

PROBLEMS IN THE MORALITY OF WARFARE

I. THE PAST TEACHING

1.—THE MORALISTS

THE moralists agree with St. Thomas¹ that war *per se* is licit, whether to repel an injustice or to vindicate one's right. The reason assigned is that any society independent of other societies, must have the means of protecting itself against injustice and of vindicating its rights, and sometimes there is no other means of obtaining this end than war.

From this eminently practical point of view moralists discuss, for the most part quite briefly, the occasions on which war is licit and the means which may be used when war is licit. A perusal of the works of the various authors, e.g. Aertnys-Damen, Donovan, Sabetti-Barrett, Konings, Gury-Ballerini, Arregui, Noldin-Schmitt, Ferreres, Gousset, Lehmkuhl, Tanquerey, reveals that in the few pages which each devotes to the topic "War" he repeats substantially the ideas, and, not infrequently, the words of St. Alphonsus in his famous lib. IV, tract. 4, *de quinto decalogi praecepto*, nn. 402 sqq.

St. Alphonsus it is who sets out the three conditions: 1—the war must be waged on the authority of the prince, a sovereign who has no other prince superior to him; 2—there must be a just cause and that indeed a serious one, v.g. necessity of the common good, and of the preservation of tranquillity, the recovery of things unjustly taken away, the repression of rebels, the defense of the innocent; 3—the war must be waged with the right intention, not out of hatred, but from love of the common good. Some, as Konings, add: the war must be waged in the proper manner.

St. Alphonsus observes that it can happen in practice that neither side sins in warring, because of invincible ignorance. The king, however, is bound to use all diligence, before war is begun, to be certain

¹ II-II, q. 40.

that it is justified and that the reason is serious. This, St. Alphonsus suggests, he should learn from counsellors who are not only expert but also good men. Lehmkuhl observes that such decisions pertain to the leaders of the country and their advisors, and that while soldiers who join the army voluntarily to fight are obliged to consider the question, conscripts who are in the army perforce need only be satisfied that the war is not evidently unjust. There is some suggestion, too, that among the counsellors there might well be some theologians who could advise as to the justice of the conflict.

Tanqueray, like the rest, points to the need to settle the dispute peaceably before the resort to arms, if such settlement is possible. He considers justifying causes for war: 1—an unjust invasion or detention of some province by the enemy; 2—grave insults either to the nation, or to its diplomatic representatives, or to its citizens, which the other nation obstinately refuses to repair; 3—violation of a treaty with great harm to the common good; 4—violation of neutrality; 5—need to assist another people unjustly oppressed. Diversity of religion or a desire to convert infidels are not just causes for war, nor is mere extension of empire, nor the particular progress of one nation, nor the private glory or good of the prince and his family.

Following St. Alphonsus' distinction between offensive and defensive warfare, the moralists have worked out the idea already broached by him that a morally certain cause is required for offensive warfare, not a cause that is merely probable; but for defensive warfare they are more lenient, permitting a probable cause as justification.

St. Alphonsus also mentions that the rulers are bound to pay the soldiers their stipend, otherwise they are bound to compensate for the damages which have been received by the soldiers themselves, and by others who have been damaged by the soldiers. Present practice in the treatment of veterans seems to go much farther than this.

As to killing in warfare, the moralists follow St. Alphonsus who says that those who are "harmful," i.e. the soldiers who have fought, can sometimes be killed if this is necessary to establish peace and security or to vindicate injuries, unless they have surrendered on

condition that their lives would be spared. This obviously refers not to killing in battle, but to death imposed upon the soldiers after battle, as has been the case in the famous trials at Nuremburg and Tokyo and in the other less publicized trials which have been taking place elsewhere in Europe. The observation of St. Alphonsus that such procedure is "quite alien to our times," does not exactly fit what our times are witnessing.

As to the innocent, among whom St. Alphonsus includes: children, women, old people, foreigners, clerics, religious, merchants, and farmers; he says that these cannot be killed directly, unless it is proved that they were associated in the war with those who actively waged it. They may, however, be killed indirectly, he says, while the fighting continues, if they are so intermingled with those who are "harmful" to the other that if they are spared the rest of the group of "harmful" people (soldiers) which it is necessary to destroy cannot be put out of the way. With him in this idea agree: Gury-Ballerini, Donovan, Konings, Ferreres, Lehmkuhl, Tanqueray. Gousset observes, "Mais ils n'ont droit d'être respectés par l'ennemi qu'autant qu'ils ne prennent aucune part active au combat."

St. Alphonsus also points out that *per accidens* it is licit at times to burn even churches, to drag the enemy out of them, to despoil the enemy within the sacred precincts, and kill them there, if, e.g., the church is being used as a fortress by them in fighting back, as happened, it seems, at Montecassino.

Against the enemy it is permitted, he says, to use ambushes and stratagems, provided there is no lie involved, but even lies, e.g., when spies pretend to be friends, in such cases are not mortal sins. Those things, however, against which no prudent precautions can offer protection are not licit, e.g., the poisoning of wells, and water-supplies, and of food, which things he states were contrary to the rules of warfare observed in his day.

As to those who have come to an agreement with the enemy, he says that word given to the enemy must be kept, unless it was given under coercion, or it would turn to serious harm to the commonwealth or religion, or if the enemy has not kept his word, or finally, if the conditions and circumstances are clearly changed.

