ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

4

USE OF FORCE · WAR AND NEUTRALITY PEACE TREATIES

(N-Z)

The articles in this Encyclopedia should be cited (until publication of the final edition) according to the following example:

H.-J. Schlochauer, Arbitration, in: Bernhardt (ed.), Encyclopedia of Public International Law [Instalment 1 (1981) p. 13]

ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

PUBLISHED UNDER THE AUSPICES OF THE
MAX PLANCK INSTITUTE FOR COMPARATIVE
PUBLIC LAW AND INTERNATIONAL LAW
UNDER THE DIRECTION OF
RUDOLF BERNHARDT

4

USE OF FORCE · WAR AND NEUTRALITY PEACE TREATIES (N-Z)

1982

NORTH-HOLLAND PUBLISHING COMPANY
AMSTERDAM • NEW YORK • OXFORD

ISBN: 0 444 86234 x

Publishers:

NORTH-HOLLAND PUBLISHING COMPANY
AMSTERDAM · NEW YORK · OXFORD

Sole distributors for the U.S.A. and Canada:

ELSEVIER NORTH-HOLLAND INC.
52 VANDERBILT AVENUE
NEW YORK, N.Y. 10017

Library of Congress Cataloging in Publication Data

Main entry under title:
Encyclopedia of public international law.
Issued in parts.
Includes index.
1. International law – Dictionaries.
I. Bernhardt, Rudolf, 1925–
II. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (Heidelberg, Germany)
JX1226.E5 341'.03 81–939
AACR2

PRINTED IN THE NETHERLANDS

INTRODUCTORY NOTE

The articles in the third and fourth instalments of the Encyclopedia of Public International Law are devoted to the field of hostile inter-State relations and associated questions: the use of force, war, neutrality and peace treaties. Here, as in other instalments, articles which relate to several subject areas are included in the instalment to which they have their closest connection; for example, although "economic coercion" does concern hostile inter-State relations, it is included in instalment 8 which deals, *inter alia*, with international economic relations. Relevant decisions of international courts and arbitral tribunals are contained in the second instalment. Articles considered to have a primarily historical significance and which deal with wars and peace treaties prior to 1900 will be contained in the seventh instalment, whose subject-matter will include, *inter alia*, the history of the law of nations. The fourth instalment includes 105 articles bearing titles beginning with the letters N–Z; those with initial letters A–M appeared in the third instalment.

In order to enable the reader to use the Encyclopedia to the fullest extent, two types of cross-references are used. Arrow-marked cross-references in the texts of articles refer to other entries (e.g. The case was submitted to the → International Court of Justice) and are generally inserted at the first relevant point in an article. When a specific topic might be expected to be dealt with under a certain title but is discussed either under a different heading or only in a broader context, the title appears in the alphabetical order with a cross-reference there to the appropriate article (e.g. INQUIRY *see* Fact-Finding and Inquiry).

The manuscripts for this instalment were finalized in December 1981.

CONTENTS

LIST OF ENTRIES

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AFDI	Annuaire Français de Droit International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AnnIDI	Annuaire de l'Institut de Droit International
Annual Digest	Annual Digest and Reports of International Public Law Cases
Australian YIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
BILC	British International Law Cases (C. Parry, ed.)
BYIL	British Year Book of International Law
CahDroitEur	Cahiers de Droit Européen
CanYIL	Canadian Yearbook of International Law
CJEC	Court of Justice of the European Communities
Clunet	Journal du Droit International
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
ColJTransL	Columbia Journal of Transnational Law
Comecon	Council for Mutual Economic Assistance
CTS	Consolidated Treaty Series (C. Parry, ed.)
DeptStateBull	Department of State Bulletin
DirInt	Diritto Internazionale
EC	European Community *or* European Communities
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of the United Nations
ECR	Reports of the Court of Justice of the European Communities (European Court Reports)
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
ESA	European Space Agency
ETS	European Treaty Series
EuR	Europa-Recht
Euratom	European Atomic Energy Community
Eurocontrol	European Organization for the Safety of Air Navigation
FAO	Food and Agriculture Organization of the United Nations
Fontes	Fontes Iuris Gentium
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross

ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IDI	Institut de Droit International
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
Indian JIL	Indian Journal of International Law
IntLawyer	International Lawyer
IntRel	International Relations
ItalYIL	Italian Yearbook of International Law
JIR	Jahrbuch für Internationales Recht
LNTS	League of Nations Treaty Series
LoN	League of Nations
Martens R	Martens Recueil de Traités
Martens R2	Martens Recueil de Traités, 2me éd.
Martens NR	Martens Nouveau Recueil de Traités
Martens NS	Martens Nouveau Supplément au Recueil de Traités
Martens NRG	Martens Nouveau Recueil Général de Traités
Martens NRG2	Martens Nouveau Recueil Général de Traités, 2me Série
Martens NRG3	Martens Nouveau Recueil Général de Traités, 3me Série
NATO	North Atlantic Treaty Organization
NedTIR	Nederlands Tijdschrift voor Internationaal Recht
NILR	Netherlands International Law Review
NordTIR	Nordisk Tidsskrift for International Ret
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PolishYIL	Polish Yearbook of International Law
ProcASIL	Proceedings of the American Society of International Law
RdC	Académie de Droit International, Recueil des Cours
Res.	Resolution
RevBelge	Revue Belge de Droit International
RevEgypt	Revue Egyptienne de Droit International
RevHellén	Revue Hellénique de Droit International
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
RivDirInt	Rivista di Diritto Internazionale
SAYIL	South African Yearbook of International Law
SchweizJIR	Schweizerisches Jahrbuch für internationales Recht
SCOR	Security Council Official Records
SEATO	South-East Asia Treaty Organization
Strupp-Schlochauer, Wörterbuch	Strupp-Schlochauer, Wörterbuch des Völkerrechts (2nd ed., 1960/62)

Supp.	Supplement
Texas ILJ	Texas International Law Journal
UN	United Nations
UN Doc.	United Nations Document
UN GA	United Nations General Assembly
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
UST	United States Treaties and Other International Agreements
WEU	Western European Union
WHO	World Health Organization
WMO	World Meteorological Organization
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

NATIONAL LIBERATION, WARS OF *see* Wars of National Liberation

NAVAL DEMONSTRATION

1. Definition and Types

A naval demonstration is a non-belligerent demonstration of naval power involving the use of one or several → warships in the service of foreign policy and not as an instrument of warfare (→ War; → Peace and War). It has no precise conceptual limits in international law or political science. When used as a political instrument, the primary objective is to influence the perceptions or behaviour of foreign decision-makers, not to attain immediate military goals. The warships are employed as symbols of national strength in order to indicate a high degree of firmness in pursuing specific strategic or political objectives. For analytical purposes, three types of demonstrations may be distinguished:

(a) "Showing the flag" on the → high seas in a region of strategic importance may serve the long-term interests of demonstrating military preparedness and expressing the general determination to act. Naval forces may be concentrated temporarily in a region of acute military tension in order to deter other States from undesired action and to signal a preparedness to lend military assistance. The conduct of → naval manoeuvres, the operation of patrol or surveillance units, or the "shadowing" of foreign warships may serve similar purposes.

(b) Offshore demonstrations on the high seas or demonstrative visits to foreign → ports may underscore or replace specific acts of → diplomacy (→ Démarche; → Ultimatum), e.g. the deployment of a task group to effect the release of fishing vessels impounded by a coastal State.

(c) Warships may be used periodically to make a demonstration of a right of passage (→ Passage, Right of) through → territorial waters or → straits when such rights have been questioned by coastal States or are likely to lapse for want of exercise.

2. Current Legal Status

The legal basis of naval demonstrations on the high seas is the freedom of navigation enjoyed by warships of all States (→ Navigation, Freedom of). All operations, including naval manoeuvres, are subject to the principle of reasonable use. Violent interference with foreign shipping as a means of exerting pressure for political ends is generally unlawful but may be justified on grounds of → self-preservation (→ Blockade; → Blockade, Pacific) or under the law of → reprisals. The Soviet-American Agreement on the Prevention of Incidents on and over the High Seas of 1972 (UST, Vol. 23, p. 1168) was concluded to minimize the danger of accidents resulting from a confrontation during naval exercises. Ships are not, under the Agreement, to simulate attacks by aiming guns, missile launchers or torpedo tubes in the direction of a passing ship of the other party (Art. III(6)).

The legality of a demonstration undertaken for the purpose of underscoring a warship's right of passage depends on whether such a right is recognized in → customary international law or in treaty law (→ Conferences on the Law of the Sea). It is arguable, however, that the passage of warships for the purpose of exerting political pressure in an area of high political tension may produce such strong psychological effects that it must be looked upon as an → intervention. In the → Corfu Channel Case, the → International Court of Justice upheld the right of passage of British warships close to the Albanian coast, although the purpose of the transit was to assert the right of passage and to influence events at a time of acute tension.

Naval demonstrations are subject to the general norms of international law prohibiting the → use of force and the preparation of an act of → aggression. Generally, both the threat to use naval force in case of non-compliance with stated demands and the actual use of force as a means of attaining political objectives violate these norms. Such operations may, however, form a legitimate part of individual or → collective self-defence measures (→ United Nations Charter, Art. 51) or serve the purpose of enforcing → sanctions agreed upon by the → United Nations (→ United Nations Peacekeeping System; → Peace, Threat to).

3. Recent Developments

The "gunboat" diplomacy of earlier periods,

often used effectively to strengthen colonial power (→ Colonies) or to afford protection to citizens abroad, has lost its credibility as a coercive instrument of diplomacy (→ Peaceful Settlement of Disputes). Accompanying the transition of the Soviet Union's navy from a coastal defence force into an instrument of global sea power, naval demonstrations have come to be a powerful means of (nuclear) deterrence and of military strategy used by both super powers (→ Great Powers) in an ideologically divided world.

L.W. MARTIN, The Sea in Modern Strategy (1967).
J. CABLE, Gunboat Diplomacy (1971).
D. MAHNCKE and H.-P. SCHWARZ (eds.), Seemacht und Außenpolitik (1974).
M. MCGWIRE, K. BOOTH and J. MCDONNELL, Soviet Naval Policy, Objectives and Constraints (1975).
S.G. GORSHKOW, The Sea Power of the State (1977).
B.M. BLECHMANN and S.S. KAPLAN, Force without War, U.S. Armed Forces as a Political Instrument (1978).

ONDOLF ROJAHN

NAVAL MANOEUVRES

1. Definition and Purposes

Naval manoeuvres are exercises by → warships on the → high seas or in the → territorial waters of the State or States conducting the manoeuvres or in the waters of a friendly State. The exercises include not only navigational exercises and target practice with conventional weapons but also other exercises. → Nuclear tests, rocket tests and → naval demonstrations are not subject to the rules governing naval manoeuvres. Warships play only an incidental role in nuclear weapon and rocket tests, the main purpose of which is simply the testing of these kinds of weapons (→ Nuclear Warfare and Weapons), while naval demonstrations are a method of displaying clearly a State's foreign policy in a particular region. The main form of testing in naval manoeuvres is the trial of weapons systems and combat-management tactics.

When a naval manoeuvre is to take place, the particulars of the zone involved are notified (→ Notification) in advance by → declaration, press statement, or through diplomatic channels (→ Diplomacy) in order to warn off ships from the area and especially from those parts where firing practice will take place. The chosen exercise areas are usually in any event far away from → sea lanes, flight corridors and fishing grounds. Occasionally ships under the State's own flag (→ Ships, Nationality and Status) are not permitted to pass near or through the exercise areas. If a manoeuvre is conducted within territorial waters, the coastal State usually forbids the anchoring of ships in the affected areas and prohibits the passage of ships through the area (→ Passage, Right of).

In recent years, it has been common for ships of several allied nations (→ Alliance) to take part together in naval manoeuvres in order to test their joint fighting strength and strategies within the framework of → collective self-defence organizations. When military bases provided for collective self-defence are established on foreign territory (→ Military Bases on Foreign Territory; → Military Forces Abroad), joint manoeuvres often involve ships of the host country.

2. Legal Problems

Naval manoeuvres are an accepted use of the high seas. Under the freedom of the high seas is understood not only States' freedom of → navigation and fishing, freedom to lay submarine cables (→ Cables, Submarine) and → pipelines, and freedom to fly over the high seas (→ Overflight), but also freedom to make use of the high seas for many other purposes, peaceful and military. The right of States to conduct military manoeuvres including target practice is one such purpose and has been well established through centuries of State practice. However, it is also true that all freedoms of the high seas must be exercised by all States with reasonable regard to the similar interests of other States on a basis of equality. None of these uses of the high seas has any special priority. When a conflict of interest occurs, or in situations of uncertainty, a balancing of interests through taking into account all relevant circumstances becomes necessary. Hence, for example, manoeuvres should not take place near shipping lanes.

Warships in → convoy enjoy no priority over ships sailing singly when the question of rights of way at sea is concerned. However, minesweepers with their equipment in place are considered to be unmanoeuvrable when in convoy, so that single

ships will have to give way to avoid collision with the sweeping equipment; therefore, it is considered to be a rule of navigation that minesweepers in convoy will normally have the right of way. It is also considered to be a rule that ships should give way in the case of supply services operations transacted during manoeuvres, for example, when supplies are being loaded at sea from one ship to another.

In order not to endanger other users of the high seas, it is sometimes necessary to establish "danger zones", especially taking into account local fishing activities and with an aim to warning the users of the area involved (→ Warning Zones at Sea). These must not be turned into zones into which ships are forbidden to sail. Blockaded zones are an inadmissible usurpation of parts of the high seas. Passage through and anchorage in danger zones by ships under foreign flags must not be prevented by → use of force, because it is a basic principle of the law of the sea that the imposition of sovereign rights over ships of other States is necessarily an infringement of their home States' rights of → sovereignty and is therefore delictual (→ Internationally Wrongful Acts). However, a State participating in the manoeuvres can forbid ships of its own flag to go through the danger zone and can use force to enforce its will. The danger zones should not be more extensive than necessary. It should also be noted that the purpose of "danger zones" is not to keep away unwanted observers of manoeuvres (→ Military Reconnaissance).

The right to carry out naval manoeuvres applies also to the seas over the → continental shelf of a foreign coastal State, because its sovereign rights only refer to the exploration and exploitation of natural resources. The same applies to the → contiguous zone; here, too, the coastal State has only limited rights. Similarly, naval manoeuvres should be allowed within the → exclusive economic zone of a foreign coastal State, even though this zone is not part of the high seas as defined in the Draft Convention on the Law of the Sea of the Third United Nations Conference on the Law of the Sea (ILM, Vol. 19 (1980) p. 1129). It is, however, doubtful if firing practice is always permissible in an exclusive economic zone due to the special claim of interest that the coastal State has in such a zone.

Naval manoeuvres by a State in the territorial seas of a foreign State are not permissible, as the coastal State has territorial rights over these waters (→ Territorial Sovereignty), although it is generally true that all foreign ships have the right of innocent passage.

U. JENISCH, Das Recht zur Vornahme militärischer Übungen und Versuche auf Hoher See in Friedenszeiten (1970).

P.S. RAO, Legal Regulation of Maritime Military Uses, Indian JIL, Vol. 13 (1973) 425–454.

GÜNTER HOOG

NAVICERT SYSTEM *see* Neutrality in Sea Warfare; Safe-Conduct and Safe Passage

NEUILLY PEACE TREATY (1919)

1. Historical Setting

Through participation in World War I, Bulgaria sought to regain what she had lost in the Second → Balkan War: Macedonia (which had been annexed by Serbia) and the Southern Dobruja (annexed by Romania in 1913; → Annexation; → Territory, Acquisition). However, opposition to this policy was widespread. The Germanophile government which had ruled the country since 1913 fell on June 18, 1918 and was replaced by a government under the leader of the Democrats, Malinov. When the exhausted Bulgarian army mutinied in September 1918, King Ferdinand I abdicated in favour of his son Boris III. An unconditional → armistice was signed with the Allies on September 29 of that year.

2. Paris Peace Conference and the Treaty of 1919

The Paris Peace Conference was convened in January 1919 to draft the texts of the peace treaties with Germany (→ Versailles Peace Treaty) and the other Central Powers (→ Peace Treaties after World War I; → Saint-Germain Peace Treaty; → Trianon Peace Treaty).

The Peace Treaty with Bulgaria was signed at Neuilly, a suburb of Paris, on November 27, 1919; it came into force on August 9, 1920. Bulgaria lost various territories she had been able to retain even under the terms of the 1913 Bucharest Peace Treaty. In the North and West, several adjustments were made in favour of the Serb-Croat-

Slovene State (later Yugoslavia), but these were minor losses compared with that of Western Thrace, which went to Greece and cut Bulgaria off from the → Aegean Sea. The small strip of territory which she received from Turkey could hardly be considered a noteworthy compensation (→ Boundaries).

On the other hand in the matter of → reparations assessed, Bulgaria was treated more realistically than her allies. While the original sum of 2 250 000 gold francs seemed quite high, it was still preferable to the settlements in other peace treaties following World War I, which only embodied general obligations to pay reparations, with the actual amounts to be fixed at later dates. Moreover, the reparation commission set up for Bulgaria had the authority to reduce by a simple majority vote the lump sum mentioned (→ Lump Sum Agreements). Eventually, three-quarters of the amount owed was forgiven, and the rest was divided into 60 annual instalments.

The armed forces which Bulgaria could maintain under the Treaty (33 000 men, including gendarmes and border guards) proved insufficient even for the preservation of internal order. The → Conference of Ambassadors set up to execute the Treaty had to permit an increase by 10 000 men in 1925. Bulgaria was also allowed some small men-of-war and a few military airplanes.

Many provisions of the Neuilly Treaty shared the scheme used in the Versailles Peace Treaty and the other treaties signed within the context of the Paris Conference. It contained, *inter alia*, the Covenant of the → League of Nations, and the usual régime for the protection of → minorities. It also contained provisions concerning the → Danube and its newly established International Commission.

3. Subsequent Developments

In 1923 and 1930, Bulgaria attempted unsuccessfully to have the Treaty revised (→ Treaties, Revision). A dispute with Greece about its interpretation was settled by the → Permanent Court of International Justice in its judgment of September 12, 1924, which was clarified by a second judgment of March 3, 1925 (→ Neuilly Peace Treaty Cases).

The authoritarian régime that emerged in Bulgaria in the 1930s sympathized with Germany, who on September 7, 1940 forced Romania to return the Southern Dobruja to Bulgaria. Although Bulgaria was later permitted to occupy considerable parts of Greece (Thrace) and Yugoslavia (Macedonia and part of Serbia), she refused to join Hitler's campaign against the Soviet Union. Nevertheless, she declared → war on the United Kingdom and the United States. The Soviet Union declared war on Bulgaria on September 5, 1944, at a time when the Government in Sofia had already asked the Allies for an armistice, withdrawn from the war and unilaterally proclaimed neutrality (→ Neutrality, Concept and General Rules; → Unilateral Acts in International Law). An armistice was finally signed on October 28, 1944, and Bulgarian troops fought the last months of World War II under Soviet command against Germany.

Bulgaria, who had become a republic in 1946, signed a peace treaty in Paris on February 10, 1947 (→ Peace Treaties of 1947).

The question of the continuing validity of those provisions of the Neuilly Treaty which were not derogated by the Treaty of 1947, especially those relating to minorities, is purely academic (→ Treaties; → Treaties, Validity; → Treaties, Termination).

Treaty of Peace between the Allied and Associated Powers and Bulgaria, British and Foreign State Papers, Vol. 112 (1919) 781–895; CTS, Vol. 226 (1981) 332–433.

H.W.V. TEMPERLEY (ed.), A History of the Peace Conference, Vols. 4 and 5 (1921).

G.P. GÉNOV, Le traité de paix de Neuilly au point de vue du droit international public et privé (1927).

K. DOEHRING, Das Gutachten des Generalsekretärs der Vereinten Nationen über die Fortgeltung der nach dem ersten Weltkrieg eingegangenen Minderheitenschutzverpflichtungen, ZaöRV, Vol. 15 (1953/54) 521–540.

HERIBERT FRANZ KÖCK

NEUTRAL NATIONALS

1. Definition and General Status

Since neutrality is a relation between States, neutral nationals do not have special neutral rights and/or duties under international law (→ Neutrality, Concept and General Rules;

→ Individuals in International Law). Their treatment by belligerents is governed by the rules of international law concerning → aliens applicable in peace-time, superseded in certain respects where special international law rules of neutrality exist. But any rights are those of the neutral State, which may exercise → diplomatic protection in case of their violation.

Art. 16 of Hague Convention V of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land provides: "The nationals of a State which is not taking part in the war are considered as neutrals." Their neutral status may, however, not be invoked with regard to a belligerent against which they have committed a hostile act (Art. 17; → Hague Peace Conferences of 1899 and 1907). Diplomatic protection may be accorded not only to natural persons but also to juridical persons of the neutral's → nationality (→ National Legal Persons in International Law). The status of property generally follows that of its owner.

2. Neutral Nationals in Neutral Territory

Although the neutral State alone has duties under the laws of neutrality, it is bound to restrict the private activities of its nationals and other persons within its jurisdiction where such activities might conflict with its own neutral duties (→ Jurisdiction of States; → Responsibility of States: General Principles). Neutral States have, moreover, found it sometimes convenient to place greater restraints upon their subjects in → neutrality laws than international law would demand, to avoid chances of involvement in a war (→ Neutrality in Land Warfare; → Neutrality in Sea Warfare). Thus, certain acts which would not give rise to the loss of neutral status under international law may be forbidden under the domestic legislation of the neutral State.

Art. 18(a) of Hague Convention V provides that the furnishing of supplies or the making of loans to one of the belligerents by a neutral national does not constitute a hostile act under Art. 17 of the Convention, as long as the person so doing lives neither in the territory of the other belligerent nor in territory occupied by it, and the supplies do not come from those territories (→ Neutral Trading). However, the United Kingdom (which has not ratified this Convention) and her allies during World War II established a different practice as part of → economic warfare. In application of domestic legislation, neutrals → trading with the enemy from neutral territory became "statutory alien enemies" (→ Enemies and Enemy Subjects).

3. Neutral Nationals under the Jurisdiction of Belligerents

(a) In belligerent territory

Neutral nationals residing in the territory of a belligerent are subject to its laws and are exposed to the same general consequences of war as the other inhabitants. Their property is also subject to the laws of the host country. Only if their State of nationality has no diplomatic relations with their State of residence are neutral nationals protected by Arts. 35 to 46 of Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War (Art. 4; → Geneva Red Cross Conventions and Protocols); in such a situation, they are accorded the same treatment as resident enemy aliens. Generally, neutral nationals may be compelled to work to the same extent as nationals of the belligerent in whose territory they reside; they may also be interned (→ Internment) if the security of the detaining power makes this absolutely necessary. Their property (→ Aliens, Property) may not be confiscated (→ Expropriation and Nationalization), but if urgently required in connection with the war it is subject to → requisition under the right of angary (→ Angary, Right of) for the war's duration. This rule also applies to ships and other means of transport, including their cargoes, which may accidentally come under the jurisdiction of a belligerent.

Being under a belligerent's jurisdiction does not make neutral nationals lose their neutral status in respect of the adverse belligerent party. Art. 18(b) of Hague Convention V provides that even their rendering of services to one belligerent in matters of police or civil administration does not deprive them of their neutral status; nor does the above-mentioned furnishing of supplies or making of loans. But Anglo-American practice during the world wars followed a different line: Substituting the criterion of residence for that of nationality, the trading with the enemy legislation gave neu-

tral nationals residing in enemy-controlled territory enemy status for the purposes of that legislation.

