Military Aid To the Civil Power

The General Service Schools
Fort Leavenworth, Kansas

MILITARY AID

TO THE

CIVIL POWER

THE GENERAL SERVICE SCHOOLS
FORT LEAVENWORTH, KANSAS
1925

THE GENERAL SERVICE SCHOOLS PRESS
FORT LEAVENWORTH, KANSAS
231—12-15-25—3500

1925

THE GENERAL SERVICE SCHOOLS
FORT LEAVENWORTH, KANSAS
1925

Introduction

This volume, prepared for The General Service Schools, Fort Leavenworth, Kansas, by Major Cassius M. Dowell, Infantry, United States Army, while a member of the Judge Advocate General's Department, is designed to serve as a practical guide for officers of the Army of the United States in administering the Laws of War, and in the application of correct legal principles to situations involving Military Government, Martial Law, and Domestic Disturbances. It does not purport to exhaust the whole law on these subjects. Text-writers have already performed that task. It does attempt, however, to extract the salient principles involved and to give them practical application in concise and usable form.

Both Military Government and Martial Law have well defined positions in the field of International Law. The former is substituted for the laws theretofore in force in the enemy's territory occupied by our military forces; the latter, on proper occasion and to a limited extent, is substituted for the laws of our own land. In Domestic Disturbances, on the other hand, the employment of federal military aid does not displace the laws of the land, but *sustains* them by brushing aside interference with their administration by the proper State or Federal civil officials. Much confusion will be avoided if this distinction is kept in mind.

The Laws of War find application, more or less limited at times, throughout the entire field of active military operations.

Only so much of the general subject of International Law has been presented as was deemed necessary to furnish a setting for the specific subjects treated.

H. J. BREES,
Colonel, Cavalry (D.O.L.),
Assistant Commandant.

APPROVED:

EDW. L. KING,
Brigadier General, U. S. Army,
Commandant.

Contents

CHAPTER I

International Law

(Perspective)

CONTENTS

CHAPTER II

The Laws of War

CHAPTER III

Military Government

CONTENTS

CONTENTS

CHAPTER IV

Domestic Disturbances

CONTENTS

Appendices

CHAPTER I

International Law

(*Perspective*)

SECTION I

General Survey

1. DEFINITION.—International law embodies those principles and rules of action which are acknowledged by civilized states as controlling in their relations with each other.

2. OBJECT.—The object of international law is the regulation of international intercourse and the avoidance or mitigation of the miseries of war.

3. KINDS.—The law of nations may be considered as of three kinds: *general, conventional,* and *customary.* The first is universal, is established by the general consent of mankind, and binds all nations. The second is founded on

express consent, is not universal, and binds only those nations which have consented so to be bound. The third is founded on *tacit* consent, and is obligatory on only those nations which have adopted it.

4. ORIGIN AND NATURE.—*a.* The law governing intercourse between nations came into being by a blending of moral principles with positive law and customs as found in the jurisprudence of nations and their practices. The part based upon moral principles came from the law of nature, the remainder largely from the Roman civil law. It can not be stated just when modern international law began, but it is known that it first assumed definite form in the 16th and 17th centuries during which period Grotius, the most illustrious of a number of contemporary writers in this field, published his great work *De Jure Belli ac pacis.* (See Chap. II, pars. 12 and 13.)

b. International law denotes something more than the positive legislation of independent states. It is a body of obligations which, in a sense, is independent of and superior to such legislation. Compliance with these obligations is a prerequisite to the admission of nations to full and equal participation in the intercourse of civilized states.

5. HOW ASCERTAINED AND ADMINISTERED.—*a.* As a part of the law, the rules of international law must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending on those rules are duly presented to such courts for determination. As with municipal law, the rule applicable to a particular case may often be uncertain and difficult of ascertainment. Recourse is had to authoritative writers on the subject, to the provisions of treaties disclosing consensus of public opinion, to the laws and decrees of individual states regulating international tribunals, and to the judgments of prize courts and of ordinary municipal courts purporting to be declaratory of the law of nations. It is often found in mere usage. To ascertain that which is unwritten, we resort to the principles of reason and justice. The difficulty lies in the fact that these principles will be different-

ly understood by different nations under different circumstances.

b. In this country, intercourse with foreign nations and the policy with regard to them is placed by the Constitution in the hands of the federal government, and the decisions of the central government upon these matters are, therefore, binding upon its citizens. No statute or decision of one or two nations, however, can create obligations for the whole world, for the law of nations is founded upon the consent of civilized communities.

c. One rule governing the construction of our acts of Congress is that they ought never to be construed as violative of the law of nations if any other possible construction remains.

d. Broadly speaking, the principles of international law are enforced by international public opinion.

6. STATES SUBJECT TO INTERNATIONAL LAW.—*a.* Formerly, the states that were and those that were not subject to international law were classified as Christian and non-Christian, respectively. This was due to the fact that international law grew up in Christian Europe. States are now admitted to the family of nations regardless of religious belief. By the Treaty of Paris of 1856, Turkey was expressly "admitted to participate in the advantages of the public law and system of concert of Europe," and by the treaties of July and August, 1899, Japan's position as a fully independent sovereign power was assured. These states were admitted to the "circle of law-governed countries" because they so conducted themselves as to convince the Christian nations of their positive acceptance of the principles of international law in their entirety. Japan, for instance, in 1870, during the war between France and Germany, issued a proclamation of neutrality. In 1886, the Emperor of Japan formally adhered to the Geneva Convention. In 1887, the rules of maritime law embodied in the Declaration of Paris of 1856 were, by imperial decree, declared to be in force in the Japanese Empire. In 1894, during the war with China, a law was promulgated in Japan for the

organization of a prize court, and such a court was established at Sasebo. These acts, as above stated, convinced the civilized nations as to the attitude of Japan toward international law and gained her admission into the family of nations.

b. All the civilized states of the earth have now adopted the principles of international law, and even the semi-civilized or barbarous states are compelled to conduct both their internal and external affairs with a certain regard for the governments and peoples of other states. As aptly expressed by Lawrence in his admirable work on international law, "they cannot act as if they were alone in the world, for the simple reason that they are not alone."

7. INTERNAL QUALIFICATIONS FOR MEMBERSHIP.—If the government of a state is capable of securing at home the observance of rightful relations with other states, the demands of international law are satisfied. Such law has no concern with the form, character, or power of the constitution or government of a state, the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations.

8. SOVEREIGNTY AND INDEPENDENCE.—*a.* These terms are not quite synonymous. A state may be part-sovereign, but never partially independent. Its sovereign existence begins with its recognition by other powers; that is, from the time they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone. Each power judges for itself whether a community claiming to be recognized really possesses all the necessary requirements, and especially whether it is likely to live. The judgment of the recognizing state respecting these matters is, of course, not always sound. That of our own country with reference to Mexico is an example. In a special message to Congress on May 15, 1856, President Pierce observed that five successive revolutionary governments had made their appearance in Mexico in the course of a few months, all of which had been successively recognized by the United States.

b. The independence of a state may be self-asserted and maintained, as in the case of the United States and other great powers; or it may be guaranteed by one or more states severally or jointly, as in the case of Switzerland; or other contracting parties may agree among themselves to respect the independence and territorial integrity of another state, as was the case of the Ottoman Empire under the Treaty of Paris of 1856. This last is not a guarantee.

9. LIMITED SOVEREIGNTIES.—*a.* These range all the way from protected states and those which are within spheres of influence, down through colonies, protectorates, suzerainties, mandates, and dependencies, to the domestic dependent nations of Indians in the United States. All except the last may be described as part-sovereign for the reason that their domestic rulers in dealing with external affairs find themselves more or less restricted in the exercise of rights of control by some external power. This external power is usually the government of some external state, but this is not always the case. The city of Danzig, for instance, is now a free city under the protection of the League of Nations.

b. Strictly speaking, and contrary to popular conception, the term *protectorate* includes the protecting power as well as the protected state. For example, the Republic of San Marino, an enclave under the "exclusive protective friendship" of Italy, is popularly termed a protectorate, but the protectorate actually consists of both Italy and San Marino.

c. A *suzerainty* is practically the same thing as a protectorate except that at times it may be only nominal, as was the case of Bulgaria while it was under the suzerainty of Turkey from 1878 to 1908. The dominant state is called a *suzerain.*

d. The terms "protectorate" and "suzerainty" are both so indefinite and variable in meaning, and are otherwise so unsatisfactory, that they are carefully avoided in diplomatic papers.

e. The term *colony* does not necessarily denote the absence of international personality. As explained by Professor Winfield in his recent revision of Lawrence's *International Law* (p. 63),

> "Recent events have made it no longer possible to dismiss the British self-governing dominions, Canada, Australia, New Zealand, and South Africa as colonies which are merely part of the British Empire and possess no international personality of their own. And the same applies to India, which, like these dominions, was separately represented at the Peace Conference after the great war. Moreover, all became original members of the League of Nations, with representatives separate from that of Great Britain in the Assembly of the League. Hence * * * they have become members of the 'organized Family of Nations,' and this marks a wide difference from their pre-war position."

f. The term *mandate* was introduced into international law by the Covenant of the League of Nations. It was coined to describe the relationship existing between certain overseas dominions lost by Germany during the World War, which were inhabited by backward peoples, and the advanced nations to whom the tutelage of those backward dominions was entrusted. The guardian nations are called *mandatories.* They perform their duties on behalf of the League of Nations and report annually to the Council of the League.

g. The status of Indians in their allotted territories is marked by peculiar and cardinal distinctions which do not exist elsewhere. They can not with strict accuracy be denominated foreign nations, for our government asserts title to their lands independent of their will when their right of possession ceases. They and their territory are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and as an act of hostility. Our draft machinery reached out and effected the registration of Indians in their respective territories during the World War. Congress has by legislation asserted criminal jurisdiction over them respecting certain crimes, and our government exercises the right of eminent domain within their ter-

ritory in the usual way. Yet they are distinct communities each occupying its own territory, with its own tribal governmental organization, marriage laws, and real estate laws, also criminal laws punishing with death.

h. In 1894, Sir Julian Pauncefote, British Ambassador to the United States, complained to our State Department that certain British subjects had been unjustly removed by Choctaw Indians from their territory. The reply of Mr. Adee, our Acting Secretary of State, was that

> "The Choctaws are not citizens of the United States, but constitute a separate nation, with its own form of government and laws, existing within the borders of the United States under and in accordance with treaty stipulations. Those people who go into that country must be held to have done so with full knowledge of those treaties and of the Choctaw laws, and must accept the consequences if they are found to be there without proper authority."

i. An Indian born on an Indian reservation, even though he later separate from the tribe and live among white people, is not a citizen of the United States by virtue of the fourteenth amendment to the Constitution, for the simple reason that he was not born within the United States.* Nevertheless, the Indians are domestic subjects of our country, and the term "domestic dependent nations" has been coined by the Supreme Court of the United States (1 Peters, 1) as accurately describing their relationship. They are not members of the family of nations for the reason that they cannot deal in any way with any other power than the United States.

j. The States composing the American Union, though part-sovereign, are likewise not individual members of the family of nations for the reason that their foreign affairs are carried on solely by the central government.