Captives, he says, can escape. Rarely can a city be plundered,

but it can be done. The soldiers sin with the obligation of restitution if they take away from the farmers or others with whom they are quartered or through whose lands they pass, their property (souvenir-hunters!). Reprisals are allowed if: 1—it is clear that the citizens of the other state did the wrong; 2—if their superiors refuse to administer justice when requested to do so; 3—they are at fault in refusing; 4—the sovereign allows it; 5—no more damage is done than necessary; 6—it is not taken out on ecclesiastics.

It is interesting to see how these observations of the moralists parallel the conventions worked out among statesmen of the various nations who were faced with practical rather than speculative problems concerning warfare as it is waged among men.

2.—THE STATESMEN

Various international conventions have, during the past century and the first part of the present one, attempted to regulate in some way the conduct of warfare. In 1868 Great Britain, France, Prussia, Russia, and other nations united in a declaration at St. Petersburg, by which they agreed to renounce, in case of war among themselves, the employment of any projectile of a weight less than 400 gr., charged with fulminating or inflammable substances.²

At the Hague Peace Conference of 1899 two conventions were adopted relating to the rights and duties of belligerents in time of war; and at the Hague Peace Conference of 1907, the above conventions were revised and seven other conventions adopted regulating the law upon other questions of land and maritime warfare.

The Convention Relative to the Commencement of Hostilities, of 1907, provided that hostilities must not commence without a previous and unequivocal warning, which should take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration. Moreover, the state of war had to be notified to neutral powers without delay. Keith comments, in 1944, that this is not much observed at the present day.³

² L. Oppenheim, *International Law*, 5 ed., 2 vols., by H. Lauterpacht, Longmans, Green and Co., London, New York, 1935, Vol. 2, p. 283.

³ Wheaton's *International Law*, 7 ed. by A. Berriedale Keith, vol. 2 "War,"

The Conventions concerning the Laws and Customs of War on Land (1899-1907) define the law upon the following subjects.

(a) *Qualifications of Belligerents*. The laws, rights and duties of war apply not only to the army of a belligerent, but also to militia and corps of volunteers, provided certain conditions be fulfilled by the latter. These conditions are: 1—that they be commanded by responsible persons; 2—that they wear a fixed distinctive emblem recognizable at a distance; 3—that they carry arms openly; 4—that they conduct their operations according to the laws and customs of war. Likewise, the population of a territory who, without organization, rise up against an invader, have the rights of belligerents if they respect the laws and customs of war.⁴

The Rules of Land Warfare of the United States War Department (Department of the Army) implementing the Hague Convention⁵ provide: 1—there is a distinction between armed forces and peaceful populations; 2—where there has been a *levée en masse* the people involved cannot all be treated as brigands or bandits; 3—deserters, and persons known to have violated the laws and customs of war are not entitled to the privileges of the members of a *levée en masse*; 4—hostilities are restricted to armed forces.⁶

(b) *Prisoners of War*. It is provided that they must be humanely treated; that their personal belongings, except those of a military character, are to remain their property; that they are not to be confined unless as an indispensable measure of safety; that, while they may be put to work for the benefit of the captor state, they

London, 1944, p. 104. For the text of the Convention, see Green Haywood Hackworth, *Digest of International Law*, 7 vols. and index, U. S. Government Printing Office, Washington, D. C., 1943, vol. 6, p. 166.

⁴ Cf. Keith, *op. cit.*, p. 172. See also Henry Wager Halleck, *International Law*, new ed. by Baker, 2 vols., London, vol. 1, 1878, vol. 2, 1908, vol. 2, p. 44. This might raise a question as to the position of members of an "Underground" movement.

⁵ Cf. Hackworth, vol. 6, pp. 171-172.

⁶ It is interesting to read the statement of John Bassett Moore, United States representative at the Hague, December 11, 1922, reaffirming the distinction between combatants and non-combatants in relation to their protection against injuries not incidental to military operations against combatants. Cf. Hackworth, vol. 6, p. 172.

are to receive pay for such work, and they are not to be set to tasks connected with the operations of war; that they shall be treated as regards food and clothing on the same footing as the troops of the captor government; that, if set at liberty on parole their own government is bound not to require of them any service incompatible with such parole; that they are to be allowed opportunity for the exercise of their religion; that wills drawn up by them are to be received on the same conditions as for soldiers of the national army. Moreover, the Convention provides for the establishment of a bureau of information whose duty it is to answer all inquiries about prisoners of war; and relief societies are to receive from the belligerents every facility for the effective accomplishment of their humane task.⁷

In the convention at Geneva, 1929, it was further provided, art. 81, that army followers, e.g. newspaper correspondents, may be prisoners of war.⁸ Article 2 of Title I of the same convention provides for treatment of prisoners of war and states that they are to receive humane treatment and protection. Article 4 provides for their maintenance.⁹ Article 228 of the Treaty of Versailles asserted the right to try prisoners who were guilty of violating the laws and customs of war.¹⁰

(c) *Hostilities*. Under this heading the Conventions lay down restrictions as to the means which may be employed to injure the enemy, and the conditions are stated under which seizures and bombardments may be undertaken. Thus it is said that military necessity allows: 1—direct destruction of life and limb of armed enemies and other persons whose destruction is incidental and unavoidable in the armed contests of war; 2—capture of armed enemies, as well as of every enemy important to the hostile government or of peculiar danger to the captor; 3—destruction of property, if necessary; obstruction of ways and channels of traffic, travel or communication; and withholding of such or of means of life from the enemy; 4—appropriation of means necessary for the subsistence and safety of the army; 5—such deception as does not involve a breach of good

⁷ Cf. Halleck, vol. 2, pp. 44-46; Keith, *op. cit.*, p. 179-189.

