister, Dec. 30, 1882, For. Rel. 1883, 484, Moore, Dig., III, 196, note.

A dispute arose in 1876 between the United States and Great Britain concerning Art. X of the treaty of August 9, 1842. "In consequence of this controversy the operation of the treaty was suspended for six months. The execution of the treaty was then resumed without any express agreement as to the point of dispute which had occasioned its suspension." Moore, Dig., V, 321. Also documents cited *id.*, 321, 322.

6

EFFECT OF WAR

§547. In General.

There has been diversity of opinion as to the precise effect of war upon the treaties between belligerent States.[1] While it has long been perceived that that event does not serve to annul all such agreements, there seems to have been confusion of thought concerning the theory by virtue of which some should survive.[2]

In contrast to the views of early publicists, reflected as late as 1912 in those of the Institute of International Law,[3] Dana was of opinion that the test of survival is to be found in the nature of the provisions concerned and not in the origin of the war.[4] According to Professor Moore, the principle is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war "depends upon their intrinsic character." "If," he declares, "they relate to a right which the outbreak of war does not annul, the treaty itself remains unannulled."[5] It remains to observe the various applications of this principle when its operation is not rendered nugatory by the terms of treaties of peace.

[1] See views of publicists in Moore, Dig., V, 381–385; Oppenheim, 2 ed., II, § 99; Crandall, Treaties, 2 ed., II, § 181; compilation of documents on Effect of War on Treaties, prepared by Joseph R. Baker and Louis W. McKernan, in "Selected Topics Connected with the Laws of Warfare", as of August 1, 1914, Department of State, June, 1919, 220–269.

[2] "The misconception sometimes betrayed on the subject is due to the failure to note the narrow sense in which the word treaties has frequently been used in this relation. By a classification originating with the earlier publicists, and often repeated by their successors, treaties have been divided into two classes — *pacta transitoria*, or 'transitory conventions', as the words have been unfortunately translated, and 'treaties, properly so-called.' In the former class were included international compacts by which a status was permanently established, or a right permanently vested; and, in the latter, compacts which looked to future action, and the execution of which presupposed the continuance of a state of peace between the contracting parties. In accordance with the distinction thus drawn it was said that 'treaties' were terminated by war, the word treaties being used in a limited technical sense. As a result of this double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side and denied on the other, when in reality the word was used by the parties in different senses — by the one in its general and usual sense and by the other in its special and restricted sense." J. B. Moore, in *Columbia Law Rev.*, I, 209, 216–217, Moore, Dig., V, 383.

[3] According to the Regulations Regarding the Effect of War on Treaties of 1912: "All treaties, the application or interpretation of which shall have been the direct cause of the war, in consequence of the official acts of either of the governments before the opening of hostilities, are terminated automatically by the war." Art. II, par. 2, *Annuaire*, XXV, 611, J. B. Scott, Resolutions, 172.

[4] Dana's Wheaton, Dana's Note, No. 143.

[5] Moore, Dig., V, 383, *quoting* article in *Columbia Law Rev.*, I, 209, 217.

b

§ 548. Stipulations Applicable to a State of War.

Stipulations of a treaty which are applicable to a state of war should not be abrogated by the occurrence of an event in contemplation of which they have been agreed upon. The provisions of Article XIII of the treaty between the United States and Spain of October 27, 1795, to the effect that in the event of war between the contracting parties, one year after the proclamation thereof should be allowed to the merchants in the cities and towns where they lived, for collecting and transporting their goods and merchandise, was of such a character.[1] Upon the outbreak of the Spanish-American war in 1898, the United States was informed that the Spanish Government regarded the whole of the treaty of 1795 as abrogated, but would probably accept a special arrangement embodying the provisions of Article XIII in case of such a proposal by the United States. In declining to accede to this suggestion, the Department of State declared that it did "not consider treaty provisions expressly applicable to war between contracting parties as abrogated by war", and, therefore, could not propose or make any new agreement embodying the conditions of the early treaty.[2]

Upon the outbreak of war with Germany in 1917, the United States found itself confronted with Articles XXIII and XXIV of the treaty with Prussia of July 11, 1799, which had been revived by Article XII of the treaty with that State of May 1, 1828.[3] These, contemplating a state of war between the contracting parties, made provision for the treatment of nationals of either in the territory of the other, and embraced stipulations concerning prisoners of war.[4]

Prior to the outbreak of the war the Department of State, as

[1] Malloy's Treaties, II, 1644.

[2] Mr. Day, Secy. of State, to Mr. Hay, American Ambassador at London, telegram, May 8, 1898, For. Rel. 1898, 972. See, also, Mr. Hay to Mr. Day, May 10, 1898, *id.*, 973.

"If it were true that war abrogates such stipulations [as Art. XIII of the treaty of 1795 with Spain], they would be subject to the singular fate of ceasing to be in force whenever they should become applicable." Mr. Moore, Acting Secy. of State, to Mr. Wheeler, May 3, 1898, 228 MS. Dom. Let. 245, Moore, Dig., V, 376, note.

[3] Malloy's Treaties, II, 1494–1495, and 1499.

[4] According to Art. XXIV of the treaty of 1799: "It is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."

has been observed, took the stand that flagrant violations by Germany of the treaty of 1828 justified the United States in regarding the agreement as at an end.[1] The occurrence of war did not deprive it of such a right with respect to articles which that event did not itself serve to annul. Nor did the failure to denounce the entire treaty prior to that time rob the United States of such a privilege thereafter.[2]

C

§ 549. Stipulations Creating Permanent Rights.

"Treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity", do not, as was declared by the Supreme Court of the United States in 1823, "cease on the occurrence of war."[3] As the decision in the case in which these words were uttered was to the effect that rights of private property already vested under a treaty were not divested by the occurrence of a subsequent event such as the extinguishment of the treaty, the views of the Court concerning the effect of war upon the conventions between the belligerents may be fairly regarded as *dicta*.[4] They are believed to be, nevertheless, an impressive enunciation of sound principle.

The provisions of a treaty enabling the nationals of a contracting party thereafter to acquire, by any process, real property within the territory of another, would not appear to confer privileges of a permanent character. Thus, while the occurrence of war would doubtless not affect rights already acquired by virtue of the agreement, that event would put an end to the contractual

[1] Abrogation by One Party, *supra*, § 546; also correspondence with the Swiss Minister at Washington in charge of German affairs, American White Book, European War, IV, 413–417.

[2] See, in this connection, Jesse S. Reeves, "The Prussian-American Treaties", *Am. J.*, XI, 475, 507–510.

[3] Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 494, where rights of a British corporation, protected by the treaty of peace with Great Britain of 1783, and confirmed by the Jay treaty of 1794, were challenged. See, also, Carneal *v.* Banks, 10 Wheat. 181; Sutton *v.* Sutton, 1 Russ. & Myl. 663.

[4] Declared Washington, J.: "Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war." Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 494.

duty of either State to permit such individuals thereafter from deriving from the agreement any fresh rights of acquisition.[1]

The provisions of a treaty for the payment of a public debt by one contracting State to another may be regarded as of a lasting character until at least the debt is paid. Thus, while payment may be necessarily suspended during the period of the war, the contractual obligation would not be annulled by that event.[2]

d

§ 550. Certain Other Classes of Agreements.

A treaty of alliance requires the existence of a singleness of purpose and relationship between the contracting States which can only last while peace endures between them. War is thus inconsistent with the nature of such a compact, and must be deemed to annul it.[3]

[1] Mr. Bayard, Secy. of State, to Messrs. L. & E. Lehman, June 23, 1885, 156 MS. Dom. Let. 80, Moore, Dig., V, 374.

Concerning the effect of the War of 1812 on rights acquired by the United States through the treaty of 1782–1783, with respect to fishing privileges within British territorial waters on the northeast coast of America, see documents in Moore, Dig., I, 767–780; J. Q. Adams, The Fisheries and the Mississippi, Washington, 1822.

The author is advised that the Department of State did not up to Feb. 1, 1921, formally announce a decision as to the effect of the existing war upon the treaties concluded by the United States with Prussia in 1828, and with Austria-Hungary in 1848. To the effect that Art. II of the latter was not abrogated by the war, see, Techt *v.* Hughes, 128 N. E. 185 (New York).

[2] According to Art. I of the claims convention with Spain of Feb. 17, 1834, the latter engaged to pay to the United States "the sum of twelve millions of rials vellon, in one or several inscriptions, as preferred by the Government of the United States, of perpetual rents, on the great book of the consolidated debt of Spain, bearing an interest of five per cent. per annum." Malloy's Treaties, II, 1659. Notwithstanding a decree of the Spanish Government, April 30, 1898, declaring all of its agreements with the United States to be terminated by the war then existing, the former Government in 1899, at the solicitation of the United States, declared that "the Government of His Majesty, wishing to give a proof of its constant good faith, has already taken the proper steps in order to guarantee completely the interests of the holders of the debt of 1834, without this resolution prejudicing in the least the matter which must be resolved by common agreement between the two Governments concerned." For. Rel. 1899, 709, 710. On Dec. 20, 1899, the two sums of twenty-eight thousand, five hundred dollars, representing installments for the years 1898 and 1899, were paid. *Id.*, 708, 713. See, also, documents in Moore, Dig., V, 376–380.

[3] Rivier, II, 137; Bonfils-Fauchille, 7 ed., § 1049: Oppenheim, 2 ed., II, § 99.

"War, however, automatically terminates: Agreements of international associations, treaties of protection, control, alliance, guaranty; treaties concerning subsidies, treaties establishing a right of security or a sphere of influence, and, generally, treaties of a political nature." Regulations of the Institute of International Law, 1912, Regarding the Effect of War on Treaties, Art. II, par. 1, *Annuaire*, XXV, 611, J. B. Scott, Resolutions, 172.

Stipulations pertaining to commerce and navigation are not of permanent character, and do not purport to manifest a design on the part of the contracting States to establish rights which should survive a war between them. Nor is it believed that provisions concerning social intercourse, or pertaining to the enjoyment of economic and political privileges, such as are embraced in naturalization conventions, stand on a better footing.[1]

The practice of States from the close of the Crimean War until the present time has been significant. Treaties of peace have revealed widespread recognition that former conventions, save those which purported to establish a permanent condition of things, or were designed to regulate the rights of the parties as belligerents, were annulled by the occurrence of war. Frequently a treaty of peace has contained appropriate provision for the reëstablishment of prior agreements, or has permitted the temporary operation thereof pending the conclusion of fresh arrangements. Reference to those agreements has assumed various forms; sometimes they have been "confirmed", sometimes "reëstablished", sometimes "maintained." In almost every case, however, the compact terminating a war has marked the establishment of a new contractual relationship rather than the modification of an existing one. Arrangements concerning former treaties have not implied a recognition of their survival by operation of law, but simply an acknowledgment of the value of their provisions as a basis for fresh covenants.[2]

[1] *Compare*, however, Hall, Higgins' 7 ed., § 125, p. 402.

[2] According to Art. XXXII of the Treaty of Paris, of March 30, 1856, concluded by Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, it was declared that: "Until the treaties or conventions which existed before the war between the belligerent powers have been either renewed or replaced [*ou renouvelés ou remplacés*] by new acts, commerce shall be conducted on the basis existing before the war; in other matters, the subjects of the contracting parties shall be accorded the most-favored-nation treatment." *Nouv. Rec. Gén.*, XV, 780; Brit. and For. State Pap., XLVI, 17.

Art. XVII of the treaty of Zurich, of Nov. 10, 1859, concluded by Austria, France and Sardinia, provided that all the treaties and conventions between Austria and Sardinia which had been in force before April 1, 1859, were confirmed [*confirmés*] in so far as they were not supplanted by the new treaty. *Nouv. Rec. Gén.*, XVI, Part 2, p. 537.

According to Art. II of the treaty of Vienna, concluded Oct. 30, 1864, between Austria and Prussia on the one side, and Denmark on the other, "all the treaties and conventions concluded before the war between the high contracting parties are reëstablished [*établis dans leur vigueur*] in so far as they are not abrogated or modified by the tenor of the present treaty." *Nouv. Rec. Gén.*, XVII, Part 2, p. 475.

See, also, Art. XIII of Treaty of Prague, of Aug. 23, 1866, between Austria and Prussia, *Nouv. Rec. Gén.*, XVIII, 348; Art. XI of Treaty of Frankfort, of May 10, 1871, between France and Germany, *Nouv. Rec. Gén.*, XIX, 693, and Art. XVIII of additional convention of Dec. 11, 1871, *Nouv. Rec. Gén.*,

e

§ 551. The Treaty of Versailles with Germany.

The treaty of peace concluded at Versailles, June 28, 1919, made elaborate provision with reference to the former conventions of every sort to which Germany had been a party. It manifested, however, no guiding principle indicative of the effect of war upon treaties other than one normally destructive of the contractual relationship. The provisions agreed upon were rather expressions of policy fixed by the Principal Allied and Associated Powers.

XX, 863; Art. X of Treaty of Constantinople, Jan. 27/Feb. 8, 1879, between Russia and Turkey, *Nouv. Rec. Gén.*, 2 ser., III, 470. According to Art. XI of the treaty of peace between Chile and Peru, of Oct. 20, 1883, the commercial relations between the two countries were to be placed, pending the conclusion of a special treaty, on the same footing as prior to April 5, 1879. Brit. and For. State Pap., LXXIV, 351. See, also, Art. III of treaty of peace between Spain and Chile, of June 12, 1883, *id.*, 721.

According to Art. VI of the treaty of peace between Japan and China of April 17, 1895, all former treaties between those States were regarded as having been abrogated by the war. *Nouv. Rec. Gén.*, 2 ser., XXI, 644.

In a communication by the Sublime Porte to the several ambassadors at Constantinople, May 14, 1897, specifying conditions for the suspension of hostilities in the war between Turkey and Greece, it was declared that "all the treaties between Turkey and Greece being abolished by the fact of war, their renewal ought to be based on the general principles of international law." French Yellow Book, Affairs of the Orient, May to Dec. 1897, No. 1. In their reply of May 23, 1897, the ambassadors said that "if the existing treaties between the two belligerents are on principle annulled by the state of war and require renewal, certain privileges and immunities have been conceded to Greek subjects by virtue of arrangements with the Great Powers, and would not, in consequence thereof, become extinct by reason of the rupture between Turkey and Greece." *Id.* Art. XI of the treaty of peace between Greece and Turkey of Nov. 22/Dec. 4, 1897, made provision for the conclusion of certain fresh agreements between the contracting parties on specified bases. See, also, Art. XII, Brit. and For. State Pap., XC, 427–428; and protocol B, *id.*, 430.

The treaty of peace between the United States and Spain, of Dec. 10, 1898, made no reference to former agreements between those States. Malloy's Treaties, II, 1690. Art XXIX of the treaty of July 3, 1902, declared that all treaties, agreements, conventions and contracts between the United States and Spain prior to the Treaty of Paris, should be "expressly abrogated and annulled", with the exception of the claims convention of Feb. 17, 1834. *Id.*, 1710.

Art. XII of the treaty of peace between Japan and Russia, of Aug. 23/Sept. 5, 1905, proclaimed the annulment by the war of the treaty of commerce and navigation between those States. For. Rel. 1905, 826.

Art. V of the treaty of peace between Italy and Turkey, of Oct. 18, 1912, announced that all the treaties and conventions subsisting between those States prior to the war should again "enter into immediate effect", and that the two Governments, as also their respective subjects, should be placed towards one another in the identical situation in which they had been before the outbreak of hostilities. *Am. J.*, VII, Supp., 59; *Nouv. Rec. Gén.*, 3 ser., VII, 8.

The treaty of peace concluded by Bulgaria, Greece, Montenegro and Servia, with Turkey, at London, May 17/30, 1913, made no reference to former treaties. Brit. and For. State Pap., CVII, Part 1, 656. *Am. J.*, VIII, Supp., 12. See, also, similar omission from the treaty of peace concluded

Only such multilateral treaties of an economic or technical character as were enumerated were to be "applied" as between Germany and such of the Allied and Associated Powers as were parties thereto.[1] Specified postal and telegraphic conventions were to be applied by the contracting parties, on condition that Germany fulfilled special stipulations which were expressed.[2]

Numerous rights and privileges acquired by Germany through prior agreements were declared to have been terminated on specified dates.[3] Each of the Allied or Associated Powers, "being guided by the general principles or special provisions" of the treaty, was to notify to Germany the bilateral treaties or conventions which the former might wish to revive with Germany, the date of revival to be that of the notification. This right of the Allied and Associated Powers was subject to the undertaking on their part not to revive any conventions or treaties at variance with the terms of the treaty of peace. In case of a difference of opinion, the League of Nations was to be called upon to decide. Former

by Bulgaria, with Greece, Montenegro, Roumania, and Servia, July 28/Aug. 10, 1913. Brit. and For. State Pap., CVII, Part 1, 658, *Am. J.*, VIII, Supp., 13. By Art. IV of the treaty of peace between Bulgaria and Turkey, of Sept. 16/29, 1913, it was agreed to put in force [*à remettre en vigueur*] and for a specified period a former treaty of commerce and navigation, and a specified consular declaration. Brit and For. State Pap., CVII, Part 1, 709, *Am. J.*, VIII, Supp., 31. By Art. II of the treaty of peace between Turkey and Greece, of Nov. 1/14, 1913, the treaties, conventions and acts subsisting between those States at the time of the rupture of diplomatic relations were to be restored [*remis intégralement en vigueur*] upon the signature of the new convention. Brit. and For. State Pap., CVII, Part 1, 894, *Am. J.*, VIII, Supp., 46. See, also, Art. I of treaty of peace between Servia and Turkey, of March 1/14, 1914, *Rev. Gén.*, XXI, 30d. Also reference to treaties cited in this paragraph in Crandall, Treaties, 2 ed., § 181, p. 455.

[1] Art. 282, where twenty-five conventions were specified.

[2] Art. 283. See, also, Art. 284, with reference to the conditions on which the International Radio-Telegraphic Convention of July 5, 1912, was to be applied.

By Art. 285 it was agreed by the contracting parties to "apply" in so far as concerned them, and under conditions previously stipulated, the conventions of May 6, 1882, and Feb. 1, 1889, regulating the fisheries in the North Sea outside of territorial waters, and the conventions and protocols of Nov. 16, 1887, Feb. 14, 1893, and April 11, 1894, regarding the North Sea liquor traffic.

See Art. 286, with reference to the renewal or coming into force again of the international convention of Paris of March 20, 1883, for the protection of industrial property, revised at Washington, June 2, 1911, and the international convention of Berne, of Sept. 9, 1886, for the protection of literary and artistic works, revised at Berlin, Nov. 13, 1908, and completed by the additional protocol signed at Berne, March 20, 1914.

[3] See, for example, Art. 288, respecting special rights granted to Germany by Art. 3 of the convention of Dec. 2, 1899, relating to Samoa. See, also, Art. 135, concerning Siam; Art. 139, concerning Liberia; Art. 141, concerning Morocco; Art. 148, with respect to Egypt. See Art. 128, respecting German renunciation in favor of China, of privileges resulting from the final Protocol of Sept. 7, 1901. See Art. 31, embracing German consent to the abrogation of the treaties of April 19, 1839, fixing the status of Belgium.

bilateral treaties and conventions with Germany which should not be revived by such notifications were declared to be and remain abrogated.[1]

[1] Art. 289. It was here also stated that "the above regulations apply to all bilateral treaties or conventions existing between all the Allied and Associated Powers signatories to the present treaty and Germany, even if the said Allied and Associated Powers have not been in a state of war with Germany."

According to Art. 290, Germany recognized that all its contractual arrangements concluded with Austria, Hungary, Bulgaria or Turkey, subsequent to Aug. 1, 1914, until the coming into force of the treaty of Versailles, were and remained abrogated by it. By Art. 292, Germany recognized that all agreements which it had concluded with Russia, or with any State or Government of which the territory had previously formed a part of Russia, or with Roumania, before Aug. 1, 1914, or after that date until the coming into force of the treaty of Versailles, were and remained abrogated. See, also, Art. 116 in which Germany accepted definitely the abrogation of the Brest-Litovsk treaties and all other agreements entered into with the Maximalist Government in Russia.

PART VI

DIFFERENCES BETWEEN STATES. MODES OF REDRESS OTHER THAN WAR

TITLE A

AMICABLE MODES

1

NON-JUDICIAL MEANS

a

§ 552. Negotiation.

Differences between States may be, and oftentimes are, amicably adjusted by diplomatic negotiation.[1] By such process the United States has succeeded in bringing to an end certain controversies of grave aspect such as those pertaining to the Northeastern Boundary in 1842,[2] and to Oregon in 1846.[3]

The fate of negotiations may depend upon considerations beyond the control of plenipotentiaries, and possibly remote from the merits of the particular dispute. The sheer power of a strong State may serve to compel a weaker adversary to yield to whatever solution is demanded, and to smother its indignation in the impeccable phrases of a sacrificial treaty. When, however, foreign offices of supposedly equal and independent States are given free rein, the efficacy of diplomacy is believed to depend in large degree upon the friendliness of tone, the accuracy of statement and the regard for international law with which the representatives of the powers at variance advocate their respective claims.[4]

[1] Moore, Dig., VII, 2.

[2] Moore, Arbitrations, I, 85–161, and documents there cited, and particularly the Webster-Ashburton treaty with Great Britain of Aug. 9, 1842, Malloy's Treaties, I, 650.

[3] Moore, Arbitrations, I, 196–213, and documents there cited, and particularly treaty with Great Britain of June 15, 1846, Malloy's Treaties, I, 656.

[4] Despagnet, 3 ed., § 470.

b

Good Offices and Mediation

(1)

§ 553. Significance of the Term "Good Offices."

The term "good offices" is somewhat ambiguous. According to Secretary Hay, its use should be confined to the two contingencies in respect to which, he declared, the Department of State was careful to limit its employment. In its first sense, he said that it corresponds to the French term *officieux*, or the Spanish *oficioso*, and "means the unofficial advocacy of interests which the agent may properly represent, but which it may not be convenient to present and discuss on a full diplomatic footing." [1] A typical case arose in 1905, when, in compliance with the request of Great Britain, the American Minister at Montevideo was instructed to use his "unofficial friendly offices" in support of the British Minister's request for the release from prison of the captain of the Canadian schooner, *Agnes G. Donahoe*.[2]

In its second sense the term "good offices" refers broadly to the act of a State or of an officer thereof in endeavoring by friendly suggestion to facilitate adjustment of a controversy between others. Thus, in June, 1905, the good offices of President Roosevelt were exercised when he suggested that both Japan and Russia, then at war, open direct negotiations for peace, and that there be a meeting of Russian and Japanese plenipotentiaries without any intermediary.[3]

[1] Communication to Mr. McNally, No. 235, March 16, 1900, MS. Inst. Cent. Am., XXI, 645, Moore, Dig., VII, 3.

Concerning Good Offices and Mediation, see documents in Moore, Dig., VII, 2–24; also Despagnet, 3 ed., §§ 472–476; bibliography on Hershey, Essentials, 342; J. P. Higgins, The Hague Peace Conferences, 167; Frederick W. Holls, The Peace Conference at the Hague, 176–203; E. J. Mélik, *La Médiation et les Bons Offices*, Paris, 1900; Oppenheim, 2 ed., II, 10–15, §§ 7–11; N. Politis, *"L'Avenir de Médiation"*, *Rev. Gén.*, XVII, 136; J. B. Scott, The Hague Peace Conferences, I, 256–265; Jean Zamfiresco, *De la Médiation*, Paris, 1911.

[2] Telegram of Mr. Adee, Acting Secy. of State, to Mr. O'Brien, Minister to Uruguay, Aug. 15, 1905, For. Rel. 1905, 916; Same to the British Ambassador at Washington, Aug. 15, 1905, *id.*

In a similar sense the good offices of the United States were requested by Colombia in 1905, in advocating the adoption by Venezuela of the principle of the free navigation of rivers common to neighboring countries. The request was complied with. For. Rel. 1905, 248–252, 1030–1036. Also *id.*, 1906, II, 1438–1440.

[3] Telegram of Mr. Loomis, Acting Secy. of State, to Mr. Meyer, American Ambassador to Russia, June 8, 1905, For. Rel. 1905, 807; Same to Mr. Griscom, Minister to Japan, June 8, 1905, *id.*, 808. The suggestions of the

Again, a State tenders its good offices when it offers its services for the purpose of devising a mode of adjusting a foreign controversy, or of furnishing through its own agencies a means of negotiation appropriate to that end. In the latter case, if the offer is accepted by the parties at variance, the offeror becomes a mediator.

(2)

§ 554. The Relation of Mediation to Good Offices.

Mediation is, therefore, not only the consequence of the tender of good offices, but also the manifestation of the exercise thereof.[1] The efficacy of mediation may depend upon avoidance of direct negotiations between parties to the controversy, or upon the skill of the mediator in initiating proposals calculated to harmonize conflicting interests. To achieve success the mediator is inclined, therefore, to encourage compromise rather than advise adherence to legal principle.

A mediating State may or may not directly conduct negotiations between the opposing States. Thus, in 1906, the United States in coöperation with Mexico, in order to facilitate the termination of war between Salvador and Honduras on the one side, and Guatemala on the other, suggested direct negotiations on board the U. S. S. *Marblehead*, in the presence of diplomatic representatives of the United States and Mexico, acting "simply in a friendly advisory capacity." The treaty of peace there concluded July 20, 1906, referred to the latter States as the "mediating nations."[2]

President were followed, and direct negotiations were held at Portsmouth, N. H., where a treaty of peace was concluded Aug. 23, 1905. For. Rel. 1905, 807–828.

[1] J. B. Scott, The Hague Peace Conferences, I, 260. *Compare* Oppenheim, 2 ed., II, § 9.

[2] For. Rel. 1906, I, 834–852.

By reason of continued disturbances in Central America, the Presidents of the United States and of Mexico, in 1907, tendered their good offices to the States at variance in order to bring about peace. For. Rel. 1907, II, 636–644; *id.*, 606–635. Accordingly, on Sept. 17, 1907, representatives of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua concluded at Washington a protocol providing for a general conference to be held in that city following a formal invitation to be extended simultaneously by the Presidents of the United States and of Mexico, and for the purpose of adjusting existing differences and of concluding a treaty to determine the general relations among the Central American States. It was agreed that the Presidents of the United States and of Mexico should be invited to appoint, if they deemed proper, their respective representatives, who should "lend their good and impartial offices in a purely friendly way toward the realization of the objects of the conference." *Id.*, II, 644. In response to the invitations contemplated, representatives of the five Central American Republics duly met in Washington, and in the presence at all deliberations of representatives of both the United States and Mexico, concluded Dec. 20, 1907,

On April 25, 1914, the diplomatic representatives at Washington of Brazil, Argentina and Chile, tendered to the Government of the United States their "good offices for the peaceful and friendly settlement of the conflict between the United States and Mexico." [1] The offer was promptly accepted by the United States, and also by General Huerta, head of the *de facto* and provisional Mexican Government with which that of the United States was in conflict.[2] Representatives of the opposing Governments assembled at Niagara, Ontario, May 20, 1914, where they held negotiations under the direction of the South American plenipotentiaries. The latter joined the former in signing a protocol of agreement June 24, 1914, according to the third Article of which it was declared that "the three mediating Governments" agreed on their part to recognize a provisional Mexican Government organized according to a specified plan.[3]

(3)

§ 555. The Hague Conventions of 1899 and 1907.

Part II of the Hague Conventions of 1899 and of 1907, for the Pacific Settlement of International Disputes, embodied a formal plan of mediation, and also described with precision the significance of acts tending to adjust differences by that process.[4] The signatory Powers agreed to have recourse, "as far as circumstances allow", to the good offices or mediation of one or more friendly Powers.[5] It was declared that, independently of such recourse, the contracting Powers deemed it expedient *and desirable* that strangers to the dispute should, on their own initiative, and as far as circumstances might allow, offer their good offices or mediation to States at variance.[6] The right of such strangers so to act, even during hostilities, was acknowledged, while the exercise of the right could never, it was said, be regarded as an unfriendly

a series of important treaties and conventions, Malloy's Treaties, II, 2392–2420, including among the latter an agreement for the establishment of a Central American Court of Justice. *Id.*, II, 2399. Respecting the Conference, see Luis Anderson (plenipotentiary of Costa Rica), "The Peace Conference of Central America", *Am. J.*, II, 144; J. B. Scott, "The Central American Peace Conference of 1907", *id.*, II, 121.

[1] For the text of the offer see *Am. J.*, VIII, 583. [2] *Id.*

[3] *Id.*, 584–585. The arrangement proved valueless. See Recognition of New Governments, *supra*, § 44, note 1, p. 71.

[4] Malloy's Treaties, II, 2020–2022, 2228–2229. [5] Art. II.

[6] Art. III. The addition of the words "and desirable" (*et désirable*), in Art. III, and the substitution of the word "contracting" (*contractantes*) for "signatory" (*signataires*) Powers (appearing also throughout the convention), constituted the only amendments to Part II of the convention of 1899, which were made by the Conference of 1907.

act.[1] It was announced that the part of a mediator consists in reconciling opposing claims and appeasing feelings of resentment between the States at variance;[2] that the functions of a mediator cease when once it is declared by a party to the dispute, or by the mediator, that the means of reconciliation proposed are not acceptable.[3] The fact was wisely emphasized that good offices and mediation, howsoever initiated, "have exclusively the character of advice and never have binding force";[4] and also, that in the absence of agreement, acceptance of mediation cannot have the effect of interrupting, delaying or hindering warlike preparations, or military operations, in case mediation occurs after the commencement of hostilities.[5]

The signatory powers agreed also in recommending in Article VIII the application, when circumstances might allow, of "special mediation", according to a specified form.[6]

(4)

§ 556. The Practice of the United States.

The amicable relations of a mediating power with the States at variance, its friendly purposes implied by the tender of good offices, and the purely advisory function which is sought to be exercised, combine, under certain circumstances, to render mediation an efficacious means of adjusting international differences after direct negotiations between the parties concerned have proved unavailing.[7]

[1] Art. III. [2] Art. IV. [3] Art. V. [4] Art. VI. [5] Art. VII.

[6] The form specified was as follows:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

Respecting the authorship and design of this Article, see F. W. Holls, The Peace Conference at the Hague, 188–203.

[7] Explanatory Note respecting Art. V of a project relating to good offices and mediation proposed by the Russian Delegation to the first Hague Peace Conference, *La Conférence Internationale de la Paix*, 1899, I, 121–124; J. B. Scott, The Hague Peace Conferences, I, 782–787.

See Art. VIII, Treaty of Paris of March 30, 1856, respecting recourse to mediation in the event of any misunderstanding which might endanger the maintenance of the relations between the Sublime Porte and one or more of the other contracting parties, *Nouv. Rec. Gén.*, XV, 770, 774; J. B. Scott, The Hague Peace Conferences, I, 261; also Art. I of treaty between the United

The United States, when itself a party to an international dispute, has rarely accepted offers of mediation.[1] Nor has it pursued a uniform policy in tendering its own good offices to other States. In earlier days of the Republic, the fear lest mediation might be construed as intervention, and as subversive of the political independence of foreign States, served to check the offering of American mediatory proposals.[2] Apparently the disposition to remain aloof from European entanglements increased the national reluctance to suggest mediation to States across the Atlantic.[3] Less hesitation appears to have been manifested with respect to differences between or relating to States of Central or South America.[4]

As the nature of mediation as well as the function of a mediator have become understood, and as the interest of the United States in averting hostilities or in terminating wars between belligerents has become apparent, it has simultaneously perceived both the propriety and desirability of exercising the right to propose

States and Korea, May 22, 1882, Malloy's Treaties, I, 334, and documents relative to its operation in Moore, Dig., VII, 7–8; Art. XII, General Act of the Berlin Conference, Feb. 26, 1885, with respect to the Congo, *Nouv. Rec. Gén.*, 2 ser., X, 414, 420.

[1] The United States did, however, accept the offer of Russia to act as mediator in the War of 1812. Am. State Pap., For. Rel. III, 623–627; also Lawrence's Wheaton, 495, quoted in Moore, Dig., VII, 2. It accepted also the tender of good offices of the plenipotentiaries of Brazil, Argentina and Chile, April 25, 1914, to pave the way for the adjustment of the controversy with General Huerta's Government in Mexico. See, also, Reprisals, The Tampico Incident, *infra*, § 591, concerning the acceptance of an offer of mediation by Great Britain in 1836, to facilitate the adjustment of the issue with France concerning payment by the latter of the spoliation claims.

[2] See, for example, Mr. Webster, Secy. of State, to the President, Aug. 12, 1852, MS. Report Book, VI, 447, Moore, Dig., VII, 4; Mr. Seward, Secy. of State, to Mr. Hassaurek, Minister to Ecuador, No. 6, Nov. 20, 1861, MS. Inst. Ecuador, I, 100, Moore, Dig., VII, 6.

[3] See documents in Moore, Dig., VII, 11–13, respecting the refusal of the United States in 1870, to use its good offices in conjunction with European powers for the restoration of peace between France and Germany.

[4] Moore, Dig., VII, 9–11, and documents there cited, concerning the mediation of the United States, 1866–1872, between Spain on the one side and Peru, Chile, Bolivia and Ecuador on the other.

Declared Mr. Gresham, Secy. of State, in a communication to Mr. Baker, Minister to Nicaragua, No. 27, July 14, 1893: "You appear to have rightfully understood the policy of this Government, which is at all times disposed to lend its impartial good offices, or those of its diplomatic agents, to the honorable adjustment of issues of peace or war in neighboring communities, whenever acceptable to both parties; and it would seem that the tender of your mediation was not made without previous knowledge that it would be equally welcomed by the titular Government and the revolutionists." For. Rel. 1893, 201, Moore, Dig., VII, 16.

See, also, Mr. Gresham, Secy. of State, to Mr. Denby, Minister to China, Nov. 24, 1894, respecting the circumstances leading to the tendering of the good offices of the United States with a view to the restoration of peace between China and Japan in 1894, For. Rel. 1894, App. I, 81, Moore, Dig., VII, 16.

mediation with respect to any contest between any powers, unless there is reason to believe that such action will prove unwelcome.[1]

On December 18, 1916, President Wilson addressed to the several belligerent and neutral powers, through the Department of State, suggestions to the effect that all of the nations then at war make "avowal of their respective views as to the terms upon which the war might be concluded and the arrangements which would be deemed satisfactory as a guaranty against its renewal or the kindling of any similar conflict in the future as would make it possible frankly to compare them." [2] It was announced that the President was not proposing peace, nor "even offering mediation", but that he was merely proposing that soundings be taken in order that it might be learned how near the haven of peace might be. As is known, these suggestions, although eliciting courteous responses, proved valueless. Notwithstanding the disclaimer as to the character of his proposals, it is believed that they were essentially mediatory in kind, and made with a view to obtaining declarations indicative of a basis on which the opposing belligerents might reach an accord.[3]

c

International Commissions of Inquiry

(1)

§ 557. The Hague Conventions of 1899 and 1907.

Controversies between States arising from questions of fact may baffle diplomacy and lead to war. The truth is usually, however,

[1] Thus on February 22, 1915, in view of correspondence with Great Britain and Germany respectively, relative to the declaration of a war zone by the German Admiralty, and the use of neutral flags by British merchant vessels, the United States expressed the hope that the two belligerent Governments might, through reciprocal concessions, find a basis for agreement which would relieve neutral vessels engaged in peaceful commerce from certain dangers encountered by them. To that end the United States suggested the terms of an agreement. Mr. Bryan, Secy. of State, to Mr. Page, American Ambassador at London, telegram, Feb. 20, 1915, American White Book, European War, I, 59. The proposal proved, however, to be unacceptable to both belligerents. See the German Minister for Foreign Affairs, to Mr. Gerard, American Ambassador at Berlin, May 28, 1915, *id.*, II, 169; also Mr. Lansing, Secy. of State *ad interim*, to Mr. Gerard, telegram, June 9, 1915, *id.*, 171.

[2] Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, telegram, Dec. 18, 1916, American White Book, European War, IV, 321; Same to Mr. Gerard, American Ambassador at Berlin, telegram, same date, *id.*, 323. For the several responses elicited, *id.*, 326–346.

[3] *Compare* proposals of the *de facto* Government of Mexico, communicated Feb. 12, 1917, *id.*, 349; also the response of the United States thereto, March 16, 1917, *id.*, 351.

within the reach of those who seek it, and notably if recourse be had to an impartial investigation; and when brought home to the States at variance, may point to a sound basis of adjustment which they are willing to accept. In view of these circumstances, Part III of the Hague Convention of 1899, for the Pacific Settlement of International Disputes (Arts. IX–XIV), established a brief plan for the use of so-called International Commissions of Inquiry.[1] The signatory powers recommended that in differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the States at variance should, as far as circumstances might allow, institute an International Commission of Inquiry to "facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation."[2] Such a commission was to be established by special agreement between the parties in conflict.[3] Its function was to make a report limited to a statement of facts, and which, it was declared, should in no way have the character of an arbitral award.[4]

The attack during the night of October 21–22, 1904, in the course of the Russo-Japanese War, upon vessels of the English fishing fleet off the Dogger Bank in the North Sea, by the Russian naval fleet bound for the Orient, gave rise to a grave issue between Great Britain and Russia. It concerned the question whether Japanese torpedo boats had been among the fishing vessels fired upon, so as to justify the Russian action which caused the destruction of British lives and property. The States at variance agreed to entrust to an International Commission of Inquiry, assembled in accordance with the provisions of the Hague Convention of 1899, the care of elucidating the question of fact involved. The Commission was also empowered to make inquiry into and draw up a report upon all the circumstances of the case, with particular reference to where responsibility lay, and the degree of blame attaching to the subjects of the contracting parties or of other countries, in case their responsibility should be established. The Commission, composed of five admirals, representative of the American, Austrian, French, British, and Russian navies, reported that no Japanese vessels had been among the fishing fleet, that the firing upon the latter was unjustifiable, and that responsibility lay with

[1] Malloy's Treaties, II, 2022. Also F. W. Holls, The Peace Conference at the Hague, 203–220; Maurice Bokanowski, *Les commissions internationales d'enquête*, Paris, 1908; André Le Ray, *Les commissions internationales d'enquête au xx^me siècle*, Saumur, 1910.

[2] Art. IX. [3] Art. X. [4] Art. XIV.

Admiral Rojdestvensky, the Commander of the Russian fleet.[1] Russia duly paid to Great Britain a substantial indemnity.[2]

The success of the North Sea Commission assured the maintenance of provisions for International Commissions of Inquiry in the Hague Convention of 1907, for the Pacific Settlement of International Disputes.[3] Part III thereof devoted twenty-eight Articles to the subject, embodying a carefully devised code of procedure the use of which was recommended.[4] The Conference of 1907 did not, however, broaden the scope of questions of fact deemed expedient "and desirable" [5] for submission to the Commission of Inquiry, nor amplify the functions of the latter, nor render compulsory the use of such a body.[6]

[1] The Commission took pains to declare that its findings were "not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky, or of the personnel of his squadron." *Am. J.*, II, 936.

[2] For the text of the Russo-British Protocol of Agreement of July 29, 1899, and the Report of the Commission of Inquiry of Nov. 12 (25), 1904, see *Am. J.*, II, 929–936, *Nouv. Rec. Gén.*, 2 ser., XXXIII, 641, 710, 712.

Concerning the case generally, see Sir T. Barclay, Problems, 35–42; Hershey, Int. Law, 326–327, and commentaries there cited; A. P. Higgins, The Hague Peace Conferences, 167–169, and documents there cited; R. de La Penha, *La Commission internationale d'enquête sur l'incident anglo-russe de la mer du Nord*, Paris, 1906; A. Mandelstam, "*La Commission internationale d'enquête sur l'incident de la mer du Nord*", *Rev. Gén.*, XII, 161 and 531; J. B. Moore, *Proceedings of Eleventh Lake Mohonk Arbitration Conference*, 1905, p. 143; Oppenheim, 2 ed., II, 7.

[3] Malloy's Treaties, II, 2230–2234.

[4] Concerning the work of the Second Hague Peace Conference relative to Commissions of Inquiry, see *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 402–416, 564–568, II, 219–226, 379–402, 625, 859–872; also J. B. Scott, The Hague Peace Conferences, I, 269–273.

[5] These words incorporated in Art. IX of the Convention of 1907, constituted an amendment to Art. IX of the convention of 1899.

[6] According to the convention, an International Commission of Inquiry is constituted by special agreement known as the Inquiry Convention, defining the facts to be examined, and determining the manner and period within which the Commission is to be formed and the extent of the powers of the commissioners; also, if need be, where the Commission is to meet, whether it may remove to another place, the language it may use, and the languages the use of which shall be authorized before it, the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed. If the parties deem it necessary to appoint assessors, the Inquiry Convention shall determine the mode of their selection and the extent of their powers. In the absence of express provision in that Convention, the Commission is to sit at the Hague; and the place of sitting once fixed, cannot be altered by the Commission except with the consent of the parties. If the Inquiry Convention has not determined what languages are to be employed, the question is to be decided by the Commission. In default of agreement to the contrary, the Commission of Inquiry is to be formed in the manner determined by Articles XLV and LVII of the Hague Convention of 1907 for the Pacific Settlement of International Disputes. The death, resignation or inability to act of a commissioner or assessor calls for the same procedure in filling his place as was followed in appointing him.

Provision is made for the appointment by the parties of special agents and counsel, the use of the International Bureau of the Permanent Court of Arbi-

(2)

§ 558. Treaties of the United States. The Bryan Peace Plan.

On August 7, 1913, the United States concluded with Salvador the first of a notable group of treaties with numerous States,

tration as the registry for the Commission sitting at the Hague, and the appointment by the Commission, if it sits elsewhere, of a secretary-general, whose office is to serve as a registry. The function of the registry, under the control of the President, is to make necessary arrangements for the sittings of the Commission, the preparation of the minutes, and, while the inquiry lasts, for the custody of the archives, subsequently, however, to be transferred to the International Bureau at the Hague. Broad power is conferred upon the Commission to settle the details of procedure not covered by the Inquiry Convention or by the Hague Convention, and the arrangement of formalities required in dealing with the evidence. The following rules of procedure are recommended.

On the inquiry both sides must be heard. At fixed dates each party is to communicate to the Commission and to the other party the statement of facts, if any, and in all cases, the instruments, papers and documents, which it considers useful for ascertaining the truth, as well as the list of its witnesses and experts.

Provision is made for the temporary removal of the Commission or members thereof to any place where it is considered useful to have recourse to this means of inquiry. Permission must, however, be obtained from the territorial sovereign. Every investigation and examination of a locality must be made in the presence of the agents and counsel, or after they have been duly summoned. The Commission may ask either party for such explanations and information as it thinks fit.

The parties undertake to afford the Commission, within the widest practicable limits, all the means and facilities necessary to enable it to become completely acquainted with and accurately understand the facts at issue, and also engage to use the means at their disposal under their municipal law, to secure the appearance of witnesses or experts within their territory, who have been summoned before the Commission.

Arrangement is made for the taking of testimony before qualified local officials, of witnesses unable to testify before the Commission. Provision is made for the service of notices and the procuring of evidence in the territory of a third contracting State, whose aid in the premises, when duly requested, is not to be refused unless deemed to impair its sovereign rights or safety. The Commission is always entitled to act through the State on whose territory it sits. The government of such a State directly summons witnesses and experts within its own territory, at the request of the parties or of the Commission.

Witnesses are to be heard in succession and separately, in the presence of the agents and counsel, and in the order fixed by the Commission. The examination is conducted by the President of the Commission, whose other members may also propound questions. The agents and counsel, although forbidden to interrupt the witness, or to put direct questions to him, may ask the President to put additional questions to him. While the witness is not permitted to read any written proof, his consultation of notes or documents may, under certain circumstances, be allowed. The witness is obliged to sign a written minute of his testimony, to which he may append such alterations and additions as he may think necessary.

The agents are authorized, in the course of, or at the close of the inquiry, to present to the Commission and to the other party, such statements, requisitions or summaries of the facts as they consider useful for ascertaining the truth. The deliberations of the Commission are in private and its proceedings remain secret. It decides all questions by a majority vote; the declination of a member to vote must be recorded. The sittings of the Commission are

whereby a broader use of commissions of inquiry was contemplated.[1] The purpose of the series was to advance the cause of peace by establishing a deterrent of war. The contracting parties took cognizance, therefore, of the following facts: first, that failure to adjust amicably questions of grave concern to the parties at variance naturally leads to war; secondly, that States generally, and even the United States, have commonly been reluctant to conclude permanent arbitration treaties embracing such differences within their scope; thirdly, that the outraged sensibilities of the people of an aggrieved State, however provocative of war, become immeasurably soothed by the mere lapse of time if unaccompanied by the outbreak of hostilities; fourthly, that nations are not unwilling to consent to the reasonable investigation of future and unknown differences of whatsoever magnitude, provided the right is reserved to disregard the report of those who make the investigation; fifthly, that the report of impartial investigators of highest moral reputation and known competency must serve to produce a profound impression upon the public opinion of the States at variance and so pave the way for the solution of their controversy; sixthly, that the organization and establishment of a permanent international commission of inquiry empowered also to suggest to the States concerned the invocation of its services, would tend to facilitate the use of such a body when the exercise of its functions was most needed.

Thus, for example, the treaty with the Netherlands of December 18, 1913, provides that all disputes "of every nature whatsoever", to the settlement of which previous arbitration treaties are not applicable in terms or are not applied in fact, are, when diplomatic methods of adjustment have failed, to be referred for investigation and report to a "permanent international commission." [2] It is

not public, nor are the minutes and documents connected with the inquiry published, except by consent of the Commission and both parties.

The inquiry is terminated by the President after the presentation of all the explanations and evidence of whatsoever kind; whereupon the Commission adjourns to deliberate and draw up its report. The report is signed by all members of the Commission; the refusal of a member to sign does not, however, invalidate the report, but such fact is to be mentioned. The report is read in open court, the agents and counsel being present, or being duly summoned to attend; and a copy of the report is furnished to each party. The report being limited to a statement of fact, has in no way the character of an arbitral award. It leaves to the parties entire freedom as to the effect to be given to the finding. Each party pays its own expenses, and an equal share of those of the Commission. Arts. X–XXXVI.

[1] These treaties embodied what has been known as Secretary Bryan's Peace Plan. See editorial comment, *Am. J.*, VIII, 565 and 876; *id.*, IX, 175.

[2] For the text of this treaty see *id.*, VIII, 568–571. See also treaty with Russia, of Oct. 1 (Sept. 18), 1914, U. S. Treaty Series, No. 616.

agreed, moreover, that war shall not be declared, nor hostilities begun, during such investigation and before the report is submitted. The international commission is to be composed of five members, one chosen from each country by the government thereof, one chosen by each government from some third country; and the fifth chosen by common agreement between the two governments from among persons who are not "citizens" of either contracting State. The Commission is to be appointed within six months after the exchange of ratifications of the treaty.

Reference of a dispute to the Commission is to take place immediately upon the failure of the contracting parties to adjust it by diplomacy. The Commission may, however, spontaneously offer its services to that effect, and in such case is to notify both governments, requesting their coöperation in the investigation. The Commission is to be furnished with all the means and facilities required for its investigation and report. The report is to be completed within one year after the date on which the Commission declares its investigation to have begun, unless there is agreement between the parties to limit or extend the time. The report is to be prepared in triplicate, of which one copy is to be presented to each government, and the third retained by the Commission for its files. The contracting parties reserve the right to act independently on the subject matter of the dispute after the report shall have been submitted.

The efficacy of treaties such as the foregoing obviously depends upon the power and disposition of the governments of the contracting parties, in the face of a popular demand for war, to respect the terms agreed upon.[1] If, however, those terms are observed, the plan devised promises much; for the report of the Commission, even if itself unacceptable, may, nevertheless, furnish or suggest a basis for adjustment by direct negotiation or by arbitration.[2]

[1] J. B. Moore, *Proceedings*, Twentieth Lake Mohonk Arbitration Conference, 1914, 17–18.

Declared Mr. Elihu Root, while Secretary of State in 1907: "It is hard for democracy to learn the responsibilities of its power; but the people now, not governments, make friendship or dislike, sympathy or discord, peace or war, between nations. In this modern day, through the columns of the myriad press and messages flashing over countless wires, multitude calls to multitude across boundaries and oceans in courtesy or insult, in amity or in defiance. Foreign offices and ambassadors and ministers no longer keep or break the peace, but the conduct of each people toward every other. The people who permit themselves to treat the people of other countries with discourtesy and insult are surely sowing the wind to reap the whirlwind, for a world of sullen and revengeful hatred can never be a world of peace. Against such a feeling treaties are waste paper and diplomacy the empty routine of idle form." *Am. J.*, I, 285–286.

[2] A Russian delegate at the Second Hague Conference made the following

2

JUDICIAL MEANS

a

Arbitration

(1)

§ 559. Definition.

In a broad sense the term arbitration,[1] as a process of adjusting international differences, signifies the reference of a controversy to a single individual known as an arbitrator, or to an uneven number of persons so described, and that regardless of whether their award is to be based upon compromise expressive of diplo-

interesting proposal as to the treatment to be accorded the report of the Commission of Inquiry (in the Convention for the Pacific Settlement of International Disputes): "The Powers at variance, having obtained knowledge of the facts and responsibilities declared by the International Commission of Inquiry, are free either to conclude a friendly arrangement, or to have recourse to the Permanent Court of Arbitration at the Hague." A. P. Higgins, The Hague Peace Conferences, 169; *Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 415.

[1] For bibliographies of the literature on International Arbitration, see Bonfils-Fauchille, 7 ed., § 944; Clunet, *Tables Générales*, I, 472–482, 886–891; List of References on International Arbitration, compiled under the direction of A. P. C. Griffin, Library of Congress, Washington, 1908; Hershey, Int. Law, 340–342; H. La Fontaine, *Bibliographie de la paix et de l'arbitrage*, Paris, 1904.

See, especially, J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Washington, 1898; The United States and International Arbitration, Boston, 1896; Digest of International Law, VII, 24–103; also H. La Fontaine, *Pacrisie internationale; Histoire documentaire des arbitrages internationaux*, 1794–1900, Berne, 1902; A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, Paris, 1905. Attention should be called to A. Mérignhac, *Traité théorique et pratique de l'arbitrage international*, Paris, 1895, a translation of a portion of which respecting arbitration in the East and in Greece, under the Roman Empire, and in the Middle Ages, is contained in Moore, Arbitrations, 4821–4831; J. H. Ralston, International Arbitral Law and Procedure, Boston, 1910.

See, also, *Proceedings*, Am. Soc. Int. L., III, 17–60; VI, 87–114, 144–189; Publications of Am. Soc. for Judicial Settlement of International Disputes, beginning Aug. 1910; Publications of American Association for International Conciliation, New York; Publications of Carnegie Endowment for International Peace (Division of International Law), especially "Arbitrations and Diplomatic Settlement of the United States", Washington, 1914; *Proceedings of Lake Mohonk Conferences on International Arbitration*, beginning 1895; *Proceedings and Publications of the Inter-Parliamentary Union (Union Interparlementaire)*, whose first regular Conference was held at Paris in 1889; *Proceedings of National Peace Congresses* held under auspices of American Peace Society, beginning 1907, also Publications of the Society, including *The Advocate of Peace*, its monthly journal published at Washington; Publications, Pamphlet Series, of The World Peace Foundation, Boston; *Proceedings* of the International Conferences of American States, the first of which was held at Washington in 1889–1890, the second at Mexico City in 1901–1902, the third at Rio de Janeiro in 1906, and the fourth at Buenos Aires in 1910.

matic achievement, and of whether those individuals are to act as the representatives of either party to the dispute.[1] In the light, however, of the practice of States which have had recourse to arbitral tribunals, it is not unreasonable to assert that the term arbitration is commonly employed by statesmen in a narrower, more precise and more technical sense. It appears to refer to an impartial adjudication according to law, and that before a tribunal of which at least a single member who is commonly a national of a State neutral to the contest acts as umpire.[2] Recourse to arbitration thus implies that the issue is regarded as justiciable, that is, one capable of reasonable adjustment by reference to accepted principles of international law,[3] that the arbitrators are

[1] In his instructions to the American delegates to the Second Hague Peace Conference of 1907, May 31, 1907, Mr. Root, Secy. of State, declared: "It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlement of the questions brought before them in accordance with traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process." For. Rel. 1907, II, 1128, 1135; Stockton, Outlines, 280.

[2] "Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. . . . Mediation is merely a diplomatic function and offers nothing new. Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts." J. B. Moore, in Dig., VII, 25.

Declared the same writer in an address May 29, 1917, on International Arbitration before the Academy of Political Science: "It is said that heretofore we have had arbitration, but that arbitration has failed, and that now we are to have the 'judicial settlement' of international disputes. Such statements illustrate the propensity to accept phrases rather than to search for facts. . . . I venture to assert that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that preceded it, as you will find in the proceedings of our ordinary judicial tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the 'judicial settlement' of international disputes we are presenting some new device or method." *Proceedings*, Academy of Political Science, VII, No. 2, Part 1, 21–22.

Declares Westlake: "The essential point is that the arbitrators are required to decide the difference — that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done, in the sense in which the best is distinguished from the most just, is not within their province, but is the province of a mediator." Int. Law, 2 ed., I, 354.

[3] Westlake, 2 ed., I, 358; Legal Problems Capable of Settlement by Arbi-

acquainted with those principles and will apply them, and that the parties to the controversy will respect the award.[1]

(2)

§ 560. Justiciable Differences.

That a dispute between States is justiciable, and so possessed of a character such as to render it fairly capable of adjustment by recourse to arbitration, is not dependent upon the magnitude of the issue, or upon the attachment of one State to a policy decisive of its conduct.[2] Nor does the circumstance that a controversy affects the so-called "vital interests", or "national honor", or "independence" of one of the parties thereto, indicate that it is outside of such a category. Policies deterring States such as the United States from agreeing generally to the adjustment by arbitration of differences affecting such matters afford no enlightening test of the scope of fairly arbitrable questions.

The true test of a justiciable controversy is believed to be whether the principles of international law are sufficiently broad and flexible in their scope and application, and sufficiently well understood, to mark clearly the lawfulness or unlawfulness of the conduct or contentions giving rise to complaint.[3]

tration, *Bulletin No. 11*, American Society for Judicial Settlement of International Disputes, February, 1913.

[1] Art. XXXVII, Hague Convention of 1907, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2234. Also Mr. Gresham, Secy. of State, to Mr. Baker, Minister to Costa Rica, July 14, 1893, For. Rel. 1893, 202, Moore, Dig., VII, 28.

[2] William C. Dennis, in *Univ. Penn. L. Rev.*, LX, 1, 7.

[3] Declares Westlake: "The rules which must govern a difference between States, in order that it may properly be described as a legal difference, must be known and generally consented to as the ground of international action, whatever form that action may take." Int. Law, 2 ed., I, 358.

"Disputes of a justiciable character are defined as disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the nature and extent of the reparation to be made for any such breach." Elihu Root, in proposal for incorporation in the Covenant of the League of Nations, embraced in annex to communication to Mr. W. H. Hays, March 29, 1919, *Am. J.*, XIII, 580, 594–595.

See, also, Rhode Island *v.* Massachusetts, 12 Pet. 657, 737.

According to Art. I of the proposed arbitration treaty between the United States and Great Britain, and signed Aug. 3, 1911: "All differences hereafter arising between the High Contracting Parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at the Hague by the convention of October 18, 1907, or to some other arbitral tribunal as may be decided in each case by special agreement." Senate Doc. No. 91, 62 Cong., 1 Sess., 2–3.

When States are at variance with respect to the law applicable to their controversy, preliminary agreement as to the principles which should guide any tribunal to be called upon to adjust it may serve to produce mutual acquiescence in recourse to arbitration.[1] If, however, such agreement cannot be effected, and the issue concerns a question of law, the difference is not necessarily without a justiciable quality; for the divergence of opinion is not decisive of the existence of legal principles applicable to the controversy, or of the availability of a tribunal competent to enunciate and apply them.

Controversies arising from interference by one State with the political independence of another are sometimes declared to be beyond the scope of adjustment by judicial process. It is said in substance that the policy of the intervening State having been fixed according to considerations of first moment to it, is not a matter of which the propriety should be submitted to an adjudication before any foreign judges.[2] This does not necessarily signify that the State which refuses to arbitrate ignores the law of nations with respect to intervention. Such a State may firmly believe that its conduct in no wise violates the requirements of that law; its refusal may be due to the intricacy of the conditions which impelled it to intervene, and to the seriousness of its doubt as to the likelihood of obtaining judicial recognition of the justice of its cause. The added difficulty of securing an impartial umpire, as well as the possibility of an adverse decision, combine to inspire caution, and also to cause the incorporation in general treaties of broad and loose reservations.

§ 561. The Same.

Whether the disposition of States to refrain from agreeing to arbitrate certain classes of differences, which are none the less justiciable in character, is to undergo modification, must depend in large degree upon the growth of popular confidence in the competence of available tribunals to administer exact justice in such cases.[3] At the present time, however, it should be observed that there remains an important class of differences which, although

[1] See, for example, the so-called Neutrality Rules contained in Art. VI of the treaty with Great Britain of May 8, 1871, for the guidance of the tribunal in the Geneva Arbitration, Malloy's Treaties, I, 703.

[2] See, for example, Mr. Hay, Secy. of State, to General Reyes, Special Plenipotentiary from Colombia, Jan. 5, 1904, For. Rel. 1903, 306.

[3] Much is believed to depend upon the extent to which the principles derived from the practice of civilized States is made the object of general and careful study. By such process both the existence and applicability of the law of

strictly justiciable, and hence difficult to distinguish in kind from others recognized as arbitrable, do not as yet appear to be generally deemed susceptible of decision by an international court of justice. For the solution of such controversies there has been a tendency to make provision for adjustment through non-judicial agencies, such as the Council of the League of Nations.[1]

It may be doubted whether in any scheme of international organization it is desirable to clothe a non-judicial body not burdened with a duty to respect the law of nations and free to give heed to political or other considerations, with the authority of a court of justice, and with power to cut off the rights of a State which does not consent to the jurisdiction.

(3)

Recourse to Arbitration by the United States

(a)

§ 562. In General.

Ever since its birth as a nation the United States has been beset with international controversies found incapable of adjustment by diplomacy. Differences arising from pecuniary claims affecting primarily the private rights of nationals regarded as victims of a denial of justice have readily been referred to arbitral tribunals. Agreement has been made for the arbitration both of individual cases[2] and of groups of cases embracing, for example, all claims of certain kinds, against a particular State.[3]

For the adjustment of controversies of grave general importance, affecting its national rights, the United States has frequently also had recourse to arbitration. By such process it has secured the adjustment of differences relating, for example, to rights of property

nations will become apparent; and from the ranks of close observers there will become available an increasing number of persons competent judicially to apply it.

[1] Art. XV of the Covenant of the League of Nations.

[2] See, for example, protocol of agreement with Haiti, Oct. 18, 1899, for the arbitration of the question of the liability and amount of damages to be awarded John D. Metzger and Company, Malloy's Treaties, I, 936.

[3] See, for example, claims convention with Mexico of July 4, 1868, Malloy's Treaties, I, 1128. This agreement provided for a typical mixed commission, composed of an appointee of each contracting party, and also an umpire. The two commissioners were to proceed conjointly to the investigation and decision of claims. In case of their disagreement, they were to call to their assistance the umpire, who after examination of the evidence, the hearing of arguments and consultation with the Commissioners was to render a decision. Concerning the work of the Commission, see Moore, Arbitrations, 1287–1358. See also protocol with Venezuela, Feb. 17, 1903, for the arbitration of American claims against that State, Malloy's Treaties, II, 1870.

and control, such as those concerning boundary disputes, servitudes and fisheries, to rights of jurisdiction, to rights of political independence, to the duties of both neutrals and belligerents, and to the interpretation of treaties.

(b)

§ 563. Territorial Differences.

The controversy respecting the boundary between the northeastern portion of the territory of the United States and the adjacent possessions of Great Britain was a legacy from the treaty of peace of 1782–1783.[1] As early as April 21, 1785, John Jay, as Secretary for Foreign Affairs, submitted to the Congress a report embracing an elaborate plan for the adjustment of the dispute by a joint commission composed of an equal number of commissioners to be appointed by the United States and by the King. A majority of the commissioners were to be empowered to render an "absolute, final and conclusive" judgment.[2] In 1790, this report was submitted by President Washington to the Senate.[3] No agreement was, however, made in pursuance of its suggestions. By Article V of the Jay Treaty of November 19, 1794, the question as to "what river was truly intended under the name of the river St. Croix", mentioned in the treaty of peace, and forming part of the boundary therein described, was referred to the final decision of three commissioners.[4] The arbitration was successful, the commission duly making its declaration October 25, 1798.[5] According to Article V of the Treaty of Ghent of December 24, 1814, the boundary extending from the source of the St. Croix River to the river Iroquois or Cataraquy, which remained in dispute, was to be referred to a joint commission of two.[6] The commission having disagreed, the controversy was referred to the decision of the King of the Netherlands, pursuant to a convention concluded September 29, 1827.[7] His award, rendered January 10, 1831, was not accepted

[1] Malloy's Treaties, I, 581 and 587.
[2] Am. State Pap., For. Rel., I, 94.
[3] *Id.*
[4] Malloy's Treaties, I, 593. It was therein provided that: "One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third; or if they cannot so agree, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners."
[5] For the text of the declaration, see Moore, Arbitrations, I, 29.
[6] Malloy's Treaties, I, 615.
[7] *Id.*, I, 646. Art. V of the Treaty of Ghent had provided for arbitration before a "friendly sovereign or State", in case the commissioners should be unable to agree.

by either Government, inasmuch as the royal arbitrator had given up the attempt to fix the boundary as described in the treaty of 1782–1783, substituting therefor his own recommendation as to the line of demarcation.[1] The controversy was finally adjusted by diplomacy, and the boundary established by virtue of Article I of the Webster-Ashburton Treaty of August 9, 1842.[2]

A dispute as to the ownership of certain islands in Passamaquoddy Bay, and of the Island of Grand Manan in the Bay of Fundy, was settled by means of a joint commission of two, pursuant to Article IV of the Treaty of Ghent.[3] A similar commission, by virtue of Article VI of the same treaty, was able to adjust the dispute respecting the water boundary extending from the intersection of the 45th degree of north latitude with the river Iroquois or Cataraquy, to Lake Superior, as well as the ownership of certain islands within the water communications between the points named.[4]

By Article VII of the Treaty of Ghent, it was agreed that the same commission should fix and determine the boundary extending from the water communication between Lake Huron and Lake Superior, to the most northwestern point of the Lake of the Woods, and should decide upon the ownership of islands lying in the lakes, water communications and rivers forming the boundary.[5] The commission failed to agree as to a portion of the line, and the boundary was ultimately fixed by Article II of the Webster-Ashburton Treaty of August 9, 1842.[6]

The difference respecting the boundary west of the Rocky Mountains and extending to the Pacific Coast was settled by direct negotiation, and the boundary fixed by the Buchanan-Pakenham Treaty of June 15, 1846.[7]

[1] Moore, Dig., VII, 59–60, and documents there cited.

[2] Malloy's Treaties, I, 650. Concerning the Northeastern Boundary dispute generally, see Moore, Arbitrations, 65–161, and documents there cited.

[3] Malloy's Treaties, I, 614. For the decision of the Commission, *id.*, I, 619. See, also, Moore, Arbitrations, 45–64, and documents there cited.

[4] Malloy's Treaties, I, 616. For the decision of the Commission, *id.*, I, 620. Also Moore, Arbitrations, 162–170, and documents there cited.

[5] Malloy's Treaties, I, 617. The commissioners were also to designate the most northwestern point of the Lake of the Woods.

[6] Malloy's Treaties, I, 652. That Article "adopts the line of the commissioners under Article VII of the treaty of Ghent, so far as they agreed upon it." Moore, Arbitrations, 193. See, generally, Moore, Arbitrations, 171–195, and documents there cited. The boundary from the Lake of the Woods to the Rocky Mountains (described as the "Stony Mountains") was fixed by Art. II of the convention of Oct. 20, 1818, Malloy's Treaties, I, 632.

[7] Malloy's Treaties, I, 656. "In January, 1845, no agreement seeming to be possible, Mr. Pakenham proposed to submit the dispute to arbitration. This proposition Mr. Calhoun declined, saying that it was the opinion of the President that it would be inadvisable to consider any other mode than

By Articles XXXIV to XLII of the Treaty of Washington of May 8, 1871, the contracting parties agreed to refer their dispute as to the San Juan water boundary to the German Emperor.[1] His award, October 21, 1872, served to give the island of San Juan to the United States.[2]

By a convention concluded January 24, 1903, the United States and Great Britain agreed to an adjudication before a joint tribunal comprising "six impartial jurists of repute" (three to be appointed by the President and three by the King), respecting the Alaskan boundary dispute, arising from divergent interpretations of the convention between Great Britain and Russia of February 28/16, 1825.[3] A decision was duly rendered by a majority of the tribunal.[4]

On April 11, 1908, the United States concluded with Great Britain an elaborate convention providing for the more complete definition and demarcation of the Canadian international boundary by a joint commission of two expert geographers or surveyors.[5] In view, however, of certain known differences respecting a portion of the boundary through Passamaquoddy Bay, agreement was made in Article I for the submission by each contracting party to the other, of a full printed statement of the evidence, with certified copies of original documents referred to therein, which were in its possession, and the arguments upon which it based its contentions, with a view to arriving at an adjustment in accordance with the true intent and meaning of the treaties of 1783 and 1814. Recourse to arbitration was to follow only in case direct negotiations should fail to accomplish their end. Such recourse was avoided by means of a treaty concluded May 21, 1910, whereby the contracting parties agreed to the definition of the line.[6]

According to Article II of the treaty of April 11, 1908, it was agreed that where the national character of any island in the St. Croix River was in dispute, the question of its nationality should be referred by the commissioners to their respective Governments, and that in all such cases the location of the boundary with respect to each island in dispute should be determined in ac-

negotiation, so long as there was a hope of arriving at a satisfactory settlement in that way." Moore, Arbitrations, 209–210.

[1] Malloy's Treaties, I, 714–716.

[2] *Id.*, 716. Also Moore, Arbitrations, 196–236, and documents there cited.

[3] Malloy's Treaties, I, 787.

[4] *Id.*, I, 792. The majority who rendered the decision were Baron Alverstone, the President, and Messrs. Root, Lodge and Turner. See, also, generally, *Proceedings of the Alaskan Boundary Tribunal*, 58 Cong., 2 Sess. Senate Doc. No. 162.

[5] Malloy's Treaties, I, 815.

[6] Charles' Treaties, 47.

cordance with certain specified rules and pursuant to a general plan. Recourse to arbitration was to follow if direct negotiations should fail to effect adjustment. Articles I and II indicated an earnest desire on the part of both Governments (emphasized also by the language of Article I of the treaty of May 21, 1910) to adjust the differences contemplated by direct negotiation rather than by arbitration, and that by means of the fullest reciprocal presentation of documentary and other evidence and arguments in support of opposing claims. The two Governments agreed, in brief, to place themselves in the position of a joint commission and to exercise the functions of one.[1]

Territorial differences with Mexico have arisen chiefly from changes in the bed and channel of the Rio Grande and of the Rio Colorado where they form the international boundary.[2] Adjustment has been effected mainly by direct negotiation,[3] and through the medium of a Joint International Boundary Commission.[4] Pursuant to a convention of June 24, 1910, a controversy respecting "the international title" to the so-called "Chamizal tract" within the Rio Grande, and concerning which the International Boundary

[1] Declared Lord Salisbury, May 18, 1896, with respect to provisions of a proposed general arbitration treaty between the United States and Great Britain: "The enforcement of arbitration in respect to territorial rights is also an untried project in regard to the provisions of the international law by which they are to be ascertained. This is in a most rudimentary condition, and its unformed and uncertain character will aggravate the other dangers on which I have dwelt in a previous despatch — the danger arising from the doubts which may attach to the impartiality and the competence of the arbitrators. . . . It appears to me that under these circumstances it will be wiser, until our experience of international arbitration is greater, for nations to retain in their own hands some control over the ultimate result of any claim that may be advanced against their territorial rights." Communication to Sir Julian Pauncefote, British Ambassador at Washington, For. Rel. 1896, 230, 231. In response, Mr. Olney, Secy. of State, said in part, June 22, 1896, that "the condition of international law fails to show any imperative reasons for excluding boundary controversies from the scope of general treaties of arbitration. If that be true of civilized States generally, a fortiori must it be true of the two great English-speaking nations." Communication to Sir Julian Pauncefote, British Ambassador, *id.*, 236.

[2] Difficulties arising from the destruction or displacement of monuments marking the boundary from the Pacific Ocean to the Rio Grande have been settled by agreement providing for the restoration to their proper places of existing monuments, and the erection of new ones, through the instrumentality of a joint international boundary commission composed of engineers and astronomers. See Boundary Convention of July 29, 1882, Malloy's Treaties, I, 1141, and agreements for the extension of the time for the completion of the work of the Commission, contained in the same volume.

[3] Boundary Convention of Nov. 12, 1884, Malloy's Treaties, I, 1159. See, also, Convention of Mar. 20, 1905, for the elimination of the Bancos in the Rio Grande from the effects of Art. II of the Convention of Nov. 12, 1884, *id.*, I, 1199.

[4] Boundary Convention of March 1, 1889, *id.*, I, 1167, and extensions thereof contained in the same volume. See, also, Boundary Convention with the Republic of Texas, April 25, 1838, *id.*, II, 1779.

Commission had failed to agree, was submitted to arbitration before the Commission, specially enlarged by the addition of a Canadian jurist.[1] The award, from which the American Commissioner dissented, was made June 15, 1911.[2] For the reasons set forth by the American commissioner, and by the American agent in his suggestion of protest, the United States announced that it did not accept the award "as valid or binding." The Government accordingly suggested the negotiation of a new boundary convention upon a specified basis. Owing to disturbed conditions existing in Mexico definite action for the settlement of the Chamizal dispute was necessarily suspended, the case remaining in *statu quo*.[3]

(c)

§ 564. Certain Differences, Other than Territorial, of Great International Significance.

The controversy growing out of the acts of the *Alabama* and certain other Confederate vessels, during the Civil War, and giving rise to the so-called "Alabama Claims", raised the issue whether the failure of Great Britain to prevent the fitting out in, and the departure from British ports of those vessels, and their use of such ports as bases of operations, rendered that State responsible to the United States for depredations committed on American commerce. The question was, briefly and generally, whether Great Britain had failed to perform its duties as a neutral.[4] Earl Russell, British Foreign Secretary, declined, in 1865, to accede to the proposal of the United States for the adjustment of the controversy by recourse to arbitration, on the ground that the questions involved could not "be put to a foreign government with any regard to the dignity and character of the British Crown and the British nation." "Her Majesty's Government are," he declared, "the sole guardians of their own honor."[5] In 1871, when a joint

[1] Charles' Treaties, 91. See, also, supplemental protocol for the arbitration of the case, Dec. 5, 1910, *id.*, 94.

[2] For the text of the award, see For. Rel. 1911, 573; also *Am. J.*, V, 585; editorial comment, *id.*, 709.

[3] Memorandum of Dept. of State, to the Mexican Embassy, Aug. 24, 1911, For. Rel. 1911, 598; also Same to Same, Oct. 6, 1911, *id.*, 604.

Concerning subsequent negotiations see Mr. Knox, Secy. of State, to the American Ambassador to Mexico, Jan. 14, 1913, For. Rel. 1913, 969; also *id.*, 957–977.

[4] Moore, Arbitrations, 495–682; also Papers Relating to the Treaty of Washington, Vols. I–IV, Washington, Government Printing Office, 1872.

[5] Dip. Cor. 1865, I, 545, Moore, Arbitrations, 496. According to Earl Russell, the two questions by which the claim of the United States to com-

high commission assembled at Washington, to negotiate a treaty providing for the adjustment of the Alabama claims and other pending differences, Great Britain was unwilling to admit that its conduct had disregarded international law, and dissented from what the United States asserted the existing law to be.[1] Nevertheless, Her Majesty's Government were willing to agree, by the Treaty of Washington of May 8, 1871,[2] first, to an expression of regret for the escape of the *Alabama* and other vessels from British ports, and for the depredations committed by them; secondly, to the reference of the controversy to a tribunal composed of five arbitrators; and thirdly, that the arbitrators should be governed by three definite rules respecting the duties of neutral States, and by principles of international law not inconsistent therewith. It was expressly declared that while Her Majesty's Government could not agree that the rules were declaratory of international law, the arbitrators might assume that that Government had undertaken to act upon the principles therein set forth.[3] The tribunal on September 14, 1872, awarded to the United States the sum of $15,500,000, which was duly paid.[4] In view of the nature of the question involved, the sensitiveness of the British Government to foreign criticism of its conduct, and the conflict of opinion as to the exact requirements of international law, the case still serves to illustrate the efficacy of arbitration as a means of adjusting international differences of first moment.[5]

The controversy with Great Britain respecting the right asserted by the United States to exercise jurisdiction in Bering Sea, and also to protect and claim property in fur-seals frequenting the islands of the United States in that sea, when such seals were found outside of the ordinary three-mile limit, was submitted to arbitration by the convention of Feb. 29, 1892.[6] The tribunal

pensation could be tested were these: "Have the British Government acted with due diligence, or, in other words, in good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is: Have the law officers of the Crown properly understood the foreign enlistment act, when they declined, in June, 1862, to advise the detention and seizure of the *Alabama*, and on other occasions when they were asked to detain other ships, building or fitting in British ports?"

[1] Moore, Arbitrations, I, 543.

[2] Arts. I–XI, Malloy's Treaties, I, 701–705. [3] Art. VI.

[4] For the text of the award, see Moore, Arbitrations, I, 653.

[5] The employment of a joint high commission of eight members under the leadership, on the American side, of Mr. Fish, Secretary of State, and on the British, of Earl de Grey and Ripon, greatly facilitated the task of concluding the treaty of Washington, and may have been indispensable to bring about the arbitration of the Alabama Claims.

[6] Malloy's Treaties, I, 746.

comprising five members, three of which were neutral, duly made an award, August 15, 1893, unfavorable to the claims of the United States.[1] The arbitrators, in accordance with the treaty, determined also what regulations were deemed necessary for the proper protection and preservation of seal life in waters "outside the jurisdictional limits of the respective Governments", and over what waters they should extend.[2]

§ 565. The Same.

In certain instances, for the solution of questions of great international concern, the United States has, by virtue of special agreements, been able to invoke the aid of tribunals organized pursuant to the Hague Conventions of 1899 or of 1907, for the Pacific Settlement of International Disputes. In the first of these, known as the Pious Fund Case, against Mexico, and decided in 1902, the chief and preliminary issue was whether the claim of the United States for indemnity in behalf of the Roman Catholic Archbishop of San Francisco, and the Bishop of Monterey, was governed by the principle of *res judicata*, by virtue of the arbitral sentence of Sir Edward Thornton of November 11, 1875, and amended by him October 24, 1876, in a case between the same parties, and respecting the same subject matter. The contention of the United States that the claim should be so governed was sustained by a unanimous court.[3]

By virtue of a series of protocols of May 7, 1903, there was submitted to the tribunal at the Hague the question whether or not Germany, Great Britain and Italy were entitled to payment of their respective claims against Venezuela out of thirty per cent. of the customs revenues of that State agreed to be set aside for that purpose, in preference to the United States, France, Spain, Belgium, the Netherlands, Sweden and Norway, and Mexico.[4] The claim of preference was based upon the action of Germany, Great Britain and Italy in blockading certain Venezuelan ports.

