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## THE EFFECT OF THE WAR ON INTERNATIONAL LAW

## II. WAR AND NEUTRALITY†

BY QUINCY WRIGHT\*

THE law of war is founded on a compromise between the sentiment of humanity and the belligerent object of bringing the enemy to complete submission as soon as possible.<sup>1</sup> Its basic principle, which forbids destruction of life and property of the enemy causing suffering out of proportion to the military advantage gained,<sup>2</sup> dates from ancient times,<sup>3</sup> but its detailed rules, though in many cases originating in the middle ages,<sup>4</sup> have not been unaffected by ephemeral conditions. The progress of invention, the concentration of national organization, and changes in the humanitarian sentiment reflected by public opinion, have continually produced modifications. The law of war has been somewhat less stable than the law of peace, during the past three centuries, and has perhaps been somewhat more affected by recent social and scientific inventions, but on the whole the World War has not shown it seriously out of harmony with present conditions.

The law of neutrality is based on compromises between more numerous and more changeable interests than the law of war, and is more directly dependent upon changing conditions, especially of transport and communication. Not only is there conflict between the general interest of neutrals to continue trade uninterruptedly and of belligerents to bring the enemy to complete sub-

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†Continued from 5 MINNESOTA LAW REVIEW 436.

<sup>1</sup>Lieber's Instructions, U. S. Army, G. O., 100, 1863, secs. 15, 16; U. S. Rules of Land Warfare, 1914, secs. 10-13; Hall, *International Law*, 7th ed., (Higgins), sec. 17; 2 Westlake, *International Law*, 2nd ed., 128.

<sup>2</sup>Declaration of St. Petersburg, 1868, Preamble; IV Hague Convention, 1907, Preamble, annex arts. 22, 23e.

<sup>3</sup>"Whereas the taking and demolishing an enemy's forts, harbours, cities, men, ships and crops, and other such things, by which our enemy is weakened, and our own interests and tactics supported, are necessary acts according to the laws and rights of war; to deface temples, statues, and such like erections in pure wantonness, and without any prospect of strengthening oneself or weakening the enemy, must be regarded as an act of blind passion and insanity," Polybius, 5: 11. Trans. Shuckburgh, quoted in Walker, *History of the Law of Nations*, p. 53.

<sup>4</sup>Especially among the Saracens and Italians, Walker, *op. cit.* pp. 126, 130, 189.

mission,<sup>5</sup> but there are conflicts between particular interests of states arising from peculiar geographical position, social organization or state policy.<sup>6</sup> States relying on a navy will want different rules of neutrality from states relying on land forces. So also the interest of states with scattered territory and numerous ports differs from that of compact and landlocked states. The same is true of states supplied with ample raw materials in their territory as opposed to states relying on external trade. Finally, states with policies creating an expectation of war will approve different rules of neutrality from those anticipating continuous peace. Experience has shown that the peculiar interests of the states which happen to be neutral and belligerent in a given war, and the ratio of belligerent to neutral potential power has greatly influenced the interpretation of the law of neutrality in every war and has often modified the law itself.<sup>7</sup> The law of neutrality has doubtless been more altered by the recent war than has the law either of peace or war.

Reflection upon the recent war is likely to convince one that fear of jeopardizing military success, whether by inviting reprisals, stimulating the enemy to greater exertion, or making neutrals enemies, is the only sanction of the laws of war and neutrality likely to prevent violations by a belligerent fighting for national existence. Consequently rules must be framed so that observance is the best policy from a purely military standpoint or they will be ignored in a closely contested war. Law may prevent wanton destruction of life and property in war but it cannot hope to prevent violence which really makes for military success.<sup>8</sup>

As has been noticed the rules of war have developed in full appreciation of this principle.<sup>9</sup> Consequently self interest would seem to sanction their observance by belligerents capable of looking beyond the immediate military operation to the war as a whole. Where solemnly accepted by treaty, as is the case with many of the rules of war, the sanction of good faith fortifies, though it must be feared somewhat feebly, that of utility. It would seem that the war experience justifies most of the established law of war. Violations seem in fact to have reacted most disastrously to the violator.<sup>10</sup>

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<sup>5</sup>Hall, *op. cit.* secs. 19, 20.

<sup>6</sup>A. J. Balfour, *The Freedom of the Seas*, Interview to American Press, May 1916, printed in *Essays Speculative and Political*, p. 211, et seq.

<sup>7</sup>Oppenheim, *International Law*, 3rd ed., p. 94.

<sup>8</sup>Supra note 1.      <sup>9</sup>Supra note 2, and Westlake, *op. cit.* pp. 61, 128.

<sup>10</sup>5 MINNESOTA LAW REVIEW 444.

The war has, however, shown that international law can not greatly reduce the destructiveness of war. Rather it has shown that with the progress of science and national organization the destructiveness of war is likely to increase to an extent jeopardizing the existing civilization.<sup>11</sup> This consideration perhaps suggests that the effort of international law to regulate war and neutrality is of slight practical value and that international law must more seriously devote itself to the regulation of conditions which lead to war and the elimination of war itself. Consequently (1) the right to declare war and (2) the right to remain neutral have been considered first in this article. Of the many topics in the laws of war and neutrality which have been discussed during the war, two have been selected for consideration because they involve consideration of fundamental principles which have been drawn in question by the war. These are (3) the right to attack non-combatants, and (4) the right to employ novel instruments of war. In all wars there have been allegations of violations of international law. Such allegations may be met by a denial that the act complained of occurred, by a denial that the principle asserted is law, or by the contention, admitting the fact and the law, that the departure from law was justified by exceptional circumstances. The sufficiency of this contention is examined according as the act complained of is (5) in retaliation, (6) at convenience, or (7) under necessity. In the law of war as of peace the need of more certain and definite processes for sanctioning the law has been felt, consequently in conclusion attention has been given to (8) the responsibility for violations of the law of war.

### 1. THE RIGHT TO DECLARE WAR

For over a hundred years international law has abandoned the quest of early publicists for general principles distinguishing between just and unjust wars and the legal right to declare war has been unlimited unless special treaties intervened.<sup>12</sup> Thus

<sup>11</sup>Lecture by Major General Sir Louis Jackson, Dec. 1919, *Journ. of the Royal United Service Institution*, 65, No. 457, Feb. 1920, quoted in H. G. Wells, *The Outline of History*, 2: 567-571.

<sup>12</sup>"Grotius devotes several chapters to an attempt to distinguish between just and unjust causes of war. Such matters as these are supremely important; but they belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status." Lawrence, *The Principles of International Law*, p. 333. See also Hall, *op. cit.* sec. 16; Wilson and Tucker, *International Law*, 7th ed. p. 236; Davis,

the commission of the Peace Conference on responsibilities, although holding 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,"<sup>13</sup> considered that even "a war of aggression may not be considered as an act directly contrary to positive law"<sup>14</sup> and consequently recommended that "The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal."<sup>15</sup> The Treaty of Versailles, however, does not follow this recommendation, but indicates a desire to modify the law by establishing a pecuniary responsibility on states and a personal liability on governments for making war without sufficient reason.