10. SOVEREIGNTY AND TERRITORY.—*a.* Sovereignty and territory are not necessarily coexistent, nor are they inseparable. The Pope, though now deprived of all temporal power, is still recognized as a sovereign by many powers of

*By legislative enactment, approved 2 June, 1924 (43 Stat. 253), Congress finally conferred citizenship upon all non-citizen Indians born within the territorial limits of the United States.

the world which receive from him diplomatic representatives in the person of either a nuncio or legate, or possibly in some other capacity, and which powers also accredit to him certain diplomatic representatives. Our government does not participate in this, but abstains from interference or criticism, recognizing it as the right of other powers to determine such questions for themselves. Our diplomatic representatives abroad are advised that when the power at whose court the United States has a representative receives a representative from the Pope of higher rank than the representative of the United States, it becomes the duty of the latter to observe toward the Pope's representative the courtesies and formality of first visit prescribed by the conventional rule of intercourse and ceremonial, in accordance with the customary precedence of diplomatic agents.

b. The League of Nations has an international entity distinct from the several states of which it is composed. It is not, strictly speaking, a sovereign body, yet we have seen that it exercises a protectorate over the Free City of Danzig. It also governs the Saar Basin through a Commission. It thus exercises certain rights normally exercised only by sovereign states, yet it has no territory peculiarly its own.

c. Military occupation, of which we shall learn more later, is still another situation which shows clearly that territory and sovereignty are separable. When Castine, Maine, was in the hands of the British in 1814-1815, the sovereignty of the United States thereover was suspended, but the territory of the United States was not actually diminished. Again, when we occupied Tampico in 1847, our sovereignty was extended thereover but our territory was not expanded. The place was still foreign. The law of nations merely prescribes that conquered territory is subject to be governed by the conqueror during his military possession. This may continue after the cessation of hostilities until stipulations contained in the treaty of peace have been complied with, or until conditions are such as to cause the conqueror to withdraw, voluntarily or otherwise, from the occupied territory.

11. RECOGNITION OF SOVEREIGNTY.—*a.* Recognition of sovereignity may be *express,* as by written or oral declaration, or *implied,* as by sending and receiving diplomatic representatives, entering into negotiations, etc. A state may be recognized as a sovereign state without being recognized as a member of the society of nations. Such was the case of Turkey prior to 1856, and such is still the situation respecting a number of Asiatic states.

b. The recognition of a new state born of an insurrection must not be confused with the recognition of an insurgent party as a belligerent. The recognition by European powers of the Southern States as belligerents during the Civil War did not amount to recognition of the Confederacy as a state.

c. Premature recognition amounts to an act of intervention, committed in favor of insurgents or of a conqueror. The recognition of the United States by France in 1778 was in reality an act of intervention. The recognition of Cuba by the joint resolution of Congress approved April 20, 1898, declaring the people of Cuba to be free and independent and directing the President to use the Army and Navy for the purpose of causing the withdrawal of Spain from the island, was a clear case of recognition amounting to intervention.

12. RECOGNITION OF BELLIGERENCY.—*a.* Recognition of belligerency, as above stated, differs from the recognition of the sovereignty of a state. Belligerency between already existing states is apparent and easily recognized; but in a case of insurrection, such as that of our Southern States during the Civil War, the magnitude which the political struggle must have attained before it will justify recognition of the insurgent faction as a belligerent is a rather difficult matter and may be determined only by the recognizing state. Such recognition involves such questions as the right of blockade, visitation, and search for and seizure of contraband articles on the high seas. It does not confer upon the community so recognized all the rights of an independent state, but it does grant its government and

subjects the rights and imposes upon them the obligations of an independent state in all matters relating to war. It gives them a recognized status which carries with it certain great advantages, such as the privilege of employing commissioned cruisers at sea, the opportunity to obtain loans and materials abroad, and the right to demand respect for their laws. Such recognition does not, however, inure solely to the advantage of the insurgents. The parent state gains the advantage of relief from responsibility for acts done in the insurgent territory, and the right to exert against neutral commerce all the powers of a party to a maritime war.

b. The recognition of belligerency may be withdrawn at the discretion of the state which granted it. Thus, on January 2, 1865, England withdrew her recognition of the belligerency of our Southern States. Spain did likewise on June 4, and France followed suit on June 22, of the same year.

SECTION II

Reactions Induced by Violation of Principles of International Law

---

13. LOSS OF MEMBERSHIP IN THE FAMILY OF NATIONS. —A state which is unable or unwilling to conform to those international obligations which must exist between established governments of friendly states, or which disclaims the authority of international law, renders itself no longer entitled to be regarded or recognized as a member of the family of nations. Thus, in 1898, when the Congress of

Ecuador passed a law declaring, among other things, that no person, whether native or foreign, should have any right of indemnity for damages incident to its military operations at home in restoring public order, the United States promptly pronounced the statute

> "generally and substantially subversive of the principles of international law by which, and not by domestic legislation, the ultimate liability of governments to one another must be determined,"

and further declared that

> "by such a declaration of rules for the guidance of her conduct in international relations Ecuador had placed herself outside the pale of international intercourse."

14. CUSTOMARY PROCEDURE WHEN A CONFLICT OF INTERNATIONAL RIGHTS ARISES.—*a.* Sometimes the acts of an offending state are such obvious and unmistakable violations of the sovereign rights of another state that no explanations are asked for, and resort is at once had to forcible measures of redress. The customary procedure, however, is for the offended state to make known its cause of complaint to the offending state and demand that justice be done, the urgency of the demand and the amount or character of the satisfaction demanded always being proportional to the views of the demanding state as to the gravity and importance of the injury alleged to have been sustained.

b. When the case is clear and there is no dispute as to the facts, reparation by the offending state is usually made with the greatest promptness by acknowledging its error, disavowing the act or acts of its subordinate officials, and offering such action, accompanied by such explanation and apology, as the situation seems to demand. If only a minor rule of little importance has been violated, the mere exchange of diplomatic notes is usually deemed a sufficient remedy. What at first appears to be an injury or insult may, upon further and more deliberate examination, be found to be merely a mistake, and not at all an act of malice or one designed to give offense. The circumstances may have arisen from unauthorized or unapproved acts of inferior persons, in which case such acts will almost invari-

ably be promptly disavowed by the government for which or in the name of which, such persons purported to act. In dealing with such questions, much depends upon the tact and moderation shown by diplomatic representatives. A little moderation, even if accompanied by considerable delay, will usually bring the offended party a just satisfaction, whereas rash and precipitate measures may often lead to serious consequences.

15. CONTROVERSIAL DISCUSSION.—If the case is not clear, and it frequently is not, a controversial discussion takes place, each state advancing arguments and citing authorities in support of that view which it holds to be in accordance with the demands of justice. These controversies are not usually settled at once. They may continue throughout a long period. That between England and the United States with reference to the right of search lasted more than fifty years.

16. MEDIATION AND ARBITRATION.—*a.* If the interested states seem unable to settle their differences in the customary way, they may resort to *mediation*; that is, they may refer the cause of difference to a disinterested power for decision or adjustment. The mediation may be asked for by the states themselves, or a third power may tender its good offices with a view to the maintenance of peace.

b. Sometimes, instead of the difference being referred to a disinterested power, it is referred to a tribunal composed of one or more persons. This is *arbitration.* A theoretical advantage of arbitration over mediation is that all suggestions of a mediator may be rejected by the litigant parties, whereas the decision of an arbitration tribunal to which the cause has been properly submitted is binding upon the parties concerned.

17. RETORSION AND REPRISALS.—*a.* If the dispute can not be settled amicably by the states themselves, and if neither mediation nor arbitration be resorted to, the next step may take the form of retaliatory measures known as *retorsion* or *reprisals.* Retorsion means merely the application by a state toward another state of the same rule of

conduct that has been applied by that state toward the other. Reprisals are not limited to like acts. They consist in the forcible seizure of property belonging to an offending state, or to its citizens or subjects, which may be found within the territory of the offended state or on the high seas. If the dispute is settled without war, the seized property is returned, but if war results it is condemned as prize.

b. Reprisals differ from retorsion not only in kind but in degree. Retorsion is resorted to when *imperfect* rights (as those depending upon the rules of comity) have been denied, whereas reprisals are resorted to when *perfect* rights (those depending upon statutory or treaty stipulation) are drawn into question, or when there has been an absolute refusal of justice. Reprisals are acts of violence and may be regarded by the state against which they are directed as amounting to a declaration of war. If war does not result, it is usually because such state regards the act as merely technical and manifests its willingness to redress the grievences of the offended state. Reprisals usually attain the desired ends without recourse to war, due in part to the fact that they are most frequently resorted to by powerful states against weak ones and very rarely by one state against another of greater or approximately equal strength.