[1] Malloy's Treaties, I, 751.

[2] See, generally, The Fur Seal Arbitration, *Proceedings of the Tribunal of Arbitration*, Washington: Government Printing Office, 1895. Also convention for the settlement of claims presented by Great Britain against the United States in virtue of the convention of Feb. 29, 1892, Malloy's Treaties, I, 766; Convention concluded by the United States, Great Britain, Russia and Japan, for the preservation and protection of fur seals (superseding the treaty of Feb. 7, 1911), July 7, 1911, Charles' Treaties, 84.

[3] Protocol of agreement, May 22, 1902, Malloy's Treaties, I, 1194; award of the Court, Oct. 14, 1902, *Am. J.*, II, 898. See, also, concerning the case, Rule of *Res judicata, infra*, § 581; For. Rel. 1902, Appendix II.

[4] Malloy's Treaties, II, 1872–1878; *Am. J.*, II, 905.

The court decided that by such conduct those powers acquired the right to preferential treatment.[1]

In the Orinoco Steamship Company Case there was referred to the tribunal at the Hague, by virtue of an agreement with Venezuela, of February 13, 1909,[2] a preliminary question of great significance "as to whether the former decision of Dr. Barge, umpire of the United States and Venezuelan Commission of 1903, was invalid as claimed by the United States, and liable to be set aside on the grounds that the umpire had disregarded the terms of the submission, and committed essential error. The tribunal declared the Barge award void on a number of points, but held the award severable, and on some points not open to the objections advanced by the United States." [3]

The North Atlantic Coast Fisheries Arbitration submitted to the tribunal at the Hague, pursuant to a special agreement with Great Britain of January 27, 1909, was the means of adjusting a controversy of grave magnitude and long duration.[4] The several questions involved arose from divergent interpretations of the provisions of Article I of the treaty of October 20, 1818. These concerned first the issue "to what extent, if at all, the British or Colonial Governments were entitled, without the consent of the United States, to limit or restrain the time, methods, or implements of fishing by American fishermen exercising their treaty liberties in British territorial waters." [5] They called for a decision also respecting the right of the latter to employ as members of fishing crews persons not inhabitants of the United States; concerning

[1] For the text of the award, of Feb. 22, 1904, see Malloy's Treaties, II, 1878, *Am. J.*, II, 907. See, also, Report of William L. Penfield, Agent of the United States, For. Rel. 1904, 509.

[2] Malloy's Treaties, II, 1881.

[3] W. C. Dennis, Agent for the United States, in *Am. J.*, V, 36. For the text of the award of Oct. 25, 1910, see For. Rel. 1911, 749; also *Am. J.*, V, 230. See Award Outside of Limits of Submission, *infra*, § 582.

[4] Malloy's Treaties, I, 835. According to Mr. Chandler P. Anderson, Agent of the United States, "This arbitration was in some respects the most notable of the many international arbitrations in which the United States has participated. The fisheries dispute, the settlement of which was its purpose, had been a constant source of irritation and friction between the United States and Great Britain for nearly a century, and on several occasions had seriously strained the friendly relations between the two countries. Throughout the course of this dispute both countries exhausted every resource of diplomacy, short of arbitration, in attempting to bring about a satisfactory adjustment of the questions at issue, but without success. It was, therefore, a surprising and encouraging triumph for the cause of arbitration in the settlement of international disputes, that, when at last arbitration was resorted to in this case, a result was secured which has been accepted on both sides as an eminently fair and satisfactory settlement of the controversy." *Am. J.*, VII, 1–2.

[5] Statement of Mr. Anderson, *id.*, 8.

also the freedom of American fishermen from the obligation to pay light, harbor and other dues not imposed upon British fishermen, or from the duty to enter and report at customhouses; the territorial extent of the area wherein the fishery privileges had been yielded; the meaning of the term "bays" as employed in the treaty, and finally the right of American fishermen to enjoy commercial privileges on the treaty coasts.[1] From the fact that such questions were not only deemed capable of solution by arbitration, but were also terminated by recourse to that agency, there is derived renewed confidence in the value of adjudications before international courts of law, such as have assembled at the Hague.[2]

(d)

§ 566. The United States as a Party to Treaties of General Arbitration.

The United States has thus far been reluctant to enter into general treaties providing for the compulsory arbitration of future differences, save under conditions restricting the contractual obligation to one of narrow scope.[3] The United States did, how-

[1] Concerning the case generally, see *Proceedings*, North Atlantic Coast Fisheries Arbitration, 12 vols., 61 Cong., 3 Sess., Senate Doc. No. 870; Argument of Hon. Elihu Root, on behalf of the United States, edited with introduction and appendix by James Brown Scott, of counsel for the United States, 1912; also "The North Atlantic Coast Fisheries Arbitration", by Robert Lansing, of counsel for the United States, *Am. J.*, V, 1; "*La question des pêcheries de l'Atlantique*", by Thomas Willing Balch, *Rev. Droit Int.*, 2 ser., XI, 415.

See, also, Bays, The North Atlantic Coast Fisheries Arbitration, *supra*, § 147; The Interpretation of Treaties, The North Atlantic Coast Fisheries Arbitration, *supra*, § 533.

[2] In commenting upon the case, the Agent of the United States has said: "It is quite probable that if before this arbitration both parties had been in full possession of all the facts as they have been developed and presented upon this arbitration, an agreement could have been reached without recourse to arbitration. The importance of reaching a common basis of fact in the discussion of international disputes, before submitting such disputes to arbitration, is not always appreciated, and resort might be had more frequently with advantage to the hitherto somewhat neglected expedient of employing an impartial commission of inquiry for the purpose of securing an agreed statement of facts as a basis for reaching, if possible, an adjustment by direct negotiation between the parties, rather than by arbitration." Chandler P. Anderson, in *Am. J.*, VII, 16.

[3] On Jan. 11, 1897, Mr. Olney, Secretary of State, and Sir Julian Pauncefote, British Ambassador at Washington, signed a remarkable treaty which failed, however, to receive the requisite approval of the Senate. For the adjustment of territorial claims, or questions of grave general importance affecting the national rights of either party, as distinquished from the private rights of which it was merely the international representative, provision was made for submission to a joint tribunal of six members, composed of an equal number of judges from specified tribunals of each country, whose award if concurred in by five members was to be final; or if rendered by a smaller majority was

ever, in 1905, ratify the convention concluded by the Second International American Conference, January 30, 1902,[1] and again, in 1911, that concluded by the Fourth International American Conference, August 11, 1910, providing for the arbitration of all private claims for pecuniary loss or damage, if found incapable of adjustment by diplomacy, and when of sufficient importance to warrant the expense of arbitration.[2] In 1909 the United States ratified the Hague Convention of 1907, respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, an agreement which made the tender of arbitration by a State seeking payment in behalf of its nationals, and the refusal thereof by a debtor State, a condition precedent to the use of armed force by the former.[3]

§ 567. The Same.

In 1908, the United States became a party to the first of a series of conventions concluded with numerous important countries, and contemplating the reference of differences of a "legal nature", or relating to the interpretation of treaties, and which it should

also to be final, unless protested against within three months. In case of protest no hostile measures were to be undertaken until the mediation of one or more friendly powers was sought. For pecuniary claims or groups thereof not exceeding altogether £100,000, and not involving the determination of territorial claims, arbitration was contemplated before a tribunal to consist of three members, the mode of whose choice was specified. All pecuniary claims or groups thereof exceeding £100,000 in amount, and all other differences other than territorial claims, were to be similarly arbitrated. If the award was not unanimous, however, either party was to have the right within six months from the date of the award, to demand a review. In such case the matter in controversy was to be submitted to a new arbitral tribunal consisting of "five jurists of repute" to be chosen according to a designated plan. For the text of the treaty see For. Rel. 1896, 238; also correspondence prior to its signature, *id.*, 222–237.

[1] Malloy's Treaties, II, 2062. With respect to the Second International American Conference, see Senate Doc. No. 330, 57 Cong., 1 Sess.

See, also, Moore, Dig., VII, 70–74, and documents there cited, with reference to the failure of the broad and important arbitration treaty proposed by the First International American Conference of 1889–1890, and with respect also to previous efforts to promote international arbitration on the American continents. Also International American Conference. Reports of Committees and Discussions thereon, 4 vols., Washington, Government Printing Office: 1890; Resolution on Arbitration of the Third International American Conference, Aug. 7, 1906, Report of Delegates of the United States, 97 (59 Cong., 2 Sess., Senate Doc. No. 365), *Am. J.*, I, Supp., 307.

[2] U. S. Treaty series, No. 594. See, generally, Fourth International Conference of American States, Senate Doc. No. 744, 61 Cong., 3 Sess., especially Report of the Delegates of the United States, pp. 21–25.

[3] Malloy's Treaties, II, 2248; also *supra*, § 309.

The United States has rarely inserted the arbitral clause in treaties of amity and commerce. It is seen, however, in Art. XII of the treaty with Tripoli of Nov. 4, 1796, Malloy's Treaties, II, 1787, and in loose form in Art. XXI of the Treaty of Guadalupe Hidalgo, of Feb. 2, 1848, *id.*, II, 1117, and renewed in Art. VII of the Gadsden Treaty of Dec. 30, 1853, *id.*, II, 1124.

not be possible to settle by diplomacy, to the Permanent Court of Arbitration established by the Hague Convention of 1899, provided, nevertheless, that they did "not affect the vital interests, the independence, or the honor of the two Contracting States", and did "not concern the interests of third Parties." [1] It was also declared that in each case, before appealing to the Court, "a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure", should be concluded and submitted, in behalf of the United States, to the approval of the Senate.

The limitations of these treaties deserve attention. The term "vital interests", however current in diplomacy, has no special signification in law. Doubtless its use in arbitration conventions is for the purpose of excluding generally from their operation controversies involving matters of grave national concern.[2] Those of an essentially political nature, regardless of whether they may also possess a justiciable character, are likely to be regarded as of such a kind.[3] In the absence of evidence of a design to attach to the

[1] See, for example, convention with France of Feb. 10, 1908, Malloy's Treaties, I, 549.

By the convention concluded at the Central American Peace Conference at Washington, Dec. 20, 1907, by representatives of Costa Rica, Guatemala, Honduras, Nicaragua and Salvador, and in the presence of representatives of the United States and Mexico, for the establishment of a Central American Court of Justice (Malloy's Treaties, II, 2399), the contracting parties bound themselves to submit to the tribunal of their own creation "all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be", if found incapable of adjustment by diplomacy. The Court was also given cognizance of claims of an international character of the nationals of one Central American State against any of the other contracting governments and that without the interposition of the claimant's government. The treaty thus contemplated in international cases the invocation of the aid of the Court by an aggrieved Central American State or individual by filing a complaint therein, without any preliminary agreement such as a *compromis*. It was agreed also that the Court should have jurisdiction over cases arising between any of the contracting governments and individuals, if by common consent they were submitted to it, and likewise, in case of special agreement, over international questions between Central American and foreign governments. See J. B. Scott, "The Central American Peace Conference of 1907", *Am. J.*, I, 121, 140–143.

[2] J. B. Moore, American Diplomacy, 221–222, quoted in J. B. Scott, The Hague Peace Conferences, I, 248; also Oppenheim, 2 ed., § 17, pp. 19–22; Westlake, 2 ed., I, 356–361; Dr. Hans Wehberg, "Restrictive Clauses in International Arbitration Treaties", *Am. J.*, VII, 301; Amaro Cavalcanti, "Restrictive Clauses in International Arbitration Treaties", *id.*, VIII, 723.

[3] At the close of 1903, the Colombian Government presented to the Department of State a statement of grievances based upon the conduct of the United States in relation to Panama, contending that they constituted a violation of the treaty with New Granada of 1846, and requesting that the questions at issue be submitted to arbitration before the Permanent Court at the Hague. The differences related to the propriety of the intervention of the United States.

term a special or narrow signification, its presence in a convention affords a contracting party convenient opportunity to refuse to arbitrate whatever important differences it is indisposed to adjust by such process. The terms "independence" and "honor" are employed for the same purpose and fulfill a like function. In view of their position and association in the texts of the conventions of the United States, they appear to bear a tautological rather than a supplementary relation to "vital interests."

It may be neither unreasonable nor inexplicable for enlightened States familiar with the use of arbitration, to be reluctant to agree to adjust by that process future and unknown differences of gravest aspect, even if they be acknowledged to possess a justiciable character. It is to be doubted, however, whether the formal acceptance of conventions such as those to which the United States became a party in 1908 and 1909, serves a highly useful purpose. As a deterrent of war they are valueless. For the arbitration of differences of great magnitude or national concern, they impose no obligation.[1] The declaration of reservations of almost limitless scope does not encourage recourse to arbitration at times when such procedure offers a reasonable means of amicable adjustment.[2]

The acts of intervention forming the basis of complaint consisted of the prevention by the United States of the landing of Colombian armed forces on the Isthmus, the prevention of the bombardment of the town of Panama and the recognition of the State of Panama as a new nation. In response, Mr. Hay, Secy. of State, declared on Jan. 5, 1904, that the grievances of Colombia were of a "political nature, such as nations of even the most advanced ideas as to international arbitration have not proposed to deal with by that process. Questions of foreign policy and of the recognition or non-recognition of foreign States are of a purely political nature, and do not fall within the domain of judicial decision; and upon these questions this Government has in the present paper defined its position." For. Rel. 1903, 294, 306.

[1] J. B. Moore, "International Arbitration — A Survey of the Present Situation", *Proceedings*, Twentieth Lake Mohonk Arbitration Conference (1914), 12, 17.

[2] It must be acknowledged, however, that the special agreement of Jan. 27, 1909, submitting to arbitration the controversy with Great Britain concerning the North Atlantic Coast Fisheries, is described (in the caption) as being "under the general treaty of arbitration concluded between the United States and Great Britain on the 4th day of April, 1908." It is understood that the existence of that treaty facilitated the conclusion of the later agreement. Doubtless the reference in the special agreement of 1909 to the general treaty was highly useful to the cause of arbitration as an indication of the readiness of two enlightened States to refer to an arbitral tribunal a grave controversy of long standing. It is believed, however, that the nature of the issue was such as to have justified either party in refusing to agree to arbitrate, on the ground that the questions involved concerned directly its vital interests. It was the common disposition of the United States and Great Britain to seek an arbitral adjustment of an essentially justiciable controversy, regardless of its magnitude or gravity, rather than their treaty of 1908, with its narrow legal obligations and broad reservations, which is believed to have led to the adjudication at the Hague.

The desire of States to make provisions for the compulsory arbitration of certain classes of differences of grave aspect, is not incompatible with the determination to retain freedom of action with respect to others. By the careful drafting of treaties in which the use of loose and equivocal terms is avoided, and the precise significance of those employed is well understood, it is believed to be possible to construct agreements exactly responsive to such political requirements. By this process the danger of divergent interpretations may be minimized, and demands for adjudication avoided which either party might deem unreasonable, without, however, limiting the applicability of conventions to disputes of essentially minor importance. To assure the solution of any preliminary issue concerning the justiciable character of a particular controversy within the meaning of a treaty, arrangement for a decision by the arbitral tribunal itself might prove effective.[1]

[1] By the proposed arbitration conventions with France and with Great Britain, of Aug. 3, 1911 (Charles' Treaties, 380 and 385), provision was made for the arbitration before the Permanent Court at the Hague, of all differences "relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." The special agreement providing for the terms of each case was to be submitted (in behalf of the United States) to the approval of the Senate.

Elaborate arrangement was made for the employment also of a joint high commission of inquiry of six persons. To the commission was to be referred for investigation any controversy made arbitrable by the terms of the treaty, prior to its submission to arbitration, as well as any other controversy, even if there were disagreement as to its arbitrable character. It was provided that such a reference might be postponed until the expiration of one year after the date of a formal request therefor, in order to give an opportunity for adjustment by direct negotiation. The Commission was to be authorized "to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate." Such reports, either on the facts or law, were not to be regarded as decisions, or to have the character of an arbitral award.

The Commission was to exercise another function of great significance. In case of disagreement as to whether a difference was subject to arbitration within the meaning of the treaty, the question was to be referred to that body, whose affirmative decision by a vote of at least five to one would render compulsory the arbitration of the controversy. By way of amendment the Senate struck out this provision, and also declared that it advised and consented to ratification with the understanding that "the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe doctrine, or other purely governmental policy." *Id.*, 384. The conventions as amended were not ratified by the President.

See Report of Senate Committee on Foreign Relations, respecting the

(4)

The Hague Conventions of 1899 and 1907, for the Pacific Settlement of International Disputes

(a)

§ 568. Declarations Respecting the System of Arbitral Justice.

The Hague Conventions of 1899 and 1907, for the Pacific Settlement of International Disputes,[1] dealt with four distinct phases of arbitration[2]: first, the general system of arbitral justice; secondly, the establishment of a permanent court; thirdly, arbitral procedure; and fourthly, arbitration by summary procedure.

With respect to the first of these, brief but significant declarations were made. The object and basis of international arbitration were clearly set forth. The obligation implied from recourse thereto, to submit loyally to the arbitral award, was emphasized.[3]

In the convention of 1899, the efficacy of arbitration as a mode of adjusting questions of a legal nature and arising especially from the interpretation or application of international conventions was acknowledged, and that without the addition of any restriction.[4]

treaties, together with the views of the minority, and the proposed committee amendments, Senate Doc. No. 98, 62 Cong., 1 Sess. See, also, William C. Dennis, "The Pending Arbitration Treaty with Great Britain", *Univ. Penn. L. Rev.*, LX, 1; C. C. Hyde, "The General Arbitration Treaties", *North Am. Rev.*, XCVII, 1 (Jan. 1912).

[1] For the texts of these conventions, in so far as they concern arbitration, see Malloy's Treaties, II, 2023–2029, and 2234–2243. Respecting the proceedings at the First Hague Conference, see *La Conférence Internationale de la Paix*, The Hague, 1899; A. H. Fried, *Die Haager Konferenz*, Berlin, 1900; also F. W. Holls, The Peace Conference at the Hague, New York, 1900. Respecting the Proceedings at the Second Hague Conference, see *La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents*, 3 vols., The Hague, 1909; The First and Second International Peace Conferences held at the Hague, Washington, 1914, 63 Cong., 2 Sess., House Doc., 1151.

See, also, A. H. Fried, *Die Zweite Haager Konferenz*, Leipzig, 1908; bibliography in Hershey, 340–342; A. P. Higgins, The Hague Peace Conferences, 164, with bibliography, 179; W. I. Hull, The Two Hague Peace Conferences, Boston, 1908; A. de Lapradelle and N. Politis, "*La Deuxième Conférence de la Paix*", *Rev. Gén.*, XVI, 385; T. J. Lawrence, International Problems and Hague Conferences, London, 1908; E. Lémonon, *La Seconde Conférence de la Paix*, Paris, 1908; O. Nippold, *Die Zweite Haager Friedenskonferenz*, Leipzig, 1908; Oppenheim, 2 ed., II, §§ 19–25a; Antoine Pillet, *La cause de la paix et les deux conférences de La Haye*, Paris, 1908; L. Renault, *Les deux conférences de la paix*, Paris, 1908; J. B. Scott, The Hague Peace Conferences, I, 274–312; Reports to Hague Conferences, 1917; P. Zorn, *Die Fortschritte des Seekriegsrechtes durch die zweite Haager Friedenskonferenz*, Tübingen, 1908.

[2] As has been observed, both conventions made provisions also concerning Good Offices and Mediation, *supra*, § 555, and with respect also to International Commissions of Inquiry, *supra*, § 557.

[3] Art. XXXVII.

[4] Art. XVI (1899). "The Hague Convention, although it does not in

In 1907, this acknowledgment was supplemented by the statement that "it would be desirable" for the contracting parties to have recourse to arbitration for the adjustment of such questions "in so far as circumstances permit." [1]

(b)

§ 569. The Permanent Court of Arbitration.

For the purpose of facilitating recourse to arbitration, the signatory powers undertook, in 1899,[2] to organize a Permanent Court of Arbitration, and in 1907 it was agreed to maintain the Court which the earlier Conference had established.[3]

The seat of the Court is at the Hague.[4] It is declared to be "competent for all arbitration cases", unless the parties agree to institute a special tribunal.[5] For service as a registry for the Court, and for the channel of communications relative to its meetings, as well as for the custody of its archives and the conduct of its administrative business, there is established a so-called International Bureau.[6] To the Bureau the contracting powers undertake to communicate, "as soon as possible," certified copies of the texts of special arbitration agreements, arbitral awards of special tribunals, and also local laws, regulations and documents showing execution of the awards given by the Court.[7]

The Court consists merely of a panel of judges, four of whom, at the most, are selected by each contracting power,[8] a list of those chosen being notified to each by the Bureau.[9] The arbitrators in a particular case must be chosen from the general list. In case of failure to agree as to the composition of the Court, each party appoints two arbitrators, "of whom one only can be its national

terms make arbitration obligatory in any case, excepts nothing from the scope of arbitration, thus leaving the parties free to apply the process to any and every question for the solution of which they may see fit to employ it, without discouraging in advance its application to any class of questions or furnishing a ready means of avoiding the resort to it." J. B. Moore, *Proceedings*, Twentieth Lake Mohonk Conference, 1914, p. 14.

[1] Art. XXXVIII. In Art. XL the contracting powers reserved to themselves "the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it."

[2] Art. XX (1899). [3] Art. XLI. [4] Art. XLIII.

[5] Art. XLII. [6] Art. XLIII. [7] *Id.*

[8] Art. XLIV. The persons so selected are to be "of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator."

[9] According to Art. XLIV the selection by two or more powers of the same person, whether by agreement or otherwise, is permitted. The term of appointment, capable of renewal, is six years.

or chosen from among the persons selected by it as members of the Permanent Court."[1] These arbitrators together choose an umpire. In case of their disagreement, his choice is entrusted to a third Power selected by agreement between the parties. If the parties cannot agree on this subject, each selects a different Power and the choice of an umpire is made by them in concert. If these two Powers within two months' time fail to agree, each of them presents two candidates from the list of members of the Permanent Court, exclusive of the members selected by the parties, and who are not nationals of either of them. From these candidates the umpire is determined by lot.[2]

As soon as the Tribunal has been constituted, the parties inform the Bureau of their determination to have recourse to the Court, the text of their *compromis* (or special agreement to arbitrate), and the names of the arbitrators. The Bureau communicates without delay to each arbitrator the *compromis*, and the names of the other members of the Tribunal. Thereupon the Tribunal assembles at the date fixed by the parties, the Bureau making necessary arrangements for its meeting.[3]

While recourse to the court is not made compulsory, it is declared to be the duty of the contracting powers, "if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them"; and it is said that "the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions."[4] A party to a dispute may always inform the Bureau, by a note of declaration, of the readiness to have recourse to arbitration. Of

[1] Art. XLV. The limitation expressed by the words quoted in the text was an amendment made in 1907. See A. P. Higgins, The Hague Peace Conferences, 171–172.

[2] Art. XLV.

[3] Art. XLVI. It is here also provided that, "The members of the Tribunal, in the exercise of their duties, and out of their own country, enjoy diplomatic privileges and immunities."

In order to facilitate recourse to arbitration the Bureau is authorized to place its services at the disposal of the contracting powers for the use of any special board of arbitration. Art. XLVII.

The jurisdiction of the Permanent Court may, under specified conditions, be extended to disputes between non-contracting powers, or between such powers and contracting powers, if the parties are agreed to have recourse to the Court. *Id.*

[4] Art. XLVIII. The words "friendly actions" is the translation published in Malloy's Treaties (II, 2237) for the French expression *actes de bons offices*. "*Bons offices*" are the exact equivalent of the English "good offices", a term which in both languages has a technical signification, which the contracting parties doubtless sought to attach to the words of the present Article.

such declaration the Bureau is obliged at once to inform the other party.[1] It is not understood that any party to the Convention has as yet, when confronted with a grave issue, made use of the Bureau for the purpose of informing its adversary of a readiness to arbitrate.

Attempts, both in 1899 and 1907, to make recourse to arbitration obligatory were unsuccessful.[2] The Anglo-American project before the Second Conference, which ultimately won the approval of a great majority of the Commission to which the matter was entrusted, contemplated the arbitration of differences of a legal nature, and primarily relating to the interpretation of treaties, provided that the issues did not involve the vital interests, independence or honor of the States at variance, and did not affect the interests of other nations not concerned in the disputes.[3] Certain specified differences of minor aspect were declared to be outside of the reservations.[4] In view of the nature and scope of these restrictions, it may be doubted whether the project was preferable to the general resolution adopted by the Conference, recognizing the principle and efficacy of obligatory arbitration, and that without reference to its limitations.[5]

[1] Art. XLVIII. Concerning this Article, see A. P. Higgins, Hague Peace Conferences, 172–173.

According to Art. XLIX, a Permanent Administrative Council, composed of the diplomatic representatives of the contracting powers accredited to the Hague, and of the Netherland Minister for Foreign Affairs, who acts as President, is charged with the direction and control of the Bureau.

In its reply of July 25, 1914, to the demands of Austria-Hungary, the Serbian Government announced a readiness "to accept a pacific understanding, either by referring this question to the decision of the International Tribunal at the Hague, or to the Great Powers which took part in the drawing up of the declaration made by the Serbian Government on 18th (31st) March, 1909." Collected Dip. Docs., 31, 37. On July 24, 1914, in response to the request of the Serbian Minister to France for advice, the French Political Director, M. Berthelot, declared that Serbia should above all "attempt to escape from the direct grip of Austria by declaring herself ready to submit to the arbitration of Europe." See M. Bienvenu-Martin, French Acting Minister for Foreign Affairs, to M. Thiebaut, French Minister at Stockholm, July 24, 1914, *id.*, 157, 158.

[2] J. B. Scott, The Hague Peace Conferences, I, 321–385.

[3] *Id.*, I, 369; also *La Deuxième Conférence internationale de la Paix, Actes et Documents*, II, 998; *id.*, II, 899 and 906.

[4] These related to (1) Reciprocal gratuitous aid to indigent sick; (2) International protection of workingmen; (3) Means of preventing collisions at sea; (4) Weights and measures; (5) Measurement of vessels; (6) Wages and estates of deceased sailors; (7) Protection of literary and artistic works; also Pecuniary claims on account of injuries when the principle of indemnity was recognized by the parties. J. B. Scott, The Hague Peace Conferences, I, 370.

[5] According to the Final Act, the Conference of 1907 was "unanimous (1) In admitting the principle of compulsory arbitration; (2) In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of International Agreements, may be submitted to compulsory arbitration without any restriction." Malloy's Treaties, II, 2378.

(c)

§ 570. Arbitral Procedure.

Articles LI to LXXXV of the Convention of 1907 are devoted to "Arbitral Procedure", and make provision generally for the steps to be taken preliminary to an adjudication, the presentation of cases before the Tribunal, and the work of that body itself.[1] Thus the function of and necessity for the *compromis* are indicated. Therein, it is said, the subject of the dispute is clearly defined, as well as, if need be, the mode of appointing arbitrators, the scope of their powers, the language to be employed by and before the Tribunal, the place of meeting and all the conditions generally on which the parties are agreed.[2] When the parties have failed so to agree, the Convention seeks to remedy the situation.[3]

Elaborate provision is made for the settlement of the *compromis* by the Tribunal when the parties are agreed to have recourse to it for that purpose, and, under certain circumstances, when the request is made by only one party.[4]

The duties of arbitrator may be conferred upon one or several persons.[5] When a sovereign or chief of State is chosen, the procedure is to be settled by him.[6] The umpire is declared to be *ex officio* president of the Tribunal. When the Tribunal does not include an umpire, it is permitted to appoint its own president.[7]

Unless the *compromis* specifies the language to be employed the question is to be decided by the Tribunal.[8] The right of the parties to appoint agents to attend the Tribunal for the purpose of acting as intermediaries between themselves and the Tribunal, and to

[1] Malloy's Treaties, II, 2237–2242. [2] Art. LII.

[3] Unfortunate results, serving to obstruct the work of obtaining justice, have oftentimes attended the action of the parties in burdening the Tribunal with the decision of numerous questions of procedure concerning which neither the Convention of 1907 nor any practice firmly established by the Permanent Court offers authoritative guidance. See William Cullen Dennis in *Am. J.*, VII, 285, 291.

[4] Arts. LIII and LIV. [5] Art. LV. [6] Art. LVI. [7] Art. LVII.

[8] Art. LXI. The experience of the United States in cases at the Hague has emphasized the soundness of the recommendation of the late William L. Penfield, its Agent in the Venezuelan Arbitration at the Hague in 1903, to the effect that "The protocol should prescribe the language of the proceedings and of the debates, and that the arbitrators must have sufficient knowledge of that language to be able to understand and speak it readily." For. Rel. 1904, 509, 515. See, also, Recommendations, Oct. 14, 1902, of the Tribunal which decided the Pious Fund Case, *Am. J.*, V, Supp., 73, 76; statement of W. C. Dennis, Agent of the United States in the Orinoco Steamship Company Case, *Am. J.*, V, 59–63.

According to Art. IX of the special agreement of Jan. 27, 1909, providing for the arbitration of the North Atlantic Coast Fisheries Case, it was provided that "the language to be used throughout the proceedings shall be English." Malloy's Treaties, I, 840.

retain counsel or advocates to defend their rights before it, is acknowledged.[1]

Members of the Permanent Court are not permitted to act as agents, counsel or advocates except in behalf of the Power which appointed them members thereof.[2] It is to be regretted that the Convention did not completely prohibit appointment of any member of the Court in such a capacity. Equally desirable would have been a restriction limiting the choice of arbitrators to persons not nationals of the parties litigant and not their appointees on the panel of the Permanent Court.[3]

Tested by the experience of the United States as a party litigant, the provisions respecting the presentation of a case before the Tribunal are inadequate. They are mainly descriptive of general steps to be followed, rather than decisive of the exact rights of the parties taking them. Arbitral procedure is said to comprise two distinct phases: "written pleadings and oral discussions." The former consist of the communication by the respective agents to the members of the Tribunal and the opposite party "of cases, counter-cases, and, if necessary, of replies", to which are to be annexed all papers and documents called for in the case.[4] The "discussions" consist in the oral development of the pleas or arguments. It is not indicated whether the case and counter-case should be confined to statements of facts relied upon, or should embrace also arguments in support thereof.[5] Attention has been

[1] Art. LXII. [2] *Id.*

[3] According to Art. IV of the claims protocol with Venezuela of Feb. 13, 1909, providing for the arbitration of the Orinoco Steamship Company Case, it was declared that "No member of said [Hague] Court who is a citizen of the United States of America or of the United States of Venezuela shall form part of said arbitral tribunal, and no member of said Court can appear as counsel for either nation before said tribunal." Malloy's Treaties, II, 1885. See also W. C. Dennis, in *Am. J.*, V, 63; Report of Wm. L. Penfield, Agent of the United States in the Venezuelan Case at the Hague, 1903, For. Rel. 1904, 509, 511; Jackson H. Ralston, in *Am. J.*, I, 321.

[4] Art. LXIII. In the text of the Convention of 1907, as published in Malloy's Treaties (II, 2239), the word "written" ("*écrite*") immediately preceding the word "pleadings" is unfortunately omitted. This important adjective was incorporated in the text by the Conference of 1907, as an amendment to the corresponding paragraph of Art. XXXIX of the Convention of 1899.

According to Art. LXIV, a duly certified copy of every document produced by one party must be communicated to the other party.

[5] "According to the practice of the United States, at least in recent years, the case and counter-case are to be regarded more or less as true pleadings, although expanded so as to give a complete, although succinct statement of the facts relied on to establish the various contentions of the respective parties. The case states the facts as persuasively as possible, ordinarily in narrative form, points out the conclusions which it is conceived should be drawn from these facts, and is accompanied by documentary evidence which is relied upon to support the facts therein related, by way of appendix. The counter-case performs a similar function as regards the facts relied upon in answer to the

called to the fact that the Convention makes no provision in regard to the question of determining who is plaintiff, and the order of speaking, and fails as well "to secure to agents and counsel the right to make interlocutory motions at appropriate times, to have a reasonable opportunity to be heard thereon in open court, and to have a timely ruling upon the point as raised." [1] Inasmuch as the Tribunal is expressly authorized to issue rules of procedure for the conduct of the case, to decide the forms, order and time in which each party must conclude its arguments, and to arrange all formalities required for dealing with the evidence,[2] there is imposed upon the agents and counsel the preliminary task of securing in each case a special ruling from the judges chosen to pass upon the merits of the controversy.[3]

Other broad discretionary powers are conferred upon the Tribunal. After the close of the pleadings it is entitled to exclude from discussion all new papers or documents which one of the parties may wish to submit without the consent of the other.[4] It is free, however, to take into consideration, and even require the production of new papers or documents to which its attention may be drawn by the agents and counsel.[5] The Tribunal may also

case of the other party. But when, as in perhaps the majority of instances, case and counter-case are to be followed with either written or oral argument, or perhaps by both, it has not been the American practice to argue, or even, to any considerable extent, to marshal the law or the facts in the case or counter-case.

"Continental and Latin-American practice, in which even the British occasionally join, is otherwise. The case and counter-case are made use of for argument as well as statement. The Continental method has the practical advantage when opposed to the American method, that under it the members of the tribunal take their places upon the bench fully acquainted with the strength of the side employing it, while the strength of the other side is as yet undeveloped. In other words, the Continental method secures the first favorable impression with the tribunal, which, as everyone knows, may be lasting. On the other hand, it has the practical disadvantage, at all times, that it is likely to result in the wasting of a great deal of ammunition in establishing contentions which are conceded and attacking positions which are undefended, and may result in compelling those who follow it to change their position during the course of the argument. It is submitted that the American method is more in accordance with the provisions of the protocol when these call for a case, counter-case and argument, and is more conducive to a logical and orderly presentation of the questions at issue." William Cullen Dennis, "The Necessity for an International Code of Arbitral Procedure", *Am. J.*, VII, 285, 289–290.

[1] *Id.*, 297, 298–299. According to Art. LXXI, the agents and counsel "are entitled to raise objections and points. The decisions of the Tribunal on these points are final and cannot form the subject of any subsequent discussion."

[2] Art. LXXIV.

[3] W. C. Dennis, in *Am. J.*, VII, 285, 292.

[4] Art. LXVII.

[5] Art. LXVIII. The Tribunal, if requiring a party to produce such new papers or documents, is obliged to make them known to the opposite party. *Id.* In several instances the mixed commission under agreement with Spain of Feb. 11–12, 1871, permitted the admission of new evidence after the case was closed. Moore, Arbitrations, 2200–2201.

require from the agents the production of all papers, and may demand all necessary explanations.[1] Members of the Tribunal are entitled to put questions to the agents and counsel, and ask for explanations on doubtful points.[2]

Of much significance is the authority given the Tribunal to determine its own competence in interpreting the *compromis*, as well as the other papers and documents which may be invoked, and in applying the principles of law.[3]

While it is provided that the discussions are under the control of the President,[4] it is also stated that the agents and counsel are authorized to present orally to the Tribunal all of the arguments which they may consider expedient in defense of their case,[5] and that when they have submitted "all the explanations and evidence in support of their case", the President shall declare the discussion closed.[6] The Tribunal considers its decisions in private and the proceedings remain secret. All questions are decided by a majority of the members.[7]

The award is said to settle the dispute definitely and without appeal.[8]

[1] Art. LXIX. It is there also declared that "In case of refusal [to comply with such demand] the Tribunal takes note of it."

[2] Art. LXXII. In the same Article it is declared that "Neither the questions put, nor the remarks made by members of the Tribunal in the course of the discussions, can be regarded as an expression of opinion by the Tribunal in general or by its members in particular."

[3] Art. LXXIII. Here again the English translation published in Malloy's Treaties (II, 2241) is at fault. The words "*Actes et documents*", substituted in the Convention of 1907, for "*Traités*" employed in the corresponding Article (XLVIII) of that of 1899, are translated as merely "Treaties", thus ignoring the important verbal change effected in 1907.

That the parties undertake, according to Art. LXXV, to supply the Tribunal, within the widest limits deemed practicable, with all the information required for the decision of the dispute, is doubtless a wise provision, but one wholly unrelated to arbitral procedure.

[4] Art. LXVI. In the same Article it is declared that the discussions are public only in case it be so decided by the Tribunal with the assent of the parties. The discussions are recorded in minutes drawn up by the Secretaries appointed by the President. The minutes are signed by him and by one of the Secretaries, and alone have an authentic character. *Id.*

[5] Art. LXX.

In the course of the Fur Seal Arbitration in 1893, the respective functions of agents and counsel became the subject of discussion. The right of General Foster, Agent of the United States, to present motions in behalf of his Government was recognized, but it was required that arguments in support thereof should be made solely by counsel. Moore, Arbitrations, 910.

[6] Art. LXXVII. According to Art. LXXVI, due respect is paid to the rights of the territorial sovereign in relation to the service of notices in the territory of a third contracting Power, and in the procuring of evidence on the spot. See, also, Art. XXIV in regard to Commissions of Inquiry.

[7] Art. LXXVIII.

[8] Art. LXXXI.

It is not believed that a State, by accepting in a *compromis* the Hague code

Any dispute between the parties as to the interpretation and execution of the award is, in the absence of an agreement to the contrary, to be submitted to the Tribunal which pronounced it.[1] The right to demand a revision of the award, if reserved by the parties in the *compromis*, is recognized. In such case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the award.[2] "It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed."[3] It is provided, moreover, that proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character above described, and declaring the demand admissible on that ground.[4] The award is not binding except on the parties in dispute.[5]

of arbitral procedure, thereby loses the right to attack the validity of an adverse award, where it appears, for example, that the Tribunal disregarded the terms of the submission.

According to Art. LXXIX, the award must give the reasons on which it is based. It contains the names of the arbitrators, and is signed by the President and Registrar, or by the Secretary acting as such. Art. LXXX provides that the award shall be read in a public session, the agents and counsel being present or duly summoned to attend.

[1] Art. LXXXII.

[2] Art. LXXXIII. This Article is identical with Art. LV of the Convention of 1899. In the Report of the American delegates to the Conference of 1899, to the Secretary of State, July 31, 1899, it is said: "As to the revision of the decisions by the tribunal in case of the discovery of new facts, a subject on which our instructions were explicit, we were able, in the face of determined and prolonged opposition, to secure recognition in the code of procedure for the American view." For. Rel. 1899, 513, 517, Moore, Dig., VII, 83, 84.

Declared Count Lewenhaupt, umpire of the mixed commission under agreement with Spain of Feb. 11–12, 1871, Malloy's Treaties, II, 1661: "The umpire is of opinion that the rule generally adopted by courts of arbitration is, that the umpire has no discretionary power to set aside his own decisions; that he has a right to correct clerical errors so long as the decision has not been satisfied, but that an error of judgment cannot be corrected after due notification of the decision; except, if the case be submitted again through the authorized channel." Moore, Arbitrations, III, 2192.

[3] Art. LXXXIII.

[4] *Id.*, where it is also declared that the *compromis* fixes the period within which the demand for the revision must be made.

[5] Art. LXXXIV. It is there also provided that when the award "concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the Award is equally binding on them."

According to Art. LXXXV, "Each party pays its own expenses and an equal share of the expenses of the Tribunal."

(d)

§ 571. Arbitration by Summary Procedure.

With a view to facilitating recourse to arbitration in cases admitting of summary procedure, certain rules are agreed upon, subject, however, to the provisions, so far as applicable, of the code of arbitral procedure.[1] Accordingly, each party in dispute appoints an arbitrator, and the two thus selected choose an umpire. If they fail to agree, each arbitrator proposes two candidates taken from the general list of the Permanent Court, exclusive of the members appointed by either of the parties, and not being nationals of either of them. From these candidates the umpire is determined by lot.[2] In the absence of previous agreement, the Tribunal, as soon as it is formed, settles the time within which the respective cases must be submitted to it.[3] Each party is represented before the Tribunal by an agent.[4] The proceedings are conducted exclusively in writing.[5] Witnesses and experts may be called by either party, while the Tribunal is given the right to demand oral explanations from the agents, as well as from the experts and witnesses "whose appearance in Court it may consider useful."[6]

(5)

§ 572. The Court of "Judicial Arbitration" Proposed by the Second Hague Peace Conference.

Numerous defects of and weaknesses in the structure of the Permanent Court of Arbitration, established in 1899 and maintained in 1907, have been acknowledged on all sides. They relate, notably, to the inadequacy of a mere panel of judges as compared with a really permanent tribunal, to the unwise latitude permitted in the choice of arbitrators, counsel and agents, to the insufficient restrictions respecting qualifications for the office of arbitrator, to the burdensome expense imposed upon parties litigant, and to the lack of an adequate code of arbitral procedure.[7]

[1] Art. LXXXVI.

[2] Art. LXXXVII. It is there also provided that the umpire shall preside over the Tribunal, which shall give its decisions by a majority of votes.

Art. III of the agreement with Great Britain of Aug. 18, 1910, for the arbitration of pecuniary claims, provided that the arbitral tribunal be constituted in accordance with this article of the Hague Convention. Charles' Treaties, 51.

[3] Art. LXXXVIII. [4] Art. LXXXIX. [5] Art. XC. [6] *Id.*

[7] Infrequency of adjudications and the resulting failure of the Court to develop a consistent or impressive body of law have also been noted. See address of Mr. Choate, head of the American delegation to the Second Hague

The United States as a party litigant has, however, found it possible on each occasion to obtain arbitrators highly qualified for the exercise of the arbitral function, unfailingly conscious of the judicial nature of the task confronting them, and hence determined to expound and apply the law of nations rather than effect compromise.

The attempt was made at the Second Hague Conference of 1907, not merely to revise and enlarge the Convention of 1899 for the Pacific Settlement of International Disputes,[1] but also to establish in addition to the Permanent Court of Arbitration, a new body to be known as the Judicial Arbitration Court.[2] Accordingly a draft convention was formulated, and annexed to the first "opinion" expressed by the Conference, advising the adoption of the convention as soon as the Powers should agree as to the selection of the judges and the constitution of the court.[3]

The convention provided for a tribunal composed of "judges representing the various juridical systems of the world, and capable of insuring continuity in jurisprudence of arbitration."[4] Qualifications for fitness for the judicial office were drawn with somewhat greater rigidity than in the case of those for the Permanent Court of Arbitration, although the appointment of judges was to be made, as far as possible, from the membership of the latter.[5]

Peace Conference, Aug. 1, 1907, *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, II, 327–330, J. B. Scott, Hague Peace Conferences, I, 426–427.

See, also, in this connection, R. Floyd Clarke, "A Permanent Tribunal of International Arbitration", *Am. J.*, I, 342, 399–408; W. C. Dennis, "Compromise — The Great Defect of Arbitration", *Col. L. Rev.*, XI, 493; "The Necessity for an International Code of Arbitration", *Am. J.*, VII, 285; Jackson H. Ralston, "Some Suggestions as to the Permanent Court of Arbitration", *id.*, I, 321; J. B. Scott, An International Court of Justice, Carnegie Endowment for International Peace, Division of International Law, New York, 1916.

Concerning the International Prize Court Convention concluded at the Second Hague Peace Conference, see American Prize Courts and Procedure, Need of an International Tribunal, *infra*, § 896.

[1] In his instructions to the American delegation to the Second Hague Conference, May 31, 1907, Mr. Root, Secretary of State, appears to have sought the development of the Permanent Court of Arbitration rather than the institution of a new organization. For. Rel. 1907, II, 1128, 1135.

[2] See address of Mr. Choate, Chief of the American delegation, Aug. 1, 1907, introducing the plan of the United States for a court of arbitral justice, *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, II, 327–330, J. B. Scott, Hague Peace Conferences, I, 425.

[3] For the text of the draft convention, see Malloy's Treaties, II, 2380. Concerning the proposed court, see *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, I, 331–335, 347–398; J. B. Scott, Hague Peace Conferences, I, 423–464; Same author, The Status of the International Court of Justice, Baltimore, 1914 (Publication Nos. 15 and 16, American Society for Judicial Settlement of International Disputes); Hershey, 335–337; also A. P. Higgins, Hague Peace Conferences, 509–517.

[4] Art. I. [5] Art. II.

A judge was not to be permitted to exercise his judicial functions in any case in which he had previously taken any part; or to act as agent or advocate before the Judicial Arbitration Court, or the Permanent Court of Arbitration, or a Special Tribunal of Arbitration, or a Commission of Inquiry, or to act for one of the parties "in any capacity whatsoever", so long as his appointment lasted.[1] He was to receive an annual salary of 6000 Netherland florins as well as 100 florins per diem when in the exercise of judicial duties, and an allowance for traveling expenses.[2]

In contrast to a mere panel of judges, the Court was to be an essentially permanent tribunal meeting in session once a year,[3] yet carrying on much of its work through a committee of three members known as the "delegation."

The tenacity with which certain participants at the Hague Conference asserted a preference for a tribunal composed of judges chosen by the parties at variance,[4] as well as disagreement respecting any other mode suggested for the selection of a permanent bench, rendered impossible the actual establishment of the court.[5]

[1] Art. VII. Also Art. X.

Such provisions would not, however, completely bar a judge from the practice of his profession in his own country during the period of his appointment, or even from holding public office. Mr. Root, Secretary of State, in his instructions to the American delegation to the Second Hague Conference, May 31, 1907, sought the "development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility." For. Rel. 1907, II, 1128, 1135.

According to Art. XI of the Convention for the establishment of a Central American Court of Justice, concluded at the Central American Peace Conference at Washington, Dec. 20, 1907, "The office of Justice whilst held is incompatible with the exercise of his profession, and with the holding of public office." Malloy's Treaties, II, 2402.

[2] Art. IX.

[3] Art. XIV which provided for a contingency when the Court was not obliged to meet.

[4] See view of M. Beernaert, Chief of the Belgian delegation to the Second Hague Conference, *La Deuxième Conférence Internationale de la Paix, Actes et Documents*, II, 331–335; J. B. Scott, Hague Peace Conferences, I, 435; A. P. Higgins, Hague Peace Conferences, 512.

The American delegation proposed a system of electing judges. "Each State was to select a person willing to act and capable of performing judicial duties. The name of this person was to be communicated to the International Bureau, which thereupon made a list of the persons so designated by the forty-six States. The list was to be transmitted to the minister of foreign affairs of each country, with the request that he check the names of fifteen persons, supposing the court was to be composed of fifteen, best qualified to constitute the court. The papers were to be returned to the International Bureau and the fifteen persons receiving the highest number of votes were to form the court for the period of twelve years." J. B. Scott, Hague Peace Conferences, I, 459.

[5] It may be observed that the choice of a judge by a party litigant is not

Hence the convention remained merely a proposal for the consideration and revision of statesmen.

(6)

The Permanent Court of International Justice Designed by Advisory Committee of Jurists, 1920[1]

(a)

§ 573. Organization.

A Permanent Court of International Justice, to which parties shall have direct access, is designed for establishment[2] in addition to, rather than a substitute for, the Court of Arbitration organized in pursuance of the previous Hague Conventions of 1899 and 1907, and special arbitral tribunals to which States are declared to be always at liberty to refer their disputes for settlement. The Permanent Court of International Justice is composed of a body of independent judges, elected regardless of their nationality, from

necessarily indicative that the person chosen is in any sense representative of the party making the selection, especially when the choice lies between persons of foreign nationality. The value of the right of choice, frequently brought home to litigants before domestic courts, is seen in the ability of a party to escape an adjudication before a judge believed to be hostile to or prejudiced against its cause. The right to a hearing before a judge of one's own choice is not incompatible with the existence of a permanent court of large dimensions.

[1] A Committee of eminent jurists, at the invitation of the Council of the League of Nations, met at the Hague in June, 1920, and prepared the plan for a Permanent Court of International Justice to which reference is made in the text. The American member of the Committee was Mr. Elihu Root, who was assisted by Dr. James Brown Scott. The scheme was "arrived at after prolonged discussion by a most competent tribunal. Its members represented widely different national points of view; they all signed the report." (Communication signed on behalf of the Council of the League of Nations, Aug. 27, 1920, and addressed to the Governments to which the plan was submitted.)

The plan designed by the Advisory Committee of Jurists, however modified by the Statute of the Permanent Court of International Justice acquiesced in by the League of Nations, is worthy of close examination. The more important changes wrought by the Statute are noted.

See Report on The Draft Scheme for the Establishment of the Permanent Court of International Justice, presented to the Council of the League of Nations on behalf of the Advisory Committee of Jurists, by Albert de Lapradelle, The Hague, July, 23, 1920; The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary, by James Brown Scott, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 35, Washington, 1920.

[2] The establishment of the Court is in accordance with Art. XIV of the Covenant of the League of Nations.

among persons of high moral character, possessed of qualifications required, in their respective countries, for appointment to the highest judicial offices, or who "are jurisconsults of recognized competence in international law." [1] The Court consists of fifteen members: eleven judges and four deputy-judges.[2] The members are elected by the Assembly and Council of the League,[3] upon the nomination of those members of the existing Court of Arbitration at the Hague, who belong to the States mentioned in the annex to the Covenant of the League of Nations (which contains the name of the United States), or to States joining the League subsequently,[4] who are invited to undertake by "national groups" [5] to propose persons in a position to accept such judicial service.[6] From the lists of the persons so nominated, the Assembly and Council of the League elect, by "independent voting", first the judges, and then the deputy-judges.[7] Candidates obtaining an absolute majority of votes in those two bodies are considered as elected.[8]

[1] Art. 2.

[2] See Art. 3, where it is also provided that the number of judges and deputy-judges may be subsequently increased by the Assembly upon the proposal of the Council, to a total of fifteen judges and six deputy-judges.

[3] Art. 4.

[4] Art. 5.

Art. 4 of the Statute of the Court as approved Dec. 13, 1920, contained the provision: "In the case of members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907, for the pacific settlement of international disputes."

[5] See Art. 5 of Statute adopted Dec. 13, 1920, enlarging the classes of persons to be invited to make nominations, and embracing the persons appointed under paragraph 2 of Art. 4 of the Statute as approved on that date.

[6] Art. 5, where it is announced that no group may nominate more than two persons, and that the nominees may be of any nationality.

According to the Statute adopted Dec. 13, 1920, Art. 5, no group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Before making such nominations, each national group is recommended to consult "its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law." Art. 6.

[7] Art. 8. According to Art. 7, the persons so nominated are the only persons eligible for appointment, except as provided in Art. 12, paragraph 2.

[8] Art. 10, where it is also provided that should more than one candidate of the same nationality be elected by the votes of both the Assembly and the Council, "the eldest of these only shall be considered as elected."

See slight amendment contained in Art. 10 of Statute as adopted Dec. 13, 1920, referring to the election of more than one national of the "same member of the League" as a substitute for the language in the original draft.

The electors are cautioned that "not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world." Art. 9.

If, after a third sitting held for the purpose of an election,[1] one or more seats remain unfilled, a joint conference consisting of three members appointed by the Assembly and three by the Council may be formed, for the purpose of choosing one name for each vacant seat, for submission to those bodies for acceptance by them.[2] If the joint conference is unsuccessful in procuring an election, the members of the Court already appointed proceed to fill the vacancies by selection from among those candidates who have obtained votes in either the Assembly or the Council; and in the event of an equality of votes among the judges, the eldest judge has "a casting vote." [3]

Members of the Court are rigidly restricted in the matter of public service. Thus the exercise of any function which belongs to the political direction, national or international, of States, by the Members of the Court, during their terms of office, is declared incompatible with their judicial duties.[4] Again, no member of the Court can act as agent, counsel or advocate in any case of an international nature. Nor can he participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.[5] A member cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.[6] Outside of their own

[1] Art. 12. According to Art. 11, three sittings are, if necessary, to be held for the purpose of an election.

[2] Art. 12 provides that if the Committee is unanimously agreed on any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations made by the Court of Arbitration. See slight amendment in Statute of Dec. 13, 1920.

[3] Art. 12.

Members are elected for a term of nine years, and may be reëlected. They continue to discharge their duty until their places have been filled. Although replaced, they are to complete any cases which they may have begun. Art. 13.

Vacancies which occur are filled by the same method as that laid down for the first election. A member of the Court elected to replace one the period of whose appointment has not expired, holds the appointment for the remainder of his predecessor's term. Art. 14.

Deputy-judges are to be called to sit in the order laid down in a list prepared by the Court, "having regard first to the order in time of each election and secondly to age." Art. 15.

[4] Art. 16. Any doubt upon the point is settled by the decision of the Court.

[5] Art. 17. Any doubt on the point is to be settled by the decision of the Court. See provisions of Arts. 16 and 17 of the Statute of Dec. 13, 1920, respecting deputy-judges.

[6] Art. 18. In case of such dismissal formal notification is given the Secretary-General of the League. Such notification makes the place vacant.

countries, members enjoy the privileges and immunities of diplomatic representatives.[1]

For the prompt despatch of its work, the Court annually forms a so-called "chamber" composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.[2]

Judges of the nationality of each contesting party retain the right to sit in the cases before the Court. If the Court includes upon its bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality if there be one. If there should not be one, that party may choose a judge, preferably from among those persons who have been nominated as candidates by some national group in the Hague Court of Arbitration.[3] If the Court includes upon its bench no judge of the nationality of the contesting

[1] Art. 19. According to Article 19 of the Statute of Dec. 13, 1920: "The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

Before taking up his duties every member of the Court is required to make a formal declaration in open Court that he will exercise his powers impartially and conscientiously. Art. 20.

According to Art. 21, the Court elects its President and Vice-President for three years; they may be reëlected. The Court appoints its Registrar. The duties of that office are not considered incompatible with those of the Secretary-General of the Permanent Court of Arbitration.

The seat of the Court is established at the Hague; and at that seat the President and Registrar are obliged to reside. Art. 22.

A session of the Court is held every year, and unless otherwise provided by rules of the Court, shall begin on June 15th, and continue for such period as may be necessary to complete the cases on the docket. Art. 23. The President is empowered to summon an extraordinary meeting of the Court whenever necessary. *Id.*

If for some special reason, a member of the Court considers that he cannot take part in the decision of a particular case, he is obliged so to inform the President. If for some special reason the President considers that one of the members of the Court should not sit in a particular case, he is obliged to notify that member. In the event of the President and a member not agreeing as to the course to be adopted in any such case, the matter is settled by decision of the Court. Art. 24.

The full Court sits except when it is expressly otherwise provided. If eleven judges cannot be present, deputy-judges are called upon to sit in order to make up that number. If, however, eleven judges are unavailable, a quorum of nine judges suffices to constitute the Court. Art. 25.

It may be noted that the Statute of Dec. 13, 1920, contained three new Articles (26, 27, and 28) providing for the adjudication before the Court of so-called "Labour cases", and cases relating to trade and communications, with particular reference to such cases as were referred to in the German and other treaties of peace.

[2] Art. 26. According to Art. 27 the Court frames rules for regulating its procedure, and, in particular, lays down rules for summary procedure.

[3] Art. 31 of the Statute of Dec. 13, 1920, consistently enlarges the class of eligible persons, referring to persons nominated as candidates as provided in Articles 4 and 5 of the Statute.

parties, each of them is permitted to select a judge according to the foregoing process.[1]

(b)

§ 574. Competence.

The Court, whose function is to adjudicate in suits between States,[2] is "open of right" to members of the League of Nations; and, under certain conditions, is accessible to other States.[3]

In suits between States to which the Court is "open of right", there appears to be contemplated obligatory arbitration under provisions fixing the terms of its jurisdiction. Thus as a condition precedent to the right of a complainant State to invoke the aid of the Court, the dispute must be one which it has been found impossible to settle by diplomatic means, and concerning which no agreement has been made "to choose another jurisdiction." Moreover, the Court must, first of all, decide whether such requirements have been met.[4]

[1] Art. 28. It is declared that should there be several parties in the same interest, they are, for the purpose of representation, to be reckoned one party only. Judges chosen by a party under this Article are obliged to fulfill conditions required by Arts. 2, 16, 17, 20 and 24; and they take part in the decision on an equal footing with their colleagues.

The judges receive an annual salary to be determined by the Assembly of the League upon the proposal of the Council. The salary must not be decreased during the period of a judge's appointment. The President receives a special grant for his period of office, to be fixed in the same way. Deputy-judges receive a grant for the actual performance of their duties to be fixed in the same way. Traveling expenses incurred in the performance of their duties are refunded to judges and deputy-judges who do not reside at the seat of the Court. Grants due to judges selected or chosen according to the provisions of Art. 28 are determined in the same way. The salary of the Registrar is decided by the Council upon the proposal of the Court. A special regulation is to provide for pensions to which the judges and registrar shall be entitled. Art. 29.

See amendments of the foregoing provisions in Art. 32 of the Statute of Dec. 13, 1920.

According to Art. 30 the expenses of the Court are borne by the League of Nations in such manner as is decided by the Assembly upon the proposal of the Council.

[2] Art. 31. The corresponding Article (34) of the Statute of Dec. 13, 1920, declares that only States "or members of the League of Nations" can be parties in cases before the Court.

[3] According to Art. 32: "The conditions under which the Court shall be open of right or accessible to other States which are not members of the League of Nations shall be determined by the Council, in accordance with Art. 17 of the Covenant."

According to the corresponding Article (35) of the Statute of Dec. 13, 1920: "The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court."

[4] Art. 33. If the Court decides that the conditions of jurisdiction have been met, it becomes its duty to hear and determine the dispute according to the limits of Art. 34.

Concerning the radical amendment touching jurisdiction of the Court,

The scope, as distinguished from the conditions, of the jurisdiction of the Court is established, and because of its nature and breadth, deserves scrutiny.

Between States which are members of the League of Nations, the Court is given jurisdiction (and that without any special convention conferring jurisdiction upon it) to hear and determine cases of a "legal nature" (*d'ordre juridique*), concerning:

(*a*) the interpretation of a treaty;
(*b*) any question of international law;
(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) the nature or extent of reparation to be made for the breach of an international obligation;
(*e*) the interpretation of a judgment rendered by the Court.[1]

Within these limits questions of a legal nature are rendered justiciable and without reservation. No definition of justiciable differences is manifested; and none is needed in view of the terms in which the jurisdiction of the Court is set forth.

As guidance for the Court, with respect to international law and the relative weight to be attached to various expressions of it, the Court is to apply the order following:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice, which is accepted as law;
3. The general principles of law recognized by civilized nations;
4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[2]

as set forth in Article 36 of the Statute of Dec. 13, 1920, see Certain Conclusions, *infra*, § 576.

[1] Art. 34. Paragraph (*e*) of this Article was omitted from the Statute of Dec. 13, 1920.

Art. 37, of the Statute of Dec. 13, 1920, declares that: "When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal."

See in this connection, "First Amendment" proposed by Mr. Elihu Root to the first published draft of the proposed Covenant of the League of Nations (as a substitute for Art. XIII thereof), and annexed to his communication to Mr. W. H. Hays, March 29, 1919, *Am. J.*, XIII, 594.

Art. 34 provides that the Court shall also take cognizance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties. It is also declared that in the event of a dispute as to whether a certain case comes within any of the categories mentioned in Art. 34, the matter shall be settled by the decision of the Court.

[2] Art. 35. The last paragraph is rendered "subject to the provisions of Article 59", in the text of the Statute of Dec. 13, 1920, according to Article 38

The Court is to give advisory opinions on questions or disputes of an international nature referred to it by the Council or Assembly of the League.[1]

(c)

§ 575. Procedure.

Certain provisions relating to procedure deserve attention. A complainant State initiates proceedings by filing a written "application" addressed to the Registrar of the Court, and indicating the subject of the dispute, and the names of the contesting parties. The Registrar forthwith communicates the application to all concerned, notifying also the members of the League of Nations through the Secretary-General.[2]

If the dispute arises out of an act which has already taken place or which is imminent, the Court is given power "to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party." Pending the final decision, notice of the measures that are suggested is given to the parties and to the Council of the League.[3]

The procedure before the Court is said to consist of two parts: written and oral.[4] The hearing in Court is public, unless the Court,

thereof, where it is also declared that "this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

[1] Art. 36. When the opinion is on a question of an international nature which does not refer to any dispute which may have arisen, the Court is to "appoint a special Commission of from three to five members." If the question is one which forms the subject of an existing dispute, the Court gives its opinion "under the same conditions as if the case had been actually submitted to it for decision."

These provisions were omitted from the Statute of Dec. 13, 1920.

[2] Art. 38.

[3] Art. 39. *Cf.* Art. 41 of Statute of Dec. 13, 1920.

The official language of the Court is French. The Court may, however, at the request of the parties, authorize the use of another language before it. Art. 37.

According to Art. 39 of Statute of Dec. 13, 1920: "The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative."

The right of parties litigant to be represented by agents, and to have counsel or advocates to plead before the Court, is recognized. Art. 40.

[4] Art. 41. The written proceedings consist of the communication to the judges and to the parties of statements of cases, counter-cases and, if necessary, replies; also all papers and documents in support thereof. These communications are made through the Registrar, in the order and within the

at the written request of one of the parties, accompanied by a statement of reasons, decides otherwise.[1] The Court makes orders for the conduct of the case, deciding the form and time in which each party must conclude its arguments; and it makes all arrangements connected with the taking of evidence.[2] Even before the hearing begins, the Court may call upon the agents to produce any documents, or to supply to the Court any explanations. A refusal to comply is recorded.[3] During the hearing in Court, the judges may put any questions considered by them to be necessary, to the witnesses, agents, advocates or counsel; and the agents, advocates and counsel enjoy the right to ask, through the President, any questions that the Court considers useful.[4] After having received the proofs and evidence within the time specified for the purpose, the Court may refuse to accept any further oral or written evidence which one party may desire to present unless the other side consents.[5]

The Court is clothed with the privilege of entrusting at any time to any individual, bureau, commission or other body which it may select, the task of making an inquiry or giving an expert opinion.[6]

Whenever one of the parties does not appear before the Court, or fails to defend its case, the opposite party may demand of the

time fixed by the Court. Art. 42. Observe parallel provisions of Art. LXIII of the Hague Convention of 1907, Malloy's Treaties, II, 2239.

The oral proceedings consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates. Art. 43.

A certified copy of every document produced by one party is to be communicated to the other party. Art. 42.

For the service of all notices upon persons other than the agents, counsel and advocates, the Court applies direct to the Government upon whose territory the notice has to be served. The same provision is made applicable whenever steps are taken to procure evidence on the spot. Art. 43.

Appropriate provision is made for the direction of the proceedings by the President, or in his absence, by the Vice-President, or in the absence of both, by the senior judge. Art. 44.

[1] Art. 45. *Cf.* corresponding Article (46) of the Statute of Dec. 13, 1920.

Minutes are made at each hearing, and signed by the Registrar and the President. These minutes constitute the only authentic record. Art. 46.

[2] Art. 47. [3] Art. 48.

[4] Art. 50. Note the slight amendment in the corresponding Article (51) of the Statute of Dec. 13, 1920.

[5] Art. 51.

When the agents, advocates and counsel, subject to the control of the Court, have presented all the evidence, and taken all the steps that they consider advisable, the President is required to declare the case closed, and the Court withdraws to consider the judgment. Its deliberations take place in private and remain secret. Art. 53.

All questions are decided by a majority of the judges present at the hearing. In case of an equal division, the President or his deputy has the deciding vote. Art. 54.

[6] Art. 49.

Court a decision in its favor. Before doing so, however, the Court must satisfy itself that it has jurisdiction (in accordance with Articles 33 and 34), and that the claim is supported by substantial evidence well founded in fact and law.[1]

The judgment expresses the reasons therefor. It mentions the names of the judges who have taken part in the decision.[2] The judgment is final and without appeal. In the event, however, of uncertainty as to its meaning or scope, it becomes the duty of the Court to construe it upon the request of any party.[3] Application for the revision of a judgment can be made only when it is based upon the discovery of some new fact, of a nature such as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and also to the party demanding revision, provided such ignorance was not due to the neglect of the latter.[4]

An outside State which deems that it has an interest of a legal nature which may be affected by the decision in a case, may request of the Court the right to intervene. The matter rests with the decision of the Court.[5] Whenever an adjudication involves the construction of a convention to which States other than those participating in the case are parties, the Registrar notifies forthwith all the signatories. Every State so notified enjoys the right

[1] Art. 52. *Cf.* Art. 53 of Statute of Dec. 13, 1920.

[2] Art. 55.

If the judgment does not represent, wholly or in part, the unanimous opinion of the judges, those who dissent are entitled to have the fact of their dissent or reservations mentioned in it, but without indication of their reasons for dissenting. Art. 56. According to the corresponding Article (57) of the Statute of Dec. 13, 1920: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion."

The judgment is signed by the President and by the Registrar, and is read in open Court, upon due notice to the agents. Art. 57. Art. 59 of the Statute of Dec. 13, 1920, declares that "the decision of the Court has no binding force except between the parties and in respect of that particular case."

[3] Art. 58.

[4] Art. 59.

Proceedings for revision are opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has a character such as to lay the case open to revision, and declaring the application admissible on such ground.

The Court may require previous compliance with the terms of the judgment before admitting proceedings in revision.

No application for revision is permitted after the lapse of five years from the date of the judgment.

By the Statute of Dec. 13, 1920, the application for revision must be made at the latest within six months of the discovery of the new fact; and no application for revision may be made after the lapse of ten years from the date of the sentence. Art. 61.

[5] Art. 60.

of intervention which, if exercised, serves to cause the interpretation contained in the judgment to be equally binding upon the intervening State.[1]

(d)

§ 576. Certain Conclusions.

By reason of the mode of its organization and membership, the continuity of its judicial life, the conditions and scope of its jurisdiction, as well as the nature of the law which was to be applied, the Permanent Court of International Justice, as designed by the Advisory Committee of Jurists, is believed to have offered the most comprehensive and promising instrumentality for the adjustment of grave international differences which has thus far been proposed for general adoption. Its broad and yet reasonable scheme for the obligatory adjudication of specified classes of disputes, without reservations serving to impair the value of the general undertaking, was of vast significance.[2] There was thus manifest the wisdom of the Committee in reckoning with the grim fact that the mere existence of an international tribunal, however well constituted, does not suffice to cause States at variance to invoke its aid for the solution of grave yet essentially justiciable controversies. That the Court purported to be an instrumentality of the League of Nations did not, as has been observed, contemplate the prevention of States which were not members thereof from enjoying access to the Tribunal. Nevertheless, the conditions under which the Court might be open to non-member States remained to be determined by the Council of the League.[3] It has recently been observed

[1] Art. 61.
Unless otherwise decided by the Court, each party bears its own costs. Art. 62.

[2] "The important point is, that *they oblige themselves* to submit a small part of the large field, reserving the right by future agreements to submit questions which are not included within this limited and compulsory field. The unwillingness to submit to judicial decision disputes falling within the limited field, is also an unwillingness to submit these very disputes to arbitration. The objection is not one of form, it is one of substance. It is a rejection of the principle that disputes of a recognized justiciable nature should be submitted either to judicial or arbitral decision; a refusal to have such international disputes decided by principles of justice known in advance, by any agency created and existing in advance, unless it should please the passing fancy of the parties in controversy to do so." J. B. Scott, Report and Commentary on the Project of a Permanent Court of International Justice, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 35, 99.

[3] While the Court was to remain an instrumentality of the League it was a natural and logical provision that the Council should be clothed with such power. If the plan devised be viewed, however, in a broader light, as a gen-

that a Court such as that proposed by the Committee of Jurists would not necessarily demand the retention of the bond between the Tribunal and the League, should some other appropriate public agency be generally preferred as the medium of common control, such as the "diplomatic representatives of the nations accredited to the Hague." [1]

With respect to the matter of jurisdiction, the original draft of the Committee of Jurists suffered radical amendment at the hands of the Council of the League of Nations in October, 1920,[2] and of the Assembly in December, 1920. The so-called Statute of the Permanent Court of International Justice as approved by the latter body December 13, 1920, declared that the jurisdiction of the Court "comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force." [3] It was also provided that "the members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes" which were specified.[4] Such was the substitute for the design contemplating the compulsory adjudication of a

eral scheme for the adjudication of international differences, it will perhaps be apparent that the conferring upon aggrieved States of the right to demand the adjudication of justiciable controversies before a world Court ought not, in the interest of peace, to be dependent upon the connection between the complainants and a particular organization of States such as the League of Nations. The value of a Permanent Court of International Justice as a deterrent of war is likely to be dependent upon whether it is fairly to be regarded as the agency of enlightened States generally rather than of a particular group of powers. If international justice is of universal application, the judicial body created in order to administer and promote it for all the world, must in a broad sense, be the representative of all civilization rather than of a part. For that reason, the United States in coöperating in the establishment of fresh and appropriate agencies to facilitate the amicable adjustment of international disputes, may deem it important to demand that all States with which diplomatic relations are had, unite in the creation and upholding of those agencies.

[1] See J. B. Scott, Report and Commentary above cited, 148.

[2] See Arts. 33 and 34 of Draft Scheme as amended by the Council, Document No. 44, of the Assembly of the League of Nations, p. 112; and also Report of M. Léon Bourgeois, and adopted by the Council, Oct. 27, 1920, *id.*, 83, 87.

[3] Art. 36. For "an authoritative copy of the project as finally adopted by the League at the Geneva meeting, Dec. 13, 1920", see *Advocate of Peace*, LXXXIII, 59–63 (February, 1921).

[4] See Report of Mr. Hagerup in behalf of the Third Commission of the Assembly, Assembly Document No. 216.

limited class of justiciable differences. Whether this action was due to a desire to shape the Statute of the Court in strict conformity with the terms of certain articles of the Covenant,[1] or to an unwillingness to entrust questions of law to a judicial rather than a non-judicial body,[2] the result is to be regretted; for it records a failure to take that short but decisive step forward which the interests of the international society appeared to demand, and which the work of the Committee of Jurists had made clear and practicable.

(7)

Powers and Functions of Arbitral Tribunals

(a)

§ 577. Limitations of the Powers of Arbitrators.

The extent of the powers of a court of arbitration is determined by and depends upon the agreement or *compromis* providing for the arbitration. Such a tribunal should not, therefore, undertake to decide any question other than that submitted to it by the States seeking its judgment, or take cognizance, for example, of any collateral issue between either of them and a third State, if not expressly referred to it by the parties directly interested.[3]

States at variance are free to clothe a court with whatever authority is deemed expedient.[4] The agreement to arbitrate may,

[1] *Cf.* Arts. XII–XVof the Covenant of the League of Nations; also, Report of M. Bourgeois, above cited.

[2] See in this connection, statement of Mr. Balfour before the Assembly, First Assembly of the League of Nations, Provisional Verbatim Record, 21st Plenary Meeting, Monday, Dec. 13, at 4 P.M., 6–7. Observe also the attitude of Lord Salisbury in a communication to the British Ambassador at Washington, May 18, 1896, criticizing the scope of proposals of Secy. Olney for incorporation in a proposed general treaty of arbitration. For. Rel. 1896, 228.

[3] Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, July 23, 1887, MS. Notes to Colombia, VII, 125, Moore, Dig., VII, 30.

Similarly, the powers of domestic commissions established by Acts of Congress, to adjudicate upon claims of citizens against foreign States, and for which the United States has by treaty assumed an obligation to make satisfaction, are limited by the terms of the legislative enactments establishing the tribunals. Comegys *v.* Vasse, 1 Pet. 193, 212–213, Moore, Dig., VII, 30; Frevall *v.* Bache, 14 Pet. 95, Moore, Dig., VII, 30.

[4] For constitutional reasons a government may deem itself restricted as to the mode of its agreement conferring certain judicial powers upon an arbitral tribunal, such as the issuance of commissions for taking testimony. See Report of Mr. Bayard, Secy. of State, to the President, in the cases of Pelletier and Lazare, Jan. 20, 1887, For. Rel. 1887, 593, 608, Moore, Dig., VII, 32–33, also Moore, Arbitrations, 1752–1756. Similarly, it may doubt its constitutional power to yield to an arbitral tribunal the right to pass upon or review decisions of a domestic court of last resort. See Agreements to Refer Differences to International Judicial Tribunals or Commissions, *supra*, § 504.

for example, authorize a tribunal to decide whether a national of one country has suffered a denial of justice at the hands of another, even though he may not have exhausted any local judicial remedy available to him,[1] or it may prescribe rules of law by which the propriety of national conduct is to be tested.[2]

That an arbitral tribunal has power, even in the absence of express agreement between the parties to the controversy, to determine questions with respect to its own jurisdiction, appears now to be accepted doctrine.[3]

That an award may be rendered by a majority of the members of an arbitral tribunal has long been the view of publicists,[4] and in practice has been accepted by the United States.[5] At the present

[1] See, for example, award of Hon. Wm. R. Day, Arbitrator in the case of the claims of John D. Metzger & Co. *v.* Hayti, under protocol of Oct. 18, 1899, For. Rel. 1901, 262, 275, Moore, Dig., VII, 31–32. For the text of the protocol, see Malloy's Treaties, I, 936.

[2] See, for example, the Neutrality Rules, contained in Art. VI of the Treaty of Washington of May 8, 1871, Malloy's Treaties, I, 703.

[3] See controversy among commissioners under Art. VII of the Jay Treaty, and the view of the Lord Chancellor Loughborough thereon, Moore, Arbitrations, 324–327; *id.*, 2290–2310; declaration of the Geneva tribunal, under Arts. I–IX, of the Treaty of Washington, May 8, 1871, with respect to "indirect claims", *id.*, 646–647; Mr. Olney, Secy. of State, to Mr. Gana, Chilean Minister, June 28, 1895, For. Rel. 1895, I, 83, Moore, Dig., VII, 34.

See, also, § 1 of "Terms of Submission" agreed upon July 6, 1911, with respect to the special agreement of Aug. 18, 1910, providing for the British-American pecuniary claims arbitration, Charles' Treaties, 55.

[4] Lord Salisbury, British Foreign Secretary, to Mr. Welsh, American Minister to Great Britain, Nov. 7, 1878, For. Rel. 1878, 316, Moore, Dig., VII, 37.

Declares Prof. Moore: "If, by general international practice, based on the authority of international law, the concurrence of a majority of a board of arbitrators is sufficient for a decision, the natural inference would be that the United States and Great Britain, in their dealings with each other or with other powers, as independent nations, intended to observe that practice, unless they expressly agreed to disregard it." Dig., VII, 38, with reference to the view of Hon. George F. Edmunds in *North Am. Rev.*, CXXVIII, 1, maintaining unanimity to be essential to the validity of the award of the Halifax Commission, under Arts. XVIII–XXV of the Treaty of Washington of May 8, 1871.

[5] Moore, Arbitrations, 10–12, and 751, note, showing the position of the United States concerning the decision by a majority of the commissioners under Art. V of the Jay Treaty of Nov. 19, 1794.

