THE GROTIUS SOCIETY

(Founded 1915)

Problems of the War

PAPERS READ BEFORE THE SOCIETY IN THE YEAR 1915

VOL. I.

Price to Non-members Five Shillings net

LONDON:
SWEET & MAXWELL, 3 Chancery Lane, W.C.
1916.

THE GROTIUS SOCIETY

(Founded 1915.)

Problems of the War

PAPERS READ BEFORE THE SOCIETY IN THE YEAR 1915

VOL. I.

Price to Non-members Five Shillings net

LONDON:
SWEET & MAXWELL, 3 Chancery Lane, W.C.
1916.

CONTENTS.

EDITORIAL NOTE.

The Grotius Society does not hold itself responsible for any of the opinions expressed by the writers of the following papers. The aim of the Society is to promote impartial discussion on the Laws of War and Peace, and on their reform in view of new conditions arising from the present war. It is believed that in the papers here presented these war-problems are considered in a spirit detached from a narrow national standpoint and in accordance with those principles of International Law which rest on the general consent of civilised nations.

HUGH H. L. BELLOT.
MALCOLM CARTER.

February, 1916.

OFFICERS OF THE GROTIUS SOCIETY.

President.
LORD REAY, K.T.

Vice-President.
PROFESSOR GOUDY, D.C.L.

Treasurer.
SIR GRAHAM BOWER, K.C.M.G.

Hon. Secretaries.
HUGH H. L. BELLOT, D.C.L.
MALCOLM CARTER.

1, MITRE COURT BUILDINGS,
INNER TEMPLE,
LONDON, E.C.

MEMBERS.

Judge Atherley-Jones, K.C.
Sir Thomas Barclay.
J. Arthur Barratt.
T. Baty, D.C.L., LL.D.
Hugh H. L. Bellot, D.C.L.
N. A. Bewes, LL.B.
W. R. Bisschop, LL.D.
Sir Graham Bower, K.C.M.G.
C. M. Le Breton, K.C.
Malcolm Carter.
Sanford D. Cole.
Lord Courtney of Penwith.
Dr. W. Evans Darby.
Professor H. Goudy, D.C.L.
R. C. Hawkin.
Sir Alfred Hopkinson, K.C.
Thomas Artemus Jones.
Rev. T. J. Lawrence, LL.D., J.P.
Sir John Macdonell, K.C.B., LL.D.
A. Maeterlinck.
Dr. Marshal.
Professor Morgan.
Sir Edward O'Malley.
G. G. Phillimore, B.C.L.
Lord Reay, K.T.
Sir H. Erle Richards, K.C.S.I., K.C.
Ernest J. Schuster, LL.D.
J. G. Shipman, B.C.L., LL.D.
C. Stubbs, LL.D.
S. Perez Triana.
Rev. T. A. Walker, LL.D.
E. A. Whittuck, B.C.L.
Clyde Wilson.
P. H. Winfield, Esq.
Hon. I. Yoshida.

THE GROTIUS SOCIETY.

(Founded 1915.)

RULES.

Name and Seat.

1. The name of the Society shall be "THE GROTIUS SOCIETY."

It shall be a British Society and its meetings are intended to take place in the United Kingdom.

Objects.

2. The objects of the Society shall be to afford facilities for discussion of the Laws of War and Peace, and for interchange of opinions regarding their operation, and to make suggestions for their reform, and generally to advance the study of International Law.

Members.

3. In addition to the persons mentioned in the next Rule, the Society shall consist of such persons as have shewn themselves in the opinion of the Executive Committee to be qualified to further the objects of the Society, who shall intimate to the Secretary their wish to become members, and who shall duly pay their annual subscriptions. Provided that no one shall be deemed to be a member until his admission as such shall be notified to him.

Original Members and Officers.

4. The persons who join the Society on its foundation shall be original members and shall elect for the first year the President, Vice-President, Honorary Secretary or Secretaries, and Honorary Treasurer. The persons so elected shall be styled the Officers of the Society. They shall hold office for one

year, but shall be eligible for re-election at the Annual General Meeting. No Officer, except the Secretary, shall hold office for more than two consecutive years.

Subscriptions and Expenses.

5. All expenses of the Society shall be met from subscriptions of the members and from such funds as the Society may by donation or otherwise acquire. The annual subscription of each member shall be 10s., but a composition of £5 shall constitute a life member. The subscriptions and all other property acquired for the purposes of the Society shall be deemed to be vested in the Officers of the Society as trustees for the members. No expenditure shall be made or incurred beyond the amount of the funds in the hands of the Treasurer.

Management.

6. The affairs of the Society shall be managed by an Executive Committee consisting of the Officers of the Society and ten additional members elected along with the Officers annually by the members of the Society at its General Meeting. Subject to the control of any General Meeting and to the provisions of Rule 5 hereof, the Executive Committee (of whom four shall be a quorum) shall be entitled to take any action on behalf of the Society which it shall hold to be conducive to its interest. It shall be its duty to present a report of its proceedings to the Annual General Meeting of the Society. Casual vacancies among the Officers or other members of the Executive Committee may be filled up until the next General Meeting.

7. The Annual General Meeting of the Society shall be held on the 10th day of April, being the birthday of Hugo Grotius, or on such other convenient day in April of each year as the Executive Committee shall fix.

8. It shall be in the power of the Society at an ordinary meeting to elect both honorary and corresponding members, whether of British or foreign nationality. Visitors may also be invited by any member of the Executive Committee to attend any of the meetings of the Society, and the Executive Committee may invite non-members to read papers, if willing to do so.

9. No one shall continue to be a member of the Society whose subscription is more than one year in arrear unless an excuse satisfactory to the Committee is offered by him.

INTRODUCTION.

By the Vice-President, H. Goudy, D.C.L.,
Regius Professor of Civil Law, Oxford.

The articles contained in this little volume are published under the auspices of the newly constituted Grotius Society, and I have been asked to say a few words by way of introduction.

The object of founding the Society has been to afford an opportunity to those interested in International Law of discussing from a cosmopolitan point of view the acts of the belligerent and neutral States in the present war, and the problems to which it is almost daily giving birth. Had the International Law Association, whose seat is in London, been able to carry on its work, there would hardly have been need for such a Society, but that influential body embraces among its members a considerable number of foreigners of different nationalities, both belligerent and neutral, and its activity is for the time being embarrassed. Even could it meet, its discussions would probably be embittered or wanting in that spirit of harmony essential to any satisfactory result.

The Grotius Society is intended to be restricted, as regards membership, to British subjects; it is to be a purely British Society. In this respect it will follow the example of the Association of International Law in the United States, which has an established position in that country and has done good work. Our Rules, however, enable us to elect, as occasion offers, foreign international lawyers as honorary and corresponding members, and also to invite non-members to read papers to us and take part in our discussions on proper introduction.

The name "Grotius Society," happily suggested by Dr. Baty, is of good omen. Grotius is the admitted founder of public International Law. Just like Adam Smith in relation to Political Economy, he may be called its father. For he was the first, as

he justly claims for himself, to envisage and expound it as a system and base it on solid foundations. Though much of the "De Jure Belli et Pacis" is now antiquated, and many of its notions about natural law and *jus gentium* can no longer be accepted, that great work must ever be regarded as the *matrix* of our science, and must be resorted to for the statement of fundamental truths.

But the "Grotius Society," though British, is far from intending to discuss international questions from a purely British standpoint, or to support dogmas because they may be thought advantageous to British interests. Any such object indeed would be fatal to its usefulness and deprive it of all influence. Its intention is to treat all international questions in an absolutely independent spirit, endeavouring to discover the truth whatever it may be, to discuss all the doctrines of international law, to examine them in the light of the present war, and to suggest reforms based on humanity and justice wherever possible. It is the welfare of the commonwealth of nations, if one may use the expression, not of any one nation or group of nations that the Society will seek to secure. For International Law, if it is to have any enduring authority, must be based on the fundamental principles of human rights and must give effect to the common welfare of nations. All assertions of right arising from patriotism or "my country before everything (*über alles*)" must be swept aside as noxious hindrances to progress.

The era of perpetual peace among civilized nations is indeed still a long way off—much further than pacifists too hastily suppose —but it is none the less the ideal goal of International Law. It is not a mere dream of poets and philosophers. It is—

> "The vision whereunto
> . . . .
> Toils the indomitable world."

In the present frightful conflagration the goal may seem to have been thrown immeasurably back, but International Law, despite the manifold and flagrant disregard of its rules, will not be overthrown. It needs no great gift of prophecy to foretell

that once Peace is obtained there will be an immense change in the attitude of the peoples of Europe towards wars and the causes that lead to wars. For good or evil there will be a powerful trend towards Socialism. Immanuel Kant, in his well-known essay on "Perpetual Peace among States," has said that the only form of government by which such peace can hope to be realised is the republican, *i.e.*, one in which the people participate in the making of laws, and that International Law must be based on a federation of such free States.[1] In this there is much truth. The peoples, if they are to escape destruction by wars, must have the control of foreign policy and the issues of war and peace entirely in their own hands. And if one result of the present war is the collapse of the autocratic or quasi-autocratic dynasties of Europe and the military castes to which they give birth, the blood of our sons will not have been shed wholly in vain. Purely dynastic wars are perhaps things of the past, but the influence of dynastic families may still check or over-ride the wishes of a people to a lamentable extent. If any proof of this were needed it would be sufficient to point to the present position of Greece. The people of Greece obviously desire to ally themselves with the Entente Powers, but King Constantine, swayed by his family connections, prevents this. And yet Greece is called a constitutional monarchy!

A few words now on the events of the war, legally considered. What strikes me as one of its saddest features is the comparative indifference with which well-established rules of International Law have been violated by each and all of the belligerents, when they have run counter to their apparent material interests. The loss of moral force and self-respect by the wrong-doing State seems to be regarded as unimportant when set off against its material interests. Thus, the carefully-drafted rules of the Hague Conventions and the Declaration of London have been in large measure, to use a vulgarism, "scrapped"; even the time-

[1] See Kant's Werke (Ed. Hartenstein, 1868), vol. vi., p. 408 *et seq.*, "Die bürgerliche Verfassung in jedem Staate soll republicanish sein," and "Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein."

sanctioned Declarations of the Treaty of Paris have not, in the matter of blockade, escaped violation. Excuses and defences for such violations have, no doubt, been set up, but as a rule they are of a kind that International Law ought emphatically to reject.

Two kinds of defence in particular have been constantly employed to justify the grossest illegalities, and I have been greatly struck by them. They are "military necessity" (or "necessities of war") and "reprisals." Neither of them have any definite meaning in International Law, and the former (though the term is sometimes met with in Treaties and Conventions[1] in relation to particular belligerent acts) can hardly be said to be recognised by it in a general sense at all. By an act of military necessity seems to be meant an act which a belligerent holds to be necessary for the success of his military operations—he himself being the judge of the necessity. It may involve a violation of the rights of neutrals as well as of the laws of war between belligerents.[2] In either case it can only be based on the maxim "necessitas non habet legem," and was frankly so based by the Chancellor Bethmann von Hollweg as justifying the German invasion of Belgium. "Not kennt kein Gebot"[3] (La nécessité n'a point de loi"). The invasion of Belgium was doubly illegal; there was not merely the entry upon neutral territory against the will of the neutral (a clear breach of the Hague Conventions of 1907), but there was also shameless disregard of Prussia's own guarantee of Belgian neutrality. Dr. Lawrence and Mr. Carter deal with this in the first part of their article. What defence do the Germans make? Simply, as I understand, that their military staff declared it to be vital to the success of their operations against France that their army should march through Belgium to the

[1] *e.g.* Hague Convention, 1907, iv., 23 (*g*).

[2] Of course the ultimate basis of some internationally recognised rules, (*e.g.* the sinking of captured merchant ships under certain conditions), may be military necessity, but that is a widely different consideration.

[3] Professor Josef Kohler, of Berlin, has published a pamphlet under this title in which he seeks to justify Germany's conduct by the maxim. He distinguishes between its application to States and to individuals. I have not been able to see a copy of the pamphlet.

attack (pretended self-preservation). But what Court of Arbiters would listen to such a plea? Or what would be the worth of a treaty of guarantee (or indeed of any treaty) into which a clause of reservation of *military necessity* was introduced as a limitation of obligation? The passage through Chinese territory by Japan, in her operations against Kiau-chau, is also perhaps open to animadversion, though here the gravamen of charge is much less, as Japan was not a guarantor of China's neutrality.[1] On the other hand, the landing of French and British troops at Salonika cannot be regarded as violation of neutral territority at all, for Greece (though protesting *pro forma*), encouraged *de facto* such landing and promised her benevolent neutrality.

Another case of *military necessity* being set up as a plea for objectionable action may be seen in the conduct of the war in "Central Africa," as pointed out by Mr. Hawkin in his paper. Here the English Government seems to blame, though there was no positive breach of International Law. It was eminently desirable that the conventional basin of the Congo should be wholly neutralised in order to prevent the sad spectacle of the natives of Africa being armed and induced to fight against each other in a European quarrel. But for military reasons our Government declined to agree to the proposal of Belgium to this effect.

We meet again the plea of military necessity in the German attempts to justify the destruction of both belligerent and neutral merchantmen by submarines, without provision being made for the safety of the passengers and crews. Because it was practically impossible to take them on board the submarines or land them otherwise in safety, the Germans have not hesitated to ignore the Hague Convention and the older International Law on the subject, and sink the merchantmen, while leaving the passengers and crews to the mercy of the waves in open boats. So, too, the destruction by Germans of merchant vessels, without warning

[1] I am officially informed that China, just as in the Russo-Japanese War, established an area within which warlike operations might take place, and that consequently there was no violation of neutrality

given, because they happen to have come within certain so-called zones of operations—illegitimately declared to be blockaded—seems to be defended on the same plea of *military necessity*. Our own seizure of neutral vessels without proof of contraband on search is open to the like objections. In some of these cases, however, the plea of reprisals has been pleaded alternatively by the separate Governments. This matter is discussed to some extent by Dr. Lawrence and Mr. Carter, and also in the articles by Dr. Bellot and Dr. Stubbs. Again, in the bombardment of open towns in order to destroy military works, munitions of war, and the like, the same excuse has been brought forward. Convention IX., Article 2, of the Hague Conference, 1907, lays down in the plainest terms that "the commander of a naval force may destroy them [*i.e.*, military works, &c.] after a summons, followed by a reasonable time of waiting, if all other means are impossible, and where the local authorities have not themselves destroyed them within the time fixed." Yet in the bombardment of the non-fortified town of Scarborough last winter by the Germans no notice whatever was given to the local authorities; the only excuse apparently was military necessity, viz., the danger to the bombarding ships of being overtaken by British warships had there been any delay. If carried to an extreme military necessity involves the negation of all International Law.

The other main excuse for violation of International Law is, as I said, *reprisals*. This is a plea which may be used to cover almost any enormity. To an uncertain extent reprisals have been at all times (either *suo nomine* or by the name of retorsion) recognised and justified by International writers. Usually they have taken place in circumstances not involving belligerency as, for example, where courtesies or privileges commonly granted by one State to another or to the individual subjects of another have been unreasonably withheld in a particular instance,[1] and this represents the strict or technical use of the term. In such cases the State

[1] Bluntschli enumerates 8 cases in which reprisals *ante bellum* are internationally legitimate (*Völkerrecht*, § 500), but such enumeration has little value.

injured may justifiably retaliate by a similar or analogous act. But the term reprisals is also applied to retaliation for illegitimate acts of war, and as such we find it employed in some military manuals.[1] As Sir G. Bower observes, the two significations sometimes overlap. Thus, for example, so long ago as 1694, when British ships under Lord Berkeley bombarded and burned the towns of Dieppe and Havre, they did so professedly as reprisals for wrongful acts done by the Grand Monarque. But there is little authority bearing on reprisals, as acts of war, in International Law books, and by the Hague Conferences of 1899 and 1907 they are wholly ignored. To my mind the plea of reprisals can rarely be set up to advantage as justifying a breach of International Law by a belligerent. In the present war they have been carried to great lengths. When our Government last Spring, yielding to foolish outcries in the newspapers, treated the officers and crews of certain captured submarines in a humiliating way by refusing to them the privileges of prisoners of war, it did so as reprisals for their conduct in illegally sinking merchant vessels. But what was the result? The Germans retaliated by placing a number of their British prisoners in solitary confinement. And so we were forced, for the sake of these prisoners, to recede from the position we had taken up. Sir Graham Bower, in his article on "Prisoners of War," deals with this.

There is, in truth, no limit to which this plea of reprisals as acts of war may not carry us—mutilation of the wounded, refusal of quarter, and so on. The bombardment by airships of French and English unfortified places is revenged by the throwing of bombs on Carlsruhe and other German towns.[2]

Without going so far as to say that reprisals are never justifiable, we should avoid them as much as possible. Hardly ever are they of military value. There can be no glory in victory

[1] See Woolsey, *International Law*, § 132; Oppenheim, *International Law*, § 247.

[2] The letter from our Foreign Office to the American Ambassador (Feb. 10, 1915) in the case of the *Wilhelmina* is a good illustration of the expanded meaning of reprisals.

by *Schrecklichkeit*. If we are to be beaten let us fall with honour and clean hands. If we are victorious let us afterwards exact reparation from those in authority who have been responsible for brutalities. Unless this is done, International Law will be degraded, if not destroyed, and civilization itself will be in danger.

THE POSITION OF ENEMY MERCHANTMEN.

BY

C. STUBBS, LL.D.

In considering the position of merchant vessels belonging to a belligerent in the present war it might be sufficient to say that the Allies have endeavoured to act in accordance with the rules of International Law, and in strict obedience to the Hague Conventions: Austria-Hungary appears to have committed no breach of the Law or the Conventions, while Germany has acted as if International Law had no force so far as she was concerned, and the Conventions signed by her representatives had no binding effect upon her and as if the moral law of humanity did not exist.

It may be as well, however, to set down certain of the details which appear to justify these statements.

Even before war between England and Germany was declared there was action by Germany which would have been unjustifiable even if war had already broken out. Two steamships, the *Iris* and *Virgo,* belonging to the General Steam Navigation Co. were to have left Hamburg on the Friday before the Declaration of War. They were not allowed by the German Government to sail and they are still detained. After war was declared between England and Germany the first question with regard to merchant vessels was their treatment if at the time in enemy ports. England was prepared to act in accordance with the practice declared "desirable" by Article I. of the Hague Convention, No. VI., that is, to allow them to "depart freely." Germany, which had agreed to be bound by this Article, held our ships which were in her ports, and England was unwillingly obliged to detain the German ships in English ports, but though in ordinary and proper course bringing the cases before the Prize Court the Government formally requested the Court not to condemn the vessels as Prize, but merely to order their detention.

Austria-Hungary acted in accordance with this Article I., and her merchant vessels in English ports were not detained. In the early course of the war when there were German war vessels afloat and at large, a number of English merchant vessels were captured and at once sunk. It is not suggested that this was in breach of the Law of Nations in time of war, in view of the probable impossibility of the German vessels bringing their prizes

in for adjudication by a Prize Court, and also as in these cases provision was apparently duly made for saving the lives of those on board the captured vessels, which is universally recognised as the absolute duty of the captor before destroying the prize. Prizes captured by English men-of-war have without exception been brought in for adjudication. One may pass on to the time when the German navy has ceased to exist on the high seas in European waters and the only German war vessels capable of attacking merchant vessels have been submarines.

Before the declaration of the war zone by the German Government, which must be considered separately, German submarines torpedoed English merchant vessels without any notice or having any regard for the lives of the non-combatants on board these vessels. To give two clear cases. On January 30th the *Tokomaru* of Southampton, a S.S. of 6,048 tons, and the *Ikaria* of Liverpool, were torpedoed in the English Channel without notice, fortunately without loss of life. A more serious case was the *Oriole,* proceeding from London to Havre. She was lost sometime before February 3rd. At first nothing was known about her except that she was missing and two of her life buoys were picked up floated ashore, but later a bottle was found with the message enclosed, "*Oriole* torpedoed, sinking."

There does not appear to be a shadow of excuse for the sinking of these vessels in the way it was done. The declaration on February 4 by the German Admiralty that the waters round Great Britain were a military area, and that after February 18th every "hostile merchant vessel in these waters would be destroyed," introduced a new series of attacks on British and other merchant vessels by German submarines. Vessels were torpedoed without notice with entire disregard to the lives of the non-combatants on board. Some of these cases may be given :—

February 20th—*Cambank,* 3,112 tons, off Amlwich, 4 killed.

March 9th—*Frangeston,* 3,731 tons, off Scarborough, 37 killed

March 15th—*Fingal,* 1,562 tons, off Coquet, 6 killed.

April 4th—*City of Bremen,* off Landsaw, 4 killed.

April 4th—*Harpalyce,* 5,940 tons, off Landsaw, 12 killed and some wounded.

There were many other merchant vessels torpedoed without warning, but without loss of life fortunately. Some justification has been put forward for this form of apparently wholly unjustifiable belligerent action :—

1. That it is to stop food supplies to this country.
2. That it is in execution of a blockade.

As to 1, stopping food supplies to the civilian population has never been recognised as permissible, and if it is alleged that Germany is simply retaliating, the allegation is not well founded, as the stoppage of foodstuffs to Germany is not to the civil population, but to the Government, which has taken over all food supplies.