18. EMBARGO AND PACIFIC BLOCKADE.—*a.* An embargo is the detention, by a state, of ships of commerce in some or all of its ports until the adjustment of an existing controversy. If the embargo is laid on the ships of the embargoing state it is called a *civil embargo;* if on the ships of another state, it is called a *hostile embargo.* The latter is a form of reprisal and follows the reprisal rule that, if war does not result, the ships are permitted to set sail as soon as the matter is adjusted, but, if war does result, the ships and their cargoes become prize.

b. A hostile embargo should be distinguished from a *pacific blockade* of the ports of an offending state, in which case force is displayed to such extent as not to permit vessels to depart therefrom until the controversy is settled.

19. WAR.—The ultimate step by a state to redress its injury is the suspension of all friendly relations with the offending state and a resort to such acts of hostility as are authorized by the laws of war. International law has nothing to do with the inherent rightfulness or wrongfulness of war, or with what constitutes a just cause for war, the only check upon these being international public opinion. It does, however, come within its province to determine how war between civilized states shall be carried on, and with what formalities it shall begin and end.

SECTION III

*Effects of a State of War**

20. EFFECT UPON BELLIGERENTS. — The principal effects of a state of war upon belligerents are as follows:

a. The belligerent states and their citizens or subjects are placed in a state of non-intercourse with each other.

b. Commercial intercourse between citizens or subjects of the belligerent states becomes illegal.

c. Each citizen or subject of one belligerent state becomes the *legal* enemy of every citizen or subject of the other.

d. Legal obligations arising out of contracts with the enemy's citizens or subjects, also partnerships and other business arrangements with them, are suspended during the continuance of hostilities.

e. Debts due the enemy's citizens or subjects are suspended during the war, but revive upon its termination.

f. Citizens of one belligerent state in the territory of the other may be required to depart or may be allowed to remain. The latter course is usually followed. Those ordered to go are allowed a reasonable time within which to remove their property. Those allowed to remain may be subjected to such special police

*The effects of a state of war really pertain to that subdivision of international law known as the *Laws of War*, a subject which is to be considered more in detail in the next chapter.

regulation and supervision as may be deemed necessary. The private property of those remaining is not confiscable so long as they conduct themselves properly.

g. Merchant ships of a belligerent in an enemy's port at the outbreak of war become prize. They were formerly allowed to depart with their cargoes and were allowed ample time to arrive at a home port or the port of a neutral. This rule was never followed by the United States, and it has now dropped into general disuse.

h. Treaties of alliance, of subsidy (obliging a state to furnish arms, ships, troops, money, or other aid), and of guaranty, made in anticipation of the war, come into effect.

21. EFFECT UPON NEUTRALS.—*a.* Strictly speaking, the relationship existing between two states at any time must be either that of peace or war. International law recognizes no intermediate condition. Neutrality is of comparatively recent growth. Among the ancients, war was the normal state of mankind. All nations participated in it, either as principals or allies. Had any state at that time attempted to compel respect for neutral rights even remotely resembling those pertaining to the neutrality of today, the belligerent against whom the attempt was made would have regarded it as an act of war. This state of affairs continued until about the close of the Middle Ages, at which time the modern idea of state sovereignty and territorial independence began generally to be recognized.

b. Today the status of neutrality is involuntary. It is imposed upon a non-belligerent state by the mere fact that war exists between other states with which it is at peace. Neutrality becomes operative upon the declaration of war or outbreak of hostilities, and is publicly assumed and made known by publication by the neutral of a proclamation enjoining its citizens or subjects from participating in the operations of the war. War used to be declared with great formality in order that neutrals might be advised of its existence. This is not so essential in these days of rapid communication, for the fact that strained relations have arisen between states now becomes known at once throughout the civilized world. It is known when diplomatic intercourse ceases, when ministers are withdrawn, and when the armies and navies of the contending states are being mobilized and

placed upon a war footing. Nevertheless, the rule laid down by the second Hague Conference was that hostilities "must not commence without previous and explicit warning, in the form of either a declaration of war with the reasons assigned for it or of an ultimatum with conditional declaration of war." This rule was violated during the World War by Germany, Austria, Turkey, and Bulgaria. However, regardless of whether a formal declaration of war is necessary between the contending states themselves, each is obliged to give notice of its intentions to its own citizens or subjects, and to neutrals. This notice is usually given by means of a proclamation which announces the date after which hostilities will be considered to exist.

c. With respect to the occupations in which the inhabitants of neutral states may be engaged at the outbreak of war, it is to be remembered in connection with the production, manufacture, or distribution of articles designed primarily for war uses that such articles, if found at sea *en route* to a hostile destination, become contraband and are liable to capture and condemnation by a belligerent. As to trade in articles *not* designed primarily for war uses, if carried on with certain ports against which a belligerent decides to exercise the right of blockade, any attempt to continue such trade after such right has been exercised would constitute a violation of the blockade, with attendant liabilities and penalties as prescribed by the law of nations or as stipulated in particular treaties. In all other cases, the undertakings of the inhabitants of neutral states are not legally affected or interrupted by the fact of war. With reference to the manufacture of contraband articles within neutral jurisdiction, Thomas Jefferson, then Secretary of State, made use of the following language in a statement to the British Minister on May 15, 1793 (III Jefferson's Works, pp. 558-560):

> "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings—the only means, perhaps, of their subsistence—because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in prac-

tice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations. It is satisfied with the external penalty pronounced in the President's proclamation—that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies."

The Supreme Court of the United States, in the case of The Bermuda (3 Wallace, 514), announced that

"Neutrals in their own country may sell to the belligerents whatever belligerents may choose to buy. The principal exceptions to this rule are that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared, within their territory, armed ships or military or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey, in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination and to become part of the common stock of the country or of the port."

d. The practice and attitude of nations is not to enact legislation prohibiting their citizens or subjects from trafficking in articles which may become contraband of war, but simply to regard such trade as carried on at the risk of those engaged in it. The law of nations exposes contraband-carrying ships and their cargoes to seizure and confiscation, and deprives persons engaged in such traffic of the right to look to their home governments for protection. Some continental writers claim that a certain amount of governmental regulation and interference in this respect is necessary, but the rule adopted by the Second Peace Conference at The Hague was that

"a neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which can be of use to an army or fleet."

A similar rule was adopted respecting undertakings on land.

22. EFFECT UPON HOSTILE TERRITORY OCCUPIED BY OUR FORCES.—*a.* We have seen that international law has to do with the events leading up to war, with the manner in which the war shall be conducted once it is under way, and with

the formalities with which it shall come to an end. When hostilities cease, it is usually the case that at least one of the belligerents will be in possession of hostile territory which he may intend to hold either temporarily or permanently. The holding of the conquered territory pending the determination of its fate at the peace table, and thereafter as may be necessary to the proper disposition of such territory, is regarded as mere military occupation. Castine and Tampico have already been cited as examples of temporary occupation. A case of permanent occupation is that of California, with reference to which the authority and jurisdiction of Mexican officials terminated on July 7, 1846. On that day the United States forces took possession of Monterey, the capital of California, and soon afterwards occupied the principal portions of the country. The military occupation continued until after the treaty of peace (Guadalupe Hidalgo) in 1848.

b. The fact of military occupation causes the old civil government to cease, and it is not only the right but the duty of the conqueror to put a government in its place that will provide for the maintenance of civil order and for the protection of the rights of the inhabitants. He may put back practically the same old civil government, with such modifications as the military situation demands, or he may establish a new and completely different system. Just what would be appropriate under different situations will be taken up later in the chapter on military government. It should be emphasized at this time, however, that whatever form of government is established is that of the conquering state. In appearance, and for all practical purposes, the old government may be continued, but, in theory and in fact, there is an absolute break which transfers the source of the government to the conqueror. He merely adopts and imposes it as his own. During such period as may intervene before he announces his intention in this respect, the old municipal laws of the conquered territory, such as affect the private rights of persons and property and provide for the punishment of crime, are regarded as adopted and continuing in force until suspended or superseded.

c. On the occupation of New Mexico in 1846, General Kearney, commanding the American forces, at once instituted a provisional government over that territory. The validity of the courts and code of laws established in connection therewith was later upheld by the Supreme Court of the United States in an opinion which stated that they not only displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them, but that they continued in force, even after the termination of the war, until expressly revoked or modified by direct legislation, the provisional government being regarded as exercising its power in the meantime through delegation by Congress.

23. PRIVATE RIGHTS NOT IMPAIRED BY CONQUEST.—*a.* War being only a relation of state to state, it follows that one belligerent who makes conquests in the territory of another cannot acquire more rights than were possessed by his predecessor. The right of conquest therefore cannot affect the property of private persons. The invaded or conquered state could not possess any right over such property, so the invader or conqueror cannot legitimately exercise any right over it. It has been held by the Supreme Court of the United States that, when New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their rights of property and their relations with each other remained undisturbed. Likewise, the same court held as to California that the rights acquired by individuals under the prior Mexican and Spanish laws were "consecrated by the law of nations." Of course, the acquisition must have been *bona fide.* A grant of lands in California made by the chief of an administration when he was in flight from the seat of government, and his cause about to be, as it was soon afterwards, completely overthrown, was not sustained.

b. Rights acquired and relationships entered into by individuals pursuant to the laws of a *de facto* government (the one actually in power, whether rightfully or wrongfully, for the time being) are valid after such government has ceased to exist, provided the acts which brought them

about did not have to do with the prosecution of the war. Thus it has been held that the Confederate States had no existence except as a conspiracy to overthrow lawful authority, so when their government was ovethrown it perished totally, leaving no laws, no statutes, no decrees, no authority which could give support to any contract or act done in its service or in aid of its purpose, or which contributed to protract its existence; but as to other acts or contracts it is recognized that the supremacy of the Confederate government actually existed over certain territory, and that individual resistance to its authority at that time would have been both futile and unjustifiable. In the face of an overwhelming force, obedience in certain matters became a necessity and in the interests of order and duty. Of this character may be mentioned the preservation of order, maintenance of police regulations, prosecution of crimes, protection of property, enforcement of contracts, celebration of marriages, settlement of estates, transfer and descent of property, and similar kindred subjects. These were not invalid merely because the government which regulated them was in hostility to the Union. The existence of war did not relieve those within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with the civil government or the regular administration of the laws. These may indirectly or remotely have promoted the ends of the *de facto* unauthorized government organized to effect a dissolution of the Union, but they were nevertheless without blame unless entered into with the actual intent of furthering the invasion or insurrection.

c. The important fact to be gathered from this paragraph is that the government of the United States not only holds that individual rights derived from a duly constituted prior foreign government to which it has succeeded are "consecrated by the law of nations," even as against rights claimed under its own subsequent laws, but it has applied the same rule in the case of an insurrectionary government formed within its own borders.