Notwithstanding his argument, submitted to the British Government, and based upon the treaty of Washington, that unanimity was essential for a valid award by the Halifax Commission, Mr. Evarts, Secretary of State, in 1878 declared that the Government of the United States would "regard the maintenance of entire good faith and mutual respect in all dealings, under the beneficent Treaty of Washington, as of paramount concern, and would not assume to press its own interpretations of the treaty on this point against the deliberate interpretation of Her Majesty's Government to the contrary." Moore, Dig., VII, 37, *citing* communication of Mr. Evarts, Secy. of State, to Mr. Welsh, Minister to Great Britain, Sept. 27, 1878, For. Rel. 1878, 290, 307–308.

See, also Colombia *v.* Cauca Co., 190 U. S. 524, 528, Moore, Dig., VII, 38.

time the *compromis* commonly makes express acknowledgment of this principle,[1] or covers it by adopting the chapter on arbitral procedure of the Hague Convention for the Pacific Settlement of International Disputes.[2]

(b)

§ 578. Cessation or Absence of Arbitral Functions.

Upon the rendition of its award a court of arbitration becomes *functus officio*, and thereafter cannot reopen the case, or reconsider its decision.[3] To preserve a right to obtain a rehearing, appropriate provision must be made in the *compromis* to prevent the cessation of the arbitral function, until the lapse of a specified time after the rendition of the award.[4] Within that period the tribunal is thereby kept alive and permitted to retain control over its own decision, the finality thereof being subject, during such interval, to the condition subsequent that no rehearing be granted.[5]

It must be clear that an arbitral tribunal lacks the power to review the decisions of precedent umpires or tribunals, or to amend or interpret the same,[6] except where an adjudication of such

[1] Art. II of protocol with Mexico, May 22, 1902, for the arbitration of the Pious Fund Case, Malloy's Treaties, I, 1195.

[2] See, for example, Art. XI of claims protocol with Venezuela, Feb. 13, 1909, providing for the arbitration of the Orinoco Steamship Company Case, Malloy's Treaties, II, 1886.

[3] Mr. Strong, Arbitrator in the Cases of Pelletier and Lazare, under protocol between the United States and Haiti, of May 28, 1884, to Mr. Preston, Haitian Minister, Feb. 18, 1886, S. Ex. Doc. 64, 49 Cong., 2 Sess., 43, Moore, Dig., VII, 41; Mr. Sherman, Secy. of State, to Mr. Rengifo, Colombian Chargé, May 5, 1897, For. Rel. 1898, 250, Moore, Dig., VII, 43; Count Lewenhaupt, umpire, Spanish-American Commission, under agreement of Feb. 11–12, 1871, Moore, Arbitrations, III, 2192. Count Lewenhaupt intimated that, according to the terms of that agreement, the umpire might have power to decide a petition for rehearing, if certified to him by the arbitrators of both the United States and Spain.

[4] Such a provision is oftentimes embodied in the *compromis*. See, for example, Art. X of special agreement with Great Britain of Jan. 27, 1909, for the North Atlantic Coast Fisheries Arbitration, Malloy's Treaties, I, 840. Also Art. LXXXIII of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, *id.*, II, 2242.

[5] Grounds justifying the demand for a rehearing should be set forth with precision in the *compromis*. According to Art. X of the special agreement with Great Britain of Jan. 27, 1909, providing for the North Atlantic Coast Fisheries Arbitration, it is declared that: "The demand can only be made on the discovery of some new fact or circumstance calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the Party demanding the revision at the time the discussion was closed, or upon the ground that the said award does not fully and sufficiently, within the meaning of this Agreement, determine any question or questions submitted." Malloy's Treaties, I, 840.

[6] Mr. Sherman, Secy. of State, to Mr. Rengifo, Colombian Chargé d'Affaires, Jan. 12, 1898, concerning the attitude of the United States respecting the reconsideration of the award of President Cleveland, March 2, 1897 (the day

matters is made the subject of a new submission by agreement between the parties.[1]

(8)

§ 579. Payment and Distribution of Awards.

If the arbitration contemplates the award of a pecuniary indemnity, the *compromis* should specify whether payment is to be made to the government of the successful party or to the individual claimant (in case private claims are the subject of adjudication).[2] It should indicate likewise the form of currency in which payment is to be made;[3] as well as the time of payment.[4]

before the expiration of his term of office as President), as arbitrator in the Cerruti Case, under protocol between Italy and Colombia of Aug. 18, 1894, For. Rel. 1898, 270, Moore, Dig., VII, 45. For the text of the award, see *Am. J.*, VI, 1015. For the text of the award of the later Arbitral Commission under *compromis* of Oct. 28, 1909, *id.*, VI, 1018. See, also, Editorial Comment, *id.*, VI, 965, and documents and commentaries there cited.

See, also, decision of Baron Blanc, umpire, Spanish-American Commission, under agreement of Feb. 11–12, 1871, in case of L. A. Price, No. 6, Moore, Arbitrations, III, 2189; opinion of Mr. Stewart, American Arbitrator, same commission, in case of Young, Smith & Co., No. 96, *id.*, 2186.

[1] For such an agreement see claims protocol with Venezuela, Feb. 13, 1909, providing for the arbitration of the Orinoco Steamship Company Case, Malloy's Treaties, II, 1881.

[2] According to Art. VII of the Jay Treaty of Nov. 19, 1794, payment was to be made to the claimants, and "in specie without any deduction." Malloy's Treaties, I, 596. See, also, Arts. IV and V, claims convention with Peru, Jan. 12, 1863, *id.*, II, 1409. More commonly it is provided that payment shall be made to the government of the nationals in whose favor sums are awarded. See, for example, Art. IV, claims convention with Mexico, July 4, 1868, *id.*, I, 1130; Art. VIII, agreement with Great Britain for the arbitration of pecuniary claims, Aug. 18, 1910, Charles' Treaties, 52.

[3] Thus Art. IX of the claims protocol with Venezuela, Feb. 13, 1909, provided that payment should be "In gold coin of the United States of America, or in its equivalent in Venezuelan money", Malloy's Treaties, II, 1886.

See Moore, Dig., VII, 51, and Moore, Arbitrations, II, 1644–1645, 1649, respecting the issue concerning the medium of payment of the sum awarded S. G. Montano, a Peruvian citizen, by the umpire of the mixed commission under convention with Peru of Jan. 12, 1863, and the decision of the mixed commission under convention of Dec. 4, 1868.

According to Art. X of the protocol with Mexico of May 22, 1902, for the arbitration of the Pious Fund Case, there was referred to the arbitral tribunal the determination of the currency in which an award against Mexico should be payable. Malloy's Treaties, I, 1198. Concerning the award see Rule of *Res judicata*, *infra*, § 581.

[4] Thus, for example, Art. VIII of the agreement with Great Britain, Aug. 18, 1910, for the arbitration of pecuniary claims, provided for payment within eighteen months after the date of the final award. Charles' Treaties, 52.

Testimonial and Expenses. "It is customary to present to arbitrators some testimonial, either in the form of plate or other token, or in money. Where the arbitrator is head of a state, the only acknowledgment given of his services is an expression of thanks, and the more substantial testimonial, whatever it may be, is bestowed upon the persons to whom he may have delegated the discharge of certain functions, such as the examination of documents, and perhaps the making of a report.

"The expenses of the arbitration are usually borne by the parties in equal

The mode of distribution to private claimants of an award paid to the government of the successful party is a matter of domestic concern.[1]

(9)

§ 580. Barring of Unpresented Claims.

"It is usual in general claims conventions to insert a stipulation expressly barring all claims, falling within the jurisdiction of the tribunal, which were not presented to it."[2] Thus, for example, Article II of the agreement with Great Britain of August 18, 1910, for the arbitration of pecuniary claims, provided that all claims outstanding between the two governments at the date of the signature of the agreement, and originating in circumstances or transactions anterior to that date, whether submitted to arbitration or not, should thereafter be barred, unless reserved by either party for further examination in accordance with the previous article.[3]

If the agreement to arbitrate makes no provision for the barring of unpresented claims,[4] or if the tribunal declares a particular claim or class of claims to be outside of its jurisdiction, the matter remains a proper subject for diplomatic treatment.[5] In a word, if

proportion, but each side pays its own agent and counsel, as well as its own individual expenses, such as the printing of its case, documents, and proofs." Moore, Dig., VII, 50.

The Department of State has declared that "it would not comport with the dignity of the American diplomatic service nor be a wise precedent to establish to permit a party interested in an arbitration before an American diplomatic officer to remunerate him for the discharge of his duties in any capacity whatever." Mr. Wilson, Acting Secy. of State, to Mr. Fox, Minister to Ecuador, Dec. 3, 1909, For. Rel. 1909, 246.

[1] Respecting the distribution of the Geneva award through the medium of "Alabama" Claims Courts, see Moore, Arbitrations, 4639–4685.

As to the adjudication of conflicting claims to an award, see cases cited in Moore, Dig., VII, 51–52.

See Opinion by J. R. Clark, Jr., Solicitor for Dept. of State, Aug. 14, 1912, on the Distribution of Alsop Award by the Secretary of State, Washington, 1912.

[2] Moore, Dig., VII, 52. "It has been held, with practical uniformity, that where a treaty provides a tribunal for the settlement of claims, and stipulates that all claims not presented to it shall be finally barred, this part of the treaty is no less obligatory than the rest, and that it precludes the two governments from renewing the claims thus barred, instead of merely giving them an option to decline to pay them." *Id.*, VII, 53. *Compare* Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Jan. 26, 1886, MS. Inst. Mexico, XXI, 427, Moore, Dig., VII, 52.

[3] Charles' Treaties, 51. See, also, Art. V, claims convention with Mexico, July 4, 1868, Malloy's Treaties, I, 1131; Mr. Rives, Assist. Secy. of State, to Mr. Gregg, May 12, 1888, 168 MS. Dom. Let. 359, Moore, Dig., VII, 54.

[4] Mr. Porter, Acting Secy. of State, to Mr. Curry, Jan. 2, 1886, MS. Inst. Spain, XX, 136, Moore, Dig., VII, 53.

[5] Mr. Bayard, Secy. of State, to Mr. Curry, Minister to Spain, April 9, 1886, MS. Inst. Spain, XX, 183, Moore, Dig., VII, 54. See, also, Same to Mr. McLane, July 29, 1885, MS. Inst. France, XXI, 231, Moore, Dig., VII, 54.

the opposing States have neither agreed to, nor succeeded in obtaining opportunity for, an arbitral adjudication, the government of the claimant is not without the right to make renewed effort to obtain redress.

(10)

Finality of Awards

(a)

§ 581. Rule of *Res Judicata.*

The rule of *res judicata* is applied to the awards of arbitral courts. The decision of an international tribunal over matters as to which it is made the supreme arbiter is said to be final, and not the subject of revision, except by the consent of the contesting sovereigns.[1]

This principle was given impressive recognition by the decision of the arbitral tribunal in the Pious Fund Case.[2] It has, moreover,

[1] Comegys *v.* Vasse, 1 Pet. 193, 212, Moore, Dig., VII, 55. See, also, La Ninfa, 75 Fed. 513, Moore, Dig., VII, 55, respecting the significance of an arbitral award under a treaty of the United States, providing that the decision of the arbitrators shall constitute a final settlement of all questions submitted, with respect to the courts of the United States.

Moore, Dig., VII, 55–56, with respect to the award in favor of R. W. Gibbes by the umpire of the American-New Granadian Commission, under convention of Sept. 10, 1857.

[2] The United States and Mexico had been at variance as to the effect of the decision of Sir Edward Thornton, as umpire, Nov. 11, 1875, and amended Oct. 24, 1876, awarding to the Roman Catholic Bishops of Monterey and of San Francisco the sum of $904,700.99 in Mexican gold dollars, this amount being for twenty-one years' interest of the annual amount of $43,080.99. This annual sum represented the amount derived from property taken from the Bishop of the Californias by the Mexican Government, and disposed of by it, the interest not being paid to him notwithstanding governmental recognition of an obligation to make payment. Moore, Arbitrations, II, 1348–1352. By a protocol of May 22, 1902 (Malloy's Treaties, I, 1194), there was referred to a tribunal selected from the Permanent Court at the Hague, the issue whether the claim of the United States to further installments of interest (after Feb. 2, 1869) was conclusively established, and its amount fixed by force of Sir Edward Thornton's award, as *res judicata*. The tribunal decided this question affirmatively. Adverting to the identity of the parties to the suit as well as of the subject matter, the tribunal awarded to the United States the sum of $1,420,682.67, Mexican, representing installments of interest from Feb. 2, 1869, to Feb. 2, 1902, and an annuity of $43,050.99, Mexican, on Feb. 2, 1903, and annually thereafter in perpetuity.

It was declared that "because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence", Sir Edward Thornton's award had not the force of *res judicata* as to form of currency in which payment should be made except for the amount he had decreed. Adverting to the absence of a stipulation in the protocol for payment in gold, it was held that the party defendant had the right to free itself of its obligation by paying in silver, which had been legal currency in Mexico. It should be observed that by the terms of the protocol the question as to the currency in which any award against Mexico should be payable

oftentimes found expression in the provisions of agreements to arbitrate.[1] The Department of State is, therefore, wisely reluctant to encourage claimants to expect an endeavor on the part of the United States to reopen adjudicated cases.[2]

(b)

§ 582. Award Outside of Limits of Submission.

An award outside of the limits of submission is not binding, for in such case the tribunal acts in excess of its powers.[3] Thus in the case of the Northeastern Boundary Dispute, the King of the Netherlands, arbitrator under the convention between the United States and Great Britain of Sept. 29, 1827, abandoned, as has been observed, the issue referred to him, of determining the true line of demarcation indicated in the treaty of 1782–1783, and instead recommended a line of his own devising. Hence acceptance of the award was not deemed obligatory, and the dispute was ultimately adjusted by diplomacy.[4]

was expressly referred to the tribunal. If the rule of *res judicata* was applicable to the amount of the interest installments fixed by Sir Edward Thornton, it is not perceived why the extent of Mexico's obligation should have been lessened by permitting payment in a depreciated currency. It may be doubted whether "the mode of payment" when it related directly to the extent of the pecuniary obligation involved did not in fact "relate to the basis of the right in litigation." For the text of the award, Oct. 14, 1902, see For. Rel. 1902, Appendix II, 16–18, *Am. J.*, II, 898.

See, also, other instances cited in Ralston, Arbitral Law and Procedure, §§ 31–32.

[1] Mr. Bayard, Secy. of State, to Mr. Rodriguez, March 22, 1886, with respect to such a provision in the Spanish-American agreement of Feb. 11–12, 1871, 159 MS. Dom. Let. 388, Moore, Dig., VII, 56; also Mr. Hay, Secy. of State, to Mr. Sparkman, June 6, 1899, 237 MS. Dom. Let. 396, Moore, Dig., VII, 58.

It must be clear that the finality of an arbitral award is unaffected by the mode by which the contractual obligation to have recourse to arbitration is perfected. See Mr. Bayard, Secy. of State, to Mr. Rodriguez, March 22, 1886, 159 MS. Dom. Let. 388, Moore, Dig., VII, 56.

"Of course an international award may not be maintained as *res judicata* against a nation not a party to it, and it was so declared in the arbitral sentence of Victor Emmanuel upon the question of the frontier between British Guiana and Brazil, *Revue Générale de Droit International Public*, 1904, documents, p. 18." Ralston, Arbitral Law and Procedure, § 35.

[2] Mr. Rives, Assist. Secy. of State, to Mr. Shipman, Feb. 2, 1888, 167 MS. Dom. Let. 70, Moore, Dig., VII, 57; Mr. Day, Assist. Secy. of State, to Mr. Oberlander, Jan. 7, 1898, 224 MS. Dom. Let. 249, Moore, Dig., VII, 58.

[3] Declared Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, respecting the claim of the Orinoco Steamship Company: "A decree of a court of arbitration is only final provided the court acts within the terms of the protocol establishing the jurisdiction of the court. . . . A disregard of such terms necessarily deprives the decision of any claim to finality." For. Rel. 1908, 774, 783. See, also, Same to Same, June 21, 1907, *id.*, 800, 802–803.

[4] For the text of the award see Moore, Arbitrations, 127; concerning its

Excessive action on the part of an arbitral tribunal may be due to a misconstruction of its powers, manifest in the reasons given in the award.[1] Thus it was declared by the Tribunal at the Hague in its decision in the Orinoco Steamship Company Case that

> Excessive exercise of power may consist, not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied.[2]

In that case recourse to arbitration was had in order to adjust a controversy between the United States and Venezuela concerning the effect of the award of Dr. Barge, umpire, of the mixed claims commission under protocol between those States of February 17, 1903.[3] The United States had contended that there should be a reopening of the case because of violations of the terms of the protocol, or errors in the final award "arising through gross errors of law and fact."[4] According to Article I of a protocol of February 13, 1909, there was submitted to the arbitral Tribunal the question, whether or not the decision of Dr. Barge, in view of all the circumstances and under the principles of international law, was void, and whether it should be considered so conclusive as to preclude a reëxamination of the case on its merits. It was agreed that should the Tribunal decide that the decision ought to be considered final, the case would be deemed by the United States as closed; but that if, on the other hand, the Tribunal should decide that the decision of Dr. Barge should not be considered as final, the Tribunal should then hear, examine and determine the case on its merits.[5] In the award of October 25, 1910, it was declared

recommendatory character, and the mutual waiver of the award, *id.*, 137–138, and documents there cited; also Moore, Dig., VII, 59–60. See, also, P. Fiore, "*La Sentence Arbitrale du Président de la République Argentine dans le Conflit de Limites entre la Bolivie et le Pérou*", *Rev. Gén.*, XVII, 225–256, cited by Oppenheim, 2 ed., II, 19.

[1] Report of Mr. Bayard, Secy. of State, to the President, Jan. 20, 1887, respecting the award of the umpire in the Pelletier Case against Haiti, under protocol of May 28, 1884, Moore, Arbitrations, II, 1793–1800, Moore, Dig., VII, 60–61, and 68–69.

[2] *Am. J.*, V, 230, 233, G. G. Wilson, Hague Arbitration Cases, 217, 223.

[3] For the text of the protocol, see Malloy's Treaties, II, 1870. For the text of the award, see Ralston's Report, Venezuelan Arbitrations, 1903, 83.

[4] Communication of Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, For. Rel. 1908, 775, 780–786.

[5] Malloy's Treaties, II, 1882. See attitude of the United States in 1885–1888, respecting the award by the commission under convention with Paraguay, Feb. 4, 1859 (Malloy's Treaties, II, 1362), adverse to the claim of the

that the parties had admitted by implication in their agreement to arbitrate, that "excessive exercise of jurisdiction and essential error in the judgment" constituted "vices involving the nullity of an arbitral decision." It was said that inasmuch as the Barge award embraced several independent claims, and consequently several decisions, the nullity of one was without influence upon any of the others, especially where the integrity and good faith of the arbitrator were not questioned. Thereupon, the Tribunal pronounced separately on each of the points at issue.[1] With respect to certain of these it annulled the decision of Dr. Barge, and held, in the language of the Agent of the United States, "that departure from the terms of the protocol is a just ground for annulling an international award and furthermore that disregard of the rules of law enjoined by the terms of submission amounts to a departure from the submission."[2]

(c)

§ 583. Unconscionable Awards.

The duty of the executive to refuse to enforce an award which turns out to have been inequitable or unconscionable has been maintained in repeated rulings of the Department of State, and is sanctioned by the Supreme Court of the United States.[3] Thus in one instance where proceedings were impeached by Venezuela for fraud, on the part of the tribunal, under convention of April 25, 1866, the United States agreed by a convention of December 5, 1885, to the rehearing of the claims.[4]

In the cases of Weil and of La Abra Silver Mining Company before the American-Mexican Commission of July 4, 1868, when

United States and Paraguay Navigation Company, Moore, Arbitrations, II, 1543–1545. See, generally, as to the Claim, *id.*, 1485–1549.

[1] *Am. J.*, V, 230; also *Nouv. Rec. Gén.*, 3 ser., IV, 79; G. G. Wilson, Hague Arbitration Cases, 217.

[2] William Cullen Dennis, "The Orinoco Steamship Company Case", *Am. J.*, V, 35, 54, where it was also said that "It is believed that there is nothing in the positive or negative action of the court which is unfriendly to the further contention of the United States that there may be essential error without any departure except that which arises from a palpable denial of justice" See, also, G. Scelle, "*Une Instance en Revision devant la Cour de la Haye.*" *Rev. Gén.*, XVIII, 164.

[3] The statement in the text is substantially the language of Mr. Bayard, Secretary of State, in a Report to the President, in the case of Antonio Pelletier, Jan. 20, 1887, *citing* Frelinghuysen *v.* Key, 110 U. S. 63, For. Rel. 1887, 593, 606; Moore, Dig., VII 69

[4] For the texts of these conventions, see Malloy's Treaties, II, 1856 and 1858, respectively Also Moore, Arbitrations, II, 1659–1692, and documents there cited; Moore, Dig., VII, 62–63.

the United States discovered that, through fraud on the part of American claimants, it had been made the instrument of wrong towards a friendly State, by means of impositions upon the arbitral tribunal as well as upon itself, it repudiated the acts and made reparation.[1]

The Department of State is rightly indisposed to seek enforcement of an award favorable to an American citizen, which is deemed unjust, by reason, for example, of the founding of the claim on the tortious conduct of the claimant, or of irregularities in the arbitral proceedings, or of the existence of documents adverse to the claimant and not submitted to the tribunal.[2]

b

§ 584. Joint Commissions.

A joint commission is a body composed of representatives of opposing States, and in which the delegation on each side has an equal voice. To that end each party commonly chooses an equal number of representatives. The function of such a body may be to adjust differences by negotiation,[3] or to investigate and report upon issues of fact as a commission of inquiry,[4] or to act as a judicial

[1] This was accomplished not only by repayment to Mexico of undistributed portions of moneys received in payment of awards, but also by an appropriation in repayment of portions of such moneys as were already distributed. Moore, Arbitrations, II, 1324–1348, also Moore, Dig., VII, 63–68, and documents there cited. Moreover, the Supreme Court of the United States held that as the person invoking the interposition of the Government to collect his claim against a foreign State impliedly engaged to act in good faith, the honesty of his claim was always open to inquiry, and that if it proved to be fraudulent or fictitious, it became the duty of his government to withhold from him any money received by it in payment thereof. La Abra Silver Mining Co. *v.* United States, 175 U. S. 423 458–459, Moore, Dig., VII, 67–68, *citing* Frelinghuysen *v.* Key, 110 U. S. 63, 71–73; Boynton *v.* Blaine, 139 U. S. 306.

[2] Report of Mr. Bayard, Secretary of State, to the President, Jan. 20, 1887, respecting the award in favor of Antonio Pelletier against Haiti, and respecting that in favor of A. H. Lazare, against the same State. Moore, Arbitrations, 1793–1800, and 1800–1805, respectively, Moore, Dig., VII, 68 and 69.

See, also, Ralston, Arbitral Law and Procedure, §§ 148 and 149.

[3] The treaty of Washington with Great Britain of May 8, 1871, Malloy's Treaties, I, 700, embracing provisions for the adjustment by arbitration of the Alabama and other claims, was the work of a joint high commission. Respecting its labors, see Moore, Arbitrations, I, 535–546.

See, also, Protocol of Conferences at Washington in May, 1898, preliminary to the appointment of a Joint High Commission for the adjustment of questions at issue between the United States and Great Britain, in respect to the relations of the former with the Dominion of Canada, Malloy's Treaties, I, 770.

[4] See, for example, provision made in Art. II of proposed general arbitration convention with France of Aug. 3, 1911, Charles' Treaties, 381.

tribunal.[1] Mixed claims commissions, until at least the commissioners disagree and refer their differences to an umpire, are frequently joint commissions of this last type.[2]

A joint commission, although entrusted with the performance of a judicial function, differs from an arbitral tribunal in that the former lacks an umpire, and is capable of disagreement precluding a decision. A decision by the barest majority requires, therefore, one member to vote against the contentions of the State which appoints him. It is found that notwithstanding their probity and ability, and their making oath to act impartially, commissioners, especially when nationals of the State appointing them, like arbitrators similarly chosen, have difficulty in acquiescing in the contentions of the State not appointing them, unless supported by the most convincing evidence and sanctioned by the law. This fact has encouraged States to submit to such commissions issues found to be incapable of adjustment by diplomacy, and for the solution of which arbitration was deemed inexpedient; for it has been felt that if a national representative should join the commissioners of the opposite party in deciding in its favor, the justice of its case would surely be established beyond reasonable doubt.

The joint commission offers, in theory, a defective mode of procedure accentuating the very imperfections which it is sought on every side to remove from arbitral tribunals. The United States has, nevertheless, on more than one occasion, through the instrumentality of such bodies found it possible to effect adjustment of grave territorial differences,[3] of which the most notable instance is that of the Alaskan Boundary Dispute.[4] The use of a joint commission was, moreover, the mode by which, through a

[1] John W. Foster, Arbitration and the Hague Court (1904), 87–95.

[2] See, for example, the mixed claims commission under Convention with Mexico of July 4, 1868, Malloy's Treaties, I, 1128.

[3] See Territorial Differences, *supra*, § 563, and especially Report of John Jay, Secy. of State for Foreign Affairs to the Congress, April 21, 1785, Am. State Pap., For. Rel. I, 94.

[4] Art. I of the Convention with Great Britain of Jan. 24, 1903, providing for the adjudication, declared that "a tribunal shall be immediately appointed to consider and decide the questions set forth in Article IV of this convention. The tribunal shall consist of six impartial jurists of repute who shall consider judicially the questions submitted to them, each of whom shall first subscribe an oath that he will impartially consider the arguments and evidence presented to the tribunal and will decide thereupon according to his true judgment. Three members of the tribunal shall be appointed by the President of the United States, and three by His Britannic Majesty. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the members thereof." Malloy's Treaties, I, 788. For the decision of the tribunal of Jan. 24, 1903, *id.*, I, 792.

permanent treaty, Secretary Olney and Lord Salisbury proposed, in 1897, to adjust territorial and other differences of first magnitude between the United States and Great Britain.[1]

C

§ 585. The Covenant of the League of Nations.

The Covenant of the League of Nations embraced in the Treaty of Versailles of June 28, 1919, is designed to make provision for the amicable adjustment of differences of every kind and degree. Thus the Members of the League undertake, in the event of a dispute between them, "likely to lead to a rupture", to submit the matter either to arbitration or to inquiry by the Council of the League, and in no case to resort to war until three months after the award by the arbitrators or the report of the Council.[2] There is agreement among the members that any dispute between them "which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy" shall be submitted to arbitration.[3] There is no provision, however, serving to render recourse to arbitration obligatory except so far as the parties to a controversy may be constrained to take such action through a mutual desire to avoid the alternative open to them. There is otherwise no compulsion to effect the adjudication before an arbitral tribunal of such justiciable differences, however defined or restricted, as experience has shown to be susceptible of reasonable adjustment by such process. The duty to carry out in the best of faith any arbitral award is acknowledged; and there is agreement not to resort to war against a Member of the League which complies therewith.[4]

[1] For the text of the treaty, see For. Rel. 1896, 238. See, also, correspondence prior to its signature, *id.*, 222–237.

[2] See Art. XII. It is also provided that in any case under this Article, the award of the arbitrators shall be made within a reasonable time, and the report of the Council within six months after the submission of the dispute.

[3] See Art. XIII. It is there added that "Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration."

See Arbitration, Justiciable Differences, *supra*, §§ 560–561.

With respect to disputes between a Member of the League and a State not a Member thereof, or between States which are not Members, see Art. XVII. See, also, in this connection, The League of Nations and Intervention, *supra*, § 84.

[4] Art. XIII. This Article also provides that "in the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto."

Should there arise between Members of the League any dispute likely to lead to a rupture, and which is not submitted to arbitration (in accordance with Article XIII of the Covenant), it is agreed that the matter shall be submitted to the Council.[1] That body is to endeavor to effect a settlement, and if its efforts are successful, it is to make public a statement giving such facts and explanations regarding the dispute and the terms of settlement as the Council deems appropriate. If the dispute is not thus settled, the Council either unanimously or by a majority vote is to make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.[2] If the report is unanimously agreed to by the Members of the Council other than the representatives of one or more of the parties to the dispute, the Members of the League agree not to go to war with any party to the dispute which complies with the recommendations of the report. If the Council fails to reach a report which is unanimously agreed to by the Members thereof, other than the representatives of one or more of the parties to the difference, it is declared that the Members of the League reserve to themselves the "right to take such action as they shall consider necessary for the maintenance of right and justice." [3]

The Council may refer a dispute, which has been submitted to

[1] Art. XV. Concerning the membership and organization of the Council, see Art. IV.

According to Art. XV, any party to the dispute may effect the submission of it to the Council by giving notice of the existence of the dispute to the Secretary-General of the League, who is to make all necessary arrangements for a full investigation and consideration thereof. For such purpose, the parties to the dispute are to communicate to him, as promptly as possible, the statements of their case with all the relevant facts and papers. It is declared that the Council may forthwith direct the publication thereof.

[2] Art. XV. It is here also provided that any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

[3] There is an important restriction in Art. XV to the effect that "if the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

According to Art. XVI: "Should any Member of the League resort to war in disregard of its covenants under Articles XII, XIII, or XV, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

it, to the Assembly of the League; and either party to the difference may, under specified conditions, demand such a reference.[1]

The foregoing provisions for the use of the Council (or the Assembly) contemplate the obligatory adjustment, by amicable although essentially non-judicial processes, of differences which, regardless of their character, States have been generally indisposed to submit to an international tribunal. The Council, once possessed of jurisdiction, enjoys largest freedom in method and purpose. It is bound by no theory or principle in exercising its function. It is free to avail itself of any practicable means which are deemed expedient. It may consult the Permanent Court of International Justice for the establishment of which provision is made in the Covenant;[2] it may follow or disregard the advice of that tribunal; it may resort to compromise or adhere to law.

[1] Art. XV. It is here provided that in any case referred to the Assembly, all the provisions of Arts. XII and XV relating to the action and powers of the Council shall apply to the action and powers of the Assembly, "provided that a report made by the Assembly, if concurred in by the representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the Members thereof other than the representatives of one or more of the parties to the dispute."

Concerning the membership and organization of the Assembly, see Art. III.

[2] Art. XIV.

TITLE B

NON-AMICABLE MODES SHORT OF WAR

1

§ 586. In General.

Enlightened States, on occasions when their grievances prove to be incapable of settlement by diplomacy, not infrequently have recourse to essentially non-amicable measures for the purpose of obtaining redress or of removing the cause of controversy. Such measures may or may not lead to war. It is the steps taken which are not necessarily designed to produce such a result, and which are not, at least for the time being, regarded by the State against which they are directed as amounting to acts of war, that are here observed.

Non-amicable measures may involve the use of force or of other forms of conduct. They may be employed for the purpose of checking the commission of legal as well as illegal acts on the part of a foreign State. They may indicate a preference for the exercise of sheer power over any other instrumentality however efficacious. Their very use may, under the existing circumstances, constitute a violation of international law.

The State which resorts to force in order to adjust, according to ways of its own devising, a difference commonly deemed susceptible of settlement by judicial means, such as arbitration, and which are suitably and reasonably proposed by the opposing State, asserts the right to be the sole judge of its own cause, and thereby places itself beyond the law. The absence, however, of general agreement concerning what differences should be referred to adjudication before an international tribunal renders it still possible for a State bent on obtaining redress by its own strong arm to excuse the use of force by pleading the non-arbitrable or non-justiciable quality of its grievance.[1] The validity of such an ex-

[1] The Hague Convention of Oct. 18, 1907, respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Malloy's Treaties, II, 2248, indicates an occasion when it is agreed that such an excuse is to be deemed inapplicable and insufficient.

cuse must, in view of existing practice, depend upon the circumstances of the particular case. Until, therefore, the principle indicating the true range of arbitrable differences is clearly perceived and generally accepted, and the means of obtaining justice in such disputes through judicial tribunals obviously assured and necessarily recognized, it is impossible to indicate with precision the conditions when recourse to non-amicable measures entailing the use of force is to be denounced as internationally illegal.

It should be observed that frequently it is not the initial denial of justice or violation of international law, but rather the refusal of an offending State to submit to any adjudication before an international tribunal that is responsible for the employment of non-amicable measures. The aggravation of its own misconduct by a delinquent State rather than the arbitrary designs of a formidable opponent has thus oftentimes been the cause of the procedure followed.

2

§ 587. Withdrawal of Diplomatic Relations.

In order to obtain redress for grievances for the satisfaction of which diplomatic negotiation has proved unavailing, a State may sever its diplomatic relations with the State charged with wrongdoing. Such action is not only expressive of national indignation, but also frequently serves to impress upon the latter the desirability of making amends.

On June 13, 1908, Secretary Root declared that in view of the persistent refusal of the existing Government of Venezuela (under President Castro) to give redress for governmental action by which substantially all American interests in that country had been destroyed or confiscated, or to submit the claims of American citizens for such redress to arbitration, the United States was forced to the conclusion that the further presence in Caracas of its diplomatic representatives subserved no useful purpose, and was determined to close its legation in that capital, and to place its interests, property and archives in Venezuela in the hands of representatives of Brazil.[1] Through the medium of that State, a new Venezuelan administration under President Gomez made known to the United States in December, 1908, a desire to settle satisfactorily all international questions.[2] In February, 1909, Mr. William I. Buchanan,

[1] Telegram to Mr. Sleeper, American Chargé d'Affaires, For. Rel. 1908, 820. See, also, generally, *id.*, 774–830.

[2] Mr. Root, Secy. of State, to Mr. Buchanan, Special Commissioner, Dec. 21, 1908, For. Rel. 1909, 609.

as Special Commissioner of the United States, effected agreements with Venezuela providing either for direct settlement or the arbitration of all pending claims.[1] The American Minister, Mr. Russell, was thereupon instructed to return to his post.[2]

It will be recalled that in 1909 the United States severed its diplomatic relations with Nicaragua while under the administration of President Zelaya, whose régime was denounced as "a blot upon the history" of that State, and whose direct order in causing the execution of two American citizens who had been officers in the revolutionary forces in that country was deemed to be at variance with the practice of civilized nations.[3]

The withdrawal of diplomatic relations never constitutes in itself internationally illegal conduct; for no legal duties rest upon an aggrieved State to maintain uninterrupted official intercourse with any other through the diplomatic channel, and still less with one whose conduct is, for any reason, deemed to be reprehensible.

[1] Mr. Root, Secy. of State, to Mr. Buchanan, Special Commissioner, Dec. 21, 1908, For. Rel. 1909, 609–624. According to a protocol of Feb. 13, 1909. *id.*, 617, it was agreed that the claim in behalf of the Orinoco Steamship Company, that in behalf of the Orinoco Corporation and of its predecessors in interest, and that in behalf of the United States and Venezuela Company should be referred to an arbitral tribunal composed of three arbitrators chosen from the Permanent Court at the Hague. The Orinoco Steamship Company's claim was duly submitted to arbitration; the other two claims were settled by direct negotiation. *Id.*, 624–629.

[2] Mr. Buchanan was commissioned "to represent the President with full power to confer with the Government of Venezuela in all matters relating to the reëstablishment of diplomatic relations between the United States and Venezuela." He was instructed that upon the incorporation in a protocol of the terms of adjustment desired "the minister of the United States to Venezuela will be directed to return to his post and the United States will be ready to receive a diplomatic representative of Venezuela." Mr. Root, Secy. of State, to Mr. Buchanan, Special Commissioner, Dec. 21, 1908, For. Rel. 1909, 609.

See, also, documents in Moore, Dig., VII, 103–105.

In response to a request of Mr. Monroe, American Minister at Paris, Dec. 6, 1796, for the appointment of a time when he might present his successor, Mr. Pinckney, as well as his own letters of recall, Mr. De La Croix, the French Minister of Foreign Affairs, replied: "The directory has charged me to notify to you 'that it will no longer recognize nor receive a minister plenipotentiary from the United States, until after a reparation of the grievances demanded of the American Government, and which the French Republic has a right to expect.'" Am. State Pap., For. Rel. I, 746. "The Directory refused to give Pinckney a permit to sojourn in Paris as a private foreigner, and afterwards sent him a notice to quit the territories of the Republic. He then retired to Amsterdam to await developments." Moore, Dig., V, 598, *citing* Am. State Pap., For. Rel. II, 10.

[3] Mr. Knox, Secy. of State, to the Nicaraguan Chargé d'Affaires, Dec. 1, 1909, For. Rel. 1909, 455.

In April, 1914, after Rear-Admiral Fletcher had seized the customhouse at Vera Cruz, General Huerta, as head of the Provisional Mexican Government, gave Mr. O'Shaughnessy, the American Chargé d'Affaires *ad interim* at Mexico City, his passports, with a view to severing diplomatic relations with the United States. *Am. J.*, VIII, 582–583.

The unwisdom, however, of recourse to such action, save for ample cause, must always be apparent.

3

§ 588. Retorsion. Retaliation.

The term retorsion is said to refer broadly to "the action taken by a State in order to compensate it for some damage suffered through the action of another State, or in order to deter the action complained of."[1] Retorsion frequently takes the form of retaliation, when, for example, the act of the complaining State is of the same kind as that of its opponent.[2] This fact has led to the intimation that retorsion is a species of retaliation.[3] Retorsion is seen, however, in acts which are not retaliatory because neither identical with, nor closely analogous to, those of which complaint is made. Thus in 1870, President Grant, anticipating a repetition by Canadian authorities of "their unneighborly acts" towards American fishermen, recommended that the Executive be empowered to suspend, by proclamation, the operation of the laws authorizing the transit of goods, wares and merchandise in bond across the territory of the United States to Canada; and further, if need be, to suspend the operation of any laws permitting the entrance of Canadian vessels into American waters.[4] Such a response on the part of the United States would have furnished an instance of this form of non-amicable action.

Retorsion is frequently the retaliatory answer given to the unfriendly yet not illegal acts of another State. This is true, when, for example, the ports of a country are closed against vessels be-

[1] Westlake, 2 ed., II, 6.
See Marshall, C. J., in The Nereide, 9 Cranch, 388, 422, Moore, Dig., VII, 106, respecting the duty of the courts not to interfere with the political department in asserting the right to commit acts of retorsion.

[2] Thus Hall declares that retorsion "consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated. Thus if the productions of a particular state are discouraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbors by like laws and tariffs." Higgins' 7 ed., § 120, p. 379, *citing* De Martens, *Précis*, § 254; Phillimore, iii, § vii; Bluntschli, § 505.

[3] Thus there has come into being the tautological phrase that retorsion is "retaliation in kind." Wharton, Com. Am. Law, § 206, Moore, Dig., VII, 105–106. The derivation of the word retaliation from the Latin verb *retaliare*, signifying to return like for like, in contrast to that of retorsion from *retorquere*, signifying to twist or turn back, ought to suffice as a warning against such a statement. It would not be inaccurate to describe retaliation as retorsion in kind.

[4] Message of Dec. 5, 1870, For. Rel. 1870, II, Moore, Dig., VII, 107.

longing to and arriving from a foreign State whose ports are by law closed against vessels of the former.[1] When retaliation is the consequence of lawful conduct, no legal issue confronts the States at variance. It may be observed, however, that the fear of such retaliation may and oftentimes does serve to restrain the exercise of lawful though discriminatory and possibly unfriendly treatment of a foreign State or of its nationals.

Retorsion may be the answer given to internationally illegal conduct.[2] In such case it becomes difficult to estimate the value of the excuse of the aggrieved State in responding by either retaliation or some other form of essentially lawless action. That such a State has been subjected to illegal treatment or its nationals to a denial of justice, should not on principle justify a lawless retort, until at least amicable measures have been exhausted or have proven ineffectual, or appear to offer no reasonable means of adjustment.[3]

Acts of retorsion may assume a variety of forms.[4] They are seen, for example, in the display of force made by the maintenance of a naval squadron in or near the waters of a foreign State charged with wrongdoing. Such means have been employed by the United States in dealing with disordered countries, or with those not at the time accepted for all purposes as full-fledged members of the family of nations, and chiefly for the purpose of deterring the continuance of reprehensible conduct.[5]

[1] See, for example, Act of April 18, 1818, Chap. 65, 3 Stat. 432, Moore, Dig., VII, 106; and interpreting the same, see The Pitt, 8 Wheat. 371, Moore, Dig., VII, 106; and The Frances and Eliza, 8 Wheat. 398, Moore, Dig., VII, 398. Also Mr. Marcy, Secy. of State, to Mr. Parker, Oct. 5, 1855, MS. Inst. China, I, 127, Moore, Dig., VII, 106.

[2] Declares Westlake: "As a matter of law there is retorsion when state A deems that it has received from state B not merely damage but legal injury, exempting it from the duty of a strict observance of law towards the wrongdoer, and replies by another breach of law intended to be compensatory or deterrent." 2 ed., II, 6. *Compare* Oppenheim, 2 ed., II, §§ 29–32, pp. 36–38.

[3] *Id. Compare* Certain Non-political Acts of Self-defense, *supra*, §§ 65–68.

[4] Certain acts, however, by reason of the circumstances attending their commission (see Certain Non-political Acts of Self-defense, *supra*, §§ 65–68), or the nature of what is attempted or accomplished (see Reprisals, *infra*, §§ 589–590), are commonly given a narrower description which serves to obscure the broader classification within which they also naturally fall.

The classification of the several non-amicable measures which States employ for the purpose of obtaining redress may be unimportant. Publicists are not agreed in the matter, while statesmen are unconcerned. The classification here employed is suggested by that of the late Professor Westlake. Int. Law, 2 ed., II, 6–11. It has the merit of being etymologically sound, and of not violating any technical distinctions which States generally, or the United States in particular, have relied upon.

[5] See, for example, President J. Q. Adams, Annual Message, Dec. 6, 1825, Richardson's Messages, II, 299, 308, Moore, Dig., VII, 107; see also other instances cited in Moore, Dig., VII, 108–109.

In order to obtain redress for existing grievances, the Government of the United States has, on various occasions, both with and without Congressional authority, made use of force against a delinquent State without, however, attempting to take even temporary possession or control of its territory or other property. Thus, in 1858, with such authority vigorous steps were taken against Paraguay. In order to assure the obtaining of redress for the consequences of the wrongful firing upon the American naval vessel *Water Witch* while in the waters of the river Parana, and a fair mode of adjusting the pecuniary claim of the United States and Paraguay Navigation Company, a large naval fleet was sent out. Its presence in the waters of the Plate was deemed of value in enabling the special commissioner of the United States, Mr. James B. Bowlin, to secure a satisfactory adjustment.[1]

By reason of the failure of the community at Greytown, Nicaragua, to yield to the peremptory demand of Captain Hollins, commanding the U. S. S. *Cyane*, to make satisfactory apology for insults directed against Mr. Borland, the American Minister to Central America, and to pay twenty-four thousand dollars as an indemnity for injuries to the Accessory Transit Company, that town was on July 13, 1854, twice bombarded by the *Cyane*, and its destruction finally completed by fire set by a naval force sent ashore for that purpose.[2] President Pierce, in defending this action, declared the community to be "a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages."[3] The bombardment of Greytown is not, therefore, illustrative of the procedure which the United States would employ against any member of the family of nations. It is not believed that the case points to a wise or humane method of seeking justice from countries or

[1] Professor Moore adverts to the "singular circumstance" that this claim which the commission held to be unfounded, although presented by one Hopkins himself (with whom it originated), "had not actually been presented by the United States to the Paraguayan Government prior to the sending out of the expedition." Dig., VII, 111, also Moore, Arbitrations, 1485–1549.

Mr. Bowlin obtained apologies for the treatment of the *Water Witch*, a substantial indemnity for the family of the helmsman mortally wounded during the attack on the vessel, a treaty of amity and commerce (concluded Feb. 4, 1859, Malloy's Treaties, II, 1364), and a claims convention (concluded the same day, *id.*, II, 1362), providing for the arbitration of the claim of the United States and Paraguay Navigation Company.

[2] Brit. & For. State Pap., XLVI, 859–888, and XLVII, 1004–1038, Moore, Dig., VII, 112–116, 346–354, and documents there cited.

[3] Annual Message, Dec. 4, 1854, Richardson's Messages, V, 273, 282, Moore, Dig., VII, 353.

peoples regarded as outside of the limits of that family and not entitled to treatment accorded its members.[1]

4

REPRISALS

a

§ 589. The Growth of the Practice.

The modern law of reprisals finds its origin in the intercourse of alien peoples and cities centuries before the rise of international law. From early times the idea prevailed that for wrongs committed by a foreigner, his fellow-countrymen as well as himself were responsible. All were deemed severally liable for the default of the individual, a fact attributable to the oneness of interest deemed to exist between a sovereign and his subjects.[2] The obtaining of reparation was necessarily left to private individuals. Merchants banded together for the purpose of inflicting punishment upon, or of obtaining redress from, those who had wronged any of their number.[3] By land and sea the work was carried on. Persons and property were seized and even destroyed.[4] From such conduct there grew up in the Middle Ages a distinct

[1] See also documents in Moore, Dig., VII, 116–117 with reference to the steps taken in 1863 and 1864, in Japanese waters, against the rebellious Prince of Nagato.

The United States, in 1888, did not hesitate to employ its naval vessels to procure the release by the Haitian Government of the American steamer *Haytian Republic*, the seizure and possession of which by that Government were believed to be unjust. Moore, Dig., VII, 117, *citing* For. Rel. 1889, 491–494, 497, 503–511.

[2] "Reprisals (*repressalia*) were based on the solidarity which, according to ancient views, still far from having ceased to operate, existed between a prince and his subjects or between a city and its citizens. A wrong done by any of them to a foreign prince, city or person was the wrong of all, and all were answerable for it; the cause of any of them who had suffered a wrong from a foreign prince, city or person was the cause of all, and often in practice all took it up, though perhaps in theory it was only for the wronged one or his prince or city to do so." Westlake, 2 ed., II, 8. See, also, T. A. Walker, History of the Law of Nations, I, 121.

[3] Bonfils-Fauchille, 7 ed., § 981; bibliography, *id.*, § 971; Clunet, *Tables Générales*, I, 482–483, 891; bibliography in Hershey, 348; Hall, Higgins' 7 ed., § 120; P. Lafargue, *Les Représailles en Temps de Paix*, Paris, 1899; Lawrence, 5 ed., § 136; Mérignhac, III, 48–53; Ernest Nys, *Les Origines du Droit International* (1894), 62–72; Oppenheim, 2 ed., II, §§ 33–43; Rivier, II, 191–198; Stockton, Outlines, 286–289; Westlake, 2 ed., II, 6–11; Westlake, "Reprisals and War", *Collected Papers*, 590, reprinted from *Law Quar. Rev.*, XXV, 120; Dana's Wheaton, §§ 290–292; Woolsey, 6 ed., § 118.

practice given a description of its own. When property could not be retaken from him who had wrongfully seized it, or when reparation for its loss was not otherwise obtainable, the aggrieved merchants proceeded to seize the person of the wrongdoer or other property belonging to him or to his fellow-countrymen, and either to keep possession thereof until some measure of justice had been obtained, or to apply the same (in the case of property) in satisfaction of the loss sustained.[1]

It was this forcible taking of a pledge as a means of obtaining reparation which appears to have been the conduct which the term "reprisals" was first employed to describe.[2] Whether, moreover, contractual or tortious delinquencies were the causes productive of reprisals, the sum claimed was, according to Professor Westlake, in either case originally capable of pecuniary statement.[3]

The relation of the sovereign to the efforts of his aggrieved subjects to force some measure of justice from foreigners underwent

[1] E. Nys, *Les Origines du Droit International*, 65.

[2] To refer, therefore, at the present time to the rough means employed generally by ancient merchants in order to obtain reparation by force as "reprisals", is to describe their acts by a term the equivalent of which was not in fact applied to them, and which doubtless remained for centuries unknown. The word "reprisal" is the English equivalent of the French *représaille*, derived from the old French *reprisaille*. The latter was derived from the Italian *ripresaglia*. It appeared in Middle Latin in the plural as *repraesaliae*. See Du Cange, *Glossarium Mediae et Infimae Latinitatis*, 1886, VII, 434, with copious illustrations and citations, including Bartolus, *Tract. de Repraesal.*; also E. Nys, *Les Origines du Droit International*, 62; Oxford English Dictionary, VIII, 485. The word was not employed in the Roman law. It is not found, for example, in the appropriate volume (V) of *Vocabularium Jurisprudentiae Romanae jussu Instituti Savigniani*, Berlin, 1910; or in Forcellini's *Totius Latinitatis Lexicon*. Grotius regarded in his time the phrase *jus represaliarum* as a description attributable to "*recentiores jurisconsulti.*" See *De Jure Belli ac Pacis*, Book III, Chap. II, § 4. Although the word "reprisal" and its equivalents in the Latin languages are thus of relatively modern origin, the conduct which they were used to describe had a very early beginning. Grotius was quick to discern the similarity between the law of reprisals of the seventeenth century and the custom of the Athenians known as "*androlepsia*" — *ἀνδροληψία*. *Id.*, Book III, Chap. II, § 7. That custom permitted the relatives of an Athenian murdered by a foreigner, if satisfaction were refused, "to seize three fellow-countrymen of the murderer and hold them for judicial condemnation to compensation, or even to the death penalty." T. A. Walker, Hist. Law of Nations, I, 41, *citing* Vattel, II, 18, § 351, Demosth. c. *Aristocr.*, § 96. According to Gustave Glotz, *androlepsia* was not a custom peculiar to the law of the Greeks, but prevailed also among the Romans, as well as among the Ossetes, and was seen also in the early Irish law. *La Solidarité de la Famille dans le droit Criminel en Grèce*, Paris: 1904, 221–222, *citing* Plut. *Rom.*, 23; Dareste, *Étude d'hist. du dr.*, p. 141; d'Arbois de Jubainville, *Étude sur le dr. Celt.*, I, 192.

In the preparation of this note the author acknowledges his indebtedness to the assistance of Prof. O. F. Long, of Northwestern University

[3] Westlake, Collected Papers, 592.

a natural transformation. From the very magnitude of their undertakings, he ceased to be indifferent as to their success, and undertook himself to control or license their use of force. The making of reprisals began to be authorized by the issuance of formal letters to those entrusted with the work.[1] Thus as the public endeavor gradually supplanted private effort in the attempt to obtain justice from foreign States, such authority was increasingly withheld from private agencies, until the practice of authorizing so-called "special reprisals" was generally abandoned.[2] The State itself assumed the task of taking foreign property by force. It did so, moreover, not merely for the sake of its nationals whose claims it had espoused, but also for itself as sovereign, in behalf of an essentially public cause, and that irrespective of the character of the claim.[3] Thus, for example, the failure to make appropriate amends for a national insult became as certain a ground for the making of reprisals as the failure to offer any means of redress for a palpable denial of justice directed against a private individual.

Again forms of reprisals ultimately broadened. Not merely the taking but also the withholding of property, and that whether or not accompanied by the use of force, were believed to be within the limits assigned to that process. Finally, at the present time, there is a tendency on the part of publicists to regard as acts of reprisal almost any non-amicable measures of constraint which an aggrieved State may employ in order to obtain justice from its adversary.[4]

For sake of clearness, and for the purpose of preserving solid distinctions of both historical and etymological worth, it is deemed wise to confine the use of the term reprisal to the act of taking or withholding of any form of property of a foreign State or its nationals, for the purpose of obtaining, directly or indirectly, reparation on account of the consequences of internationally illegal conduct for which redress has been refused.

[1] "The license was granted by letters of marque or of reprisal, or of marque and reprisal. The former term has been connected by some with *marca*, a boundary, the letters being an authority to make captures outside the boundary of the territory; but it may be derived much more easily from *marcare* or *marchiare*, words which are found in documents of the thirteenth century in connection with *pignorare*, apparently in the sense of marking goods for a claimant's security." Westlake, 2 ed., II, 9.

[2] "There is no example in the history of the United States of authority for special reprisals." Moore, Dig., VII, 122.

[3] Westlake, *Collected Papers*, 593–596, with reference to the English reprisals of 1754.

[4] See, for example, Oppenheim, 2 ed., II, § 33. *Compare* Woolsey, 6 ed., § 118.

b

§ 590. The Practice of the United States.

The nature and use of reprisals early engaged the thought of American statesmen. Attention was, however, drawn to the policy rather than the rightfulness of such acts. Jefferson understood their serious aspect, declaring that reprisals never failed to bring about war when directed against a State able to make that response.[1] Albert Gallatin, in 1835, vigorously opposed the contention that a State having just cause for reprisals should feel obliged to resort thereto.[2]

By reason of the failure of the French Chamber of Deputies to make the necessary appropriation for the payment to the United States of the first installment, some time overdue, in settlement of the French spoliation claims, in accordance with the terms of the convention of July 4, 1831,[3] President Jackson, in his annual message of December 1, 1834, expressed the opinion that the United States should insist upon prompt execution of the treaty, and in case of a refusal or longer delay on the part of France, should "take redress into their own hands." He declared it to be "a well-settled principle of the international code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war."[4] The resentment produced in France by the President's recommendation was appeased by expressions contained in his annual message of the following year.[5]

[1] See opinion of Mr. Jefferson, Secy. of State, May 16, 1793, Jefferson's Works, 628, Moore, Dig., VII, 123; see, also, Report of Mr. Clay, Senate Committee on For. Rel., Jan. 6, 1835, in the course of which he said: "Reprisals do not of themselves produce a state of public war; but they are not unfrequently the immediate precursor of it. When they are accompanied with an authority, from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance." Senate Doc. No. 40, 23 Cong., 2 Sess., p. 21, Moore, Dig., VII, 126.

[2] Communication to Mr. Everett, Secy. of State, January, 1835, 2 Gallatin's Writings, 494, Moore, Dig., VII, 122.

[3] Malloy's Treaties, I, 523. By Art. II, France agreed to pay 25,000,000 francs in six annual installments of 4,166,666.66 francs, the first to be paid one year after the exchange of ratifications of the convention, and the others at successive intervals of a year, one after another, until the whole should be paid. Each installment was to bear interest at 4 per cent. from the date of the exchange of ratifications. Ratifications were exchanged Feb. 2, 1832.

[4] Richardson's Messages, III, 97, 106. See. also. Message of President Jackson, Dec. 7, 1835, *id.*, III, 147, 152–161.

[5] *Id.*, III, 147, 152–161. See, also, the Message of President Jackson of Jan. 15, 1836, *id.*, III, 188, Senate Ex. Doc. 62, 24 Cong., 1 Sess., 1, 4; John

Payment of the installments due was ultimately made, both of the States at variance having previously, however, accepted an offer of mediation emanating from Great Britain. The formal use thereof was rendered unnecessary by an announcement by France of a readiness to fulfill its obligation.[1]

The United States has since regarded with increasing disfavor the policy of making reprisals for the purpose of exacting pecuniary indemnities from delinquent States in satisfaction of the private claims of its nationals.[2] The practice of European States does not as yet indicate a similar tendency.

By reason of the failure of Nicaragua to pay an indemnity demanded by Great Britain in reparation for the treatment accorded the British Consul at Bluefields, together with some twenty British subjects, naval forces were landed at Corinto, April 27, 1895, and took military possession of the place. Upon the conclusion of an agreement for the adjustment of the difference, the forces were withdrawn.[3] Again, in 1901, France seized the customhouse at Mytilene, in order to obtain compliance by Turkey with certain de-

Spencer Bassett, Life of Andrew Jackson, New York, 1916, 666–673, and documents there cited.

[1] Brit. & For. State Pap., XXIV, 1156–1165; also, generally, Moore, Arbitrations, V, 4447–4468, and documents there cited; Moore, Dig., VII, 123–130.

See, also, third Annual Message of President Buchanan, Dec. 3, 1859, recommending penetration into the interior of Mexico by an American force "for the purpose of obtaining indemnity for the past and security for the future" from the rebellious General Miramon, a move which, the President declared, would enable the constitutional government of General Juarez to extend its power over the whole Mexican Republic. Richardson's Messages, V, 552, 563–568; Moore, Dig., VII, 130, VI, 482–483.

[2] Mr. Seward, Secy. of State, Report to the President, March 30, 1861, 8 MS. Report Book, 154, Moore, Dig., VII, 130; Mr. Bayard, Secy. of State, to Messrs. Benedict, Taft, and Benedict, May 18, 1886, 160 MS. Dom. Let. 237, Moore, Dig., VII, 130.

"Our own Government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not." President Roosevelt, Annual Message, Dec. 5, 1905, For. Rel. 1905, xxxiv.

[3] For. Rel. 1895, II, 1032–1034, Moore, Dig., VII, 134.

Concerning the well-known case of the confiscation by the King of Prussia in 1752 of the revenues of Silesia previously hypothecated to British creditors, and the stoppage of the interest on a loan to the latter, see Martens, *Causes Célèbres* (ed. of 1827), II, 1–88, Pitt Cobbett's Cases, 3 ed., I, 334.

Respecting the capture of Neapolitan vessels by Great Britain in 1840, on account of the grant by the King of Naples of a monopoly of all sulphur worked and produced in Sicily, and deemed contrary to a treaty between Great Britain and the Two Sicilies, of Sept. 26, 1816, see Phillimore, III, 1 ed., 27, cited in Moore, Dig., VII, 132. For the text of the treaty see Hertslet's Commercial Treaties, II, 131.

Concerning the case of *Don Pacifico*, and the reprisals made by Great Britain against Greece in 1850, see Phillimore, 1 ed., III, 29–31; also Moore, Dig., VII, 132–133, and documents there cited.

mands embracing a settlement of the so-called Lornado claim for a substantial sum. The procedure adopted proved efficacious in obtaining a settlement.[1] In 1908, certain Venezuelan guardships were seized by a Netherlands naval force as a means of obtaining satisfaction for the seizure by Venezuela of certain Dutch vessels. By a protocol of the following year, Venezuela agreed to pay an indemnity, and the Netherlands agreed to release the guardships.[2]

§ 591. The Tampico Incident, 1914.

More recently the United States made significant use of reprisals to enforce redress on account of a public claim arising from indignities committed against itself. On April 9, 1914, a paymaster of the U. S. S. *Dolphin* and two seamen therefrom were arrested without just cause at Tampico, Mexico, by an officer and squad of men in the army of General Huerta, head of the provisional government of Mexico. Shortly thereafter the Commander of the Huertista forces ordered the release of the paymaster and his men. This was followed by apologies from the commander and an expression of regret from General Huerta himself. Rear Admiral Mayo, U. S. N., in command of the American naval forces near Tampico, regarded the arrest as so serious that he was not satisfied with the apologies offered, but demanded that the flag of the United States be saluted with special ceremony by the military commander of the Port. General Huerta, although willing to fire a salute of twenty-one guns, insisted that the American forces should fire a like salute, gun for gun. This proposition being declined, President Wilson on April 20, 1914, sought Congressional authority for the use of the armed forces of the United States in such ways and to such an extent as might be necessary to obtain from General Huerta and his adherents "fullest recognition of the

[1] For. Rel. 1901, 529–530.
Mr. Bayard, Secy. of State, to Mr. Pendleton, Minister to Russia, Jan. 17, 1888, respecting the seizure or attachment by the German Consul-General at Apia in 1885, of the sovereign rights of the King of Samoa in the municipality of Apia, and the disavowal of this action by the German Government, For. Rel. 1888, I, 594, 600, Moore, Dig., VII, 134.

[2] For. Rel. 1909, 630–635. The sudden dismissal by Venezuela of the Dutch Minister Resident was also a source of friction. It may be observed that the Dutch Government made preliminary inquiry whether the United States would object to coercive measures in Venezuela should the national honor of the Netherlands require them. The Department of the State declared in response that the United States would not feel at liberty to object to measures described in the inquiry "not involving occupation of territory either permanent or of such a character as to threaten permanency." *Id.*, 631–632.

rights and dignity of the United States." [1] On April 22, 1914, the following joint resolution was approved:

> In view of the facts presented by the President of the United States in his address delivered to the Congress in joint session on the twentieth day of April, nineteen hundred and fourteen, with regard to certain affronts and indignities committed against the United States in Mexico: Be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.
>
> *Be it further resolved,* That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.[2]

[1] President Wilson, Address to the Congress, April 20, 1914.

When the reparation demanded has been a salute to the flag of the aggrieved State, the practice of the United States with respect to a return of the salute does not appear to have been uniform. In 1855, the French Government agreed to accept as satisfaction for the indignity suffered by its consul at San Francisco during the previous year, a salute of the national flag borne by a French ship or squadron entering the harbor of San Francisco. It was agreed that the vessel thus saluted should return the salute gun for gun. See Correspondence between Mr. Marcy, Secy. of State, and Mr. Mason, American Minister to France, 1854–1855, Moore, Dig., V, 79–80, and documents there cited. By reason of the capture of the Confederate cruiser *Florida* by the U. S. S. *Wachusett* Oct. 7, 1863, in the harbor of Bahia, the salute of the Brazilian flag was demanded of the United States. In accordance with instructions, Commander F. B. Blake, U. S. N., commanding the U. S. S. *Nipsic,* on July 23, 1866, hoisted the Brazilian flag at the foremasthead of his ship in Brazilian waters and fired a salute of twenty-one guns. The report of the case does not indicate that the salute was returned. Mr. Lidgerwood, American Chargé d'Affaires at Rio de Janeiro, to Mr. Seward, Secy. of State, Aug. 1, 1866, and enclosures, Dip. Cor. 1866, II, 317–318. In connection with the case of the *Virginius,* it was agreed by Mr. Fish, Secy. of State, and the Spanish Minister at Washington, Dec. 8, 1873, that on Dec. 25, following, a vessel of war of the United States would be in the harbor of Santiago de Cuba, and at the hour of 12 meridian, the United States flag would be raised on a Spanish fort or battery, and a salute of twenty-one guns fired. It was agreed that "this being done, the United States vessel, or, if there be more than one, one of them, will raise the Spanish flag, and return the salute, gun for gun." For. Rel. 1874, 990–991. The salute to the flag of the United States was, however, spontaneously dispensed with, pursuant to the terms of an earlier protocol. *Id.,* 1115–1116. The United States demanded of Salvador the salute of the American flag on account of an assault on the American consulate in the City of San Salvador in 1890, by forces of the Provisional Government. The flag was duly hoisted at the consulate by a commissioned officer of those forces, and a salute of twenty-one guns was fired. It does not appear from the report of the American naval officer detailed to witness the ceremony, that the salute was returned. For. Rel. 1890, 75–77.

[2] 38 Stat. 770.

Admiral Fletcher, U. S. N., commanding a large naval force off the Mexican coast, had on the previous day, pursuant to instructions, landed marines at Vera Cruz, and seized the customhouse in order to prevent anticipated importations of munitions of war from reaching General Huerta. On April 21, the American Chargé d'Affaires *ad interim* at Mexico City was given his passports. On April 25, the United States, and on April 26, General Huerta, accepted the mediatory proposals of Brazil, Argentina and Chile.[1] A military force, under Major-General Funston, U. S. A., relieving the naval forces at Vera Cruz, occupied that city and there remained for a period of months.

Notwithstanding a disclaimer of hostility against a State upon which reprisals are made, the nature of the procedure is one still calculated to produce war. Hence countries not desirous of bringing about such a condition are reluctant to have recourse to such action unless the delinquent State is so inferior in point of military or naval resources that its indignation is not to be dreaded. Reprisals are essentially the remedy of the strong against the weak. It is unlikely, therefore, that the United States will ever again make use thereof, unless the State itself has suffered a national affront through a grave violation of international law, and unless its adversary remains stolidly indifferent as to its duty to make amends. It is believed, moreover, that both policy and sound practice discountenance the employment of reprisals so long as any amicable mode of obtaining justice remains unexhausted.[2]

5

§ 592. Pacific Blockade.

The term pacific blockade refers to the cutting off of access to or egress from a foreign port or coast by a naval operation designed to compel the territorial sovereign to yield to demands made of it, such as the granting of redress for the consequences of its wrongful conduct, and by a process whereby the blockading State does not purport to bring into being a state of war.[3] Such action is to be

[1] *Am. J.*, Editorial Comment, VIII, 579–585. Also Recognition of New Governments, the Position of the United States, *supra*, § 44.

[2] Mr. Seward, Secy. of State, Report to the President, March 30, 1861, 8 MS. Report Book, 154, Moore, Dig., VII, 130.

[3] "A pacific blockade . . . is an act of force primarily directed against the State blockaded with a view to coercing it to follow the line of policy desired. As it occurs in time of peace there are no belligerents, and therefore no neutrals, since neutrality is merely the condition of a State in relation to two opposing belligerents." A. H. Hogan, Pacific Blockade, Oxford, 1908, p. 26. This work contains a good bibliography.

See, also, Nils Söderquist, *Le Blocus Maritime*, containing bibliography,

deemed pacific merely in the sense that the blockading State is disposed to remain at peace, while the State whose territory is blockaded does not elect to treat the operation as one constituting an act of war or as compelling it to make war upon its adversary.

Although this procedure does not necessarily involve the taking or withholding of property, it prevents, if successful, highly important uses of the territory of the State against which it is established. Moreover, the detention or sequestration of the ships of such State, as a means of obtaining redress, constitutes a form of reprisal.

On certain occasions European States have found it possible to resort to pacific blockade without producing a state of war. The instances have sufficed in number to justify the conclusion that such procedure does not necessarily constitute internationally illegal conduct.[1]

The United States has never had recourse to pacific blockade. Its chief interest in the employment thereof by other States has been confined to the question whether such action was or should be designed to apply to the ships and commerce of a third power.

In 1897, upon notification from six European States of their determination to place the Island of Crete in a state of blockade,[2] and to restrict thereby the rights of quasi-neutral powers, the United States did not concede the claim asserted.[3] Again, in 1902, in response to information that Germany contemplated a pacific blockade of certain Venezuelan ports, embracing in its operation the vessels of third States, Secretary Hay declared that the United States, adhering to the position taken in 1897, did "not acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of States not parties to the

Stockholm, 1908; Hermann Staudacher, *Die Friedensblockade*, with bibliography, Leipzig, 1909; Naval War College, International Law Situations, II (1902), 84–97; Charles Barès, *Le Blocus Pacifique*, Toulouse, 1898.

Declares Professor Moore, "Reprisal is a measure short of war, but it is not otherwise 'pacific'; and so with pacific blockade. If the measure is not, like blockade in the ordinary sense, attempted to be extended to the citizens and property of third powers, there appears to be in it nothing exceptionable from the legal point of view, so long as the legality of the reprisals continues to be acknowledged." Dig., VII, 135.

[1] T. E. Holland, Studies, 144; also Westlake, 2 ed., II, 17.

[2] According to the notification, dated March 20, 1897, "The blockade will be general for all ships under the Greek flag. Ships of the six powers or neutral powers may enter into the ports occupied by the powers and land their merchandise, but only if it is not for the Greek troops or the interior of the island. The ships may be visited by the ships of the international fleets." For. Rel. 1897, 254, Moore, Dig., VII, 139.

[3] Mr. Sherman, Secy. of State, to Sir Julian Pauncefote, British Ambassador, March 26, 1897, For. Rel. 1897, 255, Moore, Dig., VII, 139.

controversy, or discriminate against the commerce of neutral nations", and that it reserved all its rights in the premises.[1] The blockade which was duly established by Germany, Great Britain and Italy, acting in concert, appears to have been regarded by them as an act of war, accompanied by all of the conditions of such a measure, and with the same effect as if war had been declared.[2] Hence it is not to be relied upon as an instance of pacific blockade.

The assertion that the right to coerce a delinquent State by means of a pacific blockade embraces incidentally the right to interfere with vessels of third States, whether on the high seas or within the territorial waters of the blockaded State, appears to be at variance with sound principle.[3] To restrict in time of peace the operations of such vessels is to subject to injury him who has done no wrong, a result which must always be regarded as opposed to the requirements of justice. That a blockading State may, when at war, cut off all communications by sea between the vessels of neutral powers and the blockaded coast of its enemy is due to

[1] Telegram to Mr. Tower, American Ambassador to Germany, Dec. 12, 1902, For. Rel. 1903, 420, Moore, Dig., VII, 140. See, also, German promemoria of Dec. 20, 1901, For. Rel. 1901, 196.

[2] Thus Lord Lansdowne, British Foreign Secy., in a note of instruction to Sir M. Herbert, British Ambassador at Washington, Jan. 13, 1903, declared: "The establishment of a blockade created *ipso facto* a state of war between Great Britain and Venezuela, involving, it might be contended, the abrogation of any treaty existing between the two countries." Brit. and For. State Pap., XCVI, 475, 481.

See, also, Mr. Tower, American Ambassador to Germany, to Mr. Hay, Secy. of State, Dec. 17, 1902, For. Rel. 1903, 421; Same to Same, telegram, Dec. 18, 1902, *id.*, 423; Same to Same, Dec. 22, 1902, enclosing blockade proclamation, *id.*, 425; T. E. Holland, "War Sub Modo", *Law Quar. Rev.*, LXXIV, 133–135; also language of Award of Tribunal of Arbitration composed of members of the Permanent Court at the Hague, Feb. 22, 1904, under protocols of May 7, 1903, respecting the preferential treatment gained by the blockading powers, For. Rel. 1904, 506.

[3] According to the resolution of the Institute of International Law in 1887, respecting Blockade in the Absence of a State of War: "The establishing of a blockade in the absence of a state of war should not be considered as permissible under the law of nations except under the following conditions:

"1. Ships under a foreign flag shall enter freely in spite of the blockade.

"2. Pacific blockade must be officially declared and notified, and maintained by a sufficient force.

"3. The ships of the blockaded Power which do not respect such a blockade may be sequestrated. When the blockade is over, they shall be restored to their owners together with their cargoes, but without any compensation whatsoever." *Annuaire*, IX, 300, J. B. Scott, Resolutions, 69.

See, also, views of publicists given in Moore, Dig., VII, 141–142.

"*Résumé* — It would seem from the weight of authorities and from the majority of later cases, that pacific blockades should not bear upon third States except as they are affected by the constraint directly applied to the State blockaded, *i.e.*, the vessels of a third State should be entirely free to go and come while such measures of constraint as may be decided upon may be applied to the blockaded State." Naval War College, Int. Law Situations, 1902, 87.

the general acquiescence of maritime States which yield to a belligerent as such special rights incidental to the state of war.[1] Such a concession is not indicative of the nature or scope of privileges possessed by a blockading State in time of peace.

The position of the United States is believed to have been a wise deterrent of action which it has opposed. Through its influence, as well as through the attitude of Great Britain in 1884 and in 1902, there is ground for anticipating increasingly stubborn resistance to the establishment of a rule permitting interference in time of peace with the ships of non-blockading powers.[2]

If ships of quasi-neutral States are entitled to freedom from interference there would appear to be no legal duty to notify such vessels or the governments of the States to which they belong of the establishment of a pacific blockade as a condition essential to the validity of the operation.[3] The expediency of such a notification would, however, seem to be obvious.

6

§ 593. Embargo.

The term "embargo" is employed to describe generally the detention within the national domain of ships or other property otherwise likely to find their way to foreign territory.[4]

If a State confines the operation of such a measure to the resources of its own territory or to its own vessels, the embargo is known as a *civil* or *pacific* one. Its purpose in such case may be to protect, for example, domestic shipping from foreign depredations; and also to prevent domestic vessels from being used as carriers

[1] Blockade, *infra*, §§ 824–825.

[2] See Westlake, "Pacific Blockade", *Collected Papers*, 572, 586–587, Reprinted from *Law Quar. Rev.*, XXV, 13.

Compare Hogan, Pacific Blockade, 51–69.

[3] Hogan, Pacific Blockade, 33–35, in which the learned author criticizes the requirement respecting notices in the declaration of the Institute of International Law of 1887.

[4] "An embargo (from the Spanish and Portuguese *embargar*, to *hinder* or *detain*, the root of which is the same as that of *bar*, *barricide*) is, in its special sense, a detention of vessels in a port, whether they be national or foreign, whether for the purpose of employing them and their crews in a naval expedition, as was formerly practiced, or for political purposes, or by way of reprisals." Woolsey, 6 ed., § 118.

See, also, Bonfils-Fauchille, 7 ed., §§ 328 and 985; Hall, Higgins' 7 ed., §§ 120 and 122; Sir S. Baker's 4 ed., of Halleck, I, 516; Hershey, 344–345; Lawrence, 5 ed., § 137; Oppenheim, 2 ed., II, § 40; Phillimore, III, §§ 24–48; Westlake, 2 ed., II, 8; Dana's Wheaton, § 293, especially Dana's Note No. 152; Wilson and Tucker, 5 ed., 227–228; Library of Congress, List of References on Embargoes, compiled under direction of Herman H. B. Meyer, Washington, 1917.

to a foreign State whose conduct is thus sought to be influenced. When employed to accomplish the latter end a pacific embargo becomes a non-amicable mode of procedure. The right of a State to resort to such a measure for such a purpose is, however, unquestionable. In 1807, following President Jefferson's recommendation, the United States placed an embargo on American ships as a means of protecting American commerce from illegal belligerent operations on the part of both Great Britain and France.[1] Although Great Britain is said to have been injured by this action, the conduct of the United States afforded no just ground for complaint.[2]

Again, a State may place a pacific embargo on the produce of its soil or the output of its factories, and that for the purpose either of preserving what is detained for domestic use, or of preventing its employment in a foreign State or group of States. Thus on March 14, 1912, in accordance with a joint resolution of Congress, President Taft, finding that conditions of domestic violence existed in Mexico, and were being promoted by the use of arms and munitions of war procured from the United States, placed an embargo on the shipment of such articles to Mexico, except under such limitations and exceptions as the Executive might prescribe.[3]

[1] Act of Congress, Dec. 22, 1807, 2 Stat. 451, 452. Respecting this and supplementary acts of Jan. 9, 1808, 2 Stat. 453; March 12, 1808, 2 Stat. 473; April 25, 1808, 2 Stat. 499; and Jan. 9, 1909, 2 Stat. 506; and for decisions interpretative thereof, see Moore, Dig., VII, 143–147. President Jefferson's Message of Dec. 18, 1807, is contained in Am. State Pap., For. Rel., III, 25.

[2] Woolsey, 6 ed., § 118; also Taylor, § 434.

[3] Proclamation of President Taft, March 14, 1912, *Am. J.*, VI, Supp., 147. See, also, Address of President Wilson to the Congress on Mexican Affairs, Aug. 27, 1913, *id.*, VII, 279, 283, in the course of which he said: "I deem it my duty to exercise the authority conferred upon me by the law of March 14, 1912, to see to it that neither side to the struggle now going on in Mexico receive any assistance from this side the border. I shall follow the best practice of nations in the matter of neutrality by forbidding the exportation of arms or munitions of war of any kind from the United States to any part of the Republic of Mexico — a policy suggested by several interesting precedents and certainly dictated by many manifest considerations of practical expediency." Because he deemed the operation of the foregoing law as detrimental to the so-called Constitutionalist party and proportionally advantageous to that of General Huerta, President Wilson, on Feb. 13, 1914, raised the embargo. For the text of the Act of March 14, 1912, see 37 Stat. 630, U. S. Comp. Stat. 1918, §§ 7677 and 7678; also For. Rel. 1912, 745.

