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LAW OF AERIAL WARFARE†

By ELBRIDGE COLBY*

IX. CIVIL POPULATION AND AIRCRAFT

SOLDIERS are decent persons after all. It is a question of accuracy rather than of intent. Whatever may be said of excited belligerent governments or newspapers, the intent may be quite proper and the fault be merely one of observation or of accuracy in execution. And yet even here there are differences of opinion. It has been said:

"Everything points to the conclusion that Zeppelin navigators were only enabled to pick up a general idea of locality by following the Thames, or some other river, and that as regards London they had little idea as to which of its 200 square miles they were directly over."¹³⁰

And it has likewise been said—by a German airplane commander—that all the objects which they sought to hit were "absolutely clear."¹³¹

Most of this bombing is done at night, frequently on the darkest nights.¹³² In spite of its tendency towards inaccuracy, it is considered as important as day bombing.¹³³ It is done from planes flying anywhere from 90 to 115 miles per hour,¹³⁴ and from an altitude of from 4,000 to 6,000 feet.¹³⁵ Under such circumstances, a very high degree of accuracy cannot be expected, particularly when the pressure for replacements and for rapidity in training has resulted—and may in the future result—in sending out men not sufficiently experienced in dropping bombs.¹³⁶ "The object of a bomber," says a Manual on the subject, "is to get the load of bombs over the target and to discharge them in such a way that the maximum number of hits are registered."¹³⁷ Some are bound to be "misses" instead of "hits" as any one who has handled a weapon on a target range must know. And there will be other factors than the mere human

†Continued from 10 MINNESOTA LAW REVIEW 148.

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¹³⁰Ibid., p. 32.

¹³¹Ibid., p. 158.

¹³²Aerial Bombardment Manual, U. S. Army (1920), Part 3, p. 25.

¹³³Ibid., (1920), Part 1, p. 3.

¹³⁴Training Regulations No. 15-70, U. S. Army (1922), par. 14, d, (1).

¹³⁵Aerial Bombardment Manual, U. S. Army, (1920), Part 3, p. 30.

¹³⁶Ibid., (1920), Part 1, pp. 5-6.

¹³⁷Ibid., (1920), Part 1, p. 8.

equation to make some of them miss their target. The aviator flies at night to avoid observation and annoyance from hostile scouts and pursuit planes. He is generally sent to points "deep in the enemy's territory."¹³⁸ Some times the town containing the military objectives of his flight, is revealed to him only by a river line or some very distinct natural landmark of some other kind, from which he must calculate his distances and estimate the location of his objective.¹³⁹ When he attacks in this fashion, innocent people are bound to be struck. How can the man across the street from the General Post Office in London be safe, when sixty yards is laid down as the average striking distance from a thirty-foot target which is attained only at an advanced stage of bombing training?¹⁴⁰ Because a tobacconist or a haberdasher has a little shop over there, shall the enemies of England be compelled to refrain from using their aerial power to strike at the center of postal and telegraphic communications of the Empire? Such deadly accuracy as would be needed to demolish the government building with one or more bombs and have none fall anywhere else, is not human. It is not reasonable to expect such accuracy under the conditions under which aviators have to work. No belligerent could fairly be held to that, whatever war-time propagandists or theoretical jurists may say. It would be "the 'pound of flesh' which the air commander must take without drawing civilian blood."¹⁴¹ An American commentator on this point has said:

"How, it may well be asked, can an aviator who flies over a city at great height during the night, when all lights are extinguished, as was the general practice during the World War, identify the persons and things which he is permitted to bombard? How can he distinguish between the military forces and the civil population; between military works, depots and factories engaged in the manufacture of arms and munitions or used for military purposes, and other establishments engaged in the manufacture or production of articles used for civil purposes, or between railway lines used for military purposes and those which are not? To require aviators to single out the one class of persons and things from the other and to confine their attacks 'exclusively' to one of them will in many cases amount to an absolute prohibition of all bombardment."¹⁴²

¹³⁸Training Regulations No. 15-70, U. S. Army (1922), par. 15.

¹³⁹Manual of Anti-Aircraft Defense (British), 1922, p. 172, sec. 145.

¹⁴⁰Aerial Bombardment Manual, U. S. Army (1920), Part 4, p. 12.

¹⁴¹Spaight, Air Bombardment, in *British Yearbook of International Law*, 1923-24, p. 30.

¹⁴²Garner, Proposed Rules for the Regulation of Aerial Warfare, in 18 *Am. J. Int. L.* 69.

The question is a question of accuracy and not a question of intent. No belligerent should be required to forfeit the normal percentage of hits which might be expected on his target, simply because there will be a percentage of "misses." The percentage of "hits" is a military weapon to the use of which he is entitled. By it he may be able to win his war. It is not a question of an intention to hit civilians instead of military depots, or of an intention to terrorize generally. Like the actuary figuring expectant mortality for a life insurance company, he cannot foretell what will happen in any individual case,¹⁴³ but he can tell what his average will be. His intent is to place "the maximum number of hits" on his target according to his average accuracy.

A single incident in American military aviation history will illustrate the point, an incident deliberately chosen from time of peace, in order to preclude all criticism as to partisanship and unusual inefficiency on the part of the bombers. In the spring of 1923, the United States Air Service sent two airplanes to bomb an ice gorge in the Delaware River, at the request of the local civil authorities. The aviators must be presumed competent, for no government would risk killing its own citizens in time of peace by sending insufficiently trained bombers or pilots. The Army is hedged about with too many legislative and judicial responsibilities for that. The ice gorge extended along a river-line—not too hard to follow—for a distance of three miles. A total of seven bombs were dropped from a height of 1,500 feet—far lower than war conditions would usually permit. Only four bombs hit the attenuated target. One of the three that missed, nearly hit a farmhouse 300 feet from the river.¹⁴⁴ Indeed, it is a question of accuracy. In peace-time, from a comparatively low height, unharried by enemy guns or planes, with a long strip of a target, the percentage of hits was $57 \frac{1}{7}$. In war-time, the farm house might very probably have been hit; the percentage of hits would almost certainly have been lower.

Another post bellum instance of the employment of airplanes is also interesting, not only as regards the question of accuracy but also on another score. During British operations against Afghans on the North West Frontier of India, the general officer

¹⁴³I am unable to subscribe to the "unusual degree of disgust and hatred" felt by one writer toward an enemy for using such a method of attack which "although aimed at a city containing troops, munition factories, and military depots, must inevitably fall almost entirely upon civilians." Turner, *The Struggle in the Air* 144.