CHAPTER II

The Laws of War

SECTION I

Origin and Development

1. PATRIARCHAL GOVERNMENTS.—*a.* At some time during the primitive period of man's existence there came a time when he began to realize that, by giving up certain individual liberties and subordinating them to community interests, he would receive in exchange a greater degree of safety and a larger measure of happiness. He sought the most natural association available, and thus it was that men banded themselves together on the basis of family ties, thereby instituting the patriarchal system of government. The ruler was in all cases the old father, whose place was ultimately taken by his eldest son, whose place was in turn taken by *his* eldest son, and so on down through the family lineage.

b. After this fashion was born the earliest and simplest form of our modern civilized state.

2. NOMADIC TRIBES.—The next step after patriarchal governments consisted in the alliance of several closely related groups or families for mutual protection against similar groups. In those days these groups wandered about seeking pasturage for their herds and flocks, and what they found was theirs if they could take it by physical force from less powerful communities. This was the beginning of war. It consisted in fighting other tribes to gain the real or supposed necessities of life. The vanquished tribe was usually effaced from the earth. The men were killed and the women and children either sold into slavery or used as was considered would best serve the interests and desires of the conqueror. All the captured herds and pastures and other property passed absolutely to the victor. Struggles of this kind were the normal existence.

3. THE STABILIZING INFLUENCE OF AGRICULTURE.—*a.* As tribes multiplied, the pastures grew more and more scarce. The wanderer then discovered that he could plant and grow things that were good to eat and fit to feed his flocks, and that many of his other needs could be supplied in this way. He found this to be much easier and more peaceable than roaming about and fighting hard for what he got. Agricultural pursuits thus had their dawn. But the

pursuit of agriculture means a settled existence. It is inconsistent with nomadic life. The latter therefore waned, and fixed communities became the rule along the river valleys where the soil was fertile and water was plentiful. The need for fighting strength was no longer so great as in the nomadic days, being thereafter necessary principally for defense against the few wanderers that still remained, and against encroachments upon their land by neighboring settlements.

b. The early form of government was always of the autocratic kind, the ruler continuing individually to direct the whole of his people's lives so long as it was possible for him to know all of his subjects by name. His commands were absolute, his will law, and his sense of right and wrong the sole court of justice to which appeal could be made.

4. THE GROWTH OF CITIES.—*a.* A more concentrated form of human existence, where comparatively large numbers of persons grouped themselves together within a comparatively small space, did not come into being until ideas of manufacture and trade began to develop. If a member of a tribe which had ceased its wanderings and settled down to agricultural pursuits had more of one kind of an article than he could use, he found it to his advantage to exchange this surplus for something of which he had less than sufficient to meet his needs. This involved knowing with whom such an exchange could be effected most advantageously, and this in turn involved much travel in search of customers. It was therefore soon found to be more convenient to have a common meeting ground where all who had surplus products might repair and barter as they desired. The next discovery was that if certain persons would remain permanently at the common meeting place to take this surplus and give what was desired in return, it was still more convenient than it was for each to stay at the meeting place waiting for a person to come along who desired exactly what he had to dispose of and who would give him exactly what he wished in exchange therefor. Then, as mankind living in the agricultural state began to think of improving his living con-

ditions, he found that the produce of his flocks and herds, as well as some forms of the produce of his fields, could be made into better clothing if he sold it to someone who had better facilities than himself for making clothing. He therefore took his raw material to the manufacturer, who, naturally, following the main sources of supply, grouped his plants at the trading centers, and exchanged it with him for his better manufactured product; or he sold it to some middleman who made it his business to handle the manufactured product and deal directly with the consumer.

b. So it was that cities were but the natural result of the growing complexities of human existence consequent upon the abandonment of nomadic forms of life, and so it is that trade and manufacture furnish us with the immediate grounds for understanding the inception and growth of cities.

c. Sometimes one city with its surrounding country would be all that one particular tribe would develop. Sometimes a tribe would develop several cities, which, with their surrounding country, would constitute a kingdom, the latter extending its power and authority thoughout the circumscribed territory.

5. THE DEVELOPMENT OF COMMERCE.—The growth of trade did not stop with the development of cities, or even with combinations of cities formed or united into kingdoms. Trade begat the desire for more trade, not only from within but also from without, and this engendered the spirit of commerce together with that form of selfish enterprise known as trade conquest, so common today. The immediate result was the establishment of trade routes through territory not under the jurisdiction of the city or kingdom. The opening and shutting of these ancient trade routes, an interesting subject all by itself, caused more of the great wars of history than any other one thing. Trade expansion, particularly foreign trade expansion, meant the same in those days that it does today—power, wealth, prosperity, comfort, influence —while the loss of trade, due to the closing of advantageous trade routes, or due to other eventualities, meant exactly the reverse and was a thing *par excellence* to fight about.

6. THE WHOLE WORLD AS ONE STATE.—Rome, after the downfall of her rival, Carthage, and when she had arrived at her glorious estate as mistress of the known world, marks the culmination of this period of the race's development which began back in the dim twilight of the Earth's being, far in front of historic times. Here we have a monster state of the highest organization and attainment, surrounded by examples of every stage of development through which the human race had passed, and ruling them all as their absolute master.

7. WAR'S PART IN THE EVOLUTION.—War played a gigantic part in this evolution, and we may say that, up until the time when Rome reached her zenith, war was the natural state of mankind. In the words of Sir Henry Sumner Maine, "war appears to be as old as mankind, but peace is a modern invention." Through all the thousands of years that it took to produce the Roman flower of civilization, little had been done to alleviate the miseries caused by war. The rule continued the same, with a few exceptions presently to be noted, that the vanquished with all his family and goods became the absolute property of the conqueror, who might kill or enslave or use or destroy, as his own interests seemed to require. Whenever the converging interests of communities brought on war, the weaker could expect only extinction of race and confiscation or destruction of property. Fighting without quarter was the rule. Pillage, rape, and general destruction were as much the component elements of war as were the clashes of hostile armies in the field.

8. EARLY RULES GOVERNING WARFARE.—*a.* Certain rules of warfare were recognized from very early times and were followed more or less closely. For instance, about the time of Alexander's greatest power, the Hindus in conducting their wars studiously refrained from injuring the husbandman or his crops. The Greeks and Romans made use of formal declarations of war. Sometimes they released their prisoners on parole or for ransom. They also appear to have denounced acts of violence against women and children.

b. There is said not to have been any great difference between the character of the warfare waged by the armies of the later Roman Empire and that of the Germanic tribes which overran it. The latter apparently had reached the same stage as the former with respect to abiding by certain rules the general tendency of which was toward the alleviation of the horrors of war.

9. THE BEGINNING OF THE LAWS OF WAR PROPER.—*a.* The Germanic invasion of the Roman Empire was followed by the Mohammedan invasion of Europe. The lawbook of the Mohammedans was the Koran, but this was supplemented by the decisions of Mohammed and his successors. To meet the needs of the different peoples whom the Mohammedans conquered, this body of law was codified and the result bears tribute to the brilliant line of jurists who accomplished it. That portion covering the laws applicable to a state of war is of considerable magnitude and is the first example we have of a systematic code of written laws of war.

b. According to this code, war was to be made once a year on the unbelievers, on the unorthodox, and in tributary countries which had failed to live up to their obligations. There were injunctions against the use of incendiary projectiles, cutting trees belonging to the enemy, intercepting his water supply, and the poisoning of wells and water courses. The killing of women and children or the insane, and the mutilation of prisoners without orders, were all absolutely forbidden. However, minors of both sexes, and women, still became the immediate and absolute property of their captors. The disposition of adult male prisoners was reserved to the commander. They might be sent back, released on ransom, exchanged, or reduced to slavery. The giving of food and drink to prisoners was compulsory. It was recommended that they should not be tortured, and their heads were not to be carried from the field of battle. The actual practice of the Mohammedans was not always up to the standard of their code, but their method of conducting warfare along these lines compared favorably with that of other nations of the period.

10. THE PERIOD OF ABASEMENT.—The great influx of barbarians into Western Europe in the fourth and fifth centuries, known as the "wandering of the nations," introduced what was, perhaps, the lowest estate to which mankind has descended since the beginning of recorded history. The period is distinguished by the abasement of everything high and noble in the existence of organized society, and by the complete obscuration of the higher mental and moral nature of mankind. The lawlessness of the sea even eclipsed the disregard of all law that prevailed on land. Piracy was common, and truces and treaties of peace had but little effect on maritime hostilities. As we shall see, however, this was only the darkness just preceding the dawn.

11. INFLUENCE OF CHRISTIANITY AND CHIVALRY.—The reign of Charlemagne had an important uplifting influence. After his death there was a partial relapse to the barbarities of former times, but the restrictions which the Church and the kings of France endeavored to place on private wars of the still later period tended strongly to reinstate the more humane conditions. The practice of reprisals still remained widespread, but the enslavement of prisoners was quite generally giving way to ransom. Formal declarations of war came to be recognized as obligatory. Christianity and the development of chivalry had a profound influence in ameliorating the conduct of war generally. Profession of the principles of the Christian religion, respect for sacred things, honesty, loyalty, fairness, and honor were essential qualities of the true knight, and they were so drilled into the aristocracy of the time that they became ingrained in all that was best of the life of Christian Europe. Piracy, however, had not by any means been stamped out at the close of the fourteenth century.