By article 231:

"The Allied and Associated Governments affirm, and Germany accepts, the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."

By article 227 "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties," reference being apparently to the origin of the war and violation of the neutralization treaties.

Special treaties, in the past, have made it illegal, as between contracting states, to declare war against neutralized states,<sup>16</sup> to declare war for the collection of public contract debts unless an offer of arbitration has been refused,<sup>17</sup> to declare war on account of controversies susceptible of arbitration,<sup>18</sup> and to declare war be-

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Elements of International Law, 3rd ed., p. 272. 1 Halleck, however, discusses just causes of war, 4th ed., 539 and see 7 Moore, International Law Digest, 171.

<sup>13</sup>Hearings before the Committee on Foreign Relations, United States Senate, 1919, 66th Congress, 1st Sess., Sen. Doc. No. 106, p. 321.

<sup>14</sup>Ibid. p. 329.

<sup>15</sup>Ibid. p. 336.

<sup>16</sup>Treaties neutralizing Switzerland, 1815, Belgium, 1839, Luxemburg, 1867: 1 Westlake, op. cit. 27 et seq.

<sup>17</sup>II Hague Convention, 1907.

<sup>18</sup>I Hague Convention 1899, art. 16, 1907, art. 38.

The United States has treaties with twenty-eight countries requiring submission to arbitration of "Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting Parties and which it may not have been possible to settle by diplomacy . . . provided nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting States, and

fore a delay, usually of a year, for conciliation has elapsed.<sup>19</sup> In view of such treaties the commission referred to, finding 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,"<sup>20</sup> recommended that "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."<sup>21</sup> The Treaty of Versailles, as has been noted, refers to "a supreme offense against . . . the sanctity of treaties" as a ground for arraigning the Kaiser.

The League of Nations Covenant embodies several of the limitations upon the right to declare war found in earlier special treaties. Thus, for members of the League, wars of conquest (art. 10), and wars over controversies which have been arbitrated (art. 13), or conciliated by unanimous recommendation (art. 15) are made illegal, and all wars are forbidden until a nine months' delay for peaceful settlement has intervened (art. 12).<sup>22</sup>

## 2. THE RIGHT TO REMAIN NEUTRAL

Wheaton said, "The right of every independent state to remain at peace while other states are engaged in war is an incontestable attribute of sovereignty."<sup>23</sup> This should not be understood as a guarantee of neutrality. With the exception of states permanently neutralized by special treaties, such as Belgium between 1831 and 1919, Luxemburg, 1867 to 1919 and Switzerland since 1815, any state may be put at war against its

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do not concern the interests of third Parties." Treaty With Great Britain, 1908, art. 1, Malloy, *Treaties, Conventions, etc.*, p. 814.

<sup>19</sup>By the Wilson-Bryan Peace Treaties, concluded by the United States with twenty states, 1913-14 "any dispute arising between the High Contracting Parties of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the high Contracting Parties do not have recourse to arbitration, be submitted for investigation and report to a Permanent International Commission constituted in the manner prescribed in the following article. The High Contracting Parties agree not to resort, with respect to each other, to any act of force during the investigation to be made by the Commission and before its report is handed in." Art. 3 provides that the Commissioner shall report within one year.

<sup>20</sup>Hearings before Senate Foreign Relations Committee, p. 325.

<sup>21</sup>*Ibid.*, p. 330.

<sup>22</sup>Wright, *Effects of the League of Nations Covenant*, 13 *Am. Pol. Sci. Rev.* 562, Nov. 1914.

<sup>23</sup>Wheaton, *Elements of International Law*, 8th ed., (Dana) p. 509.

will. The customary law of neutrality and the V and XIII Hague Conventions of 1907 state the rights and obligations of belligerent and neutral states but do not limit the right of either to terminate the relation of neutrality by a declaration of war.<sup>24</sup> Wheaton's statement means that states are under no obligation to go to war in the absence of special treaty and that so long as they do not go to war and belligerents do not make war on them, belligerents are bound to respect their rights as peaceful states. For states members of the League this principle is changed by article 16 of the Covenant which requires them to sever commercial relations or even to commit hostile acts against Covenant violators. If the League is at war with a member or an outside state no other member can be really neutral. Furthermore, the guarantee of Article 10 requires members of the League to depart from neutrality in case of external aggression against the territorial integrity or existing political independence of one of their number.

### 3. THE RIGHT TO ATTACK NON-COMBATANTS

Grotius thought that "a war declared against him who has the supreme authority in a population is considered to be declared against all his subjects."<sup>25</sup> In his *Social Contract*, Rousseau took the opposite view that "war is not a relation of man to man but of state to state, in which individuals are enemies only accidentally not as men nor even as citizens but as soldiers, not as members of their country but as its defenders."<sup>26</sup> This doctrine was approved by Portalis in opening the French Prize Court in 1801<sup>27</sup> and a limited application of it is embodied in the preamble of the Declaration of St. Petersburg, 1868 which reads "That the only legitimate objects which states should endeavor to accomplish during war is to weaken the military forces of the enemy."<sup>28</sup> This doctrine has been opposed, especially by British writers, because of its inconsistency with practice and because of the implication it carries with reference to the right to capture enemy private property at sea.<sup>29</sup> It has also been opposed, es-

<sup>24</sup>Wright, 5 MINNESOTA LAW REVIEW 405.

<sup>25</sup>Grotius, *De Jure Belli ac Pacis*, 1. 3 c. 3, par. 9.

<sup>26</sup>Rousseau, *Social Contract*, 1. 1, c. 4.

<sup>27</sup>Westlake, *op. cit.* 2: 40; Hall, *op. cit.* p. 66.

<sup>28</sup>Westlake, *op. cit.* 2: 57. The superior court of military justice of the German Empire in a decision of Aug. 10, 1915 declared that war is a contest between States only and does not affect the rights of private individuals. Clunet, *Journal de Droit International Privé*, 1917, p. 257, cited, Garner, *International Law and the World War*, 1:4.

<sup>29</sup>Hall, *op. cit.* p. 70; Westlake, *op. cit.* 2: 41.

pecially by German writers, because of the impediment it offers to the rapid attainment of the objects of war.<sup>30</sup>

"The greatest kindness in war" wrote von Moltke, "is to bring it to a speedy conclusion. It should be allowable, with that view, to employ all methods save those which are absolutely objectionable. I can by no means profess agreement with the Declaration of St. Petersburg, when it asserts that 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."