⁸ Cf. Hackworth, vol. 6, p. 273-274.

⁹ Cf. Hackworth, vol. 6, p. 277.

¹⁰ Cf. Hackworth, vol. 6, p. 279.

faith, positively pledged with regard to agreements made before the war, or supposed by modern laws of war to exist.¹¹

The measure of permissibility of devastation is to be found in the strict necessities of war. It is not an end in itself.¹²

The right to adopt means to injure the enemy is not unlimited. It is especially forbidden to employ poison or poisoned weapons, or to kill or wound individuals treacherously, or to kill or wound them after they have laid down their arms or, having no defense, have surrendered at discretion. It is also forbidden to declare that no quarter will be given, or to employ arms, projectiles, or materials calculated to cause unnecessary suffering. It is similarly forbidden to make improper use of a flag of truce, of the national flag or military insignia and uniform or distinctive badges provided for by the Geneva Convention. It is further forbidden to destroy or seize enemy property unless imperatively demanded by the necessities of war. To declare abolished or inadmissible in a court of law rights and actions of nationals of the hostile party is also forbidden.¹³

It has also been provided that the restriction on the use of poison or poisoned weapons extends to the use of means to spread contagious diseases, but does not prohibit measures to dry up springs, divert rivers and aqueducts, or contaminate sources of water by dead animals or otherwise, provided the means are evident or the enemy is informed thereof.¹⁴

Pillage is forbidden by art. 28 of the Hague Convention.¹⁵

(d) *Spies*. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains, or endeavors to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise, who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their

¹¹ Cf. Hackworth, vol. 6, p. 175 ff.

¹² Cf. Hackworth, vol. 6, p. 180; *Rules of Land Warfare*, sec. 324-325.

¹³ Cf. Hackworth, vol. 6, pp. 259-260; Halleck, vol. 2, p. 47.

¹⁴ Cf. Hackworth, vol. 6, p. 260.

¹⁵ Cf. Hackworth, vol. 6, p. 261.

mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally of maintaining communications between the different parts of an army or a territory.

A spy taken in the act shall not be punished without previous trial.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.¹⁶

The Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, of 1907, provides that merchant ships in the ports of a belligerent at the commencement of hostilities should be allowed to depart freely with a passport to their port of destination. Moreover, enemy merchant ships, which have left their last port of departure in ignorance of the commencement of hostilities, cannot be confiscated. In both cases enemy cargo is given the same rights as enemy ships. The widespread use of radio, however, has rendered the provision of this art. 6 of the Hague Convention less useful, for merchant ships nowadays can be apprised of the existence of a state of war while they are on the high seas.¹⁷

The Convention Relative to the Conversion of Merchant Ships into Warships, of 1907, defines the conditions subject to which such conversion may take place in time of war. This covers the conditions subject to which merchant ships may be incorporated into the fighting fleet of a state in time of war. Such ships must be under the direct authority and immediate control of the power whose flag they fly; they must bear the external marks which distinguish the warships of their nationality; their commanders must be duly commissioned officers in the service of the state; their crews must be subject to the rules of military discipline; they are bound to observe in their operations the laws and customs of war; and their names must figure on the list of ships of the military fleet of the belligerent.¹⁸

¹⁶ Cf. Halleck, vol. 2, p. 47; Keith, *op. cit.*, p. 218 f.; Hackworth, vol. 6, p. 304.

¹⁷ Cf. Hackworth, vol. 6, p. 563.

¹⁸ Cf. Keith, *op. cit.*, p. 269.

The Convention Relative to the Laying of Automatic Submarine Contact Mines, of 1907, while not forbidding their employment, restricts it by forbidding the laying of unanchored mines, and of anchored mines which do not become harmless as soon as they have broken loose from their moorings. Moreover, it is forbidden to lay automatic contact mines off the coasts of the enemy with the sole object of intercepting commercial navigation. Other rules are laid down to insure the safety of merchant ships, for the destruction of which the mines are not intended.

The Convention Respecting Bombardment by Naval Forces in Time of War, of 1907, lays down rules safeguarding the rights of non-combatant inhabitants and public buildings not used in the defense of the city. It is forbidden to bombard undefended ports or towns unless the latter refuse to comply with requisitions for supplies for the immediate use of the naval forces, and then only after due notice has been given. Bombardment for nonpayment of money contributions is forbidden. Buildings devoted to public worship, art, science, or charitable purposes, historic monuments, and hospitals are to be spared as far as possible.

Rules for the use of submarines are contained in the Treaty for Limitation and Reduction of Naval Armament signed April 22, 1930, in London. No agreement, however, was reached as to rules governing the use of aircraft against merchant vessels, although an attempt was made to apply to them the rules governing the use of submarines.¹⁹

The Conventions for the Adaptation of the Principles of the Geneva Convention to Maritime War (1899-1907) lay down rules providing for the protection from hostilities of military hospital ships, together with their religious and medical staff, provided such ships are not used for military purposes, e.g. carrying munitions, and keep aloof from the combat.²⁰

The Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War, of 1907, provides that the postal correspondence of neutrals or belligerents found on board a neutral or enemy ship at sea is inviolable; an exception, however,

¹⁹ Cf. Hackworth, vol. 6, p. 466.