¹⁴⁴The New York Times, March 15, 1923, page 9b.

commanding reported on May 17, 1919, that nearly twelve hundred weight of explosives had been dropped on Basawal, on the ridge to the west of Dakka, and on Jalalabad;¹⁴⁵ and the Afghan commander-in-chief declared that these British air bombs "inflicted heavy losses on the civil population and army of Afghanistan."¹⁴⁶ It was announced that an air raid of May 21st, caused "great confusion, and the town is practically deserted. Several government buildings were set on fire and citizens, Afghan officers, and the majority of the Afghan troops fled in panic."¹⁴⁷ At this juncture the Amir Amanulla protested that "Jalalabad and the Royal Palace at Kabul and the tombs of his forefathers were bombed," and added: "It causes us great regret to see the example of Germany followed by the British."¹⁴⁸ Then explanations were in order. The Viceroy informed the secretary of state for the Colonies of the "facts" as follows:

"Kabul: Bombing was limited to the arsenal workshops and the Ark or citadel, which is used, not for residential purposes, but as a subterranean magazine. The tomb of Abdur Rahman is in grounds outside the Ark, and it is possible that the area of burst of bombs might include it. . . . Jalalabad: our information shows that Amir Habibulla has been temporarily interred in a grave on the golf course; no bombs have been dropped on any grave that could be recognized from the air as such. The Palace was bombed; it was being used as military headquarters. Damage was undoubtedly done by bombing to the town about which troops were billeted."¹⁴⁹

In answer to the protest of the Amir, the British commander said: "My airplanes must continue to reconnoiter in order to secure my troops. . . . If our airplanes are molested, they will retaliate." Then the Amir countered as follows:

"The advent of your airplanes is certain to cause extraordinary excitement amongst our people, who will fire at them in spite of our strict orders not to. The airplane will then bomb them."¹⁵⁰ And he went on to plead for a complete cessation of aerial activity as certain to lead to trouble and irregularities. But it is not indicated that the British were willing to forego the many advantages which an efficient air force gave them over their less civilized enemies. Possibly their Flying Corps personnel had got into bad habits during the successive "reprisals" on the Western Front.

¹⁴⁵ 37 British Parliamentary Papers, East India, 1919, p. 11.

¹⁴⁶ *Ibid.*, p. 12.

¹⁴⁷ *Ibid.*, p. 19.

¹⁴⁸ *Ibid.*, p. 25.

¹⁴⁹ *Ibid.*, p. 31.

¹⁵⁰ 27 British Parliamentary Papers, East India, 1919, p. 32.

Possibly some of their higher commanders recalled that little sentence in official instructions to the effect that the rules of international law apply only to warfare between civilized states, and "do not apply in wars with uncivilized states and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case."¹⁵¹ Possibly they had in mind some such principle as that which was three years later put into words by the general staff school of another nation:

"The effect of bombing is generally very great upon the morale of an irregular enemy. The objective of irregular operations . . . may be the capital of the people, their main source of supply, their prominent leaders, or, if a fanatical people, the seat of their religion."¹⁵²

We cannot tell. The incident and the discussion is simply related for what it is worth, as indicative of the manner in which practice has continued.

X. WARS AND NON-COMBATANTS

We might conclude, after this examination of the events since 1914 and of the opinions and purposes of military men who carry combat into the air and wage it from the air, that the private citizen of the present seems less safe now than he has been for many hundreds of years. War is changing, we hear it said, in its intensiveness and in its physical and legal capacity to harm the private citizen. It has different methods and different aims we are told than it used to have. And it is not only of aerial war that this is said, but of war in general. So, it may be profitable to look into the general subject of war itself from a legal and political, as well as from a sheer military and aerial standpoint.

There is a popular idea to the contrary—to the effect that with the passing of time and the adoption of international conventions war has become more and more humane. The world is

¹⁵¹Manual of Military Law (British), 1914, p. 235, par. 7. In 1815 James Monroe declared it perfectly proper for General Harrison to have burned Indian huts and cabins in 1813, saying: "This species of warfare has been pursued by every nation engaged in war with the Indians on the American continent." 8 Niles Weekly Register, March 18, 1815, pp. 35-36.

¹⁵²Training Regulations No. 15-70, U. S. Army, par. 24. Cf. "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." (Rules of Land Warfare, U. S. Army, 1914, pp. 69-70; Hague Convention IV., 1907, art. 27.)

getting better and better, we hear it said. World peace projects, leagues to abolish war, and the like spread their doctrines through the public press and out of the Christian pulpits. Yet it is actually true that warfare has swayed here and there, has been sometimes restricted and sometimes vigorous as times changed. The World War extended its effects more and more, and its methods. It disturbed the life of the world. There have been World Wars before this one, and limited wars too. Warfare has changed back and forth from time to time.

"The warfare of the century preceding the French Revolution," says Mr. Belloc—and the pertinency of his remarks lies not in the authority of his name so much as in the verity of his facts so far as they apply to the years from 1713 to 1792—"attempted limited things in a limited manner; it did not attempt any fundamental change in society; it was not overtly—since the Thirty Years War at least—a struggle of ideas; it was conducted on behalf of known and limited interests for known and limited objects; and the instruments with which it was conducted were instruments artificial and segregated from the general life of nations . . . what have been called the 'professional' armies."¹⁵³

In 1785, it was even possible for the American people to conclude a treaty with Prussia which provided:

"All women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power by the events of war they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessities, conveniences and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested."¹⁵⁴

In conformity with ideas such as were enunciated in that treaty we have the theory that war should affect only armed men. Yet, in spite of its age, it is only a theory. It began in the mind of idealists and philosophical theorists. It became useful propa-

¹⁵³Belloc, *The French Revolution* 153.

¹⁵⁴7 Moore, *Digest*, p. 461.

ganda in the mouths of statesmen. And thus it has proceeded down the pages of history:

In 1758, Vattel remarked:

"Aujourd'hui, la guerre se fait par les troupes réglées; le peuple, les paysans, les bourgeois, ne s'en mêlent point, et pour l'ordinaire, ils n'ont rien à craindre de fer de l'ennemi."¹⁵⁵

In 1762, Rousseau declared:

"La guerre n'est point une relation d'homme à homme, mais une relation d'État à État, dans laquelle les particuliers ne sont ennemies qu'accidentellement, non point comme hommes, ni même comme citoyens mais comme soldats."¹⁵⁶

In 1792, when the French Revolution was emphasizing the rights of individuals as against those of the state, when the doctrines of Rousseau were influencing those Jacobins who embarked upon the foreign war, France declared hostilities against Austria, "not a war of nation against nation, but the just defense of a free people against the unjust aggression of a king."¹⁵⁷

In 1793, the French Republic announced itself to be "at war with the King of England and the Stadtholder of the United Provinces."¹⁵⁸

In 1798 Napoleon issued at Alexandria a very adroit proclamation, declaring that he made war only against the military governing class of the Mamelukes,¹⁵⁹ and General Montesquiou had already, in 1792, said much the same thing to the people of Savoy.¹⁶⁰

In 1804 Alexander of Russia declared:

"It is not upon France that we make war, but only upon a government as tyrannical towards France as towards the rest of Europe."¹⁶¹

¹⁵⁵ Vattel, *Droit des Gens*, bk. iii, ch. viii, sec. 147.

¹⁵⁶ Rousseau, *Contrat Social*, bk. i, ch. iv. This sentiment was repeated by the Revolutionary jurist, Portalis, and—in 1806—by Talleyrand in a letter to the Emperor. Bray, *L'Occupation Militaire*, pp. 177-178.

¹⁵⁷ Declaration of War, April 20, 1792; 4 Duvergier, *Collection complete des lois*, 118; Anderson, *Constitutions and Documents*, 104.

¹⁵⁸ 5 Duvergier, *Collection complete des lois*, 135; Anderson, *Constitutions and Documents*, 151. At least one of their enemies remarked that "nevertheless they commenced by waging war against the people, for they immediately laid an embargo on all British vessels, seized all British property in France, and in every way harrassed and imprisoned (British) subjects." *Life of Lisle*, p. 97.