Neutral nationals merely in transit through the territory of a belligerent must be treated with particular respect, provided that their activities are consistent with their neutral status. Neutral passengers of an enemy private → aircraft which has been captured by a belligerent, as well as the neutral crew and passengers of a neutral aircraft which has been detained by a belligerent, must be released (→ Neutrality in Air Warfare).

(*b*) *In occupied territory*

Neutral nationals in occupied territory, who have, according to Art. 4 of Geneva Convention IV of 1949, the status of → protected persons, are entitled to the same treatment as the other inhabitants of the occupied terr tory (Arts. 47–78), except that they may leave the occupied territory if their departure is not contrary to the national interest of the occupying power (Art. 48; → Occupation, Belligerent). That loose wording, however, actually subjects the application of this provision to the discretion of the occupying power.

Neutral nationals whose State of nationality maintains diplomatic relations with the occupying power are not protected in this way. They would, for instance, appear to be liable to expulsion or deportation from the occupied territory for just cause (→ Aliens, Expulsion and Deportation). The situation of neutral diplomats or consuls residing in the occupied territory is not codified and there is little known practice (→ Diplomatic Agents and Missions). It is, however, submitted that the rules embodied ir Art. 40 of the → Vienna Convention on Diplomatic Relations (1961) and in Art. 54 of the → Vienna Convention on Consular Relations (1963) are *mutatis mutandis* applicable as a → minimum standard.

When members of a neutral → Red Cross Society who are duly authorized to assist a belligerent State fall into the hands of the adverse party, they may not be detained but may return to their country (→ Relief Actions). Pending such return they must continue their work under the direction of the adverse party (Art. 32 of Geneva Convention I of 1949).

(*c*) *In zones of operations*

Neutrals and their property situated in a zone of operations (→ War Zones; → War, Theatre of) run the risks inherent in their location, and belligerents are not responsible for damage caused by attacks which are lawful under the Hague Conventions and the Geneva Conventions and Protocols.

4. Neutral Nationals Participating in Hostilities

Art. 17 of Hague Convention V of 1907 provides that neutral nationals lose the benefit of their status if they commit hostile acts against a belligerent, especially if they voluntarily enlist in the armed forces of a belligerent party. The wording of this provision raises the problem of neutral nationals permanently residing in a belligerent State whose draft laws also conscript resident aliens (→ Aliens, Military Service). Delegates to the Hague Peace Conference of 1907 expressed the wish that States should regulate by special treaties the position of foreigners residing within their territories as regards military obligations. A certain number of relevant bilateral agreements exist and, in general, resident neutral nationals are not liable to military service against their will. If they were, however, conscripted against their will, they would presumably be entitled to claim the benefit of their neutrality on falling into the hands of the adverse party.

Art. 17 provides further that a neutral member of the enemy forces "shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent party could be for the same act". Such neutral nationals are accordingly protected by Geneva Convention III of 1949 relative to the Treatment of Prisoners of War. This applies also to those neutral nationals who, without enlisting in the regular forces of a belligerent, participate as volunteers in hostilities on its side in ways recognized by Arts. 43 and 44 of the 1977 Protocol I additional to the Geneva Conventions of 1949, provided that they are not → mercenaries within the terms of Art. 47 of that Protocol.

E. VON WALDKIRCH and E. VANSELOW, Neutralitätsrecht (1936) 92–111.

E. BORCHARD, The Power to Punish Neutral Volunteers in Enemy Armies, AJIL, Vol. 32 (1938) 535–538.

J.F. LALIVE, Le droit de la neutralité et le problème des crédits consentis par les neutres aux belligérants (1941).
E. CASTRÉN, The Present Law of War and Neutrality (1954) 445–448, 486–492.
J. STONE, Legal Controls of International Conflict (1954) 436–441.
G.H.L. FRIDMAN, Enemy Status, ICLQ, Vol. 4 (1955) 613–628.
I. BROWNLIE, Volunteers and the Law of War and Neutrality, ICLQ, Vol. 5 (1956) 570–580.
M. GREENSPAN, The Modern Law of Land Warfare (1959) 570–581.
LORD MCNAIR and A.D. WATTS, The Legal Effects of War (4th ed. 1966).
D. SCHINDLER, Aspects contemporains de la neutralité, RdC, Vol. 121 (1967 II) 219–321.

KARL ZEMANEK

NEUTRAL TRADING

1. Concept

In case of war, parties to the conflict usually interrupt their mutual commercial relations and forbid their nationals from → trading with the enemy or enemy subjects (→ Enemies and Enemy Subjects). Only occasionally do belligerents issue safe-conducts and allow safe passage to enemy subjects, ships or goods (→ Safe-Conduct and Safe Passage).

Unlike belligerents, neutral States (→ Neutrality, Concept and General Rules) are as a rule interested in maintaining their commercial relations established in peace-time with parties to the conflict. Yet States engaged in war usually seek to cut off their adversary from any supply enabling it to continue the armed struggle.

In view of these opposing interests, the law had to strike a compromise by imposing certain restrictions on free trade between neutrals and belligerents, without, however, interfering with → vital interests of the neutral States or of their nationals (→ Neutral Nationals). Through the course of history, questions surrounding neutral trading have grown in significance to the extent that contemporary international law contains a whole set of rules governing them.

2. Historical Development of Rules

Customary rules on neutral trading can be traced back to the 14th century, when a collection of customs and rules concerning maritime commerce in the Mediterranean was compiled (→ War, Laws of, History). This collection, called "Consolato del Mare", in part dealt with the protection of neutral ships and goods in time of war. One of its basic principles stated that neutral goods on board enemy ships and neutral vessels carrying enemy cargo (→ Enemy Property) should not be captured or seized by a party to the conflict.

The principles of the "Consolato del Mare", originally limited to the Mediterranean, soon became universally recognized, and had a lasting influence on the evolution of the law of the sea until up to the 19th century (→ Law of the Sea, History).

The development of rules on neutral trading had in the meantime been supplied with important impetus from legal theory which during the 17th and 18th centuries showed increasing interest in problems of neutrality. Grotius (1583–1645), in Chapter XVII of the third book of his treatise De jure belli ac pacis dealt with "his qui in bello medii sunt". Citing the concept of "just war", he claimed that neutrals should by no means support the "unjust cause". However, in case of doubt about the justness or unjustness of the war, Grotius proposed that neutrals should treat belligerents equally. Bynkershoek (1673–1743), in contradistinction to Grotius, refused to accept that the concept of just war should have any significance for the attitude of neutrals. On the contrary, neutrals should not show, for whatever reasons, any preference for a belligerent. Vattel's (1714–1767) theory of sovereign equality of States (→ States, Sovereign Equality) supported the proposition that neutrals ought to refrain from any judgment of a particular war as just or unjust in respect of a belligerent. Neutrals therefore should give all belligerents equal treatment.

Apart from legal theory, the development of the law on neutral trading remained closely related to the evolution of the law of → sea warfare (→ Neutrality in Sea Warfare). This applied in particular to two belligerent measures of major legal concern: → blockade and → contraband. In the 17th century, blockade and contraband – as well as the rights derived from them by belligerents to visit and search neutral

vessels (→ Ships, Visit and Search) and eventually to take prizes (→ Prize Law) – led neutral States to conclude treaties with belligerents guaranteeing the neutrals' right of trading within agreed limits. Lists of goods falling under the category of contraband were established.

In some instances, neutrals went even further by agreeing with other neutral powers to protect their rights, if necessary by the force of arms. In 1780 Russia, Denmark and Sweden concluded such a treaty determining that: (a) they had rights to navigate between the → ports of belligerents, and along their coasts; (b) enemy goods on neutral ships, with the exception of contraband, should not be subject to seizure; (c) a port should not be considered blockaded unless the blockade was effective; and (d) these principles should be applicable within the procedure concerning the visit and search of neutral ships as well as regarding judgments on the legality of prizes. This policy of neutrals, backed by naval strength, was known as the First Armed Neutrality. Twenty years later, Russia concluded treaties with Sweden, Denmark and Prussia renewing the principles mentioned above. In addition, a new principle was laid down prohibiting any visit and search if the commanding officer of the → convoy protecting neutral ships declared that they did not carry contraband of war.

The 19th century was characterized by the growing acceptance of the principles set forth in the treaties of Armed Neutrality. In 1801 Great Britain recognized the rights of neutrals in the Maritime Convention that she concluded with Russia. Finally, the Declaration of Paris of 1856 reaffirmed those principles, especially the rule that blockades ought to be effective.

At the Second Hague Peace Conference of 1907 (→ Hague Peace Conferences of 1899 and 1907) two conventions codifying customary rules on neutrality were adopted: Convention V respecting the Rights and Duties of Neutral Powers and Persons in War on Land, and Convention XIII respecting the Rights and Duties of Neutral Powers in Naval War. According to common Art. 7 of these Conventions, neutral powers are not obligated to prevent trading in → war material between their nationals and belligerents, although this is forbidden to the State. Common Art. 9 reiterates the principle of impartiality. Regarding → air warfare, Art. 45 of the unadopted but authoritative Hague Rules on Air Warfare of 1923 contains a provision similar to Art. 7 of the 1907 Conventions (→ Neutrality in Air Warfare). Finally, Art. 22 of the Havana Convention on Maritime Neutrality of 1928 states the same principle.

The increasing importance of → economic warfare in World Wars I and II brought about further restrictions on neutral trading, especially by the enlargement of the lists of contraband, by new methods of control (control at the source, the system of "navicerts" (→ Safe-Conduct and Safe Passage), the doctrine of continuous voyage), and by the establishment of "black lists" proscribing persons and firms in neutral States considered as enemy nationals or associates.

3. *Current Legal Situation; Special Problems*

The current legal situation of neutral trading is still based on the principles laid down in the two Hague Conventions of 1907 and the rules on contraband, blockade and unneutral service. However, through the rapid development of methods and means of warfare (→ Warfare, Methods and Means), belligerents have been confronted with new problems relevant to neutral trading which were unforeseeable in 1907. In the meantime, the economic strength of a belligerent has become an overwhelmingly important factor for defeating an adversary. This is often conditioned by belligerents ensuring the access of the maximum neutral trade into their own territory while denying the same to their opponents. As a consequence, the principles of the Hague Conventions stimulated further elaboration by way of interpretation which took the form of expanded claims of belligerent rights.

In view of the measures taken by belligerents in World Wars I and II, neutral powers issued internal regulations implementing the Hague Conventions (→ Neutrality Laws). In order to protect their nationals against undue interference by a party to the conflict, neutral powers in some instances voluntarily introduced a system of State supervision of commercial relations with belligerents by issuing export licences. In the endeavour to ensure equal treatment of all belligerents, during World War II Switzerland adopted the principle of maintaining her "normal

level" (*courant normal*) of trade in relation to parties to the conflict.

In connection with the rule forbidding the supply of → warships, ammunition, or war material by a neutral power to a belligerent (Hague Convention XIII, Art. 6), the question has arisen whether this also applies to the export of war material by a nationalized industry. Taking into account that in some States industry and foreign trade are under the control of the State (state-trading States), it may be asked whether in such a case the traditional distinction between State supplies and private trading can still be upheld. Although this problem is as yet unsettled, there are strong legal arguments in favour of maintaining such a distinction. According to these views, exports by nationalized industries or trading companies have to be considered as private commercial activities if the management of such undertakings is independent of governmental control, and thus the distinction remains valid in these circumstances.

It seems clear that the rules of international law concerning neutral trading are applicable only when the state of neutrality itself is called into being, i.e. when a state of → war exists. However, in contemporary State practice there are many instances of → armed conflicts in which parties to the conflict for various reasons do not admit to waging war, and the state of war is not immediately evident to uninvolved States. Since the status of this kind of situation has not as yet been settled by international law (→ Peace and War), it is legitimate to say that parties to the conflict have no right to claim observance of the principles governing neutral trading unless they allege the existence of war or unless the state of war becomes otherwise apparent. This of course does not prevent States which are not parties to the conflict from voluntarily submitting themselves to the observance of the relevant provisions of the law of neutrality.

4. Significance

The law of neutral trading has developed gradually. Apart from codifications such as the two Hague Conventions of 1907, State practice, based in particular on national legislation, has played an important role in the evolution of rules of customary law. The legal principles on neutral trading have always reflected a compromise between the competing interests of neutral powers on the one hand and of belligerents on the other.

The increasing significance of economic warfare measures in the two world wars was unfavourable to neutral trading. These experiences proved that it remains a crucial task for international law to find an equitable balance between the exigencies of warfare and the right of neutral States to engage in free trade.

R. STÖDTER, Handelskontrolle im Seekrieg (1940).
M. MOOS, The Navicert in World War Two, AJIL, Vol. 38 (1944) 115–119.
H.E. DUTTWYLER, Der Seekrieg und die Wirtschaftspolitik des neutralen Staates (1945).
G.G. FITZMAURICE, Some Aspects of Modern Contraband Control and the Law of Prize, BYIL, Vol. 22 (1945) 73–95.
E. CASTRÉN, The Present Law of War and Neutrality (1954).
R.L. BINDSCHEDLER, Die Neutralität im modernen Völkerrecht, ZaöRV, Vol. 17 (1956/57) 1–37.
J.L. KUNZ, Die neuen amerikanischen Flotteninstruktionen über Seekriegsrecht, Österreichische Zeitschrift für öffentliches Recht, Vol. 8 (1957–1958) 270–299.
K. ZEMANEK, Wirtschaftliche Neutralität, Juristische Blätter, Vol. 81 (1959) 249–251.
I. SEIDL-HOHENVELDERN, Handel mit Kriegsmaterial und Neutralität, Gedanken zum Außenwirtschaftsgesetz, in: Festschrift für Rudolf Laun (1962).
E. BONJOUR, Geschichte der schweizerischen Neutralität, 9 vols. (2nd ed. 1965–1976).
I.F. WALLAS, Die völkerrechtliche Zulässigkeit der Ausfuhr kriegswichtiger Güter aus neutralen Staaten, Thesis, University of Hamburg (1970).
H. HOMBERGER, Schweizerische Handelspolitik im zweiten Weltkrieg (1971).
J. KÖPFER, Die Neutralität im Wandel der Erscheinungsformen militärischer Auseinandersetzungen (1975).
A. VERDROSS, The Permanent Neutrality of Austria (1978).

ERICH KUSSBACH

NEUTRAL WATERS *see* Neutralization

NEUTRALITY, CONCEPT AND GENERAL RULES

1. Background

(a) Concept

The term "neutrality" designates the legal status of a State which does not participate in a

→ war being waged by other States. A precondition, therefore, is the existence of a war between sovereign States or a → civil war in which the rebels have been recognized as belligerents (→ Recognition of Belligerency). The laws of neutrality govern the relations between neutral and belligerent States to the extent that the latter's belligerent status requires special rules. In other respects the laws of peace continue to apply. In the case of a → use of force which falls short of actual war, the laws of neutrality do not apply; a non-participating State does not have the status of neutrality. The parties to the conflict have no special rights *vis-à-vis* the non-participating party, and the latter has no special obligations towards the former. In particular, the non-participating party is entitled to resist any → intervention from the parties to the conflict.

According to general international law, a State is normally under no obligation to remain neutral; it may enter the war on either side (but under the → United Nations Charter only in certain prescribed cases). It has the right to neutrality, as has been confirmed by the Final Act of Helsinki of August 1, 1975 (principle of sovereign equality) (→ Helsinki Conference and Final Act on Security and Cooperation in Europe). An obligation to remain neutral may, however, be treaty-based for particular conflicts, or be general if a policy of permanent neutrality has been adopted. Only permanent neutrality grants rights and imposes duties in peace-time. Neutrality agreements which relate to particular conflicts are often politically equivalent to support for one of the parties.

The laws of neutrality constitute a compromise between the conflicting interests of the belligerents and the neutral State. Their content thus depends on the power relationship between the two. As all the major powers participated in the two world wars, the belligerents were in a dominating position and were able to restrict the rights of neutrals, especially in → sea warfare and → economic warfare.

Neutrality automatically becomes effective at the outbreak of war between third States. A special declaration of neutrality is not legally necessary, although it is frequently made in practice. Neutrality ends when the neutral State enters the war, but not if it uses force to counter a violation of its neutrality (Art. 10 of Hague Convention V of 1907; → Hague Peace Conferences of 1899 and 1907).

A distinction must be drawn between the laws of neutrality and a policy of neutrality. Whereas the former comprises the legal rules which govern neutrality, the latter describes the political attitude of a neutral State in spheres not covered by the laws of neutrality – an attitude which it adopts in order to preserve its neutral status.

(*b*) *Sources*

The laws of neutrality consist, for a great part, of → customary international law. They were partially codified in the Paris Declaration of 1856 on sea warfare (→ Prize Law), in Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (→ Neutrality in Land Warfare), and in Hague Convention XIII respecting the Rights and Duties of Neutral Powers in Naval War (→ Neutrality in Sea Warfare), both of October 18, 1907. In addition, the four Geneva Conventions of 1949 on the protection of war victims (→ Geneva Red Cross Conventions and Protocols) contain provisions relating to neutrality.

2. *Historical Evolution*

(*a*) *Prior to the end of World War I*

In the Middle Ages, a period in which the notion of the just war was recognized (→ War, Laws of, History), countries which remained aloof from a conflict, especially one directed against a non-Christian enemy, were not readily granted a special status. Neutrality was thus for many centuries neither protected nor encumbered by special rules. Unilateral assistance to one party, granting of passage, violations of neutral sovereignty and interference with neutral shipping were regular phenomena. Neutral States therefore attempted to protect their status by concluding agreements with one or both of the belligerents, sometimes in anticipation of a conflict.

The laws of neutrality in sea warfare began to take form in the late Middle Ages, although this admittedly did not prevent frequent interference with → neutral trading. The laws of neutrality in land warfare were still in an embryonic state at the outbreak of the Thirty Years War. Neutrality agreements between the continental powers

resembled treaties of → alliance. No objections were made to the recruitment of troops in neutral territory; the right of passage through neutral territory, still accepted by Grotius (De jure belli ac pacis, Book 2, Chapter 2, § 13), was only finally rejected by Switzerland at the end of the Thirty Years War.

The 17th century was the period in sea warfare when attempts were made on the one hand to impose treaty obligations on neutral States and on the other to limit the activities of the belligerents by compiling lists of → contraband and free goods. In 1712, Prussia was still obliged to allow Russian troops to cross her territory in the war between Russia and Sweden. Later in the 18th century, however, the impartiality of neutral States and the inviolability of their territory came to be recognized as a basic principle (→ Territorial Integrity and Political Independence). Switzerland then refused passage to belligerents, except in cases where treaty obligations existed, using a practice endorsed by Vattel (Le droit des gens, Book 3, Chapter 7).

The classical period of protected neutrality was the 19th century and that part of the 20th century which preceded World War I. Following the two alliances known as "armed neutralities" of 1780 and 1800, which were designed to protect neutral States against the effects of → economic warfare at sea, and the efforts of the United States to keep neutral trade functioning during the Napoleonic wars (which led in 1811 to war with Great Britain), a growing trend developed in sea warfare to restrict the rights of belligerents, to the advantage of neutral trading. The high point of this development was marked by the Paris Declaration of 1856 on sea warfare. At the same time, the earlier practice of establishing neutralized protective zones in areas of tension (e.g. Burgundy's Franche-Comté as a forward defence for Switzerland) was reintroduced (→ Neutralization). Nor was this development confined to the → demilitarization of certain areas (e.g. Hüningen, → Aaland Islands, Upper Savoy). The → Great Powers also recognized the general validity of the principle of neutrality by accepting the neutral status of Switzerland (1815), Belgium (1839) and Luxembourg (1867). Towards the end of the period, further aspects of the law of neutrality were codified at the Second Hague Peace Conference of 1907. In World War I, neutrality as a legal institution was preserved in land warfare in spite of the violation of Belgian and Luxembourg neutrality by Germany, whereas in sea warfare it suffered considerable setbacks owing to the demands of economic warfare (→ Trading with the Enemy).

The extension and consolidation of neutrality in this epoch must be seen against the background of changing legal attitudes towards war from the 18th century onwards. Neutrality came to be recognized as a means for localizing wars by ensuring that third States did not intervene, and thus as a symbol of peace. As long as war was tolerated as a means of national policy, impartiality was the keystone of neutrality; respect for the territorial integrity of neutral States emanated from the principle of → sovereignty. The gradually developing humanitarian laws of war (→ Humanitarian Law and Armed Conflict), for example, the earlier Geneva Conventions, also presupposed the existence of neutral States.

(*b*) *The League of Nations and World War II*

Given that until 1914 the status of neutrality was based on the freedom of every State to determine whether or not to wage war, radical changes were inevitable with the growth of the notion that wars of → aggression are prohibited. A strict interpretation of this principle might seem to indicate that neutrality represented a dereliction of the duty to contribute towards → collective security, and even a violation of Art. 16 of the Covenant of the League of Nations. Some authors in the years between the two world wars drew such a conclusion. They maintained that States which did not directly participate in measures directed against an aggressor should at least differentiate between the belligerents. This viewpoint was legally viable only to a limited extent, namely only for members of the League, and then only if the States in question accepted the findings of the League Council under Art. 16 and had not been exempted from participation in → sanctions. Not all types of war were outlawed under the League Covenant, and membership was not universal. As every member of the League was free to decide if there had been a breach of the Covenant, and whether or not to participate in joint measures, there was sufficient leeway for

the continuing existence of neutrality. The signing of the → Kellogg-Briand Pact in 1928 did little to alter this situation, because the signatories were under no obligation to assist the victim of an armed attack.

The prevailing doctrine of the time assumed that the historic right of neutrality still existed in large measure. Thus, soon after its foundation, the League recognized the special status of neutral Switzerland (London Declaration of February 13, 1920). A considerable number of neutrality declarations were made after 1918 (e.g. by the Allied Powers during the Greco-Turkish War of 1921 and by several South American States in 1933 during the → Gran Chaco Conflict). Treaties made frequent reference to neutrality (e.g. the Nine-Power Treaty on → China of February 6, 1921 and the Straits Treaty of July 20, 1936 (→ Dardanelles, Sea of Marmara, Bosphorus; → Straits)). Inter-American treaties are a special case in point; on February 20, 1928 a convention was signed in Havana on neutrality rights in sea warfare, while the → Saavedra Lamas Treaty of 1933 contained the provision that States not directly involved in an inter-American conflict were to remain neutral.

The theory that neutrals should distinguish between the parties to a conflict also did not find its way into practice. Following the failure of sanctions in the Italo-Abyssinian conflict of 1935–1936, Switzerland was successful in having her full impartial neutrality confirmed in a League Council resolution of May 14, 1938. In 1936 Belgium and the Netherlands, followed in 1938 by the Scandinavian countries, unilaterally declared that they were returning to their traditional position of neutrality. In the United States, an isolationist trend developed and found expression in the → neutrality laws of 1935 and 1940. A neo-neutralist doctrine (Cohn) pointed to the moral contribution of neutrality towards the preservation of peace (→ Peace, Proposals for the preservation of).

The violations of neutrality perpetrated by Germany in World War II when her troops marched into Belgium, Luxembourg, the Netherlands and Norway demonstrated the futility of trying to avoid involvement in a world war by means of a previously declared policy of neutrality. By selling destroyers to Great Britain in 1940, the United States, the most powerful neutral country, veered towards a position of partisan non-belligerency. Neutral trade at sea was affected even more severely than in World War I; the pressure of the belligerents on neutral countries was also increased on land. By the end of the war the only countries to remain neutral were Ireland, Portugal, Spain, Sweden and Switzerland. Nevertheless, the continued existence of a few neutral States proved of inestimable value for ensuring the observance of the humanitarian rules of armed conflict. The fulfilment of this function, however, imposed a considerable burden on the few remaining neutral States. With the exception of those States which had simply declared a policy of non-belligerency (Spain and, before Italy's entry into the war, Turkey and Argentina), the neutrals preserved their impartiality.