In spite of these objections, international law has tended to distinguish between the armed forces and the peaceful population of belligerent states and, in accord with Rousseau's theory, to exempt the latter so far as possible from the rigors of war.<sup>31</sup> During the recent war this distinction was to a considerable degree abandoned. Most of the belligerents adopted the practice of interning resident enemy civilians and of treating them in a manner similar to prisoners of war.<sup>32</sup> Furthermore, enemy civilians subject to draft found on neutral vessels on the high seas were regarded as "persons embodied in the armed forces of the enemy" and hence subject to removal by belligerents.<sup>33</sup> All of the belligerents also employed economic pressure upon the enemy civilian population to the greatest possible extent. By sequestering enemy private property in their territory and black-listing enemy firms in neutral countries as well as by confiscating or destroying enemy private property at sea, by the cutting of cables and the censorship of mails, by the application of continuous voyage to blockade and indefinitely extend contraband lists, by the use of mine fields, submarine zones, rationing agreements with neutrals, domestic embargoes and by other means designed to cut off the enemy from commerce and intercourse they sought to bring effective pressure upon the government through the financial ruin and starvation of its civilian population, as well as through the elimination of essential military supplies. Finally Germany adopted a policy of bringing pressure upon the enemy by terrorizing the civilian population. With this object they bombarded cities from warships, aircraft and long range guns, they

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<sup>30</sup>U. S. Rules of Land Warfare, 1914, art. 10, Garner, op. cit. 1: 4.

<sup>31</sup>U. S. Rules of Land Warfare, art. 29; IV Hague Convention, 1907 annex, arts. 1-3; Westlake, op. cit. 2: 41.

<sup>32</sup>1 Garner, op. cit. 56 et seq.

<sup>33</sup>Ibid., 2: 362 et seq.

sank merchant vessels without warning and they levied severe collective punishments in occupied areas by heavy fines, destruction of cities, deportation and execution of civilians.<sup>34</sup>

The development in the recent war of these methods, which subjected civilians in an unusual degree to the hardships of war, may be accounted for by three circumstances: (1) The general adoption of universal compulsory military service which rendered every able bodied enemy subject a potential if not an actual member of the armed forces.<sup>35</sup> (2) The development of a highly centralized government control of all national resources including food and raw materials of manufacture, thus destroying the distinction between imports intended for civilian use and imports intended for the armed forces.<sup>36</sup> (3) The development of a theory of psychology on the part of the Germans that national morale could be broken by physical terrorization of the civilian population<sup>37</sup> and on the part of the allies that national morale could be broken by the economic starvation of the civilian population.<sup>38</sup>

It seems probable that if wars continue the administrative and technical conditions represented by the first two of these circumstances will continue and consequently, in so far, civilians will suffer from the war. Experience during the war seems to have demonstrated that the German view of national psychology was not well founded. Terrorism seems to have resulted in a stimulation of energy and determination. The air raids on London aided the recruiting officer, and the fall of Big Bertha shells in Paris aroused the waning spirit of France to renewed determination. The allies' view of national psychology, on the other hand, which had been demonstrated by the experience of the Napoleonic wars and fortified by that of the American Civil War, was reinforced by that of the World War. A gradual loss of wealth and decline in the abundance of luxuries, conveniences and even necessities of life, does not sting the people into renewed effort as does a sudden bar-

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<sup>34</sup>For full discussion of these practices see Garner *op. cit.*

<sup>35</sup>The Frederico, Conseil du Prises, France, March 15, 1915, 42 Clunet, 192, and *supra* note 33.

<sup>36</sup>British note to U. S. Feb. 10, 1915, U. S. White Book, European War No. 1, p. 51 (hereafter cited White Book), quoted with approval in The Kim, L. R. [1915] P. 215.

<sup>37</sup>Kellogg, 122 Atlantic Monthly, 289, (Sept. 1918.)

<sup>38</sup>This is not a new thory. See Mahan, The Influence of Sea Power upon History, p. 198, Sea Power in Relation to the War of 1812 1: 288. Printed in Mahan on Naval Warfare, 96, 139.

barity. It slowly breeds irritability and discontent, arouses suspicions of hoarding and government inefficiency, a weariness of war and withdrawal of popular support from renewed military effort.

If this analysis is correct it would seem that methods of terrorism may continue to be prohibited by the law of war. If, however, by the use of poison gases it becomes possible to destroy entire civilian populations this argument would not hold. Annihilation might be of military advantage even if the psychological effect of terrorizing were not. We may conclude that in the future the law of war must modify its distinction between armed forces and civilian populations and that the latter are likely to suffer more in future wars than they have in the past.

#### 4. THE RIGHT TO EMPLOY NOVEL INSTRUMENTS OF WAR

Natural science reinforced military science to a high degree during the war, its leading contributions being the wireless telegraph, air craft, submarines and poison gases. The world war first witnessed the extensive adaptation of these inventions to military purposes. New instruments of war have generally been looked upon with disfavor on their introduction. The cross-bow, fire arms, chain shot, explosive bullets, dum-dum bullets, have been at different times prohibited.<sup>39</sup>

The Hague Declaration of 1899 relating to air craft expired in five years, and though the Hague Conference of 1907 attempted to prohibit the dropping of explosives from air craft<sup>40</sup> and the bombardment "by any means whatever" of undefended towns and villages<sup>41</sup> the conventions containing these provisions were not strictly binding in the world war because some of the belligerents had not ratified.<sup>42</sup> One of the Hague Declarations of 1899 forbade "the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases" which was binding until entry into the war by the United States, the only non-ratifying belligerent.<sup>43</sup> The prohibition against

<sup>39</sup>Maine, *International Law*, p. 139; 1 Halleck, *op. cit.* 618; Lawrence, *op. cit.* p. 543.

<sup>40</sup>XIV Hague Conventions 1907.

<sup>41</sup>IV Hague Conventions 1907, annex art. 25.

<sup>42</sup>The Hague Conventions relating to war and neutrality all contain the clause "the provisions are binding between contracting powers and only if all the belligerents are parties to the convention."

<sup>43</sup>Brazil and Cuba had also failed to ratify but they did not enter the war until after the United States.

poison and poisoned weapons in article 23a of the Hague Conventions of 1899 and 1907, though binding through the war does not seem to include poison gases.<sup>441</sup>

The effort to prohibit specific instruments of war has never availed if the weapon has proved effective. Most weapons can be used in a number of ways and it would seem in principle that the manner and effect of use in particular circumstances is the proper subject for legal regulation rather than the instrument itself. Thus the use of aircraft for observation and bombardment of armed enemy forces could hardly be objected to whatever opinion might be entertained of aerial bombardment of cities. So also submarine operations against enemy warships would seem unobjectionable. Poison gases even if their use is confined to enemy armed forces would be objectionable if the amount of suffering their use involves is in excess of the military advantage gained. Radio telegraphy has not raised questions as between belligerents though this invention has added to the burden of neutrals in preventing their territory being used as a base of belligerent operations.