¹⁵⁹ Cambridge Modern History 599; Guitry, *L'Armée de Bonaparte en Egypte, 1798-1799*, p. 87.

¹⁶⁰ Cresson, *The Holy Alliance* 13.

¹⁶¹ 52 Archives Parlementaires, ser. i, p. 295; Wambaugh, *Monograph on Plebiscites* 269.

In 1812, when General Hull of the American Army proceeded to invade Canada, he stated that his army brought neither danger nor difficulty to the peaceable and unoffending inhabitants, whom he came to "protect" not to "injure."¹⁶²

In 1839, Rivera of Uruguay issued a proclamation declaring war upon the tyrant Rosas, but not upon the people of Argentine.¹⁶³

In 1847, General Scott proclaimed at Vera Cruz to the Mexicans:

"Americans are not your enemies, but the enemies, for a time, of the men who, a year ago, misgoverned you, and brought about this unnatural war between two great republics. We are friends of the peaceful inhabitants of the country we occupy."¹⁶⁴

In 1863, General Robert E. Lee announced from the headquarters of the Army of Northern Virginia: "We make war only on armed men."¹⁶⁵

In 1865, Uruguay, Brazil, and Argentine concluded a treaty of alliance to make "war not against the people of Paraguay but against the government,"¹⁶⁶ and proceeded to the practical annihilation of the population.

In 1868, the Declaration of St. Petersburg determined that "the only legitimate object which states should set before themselves during war is to weaken the military forces of the enemy."¹⁶⁷

In 1870, King William of Prussia publicly said: "I wage war on the soldiers not on the citizens of France."¹⁶⁸

In 1895, during the Chino-Japanese War, Marshal Yagamata stated in orders: "The enemy army contains our enemies. As for the others, except those who harm or attempt to harm our army, they ought not to be considered as our enemies." And Marshal Oyama called war "an affair concerned with the relations of state to state, which does not touch the people."¹⁶⁹

¹⁶²British Documents of the Canadian War of 1812. Champlain Society Publications, No. XIII, pp. 355-356.

¹⁶³Robertson, *History of the Latin-American Nations* 259.

¹⁶⁴Smith, *Military Government* 105.

¹⁶⁵G. O. 73, Army of No. Va., June 27, 1863; Connor, *Belligerent Occupations*, p. 55.

¹⁶⁶55 British and Foreign State Papers, p. 83, art. 7.

¹⁶⁷Cited in *Rules of Land Warfare*, U. S. Army, 1914, p. 57.

¹⁶⁸Proclamation, August 11, 1870; Bray, *L'Occupation Militaire*, pp. 179-180; Birkhimer, *Military Government*, 1st ed., p. 76.

¹⁶⁹Ariga, *La Guerre Sino-Japonaise*, pp. 40, 42.

In 1898, President McKinley's instructions to American commanders in the field, which were reiterated in military proclamations, contained the following words:

"We come not to make war upon the people of the Philippines."¹⁷⁰

"We come not to make war upon the inhabitants of Cuba."¹⁷¹

In 1900, entering the lands of the South African Republic, Gen. Buller said: "Her Majesty does not make war upon individuals. . . . The quarrel England has is with the government, not with the people, of Transvaal."¹⁷²

Finally, we have the well-known pronouncement of President Wilson: "We have no quarrel with the German people"¹⁷³ contained in his message to Congress of April 2, 1917, asking for a declaration of war on account of the misdeeds committed by "the Imperial German Government" against "the government and people of the United States"—a sentiment reflected in his letter of August 17, 1917, to the Pope wherein he said our enemies were "not the German people" but "the vast military establishment controlled by an irresponsible government,"¹⁷⁴ and probably also reflected by the formal Congressional resolution announcing war between "the United States" and "the Imperial German Government."¹⁷⁵

This is the record. How far are these true statements of fact, and how far merely war-time propaganda? It is true that in deciding a case in 1917, a court of law followed the sentiments of the presidential pronouncement and declared:

"The president has very carefully distinguished between the German government and the German people, and the sins of that government ought not to be visited upon the people except so far as the legitimate interests of the United States require."¹⁷⁶ Yet this was *dictum*, and not essential to the decision, although in conformity with it. Suppose, though, it had been essential to the decision. Will courts accept as a binding determination by

¹⁷⁰Sen. Doc. 173, 63rd Cong., 1st Sess., p. 473 (May 19, 1898).

¹⁷¹Sen. Doc. 173, 63rd Cong., 1st Sess., p. 476 (July 13, 1898).

¹⁷²Oppenheim, *International Law*, 2nd ed., p. 65.

¹⁷³House Doc. No. 1, 65th Cong. 1st Sess.; Scott, *Wilson's Foreign Policy* 275; Robinson & West, *Foreign Policy of Woodrow Wilson* 388; Wilson, *In Our First Year of War* 18.

¹⁷⁴Scott, *Wilson's Foreign Policy*, pp. 322-323; Robinson & West, *Foreign Policy of Woodrow Wilson* 409; Wilson, *In Our First Year of War*, pp. 84-85; 6 *Current History* 392; *New York Times*, August 29, 1917.

¹⁷⁵40 Stat. at L. 1650-52.

¹⁷⁶*Posselt v. d'Espard*, (1917) 87 N. J. Eq. 571, 100 Atl. 893.

the political department of the government, statements made by supreme executive officers in public addresses or in messages to their legislative departments? Probably not at all, because they have not been announced as law, and are primarily propaganda anyway. They have not the force of Congressional enactments or presidential proclamations formally made. They are not official in the legal sense of the word.¹⁷⁷ They are supplanted as evidence of the national intent by the regular enactments of the legislative branch. And they are furthermore in direct conflict with accepted principles of law regarding the status of one belligerent toward another.

The courts speak in quite an opposite tenor from the statesmen. Concerning the right of a country to employ force in war, it has been said:

"Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction, judicial tribunals cannot discriminate in its application."¹⁷⁸

It has also been stated that British subjects adhering to the British government during the war of American independence, "became *personally* answerable for the conduct of that government of which they remained a part."¹⁷⁹ And further:

"When one nation is at war with another nation, all the subjects or citizens of the one are deemed in hostility to the subjects or citizens of the other; they are personally at war with each other."¹⁸⁰

"War makes the citizens or subjects of one belligerent enemies of the government, citizens and subjects of the other. . . . During the war with Spain, Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States."¹⁸¹

"War is not war between sovereigns or governments alone. It puts each subject of the one belligerent into the position of

¹⁷⁷A field commander's words to this effect are held as a valid promise. *Planter's Bank v. Union Bank*, (1872) 16 Wall. (U.S.) 483, 21 L. Ed. 473, *Ochoa v. Hernandez*, (1913) 230 U. S. 139, 57 L. Ed. 1427, 33 Sup. Ct. 1033.

¹⁷⁸*The Venice*, (1865) 2 Wall. (U.S.) 258, 274, 17 L. Ed. 866.

¹⁷⁹*Ware v. Hylton*, (1796) 3 Dall. (U.S.) 199, 225, 1 L. Ed. 568. It is to be noted that "Rousseau's doctrine has never been fully accepted by British and American writers, and the history of all modern wars affords overwhelming evidence of its falsity." Higgins, *War and the Private Citizen* 12.