²⁰ Cf. Halleck, vol. 2, pp. 51-53, for the foregoing Conventions.

is made in case of violation of blockade.²¹ Vessels employed in coast fisheries are exempt from capture provided they take no part in hostilities, e.g., radioing warning of the approach of the enemy.²² The officers and crew of captured merchant ships, if neutral citizens, are not to be made prisoners of war, and if enemy citizens, are to be released upon written promise not to engage in the operations of war. Of course, nowadays, merchantmen have a much more direct connection with the prosecution of a war than they were thought to have in the past.²³

The Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (1899-1907) was to last until the close of the Third Peace Conference. The United States Rules for War on Land state that the "rule" is not regarded as imposing any restriction upon the use of modern military aircraft against armed forces or defended places.²⁴

According to art. 25 of the Hague Convention there was to be no bombardment of undefended places. Art. 26 provided that before a bombardment warning was to be given except in the case that the place was being taken by assault. Art. 27 provided for the sparing of buildings dedicated to religion, art, science, charitable purposes, historical monuments, hospitals, places where the sick and wounded were collected, provided they were not at the time used for military purposes. These places were required to be marked distinctly and visibly and notice of them given to the enemy.²⁵

The Commission of Jurists to consider and report upon revisions in the Rules of War included in their report, of 1923, art. 22-26 concerning the use of bombs in aerial warfare. In these articles they suggested: 1—the use of bombs is legitimate only against military targets; 2—such use is legitimate only when "directed exclusively at such an objective"; 3—the objectives are specifically enumerated and defined; 4—the bombardment of cities, towns, villages, dwellings or

²¹ Cf. Keith, *op. cit.*, pp. 282-283.

²² Cf. Keith, *op. cit.*, p. 285; *The Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

²³ Cf. Keith, *op. cit.*, pp. 282-283.

²⁴ Cf. Hackworth, vol. 6, p. 261, Rues, sec. 27.

²⁵ Cf. Hackworth, vol. 6, p. 262.

buildings not in a combat area is prohibited; 5—if it is not possible to bombard a military objective without indiscriminate bombardment of the civilian population, it is not possible to bombard at all; 6—even in a combat area bombardment is legitimate only if there is a reasonable presumption that the military concentration is sufficiently important to justify it, having regard to the civilian population; 7—the belligerent state must compensate those injured by violation of such rules.²⁶

The Declaration Ratifying the Declaration of St. Petersburg of 1868, adopted in 1899, was an agreement to abstain from the use of projectiles the sole object of which was the diffusion of asphyxiating or deleterious gases. Art. 171 of the Treaty of Versailles provided: the use of asphyxiating, poisonous, or other gases and all analogous liquids, materials, or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.²⁷

Art. 5 of the Treaty of Washington, signed in 1922 by the United States, the British Empire, France, Italy, and Japan, declared the assent of the signatories to the prohibition on the use of asphyxiating, poisonous, or other gases, and all analogous, between themselves.²⁸

The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, June 17, 1925, accepted the prohibition on gas and extended it to bacteriological warfare. It would seem, however, to allow the artificial dissemination of non-bacteriological fatal diseases.²⁹

The Declaration Prohibiting the Use of Bullets with a Hard Envelope, of 1899, was in accordance with the Declaration of St. Petersburg of 1868.

Truces. Art. 26-41 of the Convention Concerning the Laws and Customs of War on Land laid down the following rules: An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy

²⁶ Cf. Hackworth, vol. 6, p. 263.

²⁷ Cf. Hackworth, vol. 6, p. 269.

²⁸ Cf. Hackworth, vol. 6, p. 269-270.

²⁹ Cf. Hackworth, vol. 6, p. 270; Keith, *op. cit.*, p. 206.

is warned within the time agreed upon, in accordance with the terms of the armistice.

An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with and between the populations.

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained.³⁰

During the continuance of a truce, either party may do within his own territory or the limits prescribed by the armistice, whatever he could do in time of peace, e.g. levy and march troops, collect provisions, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged; but neither party can do what the continuance of hostilities would have prevented him from doing, e.g., repair fortifications of a besieged place; and all things, the possession of which was especially contested when the truce was made, must remain in their antecedent places.³¹

Military Occupation. Art. 42-56 of the Hague Convention, of 1899, in addition to codifying the existing and accepted law, provided that the occupant must respect, unless absolutely prevented, the laws in force in the country; he must not compel the population of the occupied territory to take part in military operations against its own country, nor take the oath to the hostile power. Private property

³⁰ Cf. Halleck, vol. 2, p. 48.

³¹ Cf. Oppenheim, vol. 2, pp. 433-441; Hall, *International Law*, 5 ed., Oxford, 1904, pp. 544-545.

could not be confiscated. State taxes, if collected, had to be expended for the administration of the occupied territory. Receipts had to be given for any contribution which might be levied for military necessities or the administration of the territory, as well as for requisitions, which had to be in proportion to the resources of the country.³²

The Rules of Land Warfare of the United States provide, art. 273, that military occupation gives a right of control for the period of the occupation, but no transfer of sovereignty occurs.³³ Art. 43 of the Hague Convention, of 1907, provided that the occupying power was to restore and insure public order and safety and respect in so far as possible the laws in force in the country.³⁴

Reprisals. This means the forcible taking by one nation of a thing which belonged to another, in return or satisfaction for an injury committed by the latter on the former.³⁵ Positive reprisals consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction. Negative reprisals take place when a nation refuses to fulfill a perfect obligation which it has contracted, or to permit another state to enjoy a right which it justly claims. Special reprisals are such as are granted in times of peace to particular individuals who have suffered an injury from the citizens or subjects of the other nation. General reprisals take place by virtue of commissions delivered to officers and citizens of the aggrieved state, directing them to take the persons and property belonging to the offending state wherever found.