12. CHANGE FROM MEDIEVAL TO MODERN TIMES.—Among the things which marked the change from medieval to modern times was the intense interest that began to be taken in everthing the ancients had to teach of the art of war. Especially in England, Spain, and Italy, there was an outpour of literature treating of all manner of military sub-

jects. Some important works on the laws of war appeared during this period, the most notable being that of Grotius, a Hollander, published in 1625. (See Chap. I, par. 4.)

13. BIRTH OF THE DOCTRINE OF MILITARY NECESSITY.—The fundamental principle laid down by Grotius was that "measures that are necessary to a lawful end, we have a right to use in war". In other words, *useless* injury is *unlawful.* Here we find introduced into the laws of war for the first time the great doctrine of *military necessity.* It means that the nations of the earth go to war for the purpose of accomplishing some definite end, not for the destruction of their enemies, and that only those things are lawful in the conduct of war that are necessary to attain the object or end of the war. This marks a tremendous advance beyond the laws of war of the time of the Romans, and also beyond the doctrine announced by Machiavelli, as late as 1513, to the effect that ordinary moral rules did not apply in matters of state.

14. THE DECLINE OF PILLAGE.—Passing on, we find a material advance made in the conduct of war when Gustavus Adolphus during the Thirty Years' War substituted contributions for pillage. Theretofore, the practice of pillage had been quite general. Contributions were found to be preferable because they were more convenient for both the conquered and the conqueror, and for the further reason that they relieved the non-combatants of some of the horrors of war by permitting the burden to be distributed where it could be borne with the least hardship.

15. VIEWS OF THE REVOLUTIONARY WAR PERIOD.—The eighteenth century saw the death of the practice of ransom and the birth of provisions for the better care of the sick and wounded. During the war for American Independence, Great Britian promulgated the following as recognized laws of war:

a. An army which has occupied the country of an enemy may demand provisions there and levy contributions and, to force the inhabitants to satisfy these demands, may resort to military executions; that is, ravage and destruction.

b. When the enemy, being in his own country, finds it to his advantage to prolong the war and evade coming to action, it is

permissible to ravage the country in his presence to make him expose himself in attempting to protect the country.

c. When, in war, one is not able to destroy the adverse party or lead him to reason without reducing his country to distress, it is permitted to carry distress into his country.

d. When the inhabitants are themselves the principal parties to the war, which happens in the case of a revolt or a rebellion, they are themselvse the principal objects of hostilities which one is under the necessity of directing against them to attain the end of the war.

16. MODIFICATION OF THE DOCTRINE OF CONQUEST.—The principal effect of the Napoleonic Wars on the laws of war was in connection with conquest. The old doctrine was that the ownership of invaded territory, like that of other forms of property, passed without qualification to the belligerent who had taken the territory securely into his possession. To constitute secure possession, the end of the war was not essential. It was presumed that a belligerent always intended to appropriate all the territory that he could lay his hands on. This presumption was shattered by the French Revolution, and a renunciation of wars of conquest was embodied in the Constitution of 1791. Thereafter it became settled law that the ownership of territory is not gained by military occupation but by terms of the subsequent treaty of peace.

17. THE DECLARATION OF PARIS, 1856.—*a.* All of the early efforts for the amelioration of the hardships of war were contained in treaties that were entered into by the belligerents, usually with reference to a single battle. There are records of hundreds of such treaties. Only rarely did they include the duration of the war. The first real step towards the codification of the laws of war, a step which had been advocated for many years, came with the Congress which assembled at Paris in 1856 at the end of the Crimean War. The result was the "Declaration of Paris," signed by the representatives of England, France, Russia, Prussia, Austria, and later by Turkey and Sardinia. The declaration was quite generally accepted by the other powers. Its four articles were:

(1) Privateering is and remains abolished.

(2) The neutral flag covers enemy goods, except contraband of war.

(3) Neutral goods, except contraband of war, are not liable to capture under the enemy's flag.
(4) Blockades, to be binding, must be effective.

b. The declaration marked a complete revolution in the maritime policy of Great Britain, which nation had theretofore insisted on her right to seize enemy property on the high seas, whether in neutral ships or not, on the grounds that to permit it to be otherwise would cripple her power at sea by allowing enemy commerce to be carried on in neutral ships without molestation.

c. The United States, on account of the strict prohibition against privateering, refused to sign the Declaration of Paris unless the articles were so changed as to exempt all private property at sea from capture, except in cases of contraband or where the property was involved in the violation of an effective blockade.

d. The second and third of the articles above mentioned were departed from by Germany during the World War. France and Great Britain departed from the second by way of retaliation. These rules, nevertheless still have behind them the express consent of most civilized states and the tacit consent of the remainder.

18. GENERAL ORDER NO. 100, A.G.O., 1863.—This order is entitled *Instructions for the Government of the Armies of the United States in the Field,* and is probably the most important of all documents on the subject of the rules of land warfare. It was prepared by Professor Francis Lieber in 1863, and not only served as our guide in the conduct of war continuously from that time until the publication of our War Department manual on the Rules of Land Warfare in 1914, but formed the basis, to a much greater extent than is generally recoginized, of the rules subsequently established by the Hague Conventions.

19. CONTRIBUTION OF OUR CIVIL WAR PERIOD.—*a.* Aside from General Order No. 100, just above mentioned, the net contribution of our Civil War period to the laws of war consists in the confiscation and sequestration acts of the Federal and Confederate Congresses, respectively, the cap-

tured and abandoned property acts of the Federal Congress, and the numerous decisions of our Supreme Court on questions of blockade, contraband, seizures, and the principles of military government.

b. The conduct of the war by the forces under General Grant coincided exactly with the second, third, and fourth principles stated in paragraph 15, *supra.*

20. THE EARLY GENEVA CONVENTIONS.—*a.* The efforts of the Geneva Society of Public Utility resulted in the assemblage, in a semi-official conference, of military and medical men, about half of whom were representatives of the war departments of their respective governments, for consideration of the amelioration of the condition of the sick and wounded in warfare. The first conference sat at Geneva in 1863. Its work consisted of a decision to create Red Cross societies, and the expression of a wish for the neutralization of the sick and wounded in war and of the persons and property connected therewith. The conference was not a diplomatic one, but it invested the Geneva Committee with the power to take steps toward the calling of a congress which should represent the governments themselves. This was done, with the result that delegates from sixteen countries met at Geneva in August of 1864. At this meeting a treaty was signed embodying the general views expressed by the conference of the preceding year. This treaty is known as the "Geneva Convention," and now binds practically all the outstanding powers of the world.

b. Additional articles were adopted by a conference which met in 1868, but they were never ratified. They were observed by France and Germany during their war of 1870-1871, however, and by the United States and Spain during the Spanish-American War.

21. THE DECLARATION OF ST. PETERSBURG (INTERNATIONAL MILITARY COMMISSION), 1868.—*a.* Almost simultaneously with the appearance of the Additional Articles of 1868 above mentioned, the famous Declaration of St. Petersburg was drawn up. In 1863, a bullet intended to destroy caissons of ammunition, had been introduced into the

Russian army. It was constructed, like the bullet used in hunting the tiger and elephant in India, so that it would explode on coming in contact with hard substances. Four years later another bullet which would explode on coming in contact with the human body had been proposed to the Russian government. The Russian Minister of War, being strongly of the opinion that the use of such bullets would unnecessarily increase the miseries of war, proposed to Emperor Alexander that the use of explosive bullets either be renounced completely or limited to those which would explode by means of a percussion cap on contact with hard substances. The idea of the Minister was approved by the Emperor who, to give it wider application, convened a conference of the powers at St. Petersburg.

b. The labors of this "International Military Commission," as the conference styled itself, resulted in a declaration, acceded to by most European states, to the effect that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object of accomplishment of war was to weaken the military forces of the enemy; that for this purpose it was sufficient to disable the greatest possible number of men; that this object should not be exceeded by the employment of arms which uselessly aggravated the sufferings of the disabled men or rendered their death inevitable; that the employment of such arms would be contrary to the dictates of humanity; and that, therefore, the contracting parties engaged themselves to renounce the employment by their troops in war of any projectile of less than 400 grammes in weight (about 13½ ounces) which was either explosive or charged with fulminating or inflammable substances.

22. THE BRUSSELS CONFERENCE OF 1874.—In 1874, the President of the Society for the Amelioration of the Condition of Prisoners of War, which had been formed at Paris in 1872, requested that delegates be sent to a conference to be held in Paris for the purpose of considering means for the alleviation of the condition of prisoners of war and to

prepare the way for an official congress which should formulate an international treaty on the subject. Alexander II of Russia, who had given orders that a project be drawn up which should cover practically the entire war practice on land, took up the suggestion and arranged to have the movement carried on by the Russian government. The result was the Brussels Conference of 1874 which was composed of representatives from nearly all of Europe. The conference took up the project submitted by the Russian government and modified it considerably. An effort was made to abolish contributions, but without success. It was finally decided that requisitions and contributions should be limited to the necessities of the case. The British government refused to ratify the resulting declaration, objecting to certain articles concerning the use of irregular troops. The meeting disclosed two opposing views as to the kind of troops it should be permissible to use in war. States maintaining great military establishments desired to make it unlawful for an invaded country to use irregular forces or to organize *levees en masse* among the inhabitants. States maintaining small regular establishments held out just as strongly for almost any kind of patriotic resistance to invasion. While the conclusions of this conference never reached official recognition, the discussion bore great weight in the later Hague Conventions which will be referred to presently. In fact, these subsequent Hague Conventions did little more than adopt the principles enunciated by the Brussels Conference as far as the latter went.

23. THE INSTITUTE OF INTERNATIONAL LAW, 1880.—The Institute of International Law, which carried among its members some of the leading international lawyers of the world, met at Oxford in 1880 and prepared a *Manual of the Laws of War on Land* which was somewhat of a modification of the Brussels Conference. Their labors cannot be considered as lost (see next paragraph), but the code as such was never adopted by any nation.