3. Basic Elements and Problems

(a) Fundamental rules

A neutral State has the right to demand respect for its independence and above all for its → territorial sovereignty, including its air space (→ Air, Sovereignty over the). It has the right to maintain relations with all other States, whether neutral or belligerent. → Neutral nationals must enjoy corresponding rights.

The supreme precept is that the neutral State may not, by governmental measures, intervene in the conflict to the advantage of one of the belligerents. Measures that would assist a belligerent and those that would harm it are alike forbidden. This prohibition applies even if equal treatment for both parties is contemplated (→ States, Equal Treatment). Equality of treatment and impartiality are in this respect irrelevant. It is an obligation imposed on the government of the neutral State, but not on its nationals.

In addition, the neutral State is under an obligation to prevent certain activities and to tolerate others.

The duty to remain impartial is also included in the catalogue of obligations, but it is subsidiary to the absolute obligations. It applies only to the extent that it does not conflict with any other neutral obligations. Moreover, in cases where it may be called into operation, impartiality means only the duty to treat the belligerents formally, not materially, on the basis of equality. Material equality is simply not possible, given variations in

geographic situation and economic relationships. Discriminatory sovereign acts, such as export prohibitions, directed against only one party, are forbidden.

Neutrality obligations are to be observed according to the means at the disposal of the neutral State, its ability to procure such means being a factor which should not be ignored.

Basically, neutral obligations are only of a political or a military nature. Economic obligations exist only to the extent that the neutral State may not provide the belligerents with financial assistance or supply them with → war materials; according to the right of → booty in sea warfare, its → merchant ships must also submit to visit and search (→ Ships, Visit and Search) if they are suspected of carrying contraband. Otherwise, the neutral is entitled to trade with all the belligerents, although in practice this right has become ever more restricted due to the abusive unilateral extension of the concept of contraband by the belligerents and their practice of declaring → blockades over large portions of the → high seas (see also → War Zones). It is under no obligation to regulate the political sympathies of its nationals; i.e. a neutral mentality is not demanded of individuals.

(For more detailed rules, see → Neutrality in Land Warfare, → Neutrality in Sea Warfare, and → Neutrality in Air Warfare.)

(*b*) *Neutrality and the United Nations*

An obligation to remain neutral is implied in the UN Charter to the extent that no member State may participate in an → armed conflict except in response to a call for sanctions by the → United Nations Security Council, in exercise of the right of individual or → collective self-defence under Art. 51, or on the basis of a recommendation by the Security Council or the → United Nations General Assembly. A permanently neutral State merely has the right of individual self-defence; it can participate in collective self-defence only if it is itself the direct object of attack.

In principle, neutrality is contrary to the principle of collective security expressed in Art. 2(5) of the Charter, as all obligations undertaken under the Charter have precedence over any other international obligations (Art. 103). In individual cases, however, the resort to collective action requires a binding decision by the Security Council in accordance with Chapter VII of the Charter. Only when such a decision has been reached and only when the coercive measures agreed upon lead to a state of war, does the question of the precedence of obligations under the Charter over neutral obligations arise. In practice, such a situation is unlikely to occur, as it is hardly conceivable that the Great Powers would achieve the required unanimity, and, even if this were possible, the decision itself would inhibit an armed conflict. Moreover, participation in military actions requires the conclusion of special agreements with the Security Council (Art. 43), and it is left to the latter to determine whether all or only some of the member States should take part in the action (Art. 48). Measures short of war, even when they involve the use of force, do not legally create a state of neutrality, and participation in them does not constitute a violation of the laws of neutrality. Mere declarations, recommendations or statements of the Security Council are not legally binding. The same applies to General Assembly resolutions. The question of neutrality does not arise in any of these cases; nor are neutrality and UN membership incompatible. The question of permanent neutrality must, however, be considered in a somewhat different light (→ Permanent Neutrality of States).

(*c*) *Non-belligerency*

From a legal point of view, there exist only a neutral status and a belligerent status; there is no intermediate status. There is no "strict", "benevolent", "qualified" or "discriminatory" neutrality, and no state of non-belligerency. These terms have indeed been used to describe the attitude adopted by certain States in World War II (Italy, Spain, Turkey, the United States); they imply non-participation in the hostilities, but diplomatic, economic, or other support for one of the parties. Such an attitude normally leads to a violation of the laws of neutrality and, as an → internationally wrongful act, gives the opposing party the right to take → reprisals.

As mentioned above, neutral duties do not come into operation if the use of force falls short of war. The laws of peace continue to apply. Coercive measures of the United Nations either constitute war, or measures within the framework of the laws of peace, such as reprisals, or other

measures deriving from Charter law; participation in them cannot therefore be termed "qualified" neutrality or create a special legal status of non-belligerency.

4. Conclusion

Neutrality sets limits on the spread of the use of force and preserves havens of peace. It provides the basis for the humanitarian activities of neutral States. It can facilitate the way towards the re-establishment of peaceful relations. For these reasons neutrality can also be justified by the general interest of all States, especially as the principle of collective security has so far proved unrealizable and will remain so.

J.L. KUNZ, Kriegsrecht und Neutralitätsrecht (1935).
G. COHN, Neo-Neutrality (1939).
E. CASTRÉN, The Present Law of War and Neutrality (1954).
R.L. BINDSCHEDLER, Die Neutralität im modernen Völkerrecht, ZaöRV, Vol. 17 (1956) 1–37.
H. FIEDLER, Der sowjetische Neutralitätsbegriff in Theorie und Praxis (1959).
D. SCHINDLER, Neutralität und neue Entwicklung der Kriegstechnik, in: Die Rechtsordnung im technischen Zeitalter (1961) 119–135.
E. CASTRÉN, Gesichtspunkte zur Neutralität und zum Neutralitätsrecht, Proceedings of the Finnish Academy of Science and Letters (1962) 77–94.
D. SCHINDLER, Aspects contemporains de la neutralité, RdC, Vol. 121 (1967 II) 219–321.
F. BLANKART, Der Neutralitätsbegriff aus logischer Sicht, in: Discordia concors, Festgabe für Edgar Bonjour, Vol. 2 (1968) 605–624.
D. FREI, Dimensionen neutraler Politik (1969).
U. SCHEUNER, Die Neutralität im heutigen Völkerrecht (1969).
H. BLIX, Sovereignty, Aggression and Neutrality (1970).
H. MEYROWITZ, Le principe de l'égalité des belligérants devant le droit de la guerre (1970).
R. OGLEY, The Theory and Practice of Neutrality in the Twentieth Century (1970).
P. GUGGENHEIM, Der Neutralitätsbegriff im allgemeinen Völkerrecht und in der internationalen Organisation, in: Internationale Festschrift für Alfred Verdross (1971) 119–128.
R.L. BINDSCHEDLER, Frieden, Krieg und Neutralität im Völkerrecht der Gegenwart, in: Multitudo legum ius unum, Festschrift für Wilhelm Wengler, Vol. 1 (1973) 27–49.
R.L. BINDSCHEDLER, Neutralität, in: Evangelisches Staatslexikon (2nd ed. 1975) 1628–1631.
J. KOEPFER, Die Neutralität im Wandel der Erscheinungsformen militärischer Auseinandersetzungen (1975).
I. SEIDL-HOHENVELDERN, Befreiungskriege und Neutralität, in: Studi in onore di Manlio Udina, Vol. 1 (1975) 645–661.
I. SEIDL-HOHENVELDERN, Der Begriff der Neutralität in den bewaffneten Konflikten der Gegenwart, in: Um Recht und Freiheit, Festschrift für Friedrich August Freiherr von der Heydte, Vol. 1 (1977) 593–613.
E. KUSSBACH, L'évolution de la notion de neutralité dans les conflits armés actuels, Revue de droit pénal militaire et de droit de la guerre, Vol. 17 (1979) 19–36.

RUDOLF L. BINDSCHEDLER

NEUTRALITY IN AIR WARFARE

The law on neutrality in air warfare represents an amalgam of rules derived from general principles of neutrality, custom, analogies with the rules of → land warfare and → sea warfare, and from scattered treaty regulations (see → Neutrality, Concept and General Rules: → Neutrality in Land Warfare; → Neutrality in Sea Warfare for detailed exposition of basic rules). It is a very young branch of the laws of neutrality and has thus far escaped codification. In 1923, however, an international Commission of Jurists did attempt, in Chapters V, VI and VII of its draft Hague Air Warfare Rules (HAWR), to rationalize and codify norms that had been established relating to questions of neutrality and air war rights in World War I. The Rules were never adopted by States, although they have influenced the content of neutrality regulations and declarations (→ Neutrality Laws) issued by certain countries, notably the Northern Neutrality Rules (NNR) of 1938 of the Scandinavian States (Déak and Jessup, Vol. 1, p. 479, p. 577 and p. 701; Vol. 2, p. 870 and p. 970).

1. Neutral Rights and Duties within Neutral Territory

The primary rule here that neutral airspace is inviolable was established by consistent World War I practice by neutrals; this rejected any extension of sea warfare law to the air and instead adapted the wider rights of sovereignty (→ Air, Sovereignty over the) derived from land war. Additionally adopted were the analogous concomitant duties of prevention of aerial incursions, of forcing intruders to land by the means at the neutral's disposal and of interning both the aircraft (preserving its secrets during custody) and those on board (→ Internment). World War II confirmed this position. State practice generally

only showed variations in enforcement procedures, such as the more widespread use of warning signals and a move towards expelling intruding aircraft near the border rather than simply firing on them. These variations represent a closer approximation to the land warfare pattern, and are explicable by the far more frequent intrusions (Switzerland experienced over 5000 violations of her airspace in World War II) and the danger that intruders would resist if fired on in border regions, thus depleting the neutral's air force. In addition, the humanitarian obligation to allow aircraft in evident distress to land also came to be recognized. Regarding World War II practice, however, it is noteworthy that some States, such as Eire, Portugal and the United States, did not fully observe the traditional neutral duties of neutrality in air warfare.

In contrast to clear State practice in land warfare, it remains uncertain whether a general right of passage exists for flight over neutral → territorial waters, although neutrals undoubtedly have – and have used – the right to place impartial restrictions on → overflight. This, and the question of the height above neutral territory to which neutral rights and duties apply, are, however, unsettled problems of international law.

Aircraft-carriers entering neutral → ports pose the different problem of whether the entry of the aircraft carried on them constitutes a violation of the above rules. A solution, proposed in Art. 41, HAWR, assimilates them to the carrier and therefore makes the ordinary maritime neutrality rules applicable (adopted in NNR, Art. 8(1), but see Castrén, contra, p. 589). It is clear, however, that these aircraft may commit no warlike acts or carry out → military reconnaissance. And, regarding reconnaissance, belligerent civilian aircraft – if admitted – are similarly prohibited from such activity; if reconnaissance by neutral aircraft is intended to benefit a belligerent, this also is enjoined (Art. 47, HAWR; see also Art. 13).

A special régime has been created for medical aircraft in Art. 31 of Additional Protocol I of 1977 to the → Geneva Red Cross Conventions of 1949 (cf., for non-acceding States, Geneva Convention I Art. 37) on humanitarian grounds (→ Humanitarian Law and Armed Conflict; see also → Wounded, Sick and Shipwrecked; → Air Warfare).

A neutral's failure adequately to protect its airspace militarily or diplomatically can be regarded by a belligerent prejudiced thereby as a breach of the neutral's duties. The belligerent can then → protest, claim → war damages for resultant harm and, if a serious threat faces it from the neutral's airspace through violations of it by the belligerent's opponent, it can justify corrective military action as a measure of → self-defence; depending on the scale of the threat, this could transmute that airspace into part of the region of war (→ War, Theatre of). In cases of inability to repel intruders, however, a neutral must be held to have fulfilled its duty if the belligerent's own defence systems are no more effective (thus, in World War II Switzerland was not in breach of her neutrality for failure to intercept high-flying aircraft passing over her territory that German defences had already failed to bring down). The question of interception of nuclear missiles (→ Nuclear Warfare and Weapons) is in principle covered by these considerations, although subject to controversy.

2. Neutral Aircraft outside Neutral Territory

This area is mainly one of belligerent rights exercisable in relation to → neutral trading. The applicable rules here were developed in the context of → economic warfare waged at sea, and thus the rules of → sea warfare are considered generally to apply, with the necessary modifications, together with the traditional rights of → angary and → embargo.

Neutral governments are thus bound not to allow their military aircraft to engage in the hostilities; not to sell a belligerent aeroplanes armed for hostile attack or carrying the means to enable their conversion (→ War Materials); and, by analogy with Art. 8 of Hague Convention XIII of 1907 concerning the Rights and Duties of Neutral Powers in Naval War (→ Hague Peace Conferences of 1899 and 1907), not to allow their nationals to supply belligerents with aircraft ready or with means for conversion for a hostile attack (see Spaight, pp. 474–477; also HAWR, Art. 46, which goes further and proposes, *inter alia*, a neutral's duty to prescribe precise routes for aircraft to avoid entering areas of war operations).

As regards neutral civil aircraft, the Hague Commission of Jurists in the HAWR evidently

determined to transfer sea warfare rules "*en bloc* to the domain of the air" (Spaight, p. 409), adding also certain new cases of condemnation and capture. However reasonable this may be, a dearth of State practice and prize court decisions leave doubt as to whether these maritime procedures are so easily transmutable to air warfare. For example, the rule that, if more than 50 per cent of a single cargo is → contraband, the vessel is liable to condemnation is harsher when applied to aircraft, which usually have a considerably higher value relative to their cargo and payload turnover than do ships. The limited World War II practice does, however, indicate that maritime forms will be adopted (see e.g. the British Prize Act of 1939).

Rules of Aerial Warfare, AJIL, Vol. 17, Supp. (1923) 245–260; Vol. 32 (1938) 12–56 [with commentary].

F. DEÁK and P.C. JESSUP (eds.), A Collection of Neutrality Laws, Regulations and Treaties of Various Countries, 2 vols. (1939).

J. GARNER, Proposed Rules for the Regulation of Aerial Warfare, AJIL, Vol. 18 (1924) 56–81.

A. MEYER, Das Neutralitätsrecht im Luftkriege (1931).

J.M. SPAIGHT, Air Power and War Rights (3rd ed. 1947).

O. LISSITZYN, The Treatment of Aerial Intruders in Recent Practice and International Law, AJIL, Vol. 47 (1953) 559–589.

E. CASTRÉN, The Present Law of War and Neutrality (1954) 587–601.

A. MEYER, Erschließung des Weltraums und Neutralität, Zeitschrift für Luftrecht und Weltraumfragen, Vol. 10 (1961) 260–278.

D. SCHINDLER, Neutralität und neue Entwicklungen der Kriegstechnik, in: Die Rechtsordnung im technischen Zeitalter, Festschrift zum Zentenarium des Schweizerischen Juristenvereins (1961) 119–135.

D. SCHINDLER, L'aéronef militaire et les pays non-belligérants, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, Vol. 2 (1963) 153–161.

J. VERPLAETSE, The Law of War and Neutrality in Air and Outer Space (1969).

A. WITTENWILER, Die Probleme des Neutralitätsschutzes im Luftraum unter besonderer Berücksichtigung der Schweizerischen Verhältnisse, Thesis, University of Zurich (1973).

KEVIN J. MADDERS

NEUTRALITY IN LAND WARFARE

1. Concept

Neutrality is the status of States which do not participate in a given war (→ Neutrality, Concept and General Rules). The relations between neutral States and belligerents are in principle regulated by the rules of international law applicable in peacetime, superseded in some respects by the laws of neutrality where such laws exist.

The concept of neutrality is not invalidated by the fact that during wars of the 20th century some middle-sized and larger powers, while not actually participating in a particular war, have assisted one belligerent party to the disadvantage of another. This policy, sometimes described as "benevolent" neutrality, "non-belligerency", or "pre-belligerency", has not come in response to a change in the laws of neutrality, nor has it initiated such a change. Rather, it was tolerated by the disadvantaged parties because it was preferable to the outright entry of the State or States in question into the war on the other side; such a policy requires a certain amount of power or a particular geopolitical location, and therefore it cannot be considered a generally applicable concept.

Since neutrality arises as a reaction to a war between other States, it begins with the factual existence of → war and is not conditional upon a → declaration of war or, for that matter, upon a declaration of neutrality. The relevant criteria are the neutral State's knowledge of the war's existence and its decision not to participate in it. Only permanently neutral States, such as Austria and Switzerland, have the duty and the right not to participate in any war (→ Permanent Neutrality of States). A declaration of neutrality serves, therefore, primarily a political end.

2. Applicable Law

Neutrality in → land warfare is regulated by → customary international law, part of which was codified in the 1907 Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (→ Hague Peace Conferences of 1899 and 1907). However, the two world wars generated new custom, in some instances departing from the Hague Convention, without leading to its formal revision by the parties. The resulting uncertainty and possibility of disputed interpretation is due to the international community's hesitancy in dealing with questions of war and neutrality in the era of the → United Nations.

There is no separate neutrality in land warfare

as opposed to neutrality in → sea warfare or → air warfare. Neutrality relates to the entire war situation. Separate rules exist only because of historical reasons which are reflected in the principal codification instruments. The laws of → neutrality in sea warfare have a bearing on the economic aspect of neutrality in land warfare, which also cannot properly be evaluated without reference to the rules of → neutrality in air warfare.

Only a few, if any, of the rules of neutrality are self-executing (cf. → Self-Executing Treaty Provisions). Most neutrals have, when the occasion arose, enacted → neutrality laws and regulations for their implementation in internal law, particularly for the implementation of those rules which require the neutral to punish violations. At times, neutrals have found it convenient as a matter of policy to enact laws without being required to do so by international obligations, so as better to cope with the complex situation created by a general war. This does not imply that neutrality, which is a relation between States, extends to → neutral nationals, especially as regards their freedom of speech or the freedom of the press. But it is in the interest of the neutral State to ensure that its own position of neutrality is not endangered by persons under its jurisdiction (→ Jurisdiction of States).

3. Neutral Rights and Duties in Land Warfare

(a) General rules

The fundamental principle underlying the relations between neutral and belligerent States requires neutrals not to intervene directly or indirectly in a war and requires belligerents to abstain from involving them. The belligerents are, therefore, under a duty not to use neutral territory as a base for any of their war operations (→ War, Theatre of), and neutrals are under a duty to prevent that use with the means at their disposal.

(b) Military rules

Art. 1 of Hague Convention V of 1907 states that "the territory of the neutral Powers is inviolable". Art. 2 provides that belligerents may not send troops, munitions of war (→ War Materials) or supplies through neutral territory. The neutrals must not allow such acts to occur on their territories (Art. 5).

This undisputed principle of land warfare causes problems when applied to air warfare, and even more so when applied to missile warfare. During World War II violations of air space were the most common violations of neutrality (→ Air, Sovereignty over the). The relevant provisions of the Hague Rules of Air Warfare of 1923, modelled on the provisions for sea warfare and requiring neutrals to compel intruding belligerent → aircraft to alight, proved totally unrealistic. The small European neutrals, given the size of their territories, their limited means, the short warning time, and the speed of aircraft, had little success with military actions against intruding belligerent aircraft. This situation has since worsened in view of the developments in aircraft technology. As for missiles, and in particular those with nuclear warheads (→ Nuclear Warfare and Weapons), it is submitted that under the aforementioned circumstances a neutral State is not in a position to prevent or to bring an end to → overflight. Nor can it be expected to invite destruction on its territory by bringing a nuclear device down, even if it were in a position to do so.

It appears from the wording of the provisions of Hague Convention V that they deal with violations of neutrality through acts which disadvantage, or are directed against, the other belligerent party. A belligerent party's military attack, the primary object of which is the neutral itself, is an act of war, not a mere violation of neutrality, and ends that particular neutrality for that particular war.

Members of the belligerent armed forces (→ Combatants) who enter neutral territory during the course of a violation of neutrality, or who are admitted while coming on their own initiative, must be disarmed (→ Disarming of Belligerents by Neutrals) and interned (→ Internment) by the neutral. According to Art. 4(B) (2) of Geneva Convention III of 1949 relative to the Treatment of Prisoners of War (→ Geneva Red Cross Conventions and Protocols), the provisions of this Convention are a minimum standard for internment if more favourable treatment is not granted.

A neutral State is also under a duty to prevent on its territory the formation of armed forces or the setting up of enlistment bureaus for the

benefit of belligerents, irrespective of the → nationality of the persons involved. It need not, on the other hand, prevent private individuals who intend to join the services of a belligerent from crossing its borders. The implementation of this provision, which dates from before the age of universal conscription and mass migration of workers (→ Migration Movements), may cause some problems in the future.

(c) *Humanitarian rules*

Geneva Convention III provides for the possibility that → prisoners of war be sent for internment, or sick and wounded prisoners (→ Wounded, Sick and Shipwrecked) for hospitalization, to a neutral country in accordance with a special agreement to be concluded by the States concerned (Arts. 109–111; → Humanitarian Law and Armed Conflict). The neutral State may also permit the transit through its territory of wounded or sick members of the belligerent armed forces, either by land transport (Hague Convention V of 1907, Art. 14) or by medical aircraft (Geneva Convention I, Art. 37).

Children under the age of 15 who have been orphaned or separated from their parents through the war may, according to Geneva Convention IV (Art. 24), be entrusted to a neutral for the duration of the conflict. → Asylum may be granted to certain persons, for instance escaped prisoners of war or → deserters. These persons do not, however, have an individual claim, under international law, against the neutral State to be admitted to its territory.

(d) *Economic rules*

The relevant rules of Hague Convention V of 1907 were based on two principles which directly flowed from the concept of economic liberalism reigning at the time (→ Neutral Trading). First, since the neutral must not intervene in a war by assisting the belligerents, it may as a State neither deliver war materials to them nor grant loans for the purposes of warfare. Secondly, the war should interfere as little as possible with the commercial activities of private individuals and entities of the neutral. Hence the neutral need not prevent the transit or export of war materials to the belligerents when those activities are undertaken by private individuals or entities (Art. 7). If it does do so, however, it must apply the restrictions or prohibitions equally to both belligerent parties (Art. 9; → States, Equal Treatment).

The economic concept underlying these provisions has undergone drastic changes since 1907, and as a result measures of → economic warfare have been developed. Many modern writers submit that, to the extent these measures have become part of international custom and therefore lawful, a corresponding duty has arisen for neutrals to prevent them on their territories.

A further problem is created by growing State control over economic activities. Whether in view of this the classic distinction between State and private trader should be maintained is a matter of controversy. However, according to the most commonly held opinion, the granting of an export permit does not make the State a party to the transaction. Nor does the fact that a State-owned enterprise exports war materials to a belligerent constitute a violation of neutrality unless it is shown that the transaction was instigated by the State authorities of the neutral.

4. *Present Situation*

Although the → United Nations Charter forbids any → use of force by States other than in → self-defence, neutrality has not thereby been eliminated. The circumstances necessary for the → United Nations Security Council to take a decision are usually not extant, and at least up to now it has not ordered → sanctions against a breach of the peace or an act of → aggression. Legal opinion is divided on the question of whether neutrality would legally be possible for a member of the United Nations, were the Security Council to order such sanctions. Art. 48 of the UN Charter, however, gives the Security Council discretion as to which States to call on to carry out the measures it has ordered.