Where an individual is injured by a foreign state he must first apply to its courts, if possible, and it is only when refused redress there that his own government can claim to interfere. Similarly when the injury is to a state, compensation should be demanded before recourse is had to reprisal.

Reprisals are made in two ways, either by embargo, in which case the act is that of the state, or by letters of marque and reprisal,

³² Cf. Oppenheim, vol. 2, pp. 342-357; Halleck, vol. 2, pp. 48-50.

³³ Cf. Hackworth, vol. 6, p. 385.

³⁴ Cf. Hackworth, vol. 6, p. 391.

³⁵ Cf. Vattel, *Le Droit des gens*, 4 books in 2 vols., nouvelle éd., Neuchâtel, 1773, lib. 2, c. 18, s. 342; cf. also Blackstone, *Commentaries on the Laws of England*, vol. 1, c. 7.

in which case the act is that of the citizen, authorized by the government. Such letters are generally granted for a refusal to pay debts, for an unwarrantable suspension of treaty obligations, denial of evident justice, or a refusal to pay indemnity for losses. In the United States, Congress has the power to grant letters of marque and reprisal.³⁶

The property seized in making reprisals is preserved while there is any hope of obtaining satisfaction or justice; as soon as that hope disappears, it is confiscated, and then the reprisal is complete.³⁷

The term is now used in the sense of retaliation in general, and the act is directed not merely against property of the state or its citizens, but against the citizens themselves, their liberty, and even their lives.³⁸

While applied more strictly to acts falling short of actual war, the term also includes acts of retaliation in time of war done for the purpose of checking excesses committed by the enemy in violation of the laws of war. Section 358 of the United States Rules of Land War directs that retaliation be used only as an unavoidable last resort to induce the enemy to desist from illegitimate practices.³⁹

Belligerent states not infrequently adopt the rule of reciprocity in the conduct of war, but this usage has not yet assumed the character of a positive law. Frequently an opposing belligerent applies the rule of reciprocity and metes out to his adversary the same measure of justice that he receives from him. It is said, however, that when one belligerent exceeds his extreme rights and becomes barbarous and cruel in his conduct, the other should not, as a general rule, follow and retort upon its subjects by treating them in like manner.⁴⁰

3.—THE JUDGES

The Constitution of the United States⁴¹ provides that Congress shall have the power to declare war.⁴² An Act of Congress, it has

³⁶ Cf. U. S. Constitution, Art. I, sec. 8, cl. 11.

³⁷ Cf. Vattel, lib. 2, c. 18, s. 342.

³⁸ Cf. Oppenheim, vol. 2, pp. 114-123.

³⁹ Cf. Hackworth, vol. 6, p. 181.

⁴⁰ Cf. Halleck, vol. 2, pp. 39-40.

⁴¹ Art. I, sec. 8.

⁴² *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 419, 17 L. Ed. 915; Miller

been said, is necessary to the commencement of a foreign war, and is in itself a declaration thereof.⁴³ It fixes the date of the war as to rights.⁴⁴ After Congress has acted it is not necessary to communicate the action to the enemy.⁴⁵ An Indian war, however, it was held, could exist without an Act of Congress.⁴⁶ The date of the commencement of a war may also be determined by the date of actual hostilities, and for that a formal proclamation is not necessary.⁴⁷

In this connection it might be well to note that "the President is the sole organ of the nation in its external relations and its sole representative with foreign nations."⁴⁸ He has the authority to determine what foreign governments he will recognize, and, as an incident thereto, he has "authority to speak as the sole organ" of our government with respect to the handling of claims of citizens of the respective governments. Such an agreement does not require the advice and consent of the Senate.⁴⁹ Furthermore, "the power to declare war is an exclusive power of Congress, but the conduct of international relations by the President may lead to war, and, if a war is initiated by another, he 'is bound to accept the challenge without waiting for any special legislative authority.'"⁵⁰

War gives this government full right to take the persons and confiscate the property of the enemy wherever found in the United States,⁵¹ and while the humane policy of modern times may have mitigated this rigid rule, it cannot impair the right itself.⁵² The right

v. U. S., 11 Wall. (U. S.) 268, 20 L. Ed. 135; *Tyler v. Defrees*, 11 Wall. (U. S.) 331, 20 L. Ed. 161.

⁴³ 1 Kent 55.

⁴⁴ Cf. Thayer, *Const. Cases* 2352.

⁴⁵ Cf. Kent, *loc. cit.*

⁴⁶ *Marks v. U. S.*, 28 Ct. Cl. 147.

⁴⁷ *The Buena Ventura*, 87 Fed. 927.

⁴⁸ *U. S. v. Curtiss-Wright Exporting Corp.*, 299 U. S. 304, 57 Sup. Ct. 216, 81 L. Ed. 255, quoting John Marshall.

⁴⁹ *U. S. v. Belmont*, 301 U. S. 324, 57 Sup. Ct. 758, 81 L. Ed. 1134.

⁵⁰ *Prize Cases*, 2 Black (U. S.) 635.

⁵¹ Cf. Rev. Stat. 4067-4069 on treatment of Resident Enemy Aliens; the office of the Alien Property Custodian is set up in sec. 6, of the Trading with the Enemy Act of Oct. 6, 1917.