24. THE HAGUE CONFERENCE OF 1899.—*a.* Shortly after the close of hostilities between the United States and Spain, the Czar of Russia issued an invitation for a confer-

ence "which should seek the most effectual means for securing to all peoples the benefits of a real and durable peace, and above all, for putting an end to the progressive development of the present armaments." The conference met at The Hague on May 18, 1899. Twenty-six powers were represented. Thus, for the first time in history, a great international assembly met for the express purpose of acting as a sort of rudimentary legislature by considering not one question alone, but many, and making laws thereon for the whole family of nations. One of the subjects suggested for consideration was a revision of the Brussels draft of 1874. The result of the conference was the giving of international obligation to a body of rules which were, for the most part, exactly similar to those which had been adopted at Brussels, saving modifications derived from various sources, particularly from the *Manual of Oxford* of 1880.

b. In addition to the rules adopted as above stated, a final Act of the Conference set out three distinct declarations. The first prohibited the throwing of projectiles or explosives from balloons for a period of five years; the second prohibited the employment of projectiles the sole object of which was the diffusion of asphyxiating or deleterious gases; and the third prohibited the employment of bullets which expand or flatten easily in the human body.

25. THE GENEVA CONVENTION OF 1906.—The next step in the development of a codification of the laws of war was taken by the Swiss government which invited the powers signatory to the Geneva Convention of 1864 to a conference for the purpose of discussing the advisability of a revision of the rules adopted at that time. The conference met in June, 1906, thirty-seven powers being represented. A new convention was signed on July 6, 1906. It remedied various serious faults which had been found to exist in the earlier convention, and cleared up numerous misunderstandings growing out of uncertainty as to the meaning of certain words and phrases which rendered some of the earlier provisions unworkable.

26. THE SECOND HAGUE PEACE CONFERENCE, 1907.—*a.* The second peace conference, which met at The Hague in

1907, was proposed by the President of the United States "for the purpose of giving fresh development to the humanitarian principles which served as a basis for the work of the first conference of 1899." The initiative in actually calling the conference together was courteously surrendered by President Roosevelt to Nicholas II of Russia. Forty-seven nations were invited to send representatives, and all but three complied.

b. The results of the work of this conference were voluminous, touching a great many of the subjects that required regulation, and form the last great effort to reduce the laws of war to a code and secure for the same the general recognition of the civilized world. We need not refer to them in detail at present as much of their substance constitutes the subject matter of discussions elsewhere in this text. It is enough to say of them here that they included much of the work that had already been done by former conferences, particularly that of the Hague Conference in 1899, and that many new provisions of importance were added.

27. CONFERENCE ON THE LIMITATION OF ARMAMENT, 1921.—At the invitation of President Harding, representatives of the Principal Allied and Associated Powers of the world assembled at Washington in 1921 to consider the subject of the limitation of the armaments of nations. Seven treaties were drafted and agreed upon by the representatives there assembled. One of these treaties had to do with the use of submarines and noxious gases in warfare. (See Sec. V of this chapter, par. 41.) The representatives also approved twelve resolutions (not in the nature of treaties, so requiring no ratification by the governments concerned) the first one of which was for the assembling of a commission of jurists to amend the laws of war. This commission assembled in 1922 and held its last session at The Hague on February 19, 1923. Its work was limited to recently developed implements of war. (See Appendix A, No. 34.)*

*It should be observed at this point that the rules adopted and the declarations announced by the several conferences discussed in this and the preceding paragraphs were not to be binding upon the several nations until assented to by them.

28. PRESENT SITUATION RESPECTING THE LAWS OF WAR.—In spite of all the efforts related above, it must be admitted that there is as yet no complete code of the laws of war in existence. Other efforts than those mentioned, but which have not received official sanction, have been made to cure defects and fill up gaps, particularly the Declaration of London of 1909 and those made by the Institute of International Law of more recent years. All that can be said is that a few of the customs of war have been incorporated into something of a code, leaving much to the realm of the common or unwritten branch of the custom and laws of war.

29. TREND AND POSSIBLE FUTURE DEVELOPMENT.—*a*. It is a fact that since medieval times the laws of war have undergone a great change in the direction of the amelioration of the conduct of war generally. This development has not been brought about entirely by moral considerations. An important factor has been the necessity of discipline in modern armies. The first well disciplined modern army was that of Gustavus Adolphus. During the course of the next 100 years, other European armies found it necessary to maintain discipline according to law in order that they might be successful. That moral considerations have been the dominant force in bringing about their upward trend, however, cannot be denied.

b. One of the most impressive features of the laws of war is that in their influence on the conduct of war they stand apart. Improvements in strategy, tactics, munitions, equipment, and other adjuncts to carrying on war are destructive in their nature. That fact is not altered by the contention that this or that species of weapon or bullet is more humane than some other form of the same thing. The laws of war, on the other hand, tend to preserve and ameliorate rather than to overthrow and destroy; and, while they have moved upward hand in hand with the growth and development of the conduct of war along other lines, their effect has been to continue, so far as possible, the normal and well balanced conditions of peace, not only with respect to neutral nations but also with respect to those nations actual-

ly in belligerency who are playing no direct part in the clash of arms. The laws of war have even gone farther than this. While recognizing the right of the nations at war to destroy human life in battle and to wound the members of the enemy's army in active conflict, yet the moment one of those members is placed *hors de combat,* either by reason of wounds or capture, the laws of war step in and shield him from further harm until his legal status is so changed that he again becomes an active element.

c. It is useless to speculate upon whether in this interplay of forces the laws of war with their ameliorations on the one hand and the implements of war with their intensive destructive powers on the other will eventually result in victory for the former with the accompaniment of a perpetual world peace. The only thing than can now be said is that the laws of war constitute an imperfect manifestation of what is best in modern civilization, and seem to strive for still higher levels with each stage of development of the human race.

SECTION II

General Survey of the Modern Laws of War

---

30. POSITION IN THE REALM OF LAW.—*a.* It is necessary to an understanding of the modern laws of war that we fix in our minds their position in the general scheme of the affairs of the civilized world. They are not a part of the municipal law. Since they have to do with the relations of states, they constitute a subdivision of international law.

b. We have already seen that international law embodies those rules of action which are acknowledged by civilized states as controlling in their dealings with each other,

and that one of its objects is the avoidance or mitigation of the miseries of war. During peace its influence is exerted in the direction of preventing war altogether. During war it is exerted in the direction of causing hostilities to be conducted along humane lines, and also of securing the observance by nations not at war of certain lines of conduct which have been determined upon as benefitting neutrals. War situations, therefore, bring into play two subdivisions of the rules of international law, one of which has to do with the attitude of neutrals toward each other and toward each of the belligerents, and the other of which governs the conduct of the warring states in their operations against each other as well as the conduct of military government. The last of these two subdivisions is the province of the laws of war.

31. DEFINITION.—The laws of war, then, may be defined as that subdivision of international law which prescribes the rights and obligations of belligerents, or, more broadly, those principles and usages which, in time of war, define the status and relations not only of enemies, whether or not in arms, but also of persons present upon the theater of active military operations and persons under military government, and which authorizes their trial and punishment when they become offenders.

32. DISTINGUISHING CHARACTERISTICS.—*a.* The laws of war are unlike military law proper in that they are not comprised in a formal written code, but consist mainly of general rules derived from international law, supplemented by acts and orders of the military power. They are also quite unlike and independent of the ordinary law. In the actual theater of active military operations, for example, the ordinary laws of the land are superseded by the laws of war. The jurisdiction of the civil magistrate which normally upholds the ordinary law is there suspended and military authority and force are substituted in its place. Even the highest law of our land, the Constitution itself, during a crisis or grave national emergency, may, for a time, in the theater of active military operations, be apparently supplanted by the laws of war. Thus in Varner

vs. Arnold (83 N.C. 210) the court said, referring to the Constitution, that during the Civil War "Its voice was hushed and its power suspended amid the din of arms."

b. The term "Laws of War" is, in a way, a misnomer. The word *law* gives us two quite definite mental impressions. One is that a rule has been laid down by superior authority, and the other is that it must be obeyed at the peril of punishment, for disobedience, by the power which laid it down for guidance. It is perfectly clear that the rules of international law are not laid down by superior authority, and that they are not enforceable on sovereign states by any legally constituted superior power. Why, then, does a sovereign state live up to rules which may have become inconvenient or irksome to it? There are a number of forces which operate to secure obedience, even though they do not penalize in the ordinary sense. In peace, these forces consist of the pressure which the better and more moral element of the citizens of a state will bring to bear on its central government to compel right action, the ever-present likelihood that the injured or offended people will take action through their central government by way of a declaration of war or something of that nature to secure proper treatment and respect for their rights, and the view that international public opinion will take of the situation. In war, these forces consist principally of public opinion in neutral nations, and the possibility that the enemy will resort to reprisals or some other form of retaliation. These are subtle but very effective forces. They are easily recognizable in the affairs of our daily lives, where they are not less potent than in the affairs of the great modern states.

33. WHERE THE LAWS OF WAR MAY BE FOUND.—The laws of war have been formulated in special treaties and discussed in a series of authoritative publications which have already been considered in Section I of this chapter. Of these, and official manuals on the subject in which extracts may be found, the following may be listed here for the purpose of convenience:

a. Instructions for the Government of the Armies of the United States in the Field.—Lieber. (Published in G.O. No. 100, A.G.O., 1863.)

b. Geneva Convention of 1864.
c. Declaration of St. Petersburg of 1868.
d. Project of the Brussels Conference of 1874.
e. Manual of the Laws of War on Land, prepared by the Institute of International Law, 1880.
f. Declaration of The Hague Conference of 1899.
g. International Red Cross Convention, Geneva, 1906.
h. Second International Peace Conference, The Hague, 1907.
i. Rules of Land Warfare, 1914.

(NOTE.—Important extracts will be found in No. 34, Appendix A, of this text.)

34. TOPICAL SUBDIVISIONS.—For the purposes of this text, the laws of war may be considered as topically subdivided as follows:

a. The laws of war as affecting the rights of our own people.
b. The laws of war as affecting intercourse between enemies.
c. General principles governing the conduct of war.
d. Military government.
e. Martial law.

The first three of these are considered briefly in the next three sections of this chapter. The last two are covered in Chapters III and IV, respectively.