On Oct. 19, 1915, President Wilson, again availing himself of the Act of March 14, 1912, laid an embargo on the shipment of arms to Mexico. Simultaneously, however, in a communication to the Secretary of the Treasury, the President made an exception with respect to munitions of war for the use of the recognized *de facto* government, or for industrial or commercial uses within the limits of territory under its effective control. *Associated Press* despatch, Chicago *Daily News*, Oct. 20, 1915.

To what extent a neutral State is justified in placing an embargo on muni-

§ 594. The Same.

An embargo is said to be *hostile* when it involves the detention or seizure of the ships of a foreign power. When such action is for the purpose of compelling the State to which the vessels belong to make reparation for conduct deemed to be illegal, the case is one of reprisal, and depends for its justification upon the existence of circumstances similar in kind to those required to save other forms of reprisal from appearing as the sheer abuse of power. So long as this general mode of enforcing reparation is tolerated, hostile embargo does not, on principle, deserve special condemnation. It is believed that at the present time the United States would deem it inexpedient to have recourse to such prodecure.

Thus by a joint resolution of Congress of March 26, 1794, an embargo was laid on all ships and vessels in ports of the United States bound for any foreign port or place.[1] Numerous treaties of the United States, moreover, contemplating the exercise of such a right, made provision for the indemnification of owners of vessels and cargoes affected thereby.[2] It appears to have been anticipated that vessels of the contracting parties, though not in conflict with each other, might, nevertheless, directly suffer loss by the operation of an embargo established primarily to coerce a third State.

Again, the treaties indicated special concern over the seizure of vessels of a quasi-neutral State, for a military expedition or other public purpose of the State laying an embargo. The right of the latter to make use of such resources seems, however, to have been recognized so long as indemnification was assured those

tions of war for the purpose of compelling relief from the commission of illegal acts by any or all belligerents, is to be tested by reference to general principles of neutrality.

[1] 1 Stat. 409, Moore, Dig., VII, 142, where Prof. Moore declares that "The immediate cause was the British order in council of Nov. 6, 1793, and a reported hostile speech by Lord Dorchester to the Indian tribes which were in hostility with the United States. It was expected that the measure would lead to a restriction of the supply of provisions to the British fleet in the West Indies, though the letter of the act operated equally against the French. Washington, in a message to Congress of March 28, 1794, stated that he had requested the governors of the several States to call out the militia for the detention of vessels, if necessary; and he recommended that the embargo be extended to fishing vessels, to which it had not been held to apply. It was also construed not to apply to armed vessels possessing public commissions, except letters of marque." President Washington's message is contained in Am. State Pap., For. Rel., I, 429.

[2] See, for example, Art. XVI, treaty with Prussia, Sept. 10, 1785, Malloy's Treaties, II, 1482; Art. XVI, treaty with Prussia, July 11, 1799, *id.*, II, 1492; Art. VII, treaty with Brazil, Dec. 12, 1828, *id.*, I, 135; Art. VIII, treaty with Venezuela, Jan. 20, 1836, *id.*, II, 1833.

whose property was taken.[1] It was the subject of agreement between the United States and Italy as late as 1871.[2] This right is said to be derived from or closely analogous to the belligerent right of angary or *jus angariae*.[3] It is not believed, however, that the United States would in time of peace resort to an embargo in order to possess itself of vessels of a State against which it had no cause of complaint.

To make use of hostile embargo in anticipation of war, with a view to gaining advantage through the confiscation of the ships of a probable enemy upon the outbreak of hostilities has long been discountenanced. It will be seen that the existing practice of enlightened States encourages, under certain conditions, the extension of a reasonable time for the departure of certain classes of enemy vessels in port at the commencement of war.[4]

7

§ 595. Non-intercourse.

In order to save itself and its nationals from being subjected to treatment deemed subversive of international law, as well as to

[1] Thus according to Art. XVI, of the treaty with Prussia of July 11, 1799, it was declared that "In times of war, or in cases of urgent necessity, when either of the contracting parties shall be obliged to lay a general embargo, either in all its ports, or in certain particular places, the vessels of the other party shall be subject to this measure, upon the same footing as those of the most favoured nations, . . . But on the other hand, the proprietors of the vessels which shall have been detained, whether for some military expedition, or for what other use soever, shall obtain from the Government that shall have employed them an equitable indemnity as well for the freight as for the loss occasioned by the delay." Malloy's Treaties, II, 1492.

[2] Art. IV, treaty of commerce of Feb. 26, 1871, *id.*, I, 970.

[3] Oppenheim, 2 ed., II, § 40. Declares Dana: "But embargo has been employed for a still different purpose; that is, to gain possession of neutral vessels found in port on the breaking out of a war, to be used for transportation of munitions or troops, or for other temporary belligerent purposes. It is difficult to distinguish this from the seizure of innocent neutral vessels, at any later period of the war, for the use of the belligerent government. This act is called *Angaria*, or *le droit d'Angarie*, or *Prestation*. It is a kind of forced loan or preëmption, attempted to be justified only by the necessities of war, and always accompanied with compensation. It has had the sanction of usage and of good writers. . . . These treaties [those of the United States of 1785, 1799, and 1828 with Prussia, and of 1830 with Venezuela] certainly seem to recognize this *angaria* as a right, or at least as a practice of nations, and only seek to regulate its exercise. Heffter (§ 150) speaks of *angaria* as either entirely prohibited by modern treaties, or as allowed only in case of urgent necessity and upon terms of full indemnity." Note No. 152, Dana's Wheaton. See, also, instructive note in Woolsey, 6 ed., § 118, No. 1.

See The Right of Angary, *infra*, §§ 633-634.

[4] Declares Prof. Moore: "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." Dig., VII, 453. See The *Boedus Lust*, 5 Ch. Rob. 245.

See Vessels in or Sailing for Port at Outbreak of War, *infra*, §§ 763-765.

compel the abandonment of reprehensible conduct, a State may suspend all commercial intercourse with that other whose acts are the source of complaint. However non-amicable in character, the propriety, if not the wisdom, of recourse to such procedure must be apparent. The United States, in 1798, and also in a later decade, did not hesitate to suspend commercial intercourse with France.[1]

[1] "An Act to suspend the commercial intercourse between the United States and France, and the dependencies thereof", June 13, 1798, 1 Stat. 565. Concerning the relations between the United States and France 1798–1803, see Moore, Arbitrations, 4399–4446; also Moore, Dig., VII, 148, and documents there cited.

See, also, "An Act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo", Feb. 28, 1806, 2 Stat. 351, and concerning it, Moore, Arbitrations, V, 4476–4477; "An Act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies; and for other purposes", March 1, 1809, 2 Stat. 528. It was amended by an Act of June 28, 1809, 2 Stat. 550. "The non-intercourse Act of March 1, 1809, was, by force of the Act of May 1, 1810, 2 Stat. 605, and the President's proclamation of November 2, 1810, revived on February 2, 1811." Moore, Dig., VII, 149, *citing* Brig Aurora *v.* United States, 7 Cranch, 382. See decisions interpretive of the non-intercourse acts in Moore, Dig., VII, 148–151.

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, there still remains the belief which no general arrangement has thus far served to weaken, that controversies may come into being for which a recourse to war affords the only honorable and reasonable mode of adjustment. It is the fact, rather than the cause of it, which demands consideration. So long as even the most enlightened States take cognizance of it and formulate their military and naval plans accordingly, the laws of war retain more than academic interest.

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 frêsh 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.

[1] *Isaiah, LV, 13.*

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. Such an inquiry may serve to render obvious changes which the United States might itself wisely advocate for general adoption.

The World War 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 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 the Hague Conventions of 1899, as well as those of 1907, was manifest in The World War; 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.[1] 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 enlightened States.

[1] 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 and neutral 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, Eugene Wambaugh in *Harv. Law Rev.*, XXXIV, 693, 694–695; also Naval Instructions Governing Maritime Warfare, of June 30, 1917; U. S. Army Rules of Land Warfare, 1917 edition.

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 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 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]

[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.

Opening
Wilson's
European War, II, 15, *Am. J.*, IX, Supp., 110.

[3] Declares Professor Moore: "Much confusion may be avoided by bear-

The right of a State initiating war with respect, either to the mode and extent of the pressure which it may bring to bear upon its enemy, or to the scope of its just claims upon and obligations towards neutral powers, is determined by principles of law which remain generally unaffected by the presence or absence of conditions to be regarded as justifying recourse to armed conflict.

ing 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 The World War, causing questions at issue to become moot.

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 of 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,

[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 arraigning 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 reëstablishment of intimate relations of mutual advantage between us." American White Book, European War, IV, 422, 425–426, 428.

and without discrimination between the people and government of its enemy.[1]

2

§ 599. Limited War.

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.[2] In response, Congress authorized American 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.[3] Whether or not these enactments were incompatible with the theory that the United States retained its neutral status,[4] 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.[5] French citizens came simultaneously into American courts, and in their own names claimed and obtained restitution for property seized by American

[1] 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.

[2] J. B. C. Davis' Notes, U. S. Treaty Vol. (1776–1887) 1298–1306, and documents there cited.

[3] 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.

[4] "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."

[5] *Id.*, 43.

cruisers.[1] The contest was described as a limited or partial war.[2]

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.

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.[3]

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.[4] 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

[1] Mr. Webster's speech on French spoliations, 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.'"

[2] *Id.*, 371, where the court adverted to the opinions of the several justices in Bas *v.* Tingy, 4 Dall. 37.

[3] 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.

[4] See Recognition of Belligerency, *supra*, §§ 47–49; Acts Falling Short of Recognition of Belligerency. Insurgency, *supra*, § 50.

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.[1]

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.[2] Hence the law of nations necessarily forbids them to do so.[3] 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.[4]

[1] 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.

[2] 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.

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

[4] Respecting the prevalence of a different doctrine in ancient times and even in the Middle Ages, see T. A. Walker, Hist. Law of Nations, I, 84; also Coleman 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

[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.

[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

to the Congress, of April 2, 1917, President Wilson advised that "the 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."[1] 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.[2]

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

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.

[1] 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.

[2] 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 Boedus 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.

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.[1] 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.[2]

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 war exists or is about to exist between them.[3] 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.[4] It may precede the existence of it by specifying a future hour when it shall be deemed to exist. A declaration itself initiating war may obviously precede also the commencement of hostilities.

[1] 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.

[2] 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.

[3] "A declaration of war is a communication of 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 under greater or lesser solemnities, but during the last few centuries all those formalities have vanished, and a declaration of war nowadays takes place through a simple communication." Oppenheim, 2 ed., II, § 94. See, also, Bonfils-Fauchille, 7 ed., §§ 1027–1043 (with bibliography).

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

[4] 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.

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.[1] The exercise of that power by that body, together with a proclamation by the President announcing the fact,[2] 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.[3]

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 declara-

[1] 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.

[2] 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.

[3] 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, p. 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.

tion of war."[1] Compliance with either requirement does 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.

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.[2]

[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 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] 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; Oppenheim, 2 ed., II, §§ 94–96; E. C. Stowell, "Convention Relative to the Opening of Hostilities", *Am. J.*, II, 50.

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.

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.[1]

According to Article II of the Hague Convention, 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.[2]

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.[3]

"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

"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.

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

[2] Malloy's Treaties, II, 2266; also, Westlake, 2 ed., II, 30–31.

[3] The paragraph in the text is substantially the language of Mr. Justice Grier in the Prize Cases, 2 Black, 635, 666–667.

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." [1]

[1] 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. On Diplomatic and Political Relations.

The outbreak of war necessarily destroys every relationship between the opposing belligerents which owes its life and vigor to the maintenance of peace. Thus, as has been observed, diplomatic relations, although remaining unbroken until the beginning of the conflict, are severed in consequence of it.[1] Political relationships calling for united action, such as offensive or defensive alliances, share the same fate.[2]

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 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

[1] The State of War, *supra*, § 597.
[2] Effect of War on Treaties, In General, *supra*, § 547.

it.[1] It is believed, therefore, to be the presence of an individual on belligerent soil, rather than any other consideration, which serves on principle to render unlawful 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]

[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 jural 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 unwariness." T. Baty and J. H. Morgan, War: Its Conduct and Legal Results, 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] "230. 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.

"231. 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." Rules of Land Warfare, U. S. Army, corrected to 1917.

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.

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.[1] This is regarded by American tribunals as attributable to the law of nations, and is deemed for that reason to command the respect of the courts of a belligerent.[2] Upon entering a war a State may enact laws designed to prohibit various forms of intercourse or trade.[3] The object may be to accomplish more than to prevent the commission of acts such as international law may appear to render unlawful. Thus cases may present for adjudication the question whether purely local enactments have been violated, rather than an inquiry concerning the effect of war upon the propriety of a particular form of conduct.[4] Domestic regulations may manifest the effort of a belligerent sovereign to prevent its

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, 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.

[1] 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."

[2] Kershaw *v.* Kelsey, 100 Mass. 561, 572. *Compare* Oppenheim, 2 ed., II, § 101; Lawrence B. Evans, Leading Cases on International Law, 256, note.

[3] "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 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.

[4] 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.

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 essentially different from that attributable to the necessity of cutting off communication between territories controlled by the opposing belligerents.[1]

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.[2] Transactions of a commercial character are obviously forbidden. Within the prohibition there is doubtless included, as Mr. Justice Gray declared in Kershaw *v.* Kelsey:

> Any act of voluntary submission to the enemy, or receiving his protection; as well 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.[3]

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 opposing flags.[4] A

[1] 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.

[2] The Rapid, 8 Cranch, 155, 162–163; Sir William Scott, in The Cosmopolite, 4 Ch. Rob. 8, 10.

[3] Kershaw *v.* Kelsey, 100 Mass. 561, 572–573; The Quachita 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.

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

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

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.[1]

Obviously the alien who is the national of a neutral State and who does not reside in or inhabit belligerent territory is outside of the scope of the general prohibition.[2] 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.[3]

§ 607. The Same.

The Trading with the Enemy Act of the United States, approved October 6, 1917, in order to prevent intercourse with enemy territory, was designed broadly to specify 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

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, p. 2.

[1] 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.

[2] 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.

[3] 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."

[4] Chap. 106, 40 Stat. 411. The word "enemy" as used in § 2 of the Act was deemed to mean

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." [1] There was no

"(*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, U. S. Comp. Stat. 1919, Supp., § 3115½ aa.

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 Herrara *v.* United States, 222 U. S. 569, 572.

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

According to § 3 (*a*) the unlawfulness of trading on account or in behalf of an enemy person, except with the license of the President, was clearly announced.

Provision was made in § 3 (*b*) to render unlawful the transportation into or from the United States of "any subject or citizen of an enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen", except with the license of the President.

The sending, taking or transmitting out of the United States of communications or documents for delivery, directly or indirectly, to an enemy was forbidden, save under executive license. § 3 (*c*). It was also rendered unlawful for any person ("other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such other person as he may direct"), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail. *Id.*

design to render generally illegal trade with alien enemy nationals within the United States.[1]

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.[2] A grantee accepting such a license may be fairly regarded as bound by such limitations as the grantor has seen fit to impose.[3]

It may be observed that the Trading with the Enemy Act of October 6, 1917, made certain provision for the licensing of enemy insurance companies doing business within the United States.[4] 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.[5] Broad powers were also conferred upon the President to grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he might prescribe, to any person or class of persons to perform any act made unlawful without such license by the third section of the Act.[6]

[1] See statement of Mr. Charles Warren, Assistant Atty.-Gen., concerning the general principles governing the Act, in Senate Report No. 113, 65 Cong., 1 Sess. (to accompany H. R. 4960), p. 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.

[2] 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.

[3] 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.

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

[5] § 10 (*a*).

[6] § 5 (*a*). The President was also here empowered to grant licenses for the filing and prosecution of applications under § 10 (*b*) contemplating applications for letters patent or for registration of trade-mark, print, label or

b

Contracts

(1)

§ 608. Limitations on Power to Contract.

It is important to observe the effect of the general inhibition of intercourse between territories of opposing belligerents upon the right of the inhabitants of the one to enter into contractual relations with those of the other. A tribunal may in fact regard a contract between a person connected by various ties with the enemy, as invalid or unenforcible 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.

copyright in the country of an enemy or of an ally of enemy, by an American citizen or corporation.

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.

[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 the War on Commercial Engagements, London, 1914; E. Meignen, *Les Contrats et la Guerre*, Paris, 1915; Alma Latifi, Effects of War on Property, London, 1909; Arthur Page, War and Alien Enemies, London, 1914; Coleman Phillipson, Effect of War on Contracts, London, 1909; W. S. Schwabe, Effect of War on Stock Exchange Transactions, London, 1915; Leslie Scott, The Effect of War on Contracts, London, 1914; Frederick Wirth, Jr., War: Its Effect upon the Commercial Relations of the Belligerents, Constantinople, 1913.

See, also, T. Baty and J. H. Morgan, War: Its Conduct and Legal Results, 294–303; Westlake, 2 ed., II, 48–55.

[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

In the opinion of American courts the law of nations is unconcerned with the domicile, or residence or nationality of a contracting party, when no forbidden intercourse is involved in the conclusion of the agreement. That law as interpreted by those tribunals does, however, stamp as illegal a contract the making of which requires communication with a place under the control of the enemy.[1] They would doubtless also regard as unenforcible, if not internationally illegal, an agreement the performance of which necessitated such communication.[2]

(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 operates directly upon a valid contract concluded prior to the war between private parties in territories of opposing belligerents. That law does not, however, regard a belligerent sovereign as guilty of internationally illegal conduct if its local law, howsoever

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.

[1] 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.

[2] Montgomery *v.* United States, 15 Wall. 395, Moore, Dig., VII, 244.

established or applied, attributes the dissolution of a contract to the occurrence of war.[1]

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 as an immediate result of the conflict.[2] 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.[3] 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.[4]

[1] 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.

[2] "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 Corporation, Lim. *v.* Hirsch, 85 L. J. (K. B. and C. A.) 565.

[3] 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., Lim. *v.* Passehl & Co., March 1, 1916, 85 L. J. (K. B.) 919.

[4] "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.

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.[1] 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.[2]

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.[3] 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.[4] 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,[5] or under circumstances when the exercise of the power was solely for the benefit of a third party having an equitable right to demand such action in consequence of the payment of money.[6]

[1] Griswold *v.* Waddington, 16 Johns. 438, Scott's Cases, 504; 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.

[2] "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.

[3] Fretz *v.* Stover, 22 Wall. 198, 205–207

[4] Insurance Co. *v.* Davis, 95 U. S. 425.

[5] Williams *v.* Paine, 169 U. S. 55. [6] University *v.* Finch, 18 Wall. 106.

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.[1] The outbreak thereof is doubtless deemed to terminate an existing agency designed for the purpose of or requiring forbidden communications.[2] 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.[3] 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.[4] 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.[5]

A belligerent may see fit to prevent its enemy or nationals of the enemy, wheresoever 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

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

[2] See the reasoning in Montgomery *v.* United States, 15 Wall. 395.

[3] Insurance Co. *v.* Davis, 95 U. S. 425, 429–433.

[4] 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.

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

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.[1]

§ 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 "jurisdiction" of the United States with others resident within enemy territory, but also the completion or performance of existing contracts between parties so located. 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

[1] 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 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.

[2] The words "to trade" were declared to embrace in their meaning the entering into, carrying on, completing, or performing any contract, agreement, or obligation. § 2 (*c*).

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.

[3] Provision was made for the issuing of licenses by the President to enemy insurance companies doing business through local agencies in the United States. In this connection it was rendered unlawful for any enemy or ally of enemy insurance or reinsurance company to which a license was granted, to transmit out of the United States any funds belonging to or held for the benefit of such company or to use any such funds as the basis for the establishment, directly or indirectly, of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy. See § 4a. In case of the refusal or revocation of a license, it was declared to be lawful for a policyholder or for an insurance company not an enemy or ally of enemy, holding insurance or having effected reinsurance in or with an enemy or ally of enemy company, to receive payment therefrom of any premium, claim, money, security, due in respect to insurance or reinsurance in force at the date of the refusal or revocation of license. *Id.* It was provided also that nothing in the act should "vitiate or nullify then existing policies or contracts of insurance or reinsurance, or the conditions thereof."

See proclamation of President Wilson relative to agencies in the United

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 agreement.[1] It was provided that nothing in the Act should prevent the carrying out, completion or performance of any contract originally made with an "enemy", where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy devolved by assignment or otherwise upon a person not an enemy, and where no enemy would be benefited by such carrying out, completion or performance, otherwise than by release from obligation thereunder.[2] It was also provided that nothing in the Act should be deemed to prevent payment of money belonging or owing to an enemy to a person within the United States not an enemy, "for the benefit of such person or of any person within the United States, not an 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

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, p. 1.

[1] § 8 (*b*). 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."

[2] § 7 (*b*). The situation here provided for suggests that arising in University *v.* Finch, 18 Wall. 106.

of the President.[1] 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." [2]

From the foregoing provisions it is apparent that the Congress chose not merely to rely upon the principles of international law as to the effect of war upon existing contracts or relationships of contractual origin, but rather to lay down new and definite rules of restriction. By the enactment of the act, the United States is not believed to have violated any duty towards its enemy under the law of nations.

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.[3] In 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.[4] In 1697, in the case of Wells *v.*

[1] § 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, 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.

[2] § 7 (*b*).

[3] 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.

[4] 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 Lumbard, Galiman, ou tiel marchaunt que vient icy par lycence et saufconduyt et prent cy en Lundres ou ailours vn measō pur le temps, si alcun debruse le meason et prent ses biens il auer acc'de Trespas, mes sil soit enemy le roy et vien einz sauns licence*

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." [1] 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 right to bring 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.[2]

In the United States, expressions of judicial opinion continued to resemble the English in the form of statement respecting the

ou saufconduyt auter est." 32 Y. B. Hen. VI, fol. 23, b 5, Richard Tottel, London, 1556.

[1] 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.

[2] 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, Schaffenius *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, Ragusz *v.* Les Commissionaires du Havre de Montreal, 26 *Rapports Judiciaires de Québec, Cour du Banc du Roi (en appel)*, 87.

disability of alien enemies to start suit;[1] but a broader view obtained as to consequences of the mere 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 possess the right to maintain an action.[2] 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.[3]

[1] "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 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.

[2] 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).

[3] 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,

§ 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]

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

63, 70–71; U. S. Rules of Land Warfare, No. 304; 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 J. W. Garner, Int. Law and The World War, I, § 83.

[1] 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 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). The person deemed to be an "enemy" was forbidden to prosecute any suit or action at law or in equity prior to the end of the war, unless he was licensed to do business under the Act. § 7b. If so licensed, it was provided that he might prosecute and maintain such suit or action so far as the same arose solely out of business transacted within the United States under license, and so long as the license remained in force. *Id.* The maintenance of a suit on a contract entered into prior to the beginning of the war between parties neither of whom was an "enemy", and containing any promise to pay or liability for payment evidenced by drafts or other commercial paper drawn against, or secured by funds or other property situated in enemy territory, was prohibited until after the war, or until such funds or property should be "released for the payment or satisfaction of such contract or obligation." § 8c. 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* defence to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right of 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" to file and prosecute in the United States an application for letters patent, or for registration of trade-mark, 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." § 10g.

It should be observed also that the Alien Property Custodian was vested with all of the powers of a common-law trustee in respect of all property, other than money, which should come into his possession in pursuance of provisions of the Act and, under such rules as the President might prescribe, was given broadest powers in respect to the management of such property. § 12.

against such individuals while they are being deprived of their judicial remedies.[1]

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.[2] Whether the litigant who becomes an alien enemy is defendant or plaintiff, the courts of the United States are scrupulous to exercise their discretion so as to protect the rights of the enemy litigant during the period of his disability.[3]

[1] 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.

According to § 7 (c) of the Trading with the Enemy Act of Oct. 6, 1917: "The running of any statute of limitations shall 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 is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is 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, . . . *Provided, however*, That nothing herein contained shall 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."

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

[2] 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 Valery, "*A propos de la 'condition des sujets ennemis devant les tribunaux français'*", Clunet, XLII, 1009–1024.

[3] 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.

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

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.[1] The right of defense is said to embrace the right to appeal from an adverse judgment entered prior to the war.[2]

§ 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.[3] It may be doubted whether a private individual should be enabled, through the institution 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.[4] It is not believed that any circumstance attributable to

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.

[1] *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 *Conseil des Prises* in the case of the German ship *Czar-Nicolai II.*, *Journal Officiel*, April 19, 1915, p. 2369, *Rev. Gén.*, XXII (*jurisprudence*), 9.

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

[3] § 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.

[4] Note in *Harv. Law Rev.*, XXXI, 470–475, and the comments therein on

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 has not been carefully worked out in the American cases.[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]

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.

[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.

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.[1]

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 does not yet appear to have received the general approval of American tribunals, it may be doubted whether the Supreme Court of the United States has committed itself irrevocably to an opposing doctrine.[2]

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.

[1] Washington, J., in Conn *v.* Penn, 1 Peters C. C. 496, 524, where it was said: "A prohibition 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.

[2] 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

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.[1] 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.[2] 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.[3]

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.

[1] See, for example, § 3 (*a*), of the Trading with the Enemy Act of Oct. 6, 1917.

[2] 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, p. 4.

[3] 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.[1] 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.[2]

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.[3] 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

[1] 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 10, 1915, American White Book, European War, II, 91; also telegram of Mr. Bryan to Mr. Page, March 16, 1915, *id.*, 91; further British memorandum contained in communication of Mr. Page to Mr. Bryan, March 26, 1915, *id.*, 92. See, generally, correspondence with Great Britain, *id.*, 71–94.

[2] 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. American White Book, European War, II, 72.

"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.

[3] 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 Herzian Waves, *supra*, §§ 192–193.

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.[1] 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.[2]

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.[3] Such aid

[1] Executive Order No. 2604.

[2] 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.

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.

[3] "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, No. 25.

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], Corre-

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.[1] 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.[2] Apart from the obvious duty to respect 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;[3] it may regulate his occupation as well as his place and mode of living; it may intern him;[4] it may expel him.[5] [Foot-note on next page.]

spondence 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.

[1] 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.

[2] 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.

[3] 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.

[4] 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

Prior to the World War 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.[1] It was doubtless the prevalence of such good behavior that led to the custom, and gave rise to treaties which fortified it.[2] This was due to the fact that slow means of trans-

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*, § 668.

[5] [of previous page] Rules of Land Warfare, U. S. Army, 1917, No. 28.

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-Fauchille, 7 ed., 748–749, and data there cited.

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

Expulsion, *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.

[1] 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' 7 ed., 406–407.

[2] 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 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,

portation and communication had rendered it difficult for the alien enemy to aid his country while remaining within the territory of its foe.[1] 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.[2] 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.[3]

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.

[1] 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.

[2] 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.

[3] American White Book, European War, IV, 429. In that proclamation (No. 1364) the President announced the establishment of twelve regulations

§ 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]

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 violated 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 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, 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. 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 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, Assistant 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.

[1] Agreements between States, Abrogation by One Party, *supra*, § 546.

[2] Mr. Lansing, Secy. of State, to Dr. Ritter, Swiss Minister in charge of German interests in America, March 20, 1917, American White Book, European

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.[1] 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.[2] 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."[3]

War. IV, 415. 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."

[1] Chap. 106, § 2 (c), 40 Stat. 411.

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

[3] 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.

Without asserting the right to terminate the existing treaty with Germany, or at least those provisions thereof respecting 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 its way, and made ready to exert its broad power of legitimate repression should the safety of the State so demand.[1]

4

CONTROL OF ENEMY PROPERTY WITHIN THE NATIONAL DOMAIN

a

§ 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.[2] 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.[3] It seems to be ac-

[1] 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.

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.

[2] 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.

[3] 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.

knowledged 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.[1]

A belligerent possesses the broadest right to prevent enemy property of any kind within its territory from being so employed as to afford a benefit to the foe. While this right of prevention does not imply one also of confiscation generally, the scope of the former is such as to render otherwise unimportant the manner in which it is exercised, so long as there be no unnecessary destruction or impairment of the value of the property concerned. The procedure adopted may be designed with reference to the nature or location of the owner. 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. 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.[2] 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 assert direct and exclusive control over the property. The belligerent may, moreover, 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.

[1] 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."

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

[2] 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.

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 nonresident 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 Attitude of the United States.

The United States pursued such a course as a belligerent in The World War. By virtue of the Trading with the Enemy Act of October 6, 1917,[1] 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 pursuant to the power conferred upon the President under this and supplementary acts,[2] there was established an organization for the management and administration, sale or other disposition of "enemy" property.[3] Thus moneys and other forms of property

[1] § 6, Chap. 106, 40 Stat. 411, 415.

[2] Chap. 28, Act of March 28, 1918, 40 Stat. 459; Chap. 201, Act of Nov. 4, 1918, 40 Stat. 1020.

[3] 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. § 7c. 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. § 7d. Provision was made for the discharge and full acquittance of transferors. § 7e. 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 (§ 8a), 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

were received, businesses were conducted of corporations, partnerships and individuals, and property sold as well as concerns liquidated.[1]

b

Confiscation

(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 treas-

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. § 7a.

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, p. 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, p. 2.

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

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

See Public Act No. 252, 66 Cong., of June 5, 1920, amending Section 9, of the Trading with the Enemy Act of Oct. 6, 1917.

[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.

ures of historical and literary value ought to be exempt.[1] 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.[2]

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 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.[3]

[1] 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.

[2] 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.

[3] 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.

(2)

Private Property

(a)

§ 621. Tangible Property.

In early days of the Republic a view found expression in *dicta* of the Supreme Court of the United States, that the law of nations did not forbid the confiscation by a belligerent of enemy private property on land within the national domain.[1] Even then there was evidence of a tendency or practice on the part of enlightened States to refrain from such conduct. While the growth of such a practice was perceived, its possible legal significance was not at first clearly understood. Somewhat later, however, it became apparent to Chief Justice Marshall that the usage of nations afforded the test of the propriety of national conduct, and that such usage might destroy the existence of an old belligerent right.[2]

[1] Brown *v.* United States, 8 Cranch, 110, and the comment thereon in Moore, Dig., VII, 288. *Compare* Dana's Wheaton, Dana's Note No. 156. See, also, Chase, J., in Ware *v.* Hylton, 3 Dall. 199, 225, Moore, Dig., VII, 228; Cargo of Ship Emulous, 1 Gall. 563, 580–581; Wilcox *v.* Henry, 1 Dall. 69.

[2] 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 confiscation. Since such 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 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.

On that ground he did not hesitate to denounce as internationally illegal the act of a conqueror in confiscating private property.[1]

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.[2] 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.[3] 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. As careful an observer as Hall declared that this Act of Congress was the only instance of belligerent confiscation of private property from the close of the Napoleonic wars[4] until the time when he wrote; yet he expressed doubt as to whether the usage was old and broad enough to establish a rule applicable to all forms of private property.[5]

[1] United States *v.* Percheman, 7 Pet. 51. In the course of his opinion Chief Justice Marshall declared (p. 87) that "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."

[2] 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.

[3] 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."

[4] *Id.*, 6 ed., 434.

[5] *Id.*, 435. In the sixth edition of this work, published in 1909, some years after the death of the distinguished author, the editor, Mr. J. B. Atlay, saw

§ 622. The Same.

It is believed that on principle the right 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 belligerent 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 of 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

no reason to add any comment or criticism. Nor did Mr. A. P. Higgins, in his valuable seventh edition, published in 1917, see fit to do so.

See, also, view expressed by Sir F. E. Smith, Atty.-Gen., in the House of Commons in 1914, and paraphrased in *The Law Times*, CXL, 96, Dec. 4, 1915.

[1] Sec § 12 of the Trading with the Enemy Act of Oct. 6, 1917, 40 Stat. 411, 423–424.

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., p. 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."

with scrupulous regard for the law of nations, the obtaining of satisfaction from private property would be inconsistent with the duty to respect it. That obligation clearly implies that a belligerent cannot lawfully under such circumstances pay its war bills out of such an asset.

Where the claim, the amount of which has been estimated with precision and fairness, is for compensation by way of reparation for internationally illegal conduct on the part of the enemy, the impropriety of which either is not denied, or is capable of establishment by abundant proof, the grounds for retention may appear to have a firmer basis. In such case, however, difficulties also present themselves. Such utilization of enemy private property places the burden of reparation without discrimination on persons who may or may not be in fact responsible for the wrongs committed, and upon many who are not even resident within enemy territory. It is not apparent how the enormity of the offense of the belligerent sovereign establishes a right to pursue such a course, unless the bond between that sovereign and its nationals suffices in itself to charge them generally with responsibility for its acts, and that regardless of their residence, domicile, actual participation in the war or any other consideration. Such action, whenever taken, operates as a means of loosening the pressure against the actual wrongdoer, enabling it to utilize by way of credit for reparation assets which it might otherwise find outside of its reach as a source of reimbursement.[1] It is believed, therefore, that the traditional prohibition of confiscation should not be relaxed. Nor should the exigencies produced by a particular war be permitted to weaken respect for a principle of justice which might fairly be invoked in the course of subsequent conflicts.[2]

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.[3] Technically such action was not confiscatory in character because of the undertaking of that Government to reimburse its nationals whose property was thus taken. Inasmuch, however,

[1] The economic wisdom of permitting any privately owned assets belonging within the domain of the State, and so constituting a part of the domestic wealth of the country, to be utilized as the basis of reparation on account of the illegal acts of a foreign State as a belligerent may well be doubted.

[2] See argument of Robert Lansing in "Some Legal Questions of the Peace Conference", *Reports of American Bar Association*, XLIV (1919), 238, 255.

[3] War Claims against Germany under the Treaty of Versailles, *supra*, §§ 298–299.

as the actual value of that undertaking was necessarily slight by reason of the fiscal burden imposed upon the German territorial sovereign, the agreement signified consent to what amounted to a practical confiscation of private property by its enemies.

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 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.[1]

(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 indestructability due to the circumstance that cancellation or sequestration 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.[2] It is highly improbable that the United States would resort to confiscation.

[1] 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.

[2] "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 sequestrate 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' 7 ed., § 144.

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 assert the right to control the debt as if it were tangible property. The existence of such a right does not imply the existence also of one of confiscation. The duty to abstain therefrom is believed to be clearly recognized in the United States.[1]

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.[2]

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.[3] By an Act

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.

[1] 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 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.

[2] § 7 (*c*) and (*d*), of Trading with the Enemy Act of October 6, 1917, 40 Stat. 416.

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

of Congress approved June 15, 1917, it 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.[1] 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.[2]

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.

[1] 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.

[2] Official Bulletin, July 9, 1917, 3.

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 coöperate 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

Again, on February 14, 1918, the President, by an imports and exports proclamation, 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.[1] The propriety of this action was beyond question.

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

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; also supplementary proclamation of President Wilson (No. 1410), Nov. 28, 1917.

[1] Official Bulletin, Feb. 15, 1918, No. 235, p. 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.

For texts of Presidential proclamations pursuant to the Act, see U. S. Comp. Stat., 1918 ed., following § 7678 a.

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 is contended in Germany and elsewhere that an alien from whom is 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 political privilege in order to justify the exaction of military service even

[1] Th. 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. 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.

if it is to be regarded as constituting a political duty,[1] 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.[2] 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. To deny the right to impose it upon the neutral national who remains domiciled within the national domain is to disregard the reality of the actual relationship existing between himself and the territorial sovereign, and to respect instead his technical and slender connection with the State of his allegiance as the basis of a restriction.

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

[1] 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.

[2] 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.

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.[1]

By active participation in the political life of the State as manifested by the exercise of the right of suffrage or of other political privileges, the neutral resident establishes such a relationship with the territorial sovereign as to forfeit the right to deny that he has incurred an obligation to render military service when demanded. Such participation, especially when the supplement of a declaration

[1] 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.

of intention to adopt the nationality of the State, has oftentimes been acknowledged to accomplish this result; for although not productive of expatriation, it emphasizes the weakness of the connection with the State of allegiance and the strength of the bond with the territorial sovereign. If the latter exacts its own price therefor, the former will not be disposed to complain.

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, whether or not declarants of intentions to become citizens, are afforded a reasonable opportunity to withdraw therefrom.[1] 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

[1] "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.

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 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

[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, XIV, 42. It may be observed that the quotation from the instruction to Lord Lyons, quoted by Mr. Davis, Assistant Secretary of State, in a communication to Mr. Faxon, American Consul at 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, p. 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.

July 17, 1862, for the purpose of calling forth the militia, provided for the enrollment of all able-bodied male "citizens" between specified ages.[1] 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.[2] 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.[3]

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.[4] 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 time, and with reasonable opportunity of compliance, but not otherwise." [5]

An Act of Congress of March 3, 1863, rendered liable to military

[1] 12 Stat. 597.

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

[3] 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.

[4] Parl. Papers, "North America", No. 13, 1864, p. 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."

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

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.[1] In order to avoid misapprehension concerning the liability of persons embraced within the scope of the act, a proclamation of 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.[2] The British Government regarded this position as reasonable.[3] Thus the importance of the statement of

[1] 12 Stat. 731.

Prof. Moore adverts to the fact that Mr. Seward, Secretary 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.

[2] 13 Stat. 732.

[3] 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, p. 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, p. 3.

In the course of a communication from Mr. Bayard, American Ambassador at London, to Mr. Gresham, Secretary of State, July 19, 1894, in relation to American citizens residing in the South African Republic, it was reported that

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 military duty when his Government called for his release,[1] is 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."[2] 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.[3] In 1874, he declared that while the United States had not claimed the right to impress aliens into its service 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."[4]

"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.

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

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

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

[4] 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, Secretary 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 1917, Secretary Lansing stated in substance, that while there might be a "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." [1]

§ 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,[2] and of such persons a large

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 Secretary of State, to Mr. Hibben, American Chargé d'Affaires at Bogota, 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.

[1] 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, p. 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 ser., XXXV, 217; translation by Henckels and Crocker in Authorities on the Law of Angary, Department of State, Confidential Document, 1918, p. 13.

[2] Prior to the declaration of war by the United States against Austria-Hungary, the nationals of that State residing in American territory constituted

proportion owed allegiance to States with which treaties had been concluded exempting from military service the nationals of the contracting parties.[1] The actual number of alien neutrals not entitled to the benefits of such agreements was relatively small.[2]

The selective draft law of May 18, 1917, was based upon liability to military service of male citizens, "or male persons not alien enemies who have declared their intention to become citizens", within specified ages.[3] The Department of State received numer-

a substantial group of persons technically to be regarded as neutrals, yet connected by allegiance with a State in alliance with the enemy.

[1] 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, Charles' Treaties, 78; 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.

[2] 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, Secretary 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" (p. 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.

[3] See Chap. 15, § 2, 40 Stat. 77, U. S. Comp. Stat. 1918 ed., § 2044b. 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 Hutflis, 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;

ous 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 to which the United States might have to the services of persons within its jurisdiction who had endeavored to absolve their 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.[1] An Act of Congress of July 9, 1918, provided 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 decla-

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.

[1] Communication of Mr. Lansing, Secy. of State, to Mr. Dent, chairman Committee on Military Affairs, House of Representatives, Feb. 14, 1918, Cong. Record, 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.

ration, 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.[1] A similar provision was embodied in the amended selective draft Act of August 31, 1918.[2]

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.

(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.[3]

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

[1] § 4, sub. Chap. XII, of Act making appropriation for the support of the Army for the fiscal year ending June 30, 1919. See In re Leon, 262 Fed. 166.

[2] § 1 of Act amending the Act entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States, approved May 18, 1917", Chap. 166, 40 Stat. 955.

See Second Report of the Provost Marshal General to the Secretary of War, Dec. 20, 1918, 86–108.

[3] 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; E. M. Borchard, Diplomatic Protection, 67–68.

law required to join.[1] Such individuals 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.[2] 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.

(3)

§ 629. Place of Residence and Occupation.

There is apparent 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 not unjustifiable although unrelated to any military operation, and enforced outside of a zone of hostilities.[3] 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.[4]

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

[2] Mr. Davis, Assistant 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.

[3] Hall, Higgins' 7 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.

[4] 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.

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 right of taxation does not necessarily require the existence of a bond of allegiance between him and the taxing State.[2] That right depends rather upon the relation of the property itself therewith, or upon the residence of the owner within its national domain.[3] Doubtless a belligerent State may abuse its privilege by taxing 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

[1] Mr. J. C. B. Davis, Assistant 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 Rights of Property and Control, 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*) 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.

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 is not necessarily indicative that the resident neutral is subjected to treatment which disregards any rule of international law which his own government 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] Inas-

[1] H. T. Kingsbury, *Proceedings*, American 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 E. M. 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" 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

much, 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.[1]

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.[2]

The United States has itself never exacted forced loans. It is not understood that while it remained a neutral in the course of the European war 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, and 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 the 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.[3] This claim is regarded as superior to any opposing claim of exemption based on the neutral nationality of

Caro Case, Italian-Venezuelan Commission under convention of 1903, *id.*, 810, 818.

[1] 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, Charles' Treaties, 78.

[2] Mr. Moore, Third Assistant 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.

[3] In a strict sense it is the connection of the owner with the territorial sovereign by his residence within its domain which subjects his property temporarily therein to treatment such as is accorded property there belonging.

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 owned by its nationals. On principle, therefore, the right of requisition would not seem to imply a positive obligation to compensate the owner as a condition precedent to the taking of his property. 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. Doubtless a belligerent might abuse its powers in this regard, and resort to practical confiscation under circumstances when its conduct was essentially unjust although indiscriminate.

In such case there would be ground for neutral complaint. It seems important, however, to bear in mind that it is the nature of the relationship between the property and the belligerent State[1] which gives to the latter a broad right not only of requisitioning what is essential to its needs, but also of making compensation on terms convenient to itself.

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.[2]

(4)

Neutral Property Temporarily within the State. The Right of Angary

(a)

§ 633. In General.

Neutral property temporarily within, and not belonging to or associated with the national domain, and owned by persons not there residing, such as a neutral ship within a belligerent port, is, nevertheless, under the control of the territorial sovereign. No such relationship does, however, exist between such property and that sovereign as has been observed in the case of property which

[1] 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.

[2] 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.

belongs within its territory or is owned by persons there domiciled. There is thus wanting the ground which justifies the State in dealing with the latter as if it belonged to its own nationals and on no better terms. This circumstance affords the basis of a logical and practical distinction which statesmen and jurists have not failed to perceive in determining the right of a belligerent to seize and use neutral property temporarily within its territory.[1] Both in America and England the prevailing opinion sanctions such seizure and use, provided the belligerent be confronted with a vital need, and ample compensation be assured the owners.[2] In both countries it is felt that in the absence of these two conditions such action would manifest an abuse of power. It is thus a question respecting

[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, p. 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, for example, Phillimore, 2 ed., III, § 29; Hall, Higgins' 7 ed., § 278; Oppenheim, 2 ed., II, §§ 364, 365; Westlake, 2 ed., II, 134.

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

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, however, based on a principle which events of The World War have shown to be still applicable,

[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 *ἀγγαήριον* 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 necessaries 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, pp. 25–28.

and which has also been invoked during the past century in analogous cases.[1]

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

[1] "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, p. 9.

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. State 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. See, also, Oppenheim, 2 ed., II, § 364.

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.[1]

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.[2] 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.[3]

[1] 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 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 requisition 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, p. 11.

It ought to be clear that the requisitioning of such vessels not belonging within belligerent territory, finds no analogy in the principle which permits a State to impress into its military service persons who, regardless of their nationality, have by their conduct bound themselves to the territorial sovereign by strong ties of residence and intimate association.

[2] The 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, p. 10.

[3] See memorandum of the British Foreign Office, accompanying communica-

(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 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 affected by 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 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]

tion 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.

[1] Report of negotiations by the Netherlands Minister of Foreign Affairs to the States-General, March 12, 1918, Official Bulletin, March 16, 1918, II,

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." [1] He declared that by virtue of an Act of Congress of June 15, 1917,[2] having found 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

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.

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.

[1] 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.

[2] 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 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.

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." [1]

. 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 The World War marked a departure from an early practice, the frequent recognition of it in modern treaties and by contemporaneous writers bore testimony as to the worth of the principle on which it rested, and to the likelihood of its invocation should occasion arise.[2] This circumstance

[1] Statement by President Wilson, March 20, 1918, Official Bulletin, March 21, 1918, II, No. 263.

"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.

[2] 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; Oppenheim, 2 ed., II, 446–449, with bibliography; Erich Albrecht, *Requisitionen von neutralem Privateigentum*, Breslau, 1912 (published as supplement to *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, VI); Coleman Phillipson, in *The Law Times*, April 13, 1918; Higgins' 7 ed. of Hall, 812, 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; L. E. Harley, "The Law of Angary", *id.*, XIII, 267; Albéric Rolin, "*Le droit d'angarie*", *Rev. Droit Int.*, 3 series, I, 19 (1920).

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.

(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 what international law forbade, declared it to be fortunate that that law was not "imperative."[3]

[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.

[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.

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 exerciseable.[1]

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.[2] The stress laid upon the necessity

[1] 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.

See, also, The Canton (1916), 2 Grant's P. C., 264.

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.

[2] Declared Lord Parker in the course of the judgment of the Court: "It was 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

of a 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 requisition of captured neutral vessels under the conditions thus prescribed would not seem to be unlawful.

(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]

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]

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."

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. American White Book, European War, III, 151, 153.

[1] Malloy's Treaties, II, 2300.

[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.

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]

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.

[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 reëstablishment 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 Zerbst by tieing him to a stake, Misc. No. 19 (1915), Cd. 8108, p. 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.

Such intercourse and the technical mode of conducting it are natural incidents of belligerent operations.

2

MILITARY AND NAVAL COMMUNICATIONS AND AGREEMENTS

a

§ 639. Flags of Truce.

A military commander may be said to possess the right to ascertain whether the enemy will enter into communication with him. The exercise thereof is accomplished by means of a so-called flag of truce. On principle, therefore, 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 such a flag, 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

[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*." U. S. Army, Rules of Land Warfare, 1917, No. 244.

[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*. *Parlementaires* are ordinarily agents in the non-hostile intercourse of belligerent armies. Their duties include every form of communication with the enemy in the field.

"The adoption of the word '*parlementaire*' to designate and distinguish the agent or envoy seems absolutely essential in order to avoid confusion and because all other nations, including Great Britain, utilize the word. In the past this word has been translated at times to mean the agent or envoy only, at other times the agent and emblem, or both. To call the *parlementaire* 'the bearer of a flag of truce' is not in reality correct, because he seldom, if ever, carries it." U. S. Army, Rules of Land War, 1917, No. 235.

[4] Art. XXXIII of the Hague Rules.

receive it is fraught with special danger to the *parlementaire* and his staff if the bearer presents himself during an engagement,[1] and is highly dangerous and uncertain if made at night.[2] 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.[3] 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.[4] 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.[5] 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.[6]

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.[7]

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.[8] Familiar instances are those when, under

[1] "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, U. S. Army, Rules of Land Warfare, 1917, Nos. 239 and 240.

[2] U. S. Army Rules of Land Warfare, 1917, No. 242.

[3] *Id.*, No. 240.

[4] *Id.*

[5] *Id.*, No. 244. The Army Rules of Land Warfare make elaborate provision for the formalities to be observed in the reception of *parlementaires*. See No. 246.

[6] Davis, Int. Law, 3 ed., 337.

[7] Art. XXXIII of the Hague Rules.

The U. S. Army Rules of Land Warfare, of 1917, 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. 247.

[8] 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

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 the purpose of obtaining information or with any other treacherous design. The Rules of 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.[1] 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 individual soldiers or a small party, it has come to signify surrender."[2] Such an act is essentially treacherous in character when committed for the purpose of luring an enemy force to a dangerous place.[3]

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 granted by the enemy to the pretended flag of truce. An abuse of a flag of truce may authorize a resort to reprisals." U. S. Army, Rules of Land Warfare, 1917, No. 249.

[1] 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.

[2] U. S. Army, Rules of Land Warfare, 1917, No. 238.

[3] "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, p. 57.

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]

§ 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.[2]

[1] Hall, Higgins' 7 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.

The U. S. Army Rules of Land Warfare, 1917, define a passport as "a written document given to a person or persons by a commander of belligerent forces authorizing him or them to travel unmolested within the district occupied by his troops." No. 276. See, also, J. M. Spaight, War Rights on Land, 230.

[2] See, for example, Mr. Lansing, Secy. of State, to Count von Bernstorff,

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.

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.[1]

A safe-conduct may be issued for the protection of both persons and things; an enemy vessel may be the grantee.[2]

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 military and naval attachés, respectively, at Washington, recalled by their Government, at the request of the United States), with the understanding that they would take the "southern route" to Holland, and "perform no unneutral act, such as carrying dispatches to the German Government", American White Book, European War, III, 327; 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.

According to the U. S. Army Rules of Land Warfare, 1917, a "safe-conduct as to persons" is "a document given to an enemy, alien, or other person or persons by a commander of belligerent forces authorizing him or them to go into places which they could not reach without coming into collision with armed forces actively operating against the enemy." No. 277. According to those Rules, a safe-conduct as to goods is "a written authority or license to carry goods to or out of, or to trade in a certain place or places otherwise forbidden by the laws of war, given by a commander of belligerent forces to an enemy, alien, or other person." No. 278.

[1] 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.

[2] 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 American witnesses being brought before them, safe-conducts to unneutral ships carrying victuals to Belgium." American White Book, European War, II, 100; *id.*, 99–100.

See, also, Maritime War, Safe-conducts, *infra*, § 760.

"Both passports and safe-conducts fall within the scope of international law when granted by arrangement with the enemy or with a neutral power.

§ 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] A safeguard is said to be usually directed to the succeeding commander requesting the protection of particular individuals or property.[2] The term "safeguard" is also used to describe 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."[3]

C

§ 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."[4] The agreement commonly specifies the details of the surrender, and should contain in precise terms every condition to be imposed. The time, manner and execution of them should be established unequivocally.[5] The subjects usually

The passports and safe-conducts as to persons are individual and non-transferable. A safe-conduct for goods, while restricted to the articles named in them, may be transferred from one person to another, provided it does not designate who is to carry the goods or to trade. They may be transferred when the licensee is designated if the transferee is approved by the authorizing belligerent. The term 'pass' is now frequently used instead of the older term 'passport', and likewise the word 'permit.' The word 'pass' being used for a general permission to do certain things, the word 'permit' being used like the word 'safe-conduct', to signify permission to do a particular thing." U. S. Army, Rules of Land Warfare, 1917, No. 279.

[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] U. S. Army, Rules of Land Warfare, 1917, No. 282.

[3] *Id.* See, also, J. M. Spaight, War Rights on Land, 230.

[4] U. S. Army, Rules of Land Warfare, 1917, No. 251, where it is added: "Capitulations are essentially military agreements, which involve the cessation of further resistance by the force of the enemy which capitulates. The surrender of a territory is frequently spoken of as an evacuation."

[5] *Id.*, No. 253.

regulated are said to be (*a*) the fate of the garrison, including those persons who may have assisted them; (*b*) the disarming of the place and of the defenders; (*c*) the turning over of the arms and matériel, and, in a proper case, the locating of the mine defenses, etc.; (*d*) provisions relating to private property of prisoners, including personal belongings and valuables; (*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 besiegers of certain forts or places, or other similar provisions, as a pledge for the fulfillment of the capitulation.[1]

The Rules of Land Warfare of the United States Army declare that while the commander of a fort or place and the commander in chief of an army are presumed to possess the requisite authority for concluding capitulations ("being responsible to their respective governments for any excess of power in stipulations entered into by them"), the powers of such an officer do not extend beyond what is necessary for the exercise of his command. Thus "he does not possess power to treat for a permanent cession of the place under his command, for the surrender of a territory, for the 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."[2]

While the successful commander possesses a broad right to dictate the terms of a capitulation, he is believed to be bound, like the State which he serves, to impose no terms which reflect personal ignominy upon his adversary and his forces. Thus the Hague Regulations of 1907 declare that capitulations must take into

[1] U. S. Army, Rules of Land Warfare, 1917, No. 254. 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, pp. 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, pp. 83, 84, 85 and 80, respectively.

[2] No. 252, and instances cited.

"A capitulation entered into by a belligerent in regard to the surrender of one of its possessions binds its allies." Moore, Dig., VII, 321, *citing* The Resolution, 2 Dall., I, 15.

account "the rules of military honour." [1] Those Regulations also emphasize the duty of both parties to observe scrupulously the terms agreed upon.[2] Upon the signature of a capitulation the capitulator impliedly undertakes to commit no act prior to the execution of the agreement, which shall be injurious to or destructive of anything in his possession which he has agreed to surrender.[3] His adversary, on the other hand, is obliged, during the same interval, to permit no further hostilities against any person or thing or place embraced within the terms of the agreement.

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 it 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.[4]

d

§ 644. Cartels.

The term "cartel" is defined "in the customary military sense", as an agreement entered into by belligerents for the exchange of prisoners of war.[5]

The term is also employed with a broader signification, referring,

[1] Art. XXXV of those annexed to the Convention respecting the Laws and Customs of War on Land, Malloy's Treaties, II, 2287.

[2] *Id.*

[3] § 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. See, also, U. S. Army, Rules of Land Warfare, 1917, No. 255.

[4] 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 occurred 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.

[5] U. S. Army, Rules of Land Warfare, 1917, No. 284. 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.

as Hall has said, to a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility may be carried out.[1] A cartel is regarded as voidable as soon as either party has violated it.[2]

"Cartel ships" is an appellation given 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.[3] A cartel ship is said to be "neutralized by her office and is unarmed." [4]

e

§ 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.[5] 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.[6] Lack of uniformity of description is,

[1] Higgins' 7 ed., § 193, where it is also said that cartels "provide for postal and telegraphic communication, when such communication is allowed to continue, for the mode of reception of bearers of flags of truce, for the treatment of the wounded and prisoners of war, for exchange and the formalities attendant on it, and for other like matters."

[2] U. S. Army, Rules of Land Warfare, 1917, No. 284.

[3] The language of the text is that in Oppenheim, 2 ed., II, § 225.

[4] 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.

[5] Sir S. Baker's 3 ed. of Halleck, II, 311, Moore, Dig., VII, 327; also Hall, Higgins' 7 ed., § 192; Oppenheim, 2 ed. II, § 232; U. S. Army, Rules of Land Warfare, 1917, No. 266.

[6] 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.

"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 de-

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.[1]

f

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.[2] The Rules of Land Warfare of the United States Army define it as "the cessation of hostilities for a period agreed on between belligerents."[3] 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.[4] It is there declared that an armistice may be general or local, the former suspending the operations of belligerent forces

feated 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 agreement; 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.

[1] "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' 7 ed., § 192, p. 585.

[2] U. S. Army, Rules of Land Warfare, 1917, Nos. 256a–275; 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).

[3] Edition of 1917, No. 256a.

[4] Arts. 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.

everywhere, the latter only between certain fractions of such forces and within a fixed area.[1] An armistice, according to American opinion, must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.[2]

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 Rules of the United States Army 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." [3]

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.[4] 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.[5]

[1] Art. 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 are ratified in all cases. General armistices are frequently arranged by diplomatic representatives." U. S. Army, Rules of Land Warfare, 1917, No. 264. 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.

[2] U. S. Army, Rules of Land Warfare, 1917, No. 256a.

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.

[3] Edition of 1917, No. 260. 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."

[4] No. 261.

[5] J. M. Spaight, War Rights on Land, 235–239; also publicists quoted in

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.[1]

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 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 make provision for a provisional suspension of hostilities, and such procedure was duly followed.[2]

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.[3] The Rules of the United States Army declare that to

Joseph R. Baker and Henry G. Crocker, Laws of Land Warfare, Dept. of State, 1919, 256–267.

[1] 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, 351. 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.

[2] 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.

[3] 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

denounce an armistice" without some very serious breach, and to surprise the enemy before he can have time to put himself on guard would constitute an act of perfidy." In the absence of extreme urgency, some delay, it is said, should be given between the denunciation and resumption of hostilities.[1]

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.[2]

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." [3]

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. Thiébaut, 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.

[1] Edition of 1917, No. 272.

[2] Art. XLI, Malloy's Treaties, II, 2288.

[3] 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 each 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.

If nothing is stipulated, the intercourse, according to the Rules of the United States Army, remains suspended, as during actual hostilities.[1]

(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.[2] The armistice with Germany of November 11, 1918, 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

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 reëstablishment 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.

[1] Rules of Land Warfare, 1917, No. 269.

[2] See correspondence between the United States and Austria-Hungary regarding an armistice, in September and October, 1918, *Am. J.*, XIII, Supp., 73–79; correspondence between the United States and Germany, regarding an armistice, in October and November, 1918, *id.*, 85–96. With Austria-Hungary communications were held through the medium of the Swedish Legation at Washington, and with Germany, through that of the Swiss Legation in that city.

negotiations for peace.[1] 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,[2] 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 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.[3] Certain other affirmative undertakings were also imposed upon Germany such as to disclose, under penalty

[1] Commercial Cable Co. *v.* Burleson, 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. Record, May 5, 1920. For the text of the agreement see *Am. J.*, XIII, Supp., 97, Naval War College, Int. Law Documents, 1918, 56.

[2] 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.

[3] 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.

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 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,[1] the right of requisition in occupied territories, access to territories evacuated by Germany on the Eastern Front, by way of Danzig or the Vistula,[2] as well as freedom of access to and egress from the Baltic,[3] the continuance of the existing blockade of Germany, and the right to capture German merchant ships at sea.[4]

Provision was made for the period of duration of the armistice,[5] for its denunciation in case of non-execution,[6] and for a Permanent

[1] 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.

[2] Such access was given in order to revictual the populations of those territories or to maintain order.

[3] 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 Cattegat 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.

[4] 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.

[5] 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, *Am. J.*, XIII, Supp., 387, 388 and 392, respectively. These supplementary agreements contained numerous modifications of and additions to the original armistice of Nov. 11, 1918.

[6] 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.

International Armistice Commission to insure fulfillment of the agreement.

The foregoing provisions reveal an arrangement designed to accomplish far 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.[1] 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.

[1] See, also, protocol of the conditions of an armistice between the Allied and Associated Powers and Austria-Hungary, of Nov. 3, 1918, *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.

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

[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.

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:

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]

[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.

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.[1]

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.[2] The Instructions 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

[1] Malloy's Treaties, II, 2281.

[2] 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.

"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.

protection.[1] So important, therefore, are the rights dependent 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 justly said to have taken place.[2] 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.[3] 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 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 as a recent belligerent was not 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.[4]

[1] § 52, as contained in Moore, Dig., VII, 172.
The same announcement was incorporated in the Rules of Land Warfare, 1917 edition, Nos. 37 and 39. According to No. 38: "Certain classes of those forming part of a *levée en masse* cannot claim the privileges accorded in the preceding paragraph. Among these are deserters, subjects of the invading belligerent, and those who are known to have violated the laws and customs of war."

[2] According to Art. XLII of the Regulations annexed to the 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, 2 ed., II, §§ 81 and 167.

[3] 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.

[4] It should be observed that if engaged in war with one or more other States,

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 claim the rights 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.[1]

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. 42.

[1] 3 ed., 292–293, where it is added: "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

A moral rather than a legal obligation may be said to impel observance of a like restriction in the waging of war against countries not only not possessed of European civilization, but also lacking the power as well as the disposition to respect the law of nations, in regard to the employment of armed forces and the mode of conducting hostilities.[1] No international obligation arises when a civilized State conducts a *de facto* war to suppress hostilities occasioned by the insurrection of uncivilized or semi-barbarous peoples who are subject to its sovereignty. Nevertheless on such occasions, by reason of its very enlightenment, such a State should not as a matter of public and domestic policy, employ against its own nationals, save in case of absolute necessity, troops such as the law of nations would forbid it to utilize in a war against another member of the family of nations. Resort should not be had to retaliation in this regard save on grounds of overwhelming necessity.

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 The World War when the United States remained a neutral, numerous American citizens entered the military services of certain belligerents.[2]

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.[3] 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.

[1] See excellent statement in Davis, Int. Law, 3 ed., 293; also J. W. Garner, Int. Law and the World War, I, §§ 191–194.

[2] 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, *Am. J.*, XII, Supp., 265, U. S. Treaty Series, No. 633; 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 Series, No. 634, *Am. J.*, XII, Supp., 270. See, in this connection, Lester H. Woolsey, editorial comment, *Am. J.*, XII, 824.

[3] Malloy's Treaties, II, 2285. See, also, Bonfils-Fauchille, 7 ed., § 1095, and literature there cited.

conditions under which a belligerent may not unreasonably draft into its service aliens who are nationals of neutral States are discussed elsewhere.[1]

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.[2]

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, *Am. J.*, III, 755, 758. Concerning the case see Gilbert Gidel, "*L'Arbitrage de Casablanca*", *Rev. Gén.*, XVII, 326–407.

[1] Neutral Persons and Property within Belligerent Territory, *supra*, §§ 625–627.

[2] 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 reconnoissance, 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 exist-

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 at 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, 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." [1]

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's 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." [2] 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.

ing, 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.

[1] *Am. J.*, I, 13, 16–17.

"82. Men, or squads of men, who commit hostilities, whether by fighting, or by inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers — such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates." Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, Moore, Dig., VII, 174, and incorporated in the Rules of Land Warfare, 1917, as No. 371.

[2] U. S. Army, Rules of Land Warfare, 1917, No. 373, following Section 84 of General Orders No. 100, of April 24, 1863.

"*Marauders.* Marauders are individuals, either civilians or soldiers, who have left their corps, and who follow armies on the march or appear on battlefields, either singly or in bands, in quest of booty, and rob, maltreat, or murder stragglers and wounded, and pillage the dead. Their acts are considered acts of illegitimate warfare, and the punishment is imposed in the interest of either belligerent." Rules of Land Warfare, 1917, No. 374. This definition is taken from Oppenheim's Rules of Land Warfare, par. 488.

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-combatant in general, 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.[3] The so-called non-combatant member of an

[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.

[3] 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

armed force is 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.[1] 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.[2]

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

men and who do not themselves oppose the enemy arms in hand." J. M. Spaight, War Rights on Land, 58.

[1] Oppenheim, 2 ed., II, § 79; Westlake, 2 ed., II, 67.

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.

[2] Art. XIII of Hague Regulations, Malloy's Treaties, II, 2283.

Neutral military observers and diplomatic officers who are guests of the commander-in-chief may fall within the same class.

See views of publicists in Joseph R. Baker and Henry G. Crocker, Laws of Land Warfare, 83–88.

complete submission of the enemy 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 Rules of Land Warfare of 1917, military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is *unavoidable* in the armed contests of war; it allows of the capturing of every armed enemy and of every enemy of importance to the hostile Government or of peculiar danger to the captor; it allows of all destruction of property, and of obstruction of ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever the enemy's country affords that is necessary, for the subsistence and safety of the army, and of 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 for the sake of suffering or for revenge, nor of maiming or wounding except in fight, 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; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult." [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 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

[1] Nos. 10 and 11, Rules of Land Warfare. 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. 12, Rules of Land Warfare. [3] No. 13, Rules of Land Warfare.

it necessarily pays respect to the rights 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.[1] 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 imperative need, and allows a belligerent commander to be the judge of the existence 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.[2]

[1] 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 reasonable 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, Dienstag*, 4 August, 1914, *Am. J.*, XIV, 95, 111.

[2] 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; Rules of Land Warfare, p. 161, Appendix 2.

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 isolation 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 noncombatants, 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 authorize the population, including women, children, aged, sick, wounded, subjects of neutral powers, or temporary residents, to leave the locality, even when a bombardment is about to commence. It is entirely within the discretion of the

[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.

[3] According to No. 224 of Rules of Land Warfare, "The commander of the investing force has the absolute right to forbid all communications between the besieged place and the outside. The application of this rule to diplomatic envoys of neutral powers is unsettled."

No. 219 of the Rules of Land Warfare 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 the other inhabitants."

[4] No. 222, Rules of Land Warfare; also Section XVII General Orders, No. 100, of 1863.

[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.

besieging commander whether he will permit them to leave or not, and under what conditions.[1]

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.[2] It must be clear that a town does not necessarily cease to be defended because it lacks fortifications, and that conversely, an unfortified place possessing a military force or a population rising in armed resistance must be regarded as defended. According to Prof. 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." [3] A place thus open 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.[4]

[1] The language of the text is that of No. 218, Rules of Land Warfare, *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.

See, also, Nos. 220, 221 and 223, Rules of Land Warfare.

[2] 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.

[3] 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 The World War, contained in Annex I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie Endowment for International Peace, Div. of Int. Law, Pamphlet No. 32, p. 46.

Also J. W. Garner, Int. Law and The World War, I, §§ 269–272.

[4] According to No. 214 of the Rules of Land Warfare, defended places include the following:

"(*a*) A fort or fortified place.

"(*b*) A town surrounded by detached forts is considered jointly with such forts as an indivisible whole, as a defended place.

"(*c*) A place that is occupied by a military force or through which such force is passing is a defended place. The occupation of such place by sanitary troops alone is not sufficient to consider it a defended place."

See Hague Convention of 1907, respecting Bombardment by Naval Forces in Time of War, Malloy's Treaties, II, 2314.

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. This would be true in the case of a town itself incapable of offering any resistance, if actually defended by guns mounted outside of its limits and not in close proximity thereto. The enemy might, without violating any prohibition of the regulations, attack the town as a means of silencing the batteries defending it. 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.[1] 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.[2]

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.[3]

It is declared 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.[4]

To bombard deliberately a hospital,[5] or church or other building within the same category which serves no strategic purpose to the

[1] 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 bombarded.

[2] 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.

[3] Art. XXVI.

According to No. 217, Rules of Land Warfare: "Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity."

[4] Art. XXVII. See, in this connection, No. 226, Rules of Land Warfare.

[5] J. M. Spaight, War Rights on Land, 184.

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 The World War.[1] 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.[2]

An attacking force may be unable to detect, or if detecting them, to spare buildings or monuments normally entitled to special protection.[3] Obviously, their use for military purposes destroys the foundation of any just claim to immunity.[4] 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.[5]

In case of bombardment, the attacking force is not required by The Hague Regulations to confine its operations to fortifications. Subject to the limitations noted, such a force is free to destroy any edifices, public or private; and it may be expected so to direct its fire as to cause the reduction of the bombarded place by the surest and quickest process.[6]

[1] 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, p. 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.

[2] Admiral Sims has 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.

[3] 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.

[4] No. 228, Rules of Land Warfare.

[5] 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.

[6] Oppenheim, 2 ed., II, § 158.

c

§ 657. Seizure, Destruction and Devastation of Enemy Property.

The right of 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 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 practice. 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 German 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 open to such an objection.[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

[1] Article XXIII (*g*).

[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.

in the Instructions for the Government of the Armies of the United States in the Field, of 1863,[1] and again in the Rules of Land Warfare of 1917, and will be utilized by American officers whenever appropriate occasion arises. Hence it is not unreasonable to refer to the right as one the normal user of which is not exceptional.[2] It is important, however, to bring home to a belligerent commander a clear understanding of the wrongfulness of seizure or destruction when no imperative necessity arises, and when no special problem of defense is concerned. 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.[3]

The Hague Regulations of 1907 declare, for example, 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.[4]

According to the Rules of Land Warfare, 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.[5] The wanton destruction of property must ever be regarded as contrary to international law.[6] 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.[7]

[1] Section XV, General Orders, No. 100, Apr. 24, 1863, Moore, Dig., VII, 178.

[2] According to No. 332 of the Rules of Land Warfare: "The rule is that in war a belligerent can destroy or seize all property of whatever nature, public or private, hostile or neutral, unless such property is specifically protected by some definite law of war, provided such destruction is imperatively demanded by the necessities of war." It is appended in a note that the only property safeguarded is the matériel of the mobile sanitary formations under the Geneva Convention.

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.

[3] 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.

[4] Art. XXVIII, Malloy's Treaties, II, 2286; also Art. XLVII, *id.*, 2289.

[5] No. 340.

[6] See E. M. 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.

[7] Wharton, Dig., III, 335, *citing* Hansard, Parl. Debates, 526, and quoted

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 whether offensive or defensive, as a means, for example, of preventing the surrender of an army.[1] 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.[2] 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 intolerable, because of the entire absence of any connection between such an achievement and the military operations of the devastator.[3]

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.

[1] It is well said in No. 334 of the Rules of Land Warfare: "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."

[2] No. 334, Rules of Land Warfare.

German opinion is 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 strategical 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.

[3] 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 The World War, contained in Appendix I to Report of Commission of Responsibilities, Paris Conference, 1919, Carnegie

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 applicable to the conduct of a mobile force actively participating in a hostile movement.[1]

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." [2] Against this policy of devasta-

Endowment for International Peace, Div. of Int. Law. Pamphlet No. 32, p. 44.

See also J. W. Gardner, Int. Law and The World War, I, §§ 206-213, and documents there cited.

[1] 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. [illegible]

[illegible] 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.

[2] President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, xii, Moore, *Dig.*, VII, 212.

tion 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 insurgents. 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.[1] 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.[2] 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.[3]

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

[1] 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."

[2] See Same to Same, Nov. 6, 1897, For. Rel. 1897, 509, Moore, Dig., VII, 214.

[3] 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.

steps were taken to safeguard the non-combatants involved from hunger and pestilence.[1]

e

§ 659. Deceit.

A belligerent may not unlawfully attempt to deceive the enemy.[2] The processes of so doing are numerous. Their enumeration and operation are matters of military rather than of legal science. In general, resort thereto "for mystifying or misleading the enemy, which the enemy ought to take measures to secure himself against, such as the employment of spies, inducing soldiers to desert, to surrender, to rebel, or to give false information to the enemy", is said to be justifiable.[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,

[1] 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 The World War. 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.

[2] According to Article XXIV of the Regulations annexed to The Hague Convention of 1907, respecting 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.

[3] Rules of Land Warfare, No. 191; also generally, *id.*, Nos. 189–198.

See, also, Bonfils-Fauchille, 7 ed., §§ 1073–1076; Oppenheim, 2 ed., II, §§ 163–165.

[4] No. 192, Rules of Land Warfare; 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.

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." [1] The Hague Regulations of 1907 forbid any "improper use" of such articles.[2] 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." [3] 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.[4] 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 intrusted with the discipline of armies, should unite in denouncing as invariably illegal every form of deception which savors of bad faith.[5]

[1] § LXV, General Orders, No. 100, of 1863. See, also, Rules of Land Warfare, 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."

[2] Art. XXIII (*f*), Malloy's Treaties, II, 2285.

[3] Art. I, *id.*, II, 2281. *Compare* interpretation of this Article in No. 196, Rules of Land Warfare.

Declares Oppenheim: "The use of the enemy uniform for the purpose of deceit is different from the case when members of armed forces who are deficient in clothes wear the uniforms of prisoners or of the enemy dead. If this is done — and it always will be done if necessary — such distinct alterations in the uniform ought to be made as will make it apparent to which side the soldiers concerned belong." 2 ed., II, 202, note 3.

[4] 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." 6 ed., 533, 534, quoted in Moore, Dig., VII, 191.

[5] 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,

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

Rules of Land Warfare. The practice has thus been robbed of any improperly deceptive aspect.

[1] *Nouv. Rec. Gén.*, XVIII, 474, also published in Oppenheim, 2 ed., II, Appendix 2, p. 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. 185, Rules of Land Warfare, the prohibition of the Regulations "is not intended to apply to the use of explosives contained in artillery projectiles, mines, aërial torpedoes, or hand grenades, but it does include the use of lances with barbed heads, irregular shaped bullets, projectiles filled with glass, etc., and the use of any substance on these bullets that would tend to unnecessarily inflame a wound inflicted by them, and the scoring of the surface or filing off the ends of the hard case of such bullets. It is believed that this prohibition extends to the use of soft-nosed and explosive bullets, mentioned in paragraph 175 and note."

According to No. 186, of the Rules of Land Warfare: "Train wrecking and setting on fire camps or military depots are legitimate means of injuring the enemy when carried out by the members of the armed forces. Wrecking 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

devoted slight attention to the matter. At the outbreak of The World War in 1914, the participants therein were by no means in agreement. From the experience 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 enlightened 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 The World War possess a military value which outweighs in significance the severity and magnitude of the suffering caused by their use and likely to be incidentally shared by non-combatants. If foreign offices continue, as heretofore, to accept the counsel of military advisors, 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. The experience of The World War 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 the normal method of adjusting its differences of gravest kind must anticipate also participation in conflicts characterized by

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."

the use of hideously cruel instrumentalities, and in which the victory may be denied that belligerent which hesitates long to adopt them. For that reason there seems to be little hope of amelioration of present practices or of certain existing abuses. The prospect of better things seems to lie in the success of a different endeavor, through the attempt by concerted action to allay causes of international controversies, and to insure the just solution by amicable means of those which threaten the general peace.

(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

See, also, instructions to the American delegates, For. Rel. 1899, 511, 512, Moore, Dig., VII, 205.

[1] *Conférence Internationale de la Paix*, 75; F. W. Holls, Peace Conference at The Hague, 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, 389: Oppenheim, 2 ed., II, Appendix, p. 584.

[2] *Conférence Internationale de la Paix*, 250; F. W. Holls, Peace Conference at The Hague, 98–117.

See, also, A. P. Higgins, Hague Peace Conferences, 495–497; Geo. B. Davis, in *Am. J.*, II, 74 and 528; Hershey, bibliography in note 48, p. 391.

[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 properly 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

by delegations representing sixteen States, and was formally accepted by numerous powers.[1] In earlier stages of The World War every belligerent was a party to the agreement. Charges were frequently made, however, that the compact was not respected.[2]

Enlightened States are doubtless now in a position to determine with possible unanimity, the true principle which should restrict belligerent action. It must be clear that it is not the extent of injury or destruction capable of being wrought by a projectile so much as the nature of the harm which it produces which should be applied as the test of lawful conduct. Thus an explosive bullet or shell, by reason of its potentiality in destroying human life, is regarded as an instrumentality to be utilized rather than relinquished.[3] On the other hand, it seems apparent that bullets which primarily rather than incidentally inflict wounds of useless cruelty, such as expansive bullets, offer no military advantage commensurate with the harm inflicted, and hence belong to a class of instrumentalities to be looked upon with disapproval.[4]

civilized nation." F. W. Holls, Peace Conference at The Hague, 513; Bordwell, Law of War, 133.

See, also, Rules of Land Warfare, No. 175.

[1] 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 Bonfils-Fauchille, 7 ed., § 1069, and in Hershey, p. 391. See, also, J. M. Spaight, War Rights on Land, 79–81.

[2] 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.

[3] 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 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.

[4] 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.

"Practically all of the belligerents on each side accused those on the other side of using bullets forbidden by the Hague Convention or the usages of civil-

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.[1] The employment of mines and torpedoes in land warfare is likely to be similarly regarded.[2] It cannot be said that enlightened States at the present time are 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 of projectiles having for their sole purpose the diffusion of asphyxiating or deleterious gases.[3] The American delegation opposed the declaration.[4] The United States has not acceded to it.

ized 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." J. W. Garner, Int. Law and The World War, I, § 178.

[1] Rules of Land Warfare, Nos. 175 and 185.

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 Rules of Land Warfare, No. 177: "This prohibition extends to the use of means calculated to spread contagious diseases, and includes the deliberate contamination of sources of water by throwing into the same dead animals and all poisonous substances of any kind, but does not prohibit measures being taken to dry up springs or to divert waters and aqueducts from their courses."