It is believed that the law of war will not prohibit the use of particular instruments, except in rare cases such as poison, dum-dum and small explosive bullets. The general prohibition against "arms, projectiles, or material calculated to cause unnecessary suffering" in the Hague conventions of 1899 and 1907<sup>44a</sup> seems to state the correct theory and to cover all military inventions. Instruments of war must of course be used in a manner to accord with established principles of international law, but even with this limitation most instruments, and probably all of those here under discussion still have a field of usefulness. Careful consideration, however, might well be given to regulating in detail the manner in which these new inventions may legitimately be used.

##### 5. DEPARTURES FROM LAW IN RETALIATION

Much of the discussion with reference to belligerent and neutral action during the war hinged on the contention that alleged departures from the laws of war and neutrality were justified by exceptional circumstances. Does the war experience make possible a tentative definition of the exceptional circum-

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<sup>441</sup> Garner op. cit. 277.

<sup>44a</sup> Art. 23 e.

stances which will in fact justify a departure from law? Such exceptional circumstances may originate in the will of the party acted against, in the will of the party acting, or in an external will beyond the control of either of these parties. In other words, departures from law may be based on retaliation, convenience or necessity. Under each of these cases we may consider successively the justifiability of extraordinary measures by belligerents against enemies, by belligerents against neutrals, and by neutrals against belligerents.

The *lex talionis* is well established in international law.

"The law of war," says Lieber's Instructions, "can no more wholly dispense with retaliation than can the law of nations, of which it is a branch."<sup>45</sup>

Thus after Germany had violated international law by using poison gas, bombing undefended towns, etc., an exceptional circumstance existed which justified the allies in doing likewise, though according to recognized principles.<sup>46</sup>

"Retaliation will . . . 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."

The principle doubtless applies to belligerent action in derogation of neutral rights. If a neutral has failed to fulfill his positive obligations of neutrality, the injured belligerent may retaliate:<sup>47</sup>

"Suppose," said the British note of April 24, 1916, "that a neutral failed to prevent his territory being made use of by one of the belligerents for warlike purposes; could he object to the other belligerent acting in the same way?"

Thus after China had failed to prevent Japan using her territory for conducting operations against Tsing Tau, Germany was doubtless justified in attacking Japanese troops in that territory.<sup>48</sup>

Germany invoked the principle of retaliation to justify her submarine warfare. It could hardly be alleged that retaliation against enemy illegalities can justify acts impairing the funda-

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<sup>45</sup>Lieber's Instructions, art. 27; U. S. Rules of Land Warfare, 1914, art. 380.

<sup>46</sup>Lieber's Instructions, art. 28; U. S. Rules of Land Warfare, 1914, art. 381.

<sup>47</sup>Par. 38, White Book, No. 3, p. 77.

<sup>48</sup>2 Garner, op. cit. 239.

mental rights of an innocent neutral and Germany did not allege this. She asserted, however, that the neutrals affected were not innocent since they had, to her detriment, acquiesced in enemy impairments of their rights, although they possessed a means of compelling respect.<sup>49</sup>

"The German Government" wrote Foreign Minister von Jagow, "have given due recognition to the fact that as a matter of form the exercise of rights and the toleration of wrong on the part of neutrals is limited by their pleasure alone and involves no formal breach of neutrality. The German Government have not in consequence made any charge of formal breach of neutrality. The German Government can not, however, do otherwise, especially in the interest of absolute clearness in the relations between the two countries, than to emphasize that they, in common with the public opinion in Germany, feel themselves placed at a great disadvantage through the fact that the neutral powers have hitherto achieved no success or only an unmeaning success in their assertion of the right to trade with Germany, acknowledged to be legitimate by international law, whereas they make unlimited use of their right to tolerate trade in contraband with England and our other enemies. Conceded that it is the formal right of neutrals not to protect their legitimate trade with Germany and even to allow themselves knowingly and willingly to be induced by England to restrict such trade, it is on the other hand not less their good right, although unfortunately not exercised, to stop trade in contraband, especially the trade in arms, with Germany's enemies. In view of this situation the German government see themselves compelled, after six months of patience and watchful waiting, to meet England's murderous method of conducting maritime warfare with drastic counter measures."

Nor was Germany alone in this contention. Said Great Britain in her Memorandum of April 24, 1916:<sup>50</sup>

"The mere abstract question of the legitimacy of measures of retaliation adopted by one belligerent against his opponent, but affecting neutrals also, is one of which His Majesty's government think the discussion might well be deferred. It is a subject of considerable difficulty and complexity, but His Majesty's government are surprised to notice that the government of the states seem to regard such measures of retaliation in war as illegal if they should incidentally inflict injury upon neutrals. The advantage which any such principle would give to the determined law-breaker would be so great that His Majesty's government can not conceive that it would commend itself to the conscience of mankind. To take a simple instance, suppose that

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<sup>49</sup>Note to U. S. Feb. 16, 1915, White Book, No. 1, p. 57.

<sup>50</sup>Par. 38, Ibid. No. 3, p. 77.

one belligerent scatters mines on the trade routes so as to impede or destroy the commerce of his enemy—an action which is illegitimate and calculated to inflict injury upon neutrals as well as upon the other belligerents—what is that belligerent to do? Is he precluded from meeting in any way this lawless attack upon him by his enemy? His Majesty's government can not think that he is not entitled by way of retaliation to scatter mines in his turn, even though in so doing he also interferes with neutral rights. Or take an even more extreme case. Suppose that a neutral failed to prevent his territory being made use of by one of the belligerents for warlike purposes, could he object to the other belligerent acting in the same way? It would seem that the true view must be that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make an attack upon the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent."

This seems to assert a belligerent right to retaliate against neutrals, not only for failure to meet their positive duties but for failure effectively to assert their rights. The same argument was used during the French revolutionary and Napoleonic wars.<sup>51</sup> In the present war as then, the United States was unwilling to accept it.<sup>52</sup>

"If the course pursued by the present enemies of Great Britain," wrote Secretary of State Bryan in 1915, "should prove in fact to be tainted by illegality and disregard of the principles of war sanctioned by enlightened nations, it can not be supposed, and this government does not for a moment suppose, that His

<sup>51</sup>See discussion of French retaliatory decrees, 1795, 1797, 5 Moore, Digest, 592, 598, and of British and French retaliatory measures 1806, 1807, Ibid. 7: 798. Lord Stowell justified condemnation of an American vessel under the British retaliatory orders in Council with the remark "I have not observed that these Orders in Council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract." (The Fox, Edw. Adm. 311, 1811; 2 Roscoe's Prize Cases, 61.) This decision was criticized in the Edinburgh Review, Feb. 1812 quoted 7 Moore, Digest, 648, was cited with approval by Sir Samuel Evans in The Zamora, L. R. [1916] P. 43 and by Sir Edward Grey in a note to the United States, July 31, 1915, (White Book, No. 2 p. 181) but was criticized by Lord Parker of Waddington in The Zamora L. R. [1916] 2 A. C. 95. The American claimants in this case contended that the Orders in Council had ceased to have any justification as retaliatory measures because Napoleon had already withdrawn his obnoxious Berlin and Milan decrees by the Cadore letter of August 5, 1810, but Lord Stowell denied that the letter had had such an effect. (See Fish, American Diplomacy, p. 168.)