SECTION III

Laws of War as Affecting the Rights of Our Own People

---

35. THE TAKING OR DESTRUCTION OF PRIVATE PROPERTY.—*a.* In time of war, when there is urgent necessity or immediate public danger, the military commander may appropriate such private property of our own citizens, even in our own territory, as may be needed for the use or subsistence of our army or for defense against the enemy, and he may seize or destroy *any* private property to keep it from falling into the hands of the enemy or from being availed of by him for attack or defense.

b. It is the emergency which gives this right, but the right is not given by all emergencies. The exigency must be imminent, not contingent or remote, and the danger immediate or impending, or the necessity for the public service must be so urgent as not to admit of delay, otherwise the taking or destruction will not be justified and the individual commander (not the government) will be held to be a trespasser and liable in damages to the owner.

c. Ordinarily, property taken by the government must be paid for by the government, for our Constitution provides that private property shall not be taken for public use without due compensation. This, however, should be distinguished from the destruction or damage to private property incidentally occasioned by legitimate operations against an enemy in an emergency, in which case the owner is not in a position successfully to prosecute any claim whatever against the government except as sanctioned by the government in special statutory provisions. (See the Acts of Aug. 24, 1912, [37 Stat. 586], April 18, 1918 [40 Stat. 532], June 4, 1920 [41 Stat. 779], and June 30, 1922 [42 Stat. 725].)

36. ARREST AND RESTAINT.—Such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violations of the laws of war, may be arrested, tried, and punished.

SECTION IV

Laws of War as Affecting Intercourse Between Enemies

---

37. RULE OF NON-INTERCOURSE.—Upon the declaration or initiation of a foreign war, or of a civil war such as our own War of the Rebellion, not merely the opposing military forces but all citizens or subjects of each belligerent be-

come the legal enemies of both the adverse government and its citizens or subjects, and all intercourse between them, direct or indirect, is terminated and interdicted, even innocent correspondence having no relation to the war being prohibited. (See Chap. I, Sec. III, par. 20.) Violations of this rule by selling to, buying from, or contracting with enemies, furnishing them with supplies, corresponding with or carrying mail to them, passing the lines without authority, etc., are among the offenses most frequently tried and punished by military commissions.

38. EXCEPTIONS TO THE ABOVE RULE.—Among the more familiar exceptions to the foregoing rule of non-intercourse may be mentioned the use of flags of truce, entering into armistices, cartels, or other conventions, and special communications respecting the exchange of prisoners of war. A more distinctive exception is the licensing of trade between belligerents. During the Civil War, Congress authorized such licenses to be granted in special cases by the President (not by military commanders), and Congress later authorized the Treasury Department to make purchases of products from insurrectionary States.

SECTION V

General Principles Governing the Conduct of War

(*As specially applicable to enemies in arms*)

---

39. WAR WAGED AGAINST THE STATE AS A BELLIGERENT ONLY, AND NOT AGAINST INDIVIDUALS.—*a.* Except where

unavoidable in the course of legitimate operations, private individuals and non-combatants are not to be involved in injury to life, person, or property.

b. Life and person.—(1) The laws of war justify the killing or disabling of the members of one army by those of a hostile army, in battle or hostile operations, but, except as may be incidentally unavoidable in the armed contests of war, it is a crime to kill or commit violence against non-combatants and private individuals not in arms, including women and children, the sick, persons taken prisoner or surrendering in good faith, surgeons, assistants and employees charged with the care and transport of the wounded on the field and attendance upon them in field ambulances or hospitals, and inhabitants of the country who, in good faith, bring aid to the wounded in the field or assist in their care. (See par. 12, *Rules of Land Warfare.*)

(2) Camp-followers, though they may be taken prisoner, are to be treated as non-combatants so long as they abstain entirely from offensive acts.

(3) Sick or wounded officers or soldiers of the enemy taken in the field or in hospital are prisoners of war and are entitled to receive the same treatment as members of the capturing army similarly disabled.

c. Property.—(1) Formerly all property of the enemy, public or private, whether taken in battle or seized otherwise during the war, became the absolute property of the capturing or appropriating belligerent. This no longer applies to private property, or to lands or other real property belonging to the state unless the state be destroyed and cease to exist. It is still true, however, as to other public property, such as funds, money-securities, munitions, supplies, and means of transportation. The same rule extends to, and permits the destruction at will of, factories, mills, foundaries, warehouses, depots, offices, or other buildings in which munitions of the enemy may be manufactured or stored; but all public institutions of a civil character, such as capitols, statehouses, buildings of the departments of the government, courthouses, churches, colleges, schools, libraries, hospitals, asylums, museums, col-

lections of art and science, and historical monuments, are exempted from such disposition. The burning of our Capitol and the President's House at Washington by the British forces in 1814 was wanton, without justification, and contrary to the modern laws of war. It was scathingly denounced at the time in the British House of Commons.

(2) The rule as to taking or destroying private property of the enemy is much the same as that applied to the private property of our own people. The humane maxims of the modern law of nations exempt the private property of non-combatant enemies from capture as booty of war. In fact all private property, whether of individuals or of private corporations, is now in general regarded as properly exempt from seizure, except where it is suitable for military use or is of a hostile character.

(3) Towns and villages in the enemy's country may not be attacked at all, unless defended, and, if they are to be bombarded, fair warning must first be given by the attacking commander. If some buildings must be burned, blown up, or torn down, special care must be taken not to disturb those occupied as hospitals or in which wounded are cared for.

40. OPERATIONS OF WAR CARRIED ON ONLY BY LEGITIMATE FORCES OF THE STATE.—*a.* The legitimate forces of the United States are designated in the Constitution as the Army, Navy, and Militia. The following conditions must be satisfied:

(1) That of being under the direction of a responsible leader.
(2) That of wearing a uniform or distinctive mark, which latter must be fixed, capable of being recognized at a distance.
(3) That of bearing arms openly.

b. Recognition as forming a part of the armed forces of a state is also accorded the population of a territory not yet occupied by the enemy, who, upon his approach, spontaneously take up arms to resist the invading army, even though, owing to lack of time, they have not yet organized themselves militarily.

c. Guerillas or other irregular armed bodies or persons, not forming part of the organized forces of a belliger-

ent or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when captured, to be treated as prisoners of war, but may be summarily punished, even with death.

d. Should one belligerent organize and include within its forces contingents of uncivilized combatants who would not be likely to respect the laws of war, the other belligerent would be justified in refusing to recognize them as legitimate forces.

41. AUTHORIZED WEAPONS AND MEANS OF WARFARE.—*a.* Illegitimate weapons of war include those which, in disabling or causing death, inflict a needless, unusual, or unreasonable amount of torture or injury. Poison or poisoned weapons, explosive bullets or projectiles weighing less than 400 grammes, projectiles filled with powdered glass, dumdum bullets, etc., come under this head.

b. The poisoning of wells or springs of drinking water, or of provisions likely to fall into the enemy's hands and be partaken of by his troops, would constitute a marked violation of this principle.

c. In 1899, several of the more prominent nations of Europe and Asia pledged themselves at the Hague Conference of that year not to use projectiles the only object of which was to give out suffocating or poisonous gases. Germany signed this pledge in 1900, yet she initiated the use of poisonous gases during the World War when she launched her deadly chlorine attack on April 22, 1915, against the French and British lines in the northeastern part of the upper Ypres salient. Thus forced by Germany, the Allies turned their attention to the use of this new weapon and to devising means for protecting their troops against it.

d. Though the United States did not sign the pledge not to use poisonous gases in warfare, its attitude has always been against such employment. The soundness of this attitude is questioned by Admiral Mahan in language as follows:

> "It is illogical and not demonstrably humane to be tender about asphyxiating men with gas, when all are prepared to admit that it is allowable to blow the bottom out of an ironclad at

midnight, throwing four or five hundred men into the sea to be choked by the water, with scarcely the remotest chance to escape."

e. Regardless of the logic of this, and regardless of the extent to which we may be inclined to agree with it, the fact remains that it does not represent the views of the Conference of the Principal Allied and Associated Powers that met at Washington, D.C., in 1921, for consideration of the limitation of armament. As already stated above, one of the seven treaties agreed upon by the conferees upon that occasion related to the use of submarines and noxious gases in warfare. While the Conference was unable either to abolish or to limit submarines, it stated with clarity and force the existing rules of international law which condemned the abhorrent practices followed in the recent war in the use of submarines against merchant vessels. The treaty respecting the use of poisonous gases contained the following provision:

"The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties, to which a majority of the civilized Powers are parties,

"The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto."*

f. It may be urged that nations at war will not adhere to this rule, or that some of them in the future may break it as did Germany in the past, and thereby compel others to do likewise in self-defense. In this connection the remarks made by Mr. Root, one of the respresentatives of the United States, in presenting the treaty for the approval of the Conference are of interest. He said:

"You will observe that this treaty does not undertake to modify international law in respect of visit, search, or seizure

*The agreements made at the Washington Conference of 1921 are not binding upon any of the governments until ratified by all of the governments represented at that conference. The prohibition against the use of asphyxiating and poisonous gases has not, up to the present time (October 1, 1925), become binding upon the powers there represented.

of merchant vessels. What it does undertake to do is to state the most important and effective provisions of the law of nations in regard to the treatment of merchant vessels by belligerent warships, and to declare that submarines are, under no circumstances, exempt from these humane rules for the protection of the life of innocent non-combatants.

"It undertakes further to stigmatize violations of these rules, and the doing to death of women and children and non-combatants by the wanton destruction of merchant vessels upon which they are passengers and by a violation of the laws of war, which as between these five great powers and all other civilized nations who shall give their adherence shall be henceforth punished as an act of piracy.

"It undertakes further to prevent temptation to the violation of these rules by the use of submarines for the capture of merchant vessels, and to prohibit that use altogether. It undertakes further to denounce the use of poisonous gases and chemicals in war, as they were used to the horror of all civilization in the war of 1914-1918.

"Cynics have said that in the stress of war, these rules will be violated. Cynics are always near-sighted, and often and usually the decisive facts lie beyond the range of their vision.