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.

[2] 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.

[3] *Conférence Internationale de la Paix*, 254.

[4] The reasons for opposing the declaration were expressed by Capt. Mahan, of the American delegation, as follows: "1. That no shell emitting such gases

Such gases were used offensively in the course of The World War. 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.[1] 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.[2]

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." F. W. Holls, Peace Conference at the Hague, 494–495; Percy Bordwell, Law of War, 134–135.

[1] 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, J. W. Garner, Int. Law and The World War, I, § 180-188.

[2] 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, p. 492.

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.[1]

The development of toxic gases and liquids for offensive uses has already been such as to place a weapon of immense value within the reach of the belligerent which has made due preparation to employ it.[2] 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.[3] 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 Goverment 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.

(4)

§ 663. The Launching of Projectiles from Aircraft.

According to a declaration of the First Hague Peace Conference, the contracting parties agreed to prohibit, for a period of five years, the launching of projectiles and explosives from balloons, or by

[1] 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.

[2] "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.

[3] 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.

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]

The World War has established 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]

[1] Malloy's Treaties, II, 2032.
Concerning early uses of balloons in warfare, see Stockton, Outlines, 355; Bonfils-Fauchille, 7 ed., § 1440; 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.

[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

The right of a belligerent to employ aircraft for the purpose of attacking military, naval or aërial establishments or implements of any kind must be admitted.[1] It rests, however, upon military men, in the light of The World War, to devise and agree upon measures which will so restrict the dropping of projectiles upon places or things reasonably subject to destruction as to minimize danger to the non-combatant individual or neighborhood; and it rests upon statesmen to achieve the even more perplexing task of preventing in fact the commission by aircraft of acts which it is agreed should be forbidden. In the formulation of restrictive rules the respective equities of combatants in the air and of non-combatants below must be carefully estimated. The applicability of certain general principles obtaining in warfare between forces on the earth needs consideration. Close proximity to an object subject to destruction, such as a fortress or an arsenal, must weaken the complaint of him who suffers in consequence of an attack upon it. It is suggested that in order to prevent needless and improper injury or death to the non-combatant population of a town or community containing a place or thing subject to destruction, the latter should be marked with a distinctive sign, visible by night or day to an aircraft at a high elevation. Possibly the latter should not be charged with abuse of power if causing severe harm to a non-combatant population in the endeavor to destroy for a military purpose some instrument of war but dimly perceived or uncertainly located. In a word, the method commonly employed in assuring the immunity of a hospital from attack should be applied conversely, when everything within a given area is to be immune save a particular place which is justly subject to destruction.[2]

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 aërial 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.

[1] "There is no prohibition in The Hague rules or in other conventions against throwing authorized projectiles from balloons or aëroplanes into forts and fortified places." No. 215, Rules of Land Warfare.

[2] It is not intended to be suggested that the equities of the non-combatant population of towns containing military works, such as navy yards, arsenals, etc., with respect to hostile aircraft, were, in the course of The World War, to be measured by tests which ought hereafter to be applied. Such works had frequently been placed in densely populated districts believed to be remote and safe from attack. Air raids had not been anticipated. When they were made

It is urged with force 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,[1] is applicable to operations of belligerent aircraft.[2] 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 aërial 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.[3] It is believed, however, that in both land and naval warfare bombardment by aircraft should be generally forbidden "unless in each case a compensating advantage can be shown."[4] In situations where military works or defensive establishments of any kind remove the prohibition, deliberate attempts to terrorize the civil population by attacks specially directed against them should always be denounced as internationally illegal conduct. No room should be left for a ruthless belligerent technically entitled to bombard a particular place to utilize the occasion to gratify caprice or malice and plead the lawfulness of the havoc wrought.

In his suggested code of Aërial Warfare of 1920, Professor Wilson observes that military works, military or naval establishments, depots of arms or war material, workshops or plants, which could be utilized for the needs of the enemy forces, and ships of war in the harbor, are not included in the prohibition of the bombardment by aircraft of undefended ports and specified places. He denies moreover a right of bombardment on account of failure to pay money contributions or to furnish requisitions in kind.[5]

the non-combatants were helpless and common victims. The absence or failure of effort of German aircraft to confine attack in the course of raids over England to objects reasonably subject thereto, weakened the value of the pretension that any military achievement was the end in view. If anti-aircraft devices were employed in self-defense against the raider bent on terrorization, it did not on principle set him free to bring death upon any object of his caprice.

[1] Malloy's Treaties, II, 2286. See, also, Sieges and Bombardments, *supra*, § 656.

[2] No. 213, Rules of Land Warfare, *quoting* Jacomet, Art. LXIII.

[3] 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.

[4] George G. Wilson, suggested code of Aërial Warfare, Naval War College, April 6, 1920, Art. 28.

[5] *Id.*, Arts. 30 and 31. See general discussion in Naval War College, Int. Law Situations, 1912, 56–92.

Compare J. M. Spaight, Aircraft in War, 1914, containing in Appendix I,

In any attempt by general agreement to secure harmony of action among prospective belligerents, the nature of what may be lawfully dropped from aircraft must be a matter of as grave concern as the objects which are to be deemed fairly subject to attack. Nevertheless, so long as there remains reluctance on the part of enlightened States to agree to refrain from the use of toxic gases and liquids, it is hardly to be anticipated that the use of aircraft for their diffusion will be commonly denounced as internationally illegal conduct. For that reason it is not unlikely that in the future wars the employment of aircraft in offensive operations may prove in fact to be the most terrible and the most effective means of overcoming a foe not prepared to cope defensively therewith.

g

§ 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 Hague Regulations expressly forbid a belligerent to "kill or wound treacherously individuals belonging to the hostile nation or army; to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at

Code for Aircraft in War as proposed by that author, also Projects of Paul Fauchille, Edouard d'Hooghe, and Prof. L. von Bar, in Appendices II, III, and IV, respectively. See, also, Harold D. Hazeltine, Law of the Air, London, 1911, 117–126.

In notes appended to his Code, Prof. Wilson adverts to two important technical points: first, the impossibility of subjecting a belligerent or other airplane to visit and search; and secondly, to the circumstance that the dangers from non-military aircraft are much greater than those to be apprehended from non-combatant ships, because of the powers of observation possessed by the former.

[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.

discretion; to declare that no quarter will be given."[1] It is believed that these prohibitions may be regarded as fairly declaratory of the law of nations. It should be observed, however, that while the Instructions for the Government of Armies of the United States in the Field, of 1863, denounced any resolution "in hatred and revenge" to give no quarter, a commander was permitted to direct his troops to deny quarter, if in great straits, "when his own salvation" made it "*impossible* to cumber himself with prisoners."[2] It was also declared that all troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none,[3] and that troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.[4] These instructions are now, however, declared to be superseded by The Hague Regulations.[5]

From the experience of The World War military observers are doubtless now in a position to indicate with precision the narrow circumstances, if any, when quarter should be denied, and to devise measures to restrict those who, from motives of revenge or cruelty, may be indisposed to spare a helpless foe.[6] It is sug-

[1] Art. XXIII (*b*), (*c*), and (*d*), Malloy's Treaties, II, 2285.

[2] General Orders, No. 100, Apr. 24, 1863, Sec. LX, Moore, Dig., VII, 199.

Declares Oppenheim: "But it must be emphasized that the mere fact that numerous prisoners cannot be safely guarded and fed by the captors does not furnish an exceptional case to the rule, provided that no vital danger to the captors is involved therein." 2 ed., II, § 109.

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.

[3] § LXII, General Orders, No. 100, Moore, Dig., VII, 199.

[4] § LXIV.

[5] No. 183, note 1, Rules of Land Warfare. It should be observed, however, that Section LXII of General Orders, No. 100, noted in the text, has been utilized as No. 368 of the Rules of Land Warfare as among "Penalties for Violations of the Laws of War."

[6] According to Section LXXI, General Orders, No. 100, embodied also in No. 181, Rules of Land Warfare: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States or is an enemy captured after having committed the misdeed." Also *id.*, No. 366.

The World War has 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

gested, with greatest deference for military opinion, that 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.[1]

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."[2] It may be doubted whether any belligerent in The World War felt itself restricted by a legal duty not to pursue such a course. The Rules of Land Warfare of 1917 appear to sanction such conduct.[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

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 enlightened 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.

[1] According to No. 183, Rules of Land Warfare: "It is no longer contemplated that quarter will be refused to the garrison of a fortress carried by assault, to the defenders of an undefended place who did not surrender when threatened with bombardment, or to a weak garrison which obstinately and uselessly persevered in defending a fortified place against overwhelming odds."

[2] Int. Law, 2 ed., II, 83, quoted in Hershey, 395, note 57.

[3] No. 191, Rules of Land Warfare.

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.

i

§ 666. Services Not to Be Exacted from an Enemy Person.

The invader as well as the belligerent occupant is not free to exact any form of service from an enemy person. According to Article XXIII (*h*) 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 is 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]

In the course of The World War Germany and certain of her allies compelled enemy civilians not only to labor in connection

[1] Malloy's Treaties, II, 2285. See Belligerent Forces, Aliens, *supra*, § 651.

[2] No. 188, Rules of Land Warfare. See, in this connection, A. P. Higgins, Hague Peace Conferences, 265–269; Hershey, Int. Law, 395, note; Percy Bordwell, Law of War, 285; J. M. Spaight, War Rights on Land, 140–142.

[3] Rules of Land Warfare, No. 323. It should be observed, however, that Art. XLIV of the Hague Regulations 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." While the Rules of Land Warfare announce in No. 322 that "the impressment of guides was intended to be forbidden by this rule," as evident from the action of certain States which reserved the Article when accepting the convention, as well as from discussions at the Hague, it is declared in No. 323, that whenever 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." This reasoning is believed to be exceedingly unfortunate.

See Belligerent Occupation, Measures Relating to the Persons of the Inhabitants, *infra*, § 699.

with military operations,[1] but also to act as screens before advancing troops as a means of checking attacks upon them.[2] Moreover, conditions of labor enforced upon children and women, as well as men, were frequently inhumane to a degree.[3] Such occurrences proved the vital need not merely of a more definite understanding among enlightened States 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. In a word, events of The World War made it intolerable for the society of States that certain of its members should thereafter be permitted to become formidable belligerents until at least the theories controlling their military policies should have undergone a change.[4]

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] 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.

[2] 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.

[3] 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, *Am. J.*, XIII, Supp., 13–14.

[4] Doubtless the tolerance of conditions permitting any State which fought in The World War against the Allied and Associated Powers to become a formidable belligerent would be regarded as sharply at variance with the policies of those Powers. The statesmen of the latter, in the conclusion of a treaty of peace with Germany in 1919, did not, however, appear to be concerned with the large question whether the mind of Germany might not be capable of undergoing a change such as to cause an enlightened opinion of that country to experience ultimately a sense of national outrage in the previous conduct of its own armies, and to discourage and prevent the recrudescence of ideas that once prevailed therein. If such a change is in fact possible, the method by which it can be wrought is believed to be as reasonable and vital a problem for the consideration of the United States and the Powers aligned with it in The World War as any pertaining to the general peace; for it must be apparent that the ease with which an enduring peace is to be maintained rests upon the zealous and lively coöperation of *all* the States which were once belligerents, and that such coöperation depends upon the development of a oneness of purpose uniting all in the conviction and determination that nothing short of principles of justice shall govern all international relationships.

In justification it is pleaded that a belligerent which violates the law forfeits the right to claim respect for it by its foe.[1]

In land warfare the opportunity for a commanding officer to exercise discretion in resorting to retaliation is narrow, because such procedure, by reason of the serious consequences which it may entail, is commonly determined by the highest authorities of the State, and when agreed upon, leaves the commander in the field no alternative.[2] The right, therefore, of such an officer, as a matter of domestic as well as international law, to resort to the excesses of the enemy as a means of causing their abatement, must be limited to occasions when no other effective deterrent is available.[3]

According to the Rules of Land Warfare, "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." [4]

[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.

[2] 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.

[3] 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 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.

[4] No. 381, where it is added that "Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular

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, however, that retaliation does not purport to be the imposition of a penalty as such,[1] but merely a preventive which may, of necessity, demand the application of severe measures against persons themselves guilty of no wrongful conduct.[2] 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 even retaliatory acts of cruelty.[3]

Where the lawlessness of a hostile army takes the form of acts which disregard the laws of humanity and morality, the return of like for like can give no cause of umbrage to the former. Doubtless in dealing with certain uncivilized tribes no milder response may serve to check atrocities. When, however, the army of an enlightened 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 The World War, that the highest military authorities

war, and by rapid steps leads them nearer to the internecine wars of savages." See § XXVIII General Orders, No. 100, of April 24, 1863.

[1] Stockton, Outlines, 330.

[2] § 59 of General Orders, No. 100, of April 24, 1863, declared that "All prisoners of war are liable to the infliction of retaliatory measures." This language has been incorporated in the Rules of Land Warfare, in No. 383, and is followed by the statement that "Persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others." It may be doubted whether this sentence was intended to signify more than that innocent persons might be subjected to retaliatory measures.

[3] "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.

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.[1]

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.[2]

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 nineteen[3] and even

[1] 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 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.

[2] 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 Belligérants et des Prisonniers de Guerre*, Brussels, 1894.

[3] 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

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.

The practices of Germany and her allies in the course of The World War have served to emphasize the fact that such individuals 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 existing regulations assure adequate protection.[1]

(2)

§ 669. The Hague Regulations of 1907.

Dr. Lieber's Code of 1863,[2] the project of the Brussels Conference of 1874,[3] and the regulations adopted by the Institute of International Law, at Oxford in 1880,[4] were the antecedents of the Regulations annexed to the Hague Convention of 1899, respecting the Laws and Customs of War on Land.[5] These were reëstablished in somewhat amended form as the Regulations annexed to the Hague Convention of 1907, concerning the same subject.[6]

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.

[1] 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.

[2] §§ 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.

[3] For. Rel. 1875, II, 1017, 1018–1019.

[4] §§ 20, 21, 61–78, *Annuaire*, V, 157, 170–172, J. B. Scott, Resolutions, 21, 38–40.

[5] Arts. IV–XX, Malloy's Treaties, II, 2049–2051.

[6] 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,

The Hague Regulations of 1907, adverting to the fact that prisoners of war are in the power of the hostile government rather than of the individuals or corps who capture them, declare that prisoners must be "humanely treated." [1] To that end it is provided that all their personal belongings, except arms, horses and military papers, shall remain their property.[2] This requirement is not deemed to authorize prisoners to retain large sums of money, or other articles which might facilitate their escape. "Such money and articles are usually taken from them, receipts are given, and they are returned at the end of the war." [3]

Events of The World War indicate 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 sub-

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.

[1] Art. IV, Malloy's Treaties, II, 2282.

See, also, § 74, Instructions for the Government of Armies in the Field, General Orders, No. 100, April 24, 1863, Moore, Dig., VII, 220.

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, matters of subsistence and discipline, were subjects of arrangement. Each party was to pay the expense of the subsistence of its own soldiers captured by the other. It was also provided: "that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him." Malloy's Treaties, II, 1485. The same Article was incorporated as Art. XXIV, in the treaty with Prussia of July 11, 1799, *id.*, II, 1494, and revived by Art. XII, of the treaty of May 1, 1828, *id.*, II, 1499.

See, also, Mr. Hay, Secy. of State, to Mr. Choate, American Ambassador to Great Britain, No. 468, Oct. 16, 1900, MS. Instructions Great Britain, XXXIII, 477, Moore, Dig., VII, 225.

[2] Declared Mr. Gerard, American Ambassador to Germany, in a communication, Oct. 2, 1914, to Mr. Page, American Ambassador to Great Britain, with respect to a visit to a camp containing British prisoners at Döberitz: "The prisoners have only one blanket and are without overcoats, as when taken prisoner they are compelled to drop their overcoats and equipment. They therefore suffer from cold." Misc. No. 7 (1915), Cd. 7817, p. 8.

For a bibliography respecting accounts of French prisoners in Germany during The World War, see *Am. Hist. Rev.*, XXII, 228.

See, also, Commander Raymond Stone, U. S. N., in *Am. J.*, XIII, 406, 419–420, referring to the deprivation of the property and clothing of prisoners by German authorities in the course of The World War, and the need of providing protection against such acts in the arrangement that was signed.

[3] Rules of Land Warfare, No. 53, *citing* Holland, Laws of War on Land, p. 21, Art. 24, and Oppenheim, Land Warfare, par. 70 and note.

jected to brutal treatment.[1] 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. In order to remedy the evil there is required further international agreement not merely expressing denunciation of inhumane conduct, but rather making appropriate provision which, if observed, shall serve in fact to assure a form of protection which at present does not exist.[2]

§ 670. The Same.

The Hague Regulations deal generally with matters of internment, occupation, maintenance, discipline and parole, as well as inquiry bureaus, and relief societies.

As a prisoner of war is not a delinquent, the obligation not to subject him to confinement "except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist" is recognized. He may be interned in a town, fortress, camp or other appropriate place, and prevented also from going beyond certain fixed limits.[3] Internment should not, however, savor of incarceration. The American-German agreement signed at Berne, Nov. 11, 1918, made ample provision for the equipment and organization of internment camps, requiring in Article 38 that the quarters provided for troops of the captor State should form in hygienic as well as other respects the standard for the housing of prisoners of war in camps established for them.[4]

[1] 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.

[2] In theory, the imposition of a severe penalty upon an offending captor by the authorities of his own government should operate as a deterrent. The evidence of wrongdoing being, however, chiefly confined to the testimony of the victim, is likely to be met in each case by ample denials deemed to be entitled to equal credibility. Again, excuses offered in justification for severity of conduct are not likely to be opposed by testimony regarded by a military tribunal as of equal weight. If the commander-in-chief of an army in the field is truly disposed to prevent the infliction by his subordinates of cruel treatment upon prisoners that are taken, he is doubtless capable of enforcing his will. The inculcation of such a disposition cannot be effected by international agreement.

[3] Art. V, Malloy's Treaties, II, 2282. Mr. Webster, Secy. of State, to Mr. Ellis, Feb. 26, 1842, MS. Inst. Mexico, XV, 151, Moore, Dig., VII, 218.

[4] There was concluded at Berne, Nov. 11, 1918, by representatives of the

The reasonableness of the utilization by the captor of the labor of prisoners of war (other than officers) must be proportional to its obligation to maintain them. The Hague Regulations impose the duty of maintenance upon the captor, declaring that in the absence of special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging and clothing on the same footing as troops of the Government who captured them.[1] It is provided that wages earned by prisoners for public or other service rendered "shall go towards improving their position, and the balance shall be paid them on their release, after deducting the

United States and Germany, an elaborate agreement embracing one hundred and eighty-five Articles and seven annexes, concerning prisoners of war, sanitary personnel and civil prisoners. This arrangement, signed on the same day as the armistice with Germany, was not ratified by the United States. It is referred to hereafter as the Berne agreement. For the text see *Am. J.*, XIII, Supp., I. For an authoritative and extended commentary on the negotiation of the agreement and the significance of certain of its provisions, see Commander Raymond Stone, U. S. N., Assistant Commissioner on the Special Diplomatic Mission of the United States, "The American-German Conference on Prisoners of War", *Am. J.*, XIII, 406. See, also, editorial comment by Hon. Chandler P. Anderson, *id.*, 97.

It may be noted that the Berne agreement contained in Art. 31 the unique provision that all female personnel serving with the armed forces of either of the contracting parties should, if captured, be given every possible protection against harsh treatment, insult or any manifestation of disrespect in any way related to their sex. They were to be suitably and decently quartered, and provided with lavatories, bathing facilities and other similar necessities quite separate from those provided for males.

[1] Art. VII. *Compare* § 76 of Dr. Lieber's Code, which provided that prisoners of war should be "fed upon plain and wholesome food, whenever practicable, and treated with humanity", and also § 69 of the Oxford Rules of 1880, providing that in all matters regarding food and clothing, prisoners, in the absence of agreement, should be placed upon the peace-footing of the State holding them in captivity. The Hague Regulations of 1907 (like the Oxford Rules) 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. This might be accomplished in part by permitting prisoners to administer their own commissary department, and by having, as far as possible, all food cooked and prepared by prisoners of the same nationality or State as that of those by whom it is to be eaten. Appropriate international agreement, requiring, under reasonable conditions, observance of such a practice might be desirable.

Art. 52 of the Berne agreement specified the nature, quality and amount of the ration to be served to prisoners of war, requiring that generally it should not be inferior to that afforded the armed forces of the captor. Provision was made for an increase in the ration to be served to "heavy workers."

cost of their maintenance."[1] It is believed, however, that the wisdom of imposing upon the captor the duty of maintenance 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 will seek to accomplish that end by the exaction of the maximum of labor and the issuance of cheapest rations, thereby placing upon the prisoner the burden of obtaining by his own excessive labor the plain necessities of life.[2] Such was the case during The World War. The starvation of American, British, French and other prisoners by their captors was notorious.[3] 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 Prussia, of September 10, 1785, placing the burden of maintenance of both officers and men who were taken prisoners on the State to which they belonged, is not believed to have been a step forward.[4]

[1] Art. VI.

[2] This is believed to be true notwithstanding the declaration in Art. VI of the Regulations that the tasks imposed "shall not be excessive and shall have no connection with the operations of the 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.

[3] "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 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.

[4] Malloy's Treaties, II, 1484.

The Hague Regulations provide that officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government. Art. XVII. In view of sharp differences that may exist in the rates of pay and modes of living of officers of opposing belligerents, it would be desirable that the pay of a captured officer conform either to the rate established by his own country or to one fixed beforehand by international agreement.

By the Berne agreement of Nov. 11, 1918, all officers and others entitled to pay were, for purposes of pay, divided into three classes; and it was specified into each of which the several grades of officers of both parties should fall. It was declared that officials of the army or navy, prisoners of war of either side, should receive during their captivity the same pay as the military persons whose rank they held. All payments by the captor State were to be reimbursed by the State of origin. Arts. 124–132.

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 make renewed endeavor to protect the soldier of humblest rank from being treated when a captive as though he were a convict.[1] 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.[2] Such an incentive may never possibly be wholly removed; but its force may be greatly lessened, and to a degree sufficient to determine 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 captive 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,[3] with special consideration for the adaptability of the individual for the particular task to be assigned him,[4] there is an additional preventive. If it is understood that for services in excess of those legitimately to be imposed, as for extra-time, the prisoner be remunerated at a specified rate or according to a definite basis of compensation, and enjoy the privilege of utilizing such earnings for his own immediate comfort, there is still another buffer established for his benefit.[5] If,

[1] In the course of The World War the prisoners of war in internment camps of Germany and Austria were doubtless oftentimes envious of the tasks assigned to felons incarcerated in American penitentiaries.

[2] The Hague Regulations reveal their inadequacy because they wholly fail to reckon with this consideration.

[3] See the elaborate provisions in this regard in Arts. 41–51 of the Berne agreement of Nov. 11, 1918. While they doubtless expressed the full measure of what could then be obtained from Germany as a belligerent, and are far in advance of the provisions of the Hague Rules, they are susceptible of improvement. The prohibition of Art. 48 against the employment of prisoners of war "in mines, marshes, munitions factories or for dangerous work in quarries" is a restriction which, however sound in purpose, lends itself to broader treatment. The prohibition against "dangerous work" should not be confined to that in quarries. The requirement of Art. 43 confining employment to places not within thirty kilometers of the front line of the captor State is obviously wise.

[4] Art. VI of the Hague Regulations permits the utilization of labor of enlisted men "according to their rank and aptitude."

[5] The Hague Regulations contemplate in Art. VI the authorization of prisoners of war to work for private or public purposes, and on their own

in addition to the foregoing requirements, the general principle be accepted that the test of the propriety of occupation in the broadest sense be an international one fixed by general agreement rather than by reference to the standard observed by the captor in dealing even with its own forces, there is further safeguard lest the soldier of an enlightened State be treated as a peon by a captor whose standards permit it so to deal with its own soldiery.[1]

The Hague Regulations permit the captor to subject prisoners of war to the laws, regulations and orders in force in its own army; and insubordination is said to justify the adoption of such measures of severity as may be considered necessary.[2] Here, again, the standard is believed to be an unsafe one, exposing the captive to cruel treatment if guilty of slight and technical offenses against a captor eager for excuse to impose a harsh penalty, and habitually severe in disciplining its own forces. As a safeguard, it would seem essential to fix by general agreement the nature and extent of penalties to be imposed for certain specified offenses known to be of common occurrence,[3] and even to declare that certain

account, for remuneration. The plan devised is, however, open to criticism, because the general theory of the Regulations appears to be that, in the case of the enlisted personnel, the burden of maintenance rests upon the captor. Acquiescence in that theory is believed to offer a firm obstacle against an improved practice.

See Takahashi, International Law Applied to the Russo-Japanese War, 124–127, in which the Hague Regulations are criticized, and where attention is called to the fact that, by the treaty of Portsmouth of 1905, Japan and Russia agreed to refund to each other the expenses paid out on account of prisoners of war. For. Rel. 1905, 826.

According to § 1288, Rev. Stat.: "Every non-commissioned officer and private of the Regular Army, and every officer, non-commissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law."

[1] It might serve no useful purpose to make specific comparisons. The author has constantly had in mind, however, the possible treatment of the average American soldier when in captivity according to an occupational, as well as a dietary, standard which certain unenlightened States might without compunction apply to their own forces.

[2] Art. VIII.

[3] For this suggestion the author is indebted to Lieut. Col. George V. Strong, Judge-Advocate, U. S. A., when an officer of lower rank, in 1916.

It is believed that the work of maintaining discipline is best accomplished through the agency of prisoners chosen for the purpose, and held accountable therefor to the captor. International agreement encouraging if not requiring such procedure would be desirable.

See Report of Mr. Jackson to Mr. Gerard, American Ambassador to Germany, Oct. 14, 1915, concerning the detention camp at Schneidemühl, and adverting to the fact that the administration of the interior thereof was mainly

conduct on the part of a captive should not be deemed reprehensible.[1]

The Hague Regulations permit the captor to subject to disciplinary punishment escaping prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them. It is declared also that prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of their previous flight.[2] It may be observed that the attempt to escape is usually unsuccessful, is productive, when successful, of slight value to the military force to which the individual belongs, is highly detrimental to the prisoner if retaken, and tends to effect curtailment of the privileges of his comrades as well as of himself.[3]

§ 671. The Same.

According to the Hague Regulations, 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.[4] It is wisely de-

in the hands of the prisoners, and that very few permanent sentries were in it. Misc. No. 19 (1915), Cd. 8108, p. 52.

[1] It was provided in the elaborate provisions concerning the punishment of prisoners of war in the Berne agreement, that such individuals should not be subjected to extreme heat or cold, and that "marching with full equipment and other aggravations of punishment are forbidden." Art. 76. See, in this connection, Commander Raymond Stone, in *Am. J.*, XIII, 430–431. That writer adverts to the fact that by Art. 26 of that agreement prisoners were to be allowed to talk with one another, and noting that "one of the nagging, hazing, methods of handling prisoners of war by some of the German prison camp commandants consists in forbidding the prisoners to talk with one another." *Id.*, 420.

[2] Art. VIII.

[3] The Berne Agreement contained the important provision that dogs should not be used as guards in the interior of prison camps or in guarding working or exercise detachments, unless they were in leash, or securely muzzled. It was declared that "Unmuzzled dogs shall under no circumstances be used in tracking down escaped prisoners of war." Art. 29.

"Prisoners of war may be fired upon and may be shot down while attempting to escape, or if they resist their guard, or attempt to assist their own army in any way. They may be executed by sentence of a proper court for any offense punishable with death under the laws of the captor, after due trial and conviction. It may well be doubted whether such extreme necessity can ever arise that will compel or warrant a commander to kill his prisoners on the ground of self-preservation." Rules of Land Warfare, No. 68. See, also, No. 70, providing for the punishment of the participants in a conspiracy to effect a united or general escape.

[4] Art. X, Malloy's Treaties, II, 2283.

"The parole should be in writing and be signed by the prisoners. The

clared 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.[1]

The same Regulations call for the institution of an inquiry office for prisoners of war on the commencement of hostilities in each belligerent State, and also, when necessary, in neutral countries which have received belligerents in their territory. It is said to be the function of the office "to reply to all inquiries about the prisoners." It is made the recipient of full information respecting internments and transfers, releases on parole, exchanges, escapes, admission into hospitals, deaths, as well as other information to enable it to make out and keep up to date an individual return for each prisoner of war. In such return the office is obliged to state the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return is to be sent to the government of the other belligerent after the conclusion of peace. It is likewise made the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc. found on the field of battle or left by prisoners released on parole, or exchanged

conditions thereof should be distinctly stated, so as to fix as definitely as possible exactly what acts the prisoner must refrain from doing; that is, whether he is bound to refrain from all acts against the captor or whether he must refrain only from taking part directly in military operations against the captor, and may accept office and render indirect aid or assistance to his own government." Rules of Land Warfare, No. 73.

[1] Art. XI.

According to Art. IX, "Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed."

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.

"No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer." Rules of Land Warfare, No. 74.

"Commissioned officers can give their parole only with the permission of a military superior, as long as such superior in rank is within reach." *Id.*, No. 75.

"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. *Id.*, No. 76.

or who may have escaped, or died in hospitals or ambulances, and to forward them to those concerned.[1]

Relief societies properly constituted and designed to serve as a channel for charitable interests 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 and administrative regulation. Thus provision is made for the admission of agents of such societies to places of internment for the purpose of distributing relief.[2]

To facilitate freedom of communication and transportation, provision is made that inquiry offices shall enjoy the privilege of free postage. Exemption from import duties as well as transportation charges on State railways is established with respect to presents and relief in kind for prisoners of war.[3]

Provision is also made for liberty of religious worship,[4] the receipt and execution of wills, and the making of death certificates.[5]

(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 The World War both Germany and Great Britain

[1] Art. XIV, Malloy's Treaties, II, 2283. Takahashi, Int. Law Applied to the Russo-Japanese War, 114–118, respecting the operation of Bureau of Information in Japan for the benefit of Russian prisoners of war.

Discussions between Germany and Great Britain concerning the operation and functions of inquiry offices for prisoners in those respective States during The World War will be found in Misc. No. 7 (1915), Cd. 7817.

See, also, R. F. Roxburgh, The Prisoners of War Information Bureau in London, with introduction by L. Oppenheim, London, 1915.

[2] Art. XV, Malloy's Treaties, II, 2284.

Such agents, who may be admitted also to the halting places of repatriated prisoners, must be furnished with a personal permit by the military authorities, and are required to give an undertaking in writing to comply with all measures of order and police which the latter may issue. *Id.*

The Berne agreement of Nov. 11, 1918, made wise provision for the formation and operation of so-called Camp Help Committees to be freely chosen by the prisoners in each camp, and which were clothed with important representative functions for the protection as well as the improvement and amusement of prisoners. Arts. 93–102. One important power lodged with such committees was that of acting as the medium of the communication of complaints to the diplomatic representative of the neutral Power exercising a protective oversight with respect to the prisoners. Arts. 97, and 118.

[3] Art. XVI. It is there also provided that, "Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through."

[4] Art. XVIII.

[5] Art. XIX.

acquiesced in a plan permitting the inspection and supervision of relief of prisoners held by each belligerent respectively, 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 with respect to them.[4]

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

[1] Misc. No. 7 (1915), Cd. 7817, Nos. 44, 57, 62, 75, 89, 90, 91, 106, 111–120. 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 respectively 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

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 should be made until after a 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]

(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

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.

[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' 7 ed., p. 434.

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 Nos. 91–93, Rules of Land Warfare. See, also, Nos. 95 (concerning surplus) and 94 (concerning substitutions).

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.

Concerning the seizure by a military occupant of enemy persons as hostages for the good behavior of the civil population, or the payment of contributions that have been levied, see Belligerent Occupation, Hostages, *infra*, § 700; also Oppenheim, 2 ed., II, 317–319.

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]

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

[1] The sentence in the text reproduces the provision of 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. Attys.-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] For. Rel. 1898, 989–998, Moore, Dig., VII, 230–231, concerning the return of Spanish prisoners to Spain in 1898.

See, also, Section 10 of armistice with Germany of Nov. 11, 1918, concerning the immediate repatriation without reciprocity of all Allied and United States prisoners of war, *Am. J.*, XIII, Supp., 99. 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.

concern. It may be doubted whether, under these circumstances, any mode of releasing or restoring such individuals should be described as repatriation.[1]

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 individuals who follow an army without belonging to it.[2] Persons who without belligerent qualifications, nevertheless, commit acts of violence, lack the right to demand, when captured, that they be deemed and treated as prisoners of war.[3]

Heedlessness of the laws of war by armed combatants violates one of the conditions upon which belligerent qualifications are established. Such heedlessness does not always necessarily deprive the actor, once admitted to possess those qualifications, of the right to be dealt with, when captured, as a prisoner of war.[4]

[1] Oppenheim, 2 ed., II, § 132.

[2] See Divisions of Belligerent Forces, Combatants, and Non-combatants, *supra*, §§ 653–654.

A prisoner of war is defined in the Rules of Land Warfare as "an individual whom the enemy, upon capture, temporarily deprives of his personal liberty on account of his participation directly or indirectly in the hostilities, and whom the laws of war prescribe shall be treated with certain considerations." No. 43.

According to Annex 7 of the Berne agreement of Nov. 11, 1918: "The term 'prisoners of war' shall comprise those officers, officials, non-commissioned officers and enlisted or enrolled persons, male or female, of all branches and corps of the army, navy and marine corps, whether on the active, retired or reserve lists, who are captured while in the active service of the armed forces of their State of Origin. Sanitary personnel are excluded." *Am. J.*, XIII, Supp., 71.

[3] See Belligerent Qualifications, Generally, *supra*, § 648.

[4] The Hague Regulations do not encourage such an inference. Art. III, Malloy's Treaties, II, 2282.

Enunciation of a rule announcing under certain circumstances the right of a captor to deny to armed combatants of the enemy treatment accorded prisoners of war would encourage pretext for summary and inhumane conduct. Innumerable excuses would be offered to justify acts of retaliation and revenge. Innocent and guilty alike would suffer increasingly from the caprice of the captor.

That such an individual remains punishable for crimes committed prior to his capture against the captor's army or people, and for which he has not been punished by his own authorities, is hardly indicative of any loss of status.

It should, however, be constantly borne in mind that the retention of the requisite belligerent qualifications by a *bona fide* member of a military force may in the particular case depend upon whether, at the time of his capture, he is acting as a part of that force in an operation in which it is engaged.[1] The bare fact of membership will not at least suffice to shield him from treatment other than as a prisoner of war if, when captured, he is engaged alone in an attempt to commit acts of violence outside of the zone of hostile operations and as a detached and isolated figure. It is such a combination of circumstances that appears to rob him of the claim to be treated as a combatant, regardless of whether his conduct flouts the requirements of the laws and customs of war, and even though it be in obedience to a military command.[2] On the other hand, it may be the essential nature of an act, in the light of attending circumstances, which, regardless of the number of those who organize to participate in its commission, deprives the actors of the right to be dealt with as prisoners of war. Thus so-called war-rebels — "persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same" — find themselves in such a plight. If captured, it is said that they may suffer death, whether they rise singly, in small or large bands, and whether or not called upon to do so by their own but expelled government.[3]

(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 within its territory is elsewhere discussed.[4] 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.[5]

[1] Such is a fair inference from Art. I of the Hague Regulations.

[2] The so-called armed prowler is thus without the requisite belligerent qualifications. See Rules of Land Warfare, No. 373.

[3] See Rules of Land Warfare, No. 370, where it is added: "They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising or armed violence."

[4] See Control over the Persons of Resident Alien Enemies, *supra*, §§ 616–617.

[5] The Rules of Land Warfare announce that in addition to the armed forces,

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 might be fairly claimed by captured commissioned officers, and those to be treated less favorably.[1]

The Berne agreement of 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.[2] 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

both combatant and non-combatant, and civilians authorized to follow armies, the following may be made prisoners of war:

"(*a*) 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;

"(*b*) Civil officials and diplomatic agents attached to the army;

"(*c*) Persons whose services are of a particular use and benefit 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;

"(*d*) The citizens who rise en masse to defend their country or district from invasion by the enemy." (No. 48.)

[1] 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.

[2] Art. 170, *Am. J.*, XIII, Supp., 48. 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.

when interned advantages not yielded to persons defined by the agreement as prisoners of war.[1]

(3)

§ 677. Spies.

According to the Hague Regulations, a person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, it is declared that 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: 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.[2] It is action under false pretenses as well as under disguise that taints the seeker of information with the character of a spy.[3]

[1] 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.

[2] The paragraph in the text embodies the language of 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.

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, No. 199, note 2.

[3] 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*

The definition of the Hague Regulations comprehends, according to the Rules of Land Warfare of the United States, "all classes whether officer, soldier, or civilian, and, like the criminal law, makes no distinction of sex. It does not include all cases in which a person makes or endeavors to make unauthorized or secret communications to the enemy." The latter cases are, it is said, to be dealt with under the laws relating to treason and espionage.[1]

A spy taken in the act should not be punished without previous trial.[2] In case of conviction, the severity of the punishment is determined by the captor.[3] The Rules of Land Warfare declare that a spy is punishable with death, whether or not he succeed in obtaining information or in conveying it to the enemy.[4]

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 *commercia 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.

Declares Oppenheim: "And it matters not whether despatch-bearers make use of balloons or of other means of communication. Thus, a soldier or civilian trying to carry despatches from a force besieged in a fortress to other forces of the same belligerent, whether making use of a balloon or riding or walking at night, may not be treated as a spy. On the other hand, spying can well be carried out by despatch-bearers or by persons in a balloon, whether they make use of the balloon of a despatch-bearer or rise in a balloon for the special purpose of spying. The mere fact that a balloon is visible does not protect the persons using it from being treated as spies; since spying can be carried out under false pretenses quite as well as clandestinely." 2 ed., II, § 160.

[1] No. 201. See, in this connection, United States *v.* McDonald, 265 Fed. 754, 762.

[2] Art. XXX Hague Regulations of 1907, Malloy's Treaties, II, 2286. *Compare* Davis, 3 ed., 321.

According to Art. XXXI: "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

[3] 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.

[4] No. 206; also General Orders No. 100, 1863, § 88.

According to Art. 82, of the Articles of War, Rev. Stat. § 1343, § 1342, amended, Aug. 29, 1916, Chap. 418, § 3, 39 Stat. 663, U. S. Comp. Stat.,

(4)

§ 678. Traitors. 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.[1] 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. Their privilege of communicating with foreign parts or with the inhabitants of hostile territory is said to be as far as military authority permits, but no further.[2]

A person who, in a place or district under martial law (defined as military government), unauthorized by the military commander, gives information of any kind to the enemy or holds intercourse with him, is described as a war traitor.[3] Thus "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 deemed to be a war traitor.[4] Again, if a citizen of a hostile or invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is similarly regarded.[5] The war traitor is always severely punished. 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 said to be death.[6]

1918 ed., § 2308a: "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." See, also, §§ 1 and 2, Title I, of Espionage Act of June 15, 1917, 40 Stat. 217 and 218, U. S. Comp. Stat., 1918 ed., § 10212a and § 10212b.

[1] "89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death." Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863, Moore, Dig., VII, 231.

[2] Rules of Land Warfare, No. 202.

[3] *Id.*, No. 203.

[4] *Id.*, No. 204.

See correspondence between the American Embassy at London and the British Foreign Office in 1915, respecting the execution of Miss Edith Cavell at Brussels, Misc. No. 17 (1915), Cd. 8013.

[5] Rules of Land Warfare, No. 205.

[6] *Id.*, No. 207.

According to the Rules of Land Warfare, a person guilty of treason gains no immunity from prosecution by escaping from custody and joining or rejoining the hostile army, should he be subsequently captured. "It is not necessary that traitors be caught in the act in order that they may be punished." [1] The assisting or favoring espionage or treason and knowingly concealing a spy may be made the subject of charges. Such acts are said to be equally punishable by the customary laws of war.[2]

(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.[3]

4

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.[4] That convention is said to

[1] Rules of Land Warfare, No. 210. The immunity given a spy under conditions stated in Art. XXXI of the Hague Regulations is thus not applicable to a person guilty of treason.

[2] Rules of Land Warfare, No. 211.

[3] § 48, Moore, Dig., VII, 234, and quoted in Rules of Land Warfare, No. 38, Note 1.

[4] For the text of the Convention, see Malloy's Treaties, II, 1903.

Art. XXXI of the Geneva Convention of 1906 provides 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

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.[1] 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.[2] It provided also for the caring for such persons in the houses of the inhabitants, and deemed the entertainment of wounded men as ground for exemption from the burden of quartering troops.[3] The convention

parties who signed it but who may not also ratify the present convention." *Id.*, II, 2193.

[1] 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.

[2] "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.

[3] "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.*

lacked, moreover, a definition as to the status of the sick and wounded, who fell into the hands of the enemy.[1]

b

The Geneva Convention of 1906

(1)

§ 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.[2]

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.[3]

[1] See Report of the American Delegation to the Second Geneva Conference, July 10, 1906, For. Rel. 1906, II, 1548, 1555.

[2] 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, 388, 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.

[3] 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

(2)

§ 682. The Sick and Wounded.

The duty to respect and care for the sick and wounded officially attached to armies and without distinction of nationality is acknowledged.[1] Even the belligerent who is compelled to abandon his wounded to the enemy is obliged, so far as military conditions permit, to leave with them a portion of the personnel and matériel of his sanitary service to assist in caring for them.[2]

It is declared that subject to the foregoing provisions, the sick and wounded falling into the enemy's hands become prisoners of war, and that the general rules of international law in respect to prisoners become applicable to them. This definition of their status is highly useful.[3]

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."

[1] Art. I, which is broad enough to include non-combatant as well as combatant members of the enemy's forces. Report of American Delegation, For. Rel. 1906, II, 1548, 1557.

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 of The World War. 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 Ethe (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 J. W. Garner, Int. Law and The World War, I, § 316, with respect to the bombing of hospitals.

According to the Rules of Land Warfare, Art. I of the Geneva Convention does not impose obligations to aid the inhabitants or other persons not officially attached to armies who may be wounded by chance or accident as a result of the hostilities in progress. But the dictates of humanity are said to demand that inhabitants so wounded be aided if the other inhabitants are without facilities to give them proper care, and if they can be aided without neglecting the sick and wounded of either belligerent. No. 104.

[2] "These clauses are very broadly stated, and are intended to apply not only to the case where a successful belligerent occupies the battlefield, but also to a case in which both of the opposing armies occupy new positions at some distance from the field in which the losses were incurred." Report of American Delegation, Geneva Conference, For. Rel. 1906, II, 1557.

"Necessarily the commander of the army, who is compelled by the military situation to abandon his wounded, must determine what the precise exigencies of the situation permit him to do with regard to leaving his medical personnel and matériel behind for the care of his wounded and sick; but it is clearly intended by this Article that he shall relieve the victor left in possession of the battlefield, as far as practicable, of the additional burdens involved in the care of the enemy sick and wounded as well as his own." Rules of Land Warfare, No. 106.

[3] Art. II.

According to the same Article belligerents remain free to enter into special agreements in relation to the sick and wounded. They have especially authority:

After every engagement the belligerent remaining in possession of the field of battle is obliged to take measures to search for the wounded and to protect them as well as the dead from robbery and ill-treatment. Prior to interment or incineration careful examination is to be made of the bodies of the dead.[1] Each belligerent is charged also with the duty to forward as soon as possible "to the authorities of their country or army" the marks or military papers of identification found upon the bodies of the dead, together with a list of the names of the sick and wounded taken in charge.[2] 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.

Somewhat in contrast to the provisions of the convention of 1864, it was declared in that of 1906, that military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision, to care for the sick and wounded of the armies, granting to persons responding to such appeals special protection and certain immunities.[3]

"*a.* To return mutually the sick and wounded left on the field of battle after an engagement.

"*b.* To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

"*c.* To send the sick and wounded of the enemy to a neutral State, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities."

See correspondence between the American Ambassador at London and the British Foreign Secretary, March 25–May 13, 1916, respecting the transfer to Switzerland of British and German wounded and sick combatant prisoners of war, Misc. No. 17 (1916), Cd. 8236.

[1] Art. III.

"The foregoing duty of policing the field of battle imposed on the victor after the fight contemplates that he shall take every means in his power to comply therewith." Rules of Land Warfare, No. 111.

[2] Art. IV. In the same Article it is declared: "Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country."

The Rules of Land Warfare state, in No. 115, that "the foregoing provisions relate obviously to the wounded and sick of the enemy, since the duties referred to with regard to wounded, sick, and dead of his own army will be regulated by the internal laws of the belligerent." It is added that the proper channel of communication is through the Prisoner's Bureau of Information.

[3] Art. V. *Compare* Art. V of the convention of 1864, Malloy's Treaties, II, 1906, which declared that "Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent Powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it."

(3)

§ 683. Sanitary Formations and Establishments.

In the Convention of 1906, the term sanitary formation is applied to all establishments, whether fixed or movable, which are provided by public appropriation or private charity for the treatment of the sick and wounded in time of war.[1] "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.[2] The protection otherwise due to them ceases, however, "if they are used to commit acts injurious to the enemy."[3] As examples of harmful acts the Rules of Land Warfare cite "taking part in the campaign, sheltering spies or combatants, placing these units directly in the line of fire of the enemy, or in a strategic position, where they restrict military operations or conceal guns, or making use of sanitary trains to transport effectives, etc."[4] The right to claim protection is not lost, however, by the arming of the personnel and their use of arms in self-defense or in defense of their sick and wounded; nor is it lost by the guarding of a formation, in the absence of armed hospital attendants, by an armed detachment or by sentinels acting under competent orders; nor is it forfeited by finding in the formation or establishment arms or cartridges taken from the wounded and not yet turned over to the proper authorities.[5]

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.[6] Its safety during an

[1] The language of the text is that contained in the Report of the American Delegation to the Second Geneva Conference, For. Rel. 1906, II, 1548, 1555.

[2] Art. VI.

"By mobile sanitary formations must be understood all organizations which follow the troops on the field of battle. In our service is included the following: (1) Regimental equipment; (2) Ambulance companies; (3) Field hospitals; (4) The reserve medical supply; (5) The sanitary column, including (*a*) Ambulance column, (*b*) Evacuation hospital; (6) Hospital trains; (7) Hospital boats; (8) Red Cross transport column." Rules of Land Warfare, No. 119.

"The term 'Fixed establishments' is clearly intended to cover the stationary or general hospitals, whether actually movable or located on the line of communications, or at a base, and in our service would include: (1) The base medical supply depot; (2) Base hospitals; (3) Casual camps; (4) Convalescent camps; and (5) Red Cross hospital columns." *Id.*, No. 120.

[3] Art. VII. [4] No. 123. [5] Art. VIII of the Convention.

[6] 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,

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.[1]

(4)

§ 684. Personnel.

The quality of inviolability is wisely attached to the personnel engaged exclusively in the collection, transportation and treatment of the sick and wounded and also in the administration of sanitary formations and establishments, as well as to chaplains attached to armies. They are to be respected and protected under all circumstances. "If they fall into the hands of the enemy they shall not be considered as prisoners of war."[2] Under such circumstances the enemy is permitted to require them to exercise their functions under its directions.[3] When, however, their assistance is no longer indispensable, they are to be sent back to their army or country, within such period and by such route as may accord with military necessity. They may carry with them such effects, instruments, arms and horses as are their private property.[4] The right to detain persons who are exempt from treatment as prisoners of war, and to utilize their services when needed in caring for the wounded, doubtless fortifies the disposition of the belligerent

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 such as the Geneva Convention, 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.

[1] "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] confer 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.

[2] Art. IX, where it is added that "These provisions apply to the guards of sanitary formations and establishments in the case provided for in section 2 of Article VIII."

See, in this connection, Rules of Land Warfare, Nos. 131–132.

[3] Art. XII. See Misc. No. 8 (1915), Cd. 7857, pp. 61–63, respecting the views of Great Britain and Germany concerning the interpretation of this Article.

Art. XIII declares that "While they remain in his power, the enemy will secure to the personnel mentioned in Article IX the same pay and allowances to which persons of the same grade in his own army are entitled."

[4] Art. XII.

to accord that degree of respect and protection which the convention demands.

The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel above contemplated, if subjected to military laws and regulations. Each State is obliged, however, to make known to the other, in time of peace, or at the opening or during the progress of hostilities, and in any case before 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.[1]

If a recognized society of a neutral State desires to lend the services of its sanitary personnel and formations to a belligerent, it must obtain the prior consent of its own government and the authority of such belligerent. The belligerent accepting such services is required to notify the enemy before making use of them.[2]

(5)

§ 685. Matériel. Convoys of Evacuation.

While movable sanitary formations falling into the hands of the enemy are given the right to retain their matériel ("including the teams, whatever be the means of transportation and the conducting personnel"), the competent military authority is, nevertheless, declared to possess the right to employ such matériel in caring for the sick and wounded. It is, however, to be restored in accordance with the conditions prescribed for the sanitary personnel, and, as far as possible, at the same time.[3]

Buildings and matériel pertaining to fixed establishments remain subject to the laws of war, but incapable of diversion from

[1] Art. X.

"The National Red Cross of America is the only volunteer aid society that can be employed by the land and naval forces of the United States in future wars to aid the medical personnel, and their employment must be under the responsibility of the Government as part of the medical personnel and establishments of its Army, and they must be assigned to duties in localities designated by competent military authority." Rules of Land Warfare, No. 134.

The American National Red Cross was reincorporated by the Act of Jan. 5, 1905, Chap. 23, 33 Stat. 599, U. S. Comp. Stat. 1918 ed., § 7697.

[2] Art. XI.

[3] Art. XIV.

It is believed that the provisions of this Article are vaguely expressed, and hence capable of divergent interpretations. The report of the American plenipotentiaries fails to make clear what was agreed upon. For. Rel. 1906, II, 1555–1556. See Rules of Land Warfare, No. 145.

their use so long as necessary for the sick and wounded. "Important military necessity" is said, however, to justify the employment of such buildings by commanders of troops engaged in operations, if provision has been made for the sick and wounded.[1]

Matériel of aid societies admitted to the benefits of the convention is regarded as private property and, as such, respected under all circumstances, save that it is subject to the right of requisition by belligerents in conformity with the laws and usages of war.[2]

The treatment of convoys of evacuation is made the subject of special regulation. If a moving convoy is intercepted by a belligerent, he is authorized, "if required by military necessity", to take possession of the means of transportation in which the sick and wounded are being conveyed to their destination. In so doing, however, he charges himself with the care of the patients who are undergoing transportation, and must return the official sanitary and administrative personnel and matériel to their own lines with the least practicable delay.[3] Ambulances and other vehicles, together with hospital trains and vessels intended for interior navigation, which have been specially fitted for the transportation of the sick and wounded, are to be returned to the army to which they belong, but while in the possession of the enemy are to be used exclusively for the accommodation of the sick and wounded. Means of transportation belonging to a belligerent, but not specially fitted for hospital uses, are subject to capture; and vehicles obtained by requisition, including railway matériel and vessels utilized for convoys, or commercial vessels temporarily utilized for the conveyance of the sick and wounded, together with the drivers, crews or other employees necessary to their management or use, are made subject to the general rules of international law.[4]

[1] Art. XV.

See Report of the American Delegation to the Second Geneva Conference, July 10, 1906, For. Rel. 1906, II, 1548, 1555–1556.

[2] "It would have been desirable to secure the insertion of a clause giving a broader immunity from capture to this class of property, or restricting its application, when taken by way of requisition, to the use of the sick and wounded; but there were decided differences of view in this regard among the delegates, and the clause as adopted represents a compromise of widely divergent opinions." *Id.*

The provision mentioned in the text is contained in Art. XVI.

[3] In such case the obligation to return the sanitary personnel, as provided for in Art. XII, is extended to include the entire military personnel employed, under competent orders, in the transportation and protection of the convoy. Art. XVII.

[4] The paragraph in the text is substantially the language employed by the American plenipotentiaries, describing Art. XVII of the Convention, For. Rel. 1906, II, 1557.

See, in this connection, J. M. Spaight, War Rights on Land, 451–454.

(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 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 for which the convention contemplates respect, and that with the consent of the military authorities. It must be accompanied by the national flag of the belligerent to whose service such formation or establishment is attached.[4] Likewise, neutral formations must fly the flag of the convention together with the national flag of the belligerent to which they are attached.[5] In any case, however, sanitary formations which have fallen into the power of the enemy, "shall fly no other flag than that of the Red Cross so long as they continue in that situation."[6]

It is declared that "the emblem of the red cross on a white ground and the words *Red Cross* or *Geneva Cross* may only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and matériel protected by the convention."[7]

[1] Art. XVIII. "The use of the term 'heraldic' in describing the insignia of the Convention excludes the view that any religious association attaches to the distinctive emblem of the Convention's philanthropic and humanitarian activity. Turkey was not represented in the Conference, and it is worthy of note that the representatives of Japan, China, Persia, and Siam expressed a willingness on the part of their Governments to accept the red cross as the official insignia of the Convention." Report of the American Plenipotentiaries at the Geneva Conference, For. Rel. 1906, II, 1558.

The adherence of Turkey to the convention was given on the understanding that she might use the emblem of the "Crescent" instead of the Red Cross." Malloy's Treaties, II, 2183.

[2] Art. XIX.

[3] Art. XX. In the case of persons attached to the sanitary service of armies and not having military uniform, the brassard must be accompanied by a certificate of identity.

[4] Art. XXI. [5] Art. XXII. [6] Arts. XXI and XXII.

[7] Art. XXIII.

Application and Execution of the Convention. The provisions of the

(7)

§ 687. Repression of Abuses and Infractions.

In order to prevent the abuse by private persons or unauthorized societies of the "emblem or name of the Red Cross or Geneva Cross", particularly for commercial purposes by means of trademarks or commercial labels, the contracting Powers whose domestic legislation might be inadequate for such purpose engaged "to take or recommend to their legislatures" such measures as might be necessary to accomplish the end in view.[1]

In the event of the insufficiency of their military penal laws, the signatory Powers agreed to recommend to their respective legislatures measures necessary to repress, in time of war, individual acts of robbery and ill-treatment of the sick and wounded of the armies, and to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the convention.[2]

convention are made obligatory "only on the contracting powers, in case of war between two or more of them", and those provisions cease to be obligatory if one of the belligerent powers is not a signatory to the convention. Art. XXIV. It is made the duty of commanders-in-chief of the belligerent armies to provide for the details of the execution of the several 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. Art. XXV. It is wisely declared that "The signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large." Art. XXVI.

[1] Art. XXVII. It was contemplated in the same Article that the requisite prohibitory laws would be in operation at the latest within five years after the Convention might become effective, and it was provided that "after such going into effect, it shall be unlawful to use a trade-mark or commercial label contrary to such prohibition."

See Act of Jan. 5, 1905, Chap. 23, § 4, 33 Stat. 600, amended by Act of June 23, 1910, Chap. 372, § 1, 36 Stat. 604, U. S. Comp. Stat. 1918 ed., § 7700, as expressive of the legislation of the United States.

[2] Art. XXVIII. The signatory Powers agreed to communicate to each other, through the Swiss Federal Council, the measures taken with a view to such repression, not later than five years from the ratification of the Convention.

CERTAIN GENERAL PROVISIONS. Ratifications of the Convention are deposited at Berne. A certified copy of the record of the deposit of each act of ratification is sent through the diplomatic channel to each of the contracting Powers. Art. XXIX. Broad opportunities for adherence are offered to non-signatory Powers, and to Powers not participating in the Conference of 1906. Art. XXXII. Each of the contracting Powers enjoys the right to denounce the Convention. Such denunciation only becomes operative one year after a notification in writing shall have been made to the Swiss Federal Council, which then is to communicate such notification to all of the other contracting parties. Such denunciation only becomes operative in respect to the Power which has given it. Art. XXXIII.

5

BELLIGERENT OCCUPATION[1]

a

§ 688. Nature and Effect.

Belligerent occupation is that stage of military operations which is instituted by an 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] According to the

[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; 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, 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; Bonfils-Fauchille, 7 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' 7 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; E. Nys, *Droit International*, III, 463–472; L. Oppenheim, Int. Law, 2 ed., II, 204–215, with bibliography; 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 Stupp, *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, 329–343; A. Zorn, *Das Kriegsrecht zu Lande*, Berlin, 1906, 207–315; M. Marinoni, "*Della Natura Giuridica Dell' 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 Juridiction des Armées d'Occupation*", *Rev. Gén.* XVI, 131–161; J. W. Garner, in *Am. J.*, XI, 74 and 511.

[2] This 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

Rules of Land Warfare of the United States Army, 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.[1] 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.[2]

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,

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 bridgeheads, would 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 a belligerent occupation, because it was designed to remain operative long after peace was restored.

[1] The language of the text is that contained in Rules of Land Warfare, No. 286.

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.

See, also, Rules of Land Warfare, No. 289.

[2] Rules of Land Warfare, No. 288.

According to *id.*, No. 291: "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."

deprived of power to exercise its rights as such.[1] This deprivation of power and the relinquishment of it to the occupant are a 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. 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 actually prevails where the occupant asserts his control.

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.[2] 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.[3] The exercise of these broad privileges may give rise to controversy as to 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

[1] Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; United States *v.* Rice, 4 Wheat. 246; Fleming *v.* Page, 9 How. 603.

See, also, Rules of Land Warfare, No. 287.

"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.

[2] "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.

[3] 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.

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.[1] 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.

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.[2] The question in such case is obviously of a domestic nature, and its solution is 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 on 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."[3] 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.[4]

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."[5]

[1] See instances of abuse in The World War, 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.

[2] 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.

[3] Opinion of Mr. Justice Pitney in Ochoa *v.* Hernandez, 230 U. S. 139, 164, 165.

[4] Opinion of Mr. Justice Day in MacLeod *v.* United States, 229 U. S. 416, 434.

[5] Rules of Land Warfare, No. 290, *citing* Edmonds and Oppenheim, Land Warfare, par. 344, and Jacomet, *Les Lois*, p. 69.

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.[1] The Rules of Land Warfare 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.[2]

§ 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 reëstablished and the occupant fails promptly to suppress such rebellion or guerrilla operations. Belligerent or hostile military occupation ceases on the conclusion of peace.[3] If upon the restoration thereof territory which has been under belligerent occupation is transferred to the sovereign of the occupant, there may be a continuance in fact of military government therein.[4] From that circumstance it is not to be inferred, however, that belligerent occupation survives the final transfer of sovereignty.[5]

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.

[1] Rules of Land Warfare, No. 292, to which 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."

[2] Rules of Land Warfare, No. 293.

[3] The language in the text reproduces Rules of Land Warfare, No. 294.

[4] See, for example, Santiago *v.* Nogueras, 214 U. S. 260; also Cross *v.* Harrison, 16 How. 164; Dooley *v.* United States, 182 U. S. 222, 234.

[5] After the change the relation of the new sovereign towards the 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 latitude 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] 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]

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.

[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.

[2] Rules of Land Warfare, No. 299.

[3] Rules of Land Warfare, No. 297.

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] 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] Rules of Land Warfare, Section 299, where it is also observed that the jurisdiction of the local courts is never extended to members of the invading army.

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." [1]

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.[2] According to the Rules of Land Warfare, he will naturally alter or suspend all laws of a 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.[3] 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.[4]

The right to legislate is not deemed to be unlimited. According to The Hague Regulations of 1907, the occupant is called upon to respect, "unless absolutely prevented, the laws in force in the country." [5] Thus in restoring public order and safety he appears to be bound to make serious endeavor to continue in force the

[1] 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.

[2] Rules of Land Warfare, No. 300.

See, also, Magoon's Reports, 14.

[3] Rules of Land Warfare, No. 301, where it is added that "such suspensions should be made known to the inhabitants." See, also, in this connection, Edmonds and Oppenheim, Land Warfare, No. 362.

[4] Rules of Land Warfare, No. 302, quoting extracts from various martial law regulations of the Japanese in Manchuria.

[5] 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.

ordinary civil and criminal laws which do not conflict with the security of his army or its support, efficacy, and success.[1] 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 property without due process of law, was not only without executive sanction, but also contrary to limitations arising from general rules of international law.[2] 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.[3]

(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. In the levying of taxes "for the benefit of the State", Article XLVIII of The Hague Regulations of 1907 imposes the requirement that so far as possible the "rules of assessment and incidence in force" shall be observed, and that the occupant shall in consequence of collection be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was bound.[4] Circumstances may arise when through

[1] Rules of Land Warfare, No. 299.

"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 persons 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 sequestrated by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force, and are 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.

[2] Ochoa *v.* Hernandez, 230 U. S. 139, 164, 165.

[3] Article XXII (*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.

[4] 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 fault of local officials such procedure becomes impracticable. In such event the occupant would appear to be excused from respecting local rules of assessment and incidence.[1] The Rules of Land Warfare of the United States, declaring the imposition of taxes to be an attribute of sovereignty, forbid the occupant to impose new taxes, obliging him to obtain additional revenues from other sources and through other channels.[2] 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.[3]

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.[4]

The occupant will supervise the expenditure of such revenue and prevent its hostile use." Rules of Land Warfare, No. 311, *citing* Holland, Laws of War on Land, par. 108; Spaight, War Rights on Land, p. 378.

"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." Rules of Land Warfare, No. 310.

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.

[1] Rules of Land Warfare, No. 309. See, also, Edmonds and Oppenheim, Land Warfare, No. 371.

[2] No. 308, which is based on Edmonds and Oppenheim, Land Warfare, No. 372.

Justin H. Smith, "American Rule in Mexico", *Am. Hist. Rev.*, XXIII, 287, 292, 293, and documents there cited.

[3] Malloy's Treaties, II, 2289.

See Official Communication on the Economic Exploitation of Serbia, issued by the Serbian Minister at Washington, Aug. 28, 1917.

[4] "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.

(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 increase 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 of 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, the limitations which the principles of justice demand.

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 action,[3] and specify certain procedure to be

[1] Hall, Higgins' 7 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.

followed in the collection of funds.[1] 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 definite prohibition. There is needed a 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.[2] He ought not to be 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.[3] 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.[4]

The Hague Regulations of 1907 declare that "no general penalty,

[1] 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 contributors." 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.

[2] 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.

[3] 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.

[4] The abuse by Germany of the right of contribution during the occupation of Belgium in 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.

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." [1] 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 Rules of Land Warfare announce that such offenses are not necessarily limited to violations of the laws of war, and declare that any breach of the occupant's proclamations or martial-law regulations may be punished collectively. Thus, it is said that a town or village may be held collectively responsible for damage done to railways, telegraphs, roads and bridges in the vicinity, and that the most frequent form of collective punishment consists in fines.[2] 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 exacted in mockery of justice. Events of The World War, and notably the German occupation of Belgium, have afforded convincing proof that no rule of law merely acknowledging the right of a military officer to apply repressive fiscal measures against a helpless population under his control suffices to check wanton abuse of power.[3] There must be restraint for the intemperate and unscrupulous commander. To hold in check such an officer, as well as, or rather than, one unlikely to yield to excesses, appropriate rules of procedure need to be laid

[1] Art. L, Malloy's Treaties, II, 2289; also Rules of Land Warfare, No. 353.

[2] No. 354.

[3] Jean Massart, vice director of the class of sciences in the Royal Academy of Belgium, 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.

J. W. Garner, "Community Fines and Collective Responsibility", *Am. J.*, XI, 511; same author, Int. Law and The World War, II, §§ 403–412.

down and accepted.[1] 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.

(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 military use, or of indirect use, such as fuel and food supplies, clothing, wine, tobacco, printing presses, type, leather, cloth, etc.[2] 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."[3] Such requisitions must, moreover, "be in proportion to the resources of the country." Requisitions and services are only to be demanded on the authority of the commander in the locality occupied. It is provided that contributions in kind shall as far as possible be paid for in cash; and, if not, that a receipt be given and payment of the amount due be made as soon as possible. The Rules of Land Warfare of the United States declare that, if practicable, requisitions should be accomplished through the local authorities by systematic collection in bulk, and that they may be made "direct by detachments if local authorities fail for any reason." It is added that billeting may be resorted to if deemed advisable.[4]

[1] The same need is apparent with respect to the imposition of collective punishments where the penalty inflicted is other than pecuniary.

[2] Rules of Land Warfare, No. 346 and notes accompanying it.

[3] Malloy's Treaties, II, 2289. See, also, in this connection, G. Ferrand, *Des Réquisitions*, Paris, 1917, 209–219, 427–429.

[4] Rules of Land Warfare, No. 347. Attention is here called to the fact that the method of requisitioning "differs from the rule as to contributions, which requires the order of the commander-in-chief."

According to note 2 attached to the foregoing number: "It is generally recognized by all States that the assistance of local authorities is advisable, since in addition to the avoidance of contact with troops and inhabitants, the more even distribution of supplies furnished by the inhabitants is secured. The direct method was resorted to in the Civil War, and especially by Gen. Sherman, because 'the country was sparsely settled, with no magistrates or

"The needs of the army" for which the occupant is authorized to provide are not identical 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.[1]

Doubtless it rests with the occupant to fix the prices of articles requisitioned and paid for.[2] The expediency of cash payment when possible, and of taking up receipts as soon as possible is apparent.[3] Coercive measures may be necessary to enable the occupant to obtain articles requisitioned, especially when cash is not paid. The measures adopted ought to be limited, as the Rules of Land Warfare acknowledge, to the amount and kind necessary to attain the end in view.[4] At present there is no agreement as to the nature or extent of coercive measures. It is believed that there is need of a general understanding respecting the establishment of appropriate means to check abuses of power on the part of the occupant when the inhabitants of the district prove to be reluctant or unwilling to furnish articles requisitioned.

civil authorities, who could respond to requisitions, as is done in all wars in Europe; so that this system of foraging was indispensable to our success.' Memoirs, Vol. II, p. 183."

[1] Rules of Land Warfare, No. 348.

[2] 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 Liége, 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.

[3] Rules of Land Warfare, No. 349.

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.

[4] Rules of Land Warfare, No. 350.

(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 likely to have just grounds for its devastation.[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

[1] 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."

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, *Am. J.*, VII, 879; Stowell and Munro's International Cases, II, 536.

[2] Thus No. 334 of the Rules of Land Warfare states that in order to justify devastation, "there must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army." It must be obvious that the military problem furnishing such a connection is not likely to confront the belligerent occupant. But see P. Fauchille, "*Les Allemands en territoire occupé*", *Rev. Gén.*, XXIV, 316.

[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,

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.[1] It may be doubted whether the decisions interpreting the acts of Congress serve as useful precedents respecting the extent of the rights of a belligerent occupant under the law of nations.[2]

The Hague Regulations announce that private property "must be respected."[3] This restriction, as interpreted by the Rules of Land Warfare, does not interfere with the right of the occupant to resort to taxation, to levy forced loans, to billet soldiers or to appropriate property, especially houses, boats or ships, lands, and churches, for temporary and military use.[4] None of these acts constitutes, however, confiscation. The Hague Regulations declare that private property cannot be confiscated.[5] This prohibition implies that unless seized by lawful process as a penalty for

Dig., VII, 303; Same to Same, Dec. 3, 1886, For. Rel. 1887, 1015, Moore, Dig., VII, 304.

[1] 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, Correspondence 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.

[2] Cases in Moore, Dig., VII, 290–292.

[3] Article XLVI, Malloy's Treaties, II, 2289.

[4] No. 335, *citing* Gen. Orders, No. 100, Apr. 24, 1863, § XXXVII, par. 2.

[5] Article XLVI, Malloy's Treaties, II, 2289.

According to Article XLVII, "Pillage is formally forbidden." "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 The World War, 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 J. W. Garner, Int. Law and The World War, II, § 399, concerning the seizure by German authorities of funds of private banks in Belgium.

wrongful conduct, such property is not to be taken from the owner without compensation. It does not restrict the occupant from dealing with private property in a particular way, if he is confronted with a necessity occasioned by his actual and immediate requirements;[1] but it gives the owner hope of reimbursement for the loss he sustains in being deprived of his property.[2] In applying this principle the Hague Regulations make wise provision 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, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[3]

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.

The Hague Regulations acknowledge, yet limit, the right of the occupant to take possession of cash, funds and realizable securi-

[1] Rules of Land Warfare, No. 340, in which it is said that "Private property can be seized only by way of military necessity for the support or other benefit of the Army or of the occupant."

[2] 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.

[3] Article LIII, Malloy's Treaties, II, 2290.

According to the Rules of Land Warfare, No. 342, "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, carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, aeroplanes, depots of arms, whether military or sporting, and in general all kinds of war material." *Citing* Edmonds and Oppenheim, Land Warfare, No. 415.

ties which are strictly the property of the State, depots 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 Rules of Land Warfare 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]

(ii)

§ 696. Immovable Property.

The occupant is not deemed to possess "the absolute right of disposal or sale" of immovable property belonging to the hostile State.[4] 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.[5] Thus he should not exercise his rights in such wasteful and negligent manner as to impair the value of the property enjoyed. The Rules of Land Warfare state that he may lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines.[6] It is declared, however, that real property of a State, which is of direct military use, such as forts, arsenals,

[1] Article LIII, Malloy's Treaties, II, 2289; also Rules of Land Warfare, No. 360.

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.

[2] No. 361, where it is said that "It is usual to accord protection to crown pictures, jewels, collections of art, and archives, but papers connected with the war may be secured, even if they pertain to archives." *Citing* Edmonds and Oppenheim, Land Warfare, No. 431.

[3] Rules of Land Warfare, No. 362. [4] *Id.*, No. 356.

[5] Article LV, Malloy's Treaties, II, 2290.

[6] Rules of Land Warfare, No. 356, 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.

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.[1] 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.

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 willful damage done to, institutions of this character, historic monuments, works of art or science, is forbidden and should be made the subject of legal proceedings.[2] Doubtless the property included within this rule may be utilized in case of necessity, as the Rules of Land Warfare indicate, for quartering troops, the sick and wounded, horses, stores, etc. 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.[3]

(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.[4] 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 certain fun-

[1] Rules of Land Warfare, No. 357.
[2] Article LVI, Malloy's Treaties, II, 2290.
[3] Rules of Land Warfare, No. 359; also Gen. Orders, No. 100, Apr. 24, 1863, Art. XXXV. See, also, Edmonds and Oppenheim, Land Warfare, No. 429.
[4] Rules of Land Warfare, No. 312. See, also, Edmonds and Oppenheim, Land Warfare, Nos. 355 and 382.

damental rights. 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, that is, to the Government of the occupant.[1] It is believed that notwithstanding 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.[2]

Clearly the occupant may punish severely persons guilty of what is known as war treason. According to the Rules of Land Warfare some of the principal acts punished as treasonable by belligerents in invaded territory, when committed by the inhabitants, 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 armed forces of the enemy or members thereof; intentional misleading of troops while acting as guides; voluntary assistance to the enemy by giving money or serving as guides; inducing soldiers to serve as spies, to desert or to surrender; bribing soldiers in the interests of the enemy; damage or alteration to military notices and signposts in the interests of the enemy; fouling sources of water supply and concealing animals, vehicles, supplies and fuel

[1] 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.

[2] 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.

See Spaight, War Rights on Land, 372, cited in Rules of Land Warfare, No. 313, relative to the practice of both belligerents in the Boer War of exacting oaths of neutrality; also Holland, Laws of War on Land, 53.

Compare L. Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants", *Law Quar. Rev.*, XXXIII, 363.

in the interest of the enemy; knowingly aiding the advance or retirement of the enemy; circulating proclamations in the interests of the enemy.[1]

§ 698. Respect for Family Honor.

The Hague Regulations of 1907 declare that family honor and rights, the lives of persons, as well as religious convictions and practice, must be respected.[2] An occupant in applying penalties for resistance to his authority is not restrained by this rule from the taking of human life according to lawful process.[3] On the other hand, there are limitations respecting the forms of penalties which the occupant ought to be obliged to regard. Again, in his general course of administration, when no question as to a penalty is at issue, he should be bound on principle to respect scrupulously certain rights of the individual. The Hague Regulations furnish insufficient guidance. 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.[4] 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

[1] The language of the text is that contained in Rules of Land Warfare, No. 372, *citing* Edmonds and Oppenheim, Land Warfare, par. 445.

[2] Art. XLVI, Malloy's Treaties, II, 2289.

[3] See, in this connection, Westlake, 2 ed., II, 103.

[4] Gen. Orders, No. 100, Apr. 24, 1863, § XXXVII. This is reproduced in Rules of Land Warfare, No. 315. See, also, instructions to Gen. Merritt, May 28, 1898, quoted in note 1 appended thereto.

"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 Rules of Land Warfare, No. 316, 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."

disregard these requirements. Nevertheless, events of The World War have grimly brought home to enlightened States the necessity of enunciating prohibitions more explicit than are contained in the Hague Regulations, and that also of causing by some process a belligerent to impose definite restraint upon its forces occupying hostile territory.

The clear duty to respect family honor and rights seems to deny the occupant any right, 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.[1]

§ 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, 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.[2] 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

[1] 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.

[2] 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. Rules of Land Warfare, No. 317.

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.

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.[1]

Within the limits above prescribed the occupant may demand services within a wide field and for a variety of purposes.[2] Thus he may reasonably requisition 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

[1] Fernand Passelecq, *Les Déportations Belges à La Lumière des Documents Allemands* (Paris, 1917); Jules Destree, 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"; 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 noncombatants 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." American White Book, European War, IV, 358; also documents, *id.*, 357–373.

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.

[2] The services which may be requisitioned include, according to the Rules of Land Warfare, those of "professional men and tradesmen, such as surgeons, carpenters, butchers, bakers, etc., employees of gas, electric light, and water works, and of other public utilities, and of sanitary boards in connection with their ordinary vocations. 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 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." No. 318.

and sanitary work.[1] The prohibition against forcing the inhabitants to take part in the operations of war against their own country precludes, however, according to the Rules of Land Warfare, the requisitioning of their services upon works directly promoting the ends of war, such as the construction of forts, fortifications and intrenchments; 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.[2]

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.[3] The impressment of guides appears to be forbidden under this rule.[4] 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.[5]

§ 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.[6] The Rules of Land Warfare advert to the fact that hostages have been taken to protect lines of communication "by placing them on engines of trains in occupied territory", and also to insure compliance with requisitions and contributions.[7] Nor is it there suggested 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 of The World War encourage the belief that it is also a weapon likely to be employed by a despot to check interference of any sort with ruthless and cruel acts inspired by caprice.[8] It is believed,

[1] Rules of Land Warfare, No. 319.

[2] No. 320. See "*Du travail en vue des opérations de guerre imposé par l'Allemagne aux habitants en pays d'occupation*", Clunet, XLV, 123.

[3] Article XLIV, Malloy's Treaties, II, 2288.

[4] Rules of Land Warfare, Nos. 322 and 323. 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.

[5] J. M. Spaight, War Rights on Land, 368–371.

[6] Edmonds and Oppenheim, Land Warfare, Nos. 461–464. [7] No. 387.

[8] 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

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.