<sup>52</sup>Note March 30, 1915, White Book No. 1, p. 70. See also note Oct. 21, 1915, par. 33, Ibid. No. 3, p. 37.

Majesty's government would wish the same taint to attach to their own actions 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 affect neutral rights."

The United States, however, insisted that in fact it had not acquiesced in illegalities by either belligerent.<sup>53</sup> It is believed that a neutral which fails to exert "due diligence" to protect its fundamental rights on the high seas although not liable to reparation as is a neutral which fails to use due diligence to prevent its territory being used as a base of belligerent operations, is nevertheless liable to losses incident to retaliation by the injured belligerent against the enemy. It should be noted, however, that the "due diligence" of a neutral in asserting its rights at sea can not be measured by its success in actually protecting them. Consistent failure of a neutral to prevent its territory being used as a base of operations creates a strong presumption that the neutral has not employed due diligence, but no such presumption follows from consistent failure to gain results from protests against belligerent illegalities at sea.

Neutrals may undoubtedly retaliate against belligerents. The V Hague Convention of 1907 permits a belligerent to utilize railway material coming from neutral territory when "absolutely necessary" but "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" (Art. 19). Resistance by neutral merchant vessels to visit and search is ordinarily illegal but the United States was unquestionably justified in placing an armed guard on American merchant vessels "in view of the announcement of the Imperial German government on January 31, 1917, that all ships, those of neutrals included, met within certain zones of the high seas, would be sunk without any precaution being taken for the safety of the persons on board and without the exercise of visit and search."<sup>54</sup> Similarly the various American states were justified in assuming an attitude of partiality toward the Allies and the United States after entry of the latter into the war, in retaliation for repeated German violations of neutral rights.<sup>55</sup> In fact, however, these Latin American decrees generally professed to be based on Pan-American

<sup>53</sup>Note to Germany April 21, 1915, *Ibid.* No. 1, p. 74.

<sup>54</sup>Naval War College, *International Law Documents*, 1917, p. 275.

<sup>55</sup>See Brazilian Notification, April 11, 1917 and Peruvian Notification, Oct. 6, 1917, *N. W. C., Int. Law Docs.*, 1917, pp. 64, 198.

solidarity rather than on retaliation.<sup>56</sup> Such retaliatory acts by neutrals may be taken by the belligerent affected as acts of war, as Uruguay admitted in asking Germany whether she regarded Uruguay at war after the latter had opened her ports to American war vessels.<sup>57</sup>

#### 6. DEPARTURES FROM LAW AT CONVENIENCE

Assertion by a state of the right of retaliation is, however, very different from assertion of a right to depart from the law in view of novel circumstances created by its own act or intention, though the latter doctrine has been asserted by some text writers and as embodied in the German War Book has become known as the "German doctrine of military necessity."<sup>58</sup> In accordance with this doctrine the strategic advantage to Germany of an invasion of France from Belgium was said by Chancellor Bethmann-Hollweg to create a necessity justifying violation of the neutralization of Belgium and Luxemburg.<sup>59</sup> The immediate military advantage gained by terrorizing the population of invaded territory was thought by the German command to justify brutality against civilians contrary to the rules of war.<sup>60</sup> The "vital interests" of Germany were said to justify submarine warfare against merchant vessels.<sup>61</sup> The results of these measures seem to indicate that perhaps ultimate success would really have been more nearly attained by strict observance of the law.

Similar arguments were used to justify belligerent action against neutrals but they were not accepted. Thus the military

<sup>56</sup>Decrees and notifications by Brazil, June 4, 1917; Costa Rica, April 12, 1917; Guatemala, April 28, 1917; Peru, July 28, 1917; Salvador, Oct. 6, 1917; Uruguay, June 18, 1917; N. W. C., Int. Law Docs., 1917, pp. 64, 77, 162, 197, 210, 249.

<sup>57</sup>N. Y. Times Current History, 8 (pt. 1) p. 429, N. W. C., Int. Law Docs., 1918, p. 11.

<sup>58</sup>2 Garner, op. cit. 195; *Infra* Note 83.

<sup>59</sup>"Gentlemen, we are now acting in self defense. Necessity knows no law. Our troops have occupied Luxemburg and have possibly already entered on Belgian soil. Gentlemen, that is a breach of international law. The French government has notified Brussels that it would respect Belgian neutrality as long as the adversary respected it. But we know that France stood ready for an invasion. France could wait, we could not. A French invasion in our flank and the lower Rhine might have been disastrous. Thus we were forced to ignore the rightful protests of the Governments of Luxemburg and Belgium. The injustice—I speak openly—the injustice we thereby commit 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 the one and best way to strike." Speech of Imperial Chancellor, Bethmann-Hollweg in Reichstag, Aug. 4, 1914.

<sup>60</sup>Kellogg, 122 Atlantic Monthly 289, (Sept. 1918).

<sup>61</sup>White Book, No. 1, p. 53.

advantage accruing from the use of submarine vessels did not justify their use in a manner contrary to accepted rules of maritime warfare.<sup>62</sup>

"The government of the United States," wrote Secretary Bryan in the first *Lusitania* note, "desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity, which all modern opinion regards as imperative."

Nor can a neutral, which desires to continue that status, depart from the accepted rules from motives of interest or sympathy. This applies not only to generally accepted rules but to regulations which the neutral may have issued at discretion at the beginning of the war. Thus though the United States was unquestionably at liberty to impose an impartial prohibition upon trade in arms at the beginning of the war, as did Brazil,<sup>63</sup> having chosen not to interfere with such trade, it would have been unneutral to have altered the regulations later when the legitimate military effort of one belligerent had excluded its enemy from the benefits of that trade.<sup>64</sup>

"This government," wrote Secretary of State Bryan to Germany, "is constrained to hold, in view of the present indisputable doctrines of accepted international law, that any change in its own laws of neutrality during the progress of a war which would affect unequally the relations of the United States with the nations at war would be an unjustifiable departure from the principle of strict neutrality by which it has consistently sought to direct its actions. . . . The placing of an embargo on the trade in arms at the present time would constitute such a change and be a direct violation of the neutrality of the United States."

There is only one way in which a state may by unilateral act change its obligations under the international law of neutrality, and that is by assuming the responsibilities of war. A belligerent may increase his rights and reduce his obligations toward a neutral by declaring war against it, and a neutral is equally free to declare war against a belligerent. This being done:<sup>65</sup>

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<sup>62</sup>*Ibid.* No. 1, p. 76. The attempted justification of submarine warfare against neutrals on the grounds of retaliation has been referred to, *supra* note 49.