F. DEÁK and P. JESSUP (eds.), A Collection of Neutrality Laws, Regulations and Treaties of Various Countries, 2 vols. (1939).

E. VON WALDKIRCH, Das Neutralitätsrecht im Landkrieg (1936).

H.Y. CHANG, Déclaration de guerre et déclaration de neutralité, Leurs effets (1941).

R.R. WILSON, "Non-Belligerency" in Relation to the Terminology of Neutrality, AJIL, Vol. 35 (1941) 121–123.

P.J. POINTET, La neutralité de la Suisse et la liberté de la presse (1945).

A. GERVAIS, La pratique de la neutralité dans la seconde guerre mondiale, Die Friedenswarte, Vol. 48 (1948) 4–17.
M. HUBER, Neutralitätsrecht und Neutralitätspolitik, SchweizJIR, Vol. 5 (1948) 9–28.
R. OCHSNER, Der Transport von Personen und Gütern durch ein neutrales Land im Fall des Landkrieges (1948).
R. BAXTER, Asylum of Prisoners of War, BYIL, Vol. 30 (1953) 489–498.
E. CASTRÉN, The Present Law of War and Neutrality (1954) 421–492.
J. STONE, Legal Controls of International Conflict (1954).
E. VON WALDKIRCH, Militärische Rechte und Pflichten des neutralen Staates im Luftkrieg, unter besonderer Berücksichtigung der Schweiz 1939–45, JIR, Vol. 5 (1954) 151–167.
R.L. BINDSCHEDLER, Die Neutralität im modernen Völkerrecht, ZaöRV, Vol. 17 (1956/57) 1–37.
M. GREENSPAN, The Modern Law of Land Warfare (1959).
D. SCHINDLER, Aspects contemporains de la neutralité, RdC, Vol. 121 (1967 II) 225–313.

KARL ZEMANEK

NEUTRALITY IN SEA WARFARE

I. CONCEPT

The laws of neutrality are based on two separate rationales which are closely interlinked (→ Neutrality, Concept and General Rules): (a) the desire to guarantee that the neutral State will sustain minimal injury as a result of war; (b) the desire to guarantee the belligerents that the neutral State will be neutral not only in name but also in fact, that is to say, that it will not aid and abet one of the belligerents against its adversary. Consequently, the two basic principles underlying the laws of neutrality are non-participation in war and impartiality *vis-à-vis* the opposing belligerents.

The laws of neutrality are of particular importance in → sea warfare owing to the extended theatre of maritime war: the sea covering most of our planet (→ War, Theatre of; → High Seas). The rights of belligerents in sea warfare, particularly as regards → blockade, visit and search (→ Ships, Visit and Search), and condemnation of → contraband, have such an adverse effect on the interests of neutrals that their application in full may easily strain relations and even produce dangerous tensions between the parties.

The laws of neutrality impose obligations both on the neutral State and on the belligerents, and confer upon them correlative rights. The laws of neutrality break down into three components: (a) rules imposing duties on the neutral State as well as the belligerents; (b) rules imposing duties only on the neutral State; and (c) rules imposing duties only on the belligerents.

II. DUTIES IMPOSED ON NEUTRAL STATES AND BELLIGERENTS

A. Entry and Passage

Whereas in → land warfare, as well as → air warfare, the passage of armed units or aircraft through neutral territory is prohibited (→ Neutrality in Land Warfare; → Neutrality in Air Warfare), different and special rules apply at sea under Hague Convention XIII of 1907 concerning the Rights and Duties of Neutral Powers in Naval War (→ Hague Peace Conferences of 1899 and 1907). This Convention provides that the neutrality of a State is not affected by the mere passage through its → territorial waters of belligerent → warships (and, of course, → merchant ships, though these are not explicitly mentioned in this context) as well as prizes (namely, merchant ships captured as prize by warships (→ Prize Law)). The expression "passage" serves here in a rather loose sense and embraces not merely passage but also a temporary stop. The Convention allows the neutral State to impose conditions, restrictions or prohibitions in regard to the entry of belligerent warships and their prizes into its territorial waters, → ports or roadsteads, provided that these apply equally to all parties to the conflict. This freedom of action is accorded to the neutral State only in so far as ordinary territorial waters are concerned. As for → straits, which constitute an exceptional instance of territorial

waters, the neutral State is apparently obligated to permit passage through them to belligerent warships.

Even though Convention XIII does not expressly mention → internal waters (as compared to territorial waters), it follows from its provisions that entry into these waters, too, must not be viewed as a violation of neutrality. It is possible to draw an analogy from ports and roadsteads, that are mentioned in the Convention, to other types of internal waters. Nevertheless, it may be necessary to distinguish between different categories of internal waters (e.g. between maritime ports, on the one hand, and rivers or lakes, on the other) on the basis of the preferences of the neutral State or its international undertakings. Thus, in the case of the → Suez Canal, the coastal government is under a clear-cut obligation pursuant to the 1888 Constantinople Convention respecting the Free Navigation of the Suez Maritime Canal (CTS, Vol. 171, p. 241) to permit free passage to all warships (or merchant ships) without distinction of flag in peace-time as well as in wartime.

Hague Convention XIII sets forth that, in the absence of special provisions to the contrary in the legislation of a neutral State, belligerent warships must not remain in the territorial waters, ports or roadsteads of that State for more than 24 hours. It is noteworthy that the 24-hour rule applies both to real passage and to a stop: either way the warship must leave the territorial or internal waters within the prescribed time. In the absence of special provisions in the local legislation, the 24-hour rule applies also to belligerent warships which are present in neutral waters when the war breaks out. A deviation from the permissible time-frame is permitted only on account of damage (e.g. engine trouble) or stress of weather. Another exception relates to → hospital ships according to Geneva Convention II of 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (→ Geneva Red Cross Conventions and Protocols). The idea of these provisions is that neutral waters must become neither a haven for a belligerent warship eluding superior enemy forces nor a base of naval operations for that vessel. The 24-hour rule creates an objective criterion for a differentiation between permissible passage (including a stop) and illegal stay designed for asylum (→ Asylum, Territorial) or ambush.

Further, under Hague Convention XIII, in the absence of special provisions in the local legislation, it is unlawful for more than three warships belonging to the same belligerent to be simultaneously in one of the ports or roadsteads of a neutral State. Once more the goal is to ensure that the neutral port will not become a base for naval operations. But it should be borne in mind that this Convention does not preclude the possibility of concentrating a large fleet made up of ships from a number of allied States in a neutral port, if each ally sends only three warships into it. The Convention adds that when warships belonging to adversary belligerents are present at the same time in a neutral port or roadstead, a period of not less than 24 hours must elapse between their times of departure. The order of departure is determined by the order of arrival, unless circumstances demand the extension of the stay of the first ship. It is also prohibited for a belligerent warship to depart from a neutral port or roadstead until 24 hours have elapsed from the departure of an enemy merchant ship.

The Hague Convention authorizes the carrying out of repairs to a belligerent warship present in a neutral port or roadstead only when these are absolutely necessary to render the vessel seaworthy; it is unlawful to add in any manner whatsoever to its fighting force. The Convention forbids making use of a stay in neutral territorial waters, ports or roadsteads for completing crews, replenishing → war materials or increasing armaments. A neutral is permitted to revictual a belligerent warship only to the extent usual in peace-time, including fuel sufficient to enable it to reach the nearest port of its own country. The supply of fuel to the same belligerent warship in a neutral port at a frequency greater than once in three months is disallowed.

Also, Convention XIII permits bringing a prize into a neutral port, but only on account of unseaworthiness, stress of weather or want of fuel or provisions; the prize must leave the port as soon as conditions permit (→ City of Flint, The). If it does not, the neutral State must employ the means at its disposal to release the original crew and to intern the prize crew (installed by the capturing warship) (→ Internment). However, the

neutral State may still let the prize (whether or not escorted by a warship) enter its ports or roadsteads to be sequestrated (→ Sequestration) there, pending the decision of a prize court (of the belligerent which seized it), without interning the prize crew. This rule is quite controversial. On the one hand, the purpose is to create a practical alternative to the state of affairs which leads to the destruction of the prize owing to the impossibility of bringing it into a belligerent port. On the other hand, there are those who view the procedure as a means whereby the neutral State can render assistance to the belligerent which seized the prize.

The Convention stipulates that if a belligerent warship does not leave a port where it is not entitled to remain, the neutral State may and, in fact, must detain the vessel and its crew, and the warship must not resist these measures. The neutral State is bound to exercise in its waters such surveillance measures as the means at its disposal allow in order to prevent violations of the provisions of the Convention. When a neutral State exercises its rights under the Convention, such exercise must not be considered as an → unfriendly act towards a belligerent.

B. Right of Angary

The duties considered so far clearly devolve both on the neutral State and on the belligerents. The existence of duties implies, of course, the presence of corresponding rights. At times, it is more convenient to indicate that duties are imposed either on the neutral State or on belligerents by referring to the corresponding rights: those conferred on the neutral State (*vis-à-vis* the belligerents) or those bestowed on the belligerents (*vis-à-vis* the neutral State and each other). The right of → angary best illustrates this point. It connotes the right of a belligerent, in case of imperative need, to → requisition neutral merchant ships found within its own territory or a territory occupied by it. The vessels must be returned to the owners upon termination of the need to utilize them. At all events, full compensation must be paid for their use, and if they are lost at sea the owners must be indemnified at full value. By the same token, the neutral State is accorded the right to requisition under the same conditions merchant ships flying the flag of belligerents (or other neutral States). The "imperative need" constituting a condition for the exercise of the right of angary materializes almost automatically in every great war which disrupts maritime trade, and it is therefore easy for a State to meet that requirement. Hence, the principal condition for the exercise of the right is in reality that of compensation, which must be paid in full.

The purview of application of the right of angary is contested. Firstly, there are those who contend that it is also permissible to requisition the cargo under the same circumstances, and it was so decided in 1916 by the British Privy Council in the matter of the *Zamora* ([1916] 2 A.C. 77). The case related to a Swedish merchant ship seized by a British cruiser on the open sea during the World War I and brought before a prize court for condemnation on the ground of transport of contraband. The cargo of the *Zamora* included grain and copper, and the question was whether the copper should be viewed as contraband. The *Zamora* was admittedly sailing between two neutral ports (New York and Stockholm), but it was argued that the copper was actually destined for the enemy and that the doctrine of "continuous voyage" (see section IV C 1 *infra*) applied. In the course of the prize proceedings a requisition order was issued against the copper cargo, and the prize court confirmed the requisition. On appeal, the Privy Council held that a belligerent is entitled to requisition cargo on the basis of the right of angary. But the view is widely held that the decision of the Privy Council was wrong and that the exercise of the right of angary does not extend to the cargo.

Secondly, the view is sometimes advanced that the right of angary may be exercised against ships seized by a belligerent and brought before a prize court, pending a final decree by the court. Once more, the key authority relied upon is the *Zamora*. But even on this point the prevailing view is against the *Zamora* decision and is that the right of angary pertains only to neutral ships which entered the territory voluntarily (or are under construction there). Thirdly, it has been argued that the right of angary also encompasses the requisitioning of ships in order to destroy them, but the better view is that they may only be requisitioned for actual use. Fourthly, in the past the claim was made that it is permissible to com-

pel the crew of the requisitioned vessel to render personal services on behalf of the requisitioning State, but it is clear today that on no account may a foreign crew be subjected to → forced labour.

The right of angary applies, *inter alia*, to the requisitioning of neutral ships in an occupied territory. It should therefore be stressed again that, when it is exercised, full compensation must be paid. The general rule as regards merchant ships in occupied territories is incorporated in Art. 53 of the Regulations annexed to Hague Convention IV of 1907 respecting the Laws and Customs of War on Land. Under this provision, the occupant is entitled to requisition means of transport in private ownership, subject to the requirement that they must be restored and compensation fixed when peace is made. But as regards neutral merchant ships, requisitioned in compliance with the right of angary, payment of compensation must be arranged without waiting for the conclusion of peace (→ Peace and War; → Peace Treaties).

III. DUTIES IMPOSED ONLY ON NEUTRAL STATES

There are a number of duties owed by a neutral State in the context of sea warfare.

If → wounded, sick or shipwrecked members of belligerent armed forces are rescued by being taken on board a neutral warship, Geneva Convention II of 1949 obligates the neutral State to ensure (through their internment) that they can take no further part in operations of war. It is noteworthy that the Convention does not refer to neutral merchant ships: if the rescued persons are taken on board such a vessel, they must be released rather than interned (but should the merchant ship encounter an enemy warship, the latter will be entitled to search the former and to insist on the transfer of the rescued persons who will become → prisoners of war). Consequently, there is some authority for the view that if shipwrecked soldiers and sailors succeed in reaching a neutral coast by swimming ashore or by lifeboats, they should also be released rather than interned.

If a belligerent hospital ship wishes to disembark wounded, sick or shipwrecked combatants in a neutral territory (either because their state of health does not permit their continued transport or because the belligerent is unable to take care of them due to the number of casualties), and the neutral State gives its consent to such disembarkation, the latter must detain the combatants so that they cannot again take part in operations of war.

A neutral State must not assist the war effort of one of the belligerents against its adversary through military supplies furnished on an intergovernmental basis. Hague Convention XIII of 1907 bans the supply of warships, ammunition or → war materials of any type by the neutral State to a belligerent, and the prohibition expressly applies to any manner, direct or indirect, of such supply. All the same, the Convention prescribes that a neutral State is not bound to prevent the private export or transit, for the use of either belligerent, of arms, ammunition or in general anything which may be of use to an army or navy.

If the neutral State permits export of weapons, ammunition and war materials by private individuals to belligerents, it must take special precautions so that its territory will not be utilized as a base of military operations against one of them. This is particularly true where vessels are concerned. If a private person in the neutral State (→ Neutral Nationals) sells vessels to a belligerent, and the latter adapts them to military purposes after they have come into its hands, no contravention of international law will have occurred. But if the vessels depart from the neutral territory already armed and ready for action, being fully capable of immediately attacking enemy targets, this constitutes a violation of the laws of neutrality.

Hague Convention XIII obligates a neutral State to employ the means at its disposal to prevent: (a) the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to engage in hostile operations against a belligerent; (b) the departure of such a vessel which has been adapted (entirely or partly) within its jurisdiction for use in war. This obligation reflects the first and foremost of the "*Alabama* Rules" contained in the 1871 Washington Treaty between the United States and Britain. These rules pertained to the duties of a neutral State in wartime and were intended as a guidance for the arbitrators in the famous → *Alabama* claims arbitration. The arbitration, which was decided in favour of the United States, related to a dispute which had arisen as a result of

the construction of a number of vessels in British shipyards for the Confederate navy during the → American Civil War. The vessels were not armed with guns while being built, but it was widely known that immediately upon completion they were equipped with armaments and proceeded to destroy Union shipping on the high seas. Most notorious among these was the *Alabama*, which succeeded in capturing or sinking more than 60 Union merchant ships until she was herself sunk in battle.

To describe the duty assumed in this context by the neutral State, the Alabama Rules use the phrase → "due diligence", which was given a controversial interpretation in the arbitral award. Hague Convention XIII refers instead to the means at the disposal of the neutral State. One way or another, the emphasis is placed on the relative (i.e. non-absolute) character of the duty of prevention devolving on the neutral State.

Since the transit of belligerent vessels (as well as ships belonging to other neutral States) is permissible in neutral waters, Hague Convention VIII of 1907 relative to the Laying of Automatic Submarine Contact Mines proclaims that when a neutral State lays automatic contact → mines off its coasts, it must observe the same rules as are imposed on belligerents. It must even publicize in advance where the mines have been laid (a measure which belligerents do not have to take, for obvious reasons).

IV. DUTIES IMPOSED ONLY ON BELLIGERENTS

Belligerents cannot wage sea warfare in total disregard of the legitimate interests of neutrals. The freedom of action of belligerents is curtailed by the following obligations which are laid upon them.

A. Neutral Waters

In view of the fact that the passage of belligerent ships through neutral waters is permissible, Hague Convention XIII lays down that belligerents must respect the sovereign rights of neutral States and must abstain in neutral waters from any act which would constitute a violation of neutrality (in this connection, see the → Altmark). The Convention expressly proscribes any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral State. It follows that a belligerent must not seize prizes in neutral waters. If a prize is captured in contravention of this clause, the belligerent must release it. (For so long as a prize is in neutral waters, the neutral State must employ the means at its disposal to release the captured ship and crew). A belligerent is likewise forbidden to set up a prize court in neutral territory or aboard a ship in neutral waters. The Convention prohibits the use of neutral waters (particularly ports) by belligerents as a base of naval operations against the enemy, and also bans the placement of communications and installations there.

B. Humanitarian Aspects

Geneva Convention II of 1949 stipulates that hospital ships, utilized by national societies of the → Red Cross, other officially recognized relief societies or private persons of neutral countries, benefit from the same protection as military hospital ships, and are exempt from capture, on condition that they have placed themselves under the control of one of the belligerents with the previous consent of both governments and with → notification to the adversary. The 1977 Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), extends the protection provided in Geneva Convention II to any hospital ship made available for humanitarian purposes to a party to the conflict by a neutral State (→ Humanitarian Law and Armed Conflict).

C. Neutral Shipping on the High Seas

A belligerent must not attack neutral shipping on the high seas or in other regions of the theatre of war. Hence, unrestricted → submarine warfare against neutral shipping is unlawful. And, should a belligerent create closed → "war zones" in the open sea, it must leave regulated lanes for the passage of neutral ships. The International Military Tribunal, in its judgment passed on Admiral Dönitz in the → Nuremberg Trials in 1946, referred to the 1936 London Procès-Verbal relating to the Rules of Submarine Warfare, and stated: "The order of Dönitz to sink neutral ships without warning when found within these zones

was, in the opinion of the Tribunal, therefore a violation of the Protocol." Still, the Tribunal refrained from taking this violation into account in sentencing Dönitz, since it found that the British and American navies also resorted to unrestricted submarine warfare, at least in certain zones (e.g. the Pacific Ocean).

In principle, a belligerent is forbidden to impede the maritime trade that a neutral State carries on with other countries. One must distinguish, however, between two types of such trade: trade that one neutral State conducts with another (trade among neutral States *inter se*), and trade that a neutral State maintains with the enemy (→ Trading with the Enemy).

The trading of a neutral State with the enemy is limited in three respects: international law prohibits breach of → blockade, the carrying of → contraband, and unneutral service.

1. Continuous Voyage Doctrine; Quotas

Trade among neutral States *inter se* should not be limited at all. This, however, is easier said than done considering that what purports to be innocent commerce among neutrals in fact often disguises the crossing of a blockade or the transport of contraband. To pierce the smoke screen of a formal, neutral destination, the doctrine of "continuous voyage" has been evolved, whereby what counts is not the immediate destination of the neutral ship but the ultimate and real destination of the cargo. The unratified London Declaration of 1909 concerning the Laws of Naval War (→ London Naval Conference of 1908/1909) rejects the doctrine of continuous voyage as regards breach of blockade and transport of conditional contraband, but adopts it in respect of absolute contraband. Even so, this approach was not accepted by all the naval powers of the day.

During the world wars a rationing system was developed, under which quotas of maritime imports of items appearing on contraband lists were set for neutral countries having land communications with enemy territory, and the quotas were based more or less on the data from peacetime trade. To the extent that the quotas system is established with the consent of the neutral State, it does not present too many difficulties. Conversely, when it is imposed on a neutral State against its will, problems arise concerning the level of the quotas in general as well as prize proceedings in the specific case. It is indisputable that goods cannot be confiscated as prize on purely statistical grounds (namely, on the basis of the claim that numerous similar cargoes have already been transported to the neutral State and that the quota has already been reached). Even if a specific cargo exceeds the overall quota as set, the most that one can argue is that this raises a (rebuttable) presumption that it is actually destined to the enemy through operation of the continuous voyage doctrine.

2. Visit and Search

According to the laws of sea warfare, a belligerent warship (or aircraft) is entitled to stop a neutral merchant ship – though not a warship – on the open sea or in belligerent internal or territorial waters with a view to searching it for verification of flag and examination of the cargo. In the 1913 arbitration between France and Italy in the Affaire du *Carthage* (→ Carthage, The, and The Manouba), the arbitral tribunal (composed of members of the → Permanent Court of Arbitration) held:

> "... d'après les principes universellement admis, un bâtiment de guerre belligérant a, en thèse générale et sans conditions particulières, le droit d'arrêter en pleine mer un navire de commerce neutre et de procéder à la visite pour s'assurer s'il observe les règles sur la neutralité, spécialement au point de vue de la contrebande."

A neutral merchant ship, unlike a belligerent merchant ship, is not entitled to refrain from stopping or to resist search.

The general rule relating to the right of visit and search of a neutral merchant ship applies when the vessel sails alone. Under the London Declaration, however, when a neutral merchant ship sails in a → convoy accompanied by warships flying the same flag as herself (as distinct from warships belonging to another country, especially the enemy), she is exempt from search. The commander of the belligerent warship is entitled to obtain from the commander of the convoy all information as to the character of the vessels and their cargoes. Yet, even in the case of suspicion of abuse of the neutral nature of the convoy, all that the commander of the belligerent warship can do

is to communicate his suspicion to the commander of the convoy, and only the latter is empowered to investigate the matter. If, in the opinion of the commander of the convoy, the facts divulged in the investigation justify the capture of a vessel, he must withdraw the protection of the convoy from the culprit. The authority to determine the issue is vested in him alone.

The circumstances of a neutral convoy are exceptional. As for the general rule of the right of visit and search in every sector of the theatre of war, its implementation is fraught with danger for the belligerent warship which has to remain at a given spot for a number of hours, thus exposing herself to the possibility of attack by enemy → aircraft or → submarines. Consequently, in many instances neutral merchant ships are required to abandon their course and to sail to a belligerent port, not (as would be usual) after search in the open sea and capture as prize, but for the purpose of conducting a search in port. This practice is controversial, as it entails serious financial loss for the neutral vessel diverted from its course (→ Ships, Diverting and Ordering into Port). Hence, an alternative system was introduced during both world wars based on special certificates called "navicerts" (→ Safe-Conduct and Safe Passage). Under this procedure, any exporter in a neutral State may apply in advance to the diplomatic or consular mission of a belligerent with a view to obtaining from it a certificate affirming the nature of a shipment. The importance of obtaining the navicert was that when the merchant ship encountered a warship belonging to that belligerent, she was exempt from thorough inspection. Generally, the validity of the navicert was limited in time, and search was carried out in cases of suspicion as to the conduct of the ship subsequent to the grant of the navicert.

A belligerent is entitled to capture and confiscate as prize neutral merchant ships in four exceptional instances: (a) refusal to stop or to permit search; (b) breach of blockade; (c) transport of contraband; (d) unneutral service.

When a neutral merchant ship that has been instructed to stop refuses to do so, or forcibly resists search, the London Declaration lays down that the vessel may be condemned as prize, and the cargo may be treated as if she were aboard an enemy ship. That is to say, enemy cargo on board may be confiscated but not neutral cargo (except goods belonging to the master or owner of the vessel, which may be treated as enemy goods). There is authority for the view that when a neutral merchant ship sails in a convoy escorted by enemy warships (as distinct from a neutral convoy mentioned *supra*), she thereby displays forcible resistance to search and becomes liable to be taken as prize.

3. Unneutral Service

As regards unneutral service, the London Declaration differentiates in Arts. 45 and 46 between two separate categories according to the gravity of the act. A merchant ship belonging to the first category does not lose her neutral nature, but she may be condemned as prize as if she had carried contraband. According to Art. 45 she will be thus condemned:

> "(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.
>
> (2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy."