¹⁸⁰*White v. Burnley*, (1857) 20 How. (U.S.) 235, 249, 15 L. Ed. 886.

¹⁸¹*Herrera v. United States*, (1912) 222 U. S. 558, 56 L. Ed. 316, 32 Sup. Ct. 179.

being the legal enemy of each subject of the other belligerent."¹⁸² This is the law. Even if general practice prior to the World War was contrary thereto, which it was not—if we look back through the centuries instead of merely through a few decades—we find that all through history emphasis has been laid on the distinction between the combatant and non-combatant portions of belligerent states.¹⁸³ It is doubtful if now the distinction has not begun to vanish. Practice and precept have come down the ages with varying applications according to the more or less general scope or greater or less intensity of particular crises in war.

There are three reasons for believing that the distinction has been vanishing: (1) the economic character of modern war, (2) the prevalence of the conscription system, and (3) the character of modern governments and national policies. These must be inspected in some detail.

XI. AN "ECONOMIC WAR"

First comes the question of the economic character of modern war. A remark of von Moltke has often been cited as an extremist's opinion, one held only by ultra-militaristic military men. He declared:

"I can by no means profess agreement with the Declaration of St. Petersburg when it asserts the weakening of the military forces of the enemy is the only lawful procedure in war. No; you must attack all the resources of the enemy's government—its finances, its railways, its stores, and even its prestige."¹⁸⁴

Still, this is not a distinctly military view, nor is it the view of a single military man of a single nation. A high British court has said that "the means to be employed include . . . the damage, destruction, and appropriation of property, and injury to the general resources of the country."¹⁸⁵ The Supreme Court of the United States has remarked:

"The right of one nation not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force."¹⁸⁶

¹⁸²Daimler Co. v. Continental Tyre Co. [1916] A. C. 307, 308, 328.

¹⁸³Higgins, War and the Private Citizen 13.

¹⁸⁴Letter to Bluntschli, December 11, 1880, cited in Holland, War on Land 12; Rules of Land Warfare, U. S. Army, 1914, p. 14, par. 10.

¹⁸⁵The Flad Oyen, (1799) 1 C. Rob. 135.

¹⁸⁶The Prize Cases, (1862) 2 Black (U.S.) 635, 17 L. Ed. 459.

When the American Civil War was in progress, it was not too much to say that "the life of the Confederacy depended as much upon its cotton as it did upon its men. . . . It was the foundation upon which the hopes of the rebellion were built."¹⁸⁷ It was "potentially an auxiliary of the enemy by which they would be able to secure warlike supplies abroad."¹⁸⁸

"Victory is not won by army or navy alone," says Spenser Wilkinson, "it must be the work of the whole nation."¹⁸⁹ And the way in which the World War was fought by the principal belligerents and in which future great wars will probably be fought, has perhaps never been so well described as by President Wilson in his message of April 15, 1917 to his fellow countrymen, in which he said:

"Our industries, on the farm, in the shipyards, in the mines, in the factories, must be made more prolific and efficient than ever. They must be more economically managed and better adapted to the particular requirements of our task than they have been. . . . The men and women who devote their thought and their energy to these things will be serving their country and conducting the fight for peace and freedom just as effectively as the men on the battlefield or in the trenches. The industrial forces of the country, men and women alike, will be a great national Service Army—a notable and honored host engaged in the service of the nation and the world, the efficient friends and saviours of free men everywhere. Thousands, nay, hundreds of thousands, of men otherwise liable to military service will of right and of necessity be excused from that service and assigned to the fundamental, sustaining work of the fields and factories and mines, and they will be as much a part of the great patriotic forces of the nation as the men under fire."¹⁹⁰

Strange indeed it seems, therefore, to find a legal mind referring to the contrary statement of the same president, and saying that the German government and German people were separate, and that the German people should not be affected "except so far as

¹⁸⁷Lamar v. Browne, (1875) 92 U. S. 187, 23 L. Ed. 650.

¹⁸⁸Young v. United States, (1877) 97 U. S. 39, 59, 24 L. Ed. 992. This appears to be the real essence of this often misquoted and frequently misunderstood case. See also: Mrs. Alexander's Cotton, (1864) 2 Wall. (U. S.) 404; United States v. Padelford, (1869) 9 Wall. (U.S.) 531; Sprott v. United States, (1874) 20 Wall. (U.S.) 459; Haycraft v. United States, (1874) 22 Wall. (U.S.) 81, 22 L. Ed. 738.

¹⁸⁹Wilkinson, Government and the War, pp. 229-230.

¹⁹⁰Scott, Wilson's Foreign Policy 288; Robinson and West, Foreign Policy of Woodrow Wilson, pp. 394-395; Wilson, In Our First Year of War 34.

the legitimate interests of the United States require."¹⁹¹ In other words, the government and people of the United States were to be presumed at war with the supposedly isolated German government. All of our population was asked to take part in a war to be waged, however, not upon the enemy population but upon the politicians alone. And yet the Germans were organized for the combat the same way as the Americans. The nations of the world were all organized the same way too. A French publicist has recently remarked, with much sense and good discrimination:

"Munition workers, men and women . . . occupy a position intermediate between the combatants properly so called and the non-combatants who continue to follow their peacetime pursuits and professions. The reasons for giving them a privileged position in regard to hostile action are losing much of their force. Fundamentally these people are in almost exactly the same situation as men engaged in the auxiliary services of the army. Now the latter are certainly exposed to violent measures."¹⁹²

It is interesting, at this point to note two post-bellum pronouncements on this topic. The first is from an editorial in the *American Legion Weekly*, a popular periodical written by and read by veterans of the World War:

"The soldier on his belly on a field of fire, the workman at his bench in a factory, the executive at his desk in an office—alike they serve the flag."¹⁹³

The second is from a speech by the assistant secretary of war of the United States, who refers to the probability of the bombing of important seaports, industrial centers, and foci of communications, and says:

"If there should ever be another war, we must realize that it is not only the Army and the Navy which may be on the firing lines. We must realize that there may be no non-combatants."¹⁹⁴

This is the character of fighting which an economic contest may bring upon us. The World War may be an example for

¹⁹¹Possett v. d'Espard, (1917) 87 N. J. Eq. 571, 100 Atl. 893; See also the opinion of Cardoso, J. in *Techt v. Hughes*, (1920) 229 N. Y. 222, 128 N. E. 185, making a similar distinction.

¹⁹²1 Rolland, *Le Droit des Gens et la Guerre de 1914-1918*, pp. 646-647, cited in Spaight, "Air Bombardments" in *British Year Book of International Law, 1923-1924*, p. 32.

¹⁹³*American Legion Weekly*, June 8, 1923, p. 8.