<sup>63</sup>Rules, August 4, 1914, art. 4, N. W. C., Int. Law Docs. 1916, p. 10.

<sup>64</sup>White Book, No. 1, p. 75.

<sup>65</sup>U. S. Rules of Land Warfare, 1914, art. 11.

"Military necessity justifies a resort to all the measures which are indispensable for securing the object of war and which are not forbidden by the modern laws and customs of war."

Even the right to declare war is somewhat limited under the League of Nations Covenant, but short of the exercise of that right, a state is clearly bound by the law of neutrality.

But it has been suggested that some of the traditional practices of war and neutrality do not in reality involve fundamental principles and are not obligatory if changed conditions render their observance inexpedient. Thus while the United States was neutral the British government continually emphasized the distinction between acts affecting "life" and those affecting "property" implying that some rules of neutrality are more fundamental than others.<sup>66</sup> This contention seems to be admitted by Secretary of State Bryan in his note of March 30, 1915:<sup>67</sup>

"The government of the United States is, of course, not oblivious to the great changes which have occurred in the conditions and means of naval warfare since the rules hitherto governing legal blockade were formulated. It might be ready to admit that the old form of 'close' blockade with its cordon of ships in the immediate offing of the blockaded ports is 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; but it can 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."

This principle was invoked by the allies to justify departures from hitherto accepted methods for enforcing belligerent rights at sea. Thus the great size of modern merchant vessels and the bulkiness of their cargoes was claimed to justify search in port.<sup>68</sup> The use of mine fields, submarines, and aircraft by enemies was claimed to justify distant blockades.<sup>69</sup> The ease of transit from adjacent neutrals to belligerents was claimed to justify application of the doctrines of continuous voyage and ultimate destination to conditional contraband and blockade.<sup>70</sup> The enemy control of foodstuffs and other articles of conditional contraband

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<sup>66</sup>Moore, *Principles of American Diplomacy*, p. 80.

<sup>67</sup>White Book, No. 1, p. 70.

<sup>68</sup>The *Zamora* L. R. [1916], 2 A. C. 108, 2 British and Colonial Prize Cases 28; Higgins, ed. Hall, *International Law*, p. 801; British Memorandum to United States, April 24, 1916, pars. 4-8, White Book, No. 3, p. 64.

<sup>69</sup>*Supra* note 67.

<sup>70</sup>The *Kim*, L. R. [1915] P. 215; British Memorandum to U. S., April 24, 1916, par. 18, White Book, No. 3, p. 70.

was claimed to justify a treatment of such goods as absolute contraband.<sup>71</sup> New means of communication was claimed to justify modification of traditional prize court procedure and rules of evidence.<sup>72</sup>

Although these novel methods of the allies were protested by neutrals, yet the protests were much less emphatic than those occasioned by the novelties in maritime warfare introduced by Germany. Instead of search in port and a virtual extension of blockade to neutral ports, Germany employed the submarine to sink merchant vessels at sight in defined war zones as a blockade measure.<sup>73</sup> The distinction would seem to lie in the fact that Germany impaired much more fundamental neutral rights than did the allies.<sup>74</sup> The exact process by which a ship engaged in a prohibited trade is compelled or induced to come into a belligerent port is of less importance to neutral states than the personal safety of their citizens legitimately traveling on the high seas.

Though doubtless customary international law must be capable of adaptation to new conditions, and distinctions must be recognized in the binding character of its principles and rules, yet it must be emphasized that the elaboration of such distinctions by belligerents and neutrals in time of war is a process attended with considerable risk for the stability of law. The law of neutrality has grown up on compromises between belligerent and neutral interests with due consideration to the peculiar interests of states relying on naval power and states relying on land power, of states with numerous ports and land-locked states, of states with ample raw materials and states without.<sup>74a</sup> A slight interference with such a structure of compromise in time of stress is likely to bring the whole to the ground.<sup>75</sup>

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<sup>71</sup>Supra note 36.

<sup>72</sup>British Memorandum, cited, Par. 13, White Book, No. 3 p. 68.

<sup>73</sup>Note to U. S. Jan. 31, 1917, White Book, No. 4, p. 404, 405.

<sup>74</sup>In criticizing Professor Garner's discussion of German and allied maritime methods, Professor Corwin does not notice this distinction. 4 Weekly Review 202, March 2, 1921.

<sup>74a</sup>Supra notes 5, 6.

<sup>75</sup>U. S. note to Great Britain, Oct. 21, 1915, pars. 33-35, White Book, No. 3, p. 38. The compromise character of conventional rules of maritime international law and the dependence of the whole upon the exact preservation of each part is illustrated by the memorandum of the drafting committee upon article 65 of the Declaration of London (Naval War College, International Law Topics, 1909, p. 155, 4 MINNESOTA LAW REVIEW 20), and by the disastrous effect upon this whole codification of law when some of the belligerents insisted upon a few modifications. (White Book, No. 1, pp. 5-8.)

## 7. DEPARTURES FROM LAW UNDER NECESSITY

We have now come to the class of cases in which a departure from the normal laws of war and neutrality has occurred, most difficult to pass upon, namely those in which a belligerent or a neutral has invoked in justification exceptional circumstances beyond the control either of itself or of the state which will be adversely affected by the act. Such exceptional circumstances include not only "force majeure" or "act of God" but also acts of compelling character of a mundane third party. They are said to occasion a "necessity" which will justify departure from international law.

As between belligerents it is well recognized that certain humane practices, called by Grotius *temperamenta belli*<sup>76</sup> should be observed unless unexpected circumstances intervene. So by the IV Hague Convention of 1907 (art. 23g) it is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the *necessities* of war" and in the naval bombardment of military supplies, according to the IX Hague Convention (art. 2) a belligerent "incurs no responsibility for any *unavoidable* damage which may be caused."

The same distinction may be made with reference to neutral rights. Though a belligerent is normally obliged to refrain from destroying neutral merchant vessels, yet by the unratified Declaration of London (art. 49), if he can place the persons on board in safety he may destroy a neutral vessel liable to condemnation if failure to do so "would involve danger to the ship of war or to the success of the operations in which she is at the time engaged." So also by the V Hague Convention of 1907 (art. 19) a belligerent may utilize railway material coming from neutral territory "where and to the extent absolutely necessary," and in maritime warfare a similar belligerent right of taking neutral vessels in port is recognized under the custom of angary.<sup>77</sup>

A neutral state may depart from the usual regulations of neutrality in the presence of circumstances over which it has no control which menace its rights. Thus though the preamble of the XIII Hague Convention of 1907 asserts that neutral regulations shall not be altered in the course of the war yet excep-

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<sup>76</sup>Grotius, *op. cit.* lib. iii, c. 10.