⁵² *Brown v. U. S.*, 8 Cra. (U. S.) 110, 3 E. Ed. 504.

to take the enemy's property found in the United States requires an Act of Congress⁵³ such as that on trading with the enemy. It has, however, been held that the right to take the property of an enemy on land is substantially restricted "to special cases dictated by the necessary operations of the war;" "the seizure of private property of pacific persons for the sake of gain is excluded."⁵⁴

A belligerent may, by express law or edict, confiscate the property or even the land of an alien enemy, within its territory or the territory it occupies.⁵⁵

The right of a belligerent to confiscate debts due from its subjects to the enemy's subjects is usually recognized, but seldom exercised;⁵⁶ and this is more especially true in relation to the public debt of a belligerent state to an enemy's subject.⁵⁷ The seizure by the United States of the enemy's property on land is not authorized by the law of nations, but is upheld, if at all, by an act of Congress.⁵⁸ Vessels and cargo belonging to trading concerns in the enemy's country, or corporations organized under its laws are subject to capture, regardless of the domicil of the partners or stockholders.⁵⁹

Territory conquered during a war is part of the domain of the conqueror for all commercial and belligerent purposes, so long as he continues in possession;⁶⁰ but it is not incorporated into the domain of the conqueror except by a treaty of peace under which the former renounces it, or by long possession.⁶¹

In time of war it is lawful to pull down or injure the property of a private person; *salus populi suprema lex*.⁶²

No civil liability attached to officers or soldiers for an act done in accordance with the usages of civilized warfare, in the late rebel-

⁵³ *Brown v. U. S.*, Story J., diss.

⁵⁴ Cf. *Briggs v. U. S.*, 143 U. S. 356, 12 Sup. Ct. 391, 36 L. Ed. 180.

⁵⁵ *Union Ins. Co., v. U. S.*, 6 Wall. (U. S.) 759, 18 L. Ed. 879; *Kershaw v. Kelsey*, 100 Mass. 574, 97 Am. Dec. 124, 1 Am. Rep. 142.

⁵⁶ 1 Kent, 62.

⁵⁷ Halleck, vol. 1, pp. 487 ff.

⁵⁸ *U. S. v. Shares of Capital Stock*, 5 Blatch. 231, Fed. Cas. No. 15,961.

⁵⁹ *The Buena Ventura*, *supra*.

⁶⁰ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cra. (U. S.) 191, 3 L. Ed. 701.

⁶¹ *U. S. v. Hayward*, 2 Gall. 486, Fed. Cas. No. 15,336.

⁶² 4 Term 796.

lion (Civil War) under and by military authority of either party.⁶³ The legal condition of a Confederate soldier was that of a soldier serving against the United States under a hostile power.⁶⁴

In cases arising out of the Spanish-American War, it was held that vessels of war have the right, in the absence of any declaration of exemption by the political power, to capture the enemy's property wherever found afloat, and the burden is on the claimant to show that it comes within the exemption of any such proclamation. Cargo shipped from this country in an enemy's vessel to residents of a neutral country is presumably neutral cargo; but if so shipped to the enemy's country it is presumptively the enemy's property, although the latter presumption may be overcome.⁶⁵

War suspends all commercial intercourse between the citizens of belligerent states, except so far as may be allowed by the sovereign authority. The only exceptions are contracts for ransom and other matters of absolute necessity and the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor; but even such payments to an agent of an alien enemy must not be made with a view to transmit the funds to the principal during the continuance of the war.⁶⁶

The doctrine of the renewal of contracts suspended by a war is based on considerations of equity and justice and cannot be invoked to revive a contract which it would be inequitable to revive, as where time is of the essence of the contract or the parties cannot be made equal.⁶⁷

In *Kershaw v. Kelsey*, *supra*, quoted with approval in *New York L. Ins. Co. v. Davis*, *supra*, and *Williams v. Paine*,⁶⁸ Gray, J., said: "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or

⁶³ *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193.

⁶⁴ *Carter v. U. S.*, 23 Ct. Cl. 326.

⁶⁵ *The Buena Ventura*, *supra*.

⁶⁶ *New York L. Ins. Co. v. Davis*, 95 U. S. 429, 24 L. Ed. 453.

⁶⁷ *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

⁶⁸ 168 U. S. 72, 18 Sup. Ct. 279, 42 L. Ed. 658.

receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the textbooks are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The trading or transmission of property or money which is prohibited by international law during war, is from or to one of the countries at war. An alien enemy residing in this country may contract and sue as a citizen can.⁶⁹ Where a creditor, though the subject of the enemy, remains in the country of the debtor or has an agent there, payment to the creditor or his agent is not a violation of the duties imposed by a state of war upon the debtor.⁷⁰

The breaking out of a war does not necessarily and as a matter of law revoke every agency; it depends upon the circumstances and the nature of the agency.⁷¹ A contract of agency of an insurance company is revoked.⁷² For the subsistence of an agency during the war, it must have the assent of the parties.⁷³

⁶⁹ *Kershaw v. Kelsey, supra*; however, the modern tendency seems to be toward greater restriction, e.g. concentration camps, from which it would be difficult for the alien enemy to operate commercially.

⁷⁰ *Kershaw v. Kelsey, supra*.

⁷¹ *Williams v. Paine, supra*.

⁷² *New York L. Ins. Co. v. Davis, supra*, citing *New York L. Ins. Co. v. Statham, supra*.

⁷³ *New York L. Ins. Co. v. Davis, supra*.

War suspends the capacity of an alien enemy to sue in our courts.⁷⁴ An assignee of an alien enemy cannot sustain a claim in a prize court;⁷⁵ but an alien enemy may come into admiralty and defend his property seized as prize on the high seas.⁷⁶ The right to proceed in an action begun before the war is only suspended.⁷⁷ Neither interest nor the statute of limitations run during a war.