That this is not the reason for the action of Germany in sinking merchant vessels is clear. The *Falaba,* torpedoed off the Welsh coast on March 28th (a S.S. of 4,806 tons, with 151 passengers and a crew of 96, of whom 61 passengers and 43 of the crew were drowned) was *outward* bound.

As to 2, the declaration of a war zone is a new invention of the present war, but at most can give no more rights to the belligerent than a declaration of blockade, and if this declaration is intended to be of a general blockade it may first be pointed out that it is quite ineffective. A comparison between the great traffic into and out of our ports, and the very small percentage of these ships which the German submarines have been able to stop, shows that it is a paper blockade and nothing more, with raiding submarines attempting sometimes successfully to cut off ships where they can find them away from the protection of the English war vessels, which the submarines do not, and probably cannot, face.

However, it is not material whether the German Government rely on this declaration or on what grounds. Their claim is—and they have acted on this claim—to sink at sight without any warning and without any regard to the lives of those on board, crew or passengers, men, women or children, any ships in waters, the bounds of which are not stated even in the declaration. It is unnecessary to list the cases where this claim has been put in practice. The sinking of the *Lusitania,* with ghastly loss of innocent lives, has, of course, shocked the civilised world, but it is only one of a series of cases of a similar kind, though accompanied by less loss of life or without loss of life. Lord Bryce has very properly stigmatised the sinking of the *Lusitania* as the act of "pirates," "wild beasts of the sea," "whom every one is at liberty to seize and kill, or to bring home and after trial to execute for the offence they commit against mankind as a whole. This is not a danger to any particular nation, but a danger to all mankind."

There is one particular part of the British mercantile marine, the position of which should be separately considered in view of its treatment during the last few months, the fishing vessels, in particular the trawlers. Fishing vessels have always been considered exempt from molestation when engaged on their legitimate business, and the Hague Convention, No. XI., to which

Germany was a party, without any reservation by Article 3 expressly exempted from capture vessels employed exclusively in coast fisheries. German submarines have, however, sunk by torpedo and shell a large number of British trawlers, some with the usual want of notice and disregard of the lives of their fishermen crews. It is sufficient to mention a few :—

Trawler *St. Lawrence* in North Sea torpedoed. Two killed, seven picked up by trawler *Queenstown*, the rescuing party being, it is alleged, fired upon by the submarine.

Trawler *Cruiser* shelled by submarine and sunk. Four killed, four wounded, out of crew of nine.

Trawlers *Jason, Gloxinia, Nellie,* sunk 40 miles off Shields by submarine U10 early in April.

The case of the *Jason* may be noted for a brief conversation between the skipper and the commander of the U10. The skipper asked the commander : " When did you start sinking fishing vessels? " and it is stated that the commander answered : " We have orders to sink everything."

The only explanation of the extraordinary treatment by Germany of mercantile ships and fishing boats appears to be the desire to cause fear among the civil population of this and other countries, just as they have made the attempt in their land campaigns, not by mere destruction of property, but by killing and attempting to kill civilians. The case of the Bergen steamship *Diana* can be explained in no other way. There a German aeroplane dropped darts on the vessel, 500 being afterwards found on and in her deck; the only object could be to kill, and the darts could have no material effect on the ship herself.

In the face of these actions the position of merchant vessels of the Allies may be considered at least by Germany as outside the Rules of International Law.

Read before The Grotius Society on May 14th, 1915.

THE LAWS OF WAR: PRISONERS OF WAR AND REPRISALS.

BY

COMMANDER SIR GRAHAM BOWER, K.C.M.G. (*late Royal Navy*).

"For I very well saw throughout the Christian World so great a licence of making war and of running into arms upon every light cause, and sometimes upon none at all, that even the Barbarians would have been ashamed to have owned it. And also that, arms being once taken up there was no reverence at all had to Laws either Divine or Humane; but just as if some Fury had been sent out to kill and destroy: so War being begun a general licence was granted to work all manner of mischief whatsoever."

(*Preface to Grotius De Jure Belli ac Pacis.*)

PRISONERS OF WAR.

The present calamitous war, unprecedented in respect of the numbers engaged and the geographical areas included in the theatre of war, has, during the nine months that it has lasted, developed a tendency in the military and civil authorities of the belligerents to depart from the customary and conventional rules of war, and to infringe on the natural rights of peoples, as defined in the Law of Nations.

This tendency may be divided and classified as follows:—

(1) A tendency to disregard the rights of neutral States.

(2) A tendency to confuse the distinction between combatants and non-combatants.

(3) A tendency to ignore the obligations of humanity to the wounded. The customary armistice to succour the wounded, and bury the dead seems to have dropped into disuse.

(4) A tendency to depart from the courtesy to prisoners of war which has been customary and conventional.

All these tendencies operate to the detriment of the law breaker. For as justice and humanity alike depend on the observance of Law, so every departure from Law is a retreat from civilisation.

The reversion to conditions which men had come to treat as evidence of barbarism is to be deplored, and no effort should be spared to arrest the backward movement. Moreover, a special obligation rests on British subjects to study the Law, and to be careful in its observance, for the whole forces of the Empire are engaged in the defence of International Law and justice.

The whole question of International Law and justice will be considered by a committee of gentlemen who have given special attention to the subject. But the task of preparing a paper on the kindred subjects of Prisoners of War and Reprisals has been entrusted to me. The following remarks, therefore, do not claim to be in any way authoritative—they are written rather for the purpose of eliciting the opinions of others who are more competent than for the purpose of expounding the Law. They are necessarily written under a sense of restraint, for they submit for the consideration of an international body the lessons of history as viewed from the British standpoint. These lessons inculcate, I apprehend, the expediency of the humane treatment of prisoners of war. For it is clearly to the interest of a belligerent to encourage the opposing force to surrender; but if the conditions of surrender are so painful, or so dishonourable, as to outweigh the risks of a desperate resistance, men may prefer death to dishonour. Again, whilst acts which are dishonourable or cruel may be committed in the heat of passion, or in the blind fury of conflict. and may be condoned or forgotten by an enemy after a war, the humiliation of prisoners of war, an act for which the heat of passion cannot be pleaded as an excuse, remains as a stain. The imprisonment of Napoleon at St. Helena was justified as a measure of public safety, but the petty annoyances of Sir Hudson Lowe turned public sympathy to the illustrious prisoner. For every reason, therefore, the humane and generous treatment of prisoners of war is expedient, and the customary and conventional code has kept in touch with the progress of enlightenment. We are a long way from the slaughter or enslavement of prisoners taken in fair fight.

The treatment of prisoners of war is now regulated by Chapter II., Section I., of the Annex to the Hague Convention of 1899 as amended by the Hague Convention, No. 4, of 1907.

For the purpose of this paper the important Articles are 5, 7, 9, and 17.

Article 5 provides that "prisoners of war may be interned in a town, fortress, or camp or other place, and are bound not to go beyond certain fixed limits; but they cannot be placed in confinement, except as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist."

It is noteworthy that in this Article the word used is "interned" not "imprisoned," and the prohibition of confinement, except under conditions of temporary necessity, emphasises the distinction.

Article 7 declares that "the Government into whose hands prisoners of war have fallen is charged with their maintenance. In default of special agreement between the belligerents, prisoners of war shall be treated as regards rations, quarters and clothing on the same footing as the troops of the Government which captured them."

Article 9 requires that "every prisoner is bound to give if questioned on the subject his true name and rank, and if he infringes this rule he is liable to have the advantages given to prisoners of his class curtailed."

These two Articles read together show that a distinction of rank is to be recognised, and that the prisoners are to be treated as regards rations, quarters and clothing on the same footing as the officers and men of the capturing forces. The conditions under which this war is waged and the nationality and religion of the forces engaged raise the question whether the requirements of the Hague Convention in respect of rations are suitable in all cases. It would be impossible, for instance, to offer a Mahommedan soldier pork as a ration, or to include beef in the ration or the cooking of the ration of a Hindoo.

Article 17 provides that "officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained; the amount shall be refunded by their own Government."

Article 18 provides for liberty of religion and attendance at church, but this and other Articles providing for the humane treatment of prisoners of war are not immediately in question. It would, for instance, be difficult for Germany to provide churches for Mahommedan, Hindoo, or even Orthodox prisoners, and it is obvious that the general intention is fulfilled if the exercise of their religion and the ministration of the clergy be facilitated as far as possible.

The correspondence contained in the White Books Cd. 7815 and Cd. 7817 indicates that whilst the German regulations do not meet the requirements of the Hague Convention, they are nevertheless consistent with humanity. The complaints made by British prisoners relate mostly, though not entirely, to their treatment on the way to the internment camp. The overcrowding may be caused by the inadequacy of hastily extemporised camps or huts, and it is to be hoped that these defects will be remedied.

The rations issued are not such as are suitable for British soldiers, but if they are similar to those consumed by German troops the Convention has been observed. The complaints as to want of clothing and the deprivation of clothing are more serious, for whilst no one would object to surrendering his overcoat to a wounded man, still, the prisoner of war should be the last man to be deprived even for such a purpose. It is to be hoped that further investigation will clear the honour of the German army of the charge of ill-treatment of prisoners, and that in the cases where possibly unavoidable hardship has been caused the defect will be remedied. To a soldier the honour of his opponent is only second to his own, and every soldier of every nationality must feel that a departure from the conventional obligations in regard to the treatment of prisoners of war by any nation is a stain on the honourable traditions of the profession of arms. Certainly every British soldier or sailor may be trusted to deal courteously and sympathetically with men whom the fortune of war has placed in his power, and it needs no statement of the Law to remind him of the obligations which are already imposed by his sense of honour and of humanity.

In England the requirements of the Convention are generally fufilled in spirit. For in regard to rations, quarters, and clothing, the enemy prisoners are treated as well as the corresponding ranks of the British army. The officers it is true receive only 4s. a day for subalterns and 4s. 6d. for captains and officers of higher rank, but this is a change necessitated by the failure of the German Government to accept a reciprocal obligation in respect of Article 17 of the Hague Convention. There are, however, exceptions to the above rule and the exceptions are important.

On the 8th March the Admiralty announced that the twenty-nine prisoners from the submarine U9 would be subject to special restrictions, and cannot be accorded the distinction of their rank or be allowed to mingle with other prisoners of war.

This statement provoked a note from the German Government to the American Ambassador to which Sir Edward Grey replied as follows :—

" Foreign Office, April 1st, 1915.

" The Secretary of State for Foreign Affairs presents his compliments to the United States Ambassador, and with reference to His Excellency's note of the 20th ultimo respecting reports in the Press upon the treatment of prisoners from German submarines, has the honour to state that he learns from the Lords Commissioners of the Admiralty that the officers and men who were rescued from the German submarines U8 and U12 have been placed in the naval detention barracks, in view of the necessity

of their segregation from other prisoners of war. In these quarters they are treated with humanity, given opportunities for exercise, provided with German books, subjected to no forced labour, and are better fed and clothed than British prisoners of equal rank now in Germany.

"As, however, the crews of the two German submarines in question, before they were rescued from the sea, were engaged in sinking innocent British and neutral merchant ships and wantonly killing non-combatants, they cannot be regarded as honourable opponents, but rather as persons who at the orders of their Government have committed acts which are offences against the law of nations and contrary to common humanity.

"His Majesty's Government would also bring to the notice of the United States Government that during the present war more than 1,000 officers and men of the German navy have been rescued from the sea, sometimes to the prejudice of British naval operations. No case has, however, occurred of any officer or man of the Royal Navy being rescued by the Germans."

The last paragraph of the above note states facts which call for explanation. Until that explanation has been made public it would not be right to pronounce judgment, but the facts are so serious that a full explanation can alone save the honour of the officers of the German navy, and as a former officer of the British navy, I sincerely trust that for the honour of our common profession that explanation will be forthcoming.

But it is rather with the treatment of prisoners of war, than with the rescue of prisoners of war, that I am required to deal, and in this connection it is important to observe that in the note to which Sir Edward Grey replied the German Government stated that "the crews of the submarines acted in the execution of the orders given to them, and in doing this have solely fulfilled their military duties."

It is evident, therefore, from the correspondence that the German Government accepts responsibility for the orders given to the submarine officers and men. Sir Edward Grey, indeed, does not dispute that they acted under orders. Nevertheless, they have been placed in the naval detention barracks—that is to say—the naval prison, on the ground that they were engaged in sinking innocent British and neutral merchant ships, and wantonly killing non-combatants. The punishment, however, is rather one of moral humiliation than the infliction of physical injury, for they are kindly treated in respect to accommodation, clothing, and food.

This is an important new departure in the laws of war. It is not, I presume, disputed that belligerents have a right to sink

the merchant vessels of their enemy whenever military necessities demand. The *Alabama* throughout her short but eventful career practically did nothing else. Out of 63 ships taken she burnt 52 and sunk one.

But there is a condition. In all cases the passengers and crew must first be removed. It is, therefore, for the failure to fulfil this condition that the German officers and men are imprisoned. The only evidence of the facts in my possession is derived from newspapers, and newspaper evidence would not be accepted as conclusive in any Court, but as the facts have not been disputed by the German Government, I assume for the purpose of this paper that they are true.[1]

Do they justify imprisonment ?

On consulting the British Manual of Military Law I find that there are three classes of cases in which military courts or military authorities exercise jurisdiction over enemy subjects. They are :—

(1) Espionage.

(2) War Treason.

(3) War crimes which include the foregoing and others

Espionage is defined in Chapter II. of the Annex to the Hague Convention, No. 4, of 1907, as follows :—

" Article 29.—A person can only be considered a spy when, acting clandestinely or on false pretences he obtains or endeavours to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

" Accordingly, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies, &c., &c."

It is evident from the foregoing that the submarine officers are not spies. It is possible that whilst in British waters they have obtained information, but they did so in their military capacity as scouts, not as spies.

War treason is an offence committed by the inhabitants of a country in the occupation of an enemy belligerent. This offence is also not in point. There remains, therefore, the chapter of war crimes. These crimes are described in paragraphs 442 and 443 of the Manual of Military Law, which in effect summarises and expands Section II., Chapter I., of Hague Convention No. 4,

[1] Since this was written a Court of Enquiry, presided over by Lord Mersey, has heard the evidence in the case of the *Lusitania*, and has pronounced judgment. The facts may therefore be taken as fully established.

of 1907. Those paragraphs are important and should be quoted in full. For they are the only paragraphs that could in any way be considered as applicable. They run as follows :—

"442. War crimes may be divided into four different classes :—

"I.—Violations of the recognised rules of warfare by members of the armed forces;

"II.—Illegitimate hostilities in arms committed by individuals who are not members of the armed forces;

"III.—Espionage and war treason;

"IV.—Marauding.

"443. The more important violations are the following :— Making use of poisoned and otherwise forbidden arms and ammunition, killing of the wounded, refusal of quarter, treacherous request of quarter, maltreatment of dead bodies on the battlefield, ill-treatment of prisoners of war, firing on undefended localities, abuse of the flag of truce, firing on the flag of truce, abuse of the Red Cross flag and badge and other violations of the Geneva Convention, use of civilian clothing by troops to conceal their military character during battle, bombardment of hospitals and other privileged buildings, improper use of privileged buildings for military purposes, poisoning of wells and streams, pillage and purposeless destruction, ill-treatment of inhabitants in occupied territory. It is important, however, to note that members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commanders are not criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress, which are dealt with in this chapter."

The "other means" are reprisals; but that is a separate subject to be dealt with later. For the present we may say that whilst nearly all these crimes have been charged against the German troops in Belgium, France and Africa, they have not been alleged against the submarine officers. Moreover, the offence with which they are charged has undoubtedly, and on the admission of their own Government, been ordered by that Government. It is clear, therefore, that the concluding sentences in the paragraph quoted forbid their punishment.

The sinking of neutral ships stands on a different footing to the sinking of enemy merchant ships. By no possibility can it be construed as war treason, or a war crime, though it may be con-

strued as an act of war against the neutral State affected. Though Articles 49 and 50 of the Declaration of London conditionally admit the practice as an exception, nevertheless, if the conditions are not observed and the exception becomes the rule, it would be impossible for a neutral State to ignore attacks on vessels on the high seas. Lord Lansdowne has stated (*Times*, July 13th, 1904), "Speaking generally a British ship on the high seas is regarded as British territory," and this view is held almost universally by all nationalities, so that an attack on a neutral ship on the high seas is an attack on neutral territory. It is not surprising, therefore, that the American Government should have addressed the following warning to Germany :—

"To declare or exercise the right to attack or destroy any vessel entering the prescribed area on the high seas without first determining its belligerent nationality, and the contraband character of its cargo, is an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible.

* * * * *

"If commanders of German vessels of war act on the presumption that the Flag of the United States is not used in good faith and should destroy on the high seas an American vessel and the lives of American citizens, it would be difficult for the Government of the United States to view such an act in any other light than an indefensible violation of neutral rights, which it would be very hard indeed to reconcile with the friendly relations now happily existing between the two Governments. The United States Government would be constrained to hold the Imperial Government to strict accountability for such acts and to take any steps that might be necessary to safeguard American lives and property."

Nothing could be plainer—the destruction of a neutral ship is not a war crime against the belligerent, but an act of war against the neutral involving all the risks of such an act. It is for the neutral Government to protect its own subjects and their property.[1] But in no case is it incumbent on the British Government, as a belligerent, to take action against the German subordinate officer for an offence against a neutral flag.

We have seen that the action of the German submarine officers cannot be classified as espionage or as a war crime. But some newspapers have described the destruction of merchant ships as piracy and the officers as pirates. That the destruction of merchant ships, whether belligerent or neutral, when it is impossible to save the passengers and crew, is an act of cruelty and inhumanity as

[1] See Hall, 5th Edition p. 619.

well as a gross violation of the Conventional Law is admitted by all who are capable of dispassionate judgment, but it is not piracy. Mr. Hall defines piracy as follows:—"Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common—they are done under conditions which render it impossible or unfair to hold any State responsible for their commission. A pirate either belongs to no State, or organised political party, or by the nature of his act he has shown his intention to reject the authority of that to which he is properly subject." The sinking of merchant ships under the conditions stated is certainly reprehensible, but Germany has accepted responsibility and the German officers and men have not shown any intention to reject the authority of their Government. Therefore they are not pirates. If they commit, as they have been alleged to commit, acts contrary to the laws of war and humanity —acts which are the more reprehensible, inasmuch as they have no military value—and can in no way influence the ultimate decision, the blame does not rest with them, but with their superiors.

So far we have discussed the doctrine of the responsibility of subordinates in so far as that doctrine affects the German navy. We have now to consider how that doctrine if accepted would affect the British navy.

The Naval Discipline Act provides for the discipline of the navy in war and peace, and the penalties imposed for misconduct in times of war are severe.

Article 4 of the Naval Discipline Act of 1866 enacts as follows:—

"When any action or any service is commanded every person subject to this Act who shall presume to delay or discourage the said action or service upon any pretence whatsoever, or in the presence or vicinity of the enemy shall desert his post or sleep upon his watch shall suffer death, or such other punishment as is hereinafter mentioned."

It is evident, therefore, that if a British submarine officer received an order from a lawful authority, *e.g.*, the British Admiralty, to sink a German merchant ship without notice, and if he attempted "to delay or discourage" this service on the plea that the order violated the laws of war, he would be liable to the death penalty, and rightly so, for no army or navy could exist if every subordinate were permitted or required to constitute himself a judge of the legality or morality of the orders received from his superiors.

It may happen that an order which, on the face of it, is a violation of the laws of war is justified. It may be an act of

reprisals, or it may be that the superior authority has information not in the possession of the subordinate, as for instance, that the merchant vessel is sending wireless messages of military importance, but the subordinate cannot know and cannot judge. To make him responsible is to strike at the foundations of discipline in every army or navy in the world.

In my judgment, therefore, whilst the indignation caused by the killing of non-combatants, including women and children is natural and justified, the differential treatment of submarine officers should be abolished.[1]

Though not directly bearing on the treatment of prisoners of war, the following justification of the policy of "frightfulness" may be of interest. It is taken from Machiavelli's Prince :—

"From which we may learn the lesson that, on seizing a State the usurper should make haste to inflict what injuries he must at a stroke, so that he may not have to renew them daily, but be enabled by their discontinuance to reassure men's minds and afterwards win them over by benefits. He who either through timidity or from following bad counsels adopts a contrary course must keep the sword always drawn. . . . Injuries, therefore, should be inflicted all at once that their ill savour being less lasting may the less offend."

* * * * *

"But when a Prince is with his army and has many soldiers under his own command he must needs disregard the reproach of cruelty, for without such a reputation in its captains no army can be held together or kept under any kind of control. Among the things remarkable in Hannibal this has been noted, that having a very great army, made up of men of many different nations, and brought to fight in a foreign country, no dissension ever arose among the soldiers themselves, nor any mutiny against their leader either in his good or in his evil fortune. This we can only ascribe to the transcendant cruelty which, united with numberless great qualities, rendered him at once venerable and terrible in the eyes of his soldiers, and without this reputation for cruelty these other virtues would not have produced the like results."