<sup>77</sup>Wilson and Tucker, *International Law*, 7th ed., p. 320.

tion is made where experience has shown the necessity for such change for the protection of the rights of that power. Chile invoked this provision to justify modification of her coaling regulations as did Spain to justify modification of her regulations for sojourn, so as to exclude submarines.<sup>78</sup> As has been noticed the United States found no circumstances which would justify departure from her practice of permitting individuals to trade in munitions of war from American territory.<sup>79</sup>

From these examples it is clear that conventional and customary international law recognizes that certain rules may be overridden in case of necessity though it must be a real necessity and not a mere convenience. It is difficult to define accurately the circumstances which give evidence of such a necessity but it seems clear that they must be matters of *fact* the menace of which is ascertainable by objective proof, and not mere opinions as to distant dangers;<sup>80</sup> that they must be *exceptional* and contrary to the normal course of events;<sup>81</sup> that they must be *unintended* and beyond the control of the party invoking them.<sup>82</sup>

<sup>78</sup>Naval War College, Int. Law Docs., 1916, p. 22, 1917, p. 213.

<sup>79</sup>Supra note 64.

<sup>80</sup>"Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil" (Wharton, Criminal Law, sec. 95.) In a classic statement Secretary of State Webster said "a necessity of self defence" must be "instant, overwhelming, and leaving no choice of means and no moment for deliberation" and "must be limited by that necessity and kept clearly within it." (2 Moore, Digest, 412). Wharton agrees with this that "the right of self defence can only be appealed to to ward off a danger that is actual and immediate" (op. cit. sec. 97a, 102) but necessity goes beyond mere self defence. While the latter excuses only "the repulse of a wrong, necessity justifies the invasion of a right" (sec. 97), thus anticipating the future on the Roman law doctrine, "Melius est occurrere in tempore, quam post exitum vindicare." L. 1 c. (3. 17).

<sup>81</sup>"It is submitted that military necessity can only be invoked to justify the destruction of a prize in the presence of exceptional circumstances which were unforeseen and beyond human powers of control. Of this character would be the state of the sea, the unseaworthiness or slowness of the prize, or the depletion of the captor cruiser's crew by unforeseen circumstances. Circumstances which are the rule and known before the belligerent vessel leaves its home port, such as an absence of colonial ports to which a prize might be sent, or the inherent inability of the type of vessel employed to carry a crew sufficient to furnish prize crews, can not be pleaded as grounds of military necessity. In the former case, the circumstances are exceptional and unpremeditated. In the latter, they are the rule and foreseen. In the former case, the intention is to bring the prize in, but circumstances have prevented. In the latter case, the intention is to destroy all vessels." Wright, 11 Am. Journ. Int. Law, 376.

<sup>82</sup>"It has been sometimes said that necessity can never be advanced as a defence when the necessity is the result of the defendant's own culpable act. This cannot be accepted as universally true. . . . But if the necessity be rashly rushed into, it may cease to be a defence." Wharton, op. cit. sec. 96. See also, supra note 81.

There are, however, many prohibitions in the laws of war and neutrality stated in absolute terms by treaty. Can these be overridden by necessity? The doctrine of *Kriegsraison* as stated by Professor Lueder asserts that they can.<sup>83</sup> We agree with Westlake and others that this position seriously jeopardizes the law<sup>84</sup> and ignores the fact that the law itself has taken account of all the "necessities" really essential to the effective prosecution of war.<sup>85</sup>

Thus in applying the doctrine of necessity we must guard against two errors, that of considering a convenience a necessity, and that of regarding an absolute prohibition as qualified. The attempted justification of the invasion of Belgium committed both errors. There was no objective evidence of a menace to Germany from French invasion through Belgium sufficient

<sup>83</sup>"The justifiableness of *kriegsraison* can not be denied on occasions of extreme necessity. If the necessity of individuals is recognized as exempting them from punishment for things never so injurious done by them from that necessity, this must be still more the case in war since so much more is at stake. When therefore the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war, and can only be accomplished by breaking through those limitations, the latter is what ought to happen. It ought to happen because it must happen, that is, because the course of no war will in such extreme cases be hindered and allow itself to end in defeat, perhaps in ruin, in order not to violate formal law. No prohibition can in such a case effect any thing, or present a claim to recognition and validity; and it would be idle to formulate one, for from what commander or from what state could such heroism of meekness and renunciation be expected?" (Lueder in Holtzendorff, *Handbuch des Völkerrechts*, vol. 4, sec. 66, p. 255, trans. in Westlake, *Collected Papers*, p. 244.)

<sup>84</sup>Westlake, *Collected Papers*, p. 246-247; 2 *International Law* 128; 2 Cobbett, *op. cit.* 96; 2 Garner, *op. cit.* 196-198.

<sup>85</sup>By recognizing both the special necessity to disregard *temperamenta belli* in exceptional emergencies (*supra*) and the general necessity to destroy life and property in a manner contrary to the law of peace in order to accomplish the objects of war. "Military necessity justifies a resort to all the measures which are indispensable for securing this object (of war) and which are not forbidden by the modern laws and customs of war." (U. S. Rules of Land Warfare, 1914, art. 11, see also arts. 12, 13, repeating Lieber's Instructions, arts. 15, 16.) Grotius states as the basis of the natural law of war, "The means which lead to an end in a moral matter receive their intrinsic value from the end: wherefore the steps that are necessary (to a lawful end), necessity being taken not in physical exactness but morally, we have a right to use." (*op. cit.* lib. iii, c. 1, par. 2. See also IV Hague Convention, 1907, Preamble; 2 Westlake, *International Law*, 61; 2 Cobbett, *op. cit.* 95, note g. Lueder admits that appeal to *Kriegsraison* "can only be of exceptional occurrence, for the laws of war are so framed by ordinary custom and well weighed conventions that ordinarily it is possible to follow them. They are built on those relations of fact which are usually met with, just as are the rules of public national law and private law, and in the one case as in the other only special exceptional conditions can make it impossible to follow them." (Holtzendorff, *loc. cit.*, Westlake, *Collected Papers*, p. 244.)

to create a real necessity, and even had there been, the prohibitions of the neutralization treaty of 1839 being absolute, invasion of Belgium by German troops would not have been justifiable.<sup>86</sup> As to submarine warfare, although the prohibition against destruction of merchant vessels is qualified, yet the prohibition against endangering the lives of non-combatants traveling in them is absolute. Furthermore it can not be said that the difficulty of bringing in prizes due to geographical facts existent before the war was an exceptional circumstance such as to create a genuine necessity.<sup>87</sup> The seizure of Dutch ships by Great Britain and the United States in 1918 presents a doubtful case. The prohibition against seizure of innocent neutral vessels in belligerent ports is clearly qualified by the custom of angary, but did a real necessity exist? It would seem that the shortage of shipping was an ascertained fact menacing allied existence, for which not they, but an exceptional circumstance, the illegal German submarine warfare was responsible.<sup>88</sup>

Discussions during the world war seem to indicate that departure from the established law, both by belligerents and by neutrals, may be justified by exceptional circumstances but the convenience of the state so departing can never in itself be such a circumstance. As the preamble of the IV Hague Convention points out the law itself has been drawn in view of "military requirements" and is not to be set aside by them. Yet it can not be denied that neutrals have shown a tendency to acquiesce in belligerent adaptations of customary procedure to new conditions so long as fundamental principles of the law have not been impaired. Departure from certain customary practices may be justified by necessity arising from well authenticated, exceptional and unintended circumstances clearly menacing vital interests, and the conventional laws of war and neutrality have in terms provided for such departures. Necessity does not, however, justify departures from absolute prohibitions of law. These may be justified only as retaliation for equal and unremedied departures by the party to be adversely affected.