(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.[1] He may exclude commerce wholly from occupied ports, or permit it under such conditions as he may prescribe.[2] He may establish a censorship over various forms of publication and communication, and may himself take charge of agencies for the transmission of intelligence.[3] He may exercise full authority over all means of transportation.[4] 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 foodstuffs.[5]

of 1919, Carnegie Endowment for Int. Peace, Div. of Int. Law, Pamphlet No. 32, p. 31.

See discussion in J. W. Garner, Int. Law and The World War, I, §§ 195–201.

[1] Rules of Land Warfare, No. 304. See, also, Magoon's Reports, 210, 227.

[2] 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.

[3] Rules of Land Warfare, No. 305; also Edmonds and Oppenheim, Land Warfare, Nos. 374 and 375.

According to Article LIV of The Hague Regulations of 1907, submarine cables connecting an occupied territory with a neutral territory are not to be seized or destroyed except in the case of absolute necessity. It is declared that they must likewise be restored and compensation fixed when peace is made. See also *infra*, § 723.

[4] Rules of Land Warfare, No. 306.

[5] See correspondence in American White Book, European War, II, 97–108, respecting Belgian relief in 1914 and 1915. Also correspondence between the American Ambassador at London, and the British Foreign Office in July, 1916,

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.[1] 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.[2] This response is believed to have been sound in theory.

(5)

§ 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

concerning the relief of Allied territories in the occupation of the enemy, Misc. No. 24 [1916], Cd. 8295.

[1] 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. 14, 1914, American White Book, European War, III, 359; also note verbale from the German Foreign Office, Jan. 3, 1915, enclosed in communication of Mr. Gerard to Mr. Bryan, Jan. 11, 1915, *id.*, 360.

[2] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador at Berlin, Jan. 21, 1915, American White Book, European War, III, 361; also Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador at Vienna, telegram, Nov. 23, 1915. *id.*, 366; telegram of Acting Secy. of State, to Mr. Gerard, July 12, 1916, *id.*, 369.

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, *id.*, 363.

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.

The practice of proclaiming the fact of occupancy and of announcing the policy to be followed respecting the inhabitants of

[1] According to the Rules of Land Warfare, 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.* Dickelman, 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.

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.[1] 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 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." [2]

[1] Rules of Land Warfare, No. 299, and note 1 appended thereto.

[2] 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.

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, No. 14, note 1; Johnson *v.* Jones, 44 Ills. 142, 153–155; Lawrence B. Evans, Leading Cases on Int. Law, 110, note.

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 im-

[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] Marshall, Chief Justice, in The Nereide, 9 Cranch, 388, 426, 428.

See, also, Private Vessels Defensively Armed, § 709.

[4] 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

propriety 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.[1] This fact did not justify the conclusion that no principle of international law was violated when a private non-commissioned ship took the offensive against a vessel of the enemy,[2] 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.[3]

When the United States declared its independence, nations 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.[4] Thus the

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.

[1] Story, J., in The Dos Hermanos, 2 Wheat. 76, 99; The Amiable Isabella, 6 Wheat. 1, 66.

[2] *Dissenting* opinion of Story, J., in Brown *v.* United States, 8 Cranch, 110, 132–135; *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.

[3] "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, American White Book, European War, III, 188, 193.

[4] 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.

mere arming of a merchant vessel for defensive purposes in time of war does not suffice to convert it into such a craft.[1]

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.[2] Thus the right to

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.

[1] 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.

"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.

[2] 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

resort to privateering, in spite of the evils necessarily attending it,[1] 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.[2] The proposals emanating from England and France in the course of the Crimean War were, moreover, attributable to self-interest.[3]

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,[4] unless there was added the broader provision abolishing generally the right to capture on the high seas enemy

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.

[1] 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.

[2] 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.

[3] 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 coöperation 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.

[4] For the text of the declaration see Hertslet's Map of Europe by Treaty, II, 1282, Moore, Dig., VII, 561, 562.

private property, other than contraband articles.[1] 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.[2] 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.[3]

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.[4] That weapon was not, however, used during the Civil War.[5]

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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 vessel 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

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.[1]

In the Oxford Manual of Naval War adopted by the Institute of International Law in 1913, it is declared that "privateering is forbidden."[2] If the United States is not disposed to challenge that statement as declaratory of international law, it will be 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.[3]

It is believed that the formal commissioning of private agencies

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.

[1] 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.

[2] 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, American White Book, European War, III, 162, 164.

[3] Report of the American Delegation to the Second Hague Peace Conference of 1907, For. Rel. 1907, II, 1160, 1161.

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 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.[1]

§ 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).[2]

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."[3] 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.[4]

[1] Naval War College, Int. Law Topics, 1906, 106.

[2] 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." American White Book, European War, III, 191. 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.

[3] Naval War College, Int. Law Topics and Discussions, 1914, 9–34.

[4] See report of commission on the definition of the term "*Vaisseau Auxiliare*", at the Second Hague Peace Conference, *id.*, 13–15, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 862–864.

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 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." [1] 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." [2]

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.[3]

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

[1] Official Bulletin, Vol. I, No. 18, p. 5, Naval War College, Int. Law Documents, 1918, 243.

[2] "A vessel fitted up and used exclusively as a hospital ship" was excepted from this definition.

[3] See Public Unarmed Vessels, *infra*, § 740; also Public Armed Vessels, Certain Conclusions, *infra*, § 745.

The proclamation of May 23, 1917, fails 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.

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 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 made: The

[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' 7 ed., § 181; A. P. Higgins, War and the Private Citizen, 119–125.

[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.

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.[1] The Institute of International Law incorporated these provisions in its Oxford Manual of Naval War.[2]

(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.[3] At the Second Hague Peace Conference of 1907, the United States offered 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.[4] This proposal was renewed by the American delegation at the London Naval Conference of 1908–1909.[5] 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

[1] 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.

[2] See Arts. III–VIII, *Annuaire*, XXVI, 643, 644, J. B. Scott, Resolutions, 176.

[3] 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 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.

[4] *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.

[5] *Proceedings International Naval Conference*, Misc. No. 5, 1909, Cd. 4555, p. 268.

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." [1] 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." [2]

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.[3] 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.[4] 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.[5] The exercise of the important right

[1] Art. IX, J. B. Scott, Resolutions, 176, *Annuaire*, XXVI, 612. For the discussion concerning this Article, *id.*, 511–514.

[2] 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."

"*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.*

See, also, Art. X of the Oxford Manual, *Annuaire*, XXVI, 612, J. B. Scott, Resolutions, 176.

[3] Summary of Naval War College, Int. Law Topics and Discussions, 1906, 123, 124.

[4] 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.

[5] "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 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

of visit and search to which 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.[1]

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.[2] 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.[3] 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.[4] It is asserted, moreover, that the unfettered exercise of the right of conversion is a part of the law of nations.[5]

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.

[1] 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.

[2] See view of Mr. Ernest Renault at the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 824.

[3] 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.

[4] 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.

[5] 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.

§ 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 de-

[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.

fensive operations undertaken by private ships unrestrained by public control.

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§ 709. Private Vessels Defensively Armed.

According to the Department of State 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

[1] Mr. Lansing, Acting Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, Nov. 7, 1914. American White Book, European War, II, 45; 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." American White Book, European War, III, 192. See The Nereide, 9 Cranch, 388; also memorandum from the British Embassy at Washington, Sept. 9, 1914, American White Book, European War, II, 42.

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." American White Book, European War, III, 171. This view accords with that of Dr. George Schramm, counselor of the German Navy, and expressed in his treatise "*Das Prisenrecht 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

nations itself.[1] 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 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."[2] 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.[3]

This fact, as is noted elsewhere, had a significant bearing on the claim that unarmed belligerent merchantmen should enjoy immunity from attack at sight.[4] 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,[5]

vessel was in contact the previous year, *Am. J.*, X, 865, and documents there cited; also J. W. 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.

[1] A. P. Higgins, "Armed Merchantmen", *Am. J.*, VIII, 705; same author, Defensively Armed Merchant Ships and Submarine Warfare, London, 1917; speeches of Messrs. Sterling and Lodge in the Senate Feb. 18, 1916, Cong. Record, LIII, 3181 and 3184, respectively; Oppenheim, "*Die Stellung der feindlichen Kauffahrteischiffe im Seekrieg*", *Zeit. Völk.*, 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.

[2] 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.

[3] 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, American White Book, European War, III, 162, 163.

[4] See Attack, Armed Vessels, Merchantmen, *infra*, §§ 742–743.

[5] Article 10 (p. 3), which declares that "The personnel of merchant vessels

while the Oxford Manual of Naval War gave it fresh recognition in 1913.[1] 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 the war it placed substantial armament on merchantmen as a means of frustrating the purposes and methods of German naval submarines.[2] The United States, when it became a belligerent in 1917, likewise armed its merchant marine and with a like purpose.[3]

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.[4] One of these is the commission of offensive operations by private ships oftentimes under private control.[5] When, however, belligerent vessels of every type, public or private, armed or unarmed,

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.

[1] 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.

[2] 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.

[3] 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, given to the press, Mar. 12, 1917.

[4] Jonkheer W. J. M. von 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.

[5] Mr. Lansing, Secretary of State, in informal and confidential communication to the diplomatic representatives at Washington of certain belligerent Governments, Jan. 18, 1916, American White Book, European War, III, 162, 164.

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.[1]

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.[2]

[1] President Wilson, Address to the Congress, April 2, 1917, where he added: "They must be dealt with upon sight, if dealt with at all," American White Book, European War, IV, 422–424.

[2] "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. von 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).

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 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 connected with the

[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.

[2] Arts. XVII, and XVIII, Oxford Manual of Naval War, *Annuaire*, XXVI, 645, 646, J. B. Scott, Resolutions, 178.

prosecution of the war, such as the transportation of a military force.[1]

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.[2] 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.[3]

While there are certain weapons and also methods, recourse to 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 or to the bombardment of undefended places.

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 acceptation, 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.[4]

[1] See Attack; Public Unarmed Enemy Ships, *infra*, § 740.

[2] 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.

[3] 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.

[4] 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.

b

§ 711. Bombardment of Undefended Places — The Hague Convention of 1907.

Because the naval bombardment of undefended places produces great harm to unoffending neutral as well as enemy persons and property, and tends to render the return of peace increasingly difficult, maritime States have endeavored to agree to prohibit such action, save under circumstances when the equities appear to be on the side of the naval force.[1]

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.[2]

The First Hague Peace Conference of 1899 expressed the wish that the problem be referred to a subsequent conference for consideration.[3] 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 inhabitants and assure the preservation of the more

[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.

[2] *Annuaire*, XV, 313, Moore, Dig., VII, 363; J. B. Scott, Resolutions, 131–133. See, also, Holland, Studies in International Law, 96–111.

[3] *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.

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.[1] This provision was followed by the declaration that "a place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor." 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.[2] It is urged that a coast town defending itself by such a process of concealment forfeits the right to claim immunity from attack. Although this declaration has aroused criticism, and is deemed in its present form unacceptable to the War College,[3] 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.[4]

§ 712. The Same.

The United States with its extensive coast line on two oceans possesses, in close proximity to the sea, numerous unfortified cities

[1] Malloy's Treaties, II, 2314.

[2] 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.

The convention is reproduced in Section XV of the Naval Instructions Governing Maritime Welfare, 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."

[3] Naval War College, Int. Law Topics and Discussions, 1914, 83.

[4] *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 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.

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 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 im-

[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.

[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.

munity 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 of the impropriety of the bombardment of unfortified places even though defended by guns mounted on the ocean coast in no remote neighborhood.[1] It is the impotence of an unfortified place to offer resistance rather than the fact of complete defenselessness which should be the test of immunity from bombardment. The right of an approaching fleet to attack coast defenses should not be permitted to excuse an attack also upon an unfortified place as a means of effecting the surrender of a detached and possibly remote instrument of its defense.

The Hague Convention limits the prohibition of the bombardment of undefended places for the sake, first, of permitting the destruction of specified things, and secondly, in order to enable a hostile fleet to utilize its power in order to gain possession of needed supplies. 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.[2]

[1] 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.

[2] 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 commander 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.[1] Under stress of military necessity, demanding immediate action, the delay for purposes of warning and protection may be dispensed with.[2]

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.[3] It is believed that the transportation of needed supplies, if within the resources of the place, would fall within the limits of fair requisition.[4] 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.[5] Bombardment for the non-payment of money contributions is wisely forbidden.[6]

The Naval War College was of opinion, in 1914, that under the existing rules in regard to 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.

[1] 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.

[2] 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 of peace unnecessarily difficult." Int. Law Topics and Discussions, 1914, 69, 87–93.

[3] 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."

[4] Such is the opinion of the Naval War College, Int. Topics and Discussions, 1914, 96. See critical discussion of Article III, *id.*, 95–99.

[5] *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.

[6] See Art. IV.

The original proposition of the United States provided that "The bombard-

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, historic 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.[1] It is made the duty of the inhabitants to indicate such monuments, edifices or places by visible signs.[2] Unless military necessity does not permit, the commander of an attacking naval force is obliged, before commencing bombardment, to do his utmost to warn the authorities.[3] Even when taken by storm, a town or place may not be pillaged.[4]

c

Submarine Automatic Contact Mines

(1)

§ 713. In General.

General use of submarine automatic contact mines is a recent development of maritime warfare.[5] The Russo-Japanese War furnished distressing instances where reliance upon such weapons wrought vast harm and palpable injustice to neutral persons and

ment 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.

[1] Art. V. *Compare* Art. XXVII, of Regulations annexed to Hague Convention Respecting Laws and Customs of War on Land, Malloy's Treaties, II, 2286.

[2] 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."

[3] 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 Respect-

Respecting
II. 2286.

[5] 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).

property.[1] 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 emanating from the Conference recorded what is believed to be an insufficient basis of agreement.[2] 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 fundamental principles seems necessary.

The sowing on the high seas of submarine automatic contact 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.

[1] *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.

[2] 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.

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.

(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 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]

[1] The Hague Convention of 1907 merely 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.

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 risk 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. Pérez 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.

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.

provided sufficient regard be had for the safeguarding of innocent shipping and general access to neighboring neutral ports, and provided also that the mines employed be such as become harmless in case they break loose from their moorings.[1] 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,[2] until at least those waters and the contiguous coasts have been subjected to military control, and the conqueror 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,[3] seems to be generally

[1] 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.

[2] 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.

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 maintain a commercial blockade." *Annuaire*, XXVI, 646, J. B. Scott, Resolutions, 178.

[3] "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

acknowledged.[1] That a belligerent may also not unlawfully anchor mines within the territorial waters of the enemy appears to be accepted doctrine.[2] It is believed, however, that the right to take such action 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.[3]

(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.[4] The American delegation at the Second Hague Conference proposed that the use of unanchored mines be prohibited.[5] The Oxford Manual of Naval War prohibits the laying of unanchored (as well as anchored) mines in the open sea.[6] 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

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.

[1] See, in this connection, Westlake, 2 ed., II, 312-314.

[2] 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; (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, American White Book, European War, IV, 28.

[3] 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.

[4] Art. I. The convention does not prohibit the sowing of such mines on the high seas.

[5] *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 664, J. B. Scott, Reports to Hague Conferences, 684.

[6] Art. XX, *Annuaire*, XXVI, 646, J. B. Scott, Resolutions, 178.

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."[1] 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, 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.[2]

(4)

§ 716. The World War — 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 no-

[1] Naval War College, Int. Law Topics and Discussions, 1914, 111–116.

[2] 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.

tice 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 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 Admiralty announced that the mine-laying policy of the enemy made necessary on military grounds the adoption of countermeasures, and that the British Government was developing a system of mine fields in the southern areas 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 escaped 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 vessel 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 great 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

[1] See memorandum from the British Embassy at Washington, Aug. 11, 1914, American White Book, European War, IV, 21; memorandum from same, Aug. 19, 1914, *id.*, 23; memorandum from same, Aug. 23, 1914, *id.*, 24; memorandum from same, Aug. 30, 1914, *id.*, 24.

See, also, War Zones, and Areas of Hostilities, *infra*, § 720–721.

[2] Memorandum to the British Embassy at Washington, Aug. 13, 1914, American White Book, European War, IV, 21, 22.

[3] Memorandum from the British Embassy at Washington, *id.*, IV, 27; 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.*, 25.

See, also, reply of Germany to the British protest, Nov. 7, 1914, *id.*, 31.

[4] Enclosure in communication of Sir C. Spring-Rice, British Ambassador at Washington, to Mr. Bryan, Secy. of State, Nov. 3, 1914, *id.*, IV, 29. See British directions for navigation of mined areas, Nov. 30, 1914, *id.*, 35–37; also of May 15, 1915, *id.*, 40–42.

See, also, view of the Netherlands, Nov. 16, 1914, *Rev. Gén.*, XXII, *documents*, 136.

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.[1] 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.[2]

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.[3]

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.[4]

§ 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

[1] American White Book, European War, I, 52. 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.*, 53.

[2] Herr von Jagow, German Foreign Secy., to Mr. Gerard, American Ambassador, *id.*, I, 56, 57.

[3] Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Feb. 20, 1915, *id.*, I, 59, 60.

[4] Mr. Gerard, American Ambassador, to Mr. Bryan, Secy. of State, telegram, March 1, 1915, *id.*, I, 60, 61. See, also, Mr. W. H. Page, to Mr. Bryan, telegram, March 15, 1915, *id.*, I, 64, communicating a memorandum from Sir Edward Grey, British Foreign Secretary, of March 13, 1915.

crews, on and after February 7, 1917, a specified and extended area in the North Sea outside of Danish and Netherlands 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]

It will be recalled that the notice given by Germany to the United States on January 31, 1917, 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

[1] Telegram of Mr. W. H. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, Jan. 25, 1917, American White Book, European War, IV, 47. See, also, Same to Same, Feb. 15, 1917, containing revised notice of Feb. 13, 1917, replacing the notice of Jan. 25, 1917, *id.*, 47. 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 Netherlands 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 Netherlands territorial waters." (*Id.*, IV, 49.)

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, *id.*, IV, 49.

For instances of the extensive use of mines by Russia as a belligerent in The World War, 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.

[2] Mr. Lansing, Secy. of State, to Sir C. Spring-Rice, British Ambassador at Washington, Feb. 19, 1917, *id.*, IV, 48.

of all the weapons at its disposal, a circumstance indicating that the use of mines might be embraced in the general plan.[1]

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.[2]

§ 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 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.[3] The nature of the service in which those vessels were then 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 combating them, will doubtless be acknowledged to have justified recourse to this extraordinary and efficacious measure, despite the restrictions which it necessarily imposed upon neutral shipping.

[1] Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secy. of State, Jan. 31, 1917, *id.*, IV, 403, 405.

See, also, notification from the German Foreign Office through Dr. Ritter, Swiss Minister at Washington, Mar. 23, 1917, *id.*, 50.

[2] It may be doubted whether the stamping of a mine with the special mark of the State which plants it suffices for such purpose. The sower responsible for an explosion would be more certain of identification, if contact with its mine served to produce or release a smoke, light or buoy, easily perceptible as the distinctive and accepted token of such belligerent.

[3] 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.

(5)

§ 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 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]

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§ 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

[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, 61, 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.

[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.

[4] They acquired a right rather than assumed a burden.

[5] For an illuminating account of the achievement 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).

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 The World War, 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, 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

[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.

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 appurtenant 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. 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.[1] 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.

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.[2]

The announcement by Great Britain on November 3, 1914, of

[1] See Anchored Mines, The World War, The Attitude of the United States, *supra*, §§ 716–718.

[2] 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

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.[1] 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.[2] 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 seas without first certainly determining its belligerent nationality and the contraband character of its cargo, would be an act unprecedented in naval war.[3] 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.[4]

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.

See Access to Ports, *supra*, § 187.

[1] 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 reëstablishment 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, American White Book, European War, IV, 403, 405, 406.

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.

[2] See, especially, Herr von Jagow, German Foreign Secretary, to Mr. Gerard, American Ambassador, Feb. 16, 1915, American White Book, European War, I, 56, 57.

[3] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, Feb. 10, 1915, *id.*, 54; also Mr. Lansing, Secy. of State, to Same, telegram, April 18, 1916, *id.*, III, 241, 242.

[4] Attack, Submarine Craft, The Controversy with Germany, *infra*, §§ 747–749.

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.[1] 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.[2] 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.

See communication of the German Foreign Office, to Mr. Gerard, American Ambassador, May 4, 1916, in relation to the case of the *Sussex*, American White Book, European War, III, 302, 305.

[1] 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. Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 8, 1916, American White Book, European War, III, 306, 307; Same to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915, *id.*, 25, 37.

[2] *Id.*, IV, 48. 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.

§ 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 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. A belligerent should give fullest possible warning to neutral governments as well as ships respecting the location of such places. . 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] Nor does it sanction the reservation of proscribed waters where the attempt to destroy the enemy's commerce is to be so undertaken as to impose grave dangers on all merchant craft which may be encountered therein.

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§ 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.[2]

[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.

[2] "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.

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.[1] Possession of the power to control, whether by automatic steering apparatus or otherwise,[2] 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.[3] The Institute of International Law has approved of the prohibition.[4] The Naval War College, in 1914, did not hesitate to declare that if any change were made in the Hague Convention, the use of torpedoes should be less rather than further regulated.[5]

It is not understood that the United States, while a neutral in the course of The World War, found it necessary to complain of any injuries sustained by American vessels on account of uncontrolled or improperly constructed torpedoes.[6]

"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.

[1] Naval War College, Int. Law Topics and Discussions, 1914, 137.

[2] The development of a system of control by wireless devices suggests also the broad responsibility assumed by the belligerent availing itself thereof.

[3] 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.

[4] Art. XIX of the Oxford Manual of Naval War, *Annuaire*, XVI, 646, J. B. Scott, Resolutions, 178.

[5] Int. Law Topics and Situations, 1914, 136, 137.

[6] 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.

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§ 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 that either 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 territory 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

[1] U. S. Naval War Code, 1900, Article V, Naval War College, Int. Law Discussions, 1903, 105; Naval War College, Int. Law Situations, 1902, 7–20; 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.

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 of 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.

[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.

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.[1]

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,[2] 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.[3]

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

[1] "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 Habana. 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 Haiti was broken outside the marine league off Mole St. Nicholas. July 11, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos, and Habana, 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.

[2] "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.

[3] *Id.*, 19. See Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 40.

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.[1] 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.[2] Again, upon the resumption of peace, there should be a restoration of the cable with compensation to the neutral for its losses. Even where a cable connects the territories of the opposing belligerents, any right to subject it to such treatment as the necessities of war may require, seems to impose an obligation (towards

[1] 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.

[2] At the time of the outbreak of The World War 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, 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 reëstablished the cable which had not been diverted into Halifax, diverting, however, the Azores end of it into Brest.

Apart from any question as to the propriety of the interference with the cables connecting German territory with the United States, it is difficult to see how, for example, the diversion of the cable from New York to Halifax was essential to the achievement of a military purpose incidental to the prosecution of the war. Had the object of such action been to obtain or establish a new and permanent British cable connection between America and Europe, it would have manifested the infliction of a post-bellum injury directed against a friend as well as an enemy. There must be reluctance to impute such a deliberate design to British statesmen.

the society of nations rather than to the enemy) upon the State which diverts or removes or destroys it, to make full compensation therefor.

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 seizor 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 seizor 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.[1]

g
Visit and Search
(1)

§ 724. Nature and Purpose.

Growing out of and ancillary to the greater right of capture is the right of visit and search,[2] which is acknowledged to be the possession of every maritime State engaged in war[3] [foot-note on following page].

[1] It is believed that the known claims of the United States to the restoration of services through German-owned cables connecting with American territory, and diverted or otherwise interrupted by States with which it became co-belligerent in The World War, may be fairly based upon such a theory.

At the outbreak of The World War 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. 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.

[2] 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

According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, this belligerent right 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.[1]

If a belligerent naval vessel learns otherwise of the enemy character of a vessel encountered, visit and search become unnecessary with respect to the exercise of the right of capture,[2] 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.

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 the greater right may be legally exercised without search, the right of search can never arise or come into question." Moore, Dig., VII, 473, 474.

[3] (foot-note of page 433) See, for example, 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, American White Book, European War, I, 39, 40; E. C. E. Duboc, *Le droit de visite et de la guerre de course*, Paris, 1902; Oppenheim, 2 ed., II, 533–545, 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, Visit and Search, Boston, 1858.

[1] No. 42, the language of which is employed in the text. Also G. G. Wilson, Int. Law, 397; Art. XXX, Naval War Code of 1900, Naval War College, Int. Law Situations, 1903, 109.

[2] "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, American White Book, European War, III, 188, 191–192.

(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]
>
> 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]

[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, American White Book, European War, III, 38, 39.

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.

[2] No. 46.

In instructions of Mr. Welles, Secy. of the Navy, Aug. 18, 1862, it is 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, Appendix I, American White Book, European War, III, 38, 39.

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, American White Book, European War, IV, 243; also Mr. Gerard, American Ambassador to Germany, to Same, telegram, Aug. 27, 1916, containing German note of complaint as to the conduct

During The World War 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.[1] 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.[2]

In lieu of actual visit on board the vessel caused to stop, commanders of submarine naval vessels in The World War oftentimes, if not commonly, compelled the former to send a boat with the ship's papers to the submarine for examination thereon.[3] This practice is attended by hardship to the neutral, because of the 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

of the American steamer *Owego*, when signaled to stop by a German submarine, Aug. 3, 1916, *id.*, 244.

[1] 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, American White Book, European War, IV, 191.

[2] "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.

[3] See, for example, the treatment accorded the American steamer *Owego* by a German 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.

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 of its treaties provide that "the unarmed party shall in no case be obliged to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever,"[1] 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.[2]

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 satisfactory evidence of innocency, the vessel shall be released; otherwise she shall be seized and sent in for adjudication.[3]

[1] 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.

[2] Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 47.

[3] 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, American White Book, European War, III, 63, 66.

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;

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.[1]

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." [2] 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.

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.

[1] No. 49 of Naval Instructions Governing Maritime Warfare, June 30, 1917.

[2] 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

[1] Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Dec. 26, 1914, American White Book, European War, I, 39, 40.

[2] Sir Edward Grey, British Foreign Secy., to Same, Jan. 7, 1915, *id.*, 41–43, 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.*"

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.[1]

The United States in October, 1915, made elaborate rejoinder.[2] 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 Government of any of those States.[3] 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.[4]

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

[1] Communication to Mr. W. H. Page, Feb. 10, 1915, *id.*, 44, 48, 49.

[2] Mr. Lansing, Secy. of State, to Mr. W. H. Page, Oct. 21, 1915, *id.*, III, 25, 27, 28, 30.

[3] "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 law 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."

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.

[4] 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.

port, were not deemed to offer an adequate excuse. Belief 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.[1] 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,[2] 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 belligerent 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.[3] The question of the locality of the search was,

[1] 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 belligerent 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." American White Book, European War, III, 27–28.

[2] See memorandum accompanying note of Sir Cecil Spring-Rice, British Ambassador to the United States, to Mr. Lansing, Apr. 24, 1916, American White Book, European War, III, 64–67.

[3] 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 passenger's 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

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 an-

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 suspected persons, and to do this effectively necessitates bringing the ship into harbor." American White Book, European War, III, 65.

The French Ministry of Marine declared:

"Naval practice, as it formerly existed, consisting in searching ships on the high seas, a method handed down to us by the old navy, is no longer adaptable to the conditions of navigation at the present day. Americans have anticipated its insufficiency and have foreseen the necessity of substituting some more effective method. In the instructions issued by the American Navy Department, under date of June 20, 1898, to the cruisers of the United States, the following order is found (clause 13):

"'If the latter (the ship's papers) show contraband of war, the ship should be seized; if not, she should be set free *unless by reason of strong grounds for suspicion a further search should seem to be requisite.*'

"Every method must be modified having regard to the modifications of material which men have at their disposal, on condition that the method remains human and civilized.

"The French Admiralty considers that to-day a ship, in order to be searched, should be brought to a port whenever the state of the sea, the nature, weight, volume, and stowage of the suspect cargo, as well as the obscurity and lack of precision of the ship's papers, render search at sea practically impossible or dangerous for the ship searched.

"On the other hand, when the contrary circumstances exist, the search should be made at sea.

"Bringing the ship into port is also necessary and justified when, the neutral vessel having entered the zone or vicinity of hostilities, (1) it is a question, in the interests of the neutral ship herself, of avoiding for the latter a series of stoppages and successive visits and of establishing once for all her innocent character and of permitting her thus to continue her voyage freely and without being molested; and (2) the belligerent, within his rights of legitimate defense, is entitled to exercise special vigilance over unknown ships which circulate in these waters." *Id.*

nounced 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 The World War 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 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]

[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 ap-

Doubtless latitude should be accorded a belligerent in attempting to check traffic in contraband, and to ascertain its existence 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.

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. There is solid reason for the attempt to place within the reach of a belligerent, by some other process less injurious to innocent shipping, information concerning the nature of neutral cargoes and the voyages of neutral vessels. It is believed that neutral governmental certification of ships' papers would offer as reliable assurance as to facts ascertainable by search as could be furnished by a neutral convoy. Moreover, the burden of making such certification might be fully compensated by benefits derived from the freedom from annoyances under the system now prevailing. General approval of a procedure establishing reasonable neutral guarantees effected through increasing governmental oversight of neutral commerce, may cause the exercise of the belligerent right of visit and search to sink into a much-desired desuetude.[1]

(d)

Mail Steamers and Mail

(i)

§ 729. Practice Prior to The World War.

It is impossible to show that, prior to The World War, there was general understanding that mail steamers as such were exempt from

plied 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. If, as a distinguished publicist has declared, the right of visitation and search, rather than existing as an independent privilege, "is involved in the right of either belligerent to punish" neutral vessels breaking blockade, carrying contraband and rendering unneutral service (Oppenheim, 2 ed., II, 533, note 1), any punishment by way of examination of cargoes, or any search to ascertain whether punishment is deserved, should be stripped of harsh features when applied to innocent and guilty alike.

[1] 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.

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 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]

[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, American White Book, European War, IV, 53. 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.

[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, American White Book, European War, III, 38.

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, 2349. 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] Art. 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

The United States, when itself a belligerent, was, as Lawrence has said, a pioneer in the matter of respecting the mails.[1] This was manifest in its conduct in the Mexican War, in the Civil War, and in that with Spain.[2] 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.[3] Apart from American practice, it is 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.[4] 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.

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

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.

[1] War and Neutrality in the Far East, 189.

[2] Documents in Moore, Dig., VII, 479–484; also Mr. Lansing, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador to the United States, May 24, 1916, American White Book, European War, III, 151. Also Naval War College, Int. Law Topics and Discussions, 1906, 88–95.

[3] Mr. Seward, Secy. of State, to Mr. Welles, Secy. of the Navy, April 15, 1863, 60 Dom. Let. 234, Moore, Dig., VII, 482.

[4] Memorandum from the British Embassy at Washington, Oct. 12, 1916, in relation to the prior conduct of Japan, Russia and France, American White Book, European War, IV, 53.

Compare Mr. Lansing, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador to the United States, May 24, 1916, American White Book, European War, III, 151, 153, 154; 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.

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 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 in-

[1] Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Jan. 4, 1916, American White Book, European War, III, 145. 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."

[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. American White Book, European War, III, 147.

cluded stocks, bonds, coupons and similar 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.

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 justly capable of 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 principle 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.[1] 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.

[1] Memorandum representing the joint views of the British and French Governments, enclosure in note of Sir Cecil Spring-Rice, British Ambassador, to Mr. Lansing, Secy. of State, Oct. 12, 1916, American White Book, European War, IV, 53.

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.[1] 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,[2] 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.[3] 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 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 in the case arising, 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." [4]

[1] 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."

See J. B. Scott, Survey of Int. Relations between United States and Germany, 59–65.

[2] The case of United States *v.* Diekelman, 92 U. S. 520, was cited. 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.

[3] "For that very reason", it was declared, "Germany availed itself of Article IX 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 11, and tending to protect pacific and innocent commerce only."

[4] 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.

It was announced that the authorities had been instructed not to stop shipping documents and commercial correspondence found on neutral vessels, even in an allied port, "and offering no interest of consequence as affecting the war."[1] To lists of money orders were not assigned the character of ordinary mail ascribed to them by the United States.[2] 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.[3] If it be admitted that the entrance to allied ports of

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 Vladivostok examined their contents, which it was recognized it could lawfully do." 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 Vladivostok. For. Rel. 1904, 772–774.

[1] 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."

[2] 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." American White Book, European War, IV, 58.

[3] 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

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 such 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.[1]

(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.[2] The attempt, therefore, to escape by flight, notwithstanding a reasonable signal to stop, subjects the merchantman to the danger of lawful attack.[3] Before,

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.

[1] 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 otherwise be subject, and to which it could not be lawfully compelled to submit, must be deemed perversive 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." American White Book, European War, IV, 94.

[2] Art. XXXII, U. S. Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 110.

[3] See, for example, Mr. Lansing, Secy. of State ad interim, to Mr. Gerard,

however, making attack, it should be clearly evident that the vessel is attempting not only to avoid search by escape, but also is aware of the demand of the pursuer to lie to.[1] The effort of a neutral ship to keep beyond range of a signal to stop is not believed to be wrongful, even though a belligerent vessel of war is compelled in consequence specially to exert itself in order to get within such range.[2]

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.[3] 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.[4] Although such conduct with respect to the ship's papers

Ambassador to Germany, telegram, June 9, 1915, American White Book, European War, II, 171; Same to Same, telegram, July 21, 1915, *id.*, 178.

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.

[1] Article XXXIII, U. S. Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 110.

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*, American White Book, European War, IV, 191.

[2] 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.

[3] "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 Baigorry, 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 Jane, 37 Ct. Cl. 24.

[4] U. S. Instructions to Blockading Vessels and Cruisers, General Orders, No. 492, June 20, 1898, For. Rel. 1898, 780, 781, Moore, Dig., VII, 485;

may be capable of explanation before a prize court,[1] it may be fairly deemed by the commander of a belligerent naval vessel to afford ample justification for seizure,[2] 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

also Art. XXXIII, U. S. Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 110; memorandum of State Department, March 25, 1916, American White Book, European War, III, 188, 191; 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 coloring 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 there of 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.

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.

[1] The Pizarro, 2 Wheat. 227.

[2] The Aggi, Hurst and Bray's Russian and Japanese Prize Cases, II, 131; also The Oldhamia, *id.*, I, 145.

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.[1] 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.[2] Thus 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,[3] not against visit and search or capture, but against lawless attacks at sight by naval submarines.

(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 cap-

[1] 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.

[2] 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 no 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.

See also Prisoners of War, Occupants of Neutral Ships, *infra*, § 774.

[3] Statement of the Department of State given to the press March 12, 1917.

ture, 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

[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, American White Book, European War, III, 188, 192.

[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, 439.

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

1818, 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.[1] 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.[2]

(4)

Exemptions from Visit and Search

(a)

§ 733. Public Neutral Ships.

Public neutral ships are exempt from visit and search.[3] The reasons for the exemption are in part those which always serve to

shipper so to transport his goods by sea as to give a belligerent opportunity for visit and search.

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.

[1] 3 Wheat. 409, Moore, Dig., VII, 489.

[2] *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.

[3] 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 indi-

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.[1] 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,[2] and

viduals, may be subject to visit and search." *Annuaire*, XXVI, 649, J. B. Scott, Resolutions, 181.

The Russian Regulations Relating to Naval Prizes, of Mar. 27, 1895, provided in Section 6, that "merchant vessels (all vessels not forming part of a war fleet being considered such) may be subjected to stoppage and visitation." 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, 2 ed. II, 535; R. H. Pyke, Law of Contraband, 195.

[1] G. G. Wilson, Int. Law, 401.

[2] 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

also for the reason that the presence of the convoying ship is not necessarily indicative of a design to oppose force to force.[1] This right of exemption has found recognition in the naval regulations of maritime States, and in the Declaration of London,[2] as well as in the United States Naval Instructions Governing Maritime Warfare, of June 30, 1917.[3] 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.[4] 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.[5]

Government consents to undertake that responsibility; the right of search has no longer the same importance."

[1] 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 substitution for the process of search of a responsible governmental guarantee." Dig., VII, 497.

[2] 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.

[3] Nos. 51–53. [4] *Id.*, No. 52.

[5] *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.

Respecting Great Britain's former attitude, see Oppenheim, 2 ed., II, 543, *citing* The Maria, 1 C. Rob. 340; The Elsebe, 5 C. Rob. 173.

Cf. Mr. Balfour, British Foreign Secretary, to the Netherlands Minister at

(c)

§ 735. Belligerent Convoy.

It is believed that the acceptance by a neutral vessel of the convoying aid of a belligerent vessel of war constitutes internationally illegal conduct and so affords good ground for the condemnation of the former, because there is necessarily manifest an effort to resist by force attempts of the opposing 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 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." [3]

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

London, June 7, 1918, respecting the despatch of a Dutch convoy to the East Indies, Misc. No. 13 [1918], Cd. 9028, p. 7.

See Proclamation of the King of Sweden, Oct. 29, 1915, concerning the convoying of Swedish merchant ships, Naval War College, Int. Law Documents, 1918, 153.

[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 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.

[3] No. 54.

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.

b

Effect of Nature, Use or Conduct of Enemy Vessel Encountered

(1)

Unarmed Vessels

(a)

Merchantmen

(i)

§ 737. Surface Craft.

Long before The World War 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.

[1] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 15, 1915, American White Book, European War, I, 75, 76; Mr. Lansing, Secy. of State, *ad interim*, to Same, June 9, 1915, *id.*, II, 171, 172; Mr. Lansing, Secy. of State, to Same, July 21, 1915, *id.*, II, 178; Same to Same, April 18, 1916, *id.*, III, 241; Mr. Gerard to Mr. Lansing, No. 3848, May 4, 1916, *id.*, 302, containing note of same date from the German Foreign Office.

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.[1] 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.[2]

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 attack. 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 given over to an essentially public service. Respect for humanity still outweighed the claims of military necessity.

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 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.[3]

§ 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

[1] Marshall, Chief Justice, in The Nereide, 9 Cranch, 388.
See, also, Private Vessels Defensively Armed, *supra*, § 709.
[2] See Armed Vessels, Merchantmen, *infra*, §§ 742–743.
[3] See James Parker Hall, "Precedents in International Law", *International Journal of Ethics*, Jan., 1916, 149.

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 any 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 merchantman may 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 show-

[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, American White Book, European War, III, 302; Mr. Lansing to Mr. Gerard, telegram, April 18, 1916, *id.* 241.

ing 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.[1] 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 as to 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 also 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 is not given over to a public service, or until guilty of reprehensible conduct. Hence it is believed that the submarine

[1] 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; American White Book, European War, IV, 436, 439, 440.

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 remove 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 right of an unarmed vessel of whatsoever type to demand immunity 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.[2] The exercise of this

[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.

[2] Declares Admiral Stockton: "After the outbreak of war all men-of-war and other vessels like those just mentioned of the enemy [including unarmed

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.[1] 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.[2]

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 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.[3] 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.

(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

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.

[1] Note the case of the British S. S. *Cymric*, torpedoed at sight by a German submarine, in May, 1916.

[2] "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, American White Book, European War, IV, 436, 440.

[3] It is not believed that an American naval commander would at the present time be instructed to attack at sight an unarmed public vessel of the enemy, save under the conditions stated in the text.

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 The World War, as a safeguard against the operations of enemy submarines, numerous merchantmen under British and allied flags were equipped with substantial armament.[2] 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.[3]

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 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

[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.

[2] See Private Vessels Defensively Armed, *supra*, § 709.

In 1917 and thereafter, the United States had recourse to the same practice.

[3] See informal and confidential letter from the Secretary of State to the British ambassador, Jan. 18, 1916, American White Book, European War, III, 162, 164.

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." [1]

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.[2]

[1] American White Book, European War, III, 164. 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, *id.*, IV, 436.

[2] See enclosure 2 in communication of Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, Feb. 14, 1916, American White Book, III, 167, 169. 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

Shortly thereafter a vigorous but unsuccessful attempt 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.[1]

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.[2] 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

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." American White Book, European War, IV, 64, 65.

See, also, memorandum from the German Embassy at Washington, March 8, 1916, American White Book, European War, III, 184; Circular Note Verbale from the Austro-Hungarian Government, Feb. 10, 1916, *id.*, III, 165, 166.

[1] 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.

[2] American White Book, European War, III, 188–193. 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, American White Book, European War, II, 43.

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.

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 declaration 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.[1]

[1] See proposal of Mr. Lansing, Secy. of State, Jan. 18, 1916, American White Book, European War, III, 162; 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

(*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 assume 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

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.

to any signal made to it, may cause the vessel to attack the pursuer as soon as it gets within range.[1]

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.[2] 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.[3]

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.[4] It may be doubted whether the wise and humane effort

[1] 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." American White Book, European War, III, 192. 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.*, IV, 422–424.

[2] See Private Vessels Defensively Armed, *supra*, § 709.

[3] 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.

[4] 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. American White Book, European War, III, 192. 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 obtain hereafter 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 would 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.[1]

(3)

§ 744. Attempts to Escape Capture — Ruses.

By various processes a vessel of a belligerent State may lawfully attempt to escape capture.[2] 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

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 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.*, 193.

See, also, 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. American White Book, European War, IV, 63–66.

[1] Address of President Wilson to the Congress, April 2, 1917, American White Book, European War, IV, 422–424. 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.

[2] See Private Vessels Defensively Armed, *supra*, § 709.

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.[1]

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 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.[2] 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.[3]

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.[4] 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.[5]

[1] 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." American White Book, European War, III, 192.

[2] See Unarmed Merchantmen, *supra*, §§ 738–739; also Resistance or Evasion of Visit and Search by Belligerent Ships, *supra*, § 732.

[3] See Unarmed Public Vessels, *supra*, § 740.

[4] Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 45.

[5] 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. American White Book, European War, I, 75. 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.*, II, 169. In response, Mr. Lansing,

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.[1] 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.[2]

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.*, II, 171.

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.

[1] 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, American White Book, European War, I, 59. Same to Same, telegram, Feb. 10, 1915, *id.*, 55.

[2] 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.

(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, if wholly given over to a belligerent service incidental to the prosecution of the war, especially if it be 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 exigency, 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]

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 noncombatant human life, and to restrain certain hostile operations until ample provision had been made to that end. This obligation has become so clearly and widely understood, that in its present and beneficent form, it is looked upon as a rule of law too firmly established to be shaken in any case by the absence of circumstances which may have been in part responsible for its earliest acceptation.

[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.

(2)

§ 747. Submarine Craft — the Controversy with Germany.

The World War 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]

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 Netherlands 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, passenger 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,

[1] J. B. Moore, Principles of American Diplomacy, 66–101; J. B. Scott, Survey 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 Commercial 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.

[2] Enclosure, in communication of Mr. Gerard, Ambassador to Germany, to Mr. Bryan, Secy. of State, Feb. 6, 1915, American White Book, European War, I, 52.

Compare British Admiralty order of Nov. 2, 1914, declaring the North Sea to be a war zone, American White Book, European War, IV, 29.

the inference was clear that the work of destruction was to be undertaken by undersea vessels.[1]

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.[2]

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.[3] On the same day the British S. S. *Lusitania* left New York for England.

[1] 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.

[2] Mr. Bryan, Secy. of State, to Mr. Gerard, American Ambassador at Berlin, telegram, Feb. 10, 1915, American White Book, European War, I, 54. 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 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.*, I, 75, 76. 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.*, 56. 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.*, III, 242–243. 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.

[3] 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

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.[1]

On August 19, 1915, the British liner *Arabic* was torpedoed by a German submarine off the coast of Ireland,[2] and on March 24, 1916,

so at their peril. Imperial German Embassy. Washington, D. C., April 22, 1915."

[1] "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 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, American White Book, European War, II, 171, 172.

See, also, The Lusitania, 251 Fed. 715.

[2] American White Book, European War, III, 199–227.

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.[1]

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 sink her without leaving the several

[1] 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.*, 242 and 244.

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.

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."[1] 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.[2] 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 inconvertible rights of neutrals, and the sacred immunities of noncombatants." 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.[3]

§ 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.[4] 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 tolerate the removal from a war

[1] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 13, 1915, American White Book, European War, I, 75, 76. Also declaration of Sir Cecil Spring-Rice, British Ambassador at Washington, to Mr. Bryan, March 1, 1915, *id.*, 61.

[2] Telegram of Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, *id.*, II, 178.

[3] Same to Same, telegram, April 18, 1916, *id.*, III, 241, 244. Also Mr. Lansing, Secy. of State, to the British Ambassador, Jan. 18, 1916, *id.*, 162.

[4] 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.

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.[1]

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 derived 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.[2] The lifeboats offer at best, as the Department of State has indicated, "a poor measure of safety."[3] 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.[4] 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

[1] 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. American White Book, European War, IV, 244.

[2] 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.

[3] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 13, 1915, American White Book, European War, I, 75, 76.

[4] 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. American White Book, European War, IV, 178.

persons aboard the enemy merchantman which has surrendered or obeyed a signal to stop.[1] 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. 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 hence the right to employ them as commerce destroyers depends upon the power and disposition of those controlling them to respect that obligation.[2]

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.[3] 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

[1] *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, American White Book, European War, IV, 436.

[2] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, May 13, 1915, American White Book, European War, I, 75; Mr. Lansing, Secy. of State *ad interim*, to Same, telegram, June 9, 1915, *id.*, II, 171; Mr. Lansing, Secy. of State, to Same, telegram, July 21, 1915, *id.*, II, 178; Same to Same, telegram, April 18, 1916, *id.*, III, 241; same to Mr. Penfield, Ambassador to Austria-Hungary, Dec. 6, 1915, concerning the case of the S. S. *Ancona*, *id.*, IV, 174.

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.

[3] 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 so doing, could and did not violate any existing rules, but only took into account the peculiarity of this new weapon, the submarine boat." American White Book, European War, III, 184, 185.

ruthless procedure by way of so-called retaliation.[1] It is believed that the sufficiency of this plea depended upon proof that the enemies of Germany were in fact subjecting German merchantmen to treatment similar in kind to that which British and French vessels were being accorded.[2] If British submarines had been attacking without warning German unarmed merchantmen in any zone of hostilities, a situation would have arisen which the United States might have found difficulty in meeting. 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. Germany, therefore, owed a duty to every British subject on board the *Lusitania* and on other British ships of similarly irreproachable conduct, which no acts on the part of the State to which those vessels belonged had served to lessen. Neutral passengers thereon had the right to assume that that duty would not be wantonly violated.[3]

The United States dealt, however, with the German plea in a different way. 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 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."[4] 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.

[1] See, for example, German memorandum of Feb. 4, 1915, enclosed in communication of Mr. Gerard, Ambassador to Germany, to Mr. Bryan, Secy. of State, Feb. 6, 1915, American White Book, European War, I, 53; Herr von Jagow, German Secy. for Foreign Affairs, to Mr. Gerard, July 8, 1915, *id.*, II, 175.

[2] 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 recent 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, has bred confusion of thought. See Retaliation, *supra*, § 588.

[3] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915, American White Book, European War, I, 75.

[4] Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, July 21, 1915, *id.*, II, 178.

§ 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 thus ascribed to them. 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 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

[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' 7 ed., 787.

[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, American White Book, II, 169, 170. 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 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 noncombatants, provided that the liners do not try to escape or offer resistance." [1] 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." [2]

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.[3] 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 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.[4]

[1] Count von Bernstorff, German Ambassador, to Mr. Lansing, Secy. of State, Sept. 1, 1915, American White Book, European War, III, 159, 160; Same to Same, Oct. 5, 1915, *id.*, 218, 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."

[2] Same to Same, Jan. 7, 1916, *id.*, 161.

[3] Mr. Lansing, Secy. of State, to Mr. Gerard, telegram, Apr. 18, 1916, *id.*, 241, 244, 245.

See, also, address of President Wilson before the Congress on "Relations with Germany," Apr. 19, 1916, House Doc. 1034, 64 Cong., 1 Sess.

[4] Mr. Gerard, Ambassador to Germany, to Mr. Lansing, Secy. of State, May 4, 1916, American White Book, European War, No. III, 302, 305.

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

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.[1]

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 noncombatants. 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, American White Book, European War, III, 306, 307.

[1] Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secy. of State, Jan. 31, 1917, American White Book, European War, IV, 403 and 405.

See, also, British order in council of Feb. 16, 1917, and with respect to its validity see The Leonora, [1918], P. 182.

In view of this sudden withdrawal without prior intimation of the assurance of May 4, 1916, the United States, having no alternative consistent with its dignity and honor, severed diplomatic relations with the German Empire.[1]

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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,[2] 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.[3] 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.[4]

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. 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

[1] Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Feb. 3, 1917, American White Book, European War, IV, 407. See Attacks on Neutral Vessels, *infra*, § 750.

[2] See Visit and Search, Neutral Ships, *supra*, § 731.

[3] 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.

[4] See Contraband, Penalty for Carriage, *infra*, § 815.

the attempt to create war zones within specified areas of the high seas, or by the limitations of new instruments of naval warfare, such as submarine craft.[1]

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,[2] 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.[3] 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.[4] 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.[5] On February 26, President Wilson requested

[1] Mr. Bryan, Secy. of State, in a telegram to Mr. Gerard, Ambassador to Germany, Feb. 10, 1915, American White Book, European War, I, 54. See the facts in the case of the American S. S. *Nebraskan*, 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, American White Book, European War, IV, 235.

[2] Concerning the torpedoing of the American S. S. *Gulflight*, off the Scilly Islands, by a German submarine May 1, 1915, see Mr. Bryan, Sec. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915, American White Book, European War, I, 75; Herr von Jagow, German Minister for Foreign Affairs, to Mr. Gerard, telegram, May 28, 1915, *id.*, II, 169; Same to Same, June 1, 1915, *id.*, 170; Mr. Lansing, Secy. of State *ad interim*, to Mr. Gerard, telegram, June 9, 1915, *id.*, 171.

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, American White Book, European War, IV, 191.

[3] Mr. Lansing, to Mr. Gerard, telegram, April 18, 1916, American White Book, European War, III, 241, 243, 244.

[4] Mr. Gerard, to Mr. Lansing, telegram, May 4, 1916, *id.*, III, 302, 305.

See Mode of Conduct with Reference to Nature of Attacking Vessel, Submarine Craft, The Controversy with Germany, *supra*, § 749.

[5] See *id.*

Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Feb. 3, 1917, American White Book, European War, IV, 407; Address of President Wilson to the Congress, Feb. 3, 1917, *id.*, 410. Also J. B. Scott, Survey of Int. Relations between United States and Germany, Chap. XV.

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." [1] 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." [2] 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

[1] Address of President Wilson to the Congress, Feb. 26, 1917, p. 5.

[2] Statement of the Department of State given to the press Mar. 12, 1917. See telegram of Vice-Consul Krogh to Mr. Lansing, Secy. of State, March 24, 1917, respecting the torpedoing without warning of the American tank steamship *Healdton*, and the intense suffering, and injury as well as death, sustained by numerous occupants of the ship, American White Book, European War, IV, 295.

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 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.[1]

On April 6, the United States declared war against Germany.[2]

4

CAPTURE

a

§ 752. Acts Falling Short of Capture.

A belligerent vessel of war may in fact assume control over a foreign ship with or without the consent of its commander, for the purpose of ascertaining, as by visit and search, whether the vessel or its cargo, or both, should be captured and condemned.[3] Such detention of a neutral ship does not purport to signify confiscation; nor does it necessarily imply that the vessel is deemed guilty of unneutral conduct. 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.

As belligerent ships are, with certain well known exceptions, subject to capture, the assumption of control by an enemy vessel of war commonly warrants an inference hardly consistent with a purpose merely to examine rather than confiscate. 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.

[1] American White Book, European War, IV, 422. See, also, circular telegram of Mr. Lansing, Secy. of State, to all American diplomatic missions, April 2, 1917, *id.*, 421.

[2] See proclamation by President Wilson, April 6, 1917, *id.*, 429.

[3] See Searches in Port, *supra*, § 727.

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 seizor yielded.[2] The requisite intention of the latter may be inferred from his conduct.[3] In the case of a neutral ship there may be difficulty in determining whether the intention is to retain it as prize, or merely to detain it for purposes of search. If there should be general denunciation of searches in port, the conduct of a vessel of war in bringing a neutral vessel into such a place would be open to but one interpretation.[4]

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

[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, 118–121.

According to the Oxford Manual of Naval War: "*Capture* is the act by which the commander of a warship 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 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] The Grotius, 9 Cranch, 368, Moore, Dig., VII, 500.

[4] See Searches in Port, *supra*, § 727-728.

See, also, Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 99.

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.[1]

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.[2] It is not the bare fact of suspicion, but the reasonableness of it which appears to be requisite.[3] 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."[4] They should therefore indicate some ground for belief 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

[1] See Belligerent Forces, *supra*, §§ 703–709.

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.

[2] 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.

[3] Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, telegram, Dec. 26, 1914, American White Book, European War, I, 39, 40; see also Mr. Lansing, Secy. of State, to Same, Oct. 21, 1915, *id.*, III, 25, 26 and 28.

[4] 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, American White Book, European War, III, 25, 35.

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.[1]

d

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 safer 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 to take to the boats must be deemed to be a wanton abuse of power and incapable of justifica-

[1] 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.

tion 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; and they are never to be deemed subordinate to military necessity, 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,

[1] See Attack, Mode of Conduct with Reference to Nature of Attacking Vessel, Submarine Craft: The Controversy with Germany, *supra*, § 747.

Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, May 13, 1915, American White Book, European War, I, 75, 76; Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, concerning the case of the *Ancona*, Dec. 6, 1915, American White Book, European War, IV, 174.

See, also, undertaking of Germany, May 4, 1916, in communication of that date from the Foreign Office, American White Book, European War, III, 302, 305.

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 American White Book, European War, IV, 403 and 405.

See Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany,

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 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

Oct. 12, 1915, telegram in connection with the case of the *William P. Frye*, American White Book, European War, III, 312, 314.

[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' 7 ed., § 149.

[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.

See No. 99 of Naval Instructions Governing Maritime Warfare, of June 30, 1917.

[3] Johnson, J., in The Adventure, 8 Cranch, 221, 226, Moore, Dig., VII, 623. See American Prize Courts and Procedure, Enemy Prizes, Condemnation, *infra*, § 903; Recapture, *infra*, § 759.

[4] 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.

[5] No. 94.

[6] No. 95.

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.[1] It is believed that these instructions are in substantial harmony with the present practice of maritime States.[2]

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

[1] 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."

[2] 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.

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 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.

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.

(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. On the one hand, it is 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 and 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 investigation 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]

[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

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 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.[1] 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.[2] The provisions of naval codes of numerous maritime powers fail to warrant such an attitude.[3] The

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.

[1] 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 private parties interested 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 and dealing with conditions no longer existent are to-day of doubtful value. 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.

[2] 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.

[3] 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

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.[1] 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 vessels properly captured might not be sent in, would justify appraisal and sale, and that if that could not be done, they might be destroyed.[2] 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.[3] 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.[4]

In 1905, the Naval War College reached the conclusion that "if

Destruction of Neutral Prizes and the German Prize Code", by C. H. Huberich, *Ills. 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.

[1] General Orders No. 492, June 20, 1898, For. Rel. 1898, 780, 782, Moore, Dig., VII, 518.

[2] 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.

[3] For. Rel. 1904, 734.

[4] 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; "The *Knight Commander* Case", by Theodore S. Woolsey, *Yale L. J.*, XVI, 566.

a seized neutral vessel cannot for any reason be brought into port for adjudication, it should be dismissed." [1] 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." [2] Again, if the personnel of his fleet were so reduced that he could 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." [3]

[1] 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.)

[2] Naval War College, Int. Law Situations, 1907, 74–108.

[3] *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.

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.[1] 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.[2] 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.[3] For neutral goods not liable to condemnation, if destroyed with the vessel, the owner of the former was to be given compensation.[4] 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

See, also, General Report of the Fourth Commission to The Hague Conference, *id.*, I, 262, J. B. Scott, Reports to Hague Conferences, 609.

[1] 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."

[2] 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) should require the imposition of a penalty.

[3] Art. LII.

[4] Art. LIII.

XLIX) if it 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.[1]

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."[2]

§ 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 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.[3] 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.[4] It was contended that the treaty did not authorize the destruction of a neutral American vessel

[1] 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."

[2] No. 96.

[3] Mr. Bryan, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, March 31, 1915, American White Book, European War, I, 87.

[4] 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.

under any circumstances.[1] Germany, on the other hand, maintained that the treaty did not preclude the right of destruction, provided the captor made adequate compensation. The Foreign Office proposed that, inasmuch as the issue related to the interpretation of a treaty, the controversy be referred to a tribunal to be assembled at The Hague pursuant to Article XXXVIII of the Convention for the Pacific Settlement of International Disputes.[2] The United States concurred in this suggestion.[3] In response to an inquiry of the latter respecting the mode of German naval operations pending the 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.[4] 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.[5] 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,

[1] Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, telegram, June 24, 1915, American White Book, European War, II, 185.

[2] Mr. Gerard, to Mr. Lansing, telegram, July 30, 1915, *id.*, 187. This proposal was an alternative suggestion in case the United States did not agree to another method proposed for the adjustment of the controversy.

[3] Mr. Lansing to Mr. Gerard, telegram, Aug. 10, 1915, *id.*, 188.

[4] Mr. Gerard to Mr. Lansing, telegram, Sept. 20, 1915, *id.*, III, 311. 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 J. W. Garner, Int. Law and the World War, II, §§ 474-494.

[5] Mr. Lansing, Secy. of State, to Mr. Gerard, Ambassador to Germany, Oct. 12, 1915, *id.*, 312, 314.

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." [1]

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. 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. The specification, on the other hand, of certain situations not to be regarded as in themselves productive of the required excuse, may act as an effective deterrent of the abuse of power.

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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.[2]

[1] Herr von Jagow, German Foreign Minister, to Mr. Gerard, Nov. 29, 1915, *id.*, 315, 316.

[2] 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; 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."

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.[1] 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.[2] These were understood to impose certain restraints. One of them was that neither the bare fact of capture, nor the lapse 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

[1] "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.

[2] 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.

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.[1]

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.[2] 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.[3]

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.[4] The

[1] 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.)

[2] The Resolution, 2 Dall. 1, 4, Moore, Dig., VII, 528.

[3] 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, seemed 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.

[4] 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

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.[1]

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 pernoctation, 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 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.

[1] Revised Statutes, Section 4652. 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

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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 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

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."

It is not understood that Section 4652 is repealed or superseded by the Act of March 3, 1899, 30 Stat. 1007, abolishing the distribution of prize money and bounty.

Concerning the requirements of Section 4652, see Oakes *v.* United States, 174 U. S. 778.

[1] Dana's Wheaton, § 411, Dana's Note No. 199; L. A. Atherley-Jones, Commerce in War, 637–643; Oppenheim, 2 ed., II, 245; 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.

[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' 7 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, 16 Johns. 6, Scott's Cases, 571. See, also, Dana's Wheaton, Dana's Note No. 199 and cases there cited; Cornu *v.* Blackburne, 2 Douglas, 640, Scott's Cases, 566.

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.[1] The advantages derivable from the possession of a collectible ransom bill, even though it inure 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.

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 purports to be granted.[2] It should indicate, moreover, the nature and extent of the protection accorded the vessel concerned.

5

EXEMPTIONS FROM CAPTURE

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§ 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 derived 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

[1] Oppenheim declares that "the practice of accepting and paying ransom, which grew up in the seventeenth 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 in such cases as may be specially provided for by an order of the King in council." 2 ed., II, 245; *citing* also Art. 40 of the Naval Prize Bill of 1911.

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, Scott's Cases, 571.

See Section 93, Huberich and King's Prize Code of the German Empire, as in force July 1, 1915.

[2] See, for example, form of document which the American consul at Martinique was, 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.

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 of the general right of capture. Nevertheless, respect for usage, as well as 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.

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§ 762. Enemy Property on Neutral Ships.

At the beginning of the nineteenth century American statesmen were not ready to admit that the law of 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

[1] 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, 559, 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

the law should be otherwise.[1] Those Secretaries of State who advocated a change evinced candor in acknowledging the fact that the rule remained unaltered.[2] As late as 1854, Secretary Marcy expressed hope that the principle that free ships make free goods might become incorporated into the international code.[3] Certain of the early treaties of the United States contained provisions in mitigation of the belligerent right.[4] 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.[5]

The reasons advanced in support of the exemption deserve attention. Mr. Jefferson 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

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 ordinance 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.

[1] 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.

[2] 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. *Compare* Mr. Jefferson to Mr. Everett, Feb. 24, 1823, 7 Jefferson's Works, 270, 271, Moore, Dig., VII, 443.

[3] Mr. Marcy, Secy. of State, to Mr. Buchanan, April 13, 1854, H. Ex. Doc. 103, 33 Cong., 1 Sess., Moore, Dig., VII, 447.

[4] 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.

[5] 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.

"exempt from intrusion by any other, and from its jurisdiction, as much as if it were lying in the harbor of its sovereign." [1] 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.[2] 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.[3]

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.[4] 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.[5] These may have been advocated on loose grounds, but they were based upon principles of justice 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 Euro-

[1] President Jefferson to Mr. Livingston, Sept. 9, 1801, 8 Jefferson's Writings, Ford's ed., 88, Moore, Dig., VII, 439.

[2] Mr. Adams, Secy. of State, to Mr. Canning, June 24, 1823, MS. Notes to For. Legs. III, 141, Moore, Dig., VII, 445.

[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] 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.

[5] 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.

pean 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.[1] When the Declaration of Paris of April 16, 1856, announced 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.[2]

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.[3]

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." [4] Shortly there-

[1] 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.

See, also, President Pierce, Annual Message, Dec. 4, 1854, Richardson's Messages, V, 275, Moore, Dig., VII, 449.

[2] "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.

[3] 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.

[4] Instructions to American diplomatic officers, April 22, 1898, Moore, Dig., VII, 452.

after 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.[1] 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."[2] From that position it will be ever reluctant to depart.

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§ 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.[3] 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.[4] Russia in response granted permission to Turkish vessels within its ports to return to their destination until a specified time.[5] 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.[6]

[1] Proclamation of President McKinley, April 26, 1898, For. Rel. 1898, 772; also Spanish War decree of May 3, 1898, *id.*, 774.

[2] Moore, Dig., VII, 452.

[3] "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.

[4] Brit. and For. State Pap., XLII, 1321, 1326.

[5] Halleck, 3 ed. by Baker, I, 553, note, quoted in Moore, Dig., VII, 453.

[6] Brit. and For. State Pap., XLVI, 242 and 39, respectively.

See, also, Prussian ministerial declaration of June 21, 1866, respecting

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 same 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.[1]

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.[2]

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

Austrian merchant vessels in Prussian ports, or whose masters, unaware of the outbreak of war, might enter therein, and 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.

[1] 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.

[2] 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.

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.[1] 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.[2] It is not without significance 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 a municipal pronouncement.[3]

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.[4]

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

[1] The Buena Ventura, 175 U. S. 384. 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.

[2] 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.

It should be observed that Chief Justice Fuller, and Justices Gray and McKenna, dissented from the opinion of the Court.

[3] 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.

[4] The Panama, 176 U. S. 535.

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.[1]

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.[2] 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.

Apart from the importance of the foregoing cases in applying municipal 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

[1] For. Rel. 1898, 772.

[2] 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.

such regulations in regard to sojourn, conduct, cargo, destination, and movements after departure, of innocent enemy vessels as might be deemed necessary 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.[1]

§ 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.[2] 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 enemy. Article II forbade the confiscation of a

[1] 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, 1.

[2] 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, 2 ed., II, 141–143; 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.

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.[1]

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 The World War.

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.[2] 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

[1] 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.

[2] Manual of Emergency Legislation, 1914, 138.

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 privileges granted would also not extend to merchant ships which showed by their build that they were intended for conversion into vessels of war.[1] 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.[2]

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.[3] It was

[1] 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."

[2] 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*."

[3] 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." American White Book, European War, I, 44, 46.

found possible, however, to extend such indulgences, on a reciprocal basis, and on similar terms, to Austro-Hungarian merchant ships and their cargoes.[1]

While the foregoing precedents seem to point to the reasonableness and desirability of the attempts of opposing belligerents to make reciprocal concessions respecting days of grace, they fail to indicate the existence of a legal duty to enter into such engagements, or to grant any definite period of time to enemy ships for the loading or the unloading of cargoes, or for departure.

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, and that 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 to-day 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

[1] Manual of Emergency Legislation, 1914, 97, 142.
See review of various regulations of belligerents in The World War 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 J. W. Garner, Int. Law and The World War, I, §§ 107-114.

were partially disabled by their crews, supposedly in pursuance of instructions from the Imperial Government. Such action was doubtless due to the belief that in the event of war those vessels would otherwise be taken into the service of the United States for belligerent purposes.[1]

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.[2] 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.[3] 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

[1] 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.

[2] 40 Stat. 75.

[3] Executive order of President Wilson, No. 2651. By certain other Executive orders, the President authorized that, through the Secretary of the Navy, there be taken over to the United States possession of and title to specified German vessels. See, for example, Executive order No. 2624 of May 22, 1917, and No. 2709 of September 27, 1917.

See, also, Naval War College, Int. Law Documents, 1917, 246–248.

all the German merchant ships which are of 1,600 tons gross and upwards", reckoned in a specified manner.[1] 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.[2] No restraint imposed by international law forbade the United States to avail itself of rights so conferred should it by agreement with Germany secure the benefits thereof.

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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.[3]

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; "nor when military or naval operations create a necessity to which all

[1] 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.

[2] Paragraph 8, Annex III, Part VIII of the same treaty. See in this connection discussion in J. W. Garner, Int. Law and The World War, I, § 117.

[3] 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).

private interests must give way." [1] 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 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.[2] 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.[3] The influence of the decision is seen in a recent statement by a British prize court to the effect that it has now 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." [4]

The Second Hague Peace Conference, of 1907, concluded 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.[5] It was there provided that those used exclusively for fishing along a coast are "exempt from capture, as

[1] 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 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, 31 T. L. R. 38, *Am. J.*, IX, 544.

[2] 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.

[3] See Mr. Lansing, Secy. of State, in a communication to Mr. W. H. Page, Ambassador to Great Britain, Oct. 21, 1915.

[4] The Berlin, 31 L. T. R. 38, *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.

[5] Malloy's Treaties, II, 2348.

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.[1]

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.[2]

(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.[3] 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

[1] 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.

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.

[2] No. 63. According to No. 65 such fishing vessels may be subjected to special regulations 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."

[3] 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.

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.[1]

(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 restrictions on 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.[2] 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.[3] Some maritime States have not hesitated to yield it in their naval regulations.[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

[1] No. 65, Naval Instructions Governing Maritime Warfare of June 30, 1917.

[2] 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.

[3] 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.

"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.

[4] 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.

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]

(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.[3] 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.[4] Consequently, he

[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] Naval Instructions Governing Maritime Warfare of June 30, 1917, No. 63.

[3] Naval War College, Int. Law Topics and Discussions, 1913, 89; also Oppenheim, 2 ed., II, 283–284; J. A. Hall, Law of Naval Warfare, 41–42; 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.

[4] 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.

proceeded to enunciate in certain cases before him the conditions with which a cartel ship should comply in order to retain the right to claim an exemption. Thus he declared that such a ship is not at liberty to trade or take in a cargo.[1] 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.[2] 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.[3]

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.[4]

e

§ 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.[5] 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, which doubtless encouraged some to urge abandonment of what may have seemed also to involve no sacrifice of a substantial military benefit.[6]

[1] The Venus, 4 Ch. Rob. 355, 358. See, also, La Rosine, 2 Ch. Rob. 372.

[2] 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.

[3] La Gloire, 5 Ch. Rob. 192.

[4] 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.

[5] 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.

[6] Mr. Adams, Secy. of State, to Mr. Rush, Minister to Great Britain, July

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.[1]

At The Hague Peace Conferences of 1899,[2] 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 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.[3]

The American proposition was presented by Mr. Choate who pleaded with skill in its behalf.[4] He dwelt at length upon the views

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.

[1] 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.

[2] Memorial of American Commission, F. W. Holls, Peace Conference at The Hague, 307; also speech of Mr. Andrew D. White, of the American Commission, in support of the proposal, *id.*, 314.

[3] *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.

[4] See, generally, Charles de Boeck, *de la Propriété Privé 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,

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.[1] 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.[2] He urged by way of summary the acceptance

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.

[1] 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."

[2] He later said: "The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such service, and to concentrate their entire resources upon the construction of great battleships whose encounters with those of their adversaries shall decide any contest, thus confining war as it should be to a test of strength between the armed forces and the financial resources of the combatants on sea and land. It is probable that, if the truth were known, there has been an actual diminution by all the maritime nations in the construction of war vessels adapted to the pursuit of merchantmen, and indeed a sale or breaking up of such vessels which had been for some time in service. Indeed, none of the

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 legitimate 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.[1] 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.[2]

§ 772. The Same.

The conduct of the World War revealed the impressive fact that belligerent maritime States do not at the present time regard the capture of enemy private property, of any kind whatsoever,

great navies now existing, could afford to employ any of their great and costly ships of war or cruisers in the paltry pursuit of merchantmen scattered over the seas. The game would not be worth the candle, and the expense would be more than any probable result."

[1] On this point, see C. C. Hyde, *Proceedings*, Am. Soc. Int. Law, I, 73, 78–79.

[2] 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."

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 its 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 absolute contraband. These acts 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. Consequently 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. 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.[1] Thus for the right to reduce by starvation an

[1] 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.

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.[1]

The World War 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.[2]

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.[3] 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 unrestrained by public control.[4] The result is a warfare of a type long since sought to be abolished.

[1] Nations 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.

[2] See Capture, Effect upon the Rights of the Occupants of the Captured Vessel, *supra*, § 755.

[3] See Conversion of Volunteer, Auxiliary or Subsidized Vessels, Place of Conversion, *supra*, §§ 707–708.

[4] See Private Vessels Defensively Armed, *supra*, § 709.

The collective injury to neutral interests through the capture of private enemy property other than contraband may possibly 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.[1]

6

PRISONERS OF WAR

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Persons who may be regarded as Prisoners of War

§ 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.[2] 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 pris-

[1] J. B. Moore, "Contraband of War," *Proceedings*, Am. Philosophical Society, LI, No. 203; H. S. Quigley, in *Am. J.*, XI, 22, 27.

[2] 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, *Am. J.*, XIII, Supp., 71.

oners; 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.[1]

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 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.[2]

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." [3] The captain and officers, and members of the

[1] 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. Art. X, Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 105.

[2] 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.

[3] Art. V, Malloy's Treaties, II, 2348.

Concerning the provisions of the Convention relating to prisoners of war, 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

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.[1] 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.[2] 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,[3] 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, 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,[4] 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 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 hostile acts are directed, might believe itself justified in dealing summarily with all persons officially connected with the vessel or who partici-

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."

[1] Art. VI. [2] Art. VII. [3] Art. VIII.

[4] 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.

pated 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." [1] 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.[2]

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.[3] The exigencies of maritime operations may, how-

[1] Sir W. Scott in The Maria, 1 Ch. Rob. 340, 362; *id.*, 374.
See Attacks on Neutral Vessels, *supra*, §§ 750–751.

[2] See President Wilson, war message to the Congress of April 2, 1917, American White Book, European War, IV, 422, 424.

[3] Art. LXXIX, Oxford Manual of Naval War, *Annuaire*, XXVI, 663, J. B. Scott, Resolutions, 193.
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.

ever, give rise to 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.[1] 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.[2]

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,[3] 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.[4] 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

[1] Art. LXXI, Oxford Manual of Naval War, *Annuaire*, XXVI, 662, J. B. Scott, Resolutions, 192.

[2] See Effect of Capture upon Rights of the Occupants of the Captured Vessel, *supra*, § 755.

[3] Malloy's Treaties, II, 1907.

[4] *Id.*, II, 1903.

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 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 proposing 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.[1]

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.[2] 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.[3]

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." [4]

[1] 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.

[2] Malloy's Treaties, II, 2035.

[3] *Id.*, II, 2326, and especially Art. XXV, *id.*, 2337.

[4] 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, 2 ed., II, 252–263, 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 govern-

It is provided also that hospital ships shall in no wise hamper the movements of 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." [1] By such process an opposing belligerent is empowered to prevent abuse of the immunity accorded.[2] 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.[3]

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; [4] 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; [5] 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

ing 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."

[1] 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."

[2] 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.

[3] Art. VIII.

[4] Art. I.

See, also, the Case of The Ophelia, 1 B. & C. P. C. 210, 3 Lloyd's Prize Cases, 13, where it was held that the vessel 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." Hence it was declared that the ship had forfeited the protection claimed under the convention.

[5] 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.

authorization of that belligerent.[1] 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.[2]

Military hospital ships are to be distinguished by being painted white outside 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.[3] 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.[4]

(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.[5] 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."

[1] Art. III.

[2] Concerning the case of the German S. S. *Ophelia*, flying the red cross flag and detained and brought into an English port by a British cruiser, in October, 1914, the name of the former not having been communicated to the British Government, see Coleman Phillipson, Int. Law and the Great War, 249, *citing* the London *Times*, October 20, 1914.

[3] 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."

[4] Art. VI.

[5] Art. VII.

The religious as well as medical and hospital staff of any captured vessel is declared to be inviolable, and its members 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.[1] 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.[2]

(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 responding 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.[3]

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.[4] 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.[5]

[1] 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."

[2] Art. XI.

[3] Art. 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.

[4] Art. XIII.

[5] See 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, in-

(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 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

cluding 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.

[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, F. W. Holls, Peace Conference at the Hague, 497–506.

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 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]

[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."

[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

c

§ 782. Results of The World War.

German submarine attacks on Allied hospital ships in the course of The World War 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]

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 in-

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.

[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. 51.

See, also, The War on Hospital Ships from the Narratives of Eye-witnesses, London, 1917; Hall, Higgins' 7 ed., p. 421.

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, American White Book, European War, IV, 422.

[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 Documents, 1918, 90. See, also, note of International Red Cross Committee, of Geneva, to German Government, *id.*, 90, note 1.

telligence, and so to rob such a vessel of its normal immunities.[1] 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 battle cruiser.[2] 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

NATIONAL 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.[3] 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 its means of defense and support."[4]

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

[1] Surgeon (now Medical Director) Frank L. Pleadwell, U. S. N., in *The Military Surgeon*, XXXIII, 318.

[2] See Attack, Unarmed Public Vessels, *supra*, § 740; also Attack, Certain Conclusions, *supra*, § 745.

[3] 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.

[4] Wilson, Int. Law, 285. See, also, Dana's Wheaton, § 355, and Dana's Note, 171, 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."

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. National Character.