Here Machiavelli asserts that cruelty is profitable, and it is this belief which has caused, and may yet cause, much useless and unprofitable barbarity. It is necessary, therefore, to meet the theory of Machiavelli with the flat denial of all history. It is not true that Hannibal was cruel. Bosworth Smith says (Carthage

[1] Since this was written the differential treatment of German submarine officers has been cancelled, and it is evident that His Majesty's Government, on further examination, have adopted the conclusions put forward in this paper.

and the Carthagenians) : " Well aware that if he wished to win the day, policy must do for him more even than his sword, he (Hannibal) dismissed the Italians whom he had taken prisoners to their homes, assuring them that he came as their deliverers from the common oppressor. The Roman citizens on the other hand he kept in close confinement, giving them only what was necessary to support life." If we regard the customs of the time this was humane, and even generous treatment, and Machiavelli's statement is a libel on Hannibal's memory.

But the truth of the wisdom of clemency and the unwisdom of a war on non-combatants does not depend solely on the example of Hannibal. All history supports this truth. The cruelties of Alva did not save the Netherlands for Spain. The numerous captures of the French privateers in no way influenced the Napoleonic wars. The command of the sea was decided by the battle fleets and by them alone. It is said that in the Thirty Years' War Gustavus Adolphus carried a copy of Grotius in his baggage, and his humanity was more profitable than the cruelties of Tilly and Wallenstein. The glories of the assault of Badajos, one of the most heroic actions of the British army, are obscured by the shame of the subsequent sack of the town. The destruction of private property by the *Alabama* and her consorts was of no benefit to the Southern States. On the other hand the evidence as to the profitable consequences of the humane and considerate treatment of the civil population is overwhelming. Wellington was greatly aided by the civil population when he passed from Spain into France, and British forces in China have constantly been helped with supplies, owing to the protection afforded to agriculturists bringing provisions to the camp for sale.

This conflict of opinion as to the military and political values of cruelty or clemency is not limited to the age of Machiavelli, or of Cæsar Borgia. It exists to-day. It exists in the distinction drawn by German writers between *kriegsrason* (reasons of war) and *kriegsmanier* (or laws of war) : that is, between the demands of military necessity or expediency and the laws of war, and when we come to our next subject, that of reprisals, it is important to bear in mind that humanity points to the need for the separation of combatants from non-combatants, and that experience shows that the separation is not merely humane but profitable. Briefly stated, cruelty does not pay, it alienates sympathy and inspires disgust.

REPRISALS.

The following is extracted from Paragraph 452 of the Manual of Military Law :—

" Reprisals between belligerents are retaliation for illegitimate

acts of warfare for the purpose of making the enemy comply in future with the recognised laws of war.. . . . ."

Paragraph 454 runs as follows :—" Reprisals are an extreme measure, because in most cases they inflict suffering upon innocent individuals. In this, however, their coercive force exists, and they are indispensable as a last resource."

Paragraph 456 says that : " An infraction of the laws of war having been definitely established every effort should first be made to detect and punish the actual offenders. Only if this is impossible should other measures be taken in case the injured belligerent thinks that the facts warrant them. As a rule the injured party would not at once resort to reprisals, but would first lodge a complaint with the enemy in the hope of stopping any repetitions of the offence, or of securing the punishment of the guilty. This course should always be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offence cannot be secured."

The regulations do not apparently distinguish between retaliatory measures and reprisals, nevertheless there is a distinction which in the interest of humanity should be emphasised. For instance, if the enemy used a prohibited weapon, then it would be permissible to retaliate by the adoption of the same or a similar weapon. But there is a clear moral distinction between such an act of retaliation and the destruction, let us say, of a defenceless town as a reprisal for a military offence.

It is to be noticed also that the regulations enjoin the despatch of a threat or warning before recourse is had to reprisals. This point is important. For whilst the French maxim *les représailles ne valent rien* is true, and though reprisals generally lead to counter reprisals and a competition in barbarism, the same cannot be said of the threat of reprisals. The following is an extract from Sir Herbert Maxwell's " Life of Wellington," Vol. I., page 351 :—

" As October drew to a close, however, the reports from Pamplona showed that the garrison were in the last extremity. Deserters brought word that the whole place had been mined and that the Governor intended to destroy it. In this Wellington perceived an intention to do injury to the Spanish nation contrary to the laws of civilised war, and he sent strict orders to Don Carlos de Espana who was conducting the blockade that if this project were carried out the Governor, all the officers and non-commissioned officers, and every tenth man of the garrison should be put to death. It has been supposed that this was an empty menace, and that Wellington dared not carry it into execution.

Be it remembered that the order to Don Carlos was explicit; that it was delivered on 20th October when the Governor was treating for surrender, and that Don Carlos was not one to be squeamish about carrying it out to the letter. Happily the threat proved enough. Pamplona was delivered unharmed into the hands of Don Carlos on 31st October."

Here there was a threat of reprisals, of reprisals against the military, not the civil population, and it succeeded.

The Manual of Military Law gives the following examples of reprisals, and the threat of reprisals :—

"Early in 1813 the British Government having sent to England to be tried for treason 23 Irishmen naturalised in the United States who had been captured on vessels of the United States, Congress authorised the President to retaliate. Under this Act General Dearborn placed in close confinement 23 prisoners taken at Fort George. General Prevost, under the express direction of Lord Bathurst, ordered the close imprisonment of double the number of commissioned and non-commissioned United States officers. This was followed by a threat of unmitigated severity against American citizens and villages in case the system of retaliation was pursued. Mr. Madison retaliated by putting into confinement a similar number of British officers taken by the United States. General Prevost immediately retaliated by subjecting to the same discipline all his prisoners whatsoever . . . A better temper, however, soon came over the British Government, by whom the system had been initiated. A party of United States officers who were prisoners of war in England were released on parole with instructions to state to the President that the 23 prisoners who had been charged with treason in England had not been tried but remained on the usual basis of prisoners of war. This led to the dismissal on parole of all officers on both sides (Wharton : A Digest of the International Law of the United States, 1884, Vol. III., par. 348b).

"During the Franco-Prussian War, 1870-1, the French captured 40 merchant ships and made their crews prisoners of war. Count Bismarck, who considered it contrary to International Law to retain these men as prisoners, demanded their liberation, and when the French refused it ordered by way of reprisals 40 French private individuals of local importance to be arrested and sent as prisoners of war to Bremen, where they were kept until the end of the war. (Count Bismarck, as it happened, was decidedly wrong, for France had, as the laws then stood, in no way committed an illegal act by retaining the German crews as prisoners of war.)

"The Germans in 1870-1 by way of reprisals for offences committed by inhabitants in taking part in the attack on troops, convoys, messengers, &c., exacted fines or burnt down buildings. At Charmes the town casino was burnt down as punishment for inhabitants having fired on the escort of a convoy of prisoners of war (Von Widdern, IV., 2, p. 33). The village of Fontenay was burnt down and a fine of 10,000,000 francs levied on the Province of Lorraine on account of the railway bridge near the village having been destroyed with the alleged connivance of inhabitants (Idem, IV., 2, pp. 290-303).

"In his proclamations of 31st May, 16th June, and 19th June, 1900, Field Marshal Lord Roberts threatened reprisals for wanton damage to property, and damage to railway and telegraph lines by the burning of the houses and farms in the vicinity of the places where damage was done."

So far the Manual of Military Law. To these examples may be added the Proclamation issued by General Von Kummer at Metz on October 30th, 1870, which ran as follows:—

"If I encounter disobedience or resistance I shall act with all severity and according to the Laws of War. Whoever shall place in danger the German troops, or shall cause prejudice by perfidy, will be brought before a Council of War. Whoever shall act as a spy to the French troops or shall lodge or give them assistance, whoever shall show the road to the French troops voluntarily, whoever shall kill or wound the German troops or the persons belonging to their suite, whoever shall destroy the canals, railways or telegraph wires, whoever shall burn munitions and provisions of war, and lastly, whoever shall take up arms against the German troops, will be punished by death. It is also declared that (1) all houses in which, or from out of which, any one commits acts of hostilities towards the German troops will be used as barracks; (2) not more than ten persons shall be allowed to assemble in the streets or public-houses; (3) the inhabitants must deliver up all arms by 4 o'clock on Monday, October 31st, at the Palais Rue de la Princesse; (4) all windows are to be lighted up during the night in case of alarm."

The foregoing Proclamation may be said to deal with war treason, but as it has a certain affinity with Lord Roberts' Proclamations of 1900, which are classed by the War Office as reprisals, it is quoted as evidence that the theory of reprisals and the theory of war crimes overlap.

In any case, however, it is clear that the threat of reprisals is more likely to be successful than the reprisals themselves, that in most cases reprisals where carried out are liable to be denounced

as methods of barbarism, and are, therefore, likely to divert sympathy to the sufferers. For this reason, if for no other, great care and forethought should be given to all the aspects of the case, before a threat of reprisals is formulated. For if the threat is delivered it becomes almost impossible to avoid its execution, with all the discreditable consequences.

The whole question of reprisals is most difficult. There can be no more glaring example of barbarism than the sack of Magdeburg by Tilly's troops in the Thirty Years' War; but Gustavus Adolphus persistently refused to sanction reprisals, and history holds that he was right.

Possibly the rules proposed by Professor Holland might form a useful basis for future guidance. They are as follows :—

"Reprisals must be exercised only subject to the following restrictions :—

(1) The offence in question must have been carefully enquired into.

(2) Redress for the wrong or punishment of the real offenders must be unattainable.

(3) The reprisals must be authorised, unless under very special circumstances, by the Commander-in-chief.

(4) They must not be disproportionate to the offence, and must in no case be of a barbarous character."

These rules in effect summarise the proposals put forward by the Russian Government at the Brussels Conference of 1874. Proposals which, unfortunately, were not adopted.

As, however, the aim of reprisals is not vengeance, but prevention, I would add to the foregoing the following rule :—

"(5) A threat or warning must precede all reprisals, and the reprisals should only be carried out if the threat or warning is disregarded." As the aim of all war is a lasting peace so a reluctance to engage in reprisals, except under compulsion, is likely to promote that aim and to preserve the honour of the nation in the eyes of impartial or neutral or humane persons.

GRAHAM BOWER.

Read before The Grotius Society on May 27th, 1915.

NEUTRALITY AND WAR ZONES.

BY

THE REV. T. J. LAWRENCE, LL.D. & MALCOLM CARTER.

Nearly two centuries ago one of the greatest of the great men who gave content and form to modern International Law wrote that it was the first and most pressing duty of neutrals *omni modo cavere ne se bello interponant* (Bynkershoek, *Quest. Jur. Pub., I.*, 9). At the present moment their chief care must be to prevent belligerents from interposing in their affairs, and injuring their citizens in the performance of acts which the public law of the civilised world regards as perfectly innocent. In all great wars there has been a tendency on the part of belligerents to disregard or minimise the rights of neutrals when their own warlike aims are checked and limited thereby. But the terrible conflict now being waged in almost every part of the world has already won for itself a bad preëminence in this, as in other kinds of wrong-doing. Neither side is blameless; but on the part of Germany there has been utter disregard of neutral life, as well as lawless interference with neutral property. Her theory appears to be that there is no rule, human or divine, that may not be set aside on the plea of military necessity or national self-assertion. The issue thus raised must be decided by civilised mankind. But meanwhile neutrals, and all who care for neutrality, are faced by the question whether hostilities may be carried on without regard to neutral rights, or only according to the rules that create and protect such rights. The importance of this matter can hardly be exaggerated. Those who deal with it must first make up their minds whether they desire the international society of the future to be organised and governed in the interests of war or of peace. The notes that follow are written from the latter point of view. They are merely an attempt to assist discussion by pointing to existing rules in so far as any exist, and in so far as there are none, or only doubtful customs, by invoking generally accepted principles of justice and humanity. They are not exhaustive; and they do not attempt to cover the whole ground, but only selected portions of it. They deal with—

I.—RESPECT FOR THE NEUTRALITY OF NEUTRAL STATES.

Three hundred years ago powerful belligerents were apt to regard States who held aloof from the contest as white-livered cowards or calculating scoundrels. Those who were determined

to avoid the risks of war, or to make profit for themselves out of the dangers and difficulties of their neighbours, might possibly, as a great favour, be allowed to remain neutral. But to respect their territory and do no violence to their sovereignty was more than could be expected of high-spirited combatants when military advantages were to be gained by disregarding them. Gradually the public opinion of the civilised world came to demand even these hard things, and the performance of them was laid as an obligation on belligerent Powers, coupled with a corresponding obligation on the part of neutrals to aid neither party in the war but maintain an even balance between them. Custom followed in the wake of opinion. International Law grew clearer and clearer; till at length the Hague Conference of 1907 laid down in its Fifth Convention that "The territory of neutral Powers is inviolable" (Art. 1), and in its Thirteenth that "Belligerents are bound to respect the sovereign rights of neutral Powers" (Art. 1).

Germany accepted both these Conventions, and made no reservations with regard to the Articles just quoted. Yet she commenced the present war by invading Belgian territory. German troops crossed the frontier on the evening of Monday, August 3rd, 1914, while negotiations were still going on with the Government of Brussels, which declined to allow its country to be used as a passage-way into France, and declared that Belgium was prepared to defend its neutrality by force of arms. The next day General von Emmich, the Commander of the invading forces, issued a Proclamation in which he demanded a free passage on pain of "the horrors of war," a threat which the Report of the Bryce Committee, backed up as it is by similar Reports from a Belgian Commission, shews to have been carried out with true Teutonic thoroughness. The German General seems to have felt that his procedure required justification. Accordingly, he explained that he was constrained "by sheer necessity, the neutrality of Belgium having already been violated by French officers who have been through Belgian territory in a motor car, disguised, on their way into Germany" (*Blue Bk., Cd.* 7895, Appendix C., p. 183). Marvellous officers, who heroically invaded the enemy's country without any men to follow them, and cleverly went the longest way round in order to make their attack a complete surprise! The German Chancellor spoke the truth when he said to the Reichstag on August 4th that: "Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, this is contrary to the dictates of International Law"; and on subsequent occasions when he endeavoured to make out that Belgium was the aggressor or a willing partner in the aggression of others he spoke what is not the truth.

But bad as the German case would be if the country whose neutrality Germany violated were an ordinary State, it is made far worse by the fact that Belgium was not merely neutral, but neutralised. A neutralised State is one which is not free to make or abstain from war as it pleases, but is bound by international convention to observe neutrality towards all other States as long as they do not attack her independence or territorial integrity. The Convention which imposes this obligation on her gives her the guarantee of the other signatory Powers that they will protect her soil and sovereignty as long as she fulfils her duty of perpetual neutrality. Belgium was placed in the position just described by the Treaty of January, 1831, as confirmed by the Treaty of April, 1839. The Guaranteeing Powers were Great Britain, Austria, France, Prussia and Russia; and the obligations of Prussia in such matters have since descended on, and been assumed by, the German Empire. Nor have they become obsolete through disuse; for in 1870 Germany signed a treaty with Great Britain and Belgium, binding her to assist the former in defending the latter, if France violated Belgian neutrality in the course of the war then raging. Moreover, in 1911 Germany had given a diplomatic assurance to Belgium that she had no intention of violating Belgian neutrality; and as late as July 31st, 1914, the German Minister at Brussels had informed the Belgian Foreign Office that he knew of these assurances and was certain that "the sentiments expressed at the time had not changed." Two days later the same Minister presented to the same Foreign Office an ultimatum demanding passage on pain of instant war in case of refusal; and three days later the German troops crossed the Belgian frontier! There is nothing more to tell except that on the night of August 1st Germany seized Luxemburg, whose neutrality she had covenanted to respect by the Treaty of 1867. There she met with no armed opposition, and there her forces still remain. The heroic Kingdom is castigated well nigh to death for keeping her plighted word; but the submissive Duchy is not relieved of her burden because she accepted it without resistance. In both cases the offence of Germany is continuous as well as flagrant. Every day that passes adds to the weight of her guilt.

The question arises whether some effective protection cannot be devised for States whose right to remain neutral is wantonly disregarded. This is bound up with the vastly greater question of the development of international society in such a way that a proved and serious breach of the mass of rules and customs we call International Law shall be punished at the behests of an authority created by common consent. The nature of the authority, the nature of the sanction, and the nature of the rules to be sanctioned, are each and all matters which provoke great

differences of opinion. This is not the occasion to discuss them. But it may be pointed out that there is a real sanction in cases where the permanent neutrality of a State is guaranteed by a great law-making treaty, at least if the guarantee is several and not collective merely, as seems to be the case with regard to Luxemburg. There can be no doubt that one of the reasons which impel Great Britain, France and Russia to carry on the present war is that they may punish the brutal violation of Belgium by the German forces. With Great Britain it is probably the most cogent reason of all. Indeed, it might be questioned whether she would have drawn the sword at all but for the indignation and disgust caused by Germany's bad faith. At any rate the entire strength of the nation would not have been flung whole-heartedly into the conflict, as is the case at present. It has yet to be seen whether the statesmen of Berlin did not make, even from the point of view of the military interests of their country, the worst of their many mistakes when they sent von Emmich and his men across the Belgian frontier.

II.—Respect for the Life and Property of Neutral Individuals.

It was till lately regarded as an axiom of civilised warfare that neutral life was sacred, whatever liberties might be taken with neutral property. It is true that a neutral individual who joined the armed forces of a belligerent might be killed or wounded or taken prisoner, like any of his comrades. But that was because he had thrown off his neutral character by entering the army or navy of the enemy. And at the same time that he assumed the liabilities of a fighting man he acquired the privileges also. He was entitled to be treated in action as a lawful combatant, and if captured, he must be kept in honourable detention as a prisoner of war. But we are beginning to change all this. In the Russo-Japanese war of 1904-5 submarine contact mines were used for the first time on a large scale. Some were anchored and some were not. The anchored class frequently broke loose from their moorings and got adrift; while the unanchored class were adrift from the beginning. The result was that hundreds of neutral Chinese fishermen were destroyed, in many cases long after the war was over. Their hard and cruel lot made little impression on the Second Hague Conference, though it was presented to that august body in a pathetic memorandum. The Convention on the subject, adopted at the last moment after long and weary discussions extending over four months, was admittedly an eleventh hour compromise, which satisfied nobody. Its provisions

were weak in themselves, and in addition full of loopholes. Practically they allowed belligerents to sow the open seas with sudden death, and to lay in secret cordons of mines across the channels of access to an enemy's port as long as they could find some excuse for alleging that other objects than the closing of the port to commercial navigation had prompted their action (Seventh Convention, Articles 1-3). When these risks were pointed out by Sir Ernest Satow on behalf of Great Britain at the Eighth Plenary Meeting of the Conference on October 8th, 1907, the late Baron Marschall von Bieberstein, who was the first Plenipotentiary of Germany, replied that it would be unwise to make rules so strict that their observance might be "rendered impossible by the nature of things." "Conscience," said he, "good sense, and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses." He went on to declare that the officers of the German Navy would always fulfil "in the strictest fashion the duties which emanate from the unwritten law of humanity and civilisation," and to claim that there was no Government or country superior to his own in such matters (Parliamentary Papers, *Miscellaneous, No.* 4 (1908), pp. 54, 55).

These are brave words. A brief and very incomplete record of what the German navy has done in regard to neutral life during the present war will form an instructive commentary on them. First it laid mines along the East Anglian coast the moment war was declared, if not a good many moments before, and followed this up by placing other mine-fields in other parts of the North Sea fairways. Then it mined large tracts of open sea off portions of its own coasts, and brought about thereby the death by drowning of a few neutral sailors. Then it extended its mines along the channels of the North of Ireland, where the sea-tracks of vast numbers of vessels, many of them neutral, converge on their way to Scotch, Irish and British commercial ports. Then on February 4th, 1915, the German Government issued a decree proclaiming as from February 18th, the seas for a considerable distance round the British Isles to be a War Zone, within which all British vessels were liable to destruction by German submarines or air-craft, if necessary without warning, and neutral vessels which presumed to traverse the forbidden region were liable to share their fate. These threats were not suffered to remain unexecuted. There was action behind them; and in consequence of that action scores of innocent neutral lives have been lost. The torpedoing of the *Falaba* and the *Lusitania,* to give the two most conspicuous examples, is fresh in our minds. On both occasions American citizens perished; and on the second the horror was deepened by the terrible fact that many were women and children.

Possibly these few instances may be sufficient to convince the world that even German humanity is not to be trusted with a free hand. In truth, rules to restrain the violence of combatants are urgently required, and those not vague rules full of loopholes and saving clauses, but rules that are clear, distinct and meant to be obeyed. For lack of such restraints we are rapidly going back to a warfare in some respects worse than that of savages. They slaughter the women and children of their adversaries when the blood-lust is on them. Germany slaughters in cold blood the women and children of friends as well as foes; and unless she is checked her example will be followed by other Powers.