An American corporation doing business in Cuba was, during the war with Spain, an enemy of the United States with respect to its property found and then used in Cuba, and such property could be regarded as property of the enemy, liable to be seized and confiscated by the United States in the progress of the war.⁷⁸ All persons residing in Cuba during the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States.⁷⁹

4.—THE WRITERS

The right of making war, they teach, belongs in every civilized nation to the supreme power of the state. The exercise of this right is regulated by the fundamental laws in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation. A contest by force between independent sovereign states is called a public war. If it is declared in form or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. The Romans declared war with religious ceremony; and an invasion without a declaration was unlawful (*nefas*).⁸⁰ The present usage is to publish a manifesto within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them, usually to warn neutral states.

⁷⁴ *Fairfax's Devisse v. Hunter's Lessee*, 7 Cra. (U. S.) 603, 3 L. Ed. 453; *Johnson v. Thirteen Bales*, 2 Paine 639, Fed. Cas. No. 7,415.

⁷⁵ *The Emulous*, 1 Gall. 563, Fed. Cas. No. 4,479.

⁷⁶ *U. S. v. Shares of Capital Stock*, *supra*.

⁷⁷ *Elgee's Adm'r v. Lovell*, Fed. Cas. No. 4,344.

⁷⁸ *Juragua I. Co. v. U. S.*, 212 U. S. 297, 29 Sup. Ct. 385, 53 L. Ed. 520.

⁷⁹ *Herrera v. U. S.*, 222 U. S. 558, 32 Sup. Ct. 179, 56 L. Ed. 316.

⁸⁰ 1 Kent 53.

A civil war is never declared.⁸¹ It dates from the time the insurgents are declared belligerents. Even where there is a formal declaration of war, there is said to be a strong tendency to date the war from the first act of hostility. The present tendency is to consider a declaration of war desirable and necessary.⁸² Since the time of Bynkershoek it has been the settled practice in Europe that war may lawfully exist by a declaration which is unilateral, or without a declaration on either side; and it may begin by mutual hostilities;⁸³ at least as to subjects of a belligerent state,⁸⁴ but some public act should be done to announce to the people a state of war, and to apprise neutrals of its existence.⁸⁵ A state of war may exist without any formal declaration of it by either party, and this is true of both civil and foreign war.⁸⁶ A state of civil war exists whenever the regular course of justice is interrupted by insurrection⁸⁷

Under the regulations of the United States, the army is not allowed to use the enemy's flag or uniform for purposes of deceit, but the navy, it is said, may use a foreign flag to deceive the enemy if it is hauled down before a gun is fired.⁸⁸

The ordinary implements of war are lawful; swords, firearms, and cannon, and even those which are concealed, such as pits and mines, but this does not include poisoned weapons of any kind.⁸⁹ Custom, it seems, allows these. This being the case, custom would now add airplanes, and possibly V-bombs. The question, of course, is: how far can or should this custom be permitted to go?

When war exists between two nations, every individual of the one is theoretically at war with every individual of the other; though

⁸¹ Keith, *op. cit.*, p. 104.

⁸² 28 Am. L. Rev. 754.

⁸³ 1 Kent 54.

⁸⁴ L. R. 3 Adm. & Ecc. 390.

⁸⁵ Halleck, vol. 1, p. 480.

⁸⁶ Prize Cases, 2 Black. (U. S.) 635, 17 L. Ed. 459.

⁸⁷ Prize Cases, *supra*; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281.

⁸⁸ Cf. Hackworth, vol. 6, p. 182 for Sec. 38-40 of Rules of Land War and Art. 24 of the Hague Convention, of 1907, as to Ruses. The use of a foreign flag by the navy seems outmoded in days when ships are more usually identified by lines and signals.

⁸⁹ Oppenheim, vol. 2, pp. 99-109.

modern international law has attempted, with some success, to confine the contest to the armies of the contesting powers and relieve non-combatants from loss and suffering as much as possible. The most recent tendency, however, has been back toward the original idea of total opposition of one group of men to the other.

A belligerent has a right to seize and retain as prisoners of war all subjects of an enemy state found within its territory, but this right has usually been modified by treaty, usage, or municipal regulations, and is seldom enforced.⁹⁰ It was a general practice to permit alien residents to remain in the country during a war and to protect their property from seizure, or, if they returned to their own state, to allow them to take it with them; but now even citizens thought to be disaffected are put into concentration camps, and alien property is seized. Even trade with the enemy is restricted;⁹¹ and correspondence is subject to censorship.⁹²

This, then, is the doctrine on warfare summarized from the statements of Moralists, Statesmen, Judges, and Writers back in the good old days when "Colonel Blimp" was a young subaltern. Times, however, have changed, and war has returned to the totality which was taken for granted when savage tribes were on the march, one against the other. What was mere theory a generation ago, i.e., that every citizen of the one nation is at war with every citizen of the other, has come to be the order of the day. It behooves us, therefore, to analyze carefully, and with due consideration of all the complex problems involved, that which has been decided in the past to see whether it provides a satisfactory answer for the present, and, if it does not, to determine what is reasonable as a guide for conduct now.

II. THE NEW PROBLEMS

Recent experience has shown us cases of warfare commenced by surprise attacks. It has also shown us how *schrecklichkeit* may be used, or at least attempted, in an effort to confuse and demoral-

⁹⁰ Cf. Halleck, vol. 1, p. 483.

⁹¹ Cf. Trading with the Enemy Act, 1917, sec. 2 for definitions, and subsequent sections for lists of "unlawful acts" in this connection.