"We may grant that rules limiting the use of implements of warfare made between diplomatists will be violated in the stress of conflict. We may grant that the most solemn obligation assumed by governments in respect of the use of implements of war will be violated in the stress of conflict; but beyond diplomatists and beyond governments there rests the public opinion of the civilized world, and the public opinion of the world can punish. It can bring its sanction to the support of a prohibition with as terrible consequences as any criminal statute of Congress or of Parliament.

"We may grant that in matters which are complicated and difficult, where the facts are disputed and the argument is sophistic, public opinion may be confused and ineffective, yet when a rule of action, clear and simple, is based upon the fundamental ideas of humanity and right conduct, and the public opinion of the world has reached a decisive judgment upon it, that rule will be enforced by the greatest power known to human history."

g. Resort to the employment of assassins, or other violent or harmful and secret methods which cannot be guarded against by ordinary vigilance, such as the use of savage allies, introduction of infectious or contagious diseases, etc., is interdicted by civilized usage.* Thus the use, for the purpose of deceiving the enemy, of the national colors of the enemy, or a flag of truce, or the brassard of the Geneva Convention, or the uniform of the enemy, deprives those captured while designedly indulging in or attempting such

*See *Winthrop,* 1223 and 1224, and the numerous authorities there cited.

deception of the right to be treated as prisoners of war. They may be shot without trial, or tried and sentenced to death in the same manner as spies.

42. TRUCES AND CONVENTIONS.—*a.* Truces and conventions include cartels, capitulations, and armistices. Communications between enemies respecting them are usually initiated by flags of truce. The commander to whom a flag of truce is sent is not obliged to receive it under all circumstances, but he may not fire upon it or offer violence to its bearers without sufficient warning. An armistice may be either general or local, depending upon the purposes, duration, and terms fixed by the agreement. It does not affect the state of war; that is, it is not a partial or temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

b. The rule to remember about capitulations is that they should never involve unnecessary ignominy, or conditions otherwise repugnant to military honor. Private effects should not be required to be surrendered, and officers are generally allowed to retain their swords or other sidearms.

43. TREATMENT OF PRISONERS OF WAR.—*a.* Prisoners of war are not convicts. The purpose of their captivity is not to punish or wreak vengeance upon them, but merely to restrain them as a war measure. They are the prisoners of the captor's government, not the captor. No violence against them is justified by the mere fact that they are enemies. Each is treated with due regard to his rank, and, in the absence of special agreement between the belligerents, is placed on the same footing with regard to food and clothing as the troops of the government that made them prisoners. If they cannot be subsisted, they should be released on parole. The wounded are to be treated with the same care as the wounded of the captor.

b. The days of "no quarter" on the battlefield have long since passed, and it is now a grave violation of the laws of war to kill prisoners of war or subject them to unreasonably harsh or cruel treatment, except, to a certain degree only, by way of retaliation for similar acts by the enemy. (See next succeeding paragraph.)

c. Camp-followers, including members of soldiers' families, sutlers, contractors, newspaper correspondents, and others allowed with the army but not in the public employ, should, when taken, be treated much in the same manner as prisoners of war, but should be detained only so long as military necessity may require.

d. Of the non-combatants of an army, those comprising the staff of the hospitals and ambulance units, such as medical officers, enlisted men and other attendants employed in the care and transport of the sick and wounded, also chaplains and priests, are considered under the Geneva Convention as entitled to the benefit of neutrality while in the exercise of their functions. They are left for the time to the performance of these duties. During our Civil War, neither medical officers nor chaplains were held as prisoners of war, but were forthwith "unconditionally discharged."

e. The personal effects of prisoners of war remain their own property, except such as may be intended for or adapted to military use. To deprive them of their proper clothing, or of such necessary articles as their watches, is illicit and punishable. Large sums of money captured in their train, however, cannot be claimed by them as their private property. But for this rule, public funds about to be captured, and therefore about to become the property of the captor, could simply be turned over to an individual to be claimed as his private property.

f. Prisoners of war must not conceal their true names or rank, but they cannot be required to divulge information respecting their own government, country, or army. They may be employed upon public works which have no direct relation to military operations, provided the employment given them is not degrading with reference to their military rank, if they belong to the army, or to their official or social position if they do not so belong. They may be permitted to work for private employers, the accruing wages to be held or expended for their benefit.

g. A prisoner of war may be shot and killed while attempting to escape, or, if he escape and is retaken before being able to rejoin his own army or before leaving the terri-

tory occupied by the army which captured him, he is liable to disciplinary punishment; but if he succeed in escaping and is subsequently retaken prisoner he is not liable to punishment for the prior escape unless he was at the time under a parole *not* to escape, in which case he forfeits his right to be treated as a prisoner of war.

h. The exchange of prisoners of war may not be demanded as a matter of right, this being entirely subject to the discretion of the belligerent which holds them captive. In this connection, however, it should be borne in mind that prisoners of war are bound by the laws of their own country with reference to parole; that is, if the laws of their own country prohibit their giving a parole they cannot give one. It should also be remembered that a commissioned officer can give his parole only with the permission of a military superior, provided such superior in rank is within reach. Cartels set forth the general conditions upon which exchanges will be made and the times and places of delivery. They usually provide that prisoners of the same grade shall be exchanged, officer for officer and enlisted man for enlisted man, and that officers of the higher grades may be exchanged for a certain number of individuals of a lower rank, according to a stated scale of equivalents. Thus in the cartel of exchange entered into between the United States and the Confederate States in July, 1862, it was stipulated that a general or an admiral should be exchanged for an officer of equal rank, "or for sixty privates or common seamen," and so on down through the lower grades. A captain was declared exchangeable for an equivalent of six privates, a lieutenant for four, and a noncommissioned officer for two. Citizens were to be exchanged only for citizens. Sutlers, teamsters, and all other civilians in the actual service of either belligerent were to be exchanged for persons of similar positions. (See Appendix A, No. 7.) An interesting feature of this scale of equivalents is the low valuation placed upon officers in terms of enlisted men. Just what valuation would be appropriate will depend largely upon the circumstances existing at the time of the agreement, such as the necessity for enlisted men as compared with the

necessity for officers, the amount of technical education and training the latter have received, etc.

i. Paroled prisoners may not, until regularly exchanged or released from parole, take up arms again or engage in any work or the discharge of any duty usually performed by soldiers. No military person other than a commissioned officer can regularly give a parole. Paroles by enlisted men are rendered for them by their commanding officers. Paroles must be voluntary; that is, they cannot be compelled. Wholesale paroling, as of troops on the battlefield of or detachments in mass, is unauthorized. Violation of a parole takes away the right to be treated as a prisoner of war if recaptured. There were very few violations of paroles during our Civil War, but the Mexicans violated them so indiscriminately during the Mexican War that General Scott publicly threatened offenders with hanging and required the signing of the parole to be accompanied by the taking of a religious oath.

j. When bodies of troops or individuals of the armies of a belligerent avoid being made prisoners of war by taking refuge within the territory of a neutral power, such neutral does not, and cannot, make them prisoners. She *interns* them, that is, takes charge of and holds them with their arms and other material of war at some appointed station within her limits, usually as far removed as practicable from the theater of operations, and, in the absence of special convention otherwise regulating the matter, maintains them, clothes them, and renders them such medical or other aid as humanity may require, for all of which she is paid by their government at the conclusion of hostilities. Officers of an interned force may, in the discretion of the interning state, be paroled on condition that they are not to leave the neutral domain without special authorization.

k. The sick and wounded of a belligerent army may be moved across neutral territory without becoming subject to internment, but only hospital personnel may accompany them, and no *matériel* of war may be included except such as is required for their actual use.

44. PUNISHMENT OF PERSONS GUILTY OF VIOLATION OF THE LAWS OF WAR.—*a.* Offenders against the laws of war usually have been brought by us to trial before military commissions. Should a belligerent refuse or neglect to bring an offender to trial, the other belligerent may resort to the taking of hostages, to reprisal, or to some other form of retaliation. For example, the unwarranted treatment of prisoners of war by an enemy may be met by treating in a similar manner prisoners taken from him, or by specially holding them for such treatment. In 1776, when the British proposed to treat Major General Charles Lee, whom they had taken prisoner, as a deserter from the British Army, Congress caused a lieutenant colonel of the British army and five Hessian field officers, who were prisoners of war in our hands, to be placed in close confinement awaiting the action taken in General Lee's case. In 1782, Captain Asgill of the British army was selected by lot as a subject for retaliation for the unlawful killing of Captain Huddy of our army, a prisoner of war in the hands of the enemy. In 1863, President Lincoln ordered that a Confederate soldier be executed for every soldier of the United States killed in violation of the laws of war, and that for every one enslaved or sold into slavery (referring to the colored troops) a Confederate soldier be placed at hard labor on public works and so continued until the other should be released and accorded the treatment due a prisoner of war.

b. The right of retaliation will not justify a resort to measures repudiated by civilized warfare. Cruelty, inhumanity, or gross and unjustifiable injury practiced by one belligerent will not justify or warrant a similar proceeding by way of retaliation on the part of the other. It has been said that the soundest of the grounds for the trial and sentence of Maximilian of Mexico was that it was justified by way of retaliation for his decree of 1865 that all Juarists (supporters of the existing republican government) taken with arms in their hands should be treated as bandits.

c. A form of indirect retaliation which has sometimes been practiced consists of seizing subjects of the enemy and holding them in confinement as *hostages* until a wrong has

been righted, or as a guarantee that no wrong will be committed. In 1864, General Sullivan commanding at Harper's Ferry, directed that for every inhabitant of certain counties in Virginia conscripted into the Confederate army, the nearest and most prominent secessionist should be arrested, imprisoned, and held until the return of such conscript.

d. Taking possession of property of the enemy or of his subjects and holding it as indemnity for injury inflicted in violation of the laws of war, or as security until indemnity is duly rendered, would be *reprisal.* The case, to justify it, would have to be grave and the necessity imperative, especially if it should involve the seizure of private property, and must in all cases be consistent with the rules of humanity and morality.