When neutral life is held in little account, neutral property is not likely to be greatly respected. It is not possible in this paper to discuss fully its legal position in time of war. All that can be done is to deal with two important points. Can neutral property found on board a captured enemy vessel be destroyed when it is deemed necessary to destroy the vessel? And have belligerents a right to sink neutral prizes at sea?

On the first question a decision was given by the French *Conseil d'Etat* in 1871 in the cases of the *Ludwig* and the *Vorwärts* which had been captured in 1870, and burnt at sea along with their neutral cargoes because their captors could not safely spare a prize crew. Not only was the legality of the destruction upheld, but it was also maintained that no compensation was due to the neutral owners who had lost their property laded in these vessels. The ground of the decision appears to have been that a neutral must take the chances of war if he puts himself or his goods in a position where hostile acts may be expected. This reasoning and the judgment founded upon it have met with general acceptance. But we crave permission to differ with them. We maintain that the deliberate destruction of a cargo after the ship which carries it has passed under the power of the captor is no more incidental to the operation of capture, than the deliberate cutting of the throat of a prisoner after he has been taken is incidental to the operation of taking him. Each is a separate act, and must be judged on its own merits. Looked at in this way the burning of the cargo was a clear violation of the Third Article of the Declaration of Paris, which exempts neutral goods from capture, and *a fortiori* from destruction, when found under an enemy flag, unless they are contraband of war. Granted that there were good grounds for the destruction of the vessels, and that they could not be destroyed without destroying the cargoes, yet a wrong was done thereby to the neutral owners, and therefore full compensation was due to them. This, we venture to suggest, should be the law of the future, unless the captors can prove that the cargo was contraband,

Recent events shew that the rage for destruction grows by what it feeds on. Germany claims to use the new weapon of the submarine in such a way as to destroy the old immunities of neutrals and non-combatants. According to her, there need be no search, in some cases even no summons to surrender, no provision of safety for the crew, no attempt to take the vessel into port for adjudication, nothing but one wild orgy of indiscriminate violence. The reply of the civilised world should be a refusal to surrender the slightest neutral prerogative. Unless the outworks are held inviolate the citadel will soon be carried, and warfare at sea will become as barbarous as it was directly after the fall of the Roman Empire.

We now come to the further question whether belligerents have a right to sink neutral prizes at sea? Till lately belligerent warships rarely went to this extremity. The British custom was to release rather than resort to it. In the case of the *Actaeon* (2 Dodson, 48) Sir Will. Scott laid down that "if a belligerent ship destroys a neutral vessel, the owner thereof is entitled to be put in the same position as he was in before the destruction of his vessel, *i.e.*, to recover damages and costs. The commander of a belligerent ship may have good reason for destroying a neutral vessel, but this does not relieve him from responsibility to the owner for damages." The question was never very prominent in those days; but it sprang into importance during the Russo-Japanese War of 1904-5. Russia made a practice of sinking neutral vessels when her cruisers found it inconvenient to bring them in for adjudication, and Great Britain, along with other neutral Powers, challenged her right to do anything of the kind. The great case was that of the *Knight Commander,* a British vessel laden with a cargo of railway material. Her Russian captors declared this to be contraband, and sunk her off Yokohama, because of the proximity of an enemy's port and lack of coal to take her to Vladivostock. We claimed an indemnity of £105,000, and Russia refused to admit any liability. We then proposed that the case should be sent to Arbitration; but Russia declined our proposal. The general question was discussed at the Hague Conference of 1907, but no agreement was reached. The Naval Conference of 1908-9, however, succeeded where the larger body had failed. The Declaration of London, which it drew up, laid down a general rule in accordance with British views in the words, "A neutral vessel which has been captured may not be destroyed by the enemy." But it went on to admit the Russian idea of exceptions, and allowed destruction when observance of the rule would involve "danger to the safety of the warship, or to the success of the operations in which she is engaged at the time." The ship's papers were, however, to be preserved and brought

before a Prize Court, which must be convinced of the necessity of the destruction, and also of the liability of the vessel to capture and condemnation. Failing satisfactory proof of either or both of these, compensation must be paid (*Declaration of London*, Arts. 48-52). This solution of the difficulty seems right in principle, but wrong in conceding to the belligerent cruiser too many grounds for destruction. The phrase "danger to the success of the operations in which she is engaged at the time" is much too elastic. It may be stretched to cover consequences that are both unimportant and remote. And, though it is perfectly true that a Prize Court would not be likely to accept trivial excuses, the experiences of the present war have shewn the necessity of setting very clear and definite limits to belligerent rights. We therefore suggest that the grounds of destruction should be limited to "danger to the safety of the warship," or, as it might better be worded "immediate danger to the safety of the warship, or of the squadron to which she is attached." It need hardly be added that the destruction by German submarines of American and other neutral vessels during the present war, without even a pretence of discovering by lawful search their true nationality, business and destination, is a gross illegality, whatever view may be taken of the sinking of neutral vessels after they have been detained and examined, and their papers and crews removed.

III.—Demands by Belligerents on Neutral Governments.

Throughout the war Germany has been insistent in its demands on the United States that their Government should stop the great trade in arms and munitions of war that has sprung up between American firms and the naval and military authorities of the Allies. Its appeals to what may be called the equities of neutrality, and the abusive threats of its highly-disciplined press, are calculated to raise a smile in an assembly of jurists where the law of contraband is well known, and the recent history of German trade not entirely forgotten. The Hague Conference of 1907 twice enacted that: "A neutral Power is not bound to prevent the export or transit, on behalf of one or other of the belligerents, of arms, munitions of war, or in general of anything that can be of use to an army or a fleet." These words appear in the Seventh Article of the Fifth Convention, and also in the Seventh Article of the Thirteenth Convention. The signature of Germany is at the bottom of each of these international instruments. Moreover, the great firm of Krupp of Essen, which is so closely connected with the ruling powers in Germany as to be almost a department of the German War Office, has probably supplied more war material to belligerent States than any other

trading company on the face of the earth. The *Economist* of May 24th, 1913, declared that "the war in the Balkans has been in one of its aspects a competition between Krupp and Creusot, and the groups of bankers which support those eminent manufacturing concerns." And yet before 1914 had run its course the German Government was protesting at Washington against the supply of arms and ammunition to the Allies by American firms. Neutral Governments are hardly likely in future to take on themselves the tremendous and thankless task of endeavouring to stop the trade in arms of their subjects. If it should prove possible to obtain by general agreement a prohibition of the manufacture of warlike material by private persons or companies, the question will fall to the ground. The only other way in which it is likely to be brought to an end is by the growth of the feeling that it is immoral to make money out of the mutilation and slaughter of one's fellow-creatures; and at present the world is a long way off this altruistic attitude.

There is a certain connection between the question just discussed and the restrictions frequently laid during the present war by neutral Governments on the re-export of certain commodities from their territories to those of the belligerents. These have been particularly conspicuous with regard to the Scandinavian States and Holland, though by no means confined to them. Greece, for instance, as we were informed in an evening paper last night, has just resorted to a prohibition so sweeping in character that it covers "the export of all goods which might be considered contraband of war" (*Star and Echo,* June 1st, 1915). Leaving out this drastic and probably unenforceable piece of domestic precaution, the cases we are considering resolve themselves into two classes—those in which the goods come from the belligerent country in whose interest the restrictions are imposed, and those in which they come from other neutral countries. With the first class a belligerent can deal by the simple process of forbidding its own manufacturers and shippers to export the goods in question to the neutral States concerned, except under such conditions as shall render their further passage to the enemy practically impossible. But it has no right to *demand* action on the part of neutral Governments, though it may, of course, make friendly diplomatic requests. With the second class, belligerents have no right to interfere in any way, unless they are contraband in their own nature and there is satisfactory proof that they are destined *ab initio* for the enemy. Then, by putting them on its list of contraband, and in the case of conditional contraband giving notice that it will apply the doctrine of Continuous Transit in spite of Article 35 of the Declaration of London, it can gain the right of capturing them on the high seas. Any attempt to go

beyond this, and forbid a trade between neutrals in goods which it does not venture to pronounce contraband, is a breach of International Law. Our attempt to keep certain goods from reaching Germany by a sort of " blockade " which is not a technical blockade, but nevertheless acts in some respects as if it were, must, we think, be placed in this category, though there may be truth in the contention that it interferes with neutral trades less than a real blockade or a real proclamation of contraband would do. Moreover, it must always be remembered that a State cannot make anything contraband by merely calling it so. It must convince neutrals that the goods in question are really useful for warlike purposes.

IV.—War Zones.

No one has ever doubted that neutral individuals intrude upon a scene of conflict at their own risk. But it has been generally assumed that the risk should be confined to the area in which warlike operations were actually going on. And especially is this the case with regard to naval struggles. The high seas are free to all. Neutrals have as much right to use them for peaceful purposes as belligerents have to contend with one another upon them. When issue of battle is joined ships of third parties must keep out of the way of the conflict, lest they hamper the operations of the combatants and bring injury or destruction on themselves. But on the other hand belligerents must not choose waters already thronged with peaceful merchantmen for the commencement of an engagement. Each must use what is common to all in such a way as not to hinder its lawful use by the other; and for this purpose a certain amount of give and take is necessary, just as it is in the ordinary experience of walking along crowded streets. If there must be any preference it should be given to those engaged in peaceful avocations.

Till lately this was so much a matter of course that few jurists troubled to formulate the doctrine on which it rests, that peace is the normal condition of mankind, and neutrals, as being still at peace, have a right to continue all their previous activities except such as have been expressly forbidden by International Law. But during the last few years we have witnessed the gradual development of an attempt to shift the presumption till it favours belligerents and their acts of hostility. In the Russo-Japanese War of 1904-5 the Japanese authorities told the *Times* correspondent in the *Haimun* not to go north of a line drawn from Chifu to Chemulpo. This was a comparatively small matter. But scarcely had the present war commenced when both sides began to deliminate War Zones on the high seas. At first we

simply warned neutrals against dangers due to the mines we had laid in these areas. This was done from motives of humanity, and if it had referred to a passing use of the waters in question for purposes connected with the conflict it might have merited praise rather than blame. But except in the case of a lawful blockade, the right of any Power to permanently occupy a given portion of the high seas with instruments of destruction and warn off neutrals as trespassers, is highly questionable. The claims of the Germans are greater still. They practically laid down, in the Decree of February 4th to which we have already alluded, that within a certain area of sea around the British Isles the rights of traders and travellers were suspended. In so far as this is a measure of reprisal directed against Great Britain it falls outside the scope of the present paper. But in so far as it concerns neutrals it gives us an example of outrageous interference with their rights and callous indifference to their sufferings. American, Danish, Swedish, Norwegian, and Dutch vessels have suffered; and doubtless a complete list would contain ships from other neutral countries. The last victim up to yesterday (May 31st, 1915) was Portuguese. Fortunately for the world, America, in taking up the cause of her own citizens, is fighting the battle of all neutrals. The diplomatic correspondence now going on between Washington and Berlin is most instructive. The recent German reply to the American note on the case of the *Lusitania* reveals the true inwardness of the German mind, and exposes the full danger to civilisation of the German policy. It comes merely to this, that the loss of innocent neutral lives is an unavoidable, though regrettable, consequence of submarine warfare waged as Germany is waging it to-day. The *Westminster Gazette* of June 1st summed up the controversy most admirably in a single sentence, when it wrote "America says humanity must prevail over German necessity; Germany says perish humanity so that the submarine warfare may go on." The United States in the course of her national existence has already on two occasions done great service to the cause of true neutrality. May she now succeed in doing a third, which will win for her to the end of time the gratitude of civilised mankind.

Read before The Grotius Society on June 2nd, 1915.

DESTRUCTION OF MERCHANTMEN BY A BELLIGERENT.

BY

HUGH H. L. BELLOT, D.C.L.

Prior to the Declaration of London by a rule of international law universally acknowledged, it was incumbent upon a belligerent captor to bring in for adjudication his prize, whether enemy or neutral. To this rule there were certain exceptions, some of which were generally recognised as legitimate, whilst others were regarded as doubtful or at any rate as not enjoying general acceptance.

The destruction of enemy's ships formed the first exception. The weight of authority, municipal regulations, and international usage united in admitting that under certain circumstances, such as the dangerous condition of the prize; the possibility that if released it might give information to the enemy; the inability to furnish a prize crew; liability to recapture by the enemy; the lack of provisions or water; the distance from a national port of the captor; the prize if an enemy's might be sold, retained and used as a tender or otherwise, or destroyed. In every case of destruction the crew and passengers, if any, must be removed to a place of safety and the ship's papers and if possible the cargo preserved, so that the necessary witnesses, papers and cargo might be sent to a national port where the validity of the capture and destruction could be determined by a Prize Court.

The destruction of neutral ships constitutes the second exception to the rule. The old rule once universally acknowledged that neutral vessels must never be destroyed was rejected by Russia in her naval instructions of 1869, 1895 and 1901, by the United States in 1898, by Japan in 1904, and by Germany during the Conference which produced the Declaration of London.

By Art. 21 of the regulations of 1895, and Art. 40 of the instructions of 1901, Russian commanders were empowered to destroy their prizes whether enemy or neutral, under such exceptional circumstances as the bad condition or small value of the prize, risk of recapture, distance from Imperial ports, or their blockade, danger to the Russian cruiser, or to the success of her operations. That this exception to the rule was a modern innovation may be gathered from the maritime ordinance of Peter the Great, whereby a Russian commander was forbidden under

pain of death to destroy his prizes on the high seas or to conduct them into foreign waters unless it became necessary from dire necessity. By the regulations issued in 1898 and repeated in the Naval Code of 1900 the United States also departed from the rule which was recognised by her Prize Courts. The principle of this rule is laid down in the case of *Maisonnaire* v. *Keating;* to which Dr. Baty has called my attention.

It was there said in the argument that [1]" the property of neutrals does not vest in the captors until condemnation. The property of an enemy is by the law of war, divested immediately on the capture; but that of a friend can be forfeited only by some misconduct which must be made judicially to appear." In this case the vessel was American sailing under a Sidmouth licence and carrying food for the enemy's forces. She had thus acquired a hostile character. She was captured by a French warship and upon threat of destruction the master agreed to ransom. "The capture," said Story, J., "was strictly legal," but the hostile character, he added, "would not justify the destruction of the vessel and cargo on the high seas."

Now by the Naval Code, where controlling reasons are present why the vessel should not be sent in for adjudication, such as unseaworthiness, infectious disease, imminent danger of recapture, or lack of prize crew, the prize may in the last resort be destroyed, provided there is no doubt that she is lawful prize.

On the other hand British, French and Japanese opinion and practice were alike opposed to the destruction of neutral vessels under any circumstances. I do not know of any case which admits the right to destroy on the part of a belligerent. In none of the English cases decided in the Anglo-American war of 1812-14 was the right to destroy admitted by the Courts. All these were cases not of neutral vessels, but of American ships protected by a British licence. But although for most purposes they were analogous to neutral ships, they were not completely so. In the case of the *Actaeon*,[2] the vessel was destroyed by the British commander because if he had allowed her to proceed, the position and strength of his own squadron would in all probability have been communicated to the opposing enemy fleet which was in the neighbourhood. As an enemy ship in fact, the *Actaeon* would have been quite justified in giving this communication which in a strictly neutral vessel would have constituted unneutral service. All that these cases decided was that if a neutral or protected ship was destroyed for reasons of policy alone as between the captor and the owner, the latter was entitled not only to restitution but to damages and costs. "If," said Lord Stowell in the *Felicity*,[3]

[1] 2 Gall. 325 (1815). [2] 2 Dods, 48 (1815). [3] 2 Dods, 381 (1819).

"a neutral or protected ship is destroyed by a captor either wantonly or under an alleged necessity i which she was not directly involved, the captor or his Government is answerable for the spoliation." "When it is neutral," adds the learned judge, "the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified under any such circumstances by a full restitution in value. These rules are so clear in principle and established in practice that they require neither reason nor precedent to illustrate or support them."

It is true that in the case of the *Leucadé* Dr. Lushington in his judgment did contemplate the destruction of neutral vessels under pressure of paramount necessity. But as the vessel was not destroyed—it was in fact brought in for adjudication—the *right to destroy* was never in issue, and was not determined. Following Lord Stowell, Dr. Lushington decided that a neutral vessel must be brought in for adjudication, and if this was impossible she must, under ordinary circumstances, be released. As between captor and owner no excuse as to inconvenience or difficulty could be admitted.

From these cases Professor Holland has deduced the following proposition: "An enemy's ship, after her crew has been placed in safety, may be destroyed. When there is any ground for believing that the ship or any part of her cargo is neutral property, such action is justifiable only in cases of the gravest importance to the captor's own State, after securing the ship's papers, and subject to the right of the neutral owners to receive full compensation."[1]

With all respect I submit that this conclusion that the destruction of a neutral ship is justifiable "in cases of gravest importance" is not supported by any principle or generally recognised usage of international law. The late Mr. Arthur Cohen, K.C., denied that this construction was correct. He asserted that the liability to compensate implied that the destruction was unjustifiable as regards the owner, and that the only remedy for a wrongful deprivation of property was the recovery of compensation from the wrongdoer. These cases I submit do no more than establish the proposition that if neutral property is destroyed without justification, restitution must be made, coupled with damages and costs. They simply declare the penalty to be paid to the injured party, and that such penalty must be paid by the captor or his Government, thus recognising that such destruction is an offence against international law. They do not confer upon the captor any *right* to destroy.

[1] *Times*, 6th August, 1904.

This view has always been followed by Great Britain. By the Admiralty Manual of 1888, British commanders are instructed to release without ransom a vessel which is not in a condition to be sent in or for which a prize crew cannot be spared, unless there is clear proof that she belongs to the enemy, or is engaged in unneutral service, in which case only are they authorised to destroy it.

The instructions issued to Japanese commanders in 1894 were similar. Japanese commanders were authorised to destroy enemy's vessels if unable to send them in, but if the vessels were neutral, they must be released after articles contraband of war had been taken out.

It is true that in the Code des Prises prepared by the Institute de Droit International and approved at the Congresses of Turin, 1882, and Munich, 1883, no distinction was drawn between the destruction of enemy and neutral ships. On the other hand, at the Heidelberg Congress of 1887 this question was fully debated with the result that the rule was confined to the destruction of enemy ships. The proposition that "such right of sinking is exceptionally allowed to the captor in case of the prize being a neutral condemnable ship" was suppressed.

To meet Russia on equal terms Japan in her revised Prize Regulations, March 7th, 1904, provided by Art. 91 as follows:— "In the following cases, and when it is unavoidable, the captain of a man-of-war may destroy a captured vessel or dispose of her according to the exigency of the occasion. But before so destroying or disposing of her, he shall tranship all persons on board and as far as possible the cargo also, and shall preserve the ship's papers and all other documents for judicial examination.

"1. When the captured vessel is in a very bad condition and cannot be navigated on account of a heavy sea.

"2. When there is apprehension that the vessel may be recaptured by the enemy.

"3. When the man-of-war cannot man the prize without so reducing her own complement as will endanger her safety."

Here no distinction is drawn between the destruction of enemy and neutral ships, but Japanese commanders do not appear to have taken advantage of the regulations by sinking any neutral ships they may have captured. On the contrary, they continued to deprecate the Russian practice, and Professor Takahashi alleges that Russian commanders even abused their own naval regulations, regarding liability to capture as equivalent to liability to condemnation. In this they were followed by the Russian Prize Court.

The sinking of the *Knight Commander* and other British ships by Russian commanders was viewed with great indignation in Great Britain. It was described by Lord Lansdowne in the House of Lords as "a very serious breach of international law," and by Mr. Balfour, then Prime Minister, in the House of Commons "as entirely contrary to the practice of nations in war time." "The proper course," said Mr. Balfour, "according to international practice, is that any ship reasonably suspected of carrying contraband of war should be taken by the belligerent to one of its own ports, and its trial should take place before the Prize Court by which the case is to be determined." In consequence of strong protests by the British Government, such destruction was for a time discontinued. Upon the sinking of the British S.S. *St. Kilda,* in response to a still more serious protest from the British Government, Count Lamsdorf replied that his former assurances held good, and had been observed for nearly a year, and that the present case was an isolated one probably due to misunderstanding and the disorganisation of the Russian naval forces in the Far East.

This controversy is most important not only as evidence of British official opinion as to international law and usages at that time, but also as evidence of the influence which can be exercised by a powerful neutral State in obtaining recognition from a belligerent of the established rules and usages of international law.

The condemnation of the *Knight Commander* by the Vladivostok Prize Court was, however, affirmed by the Court of Appeal at Petrograd on December 5th, 1905, which found it "impossible to agree that the destruction of a neutral vessel is contrary to the principles of international law."

The second Peace Conference of 1907 unfortunately after a full discussion was unable to arrive at any decision upon this question and suggested its settlement at a special naval conference.[1] The question was accordingly submitted to the Conference of ten maritime Powers, which met at London, December 4th, 1908, when it was fully debated. In consequence of diverse views the result

[1] In his instructions to the British delegates, dated June 12th, 1907, Sir Edward Grey, referring to the sinking of neutral prizes, said "Great Britain has always maintained that the right to destroy is confined to enemy vessels only, and this view is favoured by other Powers. Concerning the right to destroy captured neutral vessels, the view hitherto taken by the greater Naval Powers has been that in the event of it being impossible to bring in a vessel for adjudication she must be released. You should urge the maintenance of the doctrine upon this subject, which British Prize Courts have, for at least 200 years, held to be the law."

was a compromise. The general principle was accepted in Art. 48 of the Declaration of London, which provides "A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the prize."