It was announced by the Supreme Court of the United States in 1866, that a ship is bound by the character impressed upon her by the authority of the Government from which all her documents issue.[1] According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, the neutral or enemy character of a private vessel is determined by the neutral or enemy character of the State whose flag the vessel has a right to fly as evidenced by her papers.[2] Such was the theory expressed in the Declaration

[1] Mr. Justice Clifford, in 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 Compañia 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] No. 56. The United States has concluded certain treaties based upon the same theory. See, for example, Art. VII, treaty with the Argentine Republic, July 27, 1853, Malloy's Treaties, I, 22; Art. XII, treaty with Japan, No. 22, 1894, *id.*, 1033; Art. XVII, treaty with Italy, Feb. 26, 1871, *id.*, 974; Art. XI, treaty with Spain, July 3, 1902, *id.*, II, 1704.

of London,[1] and reproduced in the Oxford Manual of Naval War of 1913.[2] It prescribes a definite test of national character which discards all considerations connected with the personal status of the owner.[3] Thus neutral ownership of any portion of a ship sailing under an enemy flag would not save the vessel from condemnation.[4]

Conversely the hostile ownership of a vessel rightfully flying a neutral flag would not appear to suffice to stamp the ship with an enemy character.[5]

[1] 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' 7 ed. of Hall, 526, note 1.

[2] Art. LI, *Annuire*, XXVI, 658, J. B. Scott, Resolutions, 186.

[3] Report of Mr. Renault, Charles' Treaties, 314–315; The Proton, 34 T. L. R. 309.

[4] Naval Instructions Governing Maritime Warfare, of June 30, 1917, No. 56. The William Bagaley, 5 Wall. 377, 410, *citing* Story on Prize, 61, The Elizabeth, 5 Ch. Rob. 3, The Fortuna, 1 Dodson, 87, The Success, *id.*, 132, 1 Kent's Com., 11th ed., 91. In the principal case it was held that the share of a citizen in a ship sailing under an enemy's flag and papers, and who had ample time and every facility to withdraw his effects from the enemy country, or dispose of such interests as could not be removed, but who had not attempted such withdrawal or disposal, was subject to capture and condemnation equally with the share of enemies in the same ship.

See, also, Westlake, 2 ed., II, 169, quoted by Sir Samuel Evans in The Marie Glaeser, 1 Lloyd's Prize Cases, 56, 129.

"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.

[5] 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. In the case of The Proton, 34 T. L. R. 309, 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

Doubtless difficulties may arise in determining whether a vessel is entitled to fly the flag under which she is sailing at the time of capture. It may be that the requirements of the State under whose flag protection is sought forbid ownership of a vessel by persons or corporations of foreign nationality and residence, and thus restrict the opportunity for alien enemy owners to claim that their vessel is lawfully registered under a neutral flag.[1]

It is suggested that as a means of preventing the concealment of the real character of a ship owned by alien enemies, the rule above laid down might be wisely so restricted in its operation as to forbid reliance upon a neutral flag in case title to the vessel were lodged in persons living or commercially established within hostile territory, or if the operations of the ship were controlled by persons within such a place.

(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.[2] Notwithstanding the validity

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.

On October 20, 1915, an order in council announced that from and after that date, Art. LVII of the Declaration of London should "cease to be adopted and put in force." (American White Book, European War, III, 50–51.) In accordance therewith in the case of The Hamborn, 34 T. L. R. 145, Sir Samuel Evans held, in 1917, that a vessel registered in Holland and flying the Dutch flag, was in reality a German ship because the vessel belonged to German owners. It did not appear that registration in Holland had been illegal.

[1] The Polzeath, 32 T. L. R. 399, and 647, respecting the forfeiture to the British Crown of a vessel owned by a British corporation whose chief office was in Hamburg, and which was controlled in Germany.

See also The St. Tudno, 2 Grant's Prize Cases, 272.

The Solveig, *Conseil des Prises*, Oct. 8, 1915, Fauchille, *Jurisprudence Française*, 126, *Journal Officiel*, Nov. 12, 1915; Higgins' 7 ed. of Hall, p. 526, note 1.

[2] 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.

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.[1]

(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 evidence of a reasonable sacrifice by the purchaser.[2] 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." [3]

[1] "The Transfer of War Vessels from Belligerents to Neutrals", editorial comment, *Am. J.*, IX, 195.

[2] 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, p. 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.

[3] 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

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.[1] 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.

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.[2] 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

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", *Col. Law Rev.*, XV, 316, 327–334, in connection with the cases of The Tommi and The Rothersand [1914], P. 251.

[1] 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.

[2] 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 of International Naval Conference*, Misc. No. 5 (1909), Cd. 4555, 290.

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.[1]

§ 787. The Same.

The provisions of the Declaration of London appear to have received the approval of the Naval War College.[2] They have been, moreover, reproduced in Article LII of the Oxford Manual of Naval War.[3] Nevertheless, it is believed that there is need of recon-

[1] Art. LVI, Charles' Treaties, 279. See, also, General Report of Drafting Committee, *id.*, 311.

In a communication of Sir Edward Grey, British Foreign Secy., to Mr. W. H. 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 rights 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." American White Book, European War, I, 44, 52.

See decision of the *Conseil des Prises* in the case of The Colonia, *Journal Officiel*, June 15, 1915, p. 3952, where the transfer was deemed invalid.

[2] Naval War College, Int. Law Topics and Discussions, 1913, 155–160. *Compare id.*, 1906, 21–22.

[3] *Annuaire*, XXVI, 656, J. B. Scott, Resolutions, 187. Mr. Beichmann, an associate 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

sideration 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 be otherwise 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,[1] 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.[2] If

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.

[1] 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.

[2] *Cf.* Memorandum of Mr. Johnson, Solicitor of Department of State, Aug. 7, 1914, Senate Doc. No. 563, 63 Cong., 2 Sess., 83; also comment thereon in

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.[1]

(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."[2] 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

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 J. W. Garner, Int. Law and The World War, I, §§ 125, 131–133.

[1] "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, U. S. Comp. Stat., 1918 ed., § 8146c.

[2] Darby *v.* The Brig Ernstern, 2 Dall. 34, Moore, Dig., VII, 410.

See, also, Mr. Bryan, Secy. of State, to Mr. W. H. Page, Ambassador to Great Britain, Mar. 30, 1915, American White Book, European War, I, 69.

the character of the belligerent in whose service they are employed, and cannot complain if they are seized and condemned as enemy property.[1]

It must be apparent that a neutral 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 since that of Washington of April 22, 1793.[2]

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.[3] 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.[4]

[1] The Hart, 3 Wall. 559, 560, Moore, Dig., VII, 410; The Baigorry, 2 Wall. 474.

[2] 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.

[3] 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.

[4] 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

In the foregoing situations the nature of the relationship established between the neutral ship and the belligerent in whose service it is employed, frees the opposing belligerent from the obligation to apply the normal test of national character in case its naval forces encounter the vessel, or its prize court adjudicates with respect to it.

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] Disagreement 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",

to Ecuador, Dec. 28, 1865, MS. Inst. Ecuador, I, 184, Moore, Dig., VII, 411; Case of the Kowshing, 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.

[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.

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.[1] 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 right to change his nationality no opinion was expressed.[2]

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 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."[3] 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."[4] 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 opin-

[1] The Experiment, 2 Dall. 41.
[2] Murray *v.* The Schooner Charming Betsy, 2 Cranch, 64, 120.
[3] Livingston *v.* Maryland Insurance Company, 7 Cranch, 506, 536–537.
[4] 8 Cranch, 253, 278–279.

ion 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.[1] 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.[2] This circumstance seems important, for it indicates that, notwithstanding the reference to Vattel, the actual intentions of the claimants with 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.[3] For that reason it is believed

[1] 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.

[2] *Id.*, 279, where the case of The Bernon, 1 Ch. Rob. 86, 102, was cited.

[3] 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 dis-

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.[1] 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*."[2]

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.[3] 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.[4] Nevertheless, as this commercial home may be distinct from and yet consistent with a legal home elsewhere, it would be

senting 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 believed 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 former State before knowledge of the war and captured by an American cruiser after the declaration thereof was subject to condemnation.

[1] 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.

[2] 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.

[3] Statement in Wharton, Dig., III, 344, and quoted in Moore, Dig., VII, 428.

[4] Declared Sir Samuel Evans in his decision in the case of The Clan Grant, Lloyd's Prize Cases, I, 398, 404: "Everyone knows that if a person carries on business in the enemy's country he has his commercial domicile there."

desirable for States whose prize courts attach significance to the former, to adopt an expression describing with greater precision the fatal connection with belligerent territory.[1] 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.[2] 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.[3]

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.[4] Wide divergence of views as to the correct test precluded agree-

[1] 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.

[2] 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."

[3] 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. Attys.-Gen., 327, Moore, Dig., VII, 432.

[4] 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.

ment at the International Naval Conference at London, of 1908–1909.[1] 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.[2] The mode of determining the character of the latter was not fixed.

(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.[3] 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.[4] The produce of the enemy's soil is similarly regarded,

[1] 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.

[2] 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."

[3] 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.

[4] The Gray Jacket, 5 Wall. 342, 369–370, where the Court declared, how-

notwithstanding the neutral character of the owner.[1] 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.[2]

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.[3] 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.[4] 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.[5]

ever, 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."

[1] 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.

[2] 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.

[3] The language of the text is that of Mr. Justice Story, delivering the opinion of the Court in The Friendschaft, 4 Wheat. 105, 107.

[4] 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, Lloyd's Prize Cases, I, 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 Aigburth, *id.*, 635, both of these cases being cited in Moore, Dig., VII, 433.

[5] See The Lützow [1918] A. C. 435, 6 Lloyd's Prize Cases, 289.

(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] 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.[2] 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."[3] Again, shipper and consignee 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.[4] 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.[5] While in the ordinary course of mercantile transactions a delivery

[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] 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.

[3] 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.

[4] The Packet De Bilboa, 2 Ch. Rob. 133, 134–135.

[5] The St. Joze Indiano, 1 Wheat. 208, Moore, Dig., VII, 405; The Merrimack, 8 Cranch, 317, 327.

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.[1] 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.[2]

It seems to be accepted opinion in America and England that where the enemy ownership 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.[3]

The invalidity of the transfer of enemy goods in transit was recognized in Article LX of the Declaration of London.[4] 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.[5]

A transfer of title made before the outbreak of hostilities and not in contemplation of war is not open to objection.[6]

[1] The Frances, 9 Cranch, 183, Moore, Dig., VII, 404; The Frances, 8 Cranch, 354; The London Packet, 5 Wheat. 132; The Miramichi, 1 Lloyd's Prize Cases, 157.

[2] Decision of the Judicial Committee of the Privy Council in The Parchim, [1918] A. C. 157; also note in *Yale, L. J.*, XXVII, 1076.

[3] 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], A. C. 145.

"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.

[4] Charles' Treaties, 279.

[5] *Id.;* The Constantia, 6 Ch. Rob. 321, 324–325.

[6] The Vrow Margaretha, 1 Ch. Rob. 336.

(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]

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]

[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 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 Friendschaft, 3 Wheat. 14, 52, Moore, Dig., VII, 433.

[4] United States *v.* Guillem, 11 How. 47, Moore, Dig., VII, 433. In delivering the opinion of the Court, Chief Justice Taney declared 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.

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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 national character for purposes of condemnation, 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 ever reasonable to ignore the neutral flag which a vessel has the right to fly, and to test its national 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, provided it be admitted that the flag which a vessel lawfully flies is not to be deemed the invariable test. Events of The World War have shown that some maritime States are not 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 not improbable that a prize court, unless restricted by the political department 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 as suffices to cause them normally to be impressed

[1] See Ships, National Character, *supra*, § 784; also The St. Tudno, 2 Grant's P. C., 272.

[2] See, for example, order in council of Oct. 20, 1915, abandoning Art. LVII of the Declaration of London, American White Book, European War, III, 50; The Polzeath, 32 T. L. R. 647.

[3] It should be observed, however, that the United States does not appear as yet to have expressed approval of any departure from the rule which tests the national character of a ship by the flag rightfully flown.

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 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 British and not as American vessels." Mr. Lansing, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador, May 10, 1916, American White Book, European War, III, 84, 85.

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.[1]

§ 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.[2] The practice which heeds the commercial domicile of an individual regardless of his legal home in determining the condemnability of his goods offers guidance.[3] 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,[4] 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 ascertaining the effect of any of these relationships upon the national character generally of corporate property encountered at sea, it seems unnecessary to make inquiry

[1] See Effect of Certain Relationships between Property and Belligerent Territory, *supra*, § 791.

[2] 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.

[3] See Belligerent Domicile, Effect of Relationship between the Owner of Property and Belligerent Territory, *supra*, §§ 789–790.

[4] 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 operations of the law. See, in this connection, In re Steer, 3 H. & N. 594.

respecting the correct theory of determining the domicile of the corporation;[1] 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 established between the corporation and the belligerent State. Upon the solution of that 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.[2] 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.[3] If the connection between the corporation and a belligerent is manifested solely by the ownership of the

[1] 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.

[2] Such appears to be the trend of British opinion. Daimler Co., Ltd. *v.* Continental Tyre & Rubber Co., Ltd. [1916], 2 A. C. 307, in which Lord Parker declared (*id.*, 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 definitely with enemy character."

See, also, Dr. E. J. Schuster, "The Nationality and Domicil 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.

Compare view of Lord Reading in Continental Tyre & Rubber Co., Ltd. *v.* Daimler Co., Ltd. [1915], 1 K. B. 893.

[3] 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.

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.[1] Even if that fact is immaterial in determining the national 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.[2] 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.[3]

It should be observed that the practice of nations has not thus far brought into being any rule of general acceptation which forbids a belligerent to disregard the nationality or the domicile of a corporation in determining the national 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.

On principle belligerent States should adopt a single theory of determining the hostile character of corporate property, and consistently refuse to invoke any other in support of condemnation.[4]

[1] See, in this connection, E. Hilton Young, "The Nationality of a Juristic Person", *Harv. L. Rev.*, XXII, 1, 2–7.

[2] 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.

[3] 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.

[4] It is submitted that events of The World War 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 national character. One result of that conflict seems to have been the growth of a tendency to disregard both fictions

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.

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.

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.

In attempting to restrict neutral commerce, belligerents from an early date resorted to the practice of announcing lists of articles

[1] T. A. Walker, Hist. Law of Nations, 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.

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 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.[1]

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." [2]

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*).[3] 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 an-*

[1] Concerning lists of contraband issued by the United States, see Certain Other Articles, *infra*, § 806.

[2] J. B. Moore, "Contraband of War", Philadelphia, 1912, p. 18; Oppenheim, 2 ed., II, § 391, p. 480; 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.

[3] *De Jure Belli ac Pacis*, Lib. III, c. I, v. 1–3.

cipitis), 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.[1] 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.[2] This necessity, moreover, he explained elsewhere as one which should be of the extremest kind,[3] and not to be invoked until all other possible means had been used.[4] 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.[5]

While it would be inaccurate to attribute to Grotius the reasons which in England, and later in the United States, were advanced in

[1] "*Nam situeri me non possum nisi quae mittuntur intercipiam, 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.

[2] 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.

"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.*

[3] *De Jure Belli ac Pacis*, Lib. III, c. XVII, i.

[4] *Id.*, Lib. II, c. II, vi–ix, and comments thereon in Lawrence's Wheaton, 2 ed., 793.

[5] See especially in this connection, Westlake, 2 ed., II, 282.

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.[1] 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 twofold aspect, with respect, first, to the nature of articles to be deemed generally subject to confiscation; and, secondly, to the circumstances when articles 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

[1] Westlake, 2 ed., II, 285.

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 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]

Development of the science and instrumentalities of warfare, changes in the relation of various articles of commerce to the conduct of hostilities, the increasingly close connection of the civilian male population of belligerent territories with military operations, together with the development of steam transportation by rail within neutral territory adjacent to belligerent countries,[2] were among the numerous circumstances which combined to vary perceptibly and unceasingly the bearing which neutral traffic in particular products had upon the military achievement of the belligerent receiving them or gaining access to them. Such changes doubtless justified broad enlargement of lists of contraband articles, and likewise varied the conditions encouraging the imputation of hostile destination to goods in transit, even to a neutral seaboard. Thus, no pronouncement as to what might be fairly regarded as contraband in the course of one war afforded exact guidance as to the propriety of conduct in another. The principle of justice to be invoked in support of the belligerent claim remained, however, constant and, therefore, never ceased to be applicable as a test. It is worth while to observe the influence of that principle upon the United States, both as a neutral and as a belligerent.

[1] Concerning the treaties concluded by Great Britain, see Hall, Higgins' 7 ed., 687–690.

[2] See, in this connection, Sir Edward Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Feb. 10, 1915, American White Book, European War, I, 44, 47.

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 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

[1] Arts. XII and XIII, *Les Grands Traités du Règne de Louis XIV*, Paris, 1893, 100, 101.

"By 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 attack 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.

in the same category as munitions of war.[1] 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,[2] 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, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested."[3] The treaty with Sweden of April 3, 1783, reproduced generally these provisions,[4] as did also that with Spain of October 27, 1795.[5]

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

[1] Art. XI, Brit. and For. State Pap., I, 701, 705.

[2] Art. XXIV, Malloy's Treaties, I, 476.

Saltpeter 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' 7 ed., 695.

[3] 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 things proper either for building or repairing ships, 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."

[4] Arts. IX and X, Malloy's Treaties, II, 1728.

[5] Art. XVI, Malloy's Treaties, II, 1645. Also Art. XXIV, treaty with the Netherlands, Oct. 8, 1782, *id.*, 1240.

enemies of the other shall be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals."[1] 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,[2] and were "revived" in that of May 1, 1828.[3]

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 be "speedily and completely indemnified." 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.[4]

[1] Art. XIII, Malloy's Treaties, II, 1481. [2] *Id.*, 1490.
[3] Article XIII, *id.*, 1499.
Concerning the effect of the treaty arrangement with Prussia upon the propriety of the destruction of the American merchantman *William P. Frye* by the German vessel of war, *Prinz Eitel Friedrich*, Jan. 28, 1915, see correspondence in American White Book, European War, I, 87, 88; *id.*, III, 311–318.
[4] Art. XVIII, Malloy's Treaties, I, 601.

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 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

[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 preëmption. Nevertheless, the United States protested against it, and it was not uniformly enforced against American vessels." J. B. Moore, "Contraband of War", Philadelphia, 1912, p. 14.

[2] Am. State Pap., For. Rel. I, 240.

of the 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 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.[1] The United States vigorously challenged the lawfulness 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

[1] 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."

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." [1]

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 circumstance that of the two only existing treaties by which the conduct of Great Britain was regulated towards neutrals in the war, that with Sweden of 1661 expressly included provisions in the enumeration of contraband articles.[2]

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,[3] 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

[1] 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.

[2] Communication to Mr. Randolph, Secy. of State, April 11, 1794, Am. State Pap., For. Rel. I, 449.

[3] 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."

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.[1]

Orders in council of November 6, 1793,[2] and January 8, 1794,[3] 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.[4] As it has been observed,[5] the treaty which he concluded on November 19, 1794, and which 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

[1] Communication to Mr. Hammond, British Minister, May 1, 1794, Am. State Pap., For. Rel. I, 450.

[2] Am. State Pap., For. Rel. I. 430.

[3] 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.

[4] 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.

[5] See Early Treaties of the United States, *supra*, § 799.

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." [1]

(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, 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." [2] 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 a 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.[3]

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 in-

[1] 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.

[2] 1 Wheat. 382, 388, Moore, Dig., VII, 679.

[3] 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

timation that foodstuffs should be deemed even conditionally contraband.[1]

In the case of the *Peterhoff*,[2] 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.[3]

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.[4] Although the

[1] 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 XVII, 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.

[2] 5 Wall. 28, 58.

[3] 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 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." 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.

[4] 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.*

United States is not known to have made definite protest,[1] Dr. Wharton, the solicitor of 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.[2] 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."[3] 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 "foodstuffs, 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."[4] During the Russo-Japanese War, both the United States and Great Britain maintained a similar stand.[5] A

[1] "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.

[2] 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.

[3] 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.

[4] 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.

[5] For the position of the British Government, see Parl. Papers, Russia, No. 1 (1905), 9, 11, quoted in Moore, Dig., VII, 686.

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." [1] Russia amended its ruling with respect to rice and other foodstuffs in substantial conformity with the American and British views.[2]

After much deliberation the Institute of International Law adopted, in 1896, significant regulations respecting contraband.[3] These limited the articles to be deemed such to arms of all kinds,

[1] 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'sRussian 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.

[2] Russian instructions of Sept. 30, 1904, and memorandum of Oct. 22, 1904, Hurst and Bray's Russian and Japanese Prize Cases, I, Appendix G.

[3] 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.

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.[1] It was provided that an article should not be considered 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.[2] The classes known as "conditional contraband" or "accidental contraband" were declared to be abolished.[3] A belligerent was, however, accorded the right upon payment of indemnity to sequestrate or preëmpt articles bound for a port of its adversary, and which might be used for purposes either of peace or of war.[4] 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.[5]

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

[1] *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.

[2] Section 3. [3] Section 4. [4] Section 5.

[5] 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, *id.*, 1160.

Concerning the British proposal for the abolition of contraband, and the reasons advanced in support of it by Lord Reay, *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.

were placed in the conditional class.[1] 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.[2] 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.[3] Conditional contraband was, moreover, rendered 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.[4] 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

[1] For the text of the Declaration of London see Charles' Treaties, 268, also Naval War College, Int. Law Topics, 1909, 169.

[2] 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.

[3] Art. XXXIV.

[4] 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.

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.[1]

(3)

§ 803. The Controversy during The World War.

Events of The World War 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.[2] 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 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

[1] Declares 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.

[2] Mr. Bryan, Secy. of State, to Mr. W. H. Page, American Ambassador at London, telegram, Dec. 26, 1914, American White Book, European War, I, 39.

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.[1] He contended also that elaborate machinery had been organized by the enemy for the supply of foodstuffs for the use of the German armies from overseas. 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.[2] 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.[3] If it could be shown that all provisions imported into the

[1] Sir Edward Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Feb. 10, 1915, *id.*, 44, 50, 51.

[2] *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.

[3] 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, required 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

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 the 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.[1] 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.[2]

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. W. H. Page, American Ambassador at London, telegram, Feb. 15, 1915, American White Book, European War, I, 81. See responses from Great Britain embodied in telegrams from Mr. Page to Mr. Bryan, Feb. 19, 1915, and Apr. 8, 1915, *id.*, 82 and 83, 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 importance; 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.

[1] Mr. Bryan, Secy. of State, to Mr. W. H. Page, American Ambassador at London, telegram, Feb. 20, 1915, American White Book, European War, I, 59.

[2] Mr. Gerard, to Mr. Bryan, telegram, March 1, 1915, American White Book, European War, I, 60; Sir Cecil Spring-Rice, British Ambassador at Washington, to Mr. Bryan, March 1, 1915, *id.*, I, 61.

The British order in council of March 11, 1915, purporting to prevent com-

§ 804. The Same.

In early stages of The World War, 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 Declaration 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

modities 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 during the war, of the British attitude respecting contraband. For the text of the order see Mr. W. H. Page, American Ambassador at London, to Mr. Bryan, March 15, 1915, American White Book, European War, I, 65.

[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.

[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 "without regard to the provisions of the declaration." Mr. Lansing, Acting Secy. of State, to Mr. Gerard, American Ambassador at Berlin, telegram, Oct. 24, 1914, American White Book, European War, I, 8. Also correspondence, *id.*, 5–8.

[3] American White Book, European War, I, 30.

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.[1]

In the Naval Instructions of the United States 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." [2]

(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, illustrate 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 may have been due in part to the circumstance that in the formulation of rules, the especial interests of particular States or groups of States have 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, have been 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.[3]

[1] Enclosure in report of Mr. Reed, American Vice-Consul at London, to Mr. Lansing, Secy. of State, Apr. 20, 1916, American White Book, European War, III, 109.

[2] 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."

[3] 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 con-

By reason of the volume of exports from its territory, the United States still finds in the treatment of foodstuffs the most serious problem confronting it with respect to contraband. 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, 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

demned by the due process of a prize court." Correspondence respecting the International Naval Conference, Misc. No. 4 [1909], Cd. 4554, 20, 23.

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. 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 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.[1] 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.[2]

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

[1] 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.

[2] 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.

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]

[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, campaign 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 accouterments 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 classi-

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.[1] 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;[2] and also as a neutral in the course of the Russo-Japanese War.[3] In The World War, Great Britain, as well as France and Russia, were at the outset disposed to regard fuel as conditional contraband;[4] and Germany, together with Austria-Hungary, indicating willingness to follow the Declaration of London if its provisions were not disre-

fication 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 detained for the use of the enemy Government or its armed forces, are, unless exempted by treaty, regarded as contraband:

"(*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."

[1] J. C. Pilidi, *Du Combustible en Temps de Guerre*, Paris, 1909, 271–338, 376–393.

[2] 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.

[3] 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.

[4] American White Book, European War, I, 11, 13, 16, 19, 20, 22, 24, 26.

garded by the other belligerents, appeared also ready to do so.[1] Turkey placed coal in the absolute list.[2] As late as November 5, 1915, Great Britain classified fuel as conditional contraband,[3] but, as has been observed, abandoned all attempt to distinguish between absolute and conditional contraband in April, 1916, at which time fuel, other than mineral oils, was declared to be simply contraband.[4] In April, 1915, Germany placed coal and coke in the absolute class, announcing that other forms of fuel "coming under the designation of conditional contraband", should be "considered as contraband of war."[5] 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.[6]

It may be doubted whether any rule relative to the treatment of fuel or any other particular article equally capable of double use can be safely laid down. Fuel may in fact assume a relation to the conflict such that its use for any other than a military end in the country importing it is not to be anticipated. Like conditions may exist with respect to importations of cotton.[7] It is believed

[1] American White Book, European War, I, 27 and 32. [2] *Id.*, I, 33.
[3] *Id.*, III, 104. [4] *Id.*, 111. [5] *Id.*, I, 30, 31. [6] No. 24 (*e*).

[7] 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 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. W. H. 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 inten-

that in order to preserve unmolested a neutral trade 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 fuel and possibly materials for clothing, their usefulness for military purposes might not preclude the conclusion of a general arrangement contemplating a system of regulated trade under neutral governmental auspices and embracing a mode of giving requisite assurance that such 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.[1]

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.[2] While this prin-

tion 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." American White Book, European War, I, 41, 43. Great Britain on Aug. 20, 1915, placed cotton and cotton products on the list of absolute contraband. *Id.*, III, 90. With respect to the reasons for this action, see Mr. Lansing, Secy. of State, to Mr. W. H. Page, Oct. 21, 1915, *id.*, 25, 31; also memorandum from the British Embassy at Washington, April 24, 1916, *id.*, 64, 76.

[1] See suggestion of Prof. Moore, in "Contraband of War" (Philadelphia, 1912), p. 41.

See, also, Visit and Search, *supra*, § 728; The Doctrine of Continuous Voyage, Conclusions, *infra*, § 813.

[2] Historicus on International Law, 191, quoted in Moore, Dig., VII, 695.

ciple 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.[1] 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.[2]

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

[1] "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. W. H. Page, American Ambassador at London, Feb. 10, 1915, American White Book, European War, I, 44, 47. See also The Imina, 3 Ch. Rob. 167.

[2] See The Doctrine of Continuous Voyage, The Civil War Cases, *infra*, § 809.

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. Whether or not the doctrine was first then applied, 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.

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

[1] C. 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.

[2] 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.

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.[1] 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.[2]

[1] 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.

[2] 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

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*." [1] 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.[2] Cases arising in the Civil War gave opportunity for a fresh judicial utilization 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.

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.

[1] 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 transshipped 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.

[2] The Twende Brodre, 4 Ch. Rob. 33, cited by L. H. Woolsey in *Am. J.*, IV, 830; also The William, 5 Ch. Rob. 385.

See, also, Mr. Justice Story in The Commercen, 1 Wheat. 382, 388, 389.

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.

Such supplies originating in England, were carried on English ships to neutral ports in the West Indies, where they were transshipped and taken by other vessels to their destination.[1] This traffic attained large dimensions. In order to thwart it, 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 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

[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 transshipped 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., VIII, 698, *citing* Moore, Arbitrations, I, 580–581.

[2] Instructions of Mr. Welles, Secy. of the Navy, to U. S. cruisers, Aug. 18, 1862, American White Book, European War, III, 38.

[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."

sought to be concealed, to transport absolute contraband on one vessel from England to belligerent territory. The decision was not 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.

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.[1] 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 no discussion as to the nature of the cargo, which appeared to be owned by the owner of the vessel.[2] No claim was put in by him, 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.[3]

The *Stephen Hart* [4] was a vessel captured January 29, 1862, about 25 miles from Key West, and about 82 miles from Point de Yeacos, Cuba.[5] 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

[1] The Pearl, 19 Fed. Cases, 54; 5 Wall. 574.

[2] 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.

[3] 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.

[4] The Stephen Hart, Blatchf. Prize Cases, 387.

[5] The Hart, 3 Wall. 559, Moore, Dig., VII, 704.

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.[1] 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.[2] The vessel and cargo were condemned 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." [3]

[1] "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.

[2] Blatchf. Prize Cases, 432, 433.

The Court also said (Betts, J.): "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.

[3] 3 Wall. 559, 560.

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.[1] 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.[2] 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

[1] The Bermuda, 3 Wall. 514.

[2] 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.

bag which he understood contained letters, "*and which he was instructed to destroy in case of capture.*" [1]

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.[2] 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.[3] While the Court was satisfied that the original destination of the *Bermuda* was a blockaded port or an intermediate port with intent to send

[1] "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.

[2] 3 Wall. 557, 558. For the contentions of the claimants, *id.*, 529–542.

[3] *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.

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.[1]

In the case of the *Peterhoff* a different situation arose.[2] 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 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,[3] 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,

[1] "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.

[2] 5 Wall. 28, Moore, Dig., VII, 715.

[3] 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.

except in contraband, was entirely free." [1] 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.[2] 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 inapplicability at the time of the Civil War of the doctrine of continuous voyage to conditional contraband.[3]

The most celebrated of the Civil War cases was that of the *Springbok*.[4] 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.*" [5] She sailed from London December 8, 1862, and was

[1] 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 or our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence." *Id.*, 57.

[2] 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.

[3] The brief and unimportant cases of The Science, 5 Wall. 178, and The Volant, 5 Wall. 179, may be also noted.

[4] 5 Wall. 1, Moore, Dig., VII, 719. For the decision of the district Court, see Blatchf. Prize Cases, 349.

[5] 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

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.[1] 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 in war, and therefore contraband within the constructions of the American and British prize courts."[2] From the special fitness of certain articles for use in the Confederate

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.

[1] "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.

[2] "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.

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." [1] 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.[2]

§ 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.[3] In no one of these cases was the appli-

[1] 5 Wall. 27, 28.

[2] See, in this connection, S. E. Baldwin, in *Am. J.*, IX, 793, 798; also C. B. Elliott, *id.*, I, 61, 104.

[3] 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

cation 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.[1] Apart from the merits of the decision, the case doubtless served to illustrate the danger of injustice to innocent persons involved in no

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 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. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 33.

[1] 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. W. H. Page, American Ambassador at London, July 23, 1915, and communicated the following day by telegram to the Secretary of State, American White Book, European War, II, 179, 180. 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.

unlawful transaction through inferences derived from surmise or conjecture.[1] 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 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 The World War.[2]

(3)

§ 811. Discussions with Great Britain during The World War.

In December, 1914, the United States complained of British interference with American vessels and cargoes ostensibly bound for neutral European States.[3] It was declared that commerce be-

[1] 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 for 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.

[2] S. E. Baldwin, in *Am. J.*, IX, 793, 800, 801.

[3] Mr. Bryan, Secy. of State, to Mr. W. H. Page, American Ambassador at London, telegram Dec. 26, 1914, American White Book, European War, I, 39.

PRACTICE BETWEEN THE CIVIL WAR AND THE WORLD WAR. — The doctrine of continuous voyage was the subject of international controversy and of judicial scrutiny on various occasions prior to The World War. 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.*,

tween 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 foodstuffs 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.[1] Many of the great industries of the United States

XXIX, 49, 55; G. Diena, "*Le Jugement du Conseil des prises d'Italie dans l'Affaires du 'Doelwijk'*", *Clunet*, XXIV, 268.

With respect 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.

[1] 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 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

were suffering, it 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." [1] 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." [2] 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.

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." American White Book, European War, I, 40.

[1] Sir Edward Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Jan. 7, 1915, American White Book, European War, I, 41.

[2] Same to Same, Feb. 10, 1915, *id.*, 44.

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 129,252 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.*, 51.

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 though at the time of capture they were en route for a neutral port from which they were intended subsequently to continue their journey."[1] 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.[2] 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.[3]

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.[4] 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

[1] 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." American White Book, European War, I, 47.

[2] See Visit and Search, *supra*, §§ 727–728.

[3] American White Book, European War, I, 13, 14.

[4] See communication of Feb. 10, 1915, American White Book, European War, I, 44, 50.

See, also, Controversies Respecting Certain Articles, Foodstuffs, *supra*, §§ 803–804.

doctrine of continuous voyage exceeded the limits of belligerent action laid down in the Declaration of London. It found, moreover, but slender 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 never asserted a belligerent claim resembling that expressed in the order in council of October 29, 1914, and the Supreme Court never had occasion to express approval of so broad a pretension.

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.[1] Thus the question 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.[2] 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 reëxportation 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 ac-

[1] Mr. Lansing, Secy. of State, to Mr. W. H. Page, Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25.

[2] 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; it was contended that there could be no legal seizure of the cargo or legal proceedings of a prize court following it, if a proper examination which warranted the taking of the goods was not brought to light by a proper examination of the *Fordney* at the time it was seized. It was declared that evidence of an illegal destination which was discovered, according to statements of the British Government, about half a year after the seizure occurred, could not justify the seizure of the ship. See correspondence in American White Book, European War, III, 117–128, and especially telegram of Mr. Lansing, to Mr. W. H. Page, April 13, 1916, *id.*, 127.

cepted as laying down a just or legal rule of evidence." "To such a rule of legal presumption", he said, "this Government cannot 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.[1] He denied, moreover, the right of a belligerent to seize goods listed as conditional contraband destined to an enemy country through a neutral country.[2]

§ 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.[3] The *Kim*, a Norwegian ship, and three other Scandinavian vessels[4] 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

[1] 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, American White Book, European War, III, 25, 29.

[2] 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.*, 30.

[3] The *Kim* [1915], P. 215, *Am. J.*, IX, 979, Evans' Leading Cases, 410, 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, American White Book, European War, III, 22.

[4] The other vessels were the *Alfred Nobel*, the *Björnsterjne Björnson* and the *Fridland*.

large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs; 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.[1] 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.[2] Denmark, with its small 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.[3] Of the several claimants,

[1] There was an exception in the case of one cargo of rubber, which was seized as absolute contraband.

[2] 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 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.

[3] "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

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.[1] 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.[2] All of the foodstuffs were suitable for the use of troops in the field; and certain consignments

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.

[1] 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 America via Copenhagen to Stettin, if the bill of lading bears the following inscription: 'Party to be notified, Order Pay & Co.", so that you stand *quasi* as consignee." *Id.*, 984 and 987.

[2] 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 90 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.

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.[1] 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."[2]

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,[3] and stated that 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."[4]

[1] 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.

[2] *Id.*, 986.

[3] 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.

[4] *Am. J.*, IX, 996.

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.[1]

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.[2] The doctrine of continuous voyage appears thus to have been given an extended application in the case of the *Kim*.[3]

See also The Louisiana and Others, 5 Lloyd's Prize Cases, 230; The San José, 33 Times L. R. 12; The Balto, *id.*, 244.

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' 7th. ed. of Hall, *citing* the above cases, 731, note 1.

[1] 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, *affirming* that of Sir Samuel Evans in 32 Times L. R. 619.

[2] In Higgins' 7 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.

[3] 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 transshipped 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." American White Book, European War, II, 59. 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.

(4)

§ 813. Conclusions.

The problem in 1914 and 1915, like that arising from the Civil War cases, was due to the difficulty of distinguishing on just grounds between lawful and unlawful transactions. In The World War that problem was further complicated by the application of the doctrine of continuous voyage to articles acknowledged to be conditional contraband.

It should be borne in mind that the reason in justification for the classification differentiating conditional from absolute contraband, has 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, are in fact destined for a hostile use by a belligerent.[1] It is thus oftentimes exceedingly difficult to obtain the requisite proof that goods of such a kind and consigned to a neutral port are to be forwarded to a place where they will be used for what may be fairly deemed a military end. It is the possibility of their use in the neutral territory either through local consumption, or in its general export trade (other than with a belligerent state) which weakens the value of inferences of hostile employment. These may 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 much reason, therefore, either for the adoption of a rule which, without changing or opposing an established practice, forbade the application of the doctrine of continuous voyage to conditional contraband,[3] or for the abandonment of the principle

[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, 686; see, also, Same to Same, Jan. 13, 1905, For. Rel. 1905, 744.

[2] 5 Wall. 28, 58.

[3] 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 bind-

of conditional contraband altogether. 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.[1]

It ought now to be clear that in view of present conditions of both war and commerce, a belligerent should enjoy the right to intercept and condemn all articles capable of assisting the enemy even though consigned to neutral territory, if shown to be ultimately destined by land or sea to the domain of the enemy, and that irrespective of the final destination of ships which bear them on their way towards an intervening port. The reasonableness of this belligerent claim is believed to justify the sweeping aside of various presumptions which have not been conducive to clearness of thought or regularity of practice, and to establish in lieu thereof a simple rule making the right of condemnation depend merely upon proof that the ultimate destination of the cargo (regarded as contraband) is a place under belligerent control.[2]

ing 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.

[1] See memorandum from the British Foreign Office, Apr. 13, 1916, American White Book, European War, III, 109. See, also, The Maritime Rights Order in Council, of July 7, 1916, and memorandum explanatory of it, *id.*, IV, 69–71; also decree of same date by the French Government and memorandum, *id.*, 73–75.

[2] According to the Naval Instructions Governing Maritime Warfare of June 30, 1917, "all kinds of fuel, food, foodstuffs, feed, forage, and clothing and articles and materials used in their manufacture", are liable to capture as contraband if actually destined for the use of the enemy Government or its armed forces. These articles are not described as conditional contraband. It is said to be immaterial whether the carriage thereof be direct in the original vessel, or involve transshipment or transport overland. (See No. 70.) With respect to these articles 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 who, by common knowledge, supplies articles of the kind in question to the enemy authorities." See 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,

The solution of the practical problems associated with the doctrine of continuous voyage, and still confronting maritime States, requires more, however, than the abandonment of the theory of conditional contraband. There is needed, on the one hand, full acknowledgment of the fact that as war is now waged, a belligerent may derive substantial and possibly decisive aid from cargoes shipped to ports of neighboring neutral territories with which easy commercial intercourse may be had by land or sea, and on the other, that a neutral is not unreasonable in asserting in behalf of the inhabitants of its domain, the right to export articles of whatsoever kind to a neutral country for use or consumption therein. Both the right of the belligerent to intercept traffic designed to aid its enemy, and that of neutral shippers to engage in innocent 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. The extent and gravity of the single interest which both possess, warrant the conclusion that there should be united governmental action combining to establish the actual nature of the contents of cargoes destined to neutral territory, and to afford complete assurance that there will be no reëxportation to places under belligerent control.

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

but in any case going to territory belonging to or occupied by the enemy, or to neutral territory in the vicinity thereof. See No. 72.

legitimate trade with neutral States, because belligerent powers would suffer no detriment from that which remained unmolested.

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 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

[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

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.[1] 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.[2]

§ 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

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.)

[1] See, for example, President Wilson's neutrality proclamation of May 24, 1915, American White Book, European War, II, 15, 17.

[2] "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.

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

[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, American White Book, European War, II, 185–189; *id.*, III, 311–318.

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.

upon a belligerent by any process, such as the concealment 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.[1]

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.[2] In such event, the vessel may be fairly regarded as identified in point of interest with the unneutral venture.[3] Its condemnation is not unreasonable.[4]

In case the vessel belongs to owners of the contraband goods there is evidence of a singleness of purpose and effort which has been deemed sufficient to justify the same treatment of both. Hence both the vessel and the goods are condemned.[5]

[1] 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.

[2] 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.

[3] 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."

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 to carrying contraband from Venezuela to Amsterdam, the cargo being ultimately destined to Hamburg.

See, also, The Lorenzo, 1 B. & C. P. C. 226.

[4] At the present day, more than in the past, the owner of the carrier must be taken to know, as Sir Samuel Evans pointed out in The Hakan, "either directly or through the master, how his vessel is laden or to what use she is put." That circumstance justifies the conclusion that the owner, save when the amount of contraband constitutes but an insignificant portion of the cargo, has full knowledge of the nature of what is being carried and of the purposes of the voyage.

[5] 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. See judgment of the Judicial Committee in The Hakan, 5 Lloyd's Prize Cases, 188, 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

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.[1] 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.[2] 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.[3] 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.[4]

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

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.

[1] Art. XLI, Charles' Treaties, 276.

[2] 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.

[3] Art. XLIII.

[4] 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.

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 belligerent, 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." [1]

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.[2]

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.[3] 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.[4]

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.[5] According to the Declaration of London, the captor is at liberty to destroy the contraband delivered to him under these conditions.[6]

[1] 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, 2 B. & C. P. C. 186, 199–201.

[2] Art. XXXVIII, Charles' Treaties, 275.

[3] The Bermuda, 3 Wall. 514.

[4] 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.

[5] Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 86.

[6] 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.

[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.

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.[1]

Controversy has arisen with respect to the class of individuals whom a belligerent may reasonably endeavor to intercept. There is disagreement, also, as to 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 commonly 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

[1] 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'?"

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 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

[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.

[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

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.[1] 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.[2]

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

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.

[1] Earl Russell, British Foreign Secy., to Lord Lyons, British Minister at Washington, Jan. 10, 1862, U. S. Dip. Cor., 1862, I, 245.

[2] 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 Orozembo, 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 American White Book, European War, II, 133, 134.

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 fundamental 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.[1]

(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. According to the Naval Instructions Governing Maritime Warfare, of June 30, 1917, the enemy persons thus to be dealt with are confined to those actually embodied in the military or naval service of a belligerent.[2] "Reservists or other persons subject to military duty but not formally incorporated in military service are not included."[3] The wisdom of this special restriction, 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.[4] Both Great Britain and France in the course

[1] "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. W. H. Page, American Ambassador at London, March 16, 1916, *Am. J.*, X, Special Supp., Oct., 1916, 428, 432.

[2] No. 91; also Nos. 36 and 37.
See, also, Art. XLVII of the Declaration of London, Charles' Treaties, 277.

[3] No. 90.

[4] For the text of the report, see Charles' Treaties, 282, 306.

of The World War declined to admit that they were bound by so precise a description of enemy nationals whom it might be lawful to arrest. 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 be fairly deemed to be embodied in a military force for purposes of interception.[1] 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.[2]

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 British Secretary maintained that the removal by the British cruiser *Laurentic* from the American steamer *China*, on the high seas and

[1] 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, *Am. J.*, X, Special Supp., Oct., 1916, 428.

[2] 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 *Conde*, 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 American White Book, European War, II, 133–136, especially telegram of Mr. Bryan, Secy. of State, to Mr. Sharp, American Ambassador at Paris, March 2, 1915, *id.*, 134.

Declared Mr. Webster, Secy. of State, in a communication to Lord Ashburton, Aug. 8, 1842: "In every regularly documented American merchant vessel 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, 999.

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.[1] 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.[2]

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.[3] 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

[1] Sir Edward Grey, British For. Secy., to Mr. W. H. Page, American Ambassador at London, March 16, 1916, *Am. J.*, X, Special Supp., Oct., 1916, 428. See, also, complaint by Mr. Lansing, Secy. of State, in his telegram to Mr. Page, Feb. 23, 1916, *id.*, 427.

[2] 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." *Am. J.*, X, Special Supp., Oct., 1916.

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 (File No. 341.622a/84). The persons held were released May 20, 1916.

[3] No. 36, of the Naval Regulations Governing Maritime Warfare of June 30, 1917, appears to acknowledge that a hostile mission as well as a hostile destination may justify interception. *Compare* Mr. Bryan, Secretary of State, to Mr. Sharp, American Ambassador at Paris, March 2, 1915, American White Book, European War, II, 134.

Art. XLV of the Declaration of London makes no reference to destination. Charles' Treaties, 276.

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 The World War has 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 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.

(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 may be observed, however, that the Naval Instructions Governing Maritime Warfare, of June 30, 1917, do not seem to contemplate the removal of enemy persons from neutral ships and a release of the latter, except when such procedure is required by treaty.[2]

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.[3] Such procedure is not as yet, however, deemed requisite.

c

§ 821. Enemy Despatches.

It is believed that a belligerent possesses the right to intercept enemy dispatches being carried by a neutral ship, and purporting to relate to the conduct of the war. Those belonging to or possessed by enemy persons who may themselves be reasonably intercepted,

[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. W. H. Page, American Ambassador at London, March 16, 1916, *Am. J.*, X, Special Supp., Oct., 1916, 428.

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.

[2] No. 89; also Nos. 36 and 37.

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.

[3] 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.

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 take such steps, 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.[2]

[1] See Visit and Search, Mail Steamers and Mail, *supra*, §§ 729–730.

[2] 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

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.[1] 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.[2]

§ 823. The Same.

The conditions under which the Naval Instructions Governing Maritime Warfare declare a neutral ship to be liable to condemnation were doubtless believed 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 were condemned.

The perpetration of any fraud by concealment or otherwise by persons controlling the ship should obviously justify its condemnation.[3]

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.

[1] No. 37. See, also, Declaration of London, Art. XLV (2), Charles' Treaties, 277.

[2] Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 38.

[3] 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

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.[1] The right of condemnation might well be restricted, however, where the knowledge of the master was confined to the contents of despatches accompanying a 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 illegal. 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.

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.

The Atalanta, 6 Ch. Rob. 440, Moore, Dig., VII, 760.

[1] 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.

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.[1] 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.

[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; Bonfils-Fauchille, 7 ed., §§ 1608–1659, with bibliography; Oppenheim, 2 ed., II, §§ 368–390, with bibliography; Hall, Higgins' 7 ed., 760–789; 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.

Belligerent powers constantly yielded, however, to both forms of excess. Recourse was had to so-called paper 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, prostituted the right of capture and wrought havoc with legitimate neutral commerce. The United States was, in early days of the Republic, a constant victim.[1]

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."[2] With the advent of the twentieth century, and, notably, with the outbreak of The World War, 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.[3] Thus, 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.

The law of blockade had its origin in the theory that when a place was besieged military operations ought not to be interfered with by certain acts, such as the sending in by neutrals of grain or provisions or men. The belligerent claim was 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

[1] 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.

[2] J. B. Moore, "Contraband of War," Philadelphia, 1912, 26.

[3] 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. W. H. Page, American Ambassador at London, telegram, March 30, 1915, American White Book, European War, I, 69, 70.

it was not actually besieged, although a siege was contemplated.[1] 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."[2] 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,

[1] 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.

[2] 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."

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." [1] The United States concluded numerous treaties in harmony with these views. Thus it was 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." [2]

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.[3] The United States acted upon such a theory when itself a belligerent. The blockade of the ports of the Confederacy during the Civil War,[4] and that of a portion of the coast of Cuba in 1898, afforded instances.[5]

§ 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.[6] 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.[7] There does not appear, therefore, to have been any general acquiescence in the claim of a bellig-

[1] 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.

[2] 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.

[3] 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.

[4] The Admiral, 3 Wall. 603.

[5] Proclamation of President McKinley, April 22, 1898, For. Rel. 1898, 769; also proclamation of President McKinley, June 27, 1898, *id.*, 773.

[6] Bonfils-Fauchille, 7 ed., § 1606; Oppenheim, 2 ed., II, § 368; Stockton, Outlines, § 187; Halleck, Baker's 3 ed., II, 184, § 3, quoted in Moore, Dig., VII, 780.

[7] 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.

erent as an incident of the right of blockade, to cut off access by sea to hostile territory by means of submarine vessels or other instrumentalities simply purporting to render dangerous the right of navigation of the high seas within areas or zones adjacent thereto. Thus, the German admiralty proclamation of February 4, 1915, declaring the waters surrounding Great Britain and Ireland to be a war zone within which enemy merchant vessels would be destroyed was in no sense a blockade.[1] Nor did the maritime danger zones maintained by Great Britain over certain waters of the high seas, from time to time in the course of The World War, more closely resemble one.[2] Therefore examination of such belligerent activities is made elsewhere.[3]

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.

2

CERTAIN CONDITIONS OF VALIDITY

a

§ 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.[4] 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."[5] A blockade is, therefore, in a strict sense, according to the

[1] American White Book, European War, I, 52. [2] *Id.*, IV, 21–50.
[3] See Belligerent Measures and Instrumentalities, War Zones, *supra*, §§ 720–721; Attack, Submarine Craft, *supra*, § 747.
[4] 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.
[5] 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

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.[1]

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 Miramon.[2] In 1891, in response to a notification that the Chilean ports of Iquique and Valparaiso would be blockaded by insurgent forces, the diplomatic representatives of the United States, France, Germany and Great Britain agreed that the blockade would be illegal.[3] 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." [4] 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 enforce-

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.

[1] Mr. Hay, Secy. of State, to the Secy. of the Navy, Nov. 15, 1902, Naval War College, Int. Law Situations, 1902, 79–80.

[2] Senate Ex. Doc. No. 29, vol. 9, p. 3, 35 Cong., 1 Sess., quoted in Naval War College Int. Law Situations, 1912, 32.

[3] 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.

[4] 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."

ment of which might involve the extension of the insurgent operations to the high seas.[1] 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.[2] Secretary Hay did not intimate that unrecognized insurgents would have the right to bar access generally of foreign vessels even within the territorial limits.[3]

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,

[1] Naval War College, Int. Law Situations, 1901, 123.

[2] 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.

[3] 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.

the United States would not be disposed to interfere to prevent its enforcement.[1] 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.[2] 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.[3]

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." [4]

It is improbable that the United States would at the present time be disposed to accord full recognition to a blockade instituted by unrecognized insurgents, although barring access effectively to a particular coast, and confining their operations to territorial waters.

[1] 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.

[2] Mr. Wilson, Acting Secy. of State, to Mr. Pierce, American Minister to Nicaragua, telegram, July 22, 1910, For. Rel. 1910, 756–757.

[3] In this communication attention was called to a letter of 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.

[4] Naval War College, Int. Law Situations, 1912, 9–10.

In case the circumstances justified acknowledgment of the fact of insurgency, as distinguished from the recognition of the insurgents as belligerents, a reasonable attempt by the blockading fleet to prevent war material from reaching the enemy, and incidentally to bar access to a blockaded port to a vessel engaged in transporting it, would doubtless 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.[1]

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.[2] This position is believed to be sound.

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."[3] This principle, which found expression also in the Declaration of London,[4] has always been maintained by the United States,[5] and was said in 1915 to have met with universal recognition.[6]

"The effectiveness of a blockade is manifestly a question of fact."[7]

[1] The Prize Cases, 2 Black, 635, 671; also statement in headnote at p. 636.

[2] 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 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.

[3] *Nouv. Rec. Gén.*, XV, 792.

[4] Art. II, Charles' Treaties, 269.

[5] "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.

[6] Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 31.

See, also, Report of Mr. Renault in behalf of the Drafting Committee of the Declaration of London. Charles' Treaties, 282, 286.

[7] Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 31.

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.[1] According to the United States Naval Instructions Governing Maritime Warfare, of June 30, 1917:

> 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.[2]

It may be doubted whether any statement concerning effectiveness should purport to specify the kind and number of instrumentalities to be employed in maintaining a blockade, or to determine the exact radius of action or zone of operations within which their use should be confined.[3]

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

[1] 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.

[2] No. 27.

[3] 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.

the coast and returning to port; and it may be wholly incapable of checking the egress and ingress of submarine vessels generally.[1] Nevertheless, it may be doubted whether this circumstance should on principle invalidate a blockade which otherwise fulfills its essential functions. It is believed, therefore, that any restatement of the test of effectiveness should be such as to recognize the legal value of the potentialities of a blockading fleet in spite of certain weaknesses attributable to existing conditions of maritime warfare.

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.[2] Such is the position taken by the United States. It finds recognition also in the Declaration of London.[3]

(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

[1] "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.

[2] The language of the text is that contained in U. S. Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 26.

[3] Arts. I and V, Charles' Treaties, 269 and 270, respectively.

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 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

[1] Communication from Sir Cecil Spring-Rice, British Ambassador at Washington, March 1, 1915, American White Book, European War, I, 61.

[2] Mr. W. H. Page, American Ambassador at London, to Mr. Bryan, Secy. of State, No. 1798, March 15, 1915, containing text of the order in council, American White Book, European War, I, 65. 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.*, 64. 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, American White Book, European War, I, 67.

[4] Mr. Bryan, to Mr. Page, March 30, 1915, American White Book, European War, I, 69.

less to detention, requisition, or confiscation."[1] 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 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."[2]

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

[1] 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." American White Book, European War, I, 69–70.

[2] 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.*, 70.

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.[1] 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.[2] Sir Edward Grey maintained that the only question which could arise in regard to the British measures was whether 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 prin-

[1] Mr. W. H. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, telegram, July 24, 1915, American White Book, European War, II, 179. The British note was dated July 23, 1915.

[2] 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.*

ciples.[1] 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.[2]

The elaborate reply of Secretary Lansing of October 21, 1915, dealt with the several forms of American complaint against British restraints on neutral commerce.[3] 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,[4] 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 German coasts were open to trade with Scandinavian countries, and German naval vessels cruised both in the North Sea and the Baltic, seizing

[1] 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." The distinguished 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.

[2] 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."

[3] Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, *id.*, III, 25.

[4] 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.*, 30.

and bringing into German ports neutral ships bound for Scandinavian and Danish ports.[1] These conditions were said, moreover, to indicate non-compliance with an essential principle of universal acceptation "that a blockade must apply impartially to the ships of all nations."[2]

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."[3] 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

[1] 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." American White Book, European War, III, 31.

[2] 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 reëxports 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.*, 32.

See communication of Sir Edward Grey, British For. Secy., to Mr. W. H. Page, American Ambassador at London, Aug. 13, 1915, *id.*, 17.

[3] American White Book, European War, III, 25, 32. 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.'"

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.[1] He protested against it as "ineffective, illegal, and 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."[2]

§ 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.[3] 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

[1] 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 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.*, 34. Concerning the decision in the *Springbok* case, see The Doctrine of Continuous Voyage, The Civil War Cases, *supra*, §§ 809–810.

[2] *Id.*, 37. 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 complacence 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." American White Book, European War, III, 62, 63.

[3] *Id.*, III, 64.

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, 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.[1] "If," it was declared, "the doctrine of continuous voyage

[1] 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." American White Book, European War, III,75–76.

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?"[1] 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.[2]

§ 831. The Same.

The effectiveness of the blockade was strengthened by the operation of the retaliatory order in council of February 16, 1917, causing 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.[3] The declaration of war by the United States

[1] American White Book, European War, III, 76. 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.

[2] 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.

[3] American White Book, European War, IV, 94, 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 (1918), P. 182, 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. 348. 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

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.[1] 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.

(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 observed [2] 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.[3] Perhaps the most en-

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. The real difficulty is seen in the unreasonableness of the assertion by a belligerent of a right to determine for itself how far the equities of neutrals in matters of trade are to be justly subordinated to its own needs in opposition to commerce with its enemy. In that determination the belligerent must be actuated chiefly by its own interests rather than by a regard for the demands of justice. Moreover, its freedom to invoke at will the retaliatory plea tends to encourage the belligerent to endeavor to modify the law according to its own requirements as they develop in the course of the conflict. Nor does the problem concerning neutral shipping seem to warrant the application of, or reliance upon, precedents drawn from situations justifying the use of so-called retaliatory devices whereby a belligerent, on grounds of self-defense, undertakes to save itself from the lawless operations of enemy submarines as by means of a mined area across a particular sea. See *supra*, §§ 716–718. The difference is due primarily to the ease with which in the latter case the detriment suffered by the neutral may be weighed against that which the endangered belligerent would sustain should it abstain from the defensive measure, and the clearness with which it is seen that the scales of justice favor definitely the belligerent.

[1] See Prohibitions of Exports, § 624.

[2] The Doctrine of Continuous Voyage, The Civil War Cases, *supra*, § 809–810.

[3] See, however, The Circassian, 2 Wall. 135. The case seems to be 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 else-

lightening utterance to be found in any of those 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.[1]

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. 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 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 ap-

where, 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.

[1] 5 Wall. 28, 57

pears 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. 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 have not yielded so broad a right. 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 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 solution of the controversy as to the limits of the right of blockade, especially in relation to restrictions upon commerce with or through neutral territory, is believed to depend upon the solution also of the unsettled problems concerning contraband. If there should be general agreement as to the mode of determining the limits to be assigned to contraband and the circumstances justifying its capture, and if there should be acceptance of the principle that the doctrine of continuous voyage should be applied to all contraband articles shown to have an ultimate hostile destination, numerous grounds for belligerent interference with commerce bound for neutral ports would disappear. With just acknowledgment of the reasonableness of the assertion of such a belligerent claim with respect to contraband, there should be a proportional tendency to restrict the exercise of the right of blockade. In order, however, to protect legitimate neutral trade in non-contraband articles with neutral territory contiguous or in close proximity to that controlled by a belligerent and under blockade, there is needed a definite prohibition of measures either capable of operating as a blockade of neutral territory, or serving to enlarge the right of capture.

3

BREACH 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

[1] Art. VIII, Charles' Treaties, 270.

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.[1]

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 force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coast line under blockade as soon as possible.[2]

The purpose of the notification to neutral States, which it is now generally acknowledged to be the duty of the belligerent to give,[3] 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.[4] 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.

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 voy-

[1] 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 (*a*) and (*b*), 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.

[2] 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, 2 ed., II, § 376.

[3] 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.

Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 33.

[4] "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.

age, 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,[1] 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,[2] and in numerous Articles of other later conventions,[3] it was agreed that whereas it frequently 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

[1] Mr. Madison, Secy. of State, Report, Jan. 25, 1806, Am. State Pap., For. Rel. II, 728, Moore, Dig., VII, 822.

[2] 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.

[3] 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 *Haytian Republic.*

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.[1] 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.[2]

§ 834. The Same.

With the perfecting of existing means of facilitating the communication of intelligence by radio and otherwise, and of informing ships at sea of belligerent operations, old reasons for solicitude as

[1] 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.

[2] 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.

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 profess 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

[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, 86–87, and cases cited, especially The Neptunus, 2 Ch. Rob. 111; Oppenheim, 2 ed., II, § 384; W. E. Hall, Higgins' 7 ed., 763–765.

Concerning the continental view see Bonfils-Fauchille, 7 ed., §§ 1652–1654. 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

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 adjusted.[1] 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."[2] 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.[3] The foregoing provisions are in substance a reproduction of instructions issued by the Navy Department in 1898, during the war with Spain.[4]

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.

[1] See, for example, the provisions of Art. XXXIV of the Declaration of London, with respect to conditional contraband, Charles' Treaties, 275.

[2] 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.

[3] No. 30. With respect to notification by a blockading vessel it is said: "The boarding officer shall enter in the log and 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."

[4] The Instructions of 1898 contained the following provision which was

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 without violating justice, 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.

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 shape 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

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.

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 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 dele-

[1] 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. 492, 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.

gation 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." [1] 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.[2]

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 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." [3]

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.[4] The American delegation at the London Conference expressed

[1] *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 1168, J. B. Scott, Reports to Hague Conferences, 626.

[2] 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.

[3] Sir Edward Grey, British For. Secy., to Lord Desart, British plenipotentiary, Dec. 1, 1908, Misc. No. 4 (1909), Cd. 4554, p. 26.

[4] 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.

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.[1] 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."[2] Article XIX forbade a belligerent to invoke the doctrine of continuous voyage as a means of establishing a breach of blockade.[3]

§ 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.[4] Nor is it 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.[5] 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

[1] Statement of the American Delegation (Rear Admiral Stockton and Prof. Wilson), appended to their report to the Secretary of State, Charles' Treaties, 340.

[2] 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.

[3] 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." American White Book, European War, IV, 69, 70.

[4] The Circassian, 2 Wall. 135; The Galen, 37 Ct. Cl. 89.

[5] See, in this connection, The Admiral, 3 Wall. 603, Moore, Dig., VII, 829.

begins and terminates with her voyage. "If," it is said, "there is good evidence that she sailed with intent to evade the blockade, she is liable to capture from the moment she appears upon the high seas."[1] 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.[2] 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.[3] 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.[4] 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.[5] The entrance into a blockaded area on grounds of distress was regarded as excusable solely in case of uncontrollable necessity.[6]

The requirement that destination to a port under blockade alone justified seizure and condemnation of vessel and cargo was made clear.[7] 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.[8] 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 other

[1] No. 31.

[2] See cases collected in Moore, Dig., VII, 828–834.

[3] 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.

[4] 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.

[5] The Dashing Wave, 5 Wall. 170; but see, also, the situation in The Teresita, 5 Wall. 180.

[6] The Diana, 7 Wall. 354. See, also, in this connection, The Nuestra Señora de Regla, 17 Wall. 29.

[7] The Bermuda, 3 Wall. 514. See, also, The Adela, 6 Wall. 266.

[8] The Peterhoff, 5 Wall. 28.

grounds for decision.[1] Hence numerous *dicta* in relation to blockade running lack the significance frequently attached to them.[2]

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.

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." [3] 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.[4]

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." [5] Thus a vessel attempting to commit

[1] 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.

[2] But see The Circassian, 2 Wall. 135.

[3] 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.

[4] See Ameliorations, *infra*, §§ 838–841.

[5] 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 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.

that offense, or sailing with intent to commit it, is deemed to subject itself to capture without regard to the nature of the cargo.[1] 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.[2]

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.[3]

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.[4] Substantially the same provisions were embodied in Stockton's Naval War Code of 1900.[5] It was not deemed necessary, however, to incorporate them in the Naval Instructions Governing Maritime Warfare, of June 30, 1917.

If a vessel has succeeded in escaping from a blockaded port, lia-

[1] 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.

[2] Memorandum on Status of Armed Merchant Vessels, March 25, 1916, American White Book, European War, III, 188, 191.

Sir Edward Grey, British Foreign Secy., in announcing to Mr. W. H. 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. American White Book, European War, I, 65–66.

[3] 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.

[4] 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.

[5] Art. XLV, Naval War College, Int. Law Discussions, 1903, 113.

bility to capture continues, according to American opinion, until the completion of the voyage; "but with the termination of the voyage the offense ends." [1] 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.[2] 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.[3] 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." [4] 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.[5] At least it is not unreasonable to deny 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 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

[1] 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.

[2] Concerning the British practice, see J. A. Hall, Law of Naval Warfare, 91–92, and cases there cited, and especially in this connection, The General Hamilton, 6 Ch. Rob. 61.

[3] Art. XX, Charles' Treaties, 271.

[4] 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.

[5] 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.

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 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]

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.[4] That usage, which has always found the hearty support of American opinion,[5] has been said to have assumed the form of "a general rule that while a period is allowed — usually of 15 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." [6]

[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.

[4] Higgins' 7 ed., § 262.

[5] 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.

[6] 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.

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 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.[1] Stockton's Naval War Code of 1900 (subsequently withdrawn) regarded such an allowance as the normal one "unless otherwise specially ordered." [2] 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.[3]

Inasmuch as the issuance 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.[4] 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.

[1] 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."

[2] Art. XLIII, Naval War College, Int. Law Discussions, 1903, 113.

[3] No. 34.

[4] In Note 2, p. 776, of his 7th edition of Hall, Mr. 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.

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 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

[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 the diplomatic and consular agents of such country at the ports adverted to." Dip. Cor. 1861, 152, Moore, Dig., VII, 852.

[2] See circular, June 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.

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.[1]

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.[2]

The United States appears to take the position that a neutral diplomatic agent is normally entitled to leave a blockaded place.[3] 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 belief 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.[4]

[1] 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.

[2] No. 32. Also Art. XXXVIII, Stockton's Naval War Code of 1900, Naval War College, Int. Law Discussions, 1903, 112.

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.

[3] 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.

[4] "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. Nel-

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§ 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, and especially of a kind deemed 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

son, American Minister to Spain, to enter Cadiz in 1823, on account of the blockade of that port by a French naval force.

[1] The Franciska, 10 Moore, P. C. 56, cited by Mr. Lansing, Secy. of State, in a communication to Mr. W. H. 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.

[3] Mr. Fish, Secy. of State, to Mr. Johnston, U. S. Senator, Feb. 27, 1872, 92 MS. Dom. Let. 587, Moore, Dig., VII, 846.

conditions, allowed neutral steamers to enter blockaded ports for the purpose of landing passengers and mail,[1] forbidding, however, the landing or removal of cargo.[2] It has accorded special permission to vessels to enter and remove Americans and neutrals desirous of leaving.[3] 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.[4]

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.[5] Obviously, a foreign ship availing itself of a concession in relaxation of a blockade must be deemed to consent to the terms imposed.[6] 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.[7]

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§ 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 blockad-

[1] 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.

[2] 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. Pauncefote, British Ambassador, No. 1016, May 16, 1898, MS. Notes to Brit. Leg., XXIV, 191, Moore, Dig., VII, 847.

[3] 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.

[4] 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 *Folsjo* and *Ulo*.

[5] The Sea Lion, 5 Wall. 630, Moore, Dig., VII, 845; also The Ouachita Cotton, 6 Wall. 521, 531.

[6] United States *v.* Diekelman, 92 U. S. 520, Moore, Dig., VII, 845.

[7] 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.

ing 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 continuity and effectiveness of the blockade operates as a suspension of it, necessitating fresh notification to neutral States in case reestablishment is attempted.[4]

[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.

[2] 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' 7 ed., 773.

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 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

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.[1]

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.[2]

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§ 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.[3] The United States did not hesitate to act on this principle in the course of the Civil War,[4] or in that of the War with Spain in 1898,[5] or as a belligerent in The

declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is reëstablished after having been raised." Charles' Treaties, 270.

[1] 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.

[2] Art. XIII, Charles' Treaties, 271.

[3] "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.

[4] 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.

[5] "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

World War.[1] The Department 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.[2] 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.[3] It is not likely, however, that an enlightened 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 territorial limits and in proximity thereto, and which are normally open to navigation generally.[4]

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.

[1] See, for example, executive order of April 5, 1917 (the day before the United States declared 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.

[2] Mr. Bayard, Secy. of State, to Mr. Denby, Minister to China, No. 90, July 28, 1886, For. Rel. 1886, 95, Moore, Dig., VII, 857.

[3] It is not understood that Mr. Seward, in his correspondence with Great Britain and France in 1862, admitted such an obligation. 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.

[4] See Submarine Automatic Contact Mines. Indication and Removal upon Termination of Hostilities, *supra*, § 719.

TITLE K

NEUTRALITY

1

THE DUTIES OF A NEUTRAL STATE

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§ 844. Nature of the Obligation.

At the time when the United States declared its independence the duties 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 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

[1] Concerning the growth of the law affecting belligerent and neutral States to the end of the eighteenth century, see Hall, Higgins' 7 ed., 208–213; *id.*, 19–25; C. G. Fenwick, Neutrality Laws of the United States, 1–14; Oppenheim, 2 ed., II, 347–368.

See David J. Hill, The Conception and Realization of Neutrality, Boston, 1902.

[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 convenience 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' 7 ed., 626. 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.

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. 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.[1] 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 belief 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.[2]

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.

[1] 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.

[2] 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 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,

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.[1]

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.[2] 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

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.

[1] 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.

[2] 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.

indicated the nature of belligerent abuses and of neutral supineness.[1]

§ 845. The Same.

From the duty not to permit the commissioning of a 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.[2] Respect for this obligation was probably not attributable to a belief 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

[1] 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.

[2] Art. VIII of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's Treaties, II, 2359.

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.[1]

§ 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 nature of this obligation varied according to circumstances. If, for example, the belligerent established stores of supplies under its exclusive 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 by 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

[1] "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.

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]

§ 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

[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, American White Book, European War, II, 194.

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.

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. Upon the American student there presses the special inquiry whether in view of its conspicuous part in securing a widening recognition of duties born of that theory, the United States cannot make a larger contribution to international justice by advocating anew full respect for all that the principle of neutrality appears to entail, rather than by acquiescing in a plan contemplating a degree of participation in future wars between foreign states.

b

§ 848. Governmental Abstention from Participation. Miscellaneous Activities.

The government of a neutral State is obliged to abstain from all participation in the conflict.[2] Participation is none the less censurable because impartial. The duty of abstention becomes applicable to all persons in the public service of the neutral, whether in the civil or military branches thereof. Thus members of its diplomatic corps must refrain from furnishing aid.[3] Members of its navy must not pass and make known resolutions of sympathy for the cause of a particular belligerent.[4]

The extent of the duty of abstention is broad. Every possible field of activity is covered. Thus the sale by a neutral govern-

[1] See The Law of Neutrality in Relation to World Organization, *infra*, § 889.

[2] Declares Oppenheim: "The duty of impartiality today comprises abstention from any active or passive coöperation with belligerents." 2 ed., II, 382.

[3] 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.

[4] 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.

ment to a belligerent of any form of war material[1] or of public ships[2] may be said to be forbidden. 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.[3] 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.[4]

The government of a neutral State is likewise obliged to abstain from placing its various agencies at the disposal of a belligerent in such a way as to aid it directly or indirectly in the prosecution of the war. Such use of public vehicles of transportation, by land[5]

[1] 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 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, 2 ed., II, 426–430.

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.

[2] 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.

[3] 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.

[4] "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.

[5] 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

or sea,[1] or governmental industrial plants,[2] would appear to be unlawful. 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.[3]

According to the Hague Convention of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land, a neutral government 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.[4] A neutral government is, however, acknowledged to possess the right to effect restriction or prohibition.[5] 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.

Shortly after the outbreak of The World War, 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."[6] 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-

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.

[1] 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.

[2] 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.

[3] 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.

[4] Art. VIII, Malloy's Treaties, II, 2298. [5] Art. IX, *id.*

[6] American White Book, European War, II, 71.

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." [1]

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.[2] 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.[3]

The duty of a neutral not to participate in hostilities between belligerents, and, therefore, not to attempt to thwart military or naval operations outside of its own domain must be apparent. It is not believed, however, that this duty is necessarily violated when the commander of a neutral vessel of war endeavors to rescue from drowning the occupants or former occupants of a belligerent vessel that has been subjected to attack, and makes no attempt in so doing to remove them from the control of a captor. Such a service is not to be deemed a military benefit to the State to which such vessel belongs, so long as the neutral makes appropriate effort to deprive that belligerent of the services of the persons rescued, throughout the remainder of the war.[4]

[1] American White Book, European War, II, 73.

[2] Art. XI, Malloy's Treaties, II, 2360.

[3] 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, 2 ed., II, 432–433.

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.

[4] Concerning the action of the British yacht *Deerhound* in picking up Capt. Semmes and 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.

In consequence of the duty to abstain from participation, a neutral government finds itself obliged also to refrain scrupulously from furthering the efforts of its nationals to commit unneutral acts, commercial or otherwise, which such government may be under no legal duty to endeavor to prevent, and yet which the belligerent against which they are undertaken may vigorously and lawfully strive to repress.[1]

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

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.

[1] "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.

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 committed 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

[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.

law of nations. Hence the duty of prevention has wide scope.[1] 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.[2] 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.[3]

[1] 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.

[2] *Cf.* Sections 1 and 2 of Draft of proposed amended neutrality act for the United States, C. G. Fenwick, Neutrality Laws of the United States, 160–162.

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.

[3] § 9, 35 Stat. 1089, Rev. Stat. § 5281; also § 10, 35 Stat. 1089, Rev. Stat. § 5282. These provisions prohibit the following acts to be done, under penalty, 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:

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.[1] 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.[2] It is the duty as

"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, U. S. Comp. Stat., 1918 ed., § 10174.

See, also, the text of § 2, of the Neutrality Act of June 5, 1794, 1 Stat. 381.

[1] Rev. Stat. § 5291; § 18, 35 Stat. 1091. 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, also, President Wilson, neutrality proclamation, May 24, 1915, American White Book, European War, II, 15.

[2] 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.

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, U. S. Comp. Stat. 1918 ed. § 10179.

well as the right of a neutral to use the means at its 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.[1] 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.[2]

§ 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.[3] 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

[1] Adverting to the circumstance that this provision was a proviso to Section 2 of the original Act of 1794, Mr. 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.

[2] 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.

[3] In such case the belligerent is at least not guilty of originating or organizing a military force on neutral soil.

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.[1] It is not understood, however, that the United States, while remaining a neutral in The World War, 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.[2]

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.[3] 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

[1] Even if it be admitted that a belligerent may on principle without impropriety call 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.

[2] 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, American White Book, European War, II, 58, 62.

[3] The Neutrality Act of the United States does not render such conduct unlawful. See United States *v.* Hertz, 26 Fed. Cases, No. 15,357, C. G. Fenwick, Neutrality Laws, 62.

See the Departure of Unorganized Individuals Contemplating Belligerent Service, *infra*, § 870.

the corresponding duty of prevention.[1] 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.[2] 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.[3]

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 objections, 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.[4] Again, the neutral obligation

[1] Mr. Jefferson, Secy. of State, to Mr. Genet, French Minister, June 5, 1793, Am. State Pap., For. Rel. I, 150, Moore, Dig., VII, 886.

[2] 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.

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.

[3] 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.

[4] 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

becomes apparent when the belligerent, undertaking to exercise rights of jurisdiction, sets up prize courts within the neutral domain,[1] or when it attempts to sell prizes[2] or initiate hostile operations therein.[3]

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."[4] This language is wisely incorporated in the United States Naval Instructions of 1917.[5] Doubtless no legal duty is 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

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.

[1] 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.

[2] 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.

[3] "Any act of hostility, including capture and the exercise 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. See *infra*, § 887.

[4] Art. X, Malloy's Treaties, II, 2360. [5] No. 2, p. 11.

and inquisitorial methods" which had compelled the Government to make complaint.[1]

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 The World War, 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.[2] 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.

(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

[1] 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, American White Book, European War, III, 139. See, also, correspondence, *id.*, 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.

[2] See instances set forth in Report of House Committee on Foreign Affairs, No. 1, 65 Cong., 1 Sess., Cong. Record, LV, No. I, 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.

with the belligerent whose cause their conduct benefits, and still less by their national character. It is rather the relation 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 unneutral 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. Nor was any trade in vessels of war

[1] 1 Stat. 381, § 3.

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.

[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.

on a large scale practicable. The Neutrality Act of 1818 did not prohibit such conduct.[1] 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 renewal or augmentation of military supplies or arms, or the recruitment of men.
>
> Thirdly. To exercise due diligence in its own ports and waters,

[1] 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.

Declares Mr. Feewick: "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.

and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.[1]

These rules were regarded by the United States as declaratory of international law before the treaty was concluded.[2] Great Britain, although declining to admit 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.[3] 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."[4] They were reproduced in Article VIII of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War.[5] 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.[6] The existence and scope of the duty of prevention seem to depend in part upon whether the government of the neutral is fairly charge-

[1] Malloy's Treaties, I, 703.

[2] 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, Aug. 19, 1914, American White Book, European War, II, 38, 40, 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."

[3] 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.

[4] Mr. Barclay, British Chargé d'Affaires at Washington, to Mr. Bryan, Secy. of State, Aug. 4, 1914, American White Book, European War, II, 37.

[5] Malloy's Treaties, II, 2359.