¹⁹⁴Dwight F. Davis, Speech at St. Louis, Mo., October 1, 1923, War Department press release. The French army bill is based on the idea that "modern war extends to every branch of national life." (*San Francisco Examiner*, March 16, 1924.)

future wars. Then, as far as defensive purposes were concerned, it was the fashion to plead righteously for the distinction between combatants and non-combatants, speaking in vague and general terms of "violated international law" whenever an allied citizen was wounded or killed, without inquiring whether or not he was a munitions worker or a railway employee. But, for offensive purposes, our civilian population was itself organized like an army. Warring nations on both sides spared no effort to increase their own economic resources by using every available worker in the "essential industries" or to cripple the economic resources of the enemy, irrespective of any supposed immunities to non-combatants. The economic needs of a nation at war and of armies in the field, in these complicated civilized times, are such that warfare is largely maintained by economic means. Industry of course cannot win a war, but it can lose a war by failing to provide the necessary materials, bullets and shells for the rifles and guns, foods and clothes for the men who direct them, and means of transporting them and of keeping up that constant communication upon which the strategic and tactical coöperation of forces in the field depends. The necessity of industry and of economic resources in war is well demonstrated by the World War, from which but a few instances will need to be drawn. For example, in 1914, when the Germans invaded Poland it was reported that the advancing armies took with them great numbers of threshing machines, reaped the crops, and sent them off to the home centers of supply.¹⁹⁵ In England, a War Agricultural Committee in each county had in 1917 compulsory powers of directing the cultivation of grass land;¹⁹⁶ industries for the making of dyes and optical glass "proved essential to the nation;"¹⁹⁷ and over 4,000 independent firms employed nearly 2,500,000 people producing munitions of war under state control as "controlled establishments."¹⁹⁸

Some persons may be called "peaceful" and some "armed" citizens of a belligerent nation, some may be called "combatant" and some "non-combatant" but it is hard to maintain very strictly in view of the actual facts, that the "peaceful" and "non-combat-

¹⁹⁵The Times (London), September 24, 1914, p. 6; Phillipson, *International Law and the Great War*, pp. 227-228.

¹⁹⁶Whetham, *The War and the Nation* 71.

¹⁹⁷*Ibid.*, p. 127.

¹⁹⁸*Ibid.*, p. 145.

ant" persons who assist in the prosecution of the war shall not be disturbed in the work which he does for the specific purpose of aiding the army. For example, in Japan since 1888 the government factory for the manufacture of military woolen cloth has been administered by the war department. In recent years the factory has left to private manufacture a part of the military woolen cloth needed by the army, and also ordinary woolen cloth which had been manufactured by the government factory as subsidiary work.¹⁹⁹ What had been a purely war department activity became, with the growth of civil industry, also a civil activity, and part of it for military purposes. Of the instruments and materials necessary for military communications, about one-third are made in Japanese military arsenals and the rest are made by private manufacturers.²⁰⁰ Horseshoes for use in ordinary times that could not be made on the spot by the troops requiring them, and all horseshoes for use in time of mobilization for war, are intended to be made at the gun accessories factory in the Tokyo arsenal, but when necessary a part of the work is given to private farriers by contract.²⁰¹ Can the same cloth-making—all military men would appreciate the need of supplying proper uniforms in time of war—can the same cloth-making which is conducted in a government factory be interfered with by aerial bombing and not that in private factories? Can the Japanese arsenal making binoculars be bombed, and not the Eastman Kodak works at Rochester, New York? Can a government storehouse full of field wire be bombed, and not those stocks of "twisted pair" owned by the Bell Telephone System?²⁰² What difference does it make where the article may be that is of military use to the soldiers, whether in a military supply base or in a private factory? On the one hand we have a collection of jurists at the Hague "agreed that it was desirable that the laws of war should be such as to prevent suffering of persons or destruction of property, except such as was inevitable for the accomplishment of the military objective."²⁰³ And on the other hand we have a Japanese writer remarking:

¹⁹⁹Kobayashi, *Military Industries of Japan* 105.

²⁰⁰*Ibid.*, p. 90.

²⁰¹*Ibid.*, p. 99.

²⁰²Crowell, *America's Munitions* 575.

²⁰³Rodgers, *Laws of War Concerning Aviation and Radio*, in 17 *Am. J. Int. L.* 632.

"The industry of the army and the general industries of the nation cannot be completely separated when the needs in time of war and in the development of the general industry are taken into consideration. On the contrary, they are ever approaching nearer and nearer to each other as the civilization of the world advances."²⁰⁴

with an able British writer adding a statement which announces "the appropriation to the purposes of war of the results of mechanical invention and the industrial revolution."²⁰⁵ The remarks have been made in connection with the military problems of production and of procurement and of supply. Do the truths they set forth apply equally well as regards the policy to be adopted by an attacking enemy, whether that enemy come through the air, or over the ocean, or across the intervening spaces of land, like the raiding cavalymen of Mosby, and Morgan, and Forrest?

We are told concerning the last war that:

"As an obstacle to economic life the almost continuous bombardment of the mine districts of the Saare Valley, the iron-district of Conflans-Briey-Longwy, Josuf, and the Rhine Valley, admittedly greatly weakened Germany's power of resistance."²⁰⁶

We are advised for the future that:

"The destructive action of bombing aviation extends as far as industrial centers and manufacturing plants which are grouped in the zone of the interior. It is there that the arms of war are manufactured, and supplies of all sorts prepared, which enable the armies to fight and to exist. To strike at such works is to hit the source itself of the current which nourishes the combative forces of the enemy."²⁰⁷

We are told concerning the last war that:

"Besides material destruction, the long-distance day raids of the Independent Air Force [Cologne, Coblenz, Mannheim, etc.] caused great injury to morale, disruption of traffic or labor, and diverted a large amount of anti-aircraft defense and air squadrons from the field of battle."²⁰⁸

We are advised for the future that:

"A bombardment of factories has for its object the destruction of certain parts of the factories, the disorganization of the crowds of workers by the losses suffered, the stoppage of work during the time of alarm, and demoralization of workers who refuse to

²⁰⁴Kobayashi, *Military Industries of Japan* 180.

²⁰⁵Wilkinson, *Government and the War* 66.

²⁰⁶*Aerial Bombardment Manual*, U. S. Army (1920), Part 1, p. 8.

²⁰⁷*Ibid.*, (1920), Part 3, p. 22.

²⁰⁸*Ibid.*, (1920), Part 1, p. 9.

work in a zone subjected to frequent attacks. The last results are perhaps the most important."²⁰⁹

After surveying these extracts, perhaps after all we may be constrained to accept a change in fact, whether or not there has been a change in law. We must at any rate seriously consider the position taken by the British Foreign Office which announced when altering the contraband list:

"So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population."²¹⁰

More recently it has been said, by an American lawyer:

"In the Great War . . . whole populations had such a direct relation to the contest that a line between combatants and non-combatants could not logically be drawn."²¹¹

And the most extreme statement of what the situation may be is this:

"In the course of the Great War several conditions developed which will materially modify the law of war. In the first place, much of the old law as to the relations between belligerent states is based upon the assumption that war is in essence a conflict between their fighting forces and not between their populations. Whether or not that condition ever in fact existed, it no longer obtains. Prior to the Great War, all the resources of Germany—military, industrial, and financial—had been organized for war. Under such an organization a peasant woman cultivating a farm was as much a part of the military machine as was a soldier in the ranks, and from a military standpoint there was no reason for placing the two in different categories. In the course of the Great War, the adversaries of Germany were forced to adopt a similar type of organization and in any future war of magnitude, the resources of the belligerents will be mobilized on the same principle but with even greater care and effectiveness."²¹²

It is very difficult to say whether such an extreme view as this warrants belief. It is very hard to think that wars will mean national extermination, or attempts at such. It is also hard to draw the line, for the future as well as for the past. Regulations will persist, because there will at least be some semblance of military object and objective whenever non-combatants suffer. But those who attempt to adhere to the ancient and now inapplic-

²⁰⁹Ibid., (1920), Part 3, p. 29.