This principle is immediately qualified by Art. 49, which declares: "As an exception a neutral vessel which has been captured and which would be liable to condemnation may be destroyed, if the observance of Art. 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time."

By Art. 50: "Before the vessel is destroyed all persons on board must be placed in safety and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding the validity of the capture must be taken on board the warship."

By Art. 51: "A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity, of the nature contemplated in Art. 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not."

In M. Renault's Report, which now forms the authorised commentary to the Declaration, it is stated that the right of destruction is subject to two conditions: first, the captured vessel must be liable to condemnation upon the facts of the case; secondly, release must involve danger to the safety of the warship or to the success of the operations in which she is engaged *at the time;* thirdly, unless the captor succeeds in establishing that "he only acted in the face of exceptional necessity" he will have to compensate the parties interested. According to the Report these rules constitute a guarantee against the destruction of prizes by throwing upon the captor the responsibility of proving that his situation was really one which falls under the head of the exceptional cases contemplated.

Further, this proof must be given in proceedings to which the neutral is a party, or from the decision of which if dissatisfied he may appeal to the international Prize Court, at present non-existent! If the proof fails, the captor must compensate the neutral owners of the vessel and cargo, and the question as to the validity of the capture will not be considered. "In this way a real sanction is provided in respect of the obligation not to destroy a prize except in particular cases, the sanction taking the form of a fine inflicted on the captor."

It is curious to find both the foreign and British delegates agreed upon the practical operation of these qualifying Articles. In their Report to Sir Edward Grey, "The delegates representing those Powers which have been most determined in vindicating the right to destroy neutral prizes declared that the combination of the rules now adopted respecting destruction and liability of the ship, practically amounted in itself to a renunciation of the right in all but a few cases. We do not conceal the fact that this was exactly the object at which we aimed." If any agreement at all was to be effected it was necessary, argued the British delegates, to admit the right to destroy. Their main efforts therefore were directed to obtaining adequate safeguards, which in their opinion amount to a renunciation of the right of destruction in all but a few cases. First, the vessel must be liable to condemnation, and it is not every infraction of rules relating to contraband and blockade that renders a vessel liable to condemnation. For instance, by Art. 40, "A vessel carrying contraband may be condemned if the contraband reckoned by value, weight, volume or freight, forms *more than half* the cargo." Secondly, the captor must prove exceptional necessity.

In the opinion of the late Arthur Cohen, K.C., who was opposed to the modern doctrine of the right to destroy, these rules embody a compromise which, considering the great difficulty of the subject, is prudent, fair and equitable. As a compromise this may be so, but one is entitled to ask whether these safeguards are really effective in practice. It may in the first place safely be assumed that the captor as a rule will find no difficulty in satisfying his own national Prize Court of "exceptional necessity." No attempt to define this expression was made, and indeed the British delegates declared it to be impracticable. Prize Courts would presumably follow the precedents created by the destruction of enemy vessels, since none exist in the case of neutral vessels except those destroyed under the Russian Naval Code, which allows a greater latitude than that contemplated by Art. 49. An enemy ship dismissed is presumably a danger, a neutral ship is not. The two cases are not really analogous. But a captor would be able to argue that a dismissed neutral ship might be a danger, and therefore liable to be destroyed. Again, it is clear that the failure of the British delegates to rule out the inability to spare a prize crew as constituting an element of danger from the expression means in practice the acceptance of this cause by Prize Courts. It is already a sufficient cause for the destruction of enemy ships.

So elastic is this expression that the captor will, as a rule, be the sole judge. Such ambiguity as necessarily attaches to this undefined and undefinable term is merely an incitement to abuse

by unprincipled captors. It was abused by Russia in the Russo-Japanese war and has been abused by Germany in the present war, and will no doubt continue to be abused by weak naval powers in times of stress. Moreover, to compel a neutral to disprove or negative the plea of "exceptional necessity" even in the impartial atmosphere of an international tribunal, to say nothing of a belligerent prize court, appears to be asking him to perform an impossible task.

Assuming, however, for the moment that these alleged safeguards are amply adequate, serious objections to any qualification of the rule remain. Peace, as Professor Lawrence has well said, is the normal state of the civilized world. When the interests of neutrals and belligerents are to be weighed in the balance those of the former must prevail. As against a neutral, a belligerent is not entitled to urge the plea of military necessity. Such a plea once admitted makes mincemeat of neutral rights and knocks the bottom out of International Law. Naturally it is highly inconvenient to Russia, the United States and to Germany, when belligerents, to possess few or no over-sea ports. That is their misfortune, but it is not a valid reason for depriving neutrals of their rights. Such rights are paramount to any military necessity of the belligerent, real or imaginary. In the normal case of the destruction of a merchantman the crew and passengers are transferred to the belligerent warship. Within a few hours the latter may be engaged by the enemy. To subject non-combatants from an enemy merchant ship to such risk is bad enough, but to allow belligerents to subject neutral non-combatants to run the risk of injury to life and limb and to undergo the ordeal of the horrors of a naval combat is a monstrous doctrine.

"Clearly," said Sir Edward Grey in his instructions to Lord Desart, "the crew and passengers on board a neutral vessel, which may perhaps include women and children, ought not to be exposed to the hardships and risks which would arise if they were to remain for any length of time on board a belligerent man-of-war. Such a ship might, while these persons were still on board, be in action with the enemy, and nothing short of an altogether imperative necessity should justify a belligerent in exposing them to such a peril."

In their anxiety to secure agreement the British delegates committed a fatal error. They admitted thereby the Prussian doctrine of military necessity. Article 49 has been used by the German Government as the jumping-off ground for their conduct of submarine warfare. Under the plea of "exceptional necessity" the German Government defends the sinking at sight and without notice of enemy and neutral merchantmen alike. In the case of the United States, the most powerful naval neutral

Power, the doctrine has come home to roost with unpleasant results probably not anticipated upon its acceptance. Japan only adopted exceptions to the rule with reluctance. Great Britain is at once the greatest naval and the greatest mercantile Power. Her interests therefore are obviously divided. She is therefore in a particularly favourable position to take the lead in upholding the rights of neutrals. Upon the conclusion of peace there should, with such a lead, be no difficulty in persuading Russia to formally abandon a policy which as a belligerent upon protest she ceased to carry into effect. Japan certainly, and the United States probably, would willingly return to the old rule. If Germany, in pursuance of her present theories of military necessity, refuses to fall into line and continues to flout the rules and usages of warfare, she must be treated as the pariah of nations. The actual perpetrators of outrages authorised by her must be treated as outlaws and war criminals. In conclusion, Chapter IV. of the Declaration of London is, I submit, a retrograde step. In the desire to obtain uniformity the paramount rights of neutrals have been sacrificed. The alleged safeguards are quite inadequate and, indeed, as safeguards against the risk to life and limb of neutral non-combatants do not exist at all. The only solution of this problem is, I contend, the restoration of the old rule that under no circumstances must a neutral vessel be destroyed on the high seas. Once admit exceptions and all the safeguards which the wit of man can devise will be found illusory.

Read before The Grotius Society on June 30th, 1915.

At the meeting on July 9th, 1915, for the further discussion of the question of "The Destruction of Merchant Ships by Belligerents," the following Resolutions were adopted :—

1. That in the opinion of this Society Article 49 of the Declaration of London ought to be suppressed. Under no circumstances ought a neutral vessel to be destroyed unless engaged in unneutral service as defined by Articles 45 and 46 of the Declaration.

2. Vessels engaged in hostile operations may be destroyed without visit and search in such cases as those in which such visit and search would be dangerous to the captor, *e.g.* :—

   (1) Mine-laying.
   (2) Vessels employed as oil-depots for submarines.
   (3) Vessels acting as Fleet-tenders, except hospital ships.

3. Destruction of merchant ships, belligerent or neutral, by submarines, is prohibited, and there is a corresponding duty on a merchant ship not to attack a submarine.

BOMBARDMENTS.

BY

G. G. PHILLIMORE, M.A., B.C.L.

Bombardment is the attack upon positions or stations of enemy troops or places and buildings in enemy occupation, either by artillery or as is now the practice with aerial warfare by hand, with missiles which are destructive over a considerable perimeter to persons or buildings. It is therefore one of the most severe means of military attack. The Hague Conventions of 1907 provide separately for naval bombardments, and for land bombardments in its rules for land war, the latter including bombardment from the air by the addition of the words "by any means whatever." But the two sets of rules have much in common, though the naval rules seem to be based on the idea that naval action against land positions or places generally can take place at greater distances than such action by land forces, which perhaps has not been borne out by the experience of this war, and it is not as a rule only part of the general operations as those on land.

Both sets of rules forbid this form of attack on undefended places, ports, towns, villages, dwellings and buildings: the naval rules specify the fact that automatic submarine contact mines are anchored off the harbour as not *per se* entitling the attacking forces to bombard the place, but several of the greater Powers (Great Britain, France, Germany and Japan) entered reserves to this rule, and their attitude is justified by Westlake on the ground that a place for which means of defence are provided and which is not left open for the enemy to enter is not regarded as undefended (see *Hershey*, International Law). The naval rules also specify military works, military or naval establishments, depots of arms or war material, workshops, or plants which could be utilized for the needs of the hostile fleet or army and ships of war in the harbour as not included in the exemption, and the commander of a naval force may destroy them by artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not destroyed them by the time fixed, and he incurs no responsibility for any unavoidable damage caused by a bombardment under such circumstances. If for military reasons immediate action is necessary and no delay can be allowed to the enemy still the

prohibition to bombard the undefended town holds good as above, and the commander must take all due measures in order that the town may suffer as little damage as possible.

Warning.

In both due warning of the intention to attack thus must be given. The naval rules specify this in the particular cases which are made exceptions to the exemptions as described above: and also in the case where bombardment of undefended places may be commenced if the local authorities after formal summons decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force in question: but bombardment of undefended ports, etc., for the non-payment of money contributions is forbidden: and unless military exigencies do not permit it the attacking commander must before commencing bombardment do all in his power to warn the authorities. In both there is a duty on the attacking commander to take all necessary measures to spare as far as possible buildings devoted to public worship ("religion" in land rules), art, science or charity, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes: and a duty on the inhabitants to indicate such buildings, etc., by special visible signs previously notified to the assailants (this last addition is made in the naval war rules) and the regular mode of such indication is specified in the naval rules, viz., large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.

Questions therefore which suggest themselves on these texts are: (1) what constitutes a "defended" place; (2) whether warning of attack by this means is practically possible as a condition; (3) what degree of latitude is admitted in the method of such attack affecting the exempted buildings; (4) what is the underlying principle on which such form of attack is legitimate.

As regards the first point a preliminary question arises as to the interpretation of the words undefended ports, towns, etc., and buildings. Does this last apply to buildings even in defended towns or places? Stockton in his work published just after the beginning of this war (325) thinks this is the proper reading, but admits it has not been followed out in recent wars. It seems likely that for practical reasons this latter view is correct. The unit for this purpose is the whole, and a defended town includes all the undefended portions, subject, however, to the safeguards of Art. 27 for indicated special buildings.

The British Manual of Military Law (1914), 252-3, declares that it is not a sufficient reason for bombardment that a town contains supplies of value to the enemy or railway establishments, telegraphs or bridges. If necessary, they must be destroyed otherwise. The defended locality need not be *fortified*, it may be deemed defended if a military force is in occupation or marching through it. A fortress or fortified place is *prima facie* deemed defended, and can be bombarded, unless there are visible signs of surrender. After surrender no further damage may be allowed except what exigencies of war require, *e.g.*, removing fortifications, demolishing military buildings, destroying stores and measures for clearing the foreground: it is not allowed to burn public buildings or private houses simply because they have been defended.

The attacking force need not limit bombardment to the fortification or defended border only. Public buildings and private houses can be bombarded, as has been the practice in order to impress on local authorities the advisability of surrender.

A town defended by detached forts though at a distance from it is liable to bombardment, for the town and forts form an indivisible whole, and a commander incurs no responsibility for unavoidable damage caused by bombardment. The town may contain workshops and provide supplies which are invaluable to the defence and serve to shelter a part of the garrison when not on duty. If military exigencies permit, the commander of an attacking force must do all in his power to warn the authorities before commencing the bombardment unless surprise is considered an essential element of success, but there is no obligation to give notice of an intended assault.

Case of London.

Sir Thomas Barclay in an article in the *English Review* (May, 1915) has dealt with the special case of London as a subject of bombardment. He points out the specified exceptions to the exemptions from bombardment of undefended towns, which the German naval expert at the Hague Conference of 1907 wished to see extended to "installations et provisions qui peuvent etre utilisées," defining "installations" as including railway junctions or floating docks, and "provisions" as including depots of coal. He withdrew his proposal on the ground that the phrase "war materials" would cover coal. He cites the following definition of an undefended town made by General der Beer Portugael, the Dutch expert delegate to the Second Hague Conference, which was officially adopted in the protocol as the interpretation.

"What is a defended town? In war on land there is no difficulty. An armed force is approaching a town. It may be fortified or open. Even if it is as usually open, the entrance may be defended by temporary banks, barricades, and other earthworks. It goes without saying that the attacking force has a perfect right to bring its artillery to bear on such defences, and in such manner as it may think most effective in order to obtain possession of the town. Nevertheless, it will concentrate its artillery against these defence works and against the enemy artillery and forces, but it will take care not to direct its shells *en pure perte* against the town itself, seeing that they might result in loss to the civil population. In so doing the true soldier respects the honourable traditions of his profession.

"In maritime war the circumstances are less simple. Suppose that an enemy tried to land on the Dutch coast, for instance, at Scheveningen, which is practically a suburb of the Hague. Dutch forces could be sent to oppose the enemy's landing. Would this defence justify the bombarding of the Hague, which is an undefended city? Assuredly not. Such defence would not constitute the Hague a defended city. In these conditions, to bombard it would be contrary to the law of nations, because it would be unnecessary cruelty. It would be worse than unnecessary. The destruction of the habitations of peaceful civilians, the setting fire to its public buildings would not only not help to overcome the forces which would have to be defeated in order to obtain a landing, but it would stimulate their ardour in fighting against such unmitigated barbarism. In short, a 'defended town' means and means alone a town which is itself directly defended."

In Sir Thomas Barclay's opinion, on the assumption that London is an inland city and a seaport, all the rules relating to bombardment apply to it. An enemy can, therefore, lawfully attack all undisguised military and naval establishments: he can destroy installations capable of being used for the needs of the military and naval forces and railways facilitating communication between them and wireless stations, and workshops for the manufacture of materials serviceable for the requirements of army or navy, *i.e.*, even private factories in densely populated districts, and can attack all batteries or guns installed for defensive purposes within the populated area: banks, Government buildings and railway stations were included in the German claim already mentioned.

As the Hague Convention declares, the specially excepted buildings in a defended town are not exempt from attack if they are used for military purposes: on this ground the Germans

justified the bombardment of Strassburg Cathedral in 1870 because an artillery observation station was established in the tower, and they have on a like pretext justified the shelling of the cathedral of Rheims. Our Military Manual on this point declares that buildings for medical purposes should not be scattered over the town attacked but should be collected together in a place remote from the defences or in neutralized ground by arrangement with the beseigers.

Sea Coast Towns.

In the special case of undefended towns on the sea coast, it seems that any portions of them used for military purposes can be bombarded, *e.g.*, in the case of Whitby, Scarborough or Yarmouth the presence of troops there would have entitled a hostile squadron to bombard the positions of such troops or their supplies. In this connection it will be remembered that twenty years ago an eminent French naval expert claimed the right and advocated its exercise, in the event of war between France and Great Britain, of French naval forces to lay English coast towns wholly of a non-military character, such as Brighton, under contribution under threat of bombardment. This led to considerable discussion and the conclusion reached, if I remember rightly, was that if this fell within the strict rights of a belligerent yet it could not be justified by any military considerations on the ground of affecting the military strength or resources of the enemy, but was at most an act *in terrorem* of his civil population.[1] In the case of mercantile ports containing shipping and potential war material the case is different. In the eighties our own Government caused the question of the defence of the mercantile ports to be considered by a commission, which recommended the adoption of systematic measures to protect our mercantile shipping in such parts from hostile attack: and there can be little doubt that the shipping and *matériel* generally in mercantile ports is a legitimate object of attack under the Hague Convention.

Warning of Bombardment.

As regards the second point, both in the case of naval and aerial bombardments the experience of this war has shewn that in the latter case the preliminary condition of giving a warning is practically impossible, consistently with the success of the operation and the safety of the airmen, in view of the defences now organized against aircraft. In the former case the German raid against an East coast town has shewn that the attacking force is not likely to be able to spare the time for warning. The

[1 By Art. 4 of Convention IX. of Hague Conference, 1907, "The bombardment of undefended ports, &c., on account of failure to pay money contributions, is forbidden."—Editors.]

Allied airmen have also taken the same course; and it seems that in practice the legitimacy of the attack will in future only be tested by the character of the actual object attacked.

Lateral Damage.

The third point as to responsibility for the lateral damage done by such attacks is similarly conditioned. Considering the range of modern naval guns and the height in the air from which an air attack is launched, it is manifestly difficult to fix responsibility on the attacker for damage done to other objects than the proper ones. But, as it has been pointed out in similar previous discussions on the new instruments of warfare employed in this war, the nature of the warlike instrument should not be allowed to affect the duty of observing established rules of war, *e.g.*, in the case of submarines their comparative fragility and openness to attack when on the surface of the water should not dispense them from the obligation of visit and search of merchant vessels before they take hostile action against them. Both sides in the present war have charged each other with making bomb attacks against buildings in towns which are protected by the Hague Convention. Without trying to apportion the blame in this respect it seems important to insist on the duty of aircraft to use the utmost practicable care in this respect to prevent damage from extending beyond the proper objects of attack, viz., those of military service, and to expose themselves to additional risk if necessary for this purpose.

The last point indicated for consideration, however, is really the governing factor in all the others. The underlying principle of the existing conventions and of any future ones on bombardments is that such an extreme form of offensive action is only applicable to strictly military purposes, and against the military forces or resources of the enemy. Directed against a city which is not in military occupation or part of the theatre of operations, it is another example of the lamentable tendency in this war, to which attention has been called in previous papers, to make no distinction between enemy combatants and non-combatants and employ arms against unarmed civilians with the deliberate intention of terrorizing the population as a whole. The only result is to embitter feeling, and to encourage the idea of reprisals: and it is essential to the restoration of international goodwill and peace that the doctrine that military necessity knows no limitations should be definitively repudiated by International Law, and that humanity and chivalry should be re-established among the rules of War.

Read before The Grotius Society on 23rd July, 1915.

THE BELGIAN PROPOSAL TO NEUTRALISE CENTRAL AFRICA DURING THE EUROPEAN WAR.

BY
R. C. HAWKIN.

(*For Supplementary Note see p.* 84.)

The Congo Conference at Berlin in 1885 formulated an International Law to promote Peace and Civilization in the Dark Continent, and the failure of this Law to keep the peace in the Conventional basin of the Congo will disappoint many who were building hopes on the ultimate abolition of war by means of a strict adherence to a code of laws sanctioned by the great family of nations.

The writer believes that by calling public attention to the facts something can yet be saved from the wreckage, and appeals even at this late hour for an armistice in Central Africa so that the whole question of the introduction of European quarrels into Central Africa may receive reconsideration.

The term "Central Africa" is used as a convenient expression to denote that region defined by Article I. of the Berlin Act. The Congo State and British and German East Africa form the greater portion of the territory, but parts of the Portuguese Congo, the French Congo, the German Cameroons, Italian Somaliland, Rhodesia, Nyasaland and Portuguese East Africa are also included.

Lord Robert Cecil has just informed the House of Commons (July 28th), that the Berlin Act does not impose any binding obligation on any Power to neutralise her Possessions in Central Africa.

Prince Bismarck, however, seems to have placed a different construction on the Act in his speech after the close of the Berlin Conference, and it is not clear what useful purpose the neutralising clauses serve if any signatory may disregard them or refuse mediation at will. These clauses are, therefore, reprinted herewith (page 74), and may be left to speak for themselves.

The Germans have now distributed thousands of rifles among the Portuguese natives, in spite of the provisions of the Brussels Act of 1890 regarding the distribution of firearms and gunpowder among African natives. This has cost Portugal four times as many lives as were spent by South Africa in suppressing her rebellion and in conquering German South West Africa.

The secret Article introduced by King Charles II. into our treaty with Portugal compels us to defend all Portuguese Colonies, and we are now pledged[1] to defend the Congo against native risings, so that the maintenance of the Berlin and Brussels Acts is of greater importance to England than to any other signatory.

The Berlin Act.