The idea in the first paragraph is that some change has occurred in the regular schedule of the vessel, in order to embark or disembark certain passengers belonging to the enemy armed forces or to transmit intelligence information. In the second case, the voyage does not take place for the exclusive purpose of transporting belligerent troops, nor does the vessel change her regular course. Still, even though the voyage is regular, the ship transports not individual passengers belonging to the enemy armed forces, but a military unit as such. Alternatively, on a regular voyage the vessel transports one or more persons who do not themselves necessarily belong to belligerent armed forces, but who during the voyage directly assist their side (e.g. by signalling). The accent is put not on the event itself, but on the knowledge (and, therefore, the complicity) of those in charge of the vessel.

The second category of unneutral service (Art.

46) covers neutral vessels which receive the same treatment as if they were enemy merchant ships. This signifies that, not only may such a vessel be condemned as prize, but in certain circumstances she may even be attacked and sunk. The second category comprises the following four eventualities: (a) the ship takes a direct part in the hostilities; (b) the ship is under the orders or control of an agent placed on board by the enemy government; (c) the ship is in the exclusive employment of the enemy government; (d) the ship is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy. In the first and fourth instances it is factually scarcely possible to distinguish between the neutral merchant ship and an enemy warship (and not only an enemy merchant ship), so she may be attacked and sunk on sight.

Although they were never adopted, it is worth mentioning the 1923 Hague Regulations for the Control of Radio in Time of War, elaborated by the Commission of Jurists which also compiled a set of rules on air warfare (AJIL, Vol. 17 (1923) Supp., p. 242). Under Art. 6 radio transmission by a neutral merchant ship on the → high seas of military intelligence for enemy use is to be deemed a hostile act; it is permissible to capture the vessel as prize and even to open fire upon her. Art. 7 allows the commanding officer of a belligerent military force to order a neutral merchant ship on the open sea to maintain radio silence in the vicinity of his units, and, should she disobey the order, capture her as prize or open fire upon her.

In accordance with a doctrine known as "the Rule of 1756" (the year when the Seven Years War broke out), a neutral merchant ship engaged during wartime in internal commerce between the ports of an enemy country, or trading between the enemy and its overseas colonies (a commerce which was generally confined by the enemy in peace-time to its own vessels), may be considered as unneutral service. This brings it within the bounds of the second category so that the vessel receives the same treatment as an enemy merchant ship. But there is no consensus on this subject, and the London Declaration deliberately left the question open.

In every case of unneutral service, condemnation as a prize encompasses the vessel herself, as well as enemy cargo on board and goods belonging to the shipowners, but not neutral cargo belonging to others.

When members of the armed forces of the enemy are found on board a neutral merchant ship during search, they may be made prisoners of war notwithstanding the lack of good grounds for capturing the vessel. The same rule applies to reservists sailing home to join their units (see → Asama Maru Incident).

The laws governing unneutral service are based on the assumption that the merchant ship under discussion is entitled to fly the neutral flag, even though she abuses that flag (→ Flag, Right to Fly). In all cases, there must be a "genuine link" between the vessel and the State whose flag she is flying, and belligerents are entitled to ignore a → flag of convenience. In the absence of such a genuine link, when the neutral flag is only camouflage for an enemy ship, the vessel may be treated in conformity with her true colours.

When a merchant ship is transferred from an enemy to a neutral flag, the general rule set forth in the London Declaration is that the transfer is valid if effected before the outbreak of hostilities and void if effected afterwards. But in both instances the rule is subject to exceptions, the purpose of which is to protect genuine transactions and to ignore fraudulent transactions designed to facilitate use of flags of convenience.

D. Prize Proceedings

As the London Declaration proclaims, a neutral merchant ship captured as prize may not be destroyed, but must be taken into port for the determination there of all questions concerning the validity of the capture. In other words, only a prize court is empowered to decide upon the confiscation of the vessel (and her cargo). However, the Declaration permits as an exception the destruction of a neutral merchant ship, which has been captured by a belligerent warship and is liable to condemnation, if the observance of the general rule would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time. The Declaration

requires that, before the vessel is destroyed, all persons on board as well as the ship's papers and other documents relevant for the determination of the validity of the capture be placed in safety. Prize proceedings are conducted subsequently, and in this context two separate questions have to be adjudicated upon: (a) whether it was necessary to destroy the vessel (assuming that her capture was lawful) and (b) whether the capture of the vessel was lawful (assuming that the destruction was necessary). If either the capture or the destruction was not justified, compensation (→ Damages) must be paid to the parties concerned (the shipowners and the cargo owners). The Declaration states that it must first be established whether an exceptional necessity to destroy the vessel existed (→ Military Necessity). If not, compensation must be paid immediately without going into the question of the validity of the capture (that is, even assuming that the original capture was carried out lawfully). The payment of compensation is also required when the destruction as such is held to have been justifiable, but the original capture was invalid. Whenever a neutral vessel is destroyed – whether or not the destruction was justifiable – the owners of neutral cargo not in itself liable to condemnation are entitled to compensation.

A belligerent may capture and condemn as prize any cargo on board a neutral merchant ship, and also neutral cargoes on board enemy merchant ships, in the circumstances of (a) breach of blockade; or (b) transport of contraband. As for neutral cargoes on board an enemy merchant ship, it is necessary to observe that the cargo may be destroyed without compensation in those instances in which a belligerent is permitted to attack and sink the vessel.

Under the Declaration, if a belligerent warship encounters a neutral merchant ship carrying contraband in a proportion which does not justify the vessel's own condemnation (i.e. if the contraband forms less than half the cargo), it is possible, with or without the consent of the merchant ship, to transfer the contraband together with the relevant papers to the warship, and to permit the merchant ship to continue on her voyage. Where necessary, the warship may destroy the contraband, subject to prize proceedings which will be held at a later stage on the basis of the papers delivered to the warship.

V. CONCLUSION

The traditional rules set out above have evolved over a long period. The trouble is that, like other laws of neutrality (those pertaining to land and air warfare), these rules presuppose equality between the belligerents. Since a war of → aggression nowadays constitutes a violation of international law and is branded as a → crime against peace, the question arises whether strict neutrality is still legally possible. This is a major problem which is exceedingly controversial. Until it has been resolved in a satisfactory way, at least the continuing applicability of the present laws of neutrality *in toto* must be viewed with a certain measure of scepticism.

L. FRIEDMAN (ed.), The Law of War, A Documentary History, 2 vols. (1972).

Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War [with comments], Harvard Research in International Law, AJIL, Vol. 33 (1939), Supp. 167–817.

C.C. HYDE, The Hague Convention respecting the Rights and Duties of Neutral Powers in Naval War, AJIL, Vol. 2 (1908) 507–527.

J.E. HARLEY, The Law of Angary, AJIL, Vol. 13 (1919) 267–301.

C.L. BULLOCK, Angary, BYIL, Vol. 3 (1922–1923) 99–129.

H.W. MALKIN, The *Trent* and the *China*, The Removal of Enemy Persons from Neutral Vessels, BYIL, Vol. 5 (1924) 66–77.

A.P. HIGGINS, Le droit de visite et de capture dans la guerre maritime, RdC, Vol. 11 (1926 I) 69–170.

R. LAUN, Le régime international des ports, RdC, Vol. 15 (1926 V) 5–143.

N.L. HILL, The Origin of the Law of Unneutral Service, AJIL, Vol. 23 (1929) 56–67.

C.C. HYDE, The City of Flint, AJIL, Vol. 34 (1940) 89–95.

P.C. JESSUP, The Diversion of Merchantmen, AJIL, Vol. 34 (1940) 312–315.

M. MOOS, The Navicert in World War II, AJIL, Vol. 38 (1944) 115–119.

G.G. FITZMAURICE, Some Aspects of Modern Contraband Control and the Law of Prize, BYIL, Vol. 22 (1945) 73–93.

C.H.M. WALDOCK, The Release of the *Altmark's* Prisoners, BYIL, Vol. 24 (1947) 216–238.

H. LAUTERPACHT, Angary and Requisition of Neutral Property, BYIL, Vol. 27 (1950) 455–459.

T. KOMARNICKI, The Place of Neutrality in the Modern

System of International Law, RdC, Vol. 80 (1952 I) 395–510.

R.W. TUCKER, The Law of War and Neutrality at Sea (1957).

J.S. PICTET (ed.), Commentary II, The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1960).

Y. DINSTEIN, The Laws of War at Sea, Israel Yearbook on Human Rights, Vol. 10 (1980) 38–69.

YORAM DINSTEIN

NEUTRALITY LAWS

1. Historical Background

The evolution of the law of neutrality (→ Neutrality, Concept and General Rules) was influenced in its early stages almost exclusively by State practice. Later on, in the 17th and 18th centuries, learned authors on international law started to concern themselves with problems of neutrality. At the same time, States began to conclude treaties to define more precisely the rights and duties of neutrals and belligerents. Treaties between maritime powers in particular contained provisions on → contraband, free lists, and → prize law (→ Neutrality in Sea Warfare). Other treaties were concerned with the right of passage (→ Passage, Right of), the recruiting of volunteers and → neutral trading (→ Neutrality in Land Warfare). However, it was not until the end of the 18th century that States began to issue formal → declarations of neutrality and to promulgate internal regulations on matters of neutrality. The purpose of such internal laws was to regulate those aspects of life within the neutral State that in some way could, without regulation, compromise the State's neutrality. Over time, these regulations have come to refer to: the breadth and the use of → territorial waters; the presence of foreign → warships in those waters; the export of arms (→ Arms Traffic in); service in foreign armies; the use of neutral territory (→ Territorial Sovereignty) and of neutral air space (→ Air, Sovereignty over the) for belligerent operations. Internal legislation moreover has also often implemented the rules of international law on neutrality.

(a) State practice in the Americas

The leading power in the field of neutrality legislation at the end of the 18th century – when the practice of national neutrality laws first developed – was the United States. In 1793, during the French Revolutionary Wars, President George Washington proclaimed the neutrality of the United States. The first American Neutrality Act was passed by Congress in 1794; this was temporary in character and placed emphasis on the duties of neutrals. The restrictive provisions of the Act prohibited American citizens (→ Neutral Nationals) and residents from enlisting in foreign military forces and from fitting out or arming ships for belligerents. In 1818 permanent legislation was enacted on the subject. Subsequent United States legislation concentrated for a considerable period on maritime neutrality, prohibiting the outfitting of vessels not only for belligerents but also for privateers (→ Privateering) and imposing restrictions on the export of certain goods for the benefit of belligerents.

In the 20th century, Congress passed further Joint Resolutions on neutrality, in particular around the time of the United States' entrance into World War I (Act of June 15, 1917), during the intervention of Italy in Ethiopia (Joint Resolutions of August 31, 1935 and of February 29, 1936), during the → Spanish Civil War (Joint Resolution of May 1, 1937), and before the United States entered World War II (Joint Resolutions of November 4, 1939 and of November 17, 1941). These legislative measures prohibited in particular the export of arms, ammunition or implements of war of belligerents (→ War Materials). Power was given to the President by Congress to issue lists of goods which should fall under an → embargo. The Neutrality Act of 1939 in addition introduced the so-called "cash and carry" policy (→ Cash and Carry Clause) for goods other than arms, ammunition or implements of war which were specified by the President. According to this Act, all rights, titles and interests in articles or materials to be exported or transported to a belligerent had to be transferred to foreign ownership before leaving the United States. Moreover, it was unlawful for American vessels to carry such materials to belligerents. Between 1935 and 1939, this legislation

reflected the increasing desire of the American people to keep out of wars (→ Isolationism).

According to the Declaration adopted at the Conference of Foreign Ministers of the American Republics held at Panama on October 3, 1939 (AJIL, Vol. 34, Supp. (1940) p. 1), the American States, including the United States, established a security zone (→ Safety Zones) extending over several hundred miles of water adjacent to the American continents, in which belligerent activities were banned. When in December 1939 a battle took place between the German battleship → Graf Spee and British cruisers in the waters adjacent to the mouth of the Rio de la Plata, American States protested the violation of the security zone. However, Germany and Great Britain both rejected the → protest and argued that unilaterally established security zones exceeding the limits of territorial waters are not binding on third States (→ Neutralization).

After the German invasions of Denmark, Norway, Belgium, Holland and Luxembourg in 1940, it became obvious that neutral status was becoming increasingly menaced. The flagrant violations of neutral rights by Germany led the United States gradually to give up her strict neutrality and to support Great Britain. Thus, with the Lend-Lease Act of March 11, 1941 the President was empowered to authorize the manufacture, sale, transfer of title, lease or disposal of defence articles to any country whose defence was vital to the defence of the United States.

(*b*) *European practice*

The American Act of 1818 served as the model for the British Foreign Enlistment Act of 1819, which was replaced by an Act of August 9, 1870. This Act prohibited enlistment of British subjects in the military forces of a belligerent, the building and equipping of vessels for belligerents, the arming of men-of-war of either belligerent, and the preparation of naval or military expeditions against a friendly State.

In 1854 the Nordic States adopted the Principles of Neutrality, which were to be reaffirmed in their Rules of Neutrality of 1912 and 1938 respectively. These codes were incorporated into the internal law of the States concerned. The Italian Law on War and Neutrality of July 8, 1938, very much like the Scandinavian Rules of Neutrality, constituted a comprehensive → codification of principles governing neutrality in warfare on land, on the sea and in the air.

On August 4, 1914, the Swiss Government issued an order which prohibited amongst other things belligerent balloons and aircraft from flying through Swiss air space (→ Overflight). This regulation was an important contribution to the general recognition of the inviolability of neutral air space. On April 14, 1939 a new ordinance was passed on the maintenance of neutrality.

(*c*) *Post-World War II developments*

Since World War II, a new type of neutrality law has appeared. On October 26, 1955 the Austrian Parliament passed a constitutional law declaring the → permanent neutrality of Austria. The law was communicated to all States with which Austria had diplomatic relations, with the expressed hope that they would recognize Austria's permanent neutrality. In fact, recognition was accorded by all States either expressly or by → acquiescence.

The Cambodian law of November 6, 1957 proclaiming the neutrality of that State was another example of this type of neutrality law.

2. *Types of Neutrality Laws*

From a typological point of view, a basic distinction may be drawn between fundamental laws which proclaim the status of permanent neutrality of a State and other laws which implement and sometimes supplement the general principles of the law of neutrality.

For the fundamental type of laws, the Austrian constitutional law of 1955 is a good example. In the hierarchy of internal legal instruments, it ranks on the highest normative level, as it requires a two-thirds majority vote for passage through Parliament. When such laws are announced to the community of States and gain general recognition, they then become legally relevant within the realm of → international law.

For the second type of laws, the United States Joint Resolutions may be cited. Such laws are as a rule more frequently altered in response to the changing conditions of the neutral's attitude. This kind of law is generally based on the existing international law of neutrality as codified in par-

ticular in the 1907 Hague Conventions V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and XIII concerning the Rights and Duties of Neutral Powers in Naval War (→ Hague Peace Conferences of 1899 and 1907). They are, however, in most cases for political reasons more restrictive than the rules of international law would require. They may codify the law of neutrality *in extenso*, as did the laws implementing the Nordic Rules of Neutrality of 1938 or the Italian Law on War and Neutrality of 1938. Their content may also be restricted to a specific part of the law of neutrality (e.g. the Austrian law of October 18, 1977 on the export, import and transit of war material). Governments are usually authorized by legislation to implement such laws (e.g. proclamations of the President of the United States; the Governmental Order of the Austrian Federal Government of November 22, 1977 concerning war material). Further examples for such legally binding instruments at a lower normative level are the various American and British military manuals containing regulations on the rights and obligations of belligerents *vis-à-vis* neutral powers.

3. *Enforcement*

The enforcement of State regulations on matters of neutrality is usually ensured by penal sanctions. Sometimes they are incorporated in the national penal code; more often, however, special penal provisions relating to the violation of specific obligations are enacted. For example, Art. 320 of the Austrian Penal Code of 1974 enumerates different kinds of criminal acts which endanger neutrality. According to that article, the following activities are considered as illegal, if they are committed knowingly in Austria during a war or an armed conflict in which Austria is not involved, or when such war or conflict is imminent: the outfitting or arming of vessels, vehicles or aircraft, or of military units of one party to a conflict, for the purpose of enabling participation in such a conflict; the organizing or maintaining of volunteer corps or the establishment of recruiting agencies in favour of one of the parties to the conflict; the export or transit of war material in violation of existing regulations; loans or public collections for military purposes and the transmission of military information or the installation or use of telecommunication stations for the same purpose in so far as they are for the benefit of one party to the conflict. Such acts may be punished with terms of imprisonment from six months to five years. Penal sanctions differ from State to State. In the United States special penal legislation relating to violations of neutrality regulations has been developed since 1794.

4. *Special Problems*

The experience of the two world wars has shown clearly the considerable impact that → economic warfare may have on neutral trading. Neutral powers were in many cases forced to impose severe restrictions on commercial activities with belligerents. World-wide economic → interdependence, which has been growing ever since, will in the future undoubtedly aggravate the conditions of neutral trading in case of war. This may occasionally necessitate the introduction of additional legislative measures by neutral powers.

More important, however, seems to be another development in State practice which emerged during World War II. At the beginning of the war some States assumed an attitude towards belligerents which differed from that of traditional neutrality. This policy, called "non-belligerency", although repeatedly pursued by States even in cases of → armed conflicts after World War II, has so far found no foundation in international law. However, some legislative actions, such as the Cash and Carry Clause and the Lend-Lease Act in the United States during World War II, were clearly inspired by this policy. The partiality of treatment implicit in this policy is a significant dilution of the traditional concept of neutrality and, irrespective of its political significance, its legal status in future conflicts awaits clarification.

F. DEÁK and P.C. JESSUP (eds.), A Collection of Neutrality Laws, Regulations and Treaties of Various Countries, 2 vols. (1939).

Neutrality of the United States [Documents], AJIL, Vol. 34, Supp. (1940) 21–74.

C. SAVAGE, Policy of the United States toward Maritime Commerce in War, 2 vols. (1934–1936, Repr. 1969).

N.J. PADELFORD, The New Scandinavian Neutrality Rules, AJIL, Vol. 32 (1938) 789–793.

H.A. STEINER, Italian War and Neutrality Legislation, AJIL, Vol. 33 (1939) 151–157.

C.G. FENWICK, Declaration of Panama, AJIL, Vol. 34 (1940) 116–119.
P.C. JESSUP, The Neutrality Act of 1939, AJIL, Vol. 34 (1940) 95–99.
M.M. WHITEMAN, Digest of International Law, Vol. 1 (1963) 361; Vol. 11 (1968) 163–166, 422–424, 451–475.
K. GINTHER, Neutralitätspolitik und Neutralitätsgesetz, Juristische Blätter, Vol. 87 (1965) 302–313.
F. ERMACORA, 20 Jahre Österreichische Neutralität (1975) 35–63.
A. VERDROSS, The Permanent Neutrality of Austria (1978).

ERICH KUSSBACH

NEUTRALIZATION

1. Concept

Neutralization denotes the process whereby the status of a particular part or zone of the territory of a State, or of a region belonging to no State, is excluded by treaty from the "region of war" (→ War, Laws of; → War, Theatre of) or → armed conflict, making military operations in that region or area illegal. The main aim of neutralization is the maintenance of peace (→ Peace, Means to Safeguard).

Neutralization is distinct from the → permanent neutrality of States. In the status of permanent neutrality, a State in peace-time undertakes to stay out of any → war, not to enter into any military → alliances, and not to permit the use of its territory for the military purposes of other States, while the other States pledge themselves to respect the territorial integrity and the independence of the permanently neutral State and not to involve it in a war. Permanent neutrality limits not only the liberty of action of the permanently neutral State but also of the other States bound by a multilateral treaty or analogous international instruments. While State practice uses the term "permanent neutrality" to describe that special international status of a sovereign, independent State (→ Sovereignty), many international law treatises continue to speak of "neutralized States" to mean permanently neutral States.

Demilitarized zones are particular zones of the territory of a State where no troops may be stationed nor fortifications established. Such buffer-zones aim mainly at avoiding military incidents in border areas; → demilitarization can be combined with neutralization.

Neutralization is also distinct from → internationalization, by which certain parts of the territory of a State are opened for the use of several or all States. Internationalization aims at promoting international intercourse and trade.

2. Neutralized Areas

(a) Parts of a State's territory

(i) Historical instances

The provinces of Chablais and Faucigny in Upper Savoy were neutralized by Art. 92 of the Final Act of the → Vienna Congress (1815). When by the Treaty of Turin (March 20, 1860) Sardinia-Piemont ceded the whole Duchy of Savoy to France, the neutralization of Chablais and Faucigny passed on to France. Art. 435 of the → Versailles Peace Treaty (1919) declared that these provisions were no longer consistent with circumstances then prevailing. The Swiss Government consented to the abrogation of the neutralization, but claimed that certain arrangements concerning customs facilities within the neutralized zone were to be maintained (→ Free Zones of Upper Savoy and Gex Case).

Under the Spanish-Moroccan treaty of November 20, 1864 (Art. 43), Morocco undertook to establish a → lighthouse on Cape Spartel near Tangier. By a treaty of May 31, 1865 the administration of the lighthouse was entrusted to the Commission internationale du phare du Cap Spartel, without prejudice to the rights, property and sovereignty of Morocco (Art. 1); the neutrality of the lighthouse was always to be maintained (Art. 3). From 1941 to 1945, Spain illegally occupied the territory and assumed the administration of the lighthouse. By a treaty of August 31, 1945, the Commission internationale was re-established. A Protocol of March 31, 1958 finally conferred the administration of the lighthouse upon Morocco as the territorial sovereign.

→ Mandates were established after World War I as separate international entities, entrusted to mandatory powers in the interest of the inhabitants who were not invested with the → nationality of the mandatory. The mandated territories were partly neutralized; Art. 22 of the Covenant of the → League of Nations forbade the establishment of fortifications or military or naval bases and, indirectly, conscription of the

inhabitants. The administration of the mandates was supervised by the League of Nations.

The demilitarization of the Rhineland under Arts. 42 to 44 of the Versailles Treaty was established by means of a neutralized zone between Germany and France (→ Rhineland Occupation after World War I). When on March 7, 1936 Germany moved into the neutralized zone militarily, the Council of the League of Nations condemned Germany's action as a breach of the peace treaty, but no countermeasures were taken.

The "Tangier Zone", a part of the territory of Morocco, was by a multilateral convention of February 18, 1923 placed under a régime of permanent neutrality. It was administered, under a statute successively amended in 1928, 1945 and 1952, by an international body under powers delegated by the Sultan of Morocco. On June 14, 1940 Spain occupied the zone illegally and international administration ceased. A conference held in Paris in 1945 restored the position as it had existed before 1940. Finally, on January 1, 1957, the international zone of Tangier was fully reintegrated in the sovereign Kingdom of Morocco.

(ii) *Current situation*

The town of Huningen (now Huningue) in France (Alsace) under the Treaty of Paris of November 20, 1815 was, in the interest of permanently neutral Switzerland (City of Basle), forbidden to be fortified. This neutralization (→ Servitudes) was not terminated when Huningen became German in 1871, nor when Huningen was ceded to France in 1919. Since 1945, this legal position has remained unchanged.

The Ionian Islands, until 1797, belonged to Venice. In 1800 they were constituted as the Septinsular Republic and were placed by the Treaty of Paris of November 5, 1815 as the United States of the Ionian Islands, under the exclusive protection of Great Britain. When the Ionian Islands were absorbed into the Kingdom of Greece, they were permanently neutralized under Art. 2 of the Treaty of London of November 24, 1863. However, under Art. 2 of the Treaty of London of March 24, 1864, this neutralization was restricted to the islands of Corfu and Paxo.