²¹⁰2 Garner, *International Law and the World War* 287. Cf. also The Kim, [1915] P. 215.

²¹¹Evans, *Leading Cases in International Law*, 2nd ed., p. 681, note.

²¹²Ibid., p. 723, note.

able distinctions which might have been perfectly valid two hundred years ago in the days of purely professional armies, should realize that the war plans of the nations today do not contemplate purely professional armies, or even contemplate all war effort by armies. In a statement concerning plans and projects for industrial mobilization in time of conflict the American assistant secretary of war said in 1923:

"Wars are no longer fought by the armed forces alone. Every man, woman, and child, every resource and every dollar in the entire nation must throw its weight toward victory in time of war."²¹³

And his predecessor in the same office said

"If war should be forced upon us, we will find that our individual and collective effort is unified, and that all America is consecrated, materially and spiritually, body and soul, to national defense."^{213b}

This is the situation which confronts us today. This is the principle which will be applied in economic wars of the future. This is the principle which governs the following imaginary warfare in the future penned by an able military man who often thinks very acutely and soundly on all phases of war. He says:

"A few years ago armies alone went forth to battle; today entire nations go to war, not only as soldiers, but as moral and material suppliers of soldiers. This being so, we find that, while a short time back it was clearly possible to differentiate between the military and the ethical objective of nations at war, today this difference is becoming more and more complex; so much so that both these objectives are likely to coincide, and when this takes place, to attack the civilian workers of a nation will then be as justifiable as to attack its soldiers."²¹⁴

This is, again, the principle involved in the analysis made by a German who, for his liberal opinions is persona non grata in his own country. He says:

"In the present age of commerce, in which millions of people live scattered about in foreign lands or move from place to place, it is impossible still to regard war as a matter which concerns only the military persons of the participating states. . . . Not alone in the belligerent countries, but even in the neutral world, there is really no one who is not in some way or other

²¹³Dwight F. Davis, speech at Chicago, Ill., October 5, 1923, War Department press release.

^{213b}J. Mayhew Wainwright, speech at Buck Hill Falls, Pa., October 25, 1922, War Department press release.

²¹⁴Fuller, *The Reformation of War* 70.

affected by a great war. The mutual connections between individuals in all walks of life are today so ramified and complicated that no one can entirely escape the effects of such a war. He who is not affected as a military person or as one who must enter into this war with body and soul will nevertheless be affected by the war in his family life, or his economic condition, or his social, spiritual and moral relations. The attempts to curb or eliminate such effects have proved to be impotent. No one escapes these effects. It is therefore an empty theory that war is an affair of states, and that the carrying on of war concerns only military persons. In the age of commerce war is an affair of peoples who conduct it with all their physical and economic strength."²¹⁵

So, in attempting to discuss war, or any of its phases or means of regulating it, we must have the facts and the theories bear some relation. The theories must be founded on the facts, as the doctrines of every international principle grow from facts. War is economic at times, economic in cause, and economic in nature. A recent writer has with great detail sustained the thesis of its almost unvarying economic cause saying that "economic conditions have stimulated war in all ages" and citing Mr. H. N. Brailsford with approval and supporting fact in the argument that "the potent pressure of economic expansion is the motive force in an international struggle."²¹⁶ Since war is economic, it affects all persons and loses many, if not most, of the ancient distinctions. For instance, before the American entrance into the World War, the British—as an incident to postal censorship—took from the mails money orders, checks, and bills of exchange payable to Germans in Germany. Cargoes of grain and flour consigned to individuals in Germany were seized by the British who quite ignored the old standards as to "contraband" and "conditional contraband." It was argued that since, on January 25, 1915, the Germans had confiscated all foodstuffs in their empire and adopted the system of "rationing," any food stuffs crossing the frontier would go inevitably to the German government and possibly to the Germany army, even though consigned and eventually delivered to private individuals.²¹⁷ The Allies then formed their famous "iron ring" around their enemies and deliberately planned to starve a whole nation, acting upon the same theory as that set forth in the Lieber Instructions of 1863: that

²¹⁵Nippold, *Development of International Law after the World War*, tr. A. S. Hershey, p. 114.

²¹⁶Bakeless, *Economic Causes of Modern War* 10.

²¹⁷Clapp, *Economic Aspects of the War*, pp. 59-64.

“war is not carried on by arms alone,” and that “it is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”²¹⁸ As early as November, 1914, Winston Churchill, then First Lord of the Admiralty, remarked that economic pressure—it is said that he invented the phrase—brought about by the naval blockade, would ultimately spell the doom of Germany as certain as the winter struck the leaves from the trees.²¹⁹ It was deemed proper to starve the non-combatants of the enemy, because the diminution of food for all would lessen the amount of food that might be forwarded to the enemy army which, like all armies, moved “on its stomach.” It was deemed proper to attack any element of the enemy country which assisted the enemy in prosecuting the war. The food crop, the mine, the forest, the factory, the transportation center, the administrative office—all places where work went on that would eventually be of support and aid to the soldiers at the front—all were deemed properly subject to attack however far from the battlefield.²²⁰ Nor, when we think of the size of modern armies, the difficulties of maintaining them, and the needs of present-day combat, is it fantastic to speak thus of attacks upon these things as military measures against enemy military resources and objectives. In connection with an extended discussion of Martial Law aroused in England by the Marais case of 1902, a distinguished English legal writer remarked:

“There may be a state of war at any given place where aid and comfort can be effectually given to the enemy having regard to the modern conditions of warfare and means of communication.”²²¹

We must simply face the fact. We wage war ourselves from every corner of the country. We should not too petulantly object if an enemy sends night bombardment units deep into our territory on strategic—as opposed to tactical in the military sense—operations which will affect our combat troops only remotely, especially since our own manuals recommend the same measures to our own flyers.²²² The battlefield is wider than it has been.

²¹⁸Lieber Instructions, G. O. 100, A. G. O., 1863, art. 17; Rules of Land Warfare, U. S. Army, 1914, p. 56, par. 173, note.

²¹⁹Clapp, *Economic Aspects of the War* 143.

²²⁰“Raids are made at great distances.” (*Aerial Bombardment Manual*, U. S. Army (1920), Part 1, p. 6.)

²²¹Pollock, *What is Martial Law?* in 18 L. Q. Rev. 152, 157.

²²²Training Regulations No. 15-70, U. S. Army (1922), pars. 15-16.

Modern industrial, economic, and social organization and administration has brought our civilian population into the war. Modern inventions and appliances have enabled both ourselves and the enemy to pass through the air and attack these "civilian soldiers" as they should be called. When an economic war comes, that is what we may expect.

XII. "SELECTIVE SERVICE"

The second reason for believing that the distinction between combatant and non-combatant has vanished is the prevalence and character of the modern conscription system. In other days the "press gang" used to take the able-bodied men it needed. Now, the draft law takes the able-bodied fit to fight only when they are not needed in some one of the "essential industries" without which the war cannot be prosecuted, and recognizes in what President Wilson said would amount to "thousands, nay, hundreds of thousands" of instances, the essential aid certain kinds of workers can give the country by remaining at their pristine tasks.