Denmark, Spain, Sweden, and Holland have all signed this [2]General Act relating to civilisation in Africa, which was done at Berlin in 1885. By Article XI. of this Act all these countries have solemnly pledged themselves to lend their good offices in order that the territories in Central Africa belonging to European Powers at war shall by common consent of the belligerents be placed during the war under the rule of neutrality.

This International Act was signed as a means of furthering the moral and material well-being of the natives, and I doubt not that all who know the African native will agree that the introduction of European warfare into the Dark Continent should as far as possible be avoided.

In his Presidential address to the Conference on 26th February, 1885, Bismarck said: "You have shown much careful solicitude for the moral and physical welfare of the native races. The evils of war would, in fact, assume a specially fatal character if the natives were led to take sides in disputes between the civilised Powers. In careful view of the dangers which such contingencies might bring with them for the interests of commerce and civilisation, they have sought for the means to withdraw a great part of the African Continent from the fluctuations of general politics and confine the rivalry of nations to the peaceful labours of trade and industry.

The work of this Conference will mark an advance in the development of national relations, and form a new bond of union among civilised peoples.

The new Congo State is called upon to become one of the chief Protectors of the work which we have in view."[3]

---

[1] See p. 83. [2] See p. 74. [3] *Times*, 27-2-85.

The Belgian Proposal.

On August 7th, 1914,[1] Belgium drew the attention of the European Powers to this Article, and instructed the Governor-General of the Congo State that he should abstain from all offensive action against the German African Colonies.

M. Davignon, the Belgian Minister for Foreign Affairs, urged that in view of the civilising mission common to colonising nations it was desirable "for humanitarian reasons" not to extend hostilities to Central Africa, a course which would put a strain upon civilisation in that region.

The Spanish Intervention.

This territory is governed by Belgium, France, Britain, Portugal, Germany, and Italy. France replied to Belgium very favourably, for on August 9th the Belgian Minister at Paris wired as follows: "French Government are strongly inclined to proclaim the neutrality of possessions in the conventional basin of the Congo, and are begging Spain to make the suggestion at Berlin."[2]

Spain seems to have decided to carry out her obligations as a neutral as defined by the Article XI. to which I have referred above.[3]

A week later the Belgian Minister at Paris pressed for a definite answer.[2] In the meantime fighting in East and West Africa had begun—and it is said that Portugal supported the Belgian request. The United States Senate had refused[4] to be a party to this international treaty regarding Africa, but America had obligations as a signatory of the Brussels Act of 1890,[5] under which she is entitled to protest against internecine wars and the importation of firearms into Central Africa.

The Breakdown of the Act.

Difficulties, however, arose; according to the Belgian Grey Book[6] France wishes to get back the territory near the Congo which she was compelled to cede at the time of the Agadir incident, Britain found that the wireless telegraphic stations in the German African Colonies were playing havoc with our shipping, and so long as the Emden and other armed vessels were at large it was thought impossible to treat the German[7] Colonies as neutral. For these and other reasons Britain declined the Belgian proposal; France then fell in with our view, Belgium and Portugal acquiesced, and war is now waged round the African Lakes and elsewhere by natives trained under European officers—a sad sequel to Kikuyu!

---

[1] See p. 80. [2] See p. 82. [3] See p. 85. [4] See p. 71.
[5] See p. 77. [6] See pp. 82 and 84. [7] See p. 83.

The arguments which induced us to refuse the Belgian request to treat Central Africa as neutral are now no longer valid.

Reasons for an Armistice.

The Togoland wireless station is in our hands, so is Windhoek; the station at Dar-es-Salaam is smashed. The German corsairs are all caught. The way is therefore clear to accept a proposal for an armistice in the area defined by this international treaty, and it would surely be easy to ask the King of Spain once more to formulate a scheme whereby all further fighting in Central Africa should cease, and the new delimitation of African frontiers should be left till the war is over.

War Plunder.

I notice that a telegram is now published in the *Independance Belge* reporting that Germany has once more proposed peace to Belgium on the terms of the immediate evacuation of Belgium and the grant of an indemnity for the damage done by the German invasion—Belgium to maintain her neutrality and *sell the Congo territory to Germany.* . . . .

All this sort of talk points to the danger of European statesmen trying to parcel out Central Africa as war plunder.

Disappointed Chauvinists will then be told that there are immense potentialities in these Equatorial districts—ivory, rubber, minerals, and wealth undreamed of.

Before, therefore, this takes place let us clearly understand what are the conditions of this vast region. It is not a white man's country like South Africa. A new Germany, a new France, or even a new British dominion cannot arise there. Central Africa is destined to be the Negro's "Place in the Sun."

The African's Home.

Some day the African will awake and say: "I, too, am a man—I love my native land—I want to play my part—what about me?" Now you cannot extinguish him as the Indians in America were extinguished; for there is no one to take his place.

The so-called treaties signed by unwary native chiefs ceding sovereignty, suzerainty, or land to traders in exchange for beads or gin, will be examined and criticised according to African ideas, and if we may judge from some of those signed in 1882-4 on the Congo, they will be declared invalid.

It will be pointed out with great force that at its inception the Congo was to have been a "Free State" and "Independent" as its titles proved, and as regards European Powers it was by them solemnly declared to be "perpetually neutral."

America's Attitude.

The United States of America, with a great Black African Electorate under its flag, have clearly recognised this point of view, for they blankly refused to ratify the Berlin Act on these very grounds, and when later they ratified the Brussels Act regarding the slave trade, the Senate at Washington formally recorded a resolution[1] disclaiming any intention to indicate any interest in the Protectorates or Possessions claimed by European Powers in Central Africa or any approval of the wisdom, expediency, or lawfulness of the policy of Europe in this matter.

Now before the Berlin Act this region was being developed by an "international association," and the warning note of the Senate will surely apply with greater force if after this war we introduce the European doctrine of conquest, with its concomitant features of sovereign rights over persons, land, and property therein.

The time for sleepy Africanus to open his eyes is not, in my opinion, in the dim future—he may awake in our children's time. Perhaps his leaders will be the men who were taught in our mission schools in Central Africa. The great military power of the Zulus was founded by a Zulu Prince who had merely watched our British soldiers drilling at Cape Town.

Christian Influence.

Up till now it has been your Father Sylvesters, your Van-der-Kemps, your Moffats, Livingstones, Colensos, and Hanningtons who have enabled Europe to influence the African tribes in favour of peace. Will this influence continue ?

In the crisis on the colour question now pending between the Wesleyan Church at home and her Mission Church on the Gold Coast we see the African already pondering these problems.

South Africa can look after herself. North Africa will doubtless remain under Mediterranean and Moslem influence; let us, then stop this suicidal policy of introducing our quarrels into Central Africa, and beware how we deal with a country which Nature has marked out as the home of the African.

The United States and the Congo.

The relations between the United States of America and the Congo State were the subject of diplomatic correspondence, which

[1] See page 78.

will be found in Vol. 3 (1909) of the American Journal of International Law, pages 93, 140 and 143. At the sittings of the Berlin Conference it was Mr. Kasson, the American delegate, who pressed for and secured the extension of the Free Trade Zone to include the districts where fighting is now in progress.

It was also at his instance that the Neutrality clauses were introduced. Although Mr. Kasson had his way, the American Senate refused to support him and the Act was not ratified by the United States. In 1908, pending the cession of the Congo State to Belgium (see page 79, Appendix), the latter promised the United States that if invited she would examine with benevolence any proposal to refer to the Hague any difference regarding the interpretation of the Treaties affecting the Congo. In January, 1909, Mr. Root called attention to the obligation of Belgium under Article II. of Brussels Act (see page 77, Appendix) "to diminish intestine wars between tribes by means of arbitration." A memorandum was also presented to Belgium calling for the practical execution *in letter and spirit* of the provisions of the Berlin and Brussels Acts.

Conquering Colonies.

A distinguished Belgian deputy writes to me that it will be useful for England to conquer all the German colonies, so that we may have something to hand back to Germany in exchange for the evacuation of the territory of Allies which may be occupied by Germany when the war ends.

Years ago it was the fashion for European peacemakers to treat colonies like remnants at a jumble sale—they were tossed over the congress tables with a surprising indifference. But in those days the colonies were conquered by British tars or regulars, not by resident colonists. This makes all the difference.

If Sir Harry Johnston marches his Black Baganda as liberators into German East Africa and then we are expected to march out, it were better for the German tribesmen that they had never seen our flag.

Imagine this principle applied to German colonies conquered by the Australians and South Africans. Propose to them that they evacuate their conquests for the sake of some ill-defined balance of power in Europe. Our Empire would be shaken to its foundations by the mere suggestion. If we dare not treat our Dominions thus let us be careful how we treat white colonists and black soldiers.

The Berlin Act.

The outrageous violation of Belgian neutrality by Germany perhaps justified the termination of all ordinary treaties with

Germany, but the Berlin Act of 1885 was an International Treaty. It was as much a treaty between England and Spain as between Germany and Belgium, and it was made in the interests of the natives. Article 84 of Chap. III. of the 1907 Hague Convention provides special facilities for arbitration in cases where International Treaties are involved, and besides all this, the Berlin Act forms an essential part of the 1894 Treaty, by which we protect Uganda.

International Law.

International Treaties are the basis on which the peaceful progress of nations depends. It, therefore, behoves us to do all we can to assure their efficacy.

At the final sitting of the great Conference at Berlin which settled this Act to promote peace and civilisation in Africa, King Leopold of Belgium caused to be read aloud[1] to the assembled delegates a formal declaration notifying the adhesion of the Congo Association to the provisions of that Act. Three months later King Leopold circularised[2] all the fourteen signatories declaring the Congo to be "perpetually neutral" in accordance with the neutrality clauses of the Act. In 1894, after the new boundaries of the Congo State were agreed, this rule of neutrality was again solemnly declared,[3] then notified to Great Britain in 1895, and then laid before the Belgian Chamber. In 1907 the Belgian Parliament accepted the cession[4] of the Congo from King Leopold, including lands, ivory, rubber, and cattle, at the same time undertaking to fulfil all the obligations of the Congo State.[5] These included the obligation to all the signatories of the Treaty, and especially to the natives, to maintain the Congo neutral in case of a European war. By promising Belgium protection against native risings on the Congo we have persuaded her to forego the benefits of the neutrality clauses. Military necessity compelled us to refuse the request to treat Central Africa as neutral, and on a strict interpretation of the effect of Belgium's annexation of the Congo I suppose the lawyers held that England could take her own course. But we are fighting for as much international law as we can get, and it will help up in this important matter if during the war we now notify Spain our willingness to submit this matter to the judgment of neutrals. The military position will not be affected, but our influence in times of peace will be greatly enhanced by a liberal handling of this grave international question.

---

[1] See p. 76. [2] See p. 76. [3] See p. 79. [4] See p. 79.

[5] Great stress was laid on the obligations of Belgium towards the natives in this respect by the United States in the diplomatic correspondence referred to above (p. 71).—R.C.H.

A Dutch Opinion.

Het Nieuws van den Dag, of Amsterdam, published on July 20th a leading article commenting on the correspondence in the British Press regarding the war in Central Africa. The writer concludes by suggesting that one of the neutral Powers should take up the question and clear the way for putting in force the International Treaty of 1885. The article is of special significance, as Holland is herself one of the neutral signatories of this Treaty. The following summary of the article is made in the *Gazette de Hollande* :—

> Sad to say this desirable and urgently necessary restriction of the military operations was frustrated by France and Britain. These two, of course, are far more powerful in Africa than Germany, although in East Africa they had met with very scant success and have only now, by the occupation of Ngaundere, succeeded in penetrating into the interior of Cameroon. France refused to declare Central Africa neutral; she sees a chance now of counteracting the hateful extension of German territory on the Lower Congo, at the expense of the French Congo, as a result of the Agadir incident. And Britain represents that the German wireless stations inflict much disadvantage on her at sea. A sad example of undisguised cupidity. ! Thus the Europeans are lying in wait for each other like wild beasts in the neighbourhood of the African lakes, in the forests and along the streams of Darkest Africa.

APPENDIX :—Exhibit No. I.

THE NEUTRALITY CLAUSES OF THE BERLIN ACT.

Extract from Government Publication C. 9088. Presented to the House of Commons by Command of Her Majesty in pursuance of their address, dated July 15th, 1898. Page 119: Part II.—entitled:

Copies of such parts of all Treaties, Conventions, and Engagements now existing and still obligatory as contain an undertaking entered into by Her Majesty with reference to the Territory or Government of any other Power.

CONGO.

(1.) Extract from the General Act of the Conference of Berlin, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal, Russia, Spain,

Sweden and Norway, Turkey, United States of America.[1] February 26, 1885.

CHAPTER III.—DECLARATION RELATIVE TO THE NEUTRALITY OF THE TERRITORIES COMPRISED IN THE CONVENTIONAL BASIN OF THE CONGO.

ART. X.—In order to give a new guarantee of security to trade and industry, and to encourage, by the maintenance of peace, the development of civilization in the countries mentioned in Article I, and placed under the free-trade system, the High Signatory Parties to the present Act, and those who shall hereafter adopt it, bind themselves to respect the neutrality of the territories, or portions of territories, belonging to the said countries, comprising therein the territorial waters, so long as the Powers which exercise, or shall exercise, the rights of sovereignty or Protectorate over those territories, using their option of proclaiming themselves neutral, shall fulfil the duties which neutrality requires.

ART. XI.—In case a Power exercising rights of sovereignty or Protectorate in the countries mentioned in Article I, and placed under the free-trade system, shall be involved in a war, then the High Signatory Powers to the present Act, and those who shall hereafter adopt it, bind themselves to lend their good offices in order that the territories belonging to this Power, and comprised in the Conventional free-trade zone, shall, by the common consent of this Power and of the other belligerent or belligerents, be placed during the war under the rule of neutrality, and considered as belonging to a non-belligerent State, the belligerents thenceforth abstaining from extending hostilities to the territories thus neutralized, and from using them as a base for warlike operations.

ART. XII.—In case a serious disagreement, originating on the subject of, or in the limits of, the territories mentioned in Article I, and placed under the free-trade system, shall arise between any Signatory Powers of the present Act, or the Powers which may become parties to it, these Powers bind themselves, before appealing to arms, to have recourse to the mediation of one or more of the friendly Powers.

In a similar case, the same Powers reserve to themselves the option of having recourse to arbitration.

---

[1] **The inclusion of the United States of America in this heading is inaccurate. Vide page 78: the American Senate refused to ratify this Act.**

EXHIBIT No. 2.

Extract from *The Map of Africa by Treaty*, Vol. II., Page 550.

ACT OF ADHESION OF THE INTERNATIONAL ASSOCIATION OF THE CONGO TO THE GENERAL ACT OF THE CONFERENCE OF BERLIN, DATED THE 26TH FEBRUARY, 1885.

The International Association of the Congo, in virtue of Art. XXXVII. of the General Act of the Conference of Berlin, hereby notifies its adhesion to the provisions of the aforesaid General Act.

In witness whereof the President of the International Association of the Congo has signed this Declaration, and has affixed thereto his seal.

Done at Berlin the 26th day of February, 1885.

(L.S.) COLONEL STRAUCH.

EXHIBIT No. 3.

DECLARATION OF CONGO NEUTRALITY.

C. 9088, at page 123.
(Translation.)

Circular Note of the Administrator-General of the Department of Foreign Affairs of the Independent State of the Congo declaring the Neutrality of that State within its Limits as defined by Treaties. Brussels, August 1, 1885.

The Undersigned, Administrator-General of the Department of Foreign Affairs of the Independent State of the Congo, is charged by the King, Sovereign of this State, to make known to his Excellency the Marquess of Salisbury, Secretary of State for Foreign Affairs in London, that in conformity with Article X of the General Act of the Berlin Conference, the Independent State of the Congo declares by these presents that it shall be perpetually neutral, and that it claims the advantages guaranteed by Chapter III of the same Act, at the same time assuming the duties which neutrality carries with it. The state (condition) of neutrality shall apply to the territory of the Independent State of the Congo comprised within the limits resulting from the successive Treaties concluded by the International Association with Germany, France, and Portugal, Treaties notified to the Berlin Conference and annexed to its Protocols, and which are thus determined, namely: –

(The limits are then defined).

Exhibit No. 4.

THE BRUSSELS ACT.

Extract from *The Map of Africa by Treaty*, Vol. II., Pages 488 and 492, General Act of the Brussels Conference, 2nd July, 1890. (In the name of God Almighty.)

The following participated in the Conference:—England, Germany, Austria, Belgium, Denmark, Spain, The Independent State of the Congo, The United States, France, Italy, Holland, Luxembourg, Persia, Portugal, Russia, Sweden and Norway, Turkey and Zanzibar.

The Preamble recites that these states are "Equally animated by the firm intention of . . . effectively protecting the aboriginal populations of Africa, and of assuring to that vast continent the benefits of peace and civilisation."

The following provisions were (*inter alia*) enacted.

Posts, Stations, and Cruisers in Inland Waters.

Art. II.—The stations, the cruisers organised by each Power in its inland waters, and the posts which serve as ports for them shall independently of their principal task, which is to prevent the capture of slaves and intercept the routes of the Slave Trade, have the following subsidiary duties:—

Protection to Natives.

1.—To serve as a base and if necessary, as a place of refuge for the native populations placed under the sovereignty or the protectorate of the State to which the station belongs, for the independent populations, and temporarily for all others in case of imminent danger; to place the populations of the first of these categories in a position to co-operate for their own defence.

Arbitration in Intestine Wars.

To diminish intestine wars between tribes by means of arbitration.

Agricultural Works and Industrial Arts.

To initiate them in agricultural works and in the industrial arts so as to increase their welfare.

Barbarous Customs. Cannibalism. Human Sacrifices.

To raise them to civilization and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices.

EXHIBIT No. 5.

Extract from *The Map of Africa by Treaty*, Vol. II., Page 526.

PROTOCOL RECORDING THE RATIFICATION BY THE UNITED STATES OF AMERICA OF THE GENERAL ACT OF BRUSSELS OF 2ND JULY, 1890. SIGNED AT BRUSSELS, 2ND FEBRUARY, 1892.

On the 2nd February, 1892, in conformity with Article XCIX. of the General Act of the 2nd July, 1890, and with the unanimous decision of the Signatory Powers prolonging until the 2nd February, 1892, in favour of the United States, the period fixed by the said Article XCIX., the Undersigned, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, deposited in the hands of the Belgian Minister for Foreign Affairs the Ratification by the President of the United States of the said General Act.

At his Excellency's request the following Resolution, whereby the Senate of the United States consented to the Ratification of the President was inserted in the present Protocol :—

> " Resolved (two-thirds of the Senators present concurring therein) That the Senate advise and consent to the ratification of the General Act signed at Brussels on the 2nd July, 1890, by the Plenipotentiaries of the United States and other Powers, for the suppression of the African Slave Trade and for other purposes.
>
> " Resolved further: That the Senate advise and consent to the acceptance of the partial ratification of the said General Act on the part of the French Republic, and to the stipulations relative thereto, as set forth in the Protocol signed at Brussels on the 2nd January, 1892.
>
> " Resolved further, as a part of this act of ratification : That the United States of America having neither Possessions nor Protectorates in Africa, hereby disclaims any intention in ratifying this Treaty, to indicate any interest whatsoever in the Possessions or Protectorates established or claimed on that Continent by the other Powers, or any approval of the wisdom, expediency, or lawfulness thereof, and does not join in any expressions in the said General Act which might be construed as such a declaration or acknowledgment; and, for this reason, that it is desirable that a copy of this resolution be inserted in the Protocol to be drawn up at the time of the exchange of the ratifications of this Treaty on the part of the United States."

EXHIBIT No. 6.

Extract from *The Map of Africa by Treaty*, Vol. II., Page 557.

DECLARATION OF THE NEUTRALITY OF THE CONGO FREE STATE.

BRUSSELS, 28TH DECEMBER 1894.

(Notified to the British Government 11th January, 1895.)

The rule of neutrality which formed the subject of the declaration notified on the 1st August, 1885 (Exhibit No. 3), to the Signatory Powers of the General Act of the Berlin Conference shall henceforth apply to the territory of the State delimitated as follows.

(The new boundaries as agreed with various European Powers were then recited.)

EXHIBIT No. 7.

Extract from *The Map of Africa by Treaty*, Vol. II., Page 548.

TREATY FOR THE CESSION OF THE INDEPENDENT STATE OF THE CONGO TO BELGIUM.

SIGNED AT BRUSSELS, 28TH NOVEMBER, 1907.

(Preamble omitted.)

ART. I.—His Majesty the King-Sovereign declares that he cedes to Belgium the Sovereignty of the territories constituting the Independent State of the Congo with all the rights and obligations attached thereto, and the State of Belgium declares that she accepts this cession, she undertakes and makes her own the obligations of the Congo State as detailed in Annex A, and she engages to respect the existing basis in the Congo as well as lawfully acquired rights of natives and others.

ART. II.—The Cession comprises all real and moveable property (mobilier) of the Free State, and especially:—

1. The ownership of all the land belonging to the State's public or private domain, subject to the obligations and duties indicated in Annex A to the present Convention.
2. The Shares, obligations and Founders' Shares (Parts de Fondateurs) which are set out in Annex B.