→ Spitzbergen (in Norwegian: Svalbard), a group of Arctic islands, was for many centuries considered *terra nullius*. By a multilateral treaty of February 9, 1920 the full and absolute sovereignty of Norway over the archipelago of Spitzbergen was recognized. Norway pledged herself not to construct any naval base or fortification on the islands, "which never may be used for any warlike purpose". The Soviet Union and Germany acceded to the treaty in 1924 and 1925 respectively. Nevertheless, in World War II, Spitzbergen became the theatre of military operations. Norway, since 1949 a member of the → North Atlantic Treaty Organization (NATO), put the territory of Spitzbergen under NATO command. The Soviet Union characterized the measure as a breach of the special status of Spitzbergen. In reply, Norway declared that the establishment of bases (→ Military Bases on Foreign Territory) on Spitzbergen was not envisaged and that accordingly the treaty of 1920 was not violated.

Under Art. 33 of the Treaty of Paris of 1856 (→ Crimean War and Paris Peace Treaty (1853–1856)), Russia undertook not to fortify the → Aaland Islands in the → Baltic Sea. That obligation passed in 1920 to the newly independent State of Finland. By a convention of October 20, 1921 signed by ten States but not including Russia, the Aaland Islands were made a "neutral zone", not to be fortified or used for any purpose connected with military operations. In a treaty with the Soviet Union of October 11, 1940, Finland confirmed anew the demilitarization of the Aaland Islands. Under the Peace Treaty with Finland of February 10, 1947 (Art. 5; → Peace Treaties of 1947), the Aaland Islands remain demilitarized "in accordance with the situation as at present existing".

The Greek Islands near the coast of Turkey are demilitarized under Art. 13 of the → Lausanne Peace Treaty (1923) (→ Aegean Sea). The Islands of the Dodecanese, ceded by Italy to Greece, share under Art. 14 of the 1947 Peace Treaty with Italy the same neutralized régime.

The Peace Treaty with Italy of 1947 also prohibits the construction of permanent fortifications and military installations to the east of the Franco-Italian frontier (Art. 47) and to the west of the Italo-Yugoslav frontier and in the Apulian peninsula (Art. 48). Pantellaria, the Pelagian Islands (Lampedusa, Lampione and Linosa) and Pianosa (in the Adriatic) are required to remain demilitarized (Art. 49).

The Peace Treaty with Bulgaria of 1947 prohibits the construction of fortifications and military installations to the north of the Greco-Bulgarian frontier (Art. 12).

Regarding areas under special régimes (partly neutralized, combined with demilitarization, and partly internationalized by treaties), see the Straits of Magellan (1881), the → Suez Canal (1888), the → Panama Canal (1901/1903) and the → Dardanelles/Bosphorus (1936), see also → Straits, → Canals, and → Internationalization.

(*b*) *Regions belonging to no State*

→ Antarctica, the uninhabited land surrounding the South Pole, is the size of a small continent. Portions of the Antarctic, defined by the coastline and the meridian drawn from the extreme points of that line (sector principle), were claimed, on the ground that they were no man's land, by several States (→ Antarctica Cases (U.K. v. Argentina; U.K. v. Chile)). The United States in 1948 proposed without success to internationalize the Antarctic and to put it under the trusteeship of the United Nations (→ United Nations Trusteeship System). Finally, by a Convention signed at Washington, D.C. on December 1, 1959 by twelve States, the Antarctic was neutralized. Art. 1 of that Convention reserves the Antarctic for peaceful purposes, prohibits the establishment of military bases and fortifications, and bans tests with conventional weapons. → Nuclear tests are prohibited under Art. 5. Scientific research in the Antarctic is permitted (Art. 2). All parties to the Convention are entitled to send → observers to any part of the Antarctic and to inspect all stations established in the region (Art. 7).

The → high seas are not the territory of a State, but are categorized as *res communis* or *res extra commercium*. Only a portion of the open sea, the → Black Sea, was, under the Treaty of Paris of 1856, neutralized; while open to merchantmen (→ Merchant Ships) of all nations, its waters and → ports were formally interdicted to any men-of-war (→ Warships) belonging to coastal States or to any other power. This provision, however, was abolished by the Treaty of London of March 13, 1871.

(*c*) *Outer space and celestial bodies*

The breakthrough of man into outer space since 1957 and the landings on the moon since 1969 have raised important legal questions regarding outer space. The → United Nations General Assembly on December 20, 1961 unanimously adopted the principle that international law, including the → United Nations Charter, applies to outer space and → celestial bodies (UN GA Res. 1721 (XVI)). It unanimously commended, by Resolution 2222 (XXI) of December 19, 1966, the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, which was opened for signature on January 27, 1967 (→ Outer Space Treaty). Under Art. II of that Treaty, outer space including the moon and other celestial bodies – as *res omnium communes* – is not subject to national appropriation by claim of sovereignty, or by means of use or occupation. Under Art. IV, States party to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, and neither to install such weapons on celestial bodies nor to station weapons in outer space in any other manner. The establishment of military bases, installations and fortifications, the testing of any type of weapon and the conduct of military manoeuvres on celestial bodies are forbidden. Under this neutralization agreement, "activities in the exploration and use of outer space, including the Moon and other celestial bodies" should be carried out "in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security" (Art. III; → Space and Space Law).

3. Significance

Neutralization of parts of the territory of States has played a considerable role in international relations and will continue to increase security in certain zones. The newly independent States, however, may prove reluctant to accept the neutralization or even the demilitarization of parts of their sovereign territories. The neutralizations of the Antarctic and of outer space (including the moon and other celestial bodies) are major achievements of the international community in recent times, and indeed may save mankind from disaster.

K. STRUPP, Neutralisation, Befriedung, Entmilitarisierung (1933).
J. LEPRETTE, Le statut international de Tanger (1948).
R. DOLLOT, Le droit international des espaces polaires, RdC, Vol. 75 (1949 II) 115–200.
G.H. STUART, The International City of Tangier (2nd ed. 1955).
F.A. VÁLI, Servitudes of International Law (2nd ed. 1958).
R. QUADRI, Droit international cosmique, RdC, Vol. 98 (1959 III) 505–599.
H. HANESSIAN, The Antarctic Treaty, 1959, ICLQ, Vol. 9 (1960) 436–480.
R.D. HAYTON, The Antarctic Settlement of 1959, AJIL, Vol. 54 (1960) 349–371.
C.W. JENKS, Space Law (1965).
L. DELBEZ, Le concept d'internationalisation, RGDIP, Vol. 71 (1967) 5–62.
R.E. GUYER, The Antarctic System, RdC, Vol. 139 (1973 II) 149–226.

STEPHAN VEROSTA

NEUTRALS, DISARMING OF BELLIGERENTS BY *see* Disarming of Belligerents by Neutrals

NON-AGGRESSION PACTS

1. Definition

The term "non-aggression pact" is used for a special form of binding international treaty (→ Treaties) by which, under international law, two or more States as contracting parties promise not to engage in (military) → aggression against one another. Non-aggression pacts belong to the type of political treaties which concern the fundamental position of States within the international community, i.e. their security, their independence, and their → sovereignty (→ Territorial Integrity and Political Independence). As international treaties, non-aggression pacts had their golden age during the years 1920 to 1939.

By nature, the non-aggression pact is cognate with → alliance and is sometimes attributed to the category of → guarantee treaties (e.g. Fauchille). However, non-aggression pacts only contain elements of a → guarantee in so far as the actual territorial integrity of the contracting parties is assured by their obligation not to attack the other (→ Status quo). Substantively, non-aggression pacts are distinct from alliances. By forging an alliance, the contracting States obtain support and assistance when a third State commences military actions against one or more of the contracting parties. Alliances are thus concluded as a contingency for → war. They preserve peace in an indirect way: A potential aggressor ought to be deterred by the combined power of an alliance.

In contrast to an alliance, a non-aggression pact aims at the direct preservation of peace by stipulating the obligation to refrain from military aggression. It creates confidence among the parties by reciprocally ascertaining peaceful intentions. But the basis of that confidence is in the contractual promise alone, and in the assumption that the other will abide by the contract (→ Pacta sunt servanda). There is another difference between an alliance and a non-aggression pact: An alliance contains an obligation to act, whereas a non-aggression pact obliges the parties to abstain from action. In this sense, a non-aggression pact is an iridescent instrument of international relations which may lend itself to divergent political aims.

2. History

As a category of international treaties, the non-aggression pact developed after World War I in close connection with efforts towards an international system of peace (→ Peace, Proposals for the Preservation of; → Wilson's Fourteen Points). During this phase, four separate areas are discernible, although to some extent they coalesce.

(a) League of Nations

It is commonly understood that the Covenant of the → League of Nations did not contain a general prohibition of the use of war in international relations, although the → preamble and Arts. 10, 11 and 16 could have been understood in this way (→ Collective Security). There were, however, several initiatives towards the evolution of the League system in the direction of such a prohibition. During its first session the Assembly of the League conducted a general debate on the interpretation and the development of Art. 10. This resulted in Resolution No. 14, proposing the conclusion of a general Treaty of Mutual Guarantee, which was passed during the third session on September 22, 1922. A draft was elaborated by delegates Cecil and Requin; it was adopted on September 29, 1923 as a draft of a "Treaty of Mutual Assistance" (Journal officiel (Conseil), December 1923, p. 1521; see also A.

Rolin, L'article 10 du pacte de la Société des Nations, in: P. Munch (ed.), Les origines et l'oeuvre de la Société des Nations, Vol. 2 (1942) p. 453).

In June 1924 delegates Shotwell and Bliss presented to the League a private draft of a "General Treaty of Disarmament and Security", the nucleus of which was an obligation of non-aggression and a condemnation of aggression combined with a system of → sanctions. With delegates MacDonald and Herriot as its promotors, the → Geneva Protocol for the Pacific Settlement of International Disputes was agreed upon by the League Assembly on October 2, 1924. This Protocol contained a condemnation of aggression as well as an obligation for compulsory → peaceful settlement of disputes and → collective measures against an aggressor (→ Collective Self-Defence). Prime Minister Neville Chamberlain, however, refused to give Britain's assent during the 33rd Session of the League Council on March 12, 1925, so that the Protocol ultimately failed in September 1925.

During the years 1927 and 1928 the League again took up this subject, and models for bilateral and multilateral non-aggression pacts were elaborated and accepted by the Assembly on September 26, 1928 (Journal officiel, Supplément spécial No. 64 (1928) p. 490). Two elements characterized these models: an obligation to renounce acts of aggression and very detailed provisions for the pacific settlement of disputes. They contained nothing on guarantees of the territorial *status quo*. The model bilateral pact subsequently served as the basis for the bilateral non-aggression pacts between Greece and Romania of March 21, 1928 (LNTS, Vol. 108, p. 188), Greece and Yugoslavia of March 27, 1929 (LNTS, Vol. 108, p. 202), Turkey and Romania of October 17, 1933 (LNTS, Vol. 165, p. 273), and Turkey and Yugoslavia of November 27, 1933 (LNTS, Vol. 161, p. 229) (for the Balkan States in general, see Huber, pp. 71–84). As a multilateral non-aggression pact, the Latin American → Saavedra Lamas Treaty of October 10, 1933 was in part connected with these developments.

(*b*) *Western Europe*

After World War I, the status of the Rhineland (Art. 41; → Versailles Peace Treaty; → Rhineland Occupation after World War I) and the way the western frontiers of Germany had been regulated gave rise to fears in neighbouring States that Germany would attempt to revise the frontiers by force. Thus the question of securing the *status quo* was a permanent subject of various conferences after 1920. As an appropriate means of achieving this aim, an international agreement was sought under which Germany would accept the territorial situation and the parties to the agreement would reciprocally renounce any acts of aggression. In 1922 at the Conference of Cannes a resolution was agreed upon that "tous les pays doivent prendre en commun l'engagement de s'abstenir de toute agression à l'égard de leurs voisins" (all countries jointly pledged to abstain from all aggression against their neighbours) (Section 6 of the final document of January 6, 1922; von Gretschaninow, p. 109, note 2). The subsequent Conference on the World Economy in Genoa passed a decision on May 18, 1922 that obliged all 29 participating States to conclude agreements to the effect "de s'abstenir de tous actes contre leurs territoires respectives" (of abstaining from all acts against their respective territories) on the basis of the acceptance of the *status quo* (*ibid.*, p. 110). Accordingly, the German Chancellor, Wilhelm Cuno, proposed to France the conclusion of a non-aggression pact for a period of 30 years (*ibid.*, p. 121). France rejected this proposal because of its limited duration, among other reasons. When the French Government under Raymond Poincaré was overthrown, and when the → Dawes Plan was successfully enacted, Germany's Gustav Stresemann again offered to the French Government a non-aggression and security agreement containing a territorial guarantee. This initiative finally led to the set of agreements concluded on October 16, 1925 in Locarno (→ Locarno Treaties), the main agreement bearing the name of "Treaty of Mutual Guarantee". In Art. 2, Belgium, France and Germany undertook "that they will in no case attack or invade each other or resort to war against each other". Excepted, however, were cases of legitimate defence and actions provided for under Arts. 15 and 16 of the League of Nations Covenant. This kind of non-aggression pact combined a territorial guarantee with obligations of non-aggression and the peaceful settlement of disputes.

(c) *Soviet bilateral treaties*

The history of non-aggression pacts after World War I in Eastern Europe began with the so-called Baltic Entente of March 17, 1922 (LNTS, Vol. 11, p. 167) which created an alliance between Poland, Latvia, Lithuania, Estonia and Finland directed against the Soviet Union. The Soviet Union subsequently tried to win the confidence of these States by proposing a non-aggression and arbitration treaty which in draft form was ultimately accepted during the Moscow Disarmament Conference on December 8, 1922 (→ Disarmament). This draft (von Gretschaninow, p. 120) combined the obligation to abstain from aggression with regulations for disarmament and peaceful settlement of disputes. But it finally failed because no agreement was reached on the question of disarmament.

Shortly after the Locarno treaties, the Soviet Union succeeded in concluding a Treaty of Friendship and Neutrality with Turkey on December 17, 1925 (LNTS, Vol. 157, p. 353). Art. 1 of the Treaty stipulated a duty to remain neutral when either contracting party was being engaged in military action by third States. Art. 2 stipulated: "Each contracting party undertakes to abstain from any aggression against the other." Likewise, the parties promised not to participate in any alliance directed against the other contracting party. In Protocol III to the Treaty, the parties undertook to enter into negotiations to determine the methods of settling disputes. This Treaty was concluded for three years, with extensions in 1929 for two, and in 1931 for five additional years.

Following the same principles of non-aggression, neutrality and peaceful settlement, the Soviet Union concluded treaties with its neighbours Lithuania on September 28, 1926 (this was the first treaty in history to be expressly named as a "non-aggression pact"; LNTS, Vol. 60, p. 145), Afghanistan on August 31, 1926 (renewed on June 24, 1931; LNTS, Vol. 157, p. 371), and Persia on October 1, 1927 (LNTS, Vol. 112, p. 275; see also the → Rapallo Treaty (1922)).

(d) *Universal developments*

The work that went into the League of Nations model non-aggression pact, the Locarno treaties and the Russian non-aggression pacts made the idea of non-aggression pacts popular and led to the → Kellogg-Briand Pact of August 27, 1928 which in substance contained a general condemnation of aggression. By this "universal non-aggression pact" (Barandon), bilateral non-aggression pacts became superfluous. Accordingly, the Soviet Union proposed to her neighbouring States, in the so-called Litvinov Protocol of February 9, 1929 (LNTS, Vol. 89, p. 370) that they immediately bring into effect the Kellogg-Briand Pact. Nevertheless, the Soviet Union concluded further bilateral non-aggression pacts which were clearly based on the Kellogg-Briand Pact: with Finland, January 21, 1932 (LNTS, Vol. 157, p. 393), Latvia, February 5, 1932 (LNTS, Vol. 148, p. 143), Estonia, May 4, 1932 (LNTS, Vol. 131, p. 297), Poland, July 25, 1932 (LNTS, Vol. 126, p. 41), France, November 29, 1932 (LNTS, Vol. 157, p. 411), Italy, September 2, 1933 (LNTS, Vol. 148, p. 319) and China, August 21, 1937 (LNTS, Vol. 181, p. 102). Besides the obligation of non-aggression, these treaties uniformly contained a proviso for neutrality, an obligation not to participate in alliances of → boycotts directed against the other party, a guarantee of territorial integrity, a statement on the inviolability of frontiers, and, in a rather general manner, an obligation for peaceful settlement.

This phase in the history of non-aggression pacts was brought to an end in 1935 by the conclusion of a non-aggression pact between Denmark and Germany (the other Scandinavian States refused to conclude such a treaty) and by the infamous non-aggression pact between Germany and the Soviet Union of August 23, 1939 which contained a division of their respective → spheres of influence in eastern Europe.

3. Evaluation

As pointed out earlier, non-aggression pacts between 1922 and 1939 were characterized by the recognition of the territorial *status quo*, the reciprocal renunciation of aggression, the obligation for peaceful settlement of disputes, an agreement on neutrality, and endeavours towards disarmament, even though not all treaties contained all five elements.

These non-aggression pacts were so comprehensive that they could serve several political purposes. For Germany (the Locarno treaties) and Russia, their policy of concluding non-

aggression pacts with their neighbours resulted in their reacceptance as equal members of the international community of States and as partners in the international legal order.

Moreover, the territorial possessions of the States were recognized so that border disputes were resolved. In a general way the idea of renunciation of war was promoted, resulting in the Kellogg-Briand Pact.

On the negative side of the balance sheet it must be remarked that none of the non-aggression pacts defined aggression. This definition was left to the London Convention on the Definition of the Aggressor of July 3, 1933 (LNTS, Vol. 147, p. 67), but this was signed only by the Soviet Union and her partners in bilateral non-aggression pacts. A non-aggression pact did not substantively increase the security of the contracting parties as long as no effective disarmament was taking place. The Baltic States and Poland became pawns in the game of the → Great Powers irrespective of whether they had valid non-aggression pacts or not.

4. Developments since 1945

After 1945, operative non-aggression pacts are rarely to be found. The universal prohibition of the → use of force in international relations contained in the → United Nations Charter has rendered them superfluous. In addition, the discouraging pre-war experience had discredited them.

The only currently known non-aggression pact in the strict sense is the "Accord de non-agression et défense mutuelle" of June 9, 1977 concluded at Abidjan in the framework of the → Economic Community of West African States, which came into force by a Protocol of July 21/22, 1981 (→ Regional Cooperation and Organization: African States).

However, there have been many proposals for the conclusion of non-aggression pacts. During the Geneva Conference of the Heads of Government of the Great Powers from July 18 to 23, 1955, the Soviet Union proposed an agreement on reciprocal obligations of non-aggression and peaceful settlement. In the discussions in the 1950s and 1960s, the idea of a non-aggression pact between the → North Atlantic Treaty Organization and the → Warsaw Treaty Organization was also repeatedly made (e.g. the Soviet proposal made in the → United Nations General Assembly on September 26, 1961, elaborated further in UN Doc. A/4892).

Some proposals for a non-aggression pact were exchanged between the Soviet Union and the People's Republic of China, but ultimately met with no success. Proposals for non-aggression pacts between Iran, Iraq and Saudi Arabia in 1975 and between Pakistan and India in 1981 should also be mentioned, although no results were forthcoming in these instances.

In the early 1970s, however, the Federal Republic of Germany concluded the so-called "*Ostverträge*" with neighbouring Eastern States and the Soviet Union which contain some elements of the "classic" non-aggression pact (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)). Besides a promise of renunciation of force in their mutual relations as a special kind of non-aggression, an obligation for peaceful settlement of disputes was also settled on, as well as a recognition of the existing territorial possessions. These treaties, according to official declarations, served the purpose of "normalizing relations". In fact, they led to the establishment of diplomatic relations between the Federal Republic of Germany on the one hand and Poland, Czechoslovakia and the German Democratic Republic on the other, to increased economic relations and to the entrance of both German States as members into the → United Nations.

The aim of the Soviet Union during the 1920s and 1930s to conclude as many non-aggression pacts as possible now finds expression in the Soviet initiative for a world treaty on non-use of force in international relations, which was submitted to the UN on September 28, 1976 (UN Doc. A/31/243; ILM, Vol. 16 (1977) p. 57). A special committee (A/AC. 193) was set up and has not yet concluded its work. In 1980 the committee agreed on 17 principles (UN Doc. A/35/41) which stress peaceful settlement, disarmament, and the renunciation of the use of force.

G. VON GRETSCHANINOW, Garantiepakte, Bündisse, Abkommen über politische Zusammenarbeit, Nichtangriffs- und Neutralitätsverträge der Nachkriegszeit (1936).

G. WASMUND, Die Nichtangriffspakte (1935).

W. W. HARTLIEB, Das politische Vertragssystem der Sowjetunion 1920–1935 (1936).

H. HUBER, Die Nichtangriffs- und Neutralitätsverträge, Thesis, University of Tübingen (1936).
P. BARANDON, Das System der politischen Staatsverträge seit 1918 (1937).
A. FREIHERR VON FREYTAG-LÖRINGHOVEN, Die Regionalpakte (1937).
F. MERKEL, Die kollektiven Beistands- und die Nichtangriffspakte, Thesis, University of Freiburg (1938).
F.E. GRAF RECHBERG, Die politischen Verträge der Sowjetunion 1919–1939, Thesis, University of Frankfurt (1957).
J. HACKER, Lockvogel Nichtangriffspakt, Irrwege der Entspannungspolitik, Die politische Meinung, Vol. 11 (1966) 55–66.
E. KREPP, Security and Non-Aggression, Baltic States and U.S.S.R. Treaties of Non-Aggression (1973).

JÖRG MANFRED MÖSSNER

NON-COMBATANTS *see* Civilian Population, Protection; Combatants

NUCLEAR-FREE ZONES

1. Concept and History

The idea of establishing nuclear-free zones, or nuclear-weapon-free zones, first appeared in the mid-1950s. It aims at excluding the production, storage, holding and use of nuclear weapons within geographically delimited areas, and contributing thereby to an international *détente* (→ Nuclear Warfare and Weapons). According to the Resolution of the → United Nations General Assembly on the "question of nuclear-weapon-free zones" of December 11, 1975 (UN GA Res. 3472 B (XXX)), a nuclear-free zone is defined as

> "any zone, recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercise of their sovereignty, has established by virtue of a treaty or convention whereby: (a) The statute of total absence of nuclear weapons to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined; (b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that statute."

This zonal approach to nuclear → arms control was advanced in 1956 by the Soviet Union in the Subcommittee of the UN Disarmament Commission (Official Records of the Disarmament Commission, Supp. for January–December 1956, Doc. DC/83, Annex 5; → Disarmament). The proposal was aimed at banning the stationing of atomic military formations and the location of atomic and hydrogen weapons of any kind in Central Europe. Wider international resonance, however, was accorded to the plan advocated by the Polish Foreign Minister Rapacki in a speech before the UN General Assembly on October 2, 1957 (UN GA Official Records, 12th session, 697th meeting, p. 235). The "Rapacki Plan", under discussion until 1964, proposed a nuclear-free zone which was initially to embrace Poland, the Federal Republic of Germany and the German Democratic Republic, later to be extended to other Central European territories.