The distinction between combatant and non-combatant has already been clearly considered as non-existent in guerilla campaigning "where a whole population engages in warfare."²²³ We have already seen how three South American nations combining against Paraguay professed to attack the government and not the people,²²⁴ and yet when the whole people became a part of the Paraguayan army, and even women were used to carry military burdens, the war extended to almost every individual until almost the entire nation was obliterated.²²⁵ What happened in a few years in South America has been happening gradually all over the face of the world. "Since the French Revolution, the dominant type of European army has been the nation in arms."²²⁶ The Grand Monarch may have said: "L'Etat c'est moi!" but the citizens of republican France, every one of whom was required to fight, declared with patriotic fervor: "L'Etat c'est nous!" The truth of the matter was well summed up by von Moltke when he wrote: "The wars of the present day call the whole peoples to arms; hardly a family which is not included."²²⁷ And an eminent

²²³Bordwell, *Laws of War* 152.

²²⁴55 *British and Foreign State Papers*, p. 83, Treaty of May 1, 1865.

²²⁵Thompson, *War in Paraguay* 342.

²²⁶1 Taylor, *Wars of Marlborough* 18.

²²⁷Wilkinson, *Government and the War* 81.

British writer and teacher on military subjects has cited with approval the remark of Clausewitz:

"Since Bonaparte, war, by becoming, first on one side then on the other, an affair of the whole people, has acquired a different character."²²⁸

Every man does his part in the war, advancing under barrages overseas, doing military police work or supply administration along the line of communications, winning and wearing silver chevrons at home, buying Liberty Bonds, boosting production, taking unaccustomed tasks so as to release another, abler person for the front, tilling a little garden plot, working on a lathe in a munitions factory, holding down a "dollar--a-day" post at the capital or on a draft board—yes, even sewing that little strip of sky-blue ribbon on the overseas cap. It is particularly worth mentioning that "anti-aircraft defense presumes coöperation of civilians in darkening areas, in issuing warnings, and in complying with them."²²⁹ Nowadays we are all in it, whether making shells or firing them from a field piece, whether writing propaganda leaflets or dropping them behind the enemy lines. Each man, and each woman, too, has a part to play, as President Wilson indicated in his message to the American people already quoted. Conscription is not merely the work of a "press gang" as in the Eighteenth Century, picking up a few stray men for small armies. Conscription is a nation-wide affair. It is called "Selective Service" because it selects this man to carry a rifle over the top, that man to build a ship, and the next man to cut spruce wood for airplanes from the forests of the state of Washington. It recognizes that modern war is an industrial war and that industries must do their part. Such may very probably be the next war. The boast has recently been made that now the British Empire "acts as one force in peace as well as in war" with "industries well organized imperially".²³⁰ Industries depend upon manpower the same as armies do. Reduce the active industrial manpower, and you reduce the force with which the war is waged. Reduce the human forces behind the war, and you work toward your war aims as effectively as when you reduce the human force that marches in khaki columns and leaps forward with thrusting bayonet.

²²⁸Ibid., p. 77.

²²⁹Manual of Anti-Aircraft Defense (British), 1922, p. 12, sec. 14.

²³⁰Clarke, 94 *The Nineteenth Century* 19.

In a very extreme statement, neither sound nor judged to be so by the court, one of the defense counsel at Leipzig in the case of the *Llandovery Castle*—in the face of international conventions protecting wounded persons and hospital personnel—argued that “it was necessary to destroy the men and women in the life-boats in order to prevent them from reaching their homes and rejoining the war.”²³¹ The statement was extreme, too extreme; yet there was some truth in the idea behind it. It is too much to assert that every man, woman, or child in any nation might be killed;²³² but it is not too much to assert that every man, woman, and child who works for the direct aid and supply of troops at the front—except those protected by the Geneva conventions—has no just cause of complaint if a hostile airplane flies overhead and hurts the individual in the course of an aerial raid aimed at preventing or hampering the war work. The methods and motives of the selective service laws are too well known to need further elaboration, except to call attention to the fact that the title is truly descriptive, and not merely a convenient and tactful substitute for the word “draft.” The result of the selective service method and idea and of its thorough-going application is to break down to a great extent the old distinction between combatant and non-combatant.

XIII. POPULAR NATIONALISM

The third reason for believing that the distinction between combatants and non-combatants has broken down, in addition to the economic character of modern war and the purpose and manner of modern conscription lies in the nature of modern governments and national policies. The absolute monarchs went to war to enrich themselves.²³³ The nations of the present go to war in support of national economic policies which are to the advantage of their citizens. The citizens are interested in the war, and also interested in the government, as never before. They have a direct hand in the moulding of governmental policies, through the ballot box, the legislative lobby, political influence, and the public press. Under the present conditions of national psychology and nation-wide publicity, a war becomes “a popular move-

²³¹Mullins, *The Leipzig Trials* 127.

²³²Evans, *Leading Cases in International Law*, 2nd ed., pp. 723-724, note.

²³³Bentwich, *War and Private Property* 12.

ment"²³⁴ and "a social effort"²³⁵ whose motives vibrate "in the spirit of every member of the community," each of whom is "deeply stirred by the cause of the quarrel."²³⁶ To an acute thinker this fact was evident during the World War. He remarked: "It has been said that we have no quarrel with the German people, but only with the Emperor and the military caste," and added that time had shown the German people to be "heart and soul in the war along with the Emperor and the military caste."²³⁷ Under such circumstances we must admit the truth of Sherman's statement, as an Englishman admitted it in 1912,²³⁸ that "the proper strategy consists in the first place in inflicting as telling blows as possible on the enemy's army, and then in causing the inhabitants so much suffering that they must long for peace and force their governors to demand it." It is a truth demonstrated by American armies in 1846-1848 when Scott's lenient attitude in Mexico was abandoned for measures more severe adopted avowedly for this purpose.²³⁹ And a modern historian has said that Sherman's own march to the sea during the American Civil War "destroyed food and confidence" and had a decided effect in weakening both the morale and the numerical strength of Lee's superb fighting machine.²⁴⁰

Thus we find in war the use of what is known as "moral pressure" far more effective now than in the days of undemocratic and non-representative governments. It has in the past been the practice to exert this pressure by deliberately firing shells into the obviously residential sections of besieged towns, to terrorize them and move them to compel the military authorities to capitulate.²⁴¹ Theorists have declared that such bombardments cannot be excused and can only be accounted for as survivals of old practice, and yet we have to admit that they are for the present "sanctioned by usage."²⁴² Similarly, one of the purposes of invading enemy territory, apart from winning victories over an adversary's troops, is to make the invader's superiority felt by the whole population of the enemy state. It has been pointed out

²³⁴Wilkinson, *Government and the War* 66.

²³⁵*Ibid.*, p. 29.

²³⁶*Ibid.*, p. 17.

²³⁷*Ibid.*, p. 213.

²³⁸Higgins, *War and the Private Citizen* 65.

²³⁹Smith, *Military Government* 63.

²⁴⁰Paxson, *The Civil War* 239.