3. All houses, buildings, settlements, plantations, and other property whatsoever, established or acquired by the Government of the Congo State, moveable objects of every kind, and cattle which the State may possess, its ships and boats with their gear, as well as military stores as set out in Annex B.

4. The ivory, india-rubber, and other African produce which are actually the property of the State, as well as the provisions and other goods belonging to her as set out in Annex B.

ART. III.—On the other hand, the Cession comprises all the liabilities and all the financial engagements of the Free State as set forth in detail in Annex C.

ART. IV.—The date on which Belgium shall assume the exercise of her right of sovereignty over the territories mentioned in Article I. shall be determined by a Royal Decree. (N.B.—This was dated 4th November, 1908.)

The moneys received and expenses incurred by the Congo State, on and after the 1st January, 1895, shall belong to Belgium.

NOTE.—Part of this translation is made by the Author, as the official translation as published seems to be defective. The Annexes are not published.

EXHIBIT No. 8.

Extract from *The Belgian Grey Book*, July 24th—Aug. 29th, 1914. Page 333.

THE BELGIAN PROPOSAL.

M. Davignon, Belgian Minister for Foreign Affairs, to the Belgian Ministers at Paris and London.

Brussels, August 7th, 1914.

(Telegram).

Belgium trusts that the war will not be extended to Central Africa. The Governor of the Belgian Congo has received instructions to maintain a strictly defensive attitude. Please ask the French Government [British Government] whether they intend to proclaim the neutrality of the French Congo [British colonies in the conventional basin of the Congo], in accordance with article 11 of the General Act of Berlin. A telegram from Boma reports that hostilities are probable between the French and Germans in the Ubangi.

EXHIBIT No. 9.

Extract from *The Belgian Grey Book*, Page 333.

THE PROPOSAL CONFIRMED.

M. Davignon, Belgian Minister for Foreign Affairs, to the Belgian Ministers at Paris and London.

Brussels, August 7th, 1914.

Sir,

With reference to my telegram of this morning, I have the honour to request you to bring to the notice of the French [British] Government the following information :—

While instructions have been sent to the Governor-General of the Congo to take defensive measures on the common frontiers of the Belgian colony and of the German colonies of East Africa and the Cameroons, the Belgian Government have suggested to that officer that he should abstain from all offensive action against those colonies.

In view of the civilising mission common to colonising nations, the Belgian Government desire, in effect, for humanitarian reasons, not to extend the field of hostilities to Central Africa. They will, therefore, not take the initiative of putting such a strain on civilisation in that region, and the military forces which they possess there will only go into action in the event of their having to repel a direct attack on their African possessions.

I should be glad to learn whether the French [British] Government share this view and in that case whether it is their intention, during the present conflict, to avail themselves of article 11 of the General Act of Berlin to neutralise such of their colonies as are contained in the conventional basin of the Congo.

I am addressing an identic communication to your colleague at London [Paris].

EXHIBIT No. 10.

Extract from *The Belgian Grey Book*, Page 334.

PRESIDENT POINCARÉ'S REPLY.

Baron Guillaume, Belgian Minister at Paris, to M. Davignon, Belgian Minister for Foreign Affairs.

Paris, August 8th, 1914.

Sir,

I have had the honour of speaking to the President of the Republic with respect to your telegram of yesterday. I had received it during the evening and had immediately communicated it to the Ministry for Foreign Affairs. They asked for time to consider it before answering.

M. Poincaré has promised me to speak on this subject to-day to the Minister of the Colonies. At first sight he could see little

difficulty in proclaiming the neutrality of the French Congo, but he nevertheless reserves his reply. He believes that acts of war have already taken place in the Ubangi. He has taken the opportunity to remind me that the protection accorded us by France extends also to our colonies and that we have nothing to fear.

EXHIBIT No. 11.

Extract from *The Belgian Grey Book*, Page 335.

FRANCE'S REQUEST TO SPAIN.

Baron Guillaume, Belgian Minister at Paris, to M. Davignon, Belgian Minister for Foreign Affairs.

Paris, August 9th, 1914.

(Telegram.)

The French Government are strongly inclined to proclaim the neutrality of the possessions in the conventional basin of the Congo and are begging Spain to make the suggestion at Berlin.

(See No. 59.)

EXHIBIT No. 12.[1]

Extract from *The Belgian Grey Book*, Page 341.

FRANCE'S REFUSAL.

Baron Guillaume, Belgian Minister at Paris, to M. Davignon, Belgian Minister for Foreign Affairs.

Paris, August 16th, 1914.

Sir,

In the course of a conversation which I had this morning with M. de Margerie, I turned the conversation to colonial affairs and to the action which you had instructed me to take in your telegram and your despatch of the 7th inst.

M. de Margerie reminded me that the French Government had approached Spain, but the latter had not answered before knowing the views of Great Britain. It seems that the latter has still given no answer.

M. de Margerie considered that in view of the present situation Germany should be attacked wherever possible; he believes that such is also the opinion of Great Britain,[1] who certainly has claims to satisfy; France wishes to get back that part of the Congo which she has been compelled to give up in consequence of the Agadir incident.

M. de Margerie added that a success would not be difficult to obtain.

---

[1] See Supplementary Note, p. 84.

EXHIBIT No. 13.

Extract from *The Belgian Grey Book*, Pages 341—2.

THE BRITISH REFUSAL.

Count de Lalaing, Belgian Minister at London, to M. Davignon, Belgian Minister for Foreign Affairs.

London, August 17th, 1914.

Sir,

In reply to your despatch of August 7th, I have the honour to inform you that the British Government cannot agree to the Belgian proposal to respect the neutrality of the belligerent powers in the conventional basin of the Congo.

[1]German troops from German East Africa have already taken the offensive against the British Central African Protectorate. Furthermore, British troops have already attacked the German port of Dar-es Salaam, where they have destroyed the wireless telegraphy station.

In these circumstances, the British Government, even if they were convinced from the political and strategical point of view of the utility of the Belgian proposal, would be unable to adopt it.

The British Government believe that the forces they are sending to Africa will be sufficient to overcome all opposition. They will take every step in their power to prevent any risings of the native population.

France is of the same opinion as Great Britain on account of German activity which has been noticed near Bonar and Ekododo.

(See Nos. 57 and 58.)

EXHIBIT No. 14.

Extract from *The Belgian Grey Book*, Page 342.

THE TREATY VIOLATED.

M. Tombeur, Belgian Vice-Governor of the Katanga, to M. Renkin, Belgian Minister for the Colonies.

Elizabethville, August 26th, 1914.

(Telegram.)

The Germans are continuing their skirmishes in Tanganyika and attacked the port of Lukuga, on August 22nd. Two of their natives were killed and two wounded. Fresh attacks are expected.

Read before The Grotius Society on 4th August, 1915.

---

[1] See Supplementary Note, p. 84.

SUPPLEMENTARY NOTE.

The Grotius Society ask me to add a few lines before this paper is reprinted, and in view of the further diplomatic correspondence which has recently been published I willingly accede to the request.

It appears that on 23rd August, 1914, Germany approached America with an offer to neutralise the German Central African possessions during the war, and asked President Wilson to intervene on this basis. America then replied that as the Senate had not ratified the Berlin Act she could not assent to this proposal. Germany then suggested that America should merely act as a medium of communication, and in this way the Wilhelmstrasse succeeded in conveying to the Allies her desire to respect the neutrality of Central Africa. A memorandum on the subject has been issued by the German Government, but until recently this paper did not reach England.

The Allied Foreign Offices decided that the German request should be refused, but since that decision there have been some remarkable admissions to the House of Commons on this subject. Sir Edward Grey has repudiated the sentiment ascribed to him by M. de Margerie on 16th August, 1914, in the letter published in the Belgian Grey Book, and reproduced in this pamphlet on page 82.

Another admission is that Germany had not taken the initiative in committing a hostile act in Central Africa when England refused the Belgian proposal. The third admission was that the Union of South Africa was never consulted regarding President Wilson's message, as she was entitled to be under the resolution of the 1911 Imperial Conference.[1]

The American press has been discussing the action of President Wilson in refusing to mediate on this question, basing criticism on the ground that as the United States was responsible for introducing the neutrality clauses into the Berlin Act, it was the President's duty to enforce them. The official reply to this suggestion is that America will thereby endanger George Washington's doctrine of non-interference with European quarrels. When the Colonial Office vote was taken on 21st July, 1915, our Government admitted the very great desirability of neutralising this region, if only it were possible. The military position was described by Mr. Bonar Law as largely one of stalemate. It therefore seems as if the whole question has been considered again since my pamphlet was written.

[1] Parl. Debates, October 28th, 1915.

One reason for this was the fact that on 14th September, 1915, the Dutch Journal "Het Nieuws van den Dag" addressed a very strong appeal to the Dutch Government to use the authority given her by Article XI. of the Berlin Act. This course is urged "as a first modest step which might lead to another of much greater significance, that might also be beneficial to Europe."

This gave rise to some conversations between Holland and the two parties concerned, but the nature of this discussion has not been made public.

It appears from an article by the Editor of "La Tribune Congolaise," published in the African World Annual just issued, that Belgian opinion has not changed on this question.

During Christmas week, 1915, Dr. Zimmermann gave a lecture on this subject in Berlin. As this official represented the German Colonial Office at the German Embassy in London, and has conducted all the African negotiations since the war broke out, he may be taken to speak with Imperial authority. Dr. Zimmermann complains that Spain did not inform her of the Belgian proposal, but he omits all mention of the argument that Germany having violated Belgian neutrality in breach of International Law, cannot be heard until she expresses herself willing to accept the verdict of International Lawyers regarding that breach. She cannot abuse one Treaty and use another—especially in this case where the neutrality of Belgium and that of the Congo State are as regards Germany one and the same.

R. C. H.

February 4th, 1916.

THE MILITARY EFFECT OF ATTACKS ON COMMERCE.

BY

HIS HONOUR JUDGE L. A. ATHERLEY-JONES, K.C.

The subject of the paper I have the honour to-day of submitting to this Society is "The Military Effect of Attacks on Commerce." For the purpose of defining the scope of my observations I confine attacks on commerce to three operations of naval warfare: (*a*) blockade, (*b*) the enforcement of the rules of contraband, (*c*)—an operation entirely novel in the conduct of war between civilised nations—naval operations having for their direct and primary object the destruction by a belligerent of ships belonging to the mercantile marine of his enemy and, when conveying cargoes—contraband or otherwise—to the territory of his enemy—the merchant ships of neutrals.

By "military effect" I understand one or all of the following results from attacks on commerce, the enemy's sensible privation of the necessary instruments of warfare, of food necessary for the maintenance of his armies immediate in its consequences, or, his subjection to an economic pressure more gradual in its effects, be it in respect of food, goods or money, which disables him from further sustaining the burthen of war.

That attacks upon her commerce must injuriously affect a nation needs no demonstration, and one aspect of the commercial position of Germany during the present war may be given as an illustration of the mischief wrought by our attacks upon her commerce. Immediately before the war the total annual value of her export and import trade was about £800,000,000[1]; the annual value of the sea-borne portion of that trade was close on £600,000,000; save for the slight mitigation afforded by neutral agencies, by land transit and illicit intercourse, the loss of her sea-borne trade through the operations of our navy has had a very serious effect, as I shall later point out, on her economic condition.

[1] The value is probably understated if we accept some figures recently given by the German Minister, but the relative proportions remain approximately the same.

We must, however, distinguish between the immediate or direct effect of attacks on commerce and their consequential or indirect effects, between a rapid collapse and a gradual decay. The practical question we have to consider is: can attacks on commerce bring war to an end, or long before such attacks can attain that result will war inevitably be determined by some other cause or causes?

Attacks by belligerents on the commerce of their enemies can find its only justification as being a means of reducing them to submission. The sinking of a great liner will startle the world with an emotion of horror, but will not cow the suffering nation, rather by the indignation it inspires will afford encouragement for new efforts to secure victory. As to this there can be no question, but it is far otherwise when we come to consider whether attacks on commerce for the purpose of cutting off his military supplies or reducing the enemy state to submission by famine; there the rule stated by Gentilis clearly applies—*salus populi suprema lex*—and the only test we are entitled to apply is whether or no the means employed are likely to be effective for attaining the desired object.

The interests of neutral commerce impose serious limitations upon the power of a belligerent to prevent the access of commodities to his enemy. History records many instances of restraint imposed by neutral Powers upon extravagant violation by belligerents of the recognised rules of international law, among which the most notable were the armed neutralities of 1785 and 1800. During the present war the United States of America have shewn serious and even menacing impatience at the drastic action the English Government has taken to prohibit neutral commerce with Germany.

It is not within the scope of this paper to discuss the merits of the contentions of the Governments of Washington and London in their diplomatic correspondence on the naval action of England against maritime commerce with Germany, but it is interesting to compare the position assumed by the former Government in 1794 with its present attitude. In 1793 England at war with France insisted on her right to prevent the access of food supplies to France; America objected, and thereupon a treaty was entered into between England and America whereby it was provided that whenever articles "not generally contraband" were seized and held to be contraband by a tribunal appointed for that purpose, the owners of the cargo should be paid full value of articles seized together with reasonable profit, and also freight and reasonable demurrage to owners of ship. Before a mixed Commission after the war the question was discussed as to whether

the seizure of food stuffs by the naval authorities was justified by the law of contraband. The English Government contended in favour of that view:—(*a*) There was reasonable prospect of reducing France to terms by reason of scarcity of food; (*b*) that England was at that time suffering from want of food, and therefore necessity justified the seizure. The American Government refused to accept the first plea, but assented to the principle enunciated in the second. In the present controversy the United States insist upon an unconditional observance of the law of contraband as hitherto expounded by the English Court of Admiralty.

The significance of the influence of neutrals in thwarting the efforts of a belligerent to deprive his enemy of commercial intercourse with other countries has been notably demonstrated during the present war, and undoubtedly the economic pressure we should have been able to impose upon Germany would have been much greater had we been able more completely to ignore the rights of neutrals.

At no time in her history has England more effectively asserted her maritime supremacy than during the present war. The naval flag of Germany, save for fleeting and furtive appearances of her submarines, has been banished from every open sea, the ocean highways of the world are deserted by her mercantile marine, and what remains of German oversea commerce has to be concealed in neutral bottoms and conducted through neutral ports.

It must be conceded that never before has England, in order to destroy the commercial intercourse of her enemy, employed her sea power with greater severity; her action against French commerce during the war of the revolution affords the nearest parallel, but if we have strained or even violated the rules of contraband and blockade sanctioned by the law of nations we can find ample justification in the fact that Germany initiated a form of warfare in spreading automatic contact mines over the *liberum mare,* unprecedented in warfare between civilised nations, repudiated and condemned at the Hague Conference, and calculated to deprive the inhabitants of this country of the means of subsistence.

But although the moral and legal justification for this action may be complete, it can avail nothing and cannot be justified on the ground of expediency unless it prove adequate to the extent either of (*a*) depriving Germany of the material necessary for effective warfare; (*b*) of cutting off the supply of food stuffs and other necessary commodities so as to render the war intolerable to her people, or (*c*) by the insistent pressure of our action rendering

her unequal to the task of sustaining the economic strain which the cost of the war imposes.

The economic strain upon Germany caused by our interference with her overseas' commerce is already very grave: it, as already observed, involved her in an annual loss of £600,000,000, the value of her sea-borne exports and imports; it has resulted in the enforced idleness of her mercantile marine, the discontinuance, partial or complete, of many branches of manufacturing industry, together with their attendant transport and other ancillary services, and as a result of the cessation of her export trade an adverse rate of exchange of no less than 30 per cent. Our rigorous enforcement of blockade and the law of contraband has resulted in her almost total deprivation of many imports, some such as coffee, articles of general consumption, others which fall within the category of luxuries, and in the almost general scarcity of meat and foodstuffs, and in the seriously diminished supply of materials for the manufacture of munitions.

Added to the economic pressure resulting from the naval operations of England is that to which all the belligerents in varying degrees are subjected—but to which Germany, unlike England, does not enjoy, the alleviation of continued, though diminished, industrial and commercial activity—the diversion of her able bodied population from productive agencies to the purpose of war either as combatants or makers of munitions, the destruction of wealth, and therefore capital, and the debasement of an ever-increasing paper currency.

No inference favourable to Germany's economic condition is to be drawn from the fact that certain staple articles of food are sold at a lower price in Germany than in England. This is due to the drastic regulation of prices imposed by the German Government on the sale of these commodities, and to the fact that by controlling the distribution of such commodities the Government has to a large extent abolished the middleman, and consequently his profits. The dominant fact remains that, despite factitiously low prices there is a somewhat serious scarcity of many articles necessary for human subsistence.

On the other hand, although Germany is disabled during the war from providing her people with sufficient for their comfort and contentment, she is still able, and will be for an indefinite period able, to provide for their subsistence. To a far greater degree than England she is self-supporting. Against about 12 per cent. of our population, she has in normal times over 40 per cent. of her population engaged in agriculture. She has for a long period regarded the prosperity of agriculture as paramount to that of every other industry. By a remarkable system of land banks and co-operative

societies she has raised agriculture to the highest standard of efficiency, and by so doing she has placed her population in absolute security from the danger of famine.

Nor are her military operations likely to be seriously embarrassed at any rate in the near future from lack of material for the manufacture of munitions of war. Her mineral wealth in Westphalia and Silesia, to which may be added that within occupied territory, provides her with abundant supplies of coal and iron. For her supply of copper, rubber and oil she was doubtless dependent upon her imports, and despite her ingenuity in availing herself of such accumulations as may be found in the possession of private persons, and the supplies that scantily trickle in from neutral countries, or are obtained by illicit trade with enemy countries, there is every reason to believe that the comparative scarcity of these commodities constitute, at present, a serious inconvenience, and if persistent, will ultimately seriously impair the efficiency of her military operations.

A country endowed with a fertile soil, rich in mineral resources, possessed by a virile population, and enjoying the advantages of excellent economic organisation, will not readily succumb to economic pressure. Former wars, mediæval or modern, afford no instance in support of the opposite view, but no just inference can be drawn therefrom. Not only have the expenses of warfare materially increased, but the vast armies of to-day involve the suspension of productive energy for the replacement of waste and the accumulation of wealth. A war of a hundred years did not involve a tenth of the economic strain to our ancestors which a war of ten years will inflict upon ourselves and our posterity. For deliverance from this war, if it be not attained by the shock of battle, we may with confidence rely not on any sudden cessation of the means of any belligerent for continuing the war, nor even to that war-weariness which is the inevitable sequel of war-enthusiasm, but to the pressure of economic exhaustion, which, however retarded by the courage or endurance and the ingenuity of organisation, must be the inevitable fate of the German Empire.

Read before The Grotius Society on 19th November, 1915.

SOME NOTES ON BLOCKADE.

BY

SIR JOHN MACDONELL, K.C.B., LL.D.

I must begin my observations by expressing regret that Mr. Barratt has not been able to give me the assistance which I much desired. You entrusted the opening of the discussion to him and to me, and no doubt you selected him, among other good reasons, because it was well that the subject of Blockade, which is of interest to belligerents and neutrals, should be looked at from the point of view of one who belongs to a State which has generally been, as it is to-day, in the position of a neutral. I regret, as doubtless you do, that he has been unable, owing to pressing engagements, to give you his aid and counsel.

Blockade and contraband are in every war closely connected. In this war they are almost inextricably mixed; and I have found again and again that I could not deal with the former without trespassing—I hope not too often or too much—into a province which will no doubt be treated in other papers.

The scope of these notes (for they are only such) is very limited. They are not intended to deal with all aspects of blockade. The chief object which I have had in view is to describe some recent changes in regard to it, and to stimulate the discussion of certain questions which this war has brought into prominence. I shall be glad if these notes help to indicate the chief problems to be considered and, if possible, solved, and to keep discussion within definite bounds.

Of the basis of the law of blockade, little need here be said. For present purposes its legitimateness and maintenance, not only as between belligerents but, subject to certain conditions, as between belligerents and neutrals, are assumed. It is at first sight somewhat strange that nations which are not concerned with the quarrels between belligerents must submit to restrictions upon trade imposed by the latter in their interest; restrictions not only as to articles which may be of use in war, but also as to commerce generally; restrictions which may be a very serious injury to large classes of the population of neutral countries. The point of Gentilis's famous antithesis is to-day not so convincing to neutrals as it once may have been[1] Nor are the

[1] Jus commerciorum æquum est: at hoc æquius, tuendæ salutis. Est illud gentium jus; hoc naturæ est. Est illud privatorum; est hoc regnorum. Cedat igitur regno mercatura, homo naturæ, pecunia vitæ.

reasons usually given for the right of blockade convincing. It has been defended, not very successfully, as occupation of part of the sea similar to occupation of vacant land. It has been described and justified as a siege of an enemy's territory in essentials similar to a siege of an enemy's city. It has also been justified on the ground that neutrals penetrating the forbidden area commit a breach of neutrality. In recent German literature it has been justified as a measure of necessity.[1] It has also been characterised as a survival from a time when real neutrality was rare, and when the position of a neutral was regarded with suspicion. Were the subject ever considered wholly *de novo*, and were the interests of neutrals to receive as full attention as those of belligerents, it is possible that all or some of the restrictions now imposed would not be universally agreed to; that neutrals might insist in war time upon doing business as before, or with far fewer limitations than are now imposed; and that a sea law, based upon the actual consent of all States, might not include the present law as to blockade.[2]

I should not have adverted to these different theories but for the fact that the absence of any distinct, generally accepted fundamental principle, prevents, or renders difficult, the expansion by analogy of the law to meet new circumstances. He who regards the law of blockade as an anomaly will not extend it a hair-breadth beyond the line drawn by existing precedents; he who sees in it a reasonable or necessary part of warfare to which neutrals must submit will endeavour to alter the rules so as to adapt them to new circumstances. The utmost to be expected is the adoption of some working, perhaps illogical, compromise.[3]

---

[1] "Die Blockade ist rechtsmässig, weil sie notwendig ist zur Erreichung der Zweckes des Seekrieges." Das Prisenrecht in seiner neuesten Gestalt von Dr. Georg Schram (1913), p. 168. See also "Nauticus" (1914), p. 303.