The idea of a military and political *détente* through nuclear-free zones did not remain limited to Central Europe. Similar initiatives have been pursued since late 1957 for the Balkans, and the Adriatic and the Mediterranean Sea areas, and since 1961 for Northern Europe (UN GA Res. 1664 (XVI) of December 4, 1961). The denuclearization of Africa was demanded by African States after France's → nuclear tests in the Sahara in 1960. The UN General Assembly adopted a resolution at its 16th session (1652 (XVI) of November 24, 1961) which called upon member States not to carry out nuclear tests in Africa, to refrain from using Africa for the testing, storing or transporting of nuclear weapons and to consider and respect Africa as a nuclear-free zone. These plans have since been pursued in several UN resolutions and through other means.

Since the mid-1970s the establishment of nuclear-free zones in the Middle East and in Southern Asia has been under discussion. At the 29th session of the UN General Assembly Iran submitted a proposal regarding the Middle East, which was supported by Egypt (UN Doc. A/9693 of July 15, 1974 and Addenda 1–3; UN Doc. A/C 1/PV 2001, pp. 27–36). In the same session the question of a nuclear-free zone in Southern Asia was discussed upon the request of Pakistan (UN Doc. A/9706 of August 19, 1974). Pakistan pointed out that these regions were particularly suited for the establishment of a nuclear-free zone since all States concerned – including India – had already declared their opposition to the acquisition of nuclear weapons or to their introduction into

the region (UN GA Res. 3265 A and B (XXIX) of December 9, 1974).

At the Lusaka conference in September 1970 a plan was proposed to declare the Indian Ocean as "a zone of peace" (→ Zones of Peace at Sea). This concept, however, exceeded a mere denuclearization and called for total → demilitarization and → neutralization of the Indian Ocean (UN GA Res. 2832 (XXVI) of December 16, 1971). Concerning the proposals for nuclear-free zones in Africa, the Middle East, South Asia, and for the establishment of a zone of peace in the Indian Ocean, see the synthesis in UN Doc. A/AC.206/7 of May 4, 1981.

2. *Current Situation*

The initiatives described above for the establishment of nuclear-free zones have so far not developed into binding instruments of international law. While more than mere declarations of political intent, they have at the very most become UN resolutions. The discussions have not led to agreements under international law or even to unilaterally binding declarations of individual States (→ Unilateral Acts in International Law).

Other denuclearization initiatives have indeed led to international agreements and are discussed below.

(*a*) *Antarctic Treaty*

The Antarctic Treaty of December 1, 1959 (UNTS, Vol. 402, p. 72) in its first article stipulates that → Antarctica is to be used for peaceful purposes only and prohibits any measures of a military nature in its area of application (defined by Art. VI as the area south of 60 degrees South Latitude). The Treaty includes a ban on the stationing and use of nuclear weapons. Art. V, para. 1 prohibits any nuclear explosions and the disposal of radioactive waste (cf. → Environment, International Protection). Art. V, para. 2 exempts from this rule activities which are in conformity with international agreements to which all of the contracting parties of the Antarctic Treaty are parties. The observance of the treaty obligations is ensured by a system of control (Art. VIII; → International Controls).

(*b*) *Outer Space Treaty*

The Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies of January 27, 1967 (UNTS, Vol. 610, p. 205; → Outer Space Treaty) stipulates in Art. IV that the contracting parties are not to place in orbit around the earth any objects carrying nuclear weapons and other kinds of weapons of mass destruction, or install such weapons on → celestial bodies, or station weapons in outer space in any other manner. The moon and other celestial bodies shall be used by all States parties to the Treaty exclusively for peaceful purposes (Art. IV, para. 2).

(*c*) *Sea-Bed Treaty*

According to Art. I of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof of February 11, 1971 (ILM, Vol. 10 (1971), p. 145; → Conferences on the Law of the Sea; → Sea-Bed and Subsoil), the contracting parties are forbidden to emplant or emplace on the seabed, the ocean floor, or in its subsoil any nuclear weapons or any other mass destruction weapons. The Sea-Bed Treaty provides for the necessary → verification procedures (Art. III).

(*d*) *Moon Agreement*

Under Art. 3(3) of the Agreement governing the Activities of States on the Moon and other Celestial Bodies adopted by UN GA Resolution of December 5, 1979 (ILM, Vol. 18 (1979), p. 1434), the "States parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons . . . or place or use such weapons on or in the moon." This Agreement, however, has so far been signed by only a few States and had not yet entered into force as of 1981.

(*e*) *Treaty of Tlatelolco*

Whereas the agreements mentioned above provide for the establishment of nuclear-free zones in non-terrestrial, uninhabited or sparsely inhabited areas, the Treaty for the Prohibition of Nuclear Weapons in Latin America of February 14, 1967 (UNTS, Vol. 634, p. 326), known as the Treaty of Tlatelolco, is the first and to date the only treaty establishing a nuclear-free zone for a

densely populated area. For the concept of a nuclear-weapon-free zone as an instrument of securing peace this Treaty has been the pilot project. After four years of → negotiations, it was signed in 1967 and entered into force on April 25, 1969. It is valid for all Latin American States except Argentina, Brazil, Chile, Cuba, and Guyana, who have not become parties. Its potential geographical area of application has as its northern limit the boundary between Mexico and the United States and extends southward to the area of application of the Antarctic Treaty; in the east and west it comprises parts of the → high seas (Art. 4(2)).

The main obligations of the contracting parties have been laid down in Art. 1, which requires them to prohibit and prevent the testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons, as well as the receipt, storage, installation, deployment and any form of possession of any nuclear weapons, which are defined in Art. 5. Largely due to the insistence of the United States because of her historical interest in the → Panama Canal, the transit of nuclear weapons has not been included in the Treaty, thus creating a loophole for bringing nuclear weapons into the region. Art. 17 expressly acknowledges the parties' right to the peaceful uses of nuclear energy, and Art. 18 allows, under certain conditions, nuclear explosions for peaceful purposes (→ Nuclear Energy, Peaceful Use).

The observance of the Treaty obligations is guaranteed by a two fold system of controls. Firstly, the Treaty establishes its own organization to ensure compliance: Organismo para la Proscripción de las Armas Nucleares en la América Latina (OPANAL), which, as a regional international organization (→ Regional Arrangements and the UN Charter; → Regional Cooperation and Organization: American States), is a → subject of international law and enjoys broad autonomy in its relations with the States parties (Art. 7–11). Secondly, the parties are obliged to enter into multilateral or bilateral safeguard agreements with the → International Atomic Energy Agency (IAEA) within a certain time limit (Art. 13), thereby submitting themselves to IAEA control as well.

By Additional Protocol I (UNTS, Vol. 634, p. 360) non-Latin-American States are given the option to submit to the Statute of denuclearization for territories in Latin America for which they are *de jure* or *de facto* internationally responsible. Protocol I has so far been ratified by the United Kingdom, the Netherlands and the United States. By Additional Protocol II (UNTS, Vol. 634, p. 364) States possessing nuclear weapons are invited to bind themselves to respect the region's denuclearization, and neither to use nuclear weapons in Latin America nor to threaten their use. Protocol II has been accepted by China, France, the Soviet Union, the United Kingdom and the United States.

3. Significance and Special Problems

The concept of a zonal approach to denuclearization, although widely discussed during the past quarter of a century of international disarmament efforts, has failed to become legally effective beyond a very limited degree. Legally effective nuclear-free zones exist on the one hand for the unpopulated areas of Antarctica, for outer space, and for the ocean floor, but also on the other hand for Latin America, which was in any case free of nuclear weapons – thus simply freezing the *status quo ante*. In politically critical areas such as the middle East or Central Europe, binding agreements on nuclear-free zones have not been achieved.

But even the legally binding establishment of nuclear-free zones entails a number of politico-legal problems. A latent tension exists between the allowed peaceful uses of nuclear energy and the prohibited keeping of nuclear arms, which is demonstrated in particular by the peaceful nuclear explosions which are permissible under the Tlatelolco Treaty. Effectiveness depends on harmonizing the requirements of unhampered peaceful uses with the requirements of effective control mechanisms (cf. the 1968 → Non-Proliferation Treaty). In this respect the Tlatelolco Treaty with its double control mechanisms may serve as an example: internal – but not national – control by OPANAL and external control by the IAEA. Another problem posed by nuclear-free zones is that territories where nuclear weapons are stationed may be geographically adjacent to nuclear-free zones. This would be particularly relevant in Europe, where the concept of → safety zones has been under discussion, which

aims at keeping the adjacent areas at least free of tactical limited-range nuclear weapons.

Special Report of the Conference of the Committee on Disarmament, UN GA Official Records, 30th Session, Supp. No. 27 A, Doc. A/10027/Add.1 (1976).

A. GARCÍA ROBLES, The Denuclearization of Latin America (1967).

A. GARCÍA ROBLES, El Tratado de Tlatelolco (1967).

A. GARCÍA ROBLES, Mesures de désarmement dans des zones particulières: Le Traité visant l'interdiction des armes nucléaires en Amérique Latine, RdC, Vol. 133 (1971 II) 43–134.

M.-F. FURET, Le désarmement nucléaire (1973) 147–200.

G. FAHL, Internationales Recht der Rüstungsbeschränkung/International Law of Arms Control, Kommentar/Loose-Leaf Commentary, 3 vols. (1975, with later additions).

J.R. REDICK, The Tlatelolco Regime and Non Proliferation in Latin America, International Organization, Vol. 35 (1981) 103–134.

NORBERT PELZER

NUCLEAR TESTS

1. Technical Background; Definition

Nuclear tests are mainly conducted to confirm the effective functioning of nuclear weapons, for the development of those weapons and for the testing of their effects (→ Nuclear Warfare and Weapons). A relatively small number of tests have been made for non-military objectives (peaceful nuclear explosions (PNEs), the so-called "Plowshare" projects; → Nuclear Energy, Peaceful Use).

The technical effects of nuclear explosions can be described as follows:

(a) Air blast and its effects;

(b) Thermal radiation (light and heat) and its effects;

(c) Electromagnetic pulse (EMP) and its effects (such as lightning);

(d) Initial nuclear radiation and residual radiation (fall-out). These are consequences of a nuclear burst that do not have any counterpart in a conventional explosion. There are a number of factors determining the geographical range and the intensity of fall-out. The most important ones are the design of the device, the place of detonation, and the meteorological conditions.

(e) Radiation injuries. Generally speaking, the larger the radiation dose, the greater the resulting radiation injury to the organism will be. Three categories of human radiation injuries can be identified: acute radiation injuries (radiation sickness or death), increased probability of cancer, and genetic (hereditary) effects.

2. History; Evolution of Legal Rules

From the first nuclear explosion (July 16, 1945, Los Alamos, New Mexico, United States) until the end of 1980 it is estimated that the nuclear powers had performed more than 1200 nuclear tests, and test activities are still considerable today. Testing sites on the territories of the United States, the Soviet Union and China as well as the French test site at Mururoa Island in the Pacific Ocean are currently in use.

The United States exploded its first hydrogen device in November 1952; the Soviet Union followed suit in August 1953. Rising concern about radioactive fall-out and the prospect of even more powerful explosions spurred efforts to halt testing. A number of events gave the dangers of fall-out concrete and human meaning and roused the conscience of the world. As a consequence of the United States' thermonuclear test at Bikini Atoll on March 1, 1954, a Japanese fishing vessel, the *Lucky Dragon*, was accidentally contaminated, and its crew suffered from radiation sickness. The same happened to the inhabitants of an atoll in the area. In a similar accident radioactive rain containing debris from a Soviet hydrogen bomb test fell on Japan.

Besides the problem of radioactive fall-out (→ Environment, International Protection), the main legal questions in connection with nuclear testing have concerned the creation of → warning zones at sea and the freedoms of fishing and navigation on the → high seas (→ Navigation, Freedom of). For some tests, the warning zones have extended over more than 400 000 square miles. Also involved were trust territories (→ United Nations Trusteeship System). In preparation for the test at Bikini Atoll the United States had to evacuate the indigenous population of such territories. Finally, the question of State responsibility had to be dealt with in relation to damage caused by some nuclear tests (→ Responsibility of States: General Principles; → Responsibility of States: Fault and Strict Liability).

Efforts were made in the Eighteen Nations Disarmament Committee (ENDC) of the → United Nations at Geneva, in the subsequent Conference of the Committee on Disarmament,

now called the Committee on Disarmament, and between certain nuclear powers to negotiate (→ Negotiation) an international agreement to end nuclear tests. Comparable efforts were made for the creation of → nuclear-free zones, for instance in Latin America, Africa, the Middle East and South Asia. Dozens of resolutions of the → United Nations General Assembly also addressed these issues.

Japan's claims for → damages in respect of the injuries caused to her citizens were settled when the United States paid two million dollars in *ex gratia* compensation without recognizing any legal obligation to do so (exchange of → notes, January 4, 1955, DeptStateBull, Vol. 22 (1955) p. 90). The UN Trusteeship Council repeatedly raised matters connected with American experiments in trust territories. In no instance was the illegality of the nuclear tests involved recognized. They were on the contrary declared to be necessary for the maintenance of international peace and security. (Trusteeship Council Res. 1082 (XIV) of July 15, 1954 and Res. 1493 (XVII) of March 29, 1956; → Peace, Means to Safeguard).

By letters of May 9, 1973 Australia and New Zealand transmitted to the → International Court of Justice applications instituting proceedings against France in respect of a dispute concerning atmospheric nuclear tests (→ Nuclear Tests Cases (Australia v. France; New Zealand v. France)). In an order of June 22, 1973 the ICJ indicated certain → interim measures of protection in the case. In its judgments of December 20, 1974 the ICJ reasoned that France had bound herself in the interval by a unilateral → declaration to carry out no more atmospheric nuclear tests in the South Pacific and that therefore the claims of Australia and New Zealand no longer had any object. Consequently, the ICJ stated that it was not called upon to render a decision.

3. Current Legal Situation

(a) Treaties

The following bilateral or multilateral international agreements contain special norms concerning nuclear tests:

(i) The Antarctic Treaty (UNTS, Vol. 402, p. 71), signed on December 1, 1959, entered into force on June 23, 1961, and currently in force for 22 States, including France, the United Kingdom, the United States and the Soviet Union. The Treaty prohibits, *inter alia*, any nuclear explosions in the Antarctic.

(ii) The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test-Ban Treaty (PTB), UNTS, Vol. 480, p. 43), signed on August 5, 1963, and entered into force on October 10, 1963, currently in force for 108 States, including the United Kingdom, the United States and the Soviet Union. The parties to the Treaty undertake not to carry out any nuclear weapon test explosion, or any other nuclear explosion, in the atmosphere, under water, in outer space or in any other environment (underground) if the explosion would cause radioactive debris outside the borders of the State conducting the explosion.

(iii) The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (→ Outer Space Treaty; UNTS, Vol. 610, p. 205), signed on January 27, 1967, entered into force on October 10, 1967, and currently in force for 78 States, including France, the Soviet Union, the United Kingdom and the United States. The States party to it undertake, *inter alia*, not to place in orbit around the earth any objects carrying nuclear weapons and to refrain from all military activities, including the testing of any type of weapons, on the moon and other celestial bodies.

(iv) The Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco, UNTS, Vol. 634, p. 281), signed on February 14, 1967, entered into force on April 22, 1968, and currently in force for more than 20 Latin American States. The contracting parties undertake to prohibit and prevent in their respective territories, *inter alia*, the testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons. The Treaty of Tlatelolco is still the only specifically nuclear-free zone treaty for an inhabited area.

(v) The Treaty on the Non-Proliferation of Nuclear Weapons (→ Non-Proliferation Treaty (NPT); UNTS, Vol. 729, p. 161), signed on July 1, 1968, entered into force on March 5, 1970, and currently in force for 114 States, including the Soviet Union, the United Kingdom, and the

United States. Non-nuclear-weapon States parties to the Treaty undertake not to acquire or produce for themselves weapons or other nuclear explosive devices and are thus not allowed to undertake nuclear explosions of any kind.

(vi) The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (Seabed Arms Control Treaty, ILM, Vol. 10 (1971) p. 146; → Sea-bed and Subsoil), signed on February 11, 1971, entered into force on May 18, 1972, and currently in force for 66 States, including the Soviet Union, the United Kingdom and the United States. The States parties to this Treaty undertake not to implant or emplace on the sea-bed and the ocean floor (beyond a zone of twelve miles from land), or in the subsoil thereof, any nuclear weapons or any other type of weapons of mass destruction. This also applies to structures, launching installations or any facilities specifically designed for storing, testing or using these weapons.

(vii) The Treaty between the United States and the Soviet Union on the Limitation of Underground Nuclear Weapons Tests (Threshold Test Ban Treaty, ILM, Vol. 13 (1974) p. 906), signed on July 3, 1974 but not yet in force as of late 1981. This Treaty intends to establish a nuclear "threshold" by prohibiting underground tests having a yield exceeding 150 kilotons (i.e. equivalent to 150 000 tons of TNT).

(viii) The Treaty between the United States and the Soviet Union on Underground Nuclear Explosions for Peaceful Purposes (Peaceful Nuclear Explosions Treaty, ILM, Vol. 15 (1976) p. 891), signed on May 28, 1976, also not yet in force as of late 1981.

(ix) Finally, there are the → peace treaties which the Allied States concluded with Bulgaria, Finland, Hungary, Italy and Romania of February 10, 1947 (→ Peace Treaties of 1947) and the → Austrian State Treaty of May 15, 1955. According to these treaties, Austria, Bulgaria, Finland, Hungary, Italy and Romania may not possess, construct or test nuclear weapons.

(*b*) *Other Sources of International Law*

Besides the specific treaty rules of international law, rules derived from other sources (→ Sources of International Law) as identified in Art. 38 (1) of the Statute of the International Court of Justice also remain applicable to nuclear tests. Worthy of special note are the rules governing any State conduct potentially affecting → neighbour States, the law of the high seas, the law concerning → internationally wrongful acts and State responsibility, together with any pertinent justifications for tests, especially by way of the doctrines of → self-defence and → self-preservation.

4. Comprehensive Test Ban; Special Problems

A major argument put forward in favour of a comprehensive test ban (CTB) is that the partial ban drastically reduced regional and worldwide radioactive fall-out. A CTB could eliminate this danger completely and could also contribute substantially to the goal of ending the nuclear arms race. Additionally, it would constitute an important measure against the proliferation of nuclear weapons.

The main obstacle to a CTB is the problem of → verification and, specifically, of distinguishing test explosions from earthquakes. This question has been studied in the Conference of the Committee on Disarmament by Ad-Hoc Group of Experts to Consider International Co-operative Measures to Detect and Identify Seismic Events, which was created in 1976. The mandate of this group has been continued in the Committee on Disarmament.

United States Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements, Tests and Histories of Negotiations (1980).

Nuclear Tests (Australia v. France; New Zealand v. France) Judgments, ICJ Reports (1974) 253–528; ICJ Pleadings, Nuclear Tests, 2 vols.

Stockholm International Peace Research Institute, Ten Years of the Partial Test Ban Treaty, 1963–1973 (1973).

Background Paper on the Basic Facts within the Framework of the United Nations in Connexion with the Realization of the Purposes of the Tenth Preambular Paragraph of the Treaty on the Non-Proliferation of Nuclear Weapons, prepared and submitted by the Secretariat of the United Nations . . . [to] the Second Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/Conf. II/2 (1980).

General and Complete Disarmament, Comprehensive Study on Nuclear Weapons, Report of the Secretary-General, UN Doc. A/35/392 (1980).

M.-F. FURET, Expérimentation des armes nucléaires et droit international public (1966).
H.J. VON ARX, Atombombenversuche und Völkerrecht (1974).
U. JENISCH, Nuclear Tests and Freedom of Seas, JIR, Vol. 17 (1974) 177–194.
H. FALSAFI, L'affaire des essais nucléaires devant la Cour internationale de Justice, Thesis, University of Neuchâtel (1978).

HERBERT VON ARX

NUCLEAR WARFARE AND WEAPONS

1. Types and Possible Usages

Nuclear weapons are, by explosion or other uncontrolled nuclear transformation of nuclear fuel or by radioactivity of nuclear fuel or radioactive isotopes, capable of mass destruction, mass injury or mass poisoning (pursuant to the definition in Protocol No. III on the Control of Armaments, Paris, October 23, 1954, Annex II, UNTS, Vol. 211, p. 364).

The first nuclear bombs derived their nuclear energy from fission of uranium 235 (fired at Hiroshima on August 6, 1945) or plutonium 239 (fired at Nagasaki on August 9, 1945). In 1952 the first hydrogen bomb was tested, deriving its energy from the fusion of hydrogen isotopes, or lithium, into helium (→ Nuclear Tests). The fusion takes place under a very high temperature, generated by a fission device acting as an igniter; for this reason the hydrogen bomb or "H-bomb" is also called a thermonuclear bomb.

The size of a nuclear weapon is measured by its equivalence to the blast effect of tons of trinitrotoluene (TNT), calculated in kilotons (Kt) and megatons (Mt). Fission bombs have an equivalent of from 0.1 to 100 Kt; standard H-bombs can go up to tens of megatons. High-energy neutrons from an H-bomb can split the atoms of otherwise stable uranium 238; thus fusion weapons coated with uranium 238 have reached a yield of 60 Mt.

After the explosion, the forming fireball emits thermal radiation, causing burns on human skin and starting fires. The specific effect of nuclear explosions is the damage done by nuclear radiation. Initial radiation lasts about 60 seconds after the explosion and contains gamma rays and high speed neutrons. Residual radiation comprises radiation induced locally by neutrons and the fall-out from the nuclear cloud. Local fall-out stems from heavier particles and occurs only in a significant amount if the fireball hits the surface. Residual radioactive material from the nuclear device vaporizes and travels over longer periods of time and over greater distances before coming down to earth.

By changing the design and mode of use of a nuclear weapon, its normal characteristics can be altered: Using a very small fission part as an igniter for a fusion bomb and enlarging the neutron yield by a special kind of coating, one can construct a device with a blast equivalent of 1 Kt TNT and a neutron yield of a 10 Kt bomb, but with a diminished fall-out, especially where an air burst is the mode of detonation chosen. This device is called an "enhanced radiation weapon" (ER weapon) or neutron bomb; it has advantages in that it limits collateral damage to the surrounding area, and, used tactically, it poses great threats to tank crews. Another approach would be to coat a nuclear device with a material that would be turned into radioactive isotopes by the explosion and vaporized. The production of radioactive aerosols would thereby be multiplied. This is the idea behind the cobalt bomb. Such a bomb has not yet been built.

Nuclear warheads of low yield may be fired by artillery from an approximate range of 15 kilometres within an accuracy of 30 metres, or be carried by light rockets. Larger devices can be delivered by bomber aircraft, by cruise missiles, or by land- or sea-launched missiles of medium or intercontinental range. With currently available technology, the accuracy of intercontinental ballistic missiles (ICBMs) may have reached 200 metres circular error probable (CEP). A cruise missile may have a CEP of less than 100 metres.

For the theoretical use of nuclear weapons, three types of targets are discussed. Low-yield weapons with short-range carriers may be used against military targets (→ Military Objectives) within the theatre of war (→ War, Theatre of) or on the battlefield as tactical weapons or for tactical use. Long-range carriers of higher-yielding warheads may be employed as strategic weapons against the launching sites of ICBMs, strategic air bases or other strategic military installations ("counterforce strike"), or, with the goal of de-

stroying the existence of a nation, against the enemy's population centres ("countervalue strike"). Due to the high degree of accuracy of the delivery systems, even small warheads can be employed as strategic weapons or for strategic uses. The same delivery systems can carry warheads to targets on the battlefield just as well. The distinction between tactical and strategic uses is of greater value than that between the types of weapons themselves.