²⁴¹Despagnet, *La Guerre Sud-Africaine* 120.

²⁴²Hall, *International Law*, 4th ed., p. 556.

that France was not vanquished when Metz and Sedan had capitulated. Paris had to be starved into a surrender and the whole nation reduced and paralyzed.²⁴³ Again, during the revolutionary conflicts in South America, Bolivar felt that the Venezuelans had not made the war sufficiently felt by the royalist population to insure him the peace he desired, so he issued the following manifesto to the inhabitants of New Granada, December 15, 1812:

"The codes consulted by our magistrates were not those in which they might learn the practical science of government; but those invented by visionaries who, imagining chimerical republics, have thought it possible to attain political perfection, assuming the perfectibility of the human race. Thus it is that we have had philosophers in place of chiefs, philanthropy in place of legislation, dialectics in place of tactics, and sophists in place of soldiers."²⁴⁴

During General Scott's occupation of Mexico in 1846, he promised immunity to persons and property and paid for what he took, until it was thought that Mexico was continuing the war because the civil population was not feeling its hardship. "Consequently instructions ordered him to support his army by uncompensated seizures."²⁴⁵ We should note the statement of von Moltke to the effect that "the factors which militate against peace, are to be found in the peoples themselves."²⁴⁶ Or, to quote an American rather than a German, we may point to Admiral Mahan remarking that the destruction of the enemy's armed forces alone will not bring a war to a conclusion for there is also needed "pressure on the population to produce stagnation of the national life."²⁴⁷ Also to be noted is the passage in the Lieber Instructions:

"Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civil 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. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war."²⁴⁸

²⁴³Higgins, *War and the Private Citizen*, pp. 49-50, 68.

²⁴⁴Robertson, *Rise of the Latin-American Republics* 225.

²⁴⁵7 Moore Digest, pp. 282-285; Wright, *Enforcement of International Law through Municipal Law* 211.

²⁴⁶Cited in Higgins, *War and the Private Citizen* 5, and in Peel, *The Enemies of England* 244.

²⁴⁷Mahan, *Some Neglected Aspects of War*, ch. vi.

The states of the world are now nationalistic. They are permeated with the patriotic spirit. The individual members thereof think together and act together in warlike operations. The man in the wealthy club on Fifth Avenue has often been accused of starting the wars of the past for the advantage of his own financial or commercial interests, and accused of being less capable of shouting about "licking the rascals" if he might himself feel the weight of the enemy power on his family or on his own person. Yet he is only a part of the nationalized state that is waging the war, a nationalized state that has called out and organized every form of resource for the purposes of war.²⁴⁹ If his opinion could be modified or his earnest exhortations suppressed, the enemy might be more successful. When the Germans raided London, it was said that they "seldom effected damage of importance."²⁵⁰ Yet it has been stated that although they "did not succeed in dropping bombs with any marked degree of accuracy, . . . they nevertheless had their value."²⁵¹ It has been claimed that the Zeppelin raids "did much for recruiting in Britain."²⁵² Yet perhaps a more mature consideration of the facts and of the cumulative effects of such raids extending continuously over a long period of time, would lead to the conclusion that a defenseless, though not undefended, population would sooner or later become war weary under successive bombardments, and become skeptical of the glowing accounts their own leaders were giving out as to their own reputed "command of the air." Slowly their morale might be broken, particularly the morale of the working population who labor in those factories most likely to be under fire. And public sentiment and opinion make possible or impossible battlefield achievements in war.²⁵³

"War, completely seen, is no mere collision of physical forces: it is a collision of will against will. It is, after all, the mind and will of a nation—a thing intangible and invisible—that assembles the materials of war, the fighting forces, the ordnance, the whole physical array. It is this invisible thing that wages the war; it is this same invisible thing that on one side or the other must

²⁴⁸Lieber Instructions, G. O. 100, A. G. O., 1863, art. 20-21; Rules Land Warfare, U. S. Army (1914), p. 14. par. 10 note.

²⁴⁹Wilkinson, Government and the War 19.

²⁵⁰Turner, The Struggle in the Air 153.

²⁵¹Aerial Bombardment Manual, U. S. Army (1920), Part 1, p. 8.

²⁵²McCurdy, Psychology of War 81.

²⁵³Hall, Morale in War and After in 15 Psychological Bulletin 398.

admit the finish and so end it. As things are now, it is the element of 'morale' that controls the outcome."²⁵⁴

Intercourse with your enemy's people is forbidden in time of war. The press is censored. Private letters have portions deleted. You may have command of the air at any given place or places; but his communiqués will seldom admit it. Your army may be as fit as his; but his leaders will not let the fact be known at home. Suppose, then, you use your aircraft to overleap his lines. You may drop leaflets setting forth your version of affairs.²⁵⁵ Or you may make your arguments more tangible and convincing than mere words on printed paper. Those might be readily branded as lies. If, however, your aircraft go deep into his territory, through his protecting squadrons, and drop explosives on military munitions plants in the neighborhood of his population, before their very eyes, within hearing of their very ears, the individual may realize that "command of the air" is not so completely in the hands of his own forces as he has been led to believe. You make each of your opponents understand that you are still continuing the fight. Such an effect on enemy morale may be gained in addition to all material harm done his rearward military establishments, and industrial equipment, and transportation centers. This effect on morale was clearly contemplated and utilized by all belligerents in the late war. Will it be used in the future? The American and British instruction books seem to so provide. One of the objects of night bombing is said to be "to lower morale of both troops and civilians . . . by continually disturbing the security of troops, of headquarters, and the native inhabitants."²⁵⁶ One of the distinctive features of the airplane is said to be its ability "to fly deep into enemy territory" where "bombing operations are conducted in order to destroy the enemy's morale, thereby reducing the efficiency and fighting power of the enemy's military forces and the support furnished by the civilian population."²⁵⁷ It is not possible to separate entirely the moral effect of bombing and its material effect. Every raid may be of use for two things. Bombing may most effectively and most economically be used to attack railway junctions,

²⁵⁴Hocking, *Morale and Its Enemies* 8.

²⁵⁵2 Stowell and Munro, *International Cases*, pp. 246-247; Draft Aircraft Convention of 1923 article 21, *New York Times*, June 24, 1923, Part II, p. 1a; 17 *Am. J. Int. L., Supp.*, p. 242.

²⁵⁶*Aerial Bombardment Manual*, U. S. Army (1920), Part 3, p. 26.

²⁵⁷*Training Regulations No. 15-70*, U. S. Army (1922), par. 13.

"arsenals, dockyards, and factories which manufacture articles necessary in warfare."²⁵⁸ But this use has a double value. It hurts the material effectiveness of military production and supply, and it also hurts the civilian operation of the agencies for that production and supply. On the one hand, the army may be deprived of tangible things required for its very existence at the front. On the other hand, it may be deprived of that popular support without which troops of today fight but ineffectively. The material destruction is rather generally admitted as permissible. The destruction of morale, which commonly accompanies it, is usually spoken of as an undesirable damage, collateral to the main purpose and almost unavoidable in these "civilized days" though, as a matter of fact this very destruction of morale is an integral part of the aim and purpose of all war-time operations and underlies all carefully planned strategy.

(To be continued)

²⁵⁸Manual of Anti-Aircraft Defense (British), 1922, p. 2.