[6] *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, American White Book, European War, II, 38, 40.

See, also, Moore, Dig., VII, 1067–1076, and documents there cited.

able 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. 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,[1] it is, by the Act of Congress of June 15, 1917, declared 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 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.[2]

§ 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.[3] The

[1] 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.

Concerning the Act of 1818, see C. G. Fenwick, Neutrality Laws of the United States, 162, 135–139.

See, also, Dana's Wheaton, Note No. 215, pp. 526, 562–563.

[2] Chap. 30, title V, § 3, 40 Stat. 222, U. S. Comp. Stat., 1918 ed., § 10182 *d*. See, also, §§ 2, 6, and 10 of the same title. 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.

[3] 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

right and power of prevention is not in theory lessened when a vessel is sold and delivered to a belligerent.[1] 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.[2]

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.[3] Nor does an apparently innocent struc-

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.

[1] 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.

[2] 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 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.

[3] This was conspicuously true in the case of the *Alabama*, which left English waters unarmed. Geneva Award, Papers relating to the Treaty of Washington, IV, 51.

tural design necessarily preclude the likelihood of the transformation of the ship into a naval auxiliary.[1]

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.[2] 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.[3] 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.[4] 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.[5] 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 under any contingency hostile acts against an enemy ship.

§ 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

[1] On Jan. 29, 1915, the Department of State, in opposition to the view of the German Embassy at Washington, announced the conclusion that hydro-aeroplanes were not to be regarded as war vessels, and that Art. VIII of the Hague Convention was not applicable thereto. American White Book, European War, II, 145–146.

[2] See Private Vessels Defensively Armed, *supra*, § 709.

[3] *Compare* Sir Cecil Spring-Rice, British Ambassador at Washington, to Mr. Bryan, Secy. of State, Aug. 25, 1914, American White Book, European War, II, 41.

[4] Discussions and declarations by the United States while a neutral in the course of The World War, 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.

[5] See, in this connection, § 2, title V, Act of June 15, 1917, relative to the enforcement of neutrality, 40 Stat. 221.

See Enforcement of Neutral Duties, Executive Action, *infra*, § 878.

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. The United States has vigorously demanded observance of the obligation within those bounds.[1]

In maritime warfare a base of operations appears to be acknowledged when neutral 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 as becoming a base when the aid procured by a belligerent therein does not produce such an effect upon such a unit. Thus the freedom with which a belligerent obtains and removes munitions of war from neutral territory for general uses is not deemed indicative of an improper use thereof which the territorial sovereign should endeavor to restrict.[2]

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 were maintained, and so

[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] Mr. Bryan, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Dec. 24, 1914, American White Book, European War, II, 31; *cf.* Count von Bernstorff to Mr. Bryan, with memorandum, Dec. 15, 1914, *id.* 31.

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, 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 procurable in a neutral port, as well as the frequency of resort thereto, suffice to transform the latter into a base of operations. Technically, a port may become such through the single augmentation of the power of a naval vessel.[1] 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,

[1] Declares 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' 7 ed., 646, 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 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." U. S. Comp. Stat. 1918, ed., § 10176.

See particularly The Santissima Trinidad, 7 Wheat. 283.

would cause the port, if such design were accomplished, to fulfill an improper function.[1]

The duty of prevention was set forth, as has been seen, in the second of the Rules of Treaty of Washington.[2] 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 make use of neutral ports and waters as a base of naval operations, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.[3] 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.[4] The duty of a neutral to use the means at its disposal to prevent such forbidden uses of its territory is also generally announced.[5]

In the early stages of The World War, 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

[1] 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." American White Book, European War, II, 32. 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.*, 44.

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.

[2] Malloy's Treaties, I, 703.

[3] *Id.*, II, 2359. Art. V is reproduced in No. 13 of Naval Instructions on Maritime Warfare, of June 30, 1917.

[4] *Id.*, 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.

[5] Art. XXV, Malloy's Treaties, II, 2362.

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.[1]

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.[2]

This enactment is believed to possess great significance; for it implies that neutral territory may become a base of operations when a belligerent force gains direct aid therefrom without entering neutral waters and by means of an intermediate agency of transportation. It points to the reasonableness of a like obligation when such supplies are sent to any foreign place on sea or land there to 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 borders. 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.[3] Although acknowledging

[1] 38 Stat. 1226.

[2] Chap. 30, § 1, title V, Act of June 15, 1917, 40 Stat. 221, U. S. Comp. Stat., 1918 ed., § 10182*b*. See also §§ 10 and 11 of same title.

[3] "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.

the right of the neutral to effect restriction, interested States have not as yet, however, been disposed to impose such a duty of prevention.[1]

(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 with which it is at peace, seems to be acknowledged.[2] 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.[3] Neutral tolerance necessarily signifies connivance, and hence governmental participation in the conflict.[4] Hence a duty of prevention must be apparent. In

[1] 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.

[2] 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.

[3] 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, 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.

[4] 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 organ-

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.[1] The enforcement of such laws may, therefore, prove an effective deterrent and hence a practical safeguard.

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 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

ized 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.

[1] 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." U. S. Comp. Stat., 1918 ed., § 10177.

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; Notes of decisions in U. S. Comp. Stat. Ann., X, § 10177. See, especially, Wiborg *v.* United States, 163 U. S. 632.

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.[1]

(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.[2] There has grown up a practice of conceding an asylum which permits a neutral port to offer solid advantages to a belligerent public ship.[3] These often-

[1] 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.

[2] 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.

[3] 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, 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, American White Book, European War, III, 190.

See President Wilson, Neutrality Proclamation, May 24, 1915, American White Book, European War, II, 15, 16.

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

times appear to be at variance with the principle that neutral waters should not become the base of operations for a belligerent fleet; and the variance is accentuated by the potentialities of vessels now employed as instruments of naval warfare.[1] 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 the 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.[2] The question constantly presents itself, however, whether at the present time the kind and amount of privileges

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.

[1] "It may be said, lastly, that any submarine war vessel far away from its base, having at its disposal a place where it can rest and replenish its supplies, is afforded, by mere rest obtained, so many additional facilities that the advantages it derives therefrom turn that place into a veritable base of naval operations." Memorandum from the French Embassy, to Department of State, Aug. 21, 1916, American White Book, European War, IV, 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 the belligerents 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." *Id.*, 126.

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.

[2] Case of the United States, Geneva Arbitration, Papers Relating to the Treaty of Washington, I, 71.

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.

(b)

§ 558. 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]

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

[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 discussion 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.

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");[1] thirdly, in the event of the presence simultaneously of vessels of war of opposing belligerents;[2] 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.[3] 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.[4]

[1] 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.

[2] "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.

[3] Naval Instructions, No. 17. *Compare* language of Art. XIX of Hague Convention.

[4] 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 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

(c)

§ 859. Food and Fuel Supplies.

The Naval Instructions of 1917 provide, in accordance with the terms of the Hague Convention, 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] Such permission doubtless accords with what is said to be a universal allowance.[3]

It would be unjust 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

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.

[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 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.

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.[1] For neutral territory to yield fuel to a belligerent vessel of war, under existing conditions of maritime warfare, is, as Professor Holland has pointed out, to enable the vessel to seek out the enemy, and to maneuver while attacking him.[2] When the supply is only limited by the capacity of the ship, such territory becomes increasingly a base of operations, fulfilling the function of a belligerent coaling station.[3] The excessive license embodied in the Hague Convention expressed a compromise representing a Russian modification of a German proposal designed to subordinate duties of prevention to the requirements of a belligerent fleet.[4] It should be observed that the United States, while a neutral, has shown 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

[1] No. 16. See, also, Art. XIX of Hague Convention.

[2] *Proceedings of British Academy*, 1905–1906, 60.

[3] 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.

[4] 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 connection, A. P. Higgins, Hague Peace Conferences, 475–477; commentary in *Am. J.*, II, 521–523.

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.[1]

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.[2] In December, 1914, the Department of State had occasion to emphasize the reasonableness of this restriction in correspondence with the German Embassy.[3]

(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.[4]

[1] 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, American White Book, European War, II, 18.

[2] 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, American White Book, European War, II, 18.

[3] Count von Bernstorff, German Ambassador at Washington, to Mr. Bryan, Secy. of State, Dec. 15, 1914, and memorandum enclosed, American White Book, European War, II, 31; Mr. Bryan to Count von Bernstorff, Dec. 24, 1914, *id.*

[4] Memorandum of Mr. W. L. Penfield, Solicitor of Department of State, June 5, 1905, Moore, Dig., VII, 992-993.

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.[1]

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.[2]

In applying these principles while a neutral in the course of The World War, 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.[3] 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.[4] 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.[5] The German vessel of war, *Prinz Eitel Friedrich*,

[1] 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.

[2] Instructions, No. 19, and Art. XVII of Hague Convention, Malloy's Treaties, II, 2361.

[3] Mr. Lansing, Counselor of Department of State, to Count von Bernstorff, German Ambassador at Washington, Oct. 30, 1914, American White Book, European War, II, 50.

[4] See correspondence, *id.*, II, 49–54; also 62.

[5] "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

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.[1] 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 to the service in which the vessel had been engaged. The ship was interned.[2]

It should be observed that the Hague Convention makes no distinction or limitation with reference to the causes of damage.[3] 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 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 offering 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

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, 54.

[1] *Id.*, II, 125.

[2] *Id.*, II, 129.

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.*, II, 139–141.

[3] 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.

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.[1]

(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.[2] The United States has taken the stand that prizes cannot lawfully be brought into American waters, when neutral, for purposes other than the foregoing.[3] In ratifying 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 sequestrated pending the decision of a prize court, and which specified treatment to be accorded

[1] 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.

[2] 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."

[3] Mr. Lansing, Secy. of State, to Count von Bernstorff, German Ambassador at Washington, April 7, 1916, American White Book, European War, III, 342, 343; Same to Same, March 2, 1916, *id.*, 335; 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.

a prize crew.[1] It has been clearly perceived by both the executive and judicial departments of the Government, that by granting the privilege to a belligerent of sequestrating prizes, neutral territory would offer a distinct and constant aid to a belligerent unable for any reason to conduct its prizes to its own ports, and in consequence become a veritable base of operations.[2] No solid ground for so relaxing the obligation of a neutral not to permit such a use of its territory is acknowledged, although denial of sequestration may serve to encourage destruction by a belligerent of prizes which it cannot bring into its own ports.[3] It should be

[1] Resolution 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 sequestrated pending the decision of a prize court." 243 U. S. 124, 151.

[2] 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, American White Book, European War, III, 342, 343; 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." American White Book, European War, II, 19. 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, American White Book, European War, II, 140.

[3] See comment in *Am. J.*, II, 524; also Note, *Harv. Law Rev.*, XXX, 161–162.

observed, however, that the position of the United States has not always been clear or uniform.[1]

§ 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.[2] On February 2, the German Ambassador at Washington informed the Department of State that the commander, pur-

[1] 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 discretional. 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 sequestrate 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, Secretary 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.

[2] 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.

suant 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.[1] 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,[2] 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 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.[3] 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.[4] 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

[1] American White Book, European War, III, 331. See, also, correspondence, *id.*, III, 331–344.

[2] 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.

[3] 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.

[4] American White Book, European War, III, 334.

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.[1] 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."[2] 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.[3] On July 29, the Court entered a decree in favor of the libelant, as also in a suit by the master of the ship to recover possession of the cargo.[4] 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.[5] 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;[6] secondly, that such use of such a port was not

[1] American White Book, European War, III, 335–337.

[2] American White Book, European War, III, 340; Memorandum from the British Embassy, Feb. 4, 1916, *id.*, III, 332.

[3] *Id.*, III, 341.

[4] 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 [illegible] Supreme Court.

[5] The Steamship *Appam*, 243 U. S. 124.

[6] 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

justified by the existing treaty with Germany;[1] 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.[2] 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."[3]

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 and is, therefore, an internationally illegal act; and secondly, that an admiralty court may order restitution for such violation of neutrality, although that viola-

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.

[1] 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 parties, 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." American White Book, European War, III, 336.

[2] 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.

[3] 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.

tion is not the proximate cause of the loss to the original owners.[1]

[1] 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 impropriety of asylum or the interpretation of the treaty. It 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 libelant 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

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§ 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 The World War. 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

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 unsound, 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 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.

defense.[1] On March 25, 1916, the Department of State expressed its views with greater fullness.[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 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 belliger-

[1] American White Book, European War, II, 43. 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.
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, American White Book, European War, III, 188.

[3] In this connection it was said: "For the guidance of its port officers and other officials a neutral Government may therefore declare its 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.*, 189.

ent 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 of defense.[1] 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.[2]

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 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. 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

[1] See Belligerent Forces. Private Vessels Defensively Armed, *supra*, § 709; Attack, Armed Merchantmen, *supra*, §§ 742–743.

[2] The test announced by the Department of State might prove to be excessively burdensome, compelling a neutral to treat as vessels of war an entire belligerent merchant fleet which had had encounters with submarine vessels, especially if it could be shown — as it might be — that the former habitually took the offensive or initiative in engaging the latter, and so had, at least with respect to such vessels, persistently aggressive purposes.

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. Even in such a state of the law, neutral territory doubtless offers 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, therefore, on the part of the territorial sovereign may seem to betoken indifference whether its domain becomes a base of belligerent operations. A broadening of the obligation of the neutral is not, however, to be anticipated so long as belligerent merchantmen are permitted or required to arm for defense. It may be doubted whether the problem confronting the neutral will find solution until the reasons compelling the arming of such vessels cease to exist, and no armed belligerent ships visit its ports save those acknowledged to be vessels of war.

(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 the 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

[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 The World War, 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*, American White Book, European War, II, 49–54; the *Prinz Eitel Friedrich*, *id.*, 125; the *Kronprinz Wilhelm*, *id.*, 129; the *Farn*, *id.*, 139–141. 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. Adee, Acting Secy. of State, to Mr. Takahira, Japanese Minister at Washington, Sept. 15, 1904, concerning the internment of the Russian warship

in abeyance during the period of internment and while the ship is in the custody of the neutral.[1] 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.[2]

When a belligerent ship of war is interned, the neutral is obliged to detain the officers and crew.[3] They are deemed to be an organized body constituting a part of a belligerent force and to be dealt with accordingly.[4] 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 believed 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.[5]

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 subjected to the measures of restriction which it may appear necessary to impose upon them.

Lena, which had arrived at San Francisco, Sept. 11, For. Rel. 1904, 428, Moore, Dig., VII, 999.

[1] Mr. Hay, Secy. of State, to Count Cassini, Russian Ambassador at Washington, Dec. 14, 1904, For. Rel. 1904, 789.

[2] Moore, Dig., VII, 994, respecting advice of State Department responsive to an inquiry from Admiral Train, U. S. N., June 24, 1905, in relation to the internment of Russian warships at Manila.

[3] Art. XXIV of Hague Convention.

See § 7, title V, of the Act of June 15, 1917, 40 Stat. 223, 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.

[4] Mr. Lansing, Acting Secy. of State, to Count von Bernstorff, German Ambassador at Washington, Nov. 27, 1914, American White Book, European War, II, 53. 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.

[5] 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."

The neutral should, however, always leave on board a sufficient number of men to look after the vessel.[1]

According to the Hague Convention, officers may be left at liberty on giving their word not to quit neutral territory without permission.[2] The United States has been disposed to accept the parole of officers for both themselves and their crews.[3] 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.[4]

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.[5]

(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

[1] Art. XXIV of Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War.

[2] Art. XXIV.

[3] Mr. Adee, Acting Secy. of State, to Mr. Takahira, Japanese Minister at Washington, Sept. 15, 1904, Moore, Dig., VII, 999, For. Rel. 1904, 428.

[4] 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." American White Book, European War, III, 348. Also *id.*, 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.

[5] Mr. Bryan, Secy. of State, to Sir Cecil Spring-Rice, British Ambassador at Washington, 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, American White Book, European War, II, 139.

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.*, III,335, 337.

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.

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.

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.

(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.[3] 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.[4] The neutral is

[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] Art. XIV of same Hague Convention.

[3] 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 Bustamente, 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, 2 ed., II, 410–416.

Concerning the interpretation of the Convention by the United States Army, see Rules of Land Warfare, 1917 ed., Nos. 412–424.

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."

[4] U. S. Army Rules of Land Warfare, No. 412.

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.[1] In case of large bodies of troops seeking refuge in neutral territory, the conditions of internment may be stipulated in an agreement concluded between the authorized representative of the neutral power and the senior officer of the troops.[2]

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.[3]

In the absence of 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.[4]

The Hague Convention declares that a neutral State which receives escaped 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.[5] 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 sequestrated in neutral waters.

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 and wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile army,

[1] Art. XI of Hague convention.

[2] Rules of Land Warfare, No. 413. 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, *id.*, Appendix A, p. 146.

[3] Rules of Land Warfare, No. 415, where it is stated that the rule expressed in the text is subject to the exception "that the neutral State would certainly sell such articles as are subject to deterioration, utilizing the proceeds for the maintenance of the troops."

[4] Art. XII of Hague convention.

[5] Art. XIII of Hague convention.

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.[1] 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 is carried, and also to accord generally impartial treatment to both belligerents.[2] 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.[3] The sick and wounded of the belligerent convoying 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 the war.[4] The Rules of Land Warfare 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.[5]

The Hague Convention declares that the Geneva Convention applies to sick and wounded interned in neutral territory.[6] Thus the medical personnel belonging to belligerent forces who have sought asylum and are interned, may be released by the neutral and permitted to return to their own State or army.[7] 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, 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

[1] Art. XIV of Hague convention; also Rules of Land Warfare, No. 418.
[2] Rules of Land Warfare, No. 419.
[3] Rules of Land Warfare, No. 420. See, in this connection, Correspondence between the American Embassy at London and the British Foreign Office, in 1916, respecting the transfer to Switzerland of British and German wounded and non-combatant prisoners of War, Misc., No. 17 (1916), Cd. 8236.
[4] Rules of Land Warfare, No. 421.
[5] *Id.*, No. 422.
[6] Art. XV, Malloy's Treaties, II, 2299.
[7] Rules of Land Warfare, No. 424.

gain a right of reimbursement from the belligerents concerned upon the termination of the war.[1]

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.

Belligerent Acquisition from Neutral Territory of Aid Which the Territorial Sovereign is not Obliged 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.[2] American statesmen have been able to

[1] The language of the text is substantially that of Rules of Land Warfare, No. 424.

[2] 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 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,

cite the approval of the publicists of every land,[1] and to rely upon the sanction of a settled practice.[2] In the course of The World War the United States is thus believed to have taken an impregnable position, fortified (if it needed fortification) by admissions

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, American White Book, European War, II, 58, 60; Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, *id.*, 194.

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.

[1] Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, American White Book, European War, II, 194, 197. 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.

[2] 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 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 intended to be suggested that neutral States have never within

from Germany in 1914,[1] and dignified by the action of the Second Hague Peace Conference,[2] 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.[3]

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.[4] Surprise was expressed

recent times endeavored to prohibit the export 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.

[1] 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 accordant with Article VII of the Hague Conventions of October 18, 1907, concerning the rights and duties of neutrals in naval and land war." American White Book, European War, II, 31.

[2] 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.

See, also, 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.

[3] 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, American White Book, European War, II, 194, 197.

[4] Herr von Jagow, German Minister of Foreign Affairs, to Mr. Gerard, American Ambassador at Berlin, Feb. 16, 1915, American White Book, European War, I, 56; Memorandum from the German Embassy at Washington, April 4, 1915, *id.*, 73; Count Burián, Austro-Hungarian Minister of Foreign Affairs, to Mr. Penfield, American Ambassador at Vienna, June 29, 1915, *id.*, II, 193; Same to Same, Sept. 24, 1915, *id.*, IV, 105.

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. American White Book, European War, II, 74. It may be observed

by the Government of the 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." [1]

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.[2] Again, as has been observed,[3] the clearance was forbidden of ships

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."

[1] Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, American White Book, European War, II, 194. See response of the Austro-Hungarian Government contained in communication of Count Burián, Minister of Foreign Affairs, to Mr. Penfield, Sept. 24, 1915, *Am. J.*, X, Special Supplement, Oct., 1916, 354, American White Book, European War, IV, 105.

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.

[2] Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, American White Book, European War, II, 58, 60–61.

[3] See Neutral Territory as a Base of Belligerent Operations, *supra*, § 855.

believed to be about to supply any form of war material or other supplies to belligerent warships, tenders or supply ships.[1] Apart, however, from these limitations, the Department of State expressed general approval of the existing law, and disapproval of any change.[2] 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 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

[1] 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. The later Act, although not enacted until the United States became a belligerent, substantially broadened the powers of the Executive. See Enforcement of Neutral Duties, Executive Action, *infra*, § 879.

[2] 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. See American White Book, European War, II, 196.

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.[1]

[1] Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, American White Book, European War, II, 194, 196, 197.

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 concern, 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, American White Book, European War, I, 73; Count Burián, Austro-Hungarian Minister of Foreign Affairs, to Mr. Penfield, American Ambassador at Vienna, June 29, 1915, *id.*, II, 193.

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 contrabande de guerre*," *Rev. Droit Int.* 1 series, XXVI, 401–414.

It must be acknowledged that the tendency 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

§ 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. Should there be a fresh consideration of the law with a view to its modification, the effect of contributions from neutral territory upon the belligerent receiving them, as well as upon a particular agency thereof, such as a vessel of war, should be closely scrutinized and appraised.[2] In such a task it will be apparent that the directness of the aid afforded a belligerent through the utilization of assets which the government of the neutral must be assumed to possess the power to control, serves to renew and accentuate the inquiry whether such a government should not be deemed itself a participant in the conflict, as conniving at what occurs, when it fails to use the means at its disposal to effect restriction.

It must be clear that the value or scope, if not the existence, of

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.

[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.

[2] See R. E. Curtis, "The Law of Hostile Military Expeditions as Applied by the United States", *Am. J.*, VIII, 1, 36–37

the belligerent right to obtain military strength from neutral territory, is likely to be affected by general acquiescence in any arrangement contemplating a limitation of armaments. A convention appropriate to that end might be rendered abortive if a contracting State, upon becoming a belligerent, could find available in the territory of a neutral non-contracting State, and lawfully import therefrom, what the former had agreed itself not to manufacture or acquire beyond certain limits when at peace.[1]

(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.[2] 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,[3] it is logical that no burden should be imposed to effect the restriction of the loaning of money

[1] See The Law of Neutrality in Relation to World Organization, *infra*, §889.

[2] 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.

[3] See Exportations of Munitions of War, *supra*, §§ 867–868.

in neutral territory by the inhabitants thereof. The law of nations as manifested by the practice of States, up to the outbreak of The World War, appears to have established none.[1]

In the early months of The World War, 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." [2]

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.[3] 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

[1] Moore, Dig., VII, 976–978; Oppenheim, 2 ed., II, 430–432; Westlake, 2 ed., II, 251–253. See, also, Hall, 6 ed., 590–591, where the following language of Mr. Webster, 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." Communication to Mr. Thompson, Ex. Docs. 27 Cong. 1841–1842. Hall adverts to the views of Bluntschli (§ 768), Phillimore (III, § clvii), Calvo (§ 2331), as condemning the negotiation of loans by private individuals.

[2] Mr. Bryan, Secy. of State, to Mr. Stone, Chairman of Senate Committee on Foreign Relations, Jan. 20, 1915, American White Book, European War, II, 58, 61–62.

[3] Stowell and Munro, International Cases, II, 321–325.

It was also sought by such process to facilitate the restoration of the normal rate of exchange on London, which had fallen in consequence of the extent of the trade balance in favor of the United States.

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,[1] 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.

(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 these 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

[1] 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

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 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.[1] 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.

[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; Rules of Land Warfare, No. 400.

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 the Base of Belligerent Operations, *supra*, § 855.

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.[1] The Rules of Land Warfare of the United States declare that individuals crossing the frontier singly or in small bands that are unorganized, create no obligation on the part of the neutral State,[2] and that nationals of a belligerent are permitted freely to leave neutral territory to join the armies of their country.[3]

(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.

[1] 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, No. 400, note 1.

See, also, C. G. Fenwick, Neutrality Laws of the United States, 127–131.

[2] No. 400.

[3] No. 401. Attention is there 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 ammunition 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, American White Book, European War, II, 58, 60.

It is declared in No. 402 of the Rules of Land Warfare 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, U. S. Comp. Stat., 1918 ed., § 10173.

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]

[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., 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

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.[1] 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.[2] 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.[3]

§ 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 impro-

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.

[1] Naval Instructions on Maritime Warfare of June 30, 1917, No. 29.
See Blockade, Capture and Penalty, *supra*, § 837.

[2] 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.

[3] See statement by Professor Moore, in Dig., VII, 748–752.
See Contraband, Penalty for Carriage, *supra*, § 815.

priety 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 neutrality proclamations of President Grant, August 22, 1870,[2] President Roosevelt, February 11, 1904,[3] and President Wilson, in the course of The World War, 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]

Thus, at the present time, a neutral State while uttering warnings as to the nature of unneutral services on the high seas, and of consequences to be apprehended by neutral ships which fail in their unlawful ventures, may without impropriety remain an indifferent spectator of the failure or success of the operations of its nationals or of private vessels under its flag, notwithstanding the sinister aspect of what takes place. This circumstance is believed to indicate unresponsiveness on the part of the existing law to the needs of the international organization known as the family of nations.

(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

[1] Am. State Pap., For. Rel. I, 140, Moore, Dig., VII, 750.
[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.

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 nationals 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 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.

The World War, 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. So long as

[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, Transfer and Departure of Vessels Adapted or Intended for Hostile Uses, *supra*, §§ 853–854.

[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.

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.[1] 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 base of belligerent strength.[2] Consequently it might not be 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.[3]

(6)

§ 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

[1] 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.

[2] 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 such a contingency.

[3] 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.

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 The World War, 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 partisanship, 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]

(7)

§ 875. Qualified Neutrality.

After the United States became a belligerent in The World War, 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,

[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.

See Freedom of Speech, *supra*, § 217.

[2] 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.

[3] See Appeal presented in the Senate by Mr. Chilton, Aug. 19, 1914, American White Book, European War, II, 17–18.

[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.

"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]

[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 The World War.

[7] See Requisite Measure of Exertion; The Rules of the Treaty of Washington, *infra*, § 882.

e

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, 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

[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.

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." [1]

(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 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.[2] In response, Congress, by an Act of June 5, 1794,[3] made the notable beginning of a

[1] 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.

[2] 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.

[3] 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.

series of enactments which took permanent form and became known as the neutrality laws of the United States.[1]

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.[2] 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.[3]

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 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.

[1] 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.

There should be noted a joint resolution approved March 14, 1912, with respect to the export of arms to an American country in which conditions of domestic violence exist, and which the President finds are promoted by the use of arms or munitions of war procured from the United States. 37 Stat. 630.

By an Act of May 7, 1917, § 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.

[2] 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."

[3] Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador, March 8, 1912, For. Rel. 1912, 740.

(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 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]

[1] § 10, Title V, of Act of June 15, 1917, chap. 30, 40 Stat. 223, U. S. Comp. Stat., 1918 ed., § 10179 and amending § 15, 35 Stat. 1091.

[2] § 1, Title V, Act of June 15, 1917, chap. 30, 40 Stat. 221, U. S. Comp. Stat., 1918 ed., § 10182b.

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

Again, during a war when 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 jurisdiction of the United States, or, having left that jurisdiction, upon the high seas.[1]

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,

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."

That the authority conferred upon the Executive under the foregoing section must be exercised through the medium of the land and naval forces of the United States, rather than through that of civil force, see Gelston *v.* Hoyt, 3 Wheat. 246, 331, Moore. Dig., VII. 1030.

See, also, opinion of Mr. Harmon, Atty.-Gen., Dec. 10, 1895, 21 Ops. Attys.-Gen., 267, 273. Moore. Dig., VII. 1029.

[1] § 2, Title V, Act of June 15, 1917, chap. 30, 40 Stat. 221, U. S. Comp. Stat., 1918 ed., § 10182c.

See, also, § 16, 35 Stat. 1091, respecting the exaction of bonds from armed vessels sailing out of the ports of or under the jurisdiction of the United States.

or until the owner gives specified bond and security that the vessel shall not be so employed.[1]

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.[2] 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.[3]

When information with reference to alleged violations of the

[1] § 17, 35 Stat. 1091.

It is possible that the practical importance of this provision has been diminished by the broader powers conferred upon the Executive in Title V of the Act of June 15, 1917, for the enforcement of neutrality.

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.

[2] § 4, Title V, of the Act of June 15. 1917, chap. 30, 40 Stat. 222, U. S. Comp. Stat., 1918 ed., § 10182e. 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.

[3] § 5, Title V, of Act of June 15, 1917, chap. 30, 40 Stat. 222, U. S. Comp. Stat., 1918 ed., § 10182f.

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."

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.[1] 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 coöperate directly with the appropriate United States District Attorney, with a view to instituting criminal proceedings by complaint under oath.[2]

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,[3] 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.[4]

(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,

[1] The author is indebted to a communication from the Honorable A. A. Adee, 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.

[2] Mr. Bayard, Secy. of State, to Mr. Preston, Minister of Haiti, Oct. 29, 1888, For. Rel. 1888, I, 990, Moore, Dig., VII, 1023; Mr. Adee, 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.

[3] Count von Bernstorff, German Ambassador at Washington, to Mr. Lansing, Secy. of State, Feb. 22, 1916, American White Book, European War, III, 334.

[4] Mr. Lansing, Secy. of State, to Count von Bernstorff, March 2, 1916, *id.*, 335, 337. See, also, The *Appam*, *supra*, § 862.

Compare Mr. Adee, Acting Secy. of State, to Mr. Bolet Peraza, Venezuelan Minister, Sept. 12, 1892, For. Rel. 1892, 640–641, Moore, Dig., VII, 1023.

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

[1] § 14, 35 Stat. 1090, Rev. Stat. § 5287.

For cases illustrating the application of the statute, see 10 U. S. Comp. Stat. Ann., § 10.178.

[2] § 340, 35 Stat. 1153.

[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 Conception, 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 pending 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.

law.[1] 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 on the high seas and navigated to an American neutral port for an indefinite stay therein.[2]

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.[3]

(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.[4] The United States has, under circumstances indicating no previous neglect on its part, disclaimed re-

[1] 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."

[2] The Steamship Appam, 243 U. S. 124, 156; also The Appam, 234 Fed. 389, 398–399. See The *Appam*, *supra*, § 862.

[3] 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. 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.

[4] 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.

sponsibility for the conduct of American merchantmen which, in foreign neutral waters, have been fitted out for hostile purposes against a belligerent.[1]

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 seas 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.[2]

(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 con-

[1] 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, 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.

[2] See Rights of Jurisdiction, The High Seas, Hot Pursuit, *supra*, § 236.

trol 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 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 government 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 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

[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*.

[2] Act of June 22, 1860, chap. 179, § 24, 12 Stat. 77. 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.

either endeavor to exert such control over its nationals in the extra-territorial 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.[1]

f

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.[2]

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.[3] 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.[4] In applying this test to the treatment of the *Alabama*, it was declared that it clearly resulted from all

[1] On Dec. 8, 1917, the author made inquiry of Dr. Koo, Chinese Minister at Washington, whether in the course of the existing war and before China became 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."

[2] 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.

[3] Malloy's Treaties, I, 703, Moore, Dig., VII, 1059.

[4] Papers Relating to the Treaty of Washington, IV, 50, Moore, Dig., VII, 1060.

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."[1] With respect to the *Florida*, it was said to result from all the facts relative to the construction of the ship (then 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 fulfil 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.[2]

[1] 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."

[2] 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.

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 that State failed to exercise the measure of prevention which the law of nations imposed upon it.[1]

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.[2] The obscurity of the phrase calling for some 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.[3] 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 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

[1] 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.

[2] 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.

[3] 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.

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 an enlightened 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.[1]

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.[2] 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.[3]

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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 become a neutral. It is not under the same obligations to both parties to the conflict.[4]

[1] See, in this connection, Mr. Bryan, Secy. of State, to Mr. Barclay, British Chargé d'Affaires at Washington, Aug. 19, 1914, American White Book, European War, II, 38; also Mr. Barclay to Mr. Bryan, Aug. 4, 1914, *id.*, 37.

[2] Mr. Fish, Secy. of State, to Mr. Akerman, Atty.-Gen., Nov. 20, 1871, 91 MS. Dom. Let. 356, Moore, Dig., VII, 1056.

[3] See, in this connection, §§ 1–4, Title V, of the text of the Act of June 15, 1917, to enforce neutrality.

[4] "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,

Thus such a State may, prior to that time, 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.[1] So long as recognition is withheld, the outside State, although not a neutral, owes a duty to the government of that other State against which there is an uprising, to make the endeavor not to permit the insurgents to commit any acts within, or make any use of the national domain, which the territorial sovereign could not lawfully tolerate in case it were a neutral with respect to a war between opposing countries. The obligation of prevention in relation to a military expedition about to depart from the national domain is illustrative.[2] That obligation exists when the relation of the territorial sovereign to a foreign insurrection is not such as to transform that sovereign technically into a neutral, and when the foreign *de jure* government remains to be regarded as identical with the State which it purports to represent.

These circumstances have been influential in determining both the scope and phraseology of the so-called neutrality laws of the United States. While it is doubtless true that their origin was due to existing problems confronting the nation as a neutral, their operation, at least with respect to the Act of April 20, 1818, has not been limited to occasions when the United States has attained such a status.[3] Attention has been repeatedly called to the fact that laws then enacted were intended, and have been enforced, for the purpose of preventing the commission of offenses against

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.

[1] 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.

[2] 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.

[3] Wiborg *v.* United States, 163 U. S. 632, 647, *citing* 13 Ops. Attys.-Gen. 177, 178.

friendly powers attempting to suppress insurgents not recognized by the United States as belligerents.[1] It should be observed, however, that a local statute may be confined in its operation to occasions when the sovereign is a neutral. Thus certain provisions of the Act of June 15, 1917, for the enforcement of neutrality are made applicable solely in case a war exists "during which the United States is a neutral nation."[2]

When a State, although unwilling to recognize the insurgents within a foreign country as belligerents, nevertheless admits the fact of insurgency, and so acknowledges that a state of war exists, there is no enlargement of its international obligations.[3] 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.[4] By so doing he sought to increase respect for the laws of the United States by persons within its territory, and thereby facilitate and simplify the task of the Government in performing the duties which it owed to the *de jure* sovereign of that island.[5]

[1] Wiborg *v.* United States, 163 U. S. 632; 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.

[2] §§ 1–4, Title V, Act of June 15, 1917, 40 Stat. 221.

See, also, the language of the joint resolution of March 4, 1915, 38 Stat. 1226.

[3] "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 oitizens, 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.

[4] See proclamation of June 12, 1895, For. Rel. 1895, II, 1195, Moore, Dig., VII, 1081.

[5] 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 tenure of power of a government may become so unstable amid a war of factions as to produce a condition of affairs such that no party seeking control is recognized by an outside State either as the lawful government or as a belligerent. In such case that State is not burdened with the technical duties of a neutral in respect to either party. This is true although the existence of a condition of insurrection may be admitted. Under such circumstances the outside State should, nevertheless, abstain from interfering between the warring factions. It should, moreover, through the enforcement of its neutrality laws (if applicable), prevent its territory from becoming a base of military operations for either contestant.[1] In a word, the withholding of recognition should not permit such a State so to acquiesce in unrestricted uses of resources within its territory as to enable a particular contestant thereby to gain control of the foreign reins of government.[2]

When, however, a third State recognizes insurgents as bellig-

[1] Such was the policy pursued by President Cleveland in dealing with the unrecognized warring factions in Haiti in 1888. See his Annual Message, Dec. 3, 1888, 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.

[2] 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. 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. 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." See President Wilson, Annual Message, Dec. 2, 1913, *id.*, 37, 38–40; 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.*, 133, 135–136; 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 freest opportunity to realize its aspirations.

See Note 1, page 71.

erents, it attains at once, as is elsewhere noted, 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 parent State or established government to accord recognition.[1]

It is possible for the government of a country in which a civil war is being waged to recognize insurgents as belligerents who have not been accorded such recognition by a third power. That circumstance, although not obliging the latter to take such a step,[2] may in fact impel it to do so. In the interval prior to the according of recognition, the outside State is not believed to owe a duty to the insurgents to accept the normal obligations of a neutral in dealing with the established government. That government, after its own act of according recognition, might, however, be deprived of just cause of complaint if its privileges within the territory of the third State were restricted to those commonly yielded by a neutral to a belligerent.[3]

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§ 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.[4] 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 belleig-

[1] See Recognition of Belligerency, In General, *supra*, § 47. See Naval War College, Int. Law Situations, 1913, 13.

[2] "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.

[3] See, in this connection, Oppenheim, 2 ed., II, 366, § 298.

[4] 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.

erent whose naval or military forces were aided, and that to the extent of the harm directly attributable to the augmentation of strength procured within the neutral domain.[1] 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."[2]

2

INVIOLABILITY 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.[3] 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."[4] The duty of the belligerent has long been apparent to the United States as well as to other Powers.[5] Definite prohibitions have found expression in the

[1] See, in this connection, President Taylor, Annual Message, Dec. 4, 1849, Richardson's Messages, V, 10, Moore, Dig., VII, 1084.

[2] Section 20, *Am. J.*, XIII, Supp., 101. See, also, Section I, of Naval Conditions of protocol of conditions of an armistice between the Allied and Associated Powers and Austria-Hungary, of Nov. 3, 1919, *id.*, 82.

[3] Opinion of Mr. Cushing, Atty.-Gen., 7 Ops. Attys.-Gen. 367, Moore, Dig., VII, 1089.

[4] 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.

[5] Mr. Jefferson, Secy. of State, to Mr. Ternant, French Minister, May 15, 1793, Am. State Pap., For. Rel. I, 147; 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.

Hague Conventions of 1907,[1] as well as in the Naval Instructions of the United States Governing Maritime Warfare of 1917,[2] and in the Rules of Land Warfare of the Army.[3]

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.[4] Again, belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.[5] 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.[6] It has been observed that the prohibition extends to the origination and organization of military and naval forces within neutral territory.[7]

The duty imposed upon the belligerent is one due to the neutral rather than the enemy.[8] That duty is not of unlimited scope.

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.

[1] 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.

[2] Section I, Nos. 1–22. [3] Ed. of 1917, Nos. 390–397.

[4] 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.

[5] No. 391, Rules of Land Warfare, quoting 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." See, also, No. 390, Rules of Land Warfare.

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.

[6] No. 409, Rules of Land Warfare, *citing* Art. III of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers and Persons in War on Land.

[7] See Acts of a Belligerent in Defiance of the Rights of the Territorial Sovereign as Such, *supra*, §§ 850–851.

[8] 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

Circumstances may arise when the belligerent is excused 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.[1] 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.[2] It is believed, however, that resort to

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 B. & C. P. C., 206, 209, and *citing* the foregoing cases.

[1] 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, 2 ed., II, § 361, p. 442; *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.

[2] 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

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.[1]

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 would appear to have ground to justify a retaliatory invasion when absolutely necessary to defend its own safety and when the neutral territorial sovereign is unable or indisposed to vindicate its rights or perform its duties as such. The obligation towards the neutral not to undertake such a movement would, for the time being, be inapplicable, by reason of its own weakness

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, Supp., 75; also note of Mr. Edwards, Chilean Minister at London, to Sir Edward Grey, March 26, 1915, *id.*, 72. See discussion in J. W. Garner, Int. Law and World War, II, § 562.

See, also, in this connection, Beltran Mathieu, Ambassador of Chile at Washington, "The 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.

[1] 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.

or indifference. It is believed, however, that the principle respecting the inviolability of neutral territory is so fundamental, and respect therefor so vital to the welfare of nations, that 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.[1]

The United States, when a belligerent, has rarely occupied neutral territory.[2] American troops did, however, enter the Grand Duchy

[1] 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.

[2] In December, 1917, the American Chargé d'Affaires at Berne presented to the Swiss Government the following memorandum: "In view of the presence

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.[1] 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.[2] 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.[3] Adequate atone-

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.

[1] 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.

[2] The foregoing statements of fact are contained in a communication from an authoritative source to Miss Ruth Putnam, June 9, 1920, and which the latter has been good enough to place before the author.

[3] 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

ment 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.[1] 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.

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.[2] The measure of exertion required by international law has also been noted. It

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 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.

[1] 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.

[2] See Acts of a Belligerent in Defiance of the Rights of the Territorial Sovereign as Such, *supra*, §§ 850–851.

has been seen that a neutral is deemed to be guilty of no delinquency for which it is chargeable with responsibility, when it employs the means at its disposal to prevent unlawful activities within its territory.[1]

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

§ 889. The Law of Neutrality in Relation to World Organization.

The principles imposing duties of abstention and duties of prevention upon States described as neutral to a conflict are not applicable to a system of international organization composed of States each member of which, upon the outbreak of war among its members, undertakes to aid or retard the efforts of one side or the other according to the merits of its cause or the reasonableness of its procedure in becoming a belligerent. Thus the Covenant of the League of Nations contemplates the united action of the parties thereto in opposition to that member which in violation of its undertakings has recourse to war, and, under certain conditions, against a non-member. Should this theory find general acceptance and these provisions of the Covenant receive the acquiescence of all interested powers, States such as the United States would have reason to anticipate, thereafter, the outbreak of few wars in any quarter in which they would remain technically non-participants. The alternative is the older system with its

[1] 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.

sharp differentiation between neutrals and belligerents, and with its injunctions addressed to States of each class. It still remains uncertain which theory is ultimately to obtain. The issue yet seems to be whether, as a means of averting war, States are generally prepared to become co-belligerents in the event of almost any conflict, or whether they prefer the right to remain non-participants and neutral in spirit, notwithstanding the extent of the efforts which they may be prepared to make in order to avert war prior to its outbreak. It needs to be perceived that this question is not necessarily related to the inquiry as to the most efficacious means of causing States at variance to adjust their differences by amicable processes, as by recourse to a judicial tribunal.

The vast power of outside and essentially non-participating States to localize and minimize the effect of hostilities between belligerents by a rigid application of the fundamental principles of neutrality has never been fully exercised. Distinctions have been so drawn between neutral duties of abstention and those of prevention in rules of general acceptation as to permit a real participation by neutral countries whose governments were both actually and technically guilty of no legal fault. For that reason it is believed that in determining whether neutrality or belligerency is the better condition normally to be attained by States with relation to conflicts waged in any continent, careful heed should be given the potentialities of those members of the family of nations which are hereafter disposed and compelled to respect the full obligations of neutrality to be logically and consistently derived 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, undertake 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. A fresh codification fixing relentlessly neutral duties of prevention on such a basis rather than on one designed in part to respond to the needs of prospective belligerents, would doubtless transform the function of a neutral State and increase the exactions made by the existing law; but it would also surely enable any substantial group of States, by the very character of their acts in keeping out of a conflict, to exert a mighty influence in localizing its effect and shortening its duration. Without venturing prediction whether enlightened States will generally prefer to assume the position of participants rather than of non-participants in future wars wherever arising, it may be safely affirmed that non-participation, in so far as it signi-

fies neutrality under the loose requirements of the present rules, promises frail means of abating wars or of exercising any salutary influence upon belligerents. Non-participation, on the other hand, which contemplates the actual withholding of the resources of neutral territory from every belligerent without discrimination, possesses a power in that regard which has never been measured because it has never been exerted, and yet which may enable essentially neutral States to maintain international peace.[1]

[1] Such non-participation through the agreement of an association of States is closely related to the matter of limiting armaments. See *supra*, § 868. Any arrangement for the latter contemplates in times of peace an estimate of the military requirements of prospective belligerents, and impliedly curtails the freedom of a State when at war to acquire, after its outbreak, military aid which would render abortive the effect of its previous renunciations. If it is feasible for a number of States to agree to a plan of limited armaments, it is because of the trust lodged in the pledges of the contracting parties, and of the acknowledgment that each can in fact control the manufacture and use and even the exportation of implements of war from within its own domain. Agreements not to increase armaments beyond specified limits do not differ in kind from those not to permit belligerent sales to certain proscribed classes of purchasers.

Arrangements limiting the freedom of belligerents and neutrals with respect to supplies of war material are closely associated with those purporting to restrict the right of a State to become a belligerent to occasions when, for example, certain amicable modes of adjustment of its grievances have proven unavailing. The larger yet single problem involves the evolution of practical devices designed to prevent any contracting party from launching war unjustly, as for the purpose of gratifying its own aggressive purposes. The point to be observed is, that once it be acknowledged that the appropriate pledges of any enlightened group of States touching the preparations for or the initiation of war are to be trusted, there exists for that group a logical basis of common action; and there becomes possible also a reasonable mode of limiting the scope of any war between its members in such a way as to minimize the relative detriment sustained by that belligerent which suffers most from inability to procure aid from neutral sources. Although experiences of The World War illustrate the impotence of any agencies, contractual or otherwise, to deter from conflict a powerful State bent on aggression, in 1914, and accentuate the harm which might have resulted from the enlargement in that struggle of neutral duties of prevention, they fail to establish that there has not survived a group of States whose agreements touching preparations for or the entering upon war, and the sustenance of belligerents, are to be relied upon, and whose conduct in pursuance thereof would serve to localize and check the continuance of hostilities between its members.

TITLE L

AMERICAN PRIZE COURTS AND PROCEDURE

1

§ 890. Courts.

In time of war the prize courts of a State, whether a belligerent or a neutral, are the instrumentality by which it exercises certain duties of jurisdiction. With the aid of such tribunals a belligerent fulfills its obligation due primarily to neutral States and their nationals, to adjudicate as to the propriety of the seizure of vessels and cargoes, 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 admiralty courts sitting as prize tribunals as an agency through which to defend and preserve its neutrality in case of belligerent acts in violation thereof.[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 mis-

[1] See Effect of Capture, Neutral Prizes — Their Destruction, *supra*, §§ 757–758; Enemy Prizes — Their Destruction, *supra*, § 756. Dana's Wheaton, Dana's Note No. 186.

[2] See Neutrality, Entrance with Prize — *The Appam*, *supra*, §§ 861–862. Enforcement of Neutral Duties, Some Aspects of American Procedure, Judicial Action, *supra*, § 879.

carriage of justice in a judicial inquiry.[1] 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.[2] A belligerent is not permitted to set up prize courts in places not under its control, and, as has been observed, it is forbidden to do so in neutral territory.[3]

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.[4] It may be deemed wise, however,

[1] 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.

[2] 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.

[3] 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.

[4] "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.

to specify by treaty the nature of the tribunals which are to exercise such functions.[1]

The public policy of a State manifested by the action of its political department may serve to restrain its tribunals from recognizing the existence of a court of prize set up in a foreign territory,[2] or from respecting the decree of a prize court the validity of whose proceedings is denied.[3]

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 Constitution [4] and the appropriate acts of Congress. The

[1] 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.

[2] See The Nueva Anna and The Liebre, 6 Wheat. 193, where "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."

[3] See The Lilla, 2 Sprague, 177, where the United States District Court in Massachusetts, in 1862, declared that "no proceedings of any such supposed tribunals [of the Confederate States] 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 a title to others."

[4] 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, 1 Stat. at L. 73, 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 Sloop Betsey, 3 Dall. 6; The Admiral, 3 Wall. 603; Jennings *v.* Carson, 1 Pet., Adm. 7; 1 Kent, Com., 12th ed. 355; 2 Stat. at L. 761, Sec. 6." Clifford, J., in United States *v.* Ames, 99 U. S. 35, 39.

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." [1]

It is accepted doctrine that the exclusive cognizance of prize questions belongs generally to the State of the captor.[2] Thus it has been held that the courts of the United States lack jurisdiction to redress alleged torts committed on the high seas against the property of American citizens, except where the vessel has been fitted out in violation of American neutrality.[3] The exception forms the basis of an important group of cases considered elsewhere.[4]

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,[5] or in case the captor has been obliged to sell, or otherwise dispose of, or to destroy the prize.[6] The Supreme Court of the United States has, however,

[1] Judicial Code, § 24, par. 3, 36 Stat. 1091.

See, also, § 238 of the Judicial Code, conferring upon the Supreme Court of the United States jurisdiction of appeals taken direct thereto from final sentences and decrees in prize causes.

[2] United States *v.* Richard Peters, 3 Dall. 121; L'Invincible, 1 Wheat. 238.

"The prize court of an ally cannot condemn. Prize or no prize, is a question belonging exclusively to the courts of the country of the captor." 1 Kent, Com. 103, quoted in Moore, Dig., VII, 589.

See convention between France and Great Britain of Nov. 9, 1914, concerning (in part) the jurisdiction within which the adjudication of joint captures might be made during the existing war, Naval War College, Int. Law Documents, 1917, 143. Concerning the accession of Italy thereto, *id.*, 143, note 1, *citing* Great Britain, Treaty Series, 1917, No. 6.

[3] L'Invincible, 1 Wheat. 238; Hernandez *v.* Aury, Fed. Cases, No. 6,413.

[4] See Neutrality, Entrance with Prize, *The Appam*, *supra*, § 862; Enforcement of Neutral Duties, Some Aspects of American Procedure, Judicial Action, *supra*, § 879.

[5] 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.

[6] 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, 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

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.[1]

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 performed its functions.[2] 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.[3]

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.[4]

what has been seized. See, in this connection, Dana's Wheaton, Dana's Note No. 186, p. 486.

[1] 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.

[2] 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, American White Book, European War, III, 342, 343–344.

[3] Same to Same, March 2, 1916, *id.*, 335, 337.

[4] 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.

There is deemed to be ground for damages in the case of capture without probable cause, that is, where the circumstances are such as not to warrant, in the case of a neutral vessel, a reasonable ground of suspicion that it was engaged in an illegal traffic.[1] 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." [2] 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.[3] 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.[4]

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." [5]

[1] 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.

[2] Taney, C. J., in Jecker *v.* Montgomery, 13 How. 498, 516.

[3] Marshall, C. J., in The Anna Maria, 2 Wheat. 327, 335.

[4] The Amiable Nancy, 3 Wheat. 546, 558–559; The Santa Maria, 10 Wheat. 431.

[5] 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

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." [1] The Supreme Court of the United States has recognized the impossibility of entering 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.[2]

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

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.

[1] 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.

[2] 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 enforced 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 Moore, P. C., 22, 86."

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.[1] Otherwise its conclusions would manifest an attempt by the State of the forum to shield its policies, regardless of their character, under a cloak of purely local judicial approval.[2]

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.

[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. Attys.-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 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 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.

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.[1] 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. 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 its own 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 belligerent claims are sharply at variance with accepted practice.

b

§ 894. Grounds of Foreign Complaint. The Discussion between the United States and Great Britain during The World War.

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;[2] that when an effective mode of re-

[1] "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. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 35.

[2] Sir Edward Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Feb. 10, 1915, American White Book, European War, I, 44, 49, 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

dress 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.[1] 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." [2] 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 international tribunal.[3]

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. A writ so issued will initiate a proceeding, which will follow its ordinary course in the prize court."

[1] American White Book, European War, I, 44, 49, where it was added: "The course adopted by Her 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."

See, also, British memorandum of June 17, 1915, contained in telegram of Mr. W. H. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, *ad interim*, June 22, 1915, American White Book, European War, II, 173.

[2] See memorandum from Sir Edward Grey, contained in telegram of Mr. Page, to Mr. Lansing, Secy. of State, July 31, 1915, American White Book, European War, II, 181, 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.

[3] 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

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." [1] 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." [2]

Almost simultaneously the Judicial Committee of the Privy Council in the case of the *Zamora* announced its authoritative

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.

[1] 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, American White Book, European War, III, 64, 78–80.

[2] 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.*, 79.

Concerning the practice which prevailed in cases of cargoes detained and placed in the Prize Court, see Mr. W. H. Page, American Ambassador at London, to Mr. Lansing, Secy. of State, Feb. 19, 1916, American White Book, European War, III, 57.

opinion to the effect that orders in council could not prescribe or alter the law to be administered by a prize court.[1] It was declared, however, that such a tribunal would act on them in every case in which they amounted to a mitigation of the Crown rights in favor of the enemy or a neutral, and that the prize 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.[2]

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

[1] The Zamora, [1916] 2 A. C. 77; 4 Lloyd's Prize Cases, 1, 84.

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.

[2] 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. Wheaton, International Law, 4th English ed., 1916, pp. 25 and 26."

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.

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.

of the rights of American citizens under international law.[1] 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.[2] He contended that the British prize courts offered no means of reparation for a real and far-reaching injury sustained by American shipping. He said:

> 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

[1] Telegram of Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, July 14, 1915, American White Book, European War, II, 177.

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.

[2] Mr. Lansing, Secy. of State, to Mr. Page, Oct. 21, 1915, American White Book, European War, III, 25, 34–37.

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. *Id.*, 79–80. An appendix to the memorandum dealt at length with what occurred in relation to them. *Id.*, 82.

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.

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 interests 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.[1]

The Secretary protested also against the manner in which British prize courts obtained jurisdiction through the operation of municipal enactments so applied to neutral ships on the high seas as to compel them to submit to British domestic laws and regulations.[2] 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.[3]

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.[4]

Doubtless the decision in the case of The *Zamora* fortified the technical position of the British Government with respect to the treatment of individual cases. The limitations announced by

[1] American White Book, European War, III, 25, 35–36. [2] *Id.*, 36.
[3] *Id.*, 37.
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, warehousage, unlading 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 realise 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.*, 80.
[4] Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Nov. 24, 1916, American White Book, European War, IV, 77. See, also, Same to Same, Sept. 18, 1916, *id.*, 75.

the Judicial Committee of the Privy Council of the application of the principle laid down by that tribunal, together with the natural tendency of the British courts to agree with the attitude of the Crown as to the propriety of belligerent acts and policies, served, however, to render it extremely unlikely that a neutral claimant could maintain in a British tribunal that the operation of an order in council regarded as of vital importance such as that of March 11, 1915, was internationally illegal regardless of what might be the fact.[1]

§ 895. The Same.

The contention that the British courts offered no reparation for such national rights of the United States as might be infringed is believed to have been unanswerable. With respect to claims of both classes, 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 capable at an early stage of the conflict of denouncing authoritatively such of them as might be at variance with international law.[2]

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."[3] The controversy with the United

[1] See The Leonora, 3 B. & C. P. C. 181; The Leonora, 3 B. & C. P. C. 385.

[2] 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 The World War 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.

[3] 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

States related rather to the stage of the proceedings when such action might be appropriately taken.

c

§ 896. Need of an International 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 conduct according to distinctive theories expressed in local regulations, the only safeguard for neutral States must lie 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.

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.

[1] See Agreements between States, Agreements to Refer Differences to International Judicial Tribunals or Commissions, *supra*, § 504. 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.

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]

[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, 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.,

There developed 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]

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] 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

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.[1]

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.[2] If upon the evidence at the

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 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.

[1] See Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 28, 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."

[2] 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

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.[1] 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 it.[2] If the evidence taken *in preparatorio* makes a clear case for condemnation an order for further proof will be denied.[3] Nor will it be granted if the evidence satisfies the court that the property ought to be restored.[4]

"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."[5] Thus intentional suppression of papers has been deemed a ground for refusing such proof.[6]

d

§ 900. Discussion with Great Britain during The World War.

In 1915, the Department of State made complaint of the change of practice manifested by the British prize court rules of 1914,

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."

[1] 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.

[2] 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.

[3] The Pedro, 175 U. S. 354, 368; The Adula, 176 U. S. 361.

[4] 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 Friendschaft, 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.

[5] 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.

[6] The St. Lawrence, 8 Cranch, 434. It was also observed in this case that where a non-production of papers was to be imputed accident or mistake, further proof might be allowed.

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 from changing its procedure, provided the practice followed should afford a fair hearing to all claims put forward by neutrals.[2]

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

[1] Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25, 28, 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. Lansing, Secy. of State, April 24, 1916, *id.*, 63, 67–69. 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.

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.[1]

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.[2] 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.

[1] Mr. Lansing, Secy. of State, to Mr. W. H. Page, American Ambassador at London, Oct. 21, 1915, American White Book, European War, III, 25.

[2] 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.

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]

b

§ 903. Enemy Prizes.

So 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.[3] 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.[4] This is true because

[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.

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.

[3] "As between the belligerents, the capture, undoubtedly, produces a complete dives[ti]ture 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.

[4] 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, 886; also Oakes *v.* United States, 30 Ct. Cl. 378, 401.

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.[1]

To establish, however, an indefeasible title to an enemy prize as against the legitimate claims of neutral States or persons, condemnation is justly regarded as necessary.[2] 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.[3] It should be noted, however, that according to the Naval Instructions 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." [4]

[1] 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.

[2] 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.

[3] Rev. Stat. § 4615; also The Santo Domingo, 119 Fed. 386, 390.

See Effect of Capture, Enemy Prizes — Their Destruction, *supra*, § 756.

[4] 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."

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 belief 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]

[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 sequestrate 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. Goñi, Spanish Minister, July 22, 1868: "It is certain that a condition of war can

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 render the procedure inadequate.[1] 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.[2]

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,[3] when, and

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 Bonfils-Fauchille, 7 ed., § 1693; Oppenheim, 2 ed., II, § 262.

[1] 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.

[2] 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 reëstablished, 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.

[3] See The Armistice with Germany of Nov. 11, 1918, *supra*, § 647.

See Charles C. Tansill, Termination of War by Mere Cessation of Hostilities, MS. 1920.

subsequent to the lapse of protracted period thereafter, no apparent issue between the belligerents impels that party to resume operations or otherwise to make objection, the formal declaration by its adversary that the war is at an end, would appear to suffice technically 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.[1] Recourse to such procedure was not 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.[2]

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

[1] 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 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.

[2] See, in this connection, Geo. A. Finch, "The Treaty of Peace with Germany in the Senate," *Am. J.*, XIV, 155.

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.[1]

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,[2] and the courts regarded his action as authoritative.[3] 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,

[1] Where the unilateral method is observed, an early agreement with the former enemy may still prove to be advantageous.

[2] 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.

[3] 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.

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] Thus absence of evidence of an intention on the part of the occupant to acquire that right by some unequivocal process such, for example, as annexation, would 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.[3] 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.[4]

e

§ 908. Agreement.

At the present time the common mode of terminating a war between opposing States is by an agreement which assumes the form of a treaty of peace. 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

[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, correctly be 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.*" Int. Law, 2 ed., II, § 264, p. 326.

[3] 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.

[4] See Conquest, *supra*, § 106; also Cession, Validity, Principle of Self-Determination, *supra*, §§ 108–109.

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 that consent must be in general regarded as capable of yielding what the exigencies of the hour may demand.[1] 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 the 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 a guarantee 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.[2] 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.[3] It should be observed, however, that belligerent powers are constantly disposed to trust each other

[1] See Agreements Between States, Validity, Constitutional Limitations, *supra*, § 494; Cessions of Territories, Boundaries, *supra*, § 501.

[2] 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 peace with Germany, concluded June 28, 1919.

[3] "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 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.

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.[1]

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.[2] 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.

[1] 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.

[2] 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." *Am. J.*, XIII, Supp., 92, 93.

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.*, 94.

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 The World War 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 The World War, 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

[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.

See correspondence between the United States and Austria-Hungary in September and October, 1918, regarding an armistice, *Am. J.*, XIII, Supp., 73–79; also correspondence between the United States and Germany in October and November, 1918, regarding an armistice, *id.*, 85–96.

as not to convey to the enemy any intimation of a readiness to forego the benefits of a subsequent and decisive military achievement.[1] Otherwise it will tend to relax belligerent energies at home, and to inspirit 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. The grave consequences of such interference 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

[1] 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. 18, 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 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." *Am. J.*, XIII, Supp. 77, 78.

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 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. 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

[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. 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. 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." *Id.* 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.

[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.

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.[1]

The manifestation of willingness to accept given terms of peace may be expressed informally although authoritatively by the belligerent to which they are offered, and so indicate that the opposing States are in substantial accord before the conclusion of so-called preliminaries of peace.[2] Any arrangement or understanding prior to that event must, however, of necessity be incomplete, embodying the barest outlines of certain bases of an ultimatum, and not binding either party to withhold further demands not inconsistent with the terms stated. Care should be taken, therefore, in preliminary negotiations ripening into the earliest contractual relationship, that no statement be made of a kind such as to restrict the right to take any stand desired in the negotiation

[1] See Armistices, General Requirements, *supra*, § 646.

[2] The steps preliminary to the conclusion of peace between the United States and Spain, in 1898, deserve examination. On July 26, 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, Secretary 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 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.

of the preliminaries of peace touching any matter not definitely fixed.

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 agreement and making provision for the negotiation of a definitive treaty, and thirdly, in the conclusion of that treaty.[1] 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.[2]

The practice of belligerents since the middle of the nineteenth

[1] 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.

[2] 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. Malloy's Treaties, II, 580. Preliminary Articles were signed in behalf of France and Great Britain, Jan. 20, 1783. *Id.*, 585. The definitive treaty of peace between the United States and Great Britain was concluded Sept. 3, 1783. *Id.*, 586.

century manifests lack of uniformity with respect both to the use of such instrumentalities, 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,[1] 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.[2] The latter made provision for numerous matters not touched upon in the earlier agreement. The "preliminaries of peace" signed at Nikolsburg, July 26, 1866,[3] in behalf of Austria and Prussia, and providing for the conclusion of the definitive treaty signed at Prague, August 23, 1866,[4] and the preliminaries signed in behalf of France and Germany at Versailles, Feb. 26, 1871,[5] arranging for the negotiation of the final treaty which was signed at Frankfort on May 10, 1871,[6] 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,[7] 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,[8] 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.[9]

[1] Brit. and For. State Pap., XLIX, 93.
[2] *Id.*, 364.
[3] *Id.*, LVI, 1029.
[4] *Id.*, 1050.
[5] *Id.*, LXII, 59.
[6] *Id.*, 77.
[7] U. S. For. Rel. 1878, 866; Brit. and For. State Pap., LXIX, 732.
[8] Brit. and For. State Pap., LXIX, 749.
[9] Brit. and In. 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, Chap. III. Appendices of the same work contain texts (in English) of each of these agreements.

§ 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 Ladrones 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 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

[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.

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.[1]

[1] 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 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, the rights generally of private individuals and the treatment of their pecuniary claims, as well as the basis of the codification or modification of rules of law.

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 reëstablishment 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. Such Articles may prove influential in deterring either of the opposing States or their plenipotentiaries from shunning the attempt to

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]

treat of matters which might otherwise be fairly omitted from a treaty which there was greatest solicitude to conclude without unnecessary delay.

Practical considerations, which ever affect the conclusion of a final treaty, serve in fact to narrow the scope of the preliminaries, and so to impair their usefulness. Thus the earnest desire for peace commonly shared by both belligerents when they enter into formal negotiations, and the uncertainty at that time as to what should be exacted or yielded or even acquiesced in without apparent concession, are influences which, through the instrumentality of an insufficient agreement, may baffle the efforts of a belligerent, however successful in the field, to obtain a treaty responsive to its reasonable designs or most enlightened purposes.

See in this connection, Coleman Phillipson, Termination of War, and Treaties of Peace, 96–98.

[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 arbitration before a tribunal of specified character, of all differences proving incapable of settlement by diplomacy and arising with respect to the inter-

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. Perspicuity 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 permitted. 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.

(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]

pretation 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.

[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.

(b)

§ 915. The Mode of Presentation and Discussion of Propositions.

The conclusion of a definitive treaty is facilitated by adherence to a procedure designed 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

[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 Com-

unrelated proposals regarding matters not touched upon in the preliminaries of peace or at variance with the terms thereof, may 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 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, adher-

mission, 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 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.

[1] 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 purport, 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

ence to a procedure which limits the opportunity to attempt to alter the scope or nature of basic terms already agreed upon, even

usefulness (for the purpose of facilitating work) of more detailed provisions than were embodied in the peace protocol of August 12, 1898.

With such an end in view, the following suggestions are submitted as the basis of possible rules.

(*a*) No party should have the right to demand that the conference make any declaration not to be incorporated in the treaty and for reference to the governments of the opposing States. The conference should, however, have the right to take such action, in the absence of objection from either side, provided the preliminaries of peace offer no obstacle.

(*b*) The opposing States should permit no discussion or negotiation by any official body other than the conference, of matters confided to it by the terms of any prior agreement.

See For. Rel. 1898, 918, 922, 923 and 924, concerning differences between the American and Spanish Commissioners to superintend the evacuation of Cuba, and proposals of the latter while the Peace Commissioners of the United States and Spain were endeavoring to conclude a treaty at Paris, in October, 1898.

(c) No proposal of any Article respecting a matter not dealt with in the preliminaries of peace should be permitted, until the plan of a treaty contemplated therein has been developed as far as possible, and substantially or provisionally agreed upon.

(*d*) The proposal and discussion of Articles should conform, in point of order, to the following classification derived from the terms of the preliminaries of peace: (*i*) Articles both a general and special character, and respecting which a basis of definite agreement has been fixed therein; (*ii*) Articles relating to matters specially referred to the conference and concerning which merely the general principles to govern adjustment have been agreed upon; (*iii*) Articles dealing with matters similarly referred yet with respect to which, however, no understanding has been reached.

(*e*) The proposal of an Article covering a provision definitely agreed upon in the preliminaries of peace should correspond in terms with the language there employed, and contain no alteration of the scope of the existing obligation. The proposal and discussion of any provision purporting to elaborate such an Article by way of explaining its scope should be made simultaneously.

(*f*) While the agreement of the plenipotentiaries as to any Articles presented should be deemed provisional until the treaty as a whole is acquiesced in, the acceptance of any Articles should serve to prevent the renewal of discussions or proposals or arguments concerning them, save with the consent of both sides.

(*g*) Each proposition submitted for incorporation in the treaty should be proposed separately, and confined in substance to matters capable of reasonable embodiment in a single Article.

(*h*) Each proposal should be in writing. The proposer should have the right to accompany it with an explanatory memorandum, and to offer within a reasonable time, written, and if desired, oral argument in support thereof. The party to which a proposal is addressed should have the right to demand written or oral explanations thereof, if none have been made, or in case those offered are deemed insufficient. The right to reply to any proposal should be acknowledged, and a like procedure observed with respect to explanations and arguments. The opportunity should be afforded for supplementary statements by way of rejoinder or otherwise, serving either to accentuate an issue or to facilitate agreement. Appropriate rules should, however, limit the time for proposals and replies, and the incidents of both, saving always the right of the conference to waive any limitation.

(*i*) No attempt should be made to restrict discussions between plenipotentiaries of the opposing States outside of sessions of the conference, or in informal gatherings designed for that purpose.

(*j*) The drafting of all Articles should be confided, in case numerous belligerents are participants in the conference, to a special committee established for the sole purpose of giving exact expression to what in substance has been agreed upon, and distinctly qualified by its personnel to render that service.

(*k*) The proceedings of every meeting of the conference, and of any committee sitting under its auspices, should be recorded in a protocol prepared conjointly, and rendered acceptable to both sides. Preliminary rules should, however, indicate the appropriate limits of each protocol, and the significance to be attached to statements therein.

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 itself. 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 the several States to which it is granted. Thus a proposal designed to regulate methods of maritime warfare, or to check the rights of a conqueror, or otherwise according recognition to fundamental principles of universal application, arouses a more intense and uniform interest in every belligerent on each 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 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.[1] 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

[1] 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.*

precedent 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 The World War, 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 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 express. 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

[1] See, generally, Charles H. Haskins and Robert H. Lord, Some Problems of the Peace Conference, Cambridge (Mass.), 1920, chap. 1; History of the Peace Conference of Paris, edited by H. W. V. Temperley, 3 vols., London, 1920; 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.

membership on Commissions.[1] Final decisions were retained or reserved by the five Great Powers through the medium of the so-called Council of Ten,[2] 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,[3] but which was further reduced to a Council of Three

[1] "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.

[2] "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's Hist. of Peace Conference, 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."

[3] "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,

during the interval when the Italian Delegation temporarily withdrew from Paris.[1] 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.[2] 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.[3]

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.[4]

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

such as those of Japan with respect to Shantung, were kept secret. President Wilson declined to produce them for the Senate Committee 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.

[1] "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." H. W. V. Temperley, Hist. of Peace Conference, I, 267.

[2] Senate Document No. 106, 66 Cong., 1 Sess., 280. There was partial representation of the smaller States on these Commissions.

[3] 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 H. W. V. Temperley, Hist. of Peace Conference, I, Chap. VIII.

[4] 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.

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 a denial of justice where the governing body was influenced by considerations of expediency as well as law, and was possessed of power to enforce its will.[1] 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.[2]

The Great Powers appear to have determined that certain of their associates should not be recognized or dealt with as independent, or as entitled to the enjoyment of rights long regarded as the common heritage of the most favored members of the international society.[3] 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

[1] "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 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." H. W. V. Temperley, Hist. of Peace Conference, 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.

[2] 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.

[3] See Certain Minor Impairments of Independence through the Medium of the League of Nations, *supra*, § 27.

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.[1]

§ 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.[2] German protests resulted in some slight modification of the terms imposed.[3] Whether the treaty was in substantial compliance with the conditions on which the armistice was concluded November 11, 1918, or whether it manifested abuse of power on the part of the Principal Allied and Associated Governments directed against a ruthless yet impotent foe, was a question on which the opposing Delegations were disagreed. 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

[1] 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 privileges of 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.

[2] 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.

[3] On May 10, 1919, M. Clemenceau announced that the Allied and Associated Governments 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, 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. *Id.*, 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.

to the formulation of conditions of peace.[1] The summary procedure whereby Germany was compelled to accept the treaty which was signed on its behalf on June 28, 1919, marked the final step of its adversaries in perfecting the development and completion of the victory won when the armistice was concluded the previous year.[2]

(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.[3] Inasmuch as

[1] See communication of M. Clemenceau to the German Delegation, June 16, 1919, together with reply of the Allied and Associated Governments appended thereto. Conditions of Peace with Germany, Senate Doc. No. 149, 66 Cong., 1 Sess., 97–155.

[2] 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.

[3] 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 humanity"; 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 Delegation, 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.

the views of the two American members of the Commission [1] 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 deserved 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.[2] 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.[3] It was contended in substance that accord-

[1] 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.

[2] 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."

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.

[3] 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

ing 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.[1] 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 respects to acts committed thereafter, his former privileges of immunity from foreign jurisdiction.[2] 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, especially in view of their sense of the actual responsibility chargeable to the former Kaiser.[3] It will be seen, however, that the provisions of the treaty did not fully respect these views.[4]

in fact enlightened States had waived their right of jurisdiction, rather than to one touching the question whether the acts of such an individual were essentially non-justiciable.

[1] *Compare* F. Larnaude 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.

[2] See Hatch *v.* Baez, 7 Hun, 596, 599, 600.

[3] "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.

[4] It would not, however, have been unreasonable for those Powers, if themselves convinced of the international lawlessness of acts chargeable directly

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 regardless of the rank of the alleged offenders, was agreed upon.[1] 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.[2]

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

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, Jurisdictional Immunities, *supra*, §§ 433–435.

[1] 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." Pamphlet No. 32, above cited, p. 23; *Am. J.*, XIV, 121.

[2] According to the Rules of Land Warfare, U. S. Army, 1917 ed., No. 366: "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.

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 also not, according to accepted practice, offenses against international law.[1] 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 the foe which had violated it, there was solid reason to make no demands for the surrender of individuals to be 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.'"[2] 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.[3]

See, also, Geo. A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes", *Am. J.*, XIV, 218.

[1] 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." Pamphlet No. 32, above cited, p. 59; *Am. J.*, XIV, 128.

[2] Robert Lansing, *Reports of American Bar Association*, XLIV, 255.

[3] 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 com-

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",[1] and his trial before a special tribunal, which was not, however, deemed to be technically of a judicial character.[2] 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,[3] 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 tribunals of the countries affected, or of a Commission thereof possessing their authority.[4] This view prevailed in the Council[5] [footnote 5 on next page].

mitted 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." Pamphlet No. 32, above cited, p. 70; *Am. J.*, XIV, 141.

[1] Art. 227.

[2] 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, 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.

[3] The plan of the Commission contemplated an international High Tribunal. See Pamphlet No. 32, above cited, 25; *Am. J.*, XIV, 139.

[4] 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

§ 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 The World War, 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 recognized as the enemy of each and entitled to no immunity from prosecution.

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."

[5] 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."

[1] Yielding to German request, the Allied Powers in February, 1920, agreed that accused persons be tried by German judicial authority.

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. To that end they tend to restrict conduct at variance with it. Simultaneously, they narrow the scope of claims existing prior to the war, and they acknowledge or confer broad possessory rights founded on military achievement while it was waged, without belittling the illegal aspect of belligerent excesses or the just consequences thereof.

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

[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' 7 ed., § 202, p. 604, 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

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.[1] 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 principle of *uti possidetis* will doubtless be deemed to prevail, and 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.[2] This circumstance renders obvious the importance of definite agreement in case it is desired to bring about a different result.[3]

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 entail no criminal responsibility." *Citing* Halleck, ii, 341–343, Phillimore, iii, § lxviii, Bluntschli, § 709, Calvo, § 3155, also The Mentor, 1 Ch. Rob. 183.

[1] 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 justly 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.

[2] 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 movable 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 stipulate cession of such territory in the treaty of peace." 2 ed., II, § 273.

[3] See the provisions of Art. I, of the Treaty of Ghent, Dec. 24, 1814, Malloy's Treaties, I, 613.

The requirements of justice must challenge, however, such an application of the doctrine of *uti possidetis* as enables a State to profit by its wrongful acts committed as a belligerent, and to claim 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,[1] 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.[2] 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.[3]

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 which the outbreak of the conflict did not serve to dissolve.[4] 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 the treaty of peace, 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.[5]

[1] Hall, Higgins' 7 ed., § 200, p. 602.

[2] 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.

[3] See, for example, President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxx, Moore, Dig., VII, 336.

[4] See Agreements between States, Effect of War, *supra*, § § 547–551.

[5] By such process there is minimized the danger of controversy as to whether a particular provision in a former treaty has survived the conflict. It will

With the termination of the conflict there is removed simultaneously the reason forbidding the communication of intelligence or the holding of commercial or other intercourse between the territories of the former opposing belligerents. Thus the ending of a war would probably be regarded by American tribunals as reviving the operation of contracts between individuals inhabiting, respectively, the territories of former enemies, provided the agreements were regarded as merely suspended by the conflict. Moreover, as an incident of the termination thereof, there would seem to disappear also the reasons for the impediments barring the maintenance of actions by persons who were previously alien enemies residing on hostile soil.

Through close perception of the legal effects generally believed to be directly attributable to the termination of war, it becomes possible for the opposing belligerents at each stage of their endeavor to conclude 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 and a careful estimate of the probable pretensions of each side respecting the matter involved, in case the treaty being negotiated 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.

4

§ 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 post-*

be recalled that the effect 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.

liminii 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.

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

[1] "The *jus postliminii* of the Romans implied certain principles of their private law, as well as conceptions derived from the fetial 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, 2 ed., II, § 279, and bibliography. Dana's Note No. 169, Dana's Wheaton, p. 441.

[2] Declares Hall: "In effect, the doctrine of postliminium amounts to a 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' 7 ed., § 162, p. 517.

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.

THE END.

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