#### 8. RESPONSIBILITY FOR VIOLATION OF THE LAW OF WAR

The IV Hague Convention of 1907 dealing with the law of war on land provided that "a belligerent party which violates" its provisions "shall, if the case demands, be liable to pay com-

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<sup>86</sup>2 Garner, *op. cit.* 201-202, *supra*, note 59.

<sup>87</sup>1 *Ibid.* 373, *supra*, note 81.

<sup>88</sup>Naval War College, *Int. Law Docs.*, 1918, p. 166.

pensation. It shall be responsible for all acts committed by persons forming part of its armed forces." (Art. 3.) The Commission of the Peace Conference on Responsibilities listed thirty-two offenses of which Germany was found to be guilty and concluded:

"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."<sup>89</sup>

In their acceptance of the German offer to make peace on the basis of President Wilson's fourteen points, the Allied powers interpreted the seventh and eighth points declaring that "invaded territories must be restored as well as evacuated and freed," to imply that Germany compensate "for all damages done to the civilian populations of the allies and their property by the aggression of Germany by land, by sea and from the air."<sup>90</sup> By article 232 of the Peace Treaty Germany acknowledges her liability "for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of belligerency of each of the Allied or Associated Powers against Germany by such aggression by land, by sea, and from the air." This liability is undoubtedly in excess of that contemplated by the Hague Convention and in fact is based upon Germany's responsibility for causing the war as well as upon her violations of international law in conducting military operations.<sup>91</sup> It would seem that more careful distinction of these two liabilities would have been desirable. The making of war even without moral justification has not heretofore been an illegal act entitling to compensation, while the illegal conduct of war has. Under the peace treaty both types of act are regarded as illegal.

Aside from the financial liability of the state for violations of international law, the personal responsibility of civilians, soldiers, and officers was discussed by the Commission on Responsibilities, with the conclusion "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of states, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."<sup>92</sup> This report was objected to by the American and Japanese representa-

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<sup>89</sup>Hearings, Senate Foreign Relations Committee, p. 327.

<sup>90</sup>Note, Nov. 5, 1918, N. W. C., Int. Law Docs., 1918, p. 212.

<sup>91</sup>See art. 231 quoted *supra* part 1.

<sup>92</sup>Hearings, Senate Foreign Relations Committee, p. 328.

tives on the ground that it neglected the usual immunity of heads of states, and that it asserted a liability for offenses against "humanity" as well as against law.<sup>93</sup> The latter objection seems to be well founded and the term "humanity" was eliminated from article 228 of the peace treaty. The doctrine of sovereign's immunity, however, seems to be a rule "of practical expediency in municipal law and is not fundamental."<sup>94</sup> Military law recognizes no such immunity. Enemy sovereigns can be made prisoners of war and there is nothing to indicate that they are exempt from the jurisdiction of courts martial. International law seems to accord a sovereign immunity from the ordinary civil courts but not from military or international courts.<sup>95</sup>

The Commission on Responsibility asserted:

"There is little doubt that the ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air."<sup>96</sup>

The report thus seemed to contemplate the punishment of persons "not only for directly ordering illegal acts of war but for having abstained from preventing such acts." To this doctrine of "negative criminality" the American representatives objected,<sup>97</sup> and in fact the liability of the Kaiser, recognized by article 227 of the peace treaty, was not for failure to prevent violations of the law of war but for "a supreme offense against international morality and the sanctity of treaties."

The report also emphasized that "civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility."<sup>98</sup> Although in common law countries, (differing in this respect from civil law countries), the orders of a superior authority are not in general a defense, the American rules of land war provided that "individuals of the armed forces will not be punished for those offenses in case they are committed under the orders or sanction of their government or commanders"

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<sup>93</sup>Ibid. pp. 365, 371, 376.

<sup>94</sup>Ibid. p. 328.

<sup>95</sup>Wright, *The Legal Liability of the Kaiser*, 13 *Am. Pol. Sci. Rev.* 124-125.

<sup>96</sup>Hearings, Senate For. Rel. Committee, p. 328.

<sup>97</sup>Ibid. p. 361.

<sup>98</sup>Ibid. p. 328.

and American courts have held the defense good in military law.<sup>99</sup> It is believed that article 228 of the peace treaty by which "The German government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war," is a provision for carrying out established law, but that the defense of superior orders should be admitted. By subsequent arrangement it has been agreed that German courts rather than allied shall exercise jurisdiction in these cases.

The writer concludes that the war has not destroyed the laws of war and neutrality though it has modified some of their rules. Probably the most important change is in those rules exempting civilians from the rigors of war. In the future civilians will probably be subject to more direct attack than in the past, not because of the invention of long range military weapons for destroying them, but because of the invention of political and technical methods whereby their state can more effectively coerce them and their property to its service in time of emergency, thus making such destruction of military utility to the enemy. In the interest of the preservation of law, it can not be too much emphasized that while the rules of war and neutrality are founded on a compromise of interests, yet when this compromise has crystallized into law, temporary variations in the interests upon which it is founded ought not to justify departure from its terms, and will seldom render such a departure expedient in the long run. While "necessity" should be a prime consideration in framing rules, as a grounds for overriding established rules it should be confined to the narrowest limits. Finally clear comprehension of the fact that the laws of war and neutrality are sanctioned mainly by the self interest of belligerents, should dispel an illusion that they can do much toward humanizing war. These branches of international law have a value to the general somewhat comparable to that of principles of tactics and strategy. To the historian they furnish a useful standard whereby the character of the peoples can be appraised. To the jurist they are interesting as the supreme illustration of law without organization. Publicists, however, who wish their efforts to make toward amelioration of the hardships of war, would better apply themselves to the international law of peace and its enforcement.

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<sup>99</sup>U. S. Rules of Land Warfare, 1914, art. 366; In *Re Fair*, 100 Fed. 149; 2 Willoughby, Constitutional Law, 1310.