⁹² Cf. Trading with the Enemy Act, (1917), sec. 3 (d); Hackworth, vol. 6, p. 600.

ize, if not an army, at least the civilian population behind the army on which it must rely if it is to be effective in the field. Recent developments and the system of modern warfare with its increased use of machines have made us acquainted with the need for keeping constantly filled the "pipe-lines" to the fronts where the machines, transported at times for great distances and through a maze of communication systems, are finally hurled at the enemy. We have also become accustomed to the necessity of planning production to make the machines so that they will go into the "pipe-line" in a steady and continuous stream.

Workers have had to be recruited from among the civilian population and contribute to the battle in a way which was unthought of in the days when a skilled armorer made a sword long months or years before it was used on the field of battle, so that his co-operation was obviously quite remote. Food has become a weapon in a way not thought of when St. Alphonsus spoke of soldiers despoiling farmers when they marched through the country-side. Children today collect the scrap which is turned into weapons of war, and contribute their pennies to finance the conflict with the opposing state. Women work in war-plants. Even the aged find something to do in assisting the state in its all-out efforts against the enemy. Merchants, too, either help finance the war, or assist in other ways, e.g. in the distribution of food and clothing so that both soldiers and workers will have enough for each to do his part in the war effort.

Fifth columns and collaborationists operating with a State attempt to overthrow it and bring the warfare much closer to the individual citizen than it ever came when men in uniform formally shot at each other on remote battlefields. Underground movements of people of the occupied territory against their conquerors pose new problems, too, as to the liceity of the movement and of its methods.

War-plants are dispersed among the homes of the workers, partly so that they will be more accessible to the labor force, and partly so that the government can scream to the world that the enemy is bombing innocent civilians in disregard of the rules of "civilized" warfare when the plants are attacked.

New weapons are devised which will burn and blast on a scale only dreamed of heretofore. Planes make "incendiary raids" which

add the terrors of uncontrollable fire to the ordinary destruction of bombs. To avoid the losses involved in sending out great swarms of planes nations strive for ever more powerful explosives which, borne by a single plane, or guided from afar, are able to do the work of whole fleets of bombers. These explosives wipe out great areas of cities, taking, along with military objectives, also the homes of workers who, if they have no place to sleep, will be unable to work the next day turning out the weapons wherewith their armies might fight back, and the workers themselves, so that the production of the machines of war will be halted and the armies in the field will have to surrender.

Farmers see their crops go up in flames when the little pieces of paper impregnated with phosphorus and sowed by planes come in contact with moisture and burst out with consuming fire, for when the crops are gone and the armies cannot eat it will be necessary for them to yield, considering how food is now packaged and shipped to the front to support the armies. Furthermore, if there is no food for the workers to eat they will not be able to keep the armies in the field supplied with the machines they need.

Populations are carried off into slavery and forced to work in war-plants producing weapons which will be used to destroy their own country and their fellow-citizens who are in the armies of their country. Prisoners of war are forced to do the same sort of work.

Governments take over everything with rationing, restrictions on speech, etc. Total war comes to mean total government control, totalitarian government, in effect.

III. THE MENTALITY AROUND US

Some there are who cannot see any other answer to all these problems except what is already in the books, or what can be deduced therefrom by simple analogy. True it is, that there is a considerable amount of material which is applicable to the problems of the present time in this matter of warfare, but there are also points at which the precedents of the past fail us either because the new problems did not present themselves to the earlier writers, or because the solutions of the past are sometimes weak and will not

support a solution to the problems of the present when war is no longer a pastime of the nobility and the paid mercenaries, as it was before the "peoples' armies" began to overrun Europe after the French Revolution.

Others, following the lead of Hegel, are overpowered by the Kismet approach to history and feel that there is nothing in the present but what is the inevitable development and growth of the past, that there is nothing which we men can do to change the course of history, and that there is no other answer than to submit blindly and with such good grace as we can muster to the inexorable evolution of man's inhumanity to man.

Still others, taking the opposite point of view, feel that we are continually developing for the better and that soon there will come the blessed day when the lion shall lie down with the lamb and all our problems with regard to war will be delightfully solved so that we shall not have to worry about them any more.

Actually, human nature being what it is, men do fight from time to time, either because they like to or because there seems to be no other way to vindicate their rights. This being so, we can hope for the best and keep our powder dry while trying to persuade men and nations to outlaw such weapons as shock men's consciences, and then to stand by their agreements, preferably through a moral conscience, which is the only real guarantee of their observance, though the idea that they are mere contracts which can be broken at pleasure if the nation breaking them can get away with it is very widespread now, but, if necessary, through a knowledge that the other side has something just as deadly or more so, as was the case during the past war with regard to gas. The one who violated the convention outlawing the use of gas could not get away with it, and it was not used. It may be that in this way men will be dissuaded from resorting to atomic bombs, bacteriological warfare, and such fantastic ideas as oxydization of the earth's crust.

It may be, too, that with wars becoming more and more total the people who used to sit comfortably at home and get a vicarious thrill out of the reports from the battle-fronts will come to realize that war is what Gen. Sherman said it was and demand that an end be put to this sort of destruction. When it is only the boys at the

front who get maimed or killed one can be urged to buy war-bonds and to work in war-plants, but when those same war-plants are targets for tonight and the plants and the workers' homes go up in one fell blast, there may be a greater demand for peaceful solutions to the problems of the world, for once the war is started it is difficult, not to say impossible, to persuade the belligerents that any holds should be barred.

*Rev. Thomas Owen Martin, S.T.D.,
The Catholic University of America,
Washington, D. C.*