[2] See Professor Westlake on "Commercial Blockades": Collected Works, 312.

[3] There was in the Napoleonic wars uncertainty as to what was an effective blockade. Fault was found with the blockade of Genoa on the ground that it did not comply with the requirements of international law; the complaint resting, apparently, on the statement that the blockading ships "could not be seen from Genoa." Nelson replied that the proof of evident danger to vessels seeking to enter or leave rested on the fact that captures were made; "and it is on the face of it absurd to say that there can be no danger to a vessel seeking to enter a blockaded port because the blockading vessels are not visible from the latter. Much more depends upon their number, disposition and speed." "From my knowledge of Genoa and its gulf," said Nelson, "I assert without fear of contradiction that the nearer ships cruise to Genoa the more certain is the escape from that port or their entrance into it ensured. I am blockading Genoa according to the orders of the Admiralty and in the way I think most proper. Whether modern law or ancient law rules my mode right, I cannot judge; and

Chief Features of the Law of Blockade.

Putting aside for the present these questions of principle, I would first recall briefly the chief features of the law of blockade; next note certain changes in warfare and otherwise, which affect the operation of that law; and then propound certain queries in order to elicit the opinion of the Grotius Society, and with the hope that those queries may help to direct the discussion to definite issues and may lead to the adoption of distinct proposals.

I pass entirely over the irregular and high-handed acts forbidding intercourse by neutrals with belligerents such, for example, as the prohibition by England or Holland in 1689 of intercourse with France; and I need not state minutely the details of the law of blockade, it is enough to mention some of its chief features.

Before the declaration of London, there were, broadly stated, two systems—the Anglo-American and the French. According to the former, to be valid a blockade must be effective. It must be impartially applied to the vessels of all nations. It must be established by the authority of the belligerent State or be adopted by the same. It may prevent egress as well as ingress. When there is the intention to break the blockade the act of sailing towards the blockaded port is an overt act until the intention is abandoned. The penalty for breach of blockade with knowledge, actual or constructive, is the condemnation of both ship and cargo. This knowledge is presumed in certain cases.

While there were many features in common, there were some differences between the Anglo-American and French systems. According to the latter, to justify capture not merely general notification addressed to the Government concerned, but also to the authorities of the ports blockaded is required. Further, "les navires qui se dirigent vers port bloqué ne sont censés connaître l'état de blocus que quand la notification en a été inscrite sur leur livre de bord par un bâtiment de guerre formant le blocus." (Official Memorandum, p. 30; Miscellaneous No. 5 (1909).)

The Declaration of London (Articles 1-21) was a compromise between the two systems. At certain points the Declaration approximated to the French system. Thus, Article

surely of the mode of disposing of a fleet, I must, if I am fit for the post, be a better judge than any landsman, however learned he may appear." (Mahan's *Life of Nelson*, II. 229.) Nelson went so far as to say that the best way of intercepting vessels from Genoa bound for the Atlantic was to station vessels at Gibraltar. Mahan remarks: "When a definition of international law is stretched as far as that, it will have little elastic force left." (II. 230.) See "Nauticus" (1914), p. 285, as to blockades conducted by Nelson and Sir John Jervis.

11 required a declaration of blockade and notification to neutral Governments and to the local authorities. Article 19 forbade the application of the doctrine of continuous voyage to blockade, thus dissenting from the doctrine which appeared to be laid down in the *Springbok* case decided by the Supreme Court of the United States. Article 15 raises a presumption of knowledge of existence of a blockade in certain cases:

"Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port, subsequent to the notification of the blockade made in sufficient time to the Power to which such port belongs."

This was modified by the Order in Council of August 20th, 1914.

"The existence of a blockade shall be presumed to be known—
(*a*) to all ships which sailed from or touched at an enemy port a sufficient time after the notification of the blockade to the local authorities to have enabled the enemy Government to make known the existence of the blockade;
(*b*) to all ships which sailed from or touched at a British or allied port after the publication of the Declaration of London (Order in Council, August 20, 1914)."

Articles 1 to 21 of the Declaration inclusive, formed a tolerably complete code as to blockade. Important changes, however, were made by Great Britain by an Order in Council of March 11th, 1915, which established what has often been described a blockade, though not conforming to some of the above-named conditions.

Articles 1, 2 and 3 are as follows:

(1) "No merchant vessel which sailed from her port of departure after the 1st of March, 1915, shall be allowed to proceed on her voyage to any German port. Unless the vessel receives a pass enabling her to proceed to some neutral or allied port to be named in the pass, goods on board any such vessel must be discharged in a British port and placed in the custody of the Marshal of the Prize Court. Goods so discharged, not being contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

(2) No merchant vessel which sailed from any German port after March 1, 1915, shall be allowed to proceed on her voyage with any goods on board laden to such port. All goods laden at such port must be discharged in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such a manner as the Court may in the circumstances deem to be just.

Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace except on the application of the proper officer of the Crown unless it be shown that the goods had become neutral property before the issue of the order.

Provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper officer of the Crown.

(3) Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may, in the circumstances, deem to be just, to person entitled thereto.

Provided that this Article shall not apply to any case falling within Articles 2 or 4 of the Order.

(4) Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin, or are enemy property, may be required to discharge such goods in a British or allied port."

The 4th Article, like the others, provides for custody, detention and sale.

This Order in Council resembles in some respects, and was no doubt modelled upon, the Orders in Council of 7th January, 1807, and 11th November, 1807, measures of reprisals on account of Napoleon's Berlin decree. The former Order declared that "no vessel shall be permitted to trade from one port to another, both which ports shall belong to, or be in possession of, France or her Allies, or shall be so far under their control as that British vessels may not freely trade thereat" on pain of being condemned as lawful prize. The latter declared that "all the ports and places of France and her Allies, or of any country at war with His Majesty, and all other ports or places in Europe, from which although not at war with His Majesty the British flag is excluded, and all ports or places in the Colonies belonging to His Majesty's enemies, shall from henceforth be subject to the same restrictions in point of trade and navigation, with the exceptions hereafter mentioned, as if the same were actually blockaded by His Majesty's naval forces in the most strict and rigorous manner."

The Order of March 11th resembles the earlier Orders in the fact that it practically forbids commercial intercourse, as to imports, by neutrals with Germany, and that it also practically forbids exports from Germany to neutrals, except so far as the British Government permits. Under the Order of March 11th (unlike its predecessors) neutral vessels contravening it are not confiscated; they are only detained.

It may be added that the reason assigned for the Orders of 1806 or 1807, viz., that the countries adjacent to France were subject to her influence, is one which cannot be given as to Denmark or Holland.

The French Government established a somewhat similar system by a decree of 12th March, 1915. Article 1 declared that: "all goods belonging to subjects of the German Empire, either

shipped from or to Germany, and having taken the sea since the promulgation of the previous decree, shall be stopped by the cruisers of the Republic."

Both this decree and the Order in Council are obviously not in accordance with the rules of international law as above stated. They have been described as commercial blockades. But they are blockades (if such they can be called) without the conditions favourable to neutrals recognised by the Anglo-American or French system or the Declaration of London, and without the penalty of condemnation.

It was objected to the earlier Orders in Council that they were vitiated by the lavish granting of licenses to trade. (See Brougham's speech of June 16th, 1812, Speeches I., 45.) In like manner exception has been taken to the Order in Council of March 11th that the so-called blockade was vitiated by the permission given to certain countries to import large quantities; an objection which would have more weight if the recent Order in Council really established a blockade. So far as I know, it has not been officially defended as fully satisfying the requirements of a blockade. The reason given for it has been that there being no power to seize articles of conditional contraband if they could not be shown to be destined for the enemy Government or its armed forces, or non-contraband articles, even if they were on their way to a port in Germany or to stop German exports, the British Government "decided to stop all goods which could be proved to be going to, or coming from, Germany. The state of things produced is in effect a blockade adapted to the condition of modern war and commerce, the only difference in operation being that the goods seized are not necessarily confiscated." (Official Statement, White Paper, issued January 4th, 1916.)

The Government of the United States protested against this Order as being contrary to the rules of international law, and other neutral Governments have done so likewise. In a note addressed to the British Government, of November, 1915, it was observed (par. 23) that "the blockade which they (the British Government) claim to have instituted under the Order in Council of the 11th March cannot be recognised as a legal blockade by the United States." Such a blockade was not confined to enemy territory; it barred access to neutral ports and coasts; it was an unwarrantable extension of the doctrine of continuous voyage; and it was not effective or impartial.

War Zones.

I pass to what is in effect a further modification of the law of blockade. I mean the establishment of a naval or strategic area called a war zone. This is not wholly new. Japan in 1904

(by the Imperial Ordinance, No. 11, January 23rd, 1904) declared that "in case of war or emergency the Ministry of the Navy may, limiting an area, designate a defence sea area under these Orders, and belts adjacent to coasts."

Article 2: In the defence area the ingress and egress passage of any vessel other than those belonging to the army or navy are prohibited from sunset to sunrise.

Article 3: Within the limits of naval and secondary naval ports included in a defence sea the ingress or egress of all vessels other than those belonging to the army or navy are prohibited.

In pursuance of this Ordinance, when war broke out, about a dozen defence areas were proclaimed; some of them extending much beyond the three miles' limit into the open sea. In at least one case (the steamship "Quang-Nam," Russia and Japanese Prize Cases, II., 343) a Japanese Prize Court condemned a vessel which was reconnoitering within a prohibited area, though she was not carrying contraband, and was not seeking to break a blockade.

Shortly after the present war begun this policy was carried out by both belligerents on a vast scale. Our Government charged the German Government with scattering mines indiscriminately in the open sea on the main trade routes; and they announced that, adopting exceptional measures they would authorise mine laying on a large scale—would, in fact, consider "the whole of the North Sea as a military area." The reply of the German Government was a counter proclamation (February 4th, 1915) declaring the waters surrounding Great Britain, including the English Channel, to be a war zone. "On and after the 19th February, 1915, every merchant vessel found in the war zone will be destroyed, without its being always possible to avert the danger to crews and passengers on that account."

It is alleged that "Altogether about 5,000 square miles of high seas have been either closed or placed under restrictions, ranging from circumscribing channels and prohibitions of night entry to complete closure." The proclamation of prohibited sea areas has been defended as measures of reprisal; and in justification of them it is also pointed out that, if neutral vessels were allowed to pass through or tarry in war zones they might obtain information as to belligerents' plans which would be of greater importance than allowing a cargo of contraband to enter a belligerent's territory.

So much for the merely documentary history of recent changes as to blockade. Their real history is at several points obscure. Only a few persons connected with certain Government departments, in particular the Foreign Office, and the Procurator

General's office, know fully what has been done to give effect to the Order in Council of March 11th which I have quoted. But it is clear from the published official statements that drastic measures have been taken to prevent the export of all goods of German origin, whether coming directly or indirectly from Germany; that for some time the export of such goods has greatly declined—indeed, may be said to have ceased. As to the import of goods into Germany, "nearly every ship on her way to Scandinavian or Dutch ports comes or is sent into port." In a larger number of cases goods have been seized as enemy's property or, more frequently, as coming within the very long list of absolute and conditional contraband.

Changes in Warfare and Commerce Affecting Blockade.

In order to ascertain whether the existing rules and usages require amendment, it is advisable to consider the changes in naval warfare and in economical conditions affecting blockade; some of which are favourable to the belligerent, some distinctly adverse to him. The chief of the former are as follows:—

He can, with the swift vessels of to-day, move at the rate of 20, 25 to 30 knots instead of 6 to 12. When 50 to 100 miles distant, he is practically as near as he would have been in the days of sailing vessels when in sight of the port blockaded. With steam power he is generally independent of weather; his ships are not scattered by every gale. His scouts can communicate with the main fleet by wireless, if a vessel attempts to enter or get out. He has the assistance of aeroplanes by day and searchlights by night to watch any movements. In other words, "long range blockade" is practicable as it never before was. Then, too, his Government can "censor" or tap wireless communications as to the departure and routes of vessels likely to attempt to penetrate the forbidden areas, and can give him information furnished by its agents as to the cargoes of vessels carrying contraband.

The circumstances *unfavourable* to him are in the main these: Mines and submarines make inshore blockade, or indeed the position of any stationary vessels, dangerous. The range of shore batteries has greatly increased. The area of operations of the submarine has been enlarged. "This Government," said Mr. Bryan, referring to these facts, "is fully alive to the possibility that the methods of modern warfare, particularly in the use of submarines for both defensive and offensive operations, may make the former means of maintaining a blockade a physical impossibility."

It should be added that, owing in particular to railway development, there is great difficulty in preventing the entrance into

blockaded towns of cargoes coming from neutral ports. To quote on this point Sir Edward Grey : " Adjacent to Germany are various neutral countries which afford her convenient opportunities for carrying on her trade with foreign countries. Her own territories are covered by a network of railways and waterways, which enable her commerce to pass as conveniently through ports in such neutral countries as through her own. A blockade limited to enemy ports would leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own territory. Rotterdam is indeed the nearest outlet for some of the industrial districts of Germany." (Sir E. Grey's Note of July 23rd, 1915.) " We are confronted with the growing danger that neutral countries contiguous to the enemy will become, on a scale hitherto unprecedented, a base of supplies for the armed forces of our enemies and for neutrals for manufacturing armaments." (Note of January 7th, 1915.)

Unless the doctrine of continuous voyage is applied to blockades as well as to contraband—which was done by the Supreme Court of the United States in the case of the *Springbok* and other cases—it will be argued that blockade must hereafter be inoperative against all continental countries[1]; it can be effectual only against Great Britain and Japan, as insular Powers.

From the point of view of the neutral there are changes, both favourable and unfavourable. He is never, or very rarely, ignorant of the existence of a blockade; if he attempts to contravene it, he does so with his eyes open. If his vessel is seized under the Order in Council of March 11th, 1915, condemnation does not follow. On the other hand, his movements are hampered by cruisers operating over a far wider area than in earlier days. If reprisals, that is, measures which do not observe all or some of the conditions stated above, are resorted to, he may be seriously injured. Furthermore, with the increase of commerce there is a likelihood of goods which have been paid for by neutrals before being shipped being detained in a blockaded port. Then there is the fact, always important, but now more so than ever before, that the interruption of commerce between a belligerent and a neutral sometimes may work grave harm to the latter. The shutting of a market to its exports or the stoppage of the supply may mean ruin to a large part of the population of a neutral country. We experienced that evil in the American Civil War; whenever we are neutrals, we may do so again. It may happen—

[1] " Blockade in the form in which it has been sanctioned by international law in the past has ceased to exist."—*International Law: Some Problems of the War.* By Sir H. Erle Richards, p. 10.

I believe it sometimes does happen—that a blockade may do much more harm to a neutral than to the belligerent.

With these facts before one, certain fundamental questions may be put and profitably discussed. The answers will probably vary according as the interest of belligerents or of neutrals are considered to be supreme. He who thinks that the rights of neutrals are not to be abridged because belligerents choose to quarrel will give one set of answers. He who thinks that in struggles between States, it may be for their existence, other States not in like peril must defer to them and submit to pecuniary loss, will return another set of answers. A third set of answers will come from those who think that the rules hitherto acknowledged—a rough compromise but still a compromise between divergent interests—should be maintained, until they are altered by agreement.

I do not believe that we shall discuss these answers with frankness unless we look at a position rarely stated in books, but taken up and defended by some who influence our actual policy. I will endeavour to express briefly and fairly their contention. "The circumstances and nature of maritime wars may differ so much that it may be impossible to lay down beforehand rules as to blockade with any confidence as to their effect. The present war with its many surprises, even to experts, has revealed the impossibility of foreseeing the exact effect of rules relating to military or naval operations, including blockade." Therefore it is suggested, either let there be no rules, or rules drawn in terms so elastic and vague that they may be interpreted to meet any new or unexpected circumstances.

I am inclined to think that what I have stated is the creed of not a few persons; and it, of course, means the abrogation of all law; it is the familiar doctrine of necessity, to be reprobated on land, but it would seem, to be approved at sea.

Others, again, say—and I am disposed to think that this is the actual working creed of some Governments—"By all means let there be rules and let them be observed when they are not seriously inconvenient. But when they prove to be very much in the way, let us be free to break them, paying damages to be awarded by an international tribunal. Compensation to neutrals is, and must be, no small part of the normal cost of a modern naval war."

I do not expect you to approve of any of these contentions; you probably will think that belligerents should exercise only such rights against neutrals as are accorded by express or implied

agreement. But I think it well to name some difficulties in the way of any agreement and of its strict observance when made :

(1) The general incompatibility of interests of the belligerent and the neutral; what the one gains the other loses.

(2) There is generally a difference between warfare on land and at sea. In the former the rules operate sometimes favourably for one belligerent, sometimes for another in the course of a long campaign. In the latter the usual experience is that either, as the result of superior force at the outset or of a decisive battle, one belligerent gets at sea the upperhand and therefore retains it throughout the war, for fleets, requiring a long time for construction, cannot be renewed as can armies. Consequently, there usually comes a period in a maritime war when one of the belligerents is free to carry out the rules of naval warfare in his own way and without appeal.

I note a further difficulty owing to the absence of suitable machinery for modifying rules. Municipal law can be expounded by judges to meet new sets of circumstances, and such expansions form part of that law. But it is difficult to adduce any reason why developments at the instance of judges or Executive of one country should bind the judges or Executive of another independent country. If developed by the Courts of one country only, such Prize Law remains municipal law. In the absence of a Court empowered to interpret and develop the law authoritatively or of agreements made from time to time to meet new circumstances, we may expect different lines of development and irreconcilable diversity of practice.

In any revision of the rules of blockade I suggest attention should be given to the following points :—

Points of Detail.

(1) What notices of blockade should be required? Are the provisions of the Declaration of London sufficient?

(2) Generally, are the provisions in the Declaration of London on the whole satisfactory? And if not, how could they be improved?

(3) May mines be used for purposes of blockading? Is the sinking of stones or using other means of preventing ingress and egress to be regarded as a form of blockade by neutrals? Must such methods be supplemented by land batteries to constitute an effective blockade?

(4) Ought exceptions already admitted (*e.g.*, stress of weather) to the rule that vessels may not enter a blockaded port be increased?

(5) Should purely commercial blockades, *i.e.*, of towns or coasts not fortified, be legitimate?

(6) Ought there to be some further limitation of the distance within which blockade squadrons should operate? Is Article 17 of the Declaration of London sufficient? ("Neutral vessels may not be captured for breach of blockade except within the area of operations of the men-of-war detailed to render the blockade effective.") (Mr. Bryan's telegram of March 5th, 1915.)

(7) Ought "long range blockade" to be recognised; and, if so, in what sense? What modifications, if any, of present practice are necessary?

(8) Is the blockade of neutral ports adjacent to enemy ports or conveniently situated for conveying goods to enemy's ports in any circumstance legitimate, and if so, when?

(9) May the mouth of a river passing through several States be blockaded if one of the riparian States be neutral?

(10) Ought a distinction to be made between cargoes going out from blockaded ports and those which it is attempted to introduce?

(11) Should goods purchased by neutrals before war broke out be free to leave?

(12) Ought neutrals to be affected by measures of reprisal? Is the reasoning of Lord Stowell in the "Fox" case valid?

(13) Is the principle underlying the Order in Council of March 11th, 1915, valid as against neutral nations?

(14) Ought the principle of continuous voyage to be applied to blockades?

(15) Ought the principle of a war zone ("defence sea area," "war area," "military area," "strategic area," etc.) to be recognised? And if it is recognised, will the effect be to remove most of the restrictions upon blockade hitherto required?

I cannot say that I have no opinion as to some, if not all, of these questions. But my chief object being to promote discussion and to keep it within defined bounds, I prefer to submit them without further comment. The answers to several of them will not be difficult—most of them will answer themselves—if we agree as to a few principles.

Read before The Grotius Society on 23rd December, 1915.

Printed by RICHARD FLINT & Co., 2, Serjeants' Inn, Fleet Street, E.C.