As of 1981, the United States and the Soviet Union between them possessed every variety of warhead and delivery system; while the United States has more warheads, the Soviet Union possesses the greater aggregate explosive power. The United Kingdom, France and the People's Republic of China possess some hundred warheads each. There are probably in existence a total of between 37000 and 50000 warheads with an overall explosive power of 11000 to 20000 Mt.

2. Pertinent Rules of International Law

The legality of the use of nuclear weapons is first of all a question of international law between belligerents (*jus in bello*; → War; → War, Laws of). Even after the general prohibition of the → use of force against another State except in cases of → self-defence, it is generally accepted that the legal rules of humanitarian warfare are applicable regardless of a war's legality (see, for example, the first articles of the Geneva Conventions of 1949; → Geneva Red Cross Conventions and Protocols; → Armed Conflict, Fundamental Rules). The different legal positions of the aggressor and the defender might, however, influence their rights to take → reprisals, as discussed below.

There is no general convention expressly prohibiting the use of nuclear weapons. A → nuclear-free zone was established for Latin America by the Treaty of Tlatelolco (Treaty for the Prohibition of Nuclear Weapons in Latin America of February 14, 1967, UNTS, Vol. 634, p. 281). States parties to the Treaty are under an obligation not to produce or possess nuclear weapons (→ Arms Control). The nuclear powers promised, in Additional Protocol II to that Treaty, to respect "the status of denuclearization of Latin America" and not to use or to threaten to use nuclear weapons against the parties to the Treaty. The Antarctic Treaty of 1959 (→ Antarctica) demilitarizes (→ Demilitarization) this polar region and expressly prohibits any nuclear explosion there.

The other general conventions concern only the stationing of nuclear weapons. The → Outer Space Treaty of 1967 and the Moon Treaty of 1979 forbid the placing in orbit around the earth of any objects carrying nuclear weapons and the use of the moon and other → celestial bodies for military purposes. The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and the Subsoil Thereof (→ Sea-Bed and Subsoil), concluded on February 11, 1971 (ILM, Vol. 10 (1971) p. 145), applies to the regions outside a twelve-mile belt from the coast line.

The possession of nuclear weapons was first forbidden in the → Peace Treaties of 1947, by which Italy, Romania, Hungary, Bulgaria and Finland are obliged not to possess, construct or test such weapons; the same prohibition is to be found in the → Austrian State Treaty of 1955. The Federal Republic of Germany in the Declaration of Paris, given on October 23, 1954 (Annex I to Protocol No. III on the Control of Armaments), undertook not to manufacture nuclear weapons within its territory. Pursuant to Art. 2 of the → Non-Proliferation Treaty of July 1, 1968 (UNTS, Vol. 729, p. 161), all non-nuclear-weapon States, parties to this Treaty, are obliged not to possess or to construct such weapons.

In connection with the Non-Proliferation Treaty, the nuclear powers which are parties to the Treaty each pledged unilaterally not to use nuclear weapons against non-nuclear-weapon States. These declarations have been repeated on several occasions, for instance, at the Tenth Special Session of the → United Nations General Assembly in 1978 and in the proceedings of the Disarmament Commission in 1980 (→ Disarmament). The United States and Great Britain pledged that they would not use nuclear weapons against a party to the Treaty except in the case of an attack on them or on their allies by such States in alliance with a nuclear-weapon State (→ Collective Self-Defence). The Soviet Union gave this pledge to States "which renounce the production and acquisition of such weapons and do not have

them on their territory". France's declaration includes only States in nuclear-free zones. Only the People's Republic of China committed herself" at no time and in no circumstances [to] be the first to use nuclear weapons" (UN Doc. A/35/392, p. 149 and Appendix II).

The efforts of a number of → United Nations member States to promote within the UN framework a treaty prohibiting the use of nuclear weapons have not been successful. In 1961 the General Assembly adopted as Resolution 1653 (XVI) the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons. This Declaration states that the use of nuclear weapons is a direct violation of the → United Nations Charter, of the rules of international law and of the laws of humanity (→ Humanitarian Law and Armed Conflict). The vote was 35 in favour and 20 against, with 26 abstentions. The General Assembly adopted Resolution 2936 (XXVII) of November 29, 1972 concerning Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons with 73 votes in favour, 4 against and 46 abstentions. The declarations could not create new law (→ Sources of International Law), and the voting demonstrates the conflicting views of States on this question.

Already from the viewpoint of methodology, it would be very difficult to establish that a rule of → customary international law prohibiting in general the use of nuclear weapons has developed. The employment of the two atomic bombs in 1945 was justified in the Declaration of United States President Truman, dated August 9, 1945. It pointed to the kind of warfare waged by Japan as having stepped beyond the laws of warfare, and said that the purpose of the weapons' use was to end the war (DeptStateBull., Vol. 13 (1945) p. 212). It seems that the text aims more at moral than at legal justification; it does not clearly indicate a general judgment by the President that the use was not unlawful solely because it was a measure of reprisal. Had the use of the atomic bombs been deemed to be illegal, it would have been because of the violation of rules forbidding aerial → bombardment of the civilian population (→ Civilian Population, Protection), or of other specific rules.

The Japanese official → protest condemned the use of the bombs as an → indiscriminate attack and as "a new crime against mankind and its civilization". However, in 1964, the Japanese Foreign Minister admitted in a statement with reference to the judgment of the Tokyo District Court in the Shimoda Case that "he could not state conclusively as a matter of strict law that the bombing had been in violation of international law, inasmuch as no rule of positive international law would appear to have existed on this point" (Japanese Annual of International Law, Vol. 10 (1966), p. 90).

Since 1945, nuclear weapons have not been used, but there is no proof for the supposition that a general rule of customary international law is responsible for this. General statements, especially in UN debates, might indicate the legal opinion of the States making them, and such statements do express the majority opinion that nuclear weapons are illegal. But the general statements of a number of non-nuclear-weapon States cannot create a rule of international law without the concurring opinion and practice of the nuclear-weapon States. Besides, a number of non-nuclear-weapon States do not share the conviction that these weapons are in general illegal.

Some indications of the positions of States may be drawn from military handbooks on the laws of war or → land warfare. In its survey of "Existing Rules of International Law Concerning the Prohibition or Restriction of Uses of Specific Weapons", UN Doc. A/9215, of November 7, 1973, the UN Secretariat summarizes the contents of a number of field manuals. It finds that the field manuals of Austria, the Federal Republic of Germany, the Netherlands, Switzerland, the United Kingdom and the United States all state that the use of nuclear weapons is not prohibited by customary international law, but it is also frequently stipulated in these manuals that the use of such weapons is subject to the general international law on the use of weapons.

As has been pointed out, most notably by Menzel, the question of the legality of employing nuclear weapons is controversial, but the majority of commentators declare their use to be contrary to international law. The reasons given, however, differ, and only a few writers postulate a general rule forbidding the use of such weapons. The common approach is to judge the legality of these

weapons' employment by applying the various specific legal rules on warfare; when the result shows that the specific rule forbids the use of nuclear weapons and the author cannot conceive of a kind of nuclear weapon or a use of one which would not be outlawed by that rule, the employment of nuclear weapons in general is then deemed to be illegal. In general, these opinions were stated in the 1950s and 1960s, so that the development of the weapons and their means of delivery may have changed the facts upon which these opinions were based.

Granting that there is no treaty provision or general rule of customary international law expressly and specifically prohibiting the use of nuclear weapons, it must still be determined whether the different kinds of weapons and their theoretical uses would violate the rules of warfare.

3. Special Rules of Warfare

The use of nuclear weapons could be viewed as being in conflict with the special rules of warfare which were developed or formulated in legal instruments during the 19th century or in the first decades of this century. It is, however, questioned whether modern warfare – total and scientific – may still be judged according to principles deduced or developed by analogy from these rules, which were drawn up to regulate a vastly different kind of warfare (see McDougal/Feliciano, Law and Minimum World Public Order (1961), p. 667; H. Lauterpacht in BYIL, Vol. 29 (1952), p. 370).

But there are good reasons for applying the traditional rules of warfare to the use of nuclear weapons. Some rules are so general that they are not bound to special weapons or technologies. The Hague Regulations respecting the Laws and Customs of War on Land annexed to Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907) state expressly in Art. 22 that: "The right of belligerents to adopt means of injuring the enemy is not unlimited." Other texts contain a clause for analogous application. The general conviction of States on the continuing applicability of these rules may have been expressed in Art. 36 of the 1977 Protocol I additional to the Geneva Conventions of 1949. It provides that States have to determine whether the employment of a newly-developed weapon would, in some or all circumstances, be prohibited by rules of international law applicable to that State (→ Weapons, Prohibited; → Warfare, Methods and Means).

Accordingly, it is alleged by many writers that the use of nuclear weapons contradicts the prohibition of the use of poison or of poisonous gas in war (→ Chemical Warfare). "To employ poison or poisoned weapons" is forbidden by Art. 23(a) of the Hague Regulations, and this prohibition was a rule of customary international law long before then. The use of gas may have fallen within that rule, but it was also expressly outlawed in the second Declaration of the Hague Peace Conference of 1899 concerning the prohibition of "the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases". The text now in force is the 1925 Geneva Protocol Prohibiting the Use in War of Asphyxiating, Poisonous and other Gases. Since 1975, when the United States adhered to this protocol, it has been in force for all of today's nuclear-weapon States.

It is questionable whether the effect of a nuclear explosion can be deemed to be an employment of poison. The use of poison and poisonous gas is categorized generally under chemical warfare; poison may be defined as a substance that causes chemical reactions resulting in death or severe disability when, even in small quantities, it is ingested or inhaled, or touches the skin. The exact definition is nevertheless not decisive because the prohibition of the use of gas goes further. The Geneva Protocol of 1925 states that "the use of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned...." This description does not include as such the radiation of gamma rays and that caused by neutrons in the first period of initial radiation, because this kind of radiation would be more analogous to thermal radiation, which does not involve introducing a damaging substance into the human body.

However, the radioactive aerosols of the fallout could be called "analogous materials" to gas, thus making the prohibition applicable to this effect of a nuclear weapon (→ War and Environment). In consequence, either the use of all specific designs of nuclear warheads producing

enhanced radioactive fall-out (such as the potential cobalt bomb) or the employment of nuclear weapons which produce local fall-out (e.g. by surface explosions) is forbidden by this rule of international law. An air burst of a nuclear device normally produces practically no local fall-out, and the residual or global fall-out cannot be considered to be analogous to gas warfare. Since the prohibition covers only the employment of weapons where the effect of the damaging gas is one of the main results and not simply a side effect of the weapon, air bursts of nuclear warheads, at least of a lower yield, are not banned by this rule. Surface explosions are in principle outlawed by this rule, but an exception might exist for counter-force employment against military objectives (e.g. hardened silos) in a very sparsely populated area, where the collateral damage caused by the local fall-out would only be a side effect of the use.

The definition of nuclear weapons in Protocol No. III of 1954 (see section I *supra*) gives no support for broadening the interpretation of "poison". That definition includes means of mass destruction which destroy by distribution of radioactive isotopes even without the power of a nuclear explosion. This type is referred to as resulting in mass poisoning, and the production of local fall-out is encompassed by this expression, too. Yet it cannot be concluded from that definition that all nuclear weapons and all means of their employment constitute poisoning in the sense of the prohibition of poison or poisonous gas.

Some writers maintain that the use of nuclear weapons violates the rule expressed in Art. 23(e) of the Hague Regulations, which forbids belligerents "to employ arms, projectiles, or material calculated to cause unnecessary suffering". According to the general literature on the law of land warfare, the main criterion is "unnecessary". Suffering is unnecessary in the sense of this rule when it is not justifiable by → military necessity, or when the suffering is disproportionate in view of the military gain derived from the employment of the weapons (→ Proportionality). Effective arms are often cruel, and the killing of the enemy's military personnel is not considered as falling under this prohibition. Also, weapons which do not always cause immediate death are not generally outlawed, and one might consider that in these cases there might be a possibility for the victim to recover. Judging from the somatic effects of a nuclear weapon used against the enemy's military personnel, the only employment outlawed by this rule is that which causes illness after a considerable amount of time, but does not disable a combatant from fighting or fulfilling a military task. But it is not conceivable that nuclear weapons will be employed in a way calculated to have this restricted effect.

A further argument to outlaw nuclear weapons under Art. 23(e) of the Hague Regulations is that they cause genetic defects which might appear over some generations. Radiation-induced changes in gonad cells might cause lower fertility, spontaneous abortion and still-births, thus adding to the casualties; they might cause birth defects or non-specific constitutional weaknesses as well. Up to now there are no observations available about genetic damages as a basis for calculations regarding damage to man over generations. Due to a number of factors, the order of magnitude of genetic damage is much below that of casualties and disabilities that would be caused by other effects of a nuclear explosion. If a nuclear weapon is employed to gain a military advantage, the side-effect of genetic damage – which is not the damage that the weapon is calculated to cause – is not disproportionate. Terrible as the sufferings and the consequences flowing from the genetic damage might be, it does not seem to be possible to outlaw the use of nuclear weapons under the rule forbidding unnecessary suffering.

The main reason for the illegality of nuclear weapons, given by a great many writers, is that their employment would violate the rules of warfare which forbid indiscriminate attacks and demand the protection of civilians. It is the basic rule of warfare that the parties to an armed conflict shall at all times distinguish between the civilian population and → combatants, and between → civilian objects and military objectives. The civilian population and civilian objects shall not be the object of attack; indiscriminate attacks are forbidden. These rules were not adhered to during the aerial bombings of World War II and in some armed conflicts since that war. Nevertheless, they are still accepted as customary international law, partly embodied in the Hague

Regulations and other instruments, and clearly stated in military handbooks (e.g. the United States Air Force Pamphlet AFP 110-31 of 1976). These general rules are also restated in Additional Protocol I of 1977; as far as these principles are concerned, the interpretation in the declarations of some States that the Protocol does not outlaw nuclear weapons as such is not important (→ Treaties, Reservations).

According to these rules of law, "counter-value" strikes against the enemy's cities are strictly forbidden. A general attack with nuclear weapons to annihilate the enemy's population is outlawed in any event as → genocide. Likewise, the use of inaccurate means of delivery for an attack against military objectives is forbidden when it is probable that a portion of the warheads will explode so as to do damage primarily to civilians. If an attack against military objectives causes damage to civilians and civilian objects collaterally, which is usually the case with heavier weapons employed in a war, the relation between the military advantage and the collateral damage is decisive; if the collateral damage is excessive in relation to the concrete and direct military advantage anticipated, the attack is forbidden. This rule forbids in most cases the use of high-yield nuclear warheads, because their radius of destruction is so wide that they would cause excessive damage to the civilian population even if there were several military objectives within their radius. Under this view of indiscriminate attack, mass destruction ground bursts of nuclear weapons producing huge amounts of early fall-out are also outlawed.

The restricted use of low-yield weapons in air bursts to attack military objectives (tactical use) does not seem to be covered by the prohibition. There might also be an exception for accurate strategic weapons of moderate yield employed against highly defined military objectives such as missile silos even in a ground burst, if the early fall-out were not to produce excessive collateral damage to civilians.

4. Deterrence, Reprisals and Nuclear War

A State attacked by an illegal use of nuclear weapons may resort lawfully to a retaliatory nuclear strike, normally illegal, under the conditions of and justifiable as → reprisals. All other kinds of reprisals would necessarily be less effective than the illegal nuclear attack, and therefore international law cannot deny this response to the victim. The threat of a retaliatory nuclear counter-attack can be regarded as the only effective deterrent against a nuclear strike directed at population centres (the counter-city strike); thus, the civilian population of a nuclear power serves as a kind of hostage to guarantee that this State will not launch an illegal nuclear attack against the civilian population of another State. The understanding that the new rules of Additional Protocol I of 1977 do not apply to the use of nuclear weapons allows an exception from the prohibition against attacking the civilian population by way of reprisals (Art. 51, para. 6), but the retaliatory response to a counter-city strike is the only such case.

Generally, it is maintained that → aggression as a breach of the peace does not justify a breach of the rules of the laws of war by way of reprisals. Therefore, neither the right to take reprisals nor the right of self-defence generally justify the use of nuclear weapons by the defender, if this use is illegal pursuant to the laws of war. But faced with the immediate danger of being completely destroyed by an illegal attack with conventional weapons, the defending State might be granted the right to employ nuclear weapons to damage the forces of the aggressor State as reprisal and in the exercise of self-defence, even if this use would normally infringe the laws of war (→ Self-Preservation).

The first employment of a nuclear weapon, even where this specific use is not forbidden by the laws of war, will most likely lead to a response in kind by the opponent State. This will in turn be answered once more by nuclear weapons. The pre-employment assessment of the effects of nuclear weapons cannot be limited to the single nuclear weapon to be used, but must take into account the use of the other weapons to be employed in this connection by the same State. And for a later use, the previous burden of radioactivity to a region must be considered. This assessment might lead to narrower legal limits for the employment of nuclear weapons, in so far as they are not in any case outlawed. When nuclear weapons are used as reprisals, the other State will most likely launch a retaliatory nuclear strike. It is

hard to imagine that the use of nuclear weapons would not lead to a general nuclear war.

Nuclear weapons are deployed not for the purpose of being employed, but rather to deter the opponent from nuclear war. Or, with the threat to use them in case of an existential danger from a conventional attack, they are used to deter the adversary from committing a serious act of aggression. Since their use against military objectives with a proportionate or lesser collateral damage to civilians and their employment as reprisals are not forbidden, international law does not diminish the convincing force of their deterrent function.

As some writers maintain, it is questionable whether the nuclear powers would make their decisions based on legal considerations in case of a nuclear war (→ War, Laws of, Enforcement; → Foreign Policy, Influence of Legal Considerations upon). But it can be hoped that, should deterrence fail, counter-city strikes will not occur, and that in case of any employment of nuclear weapons, States will try to limit collateral damage to the lowest level acceptable from the military point of view, at least in part due to legal reasons.

Report of the Secretary-General on the Effects of the Possible Use of Nuclear Weapons, UN Doc. A/6858 (1967).

Existing Rules of International Law concerning the Prohibition or Restriction of Use of Specific Weapons, Survey prepared by the Secretariat, UN Doc. A/9215, Vol. 1 (1973).

Comprehensive Study on Nuclear Weapons, Report of the Secretary-General, UN Doc. A/35/392 (1980).

A Comprehensive Study of the Origin, Development and Present Status of the Various Alternatives Proposed for the Prohibition of the Use of Nuclear Weapons, UN Doc. A/AC.206/5 (1981).

J.M. SPAIGHT, Air Power and War Rights (3rd ed. 1947).

E. SPETZLER, Luftkrieg und Menschlichkeit, Die völkerrechtliche Stellung der Zivilpersonen im Luftkrieg (1956).

G. SCHWARZENBERGER, The Legality of Nuclear Weapons (1958).

N. SINGH, Nuclear Weapons and International Law (1959).

A. EULER, Die Atomwaffe im Luftkriegsrecht (1960).

I. BROWNLIE, Some Legal Aspects of the Use of Nuclear Weapons, ICLQ, Vol. 14 (1965) 437–451.

R.A. FALK, The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki, AJIL, Vol. 59 (1965) 759–793.

E. STEIN, Impact of New Weapons Technology on International Law, Selected Aspects, RdC, Vol. 133 (1971 III) 222–387.

C.F. VON WEIZSÄCKER (ed.), Kriegsfolgen und Kriegsverhütung (1971).

S. GLASSTONE and P.J. DOLAN, The Effects of Nuclear Weapons (3rd ed. 1977).

W.G. LEE, The United States Nuclear First Strike Position, A Legal Appraisal of its Ramifications, California Western International Law Journal, Vol. 7 (1977) 508–525.

E. MENZEL, Atomwaffen und völkerrechtliches Kriegsrecht, in: Abschreckung und Entspannung, Fünfundzwanzig Jahre Sicherheitspolitik zwischen bipolarer Konfrontation und begrenzter Kooperation (1977) 148–229.

H. MEYROWITZ, La stratégie nucléaire et le Protocole additionnel I aux Conventions de Genève de 1949, RGDIP, Vol. 83 (1979) 905–961.

R. FALK, I. MEYROWITZ and J. SANDERSON, Nuclear Weapons and International Law, Indian JIL, Vol. 20 (1980) 541–594.

O. KIMMINICH, Der Einfluß des humanitären Völkerrechts auf die Kriegswaffenfrage, in: Staatsrecht, Völkerrecht, Europarecht, Festschrift für Hans-Jürgen Schlochauer (1981) 407–423.

DIETRICH RAUSCHNING

NUREMBERG TRIALS

1. Introduction

Following World War II, war crimes trials (→ War Crimes) were held in the city of Nuremberg. The first and main trial opened on November 20, 1945 against former Reichsmarschall Hermann Göring and other ranking members of the German Government and military command. The International Military Tribunal rendered its Judgment on September 30, 1946. Twelve subsequent proceedings before American military courts (→ Germany, Occupation after World War II; → Military Government) were also held in Nuremberg from 1947 to 1949. In addition, trials have also been held before courts of the vanquished States as well as before courts of the occupation powers (for details see the Law Reports of the United Nations War Crimes Commission).

Twenty-two individuals (Martin Bormann *in absentia*) and six organizations were tried in the main proceeding. One hundred and seventy-seven persons stood trial subsequently. The prosecution of ten other accused was discontinued due to death or precarious state of health. The Nurem-

berg Courts sentenced 36 persons to death in the 13 trials. Thirty-eight accused were found innocent. Twenty-three were sentenced to life imprisonment. The lesser sentences of imprisonment ranged from a year and one half to twenty-five years. Some of the death sentences were only executed years later.

Of those condemned in the main trial, only one person (Rudolf Hess) remains (1982) incarcerated in Spandau Prison, the last of the Four-Power installations stemming from the era of the Control Council for Germany. All the other convicts either completed their sentences, were pardoned, or were released on probation. On May 8, 1958, the last four persons in Landsberg Prison were released. The Government of the Federal Republic of Germany consistently opposed recurrent demands of the public and of political parties to seek a general amnesty. Instead, mixed pardon commissions were formed, whose suggestions to the Allied High Commissioners effected the pardon or conditional release of numerous prisoners.

2. Prologue to the Nuremberg Trials

The prologue to the Nuremberg Trials began directly after World War I. The victorious Allies demanded from the Netherlands the → extradition of the German Kaiser, who had established his residence there, and from Germany the extradition of some 900 other persons for trial on charges of war crimes. The Netherlands refused to extradite Wilhelm II; Germany delayed extradition, and ultimately the Allies agreed to trials before the German Reichsgericht in Leipzig of twelve officers and soldiers accused of war crimes. Although most of the accused were convicted, their sentences were relatively mild, so that much criticism ensued in the Allied countries. In the light of this unsatisfactory experience, representatives of nine → governments-in-exile established in London during World War II stated in their Declaration of St. James' of January 13, 1942 that the punishment of war crimes was "one of their principal war aims". In October 1943, 17 of the countries fighting against Germany formed the United Nations War Crimes Commission. In the Moscow Three Power Declaration of German Atrocities of October 30, 1943 the United States, Great Britain and the Soviet Union announced in the name of all 35 Allied nations that war criminals would be judged by those States within whose boundaries they had committed the acts, and the remaining "major criminals, whose offences have no particular geographical localisation", would be condemned by "the joint decision of the Governments of the Allies".

The initiative in the creation of such a common tribunal came from the United States. On May 2, 1945, President Truman named Justice Robert H. Jackson of the United States Supreme Court as Chief Prosecutor for the American contingent and plenipotentiary for → negotiations with the other principal Allies. In his Report to the President of June 6, 1945 (DeptStateBull, Vol. 12 (1945) p. 1071), Jackson presented a plan for the chief Nuremberg proceedings and developed the outlines of the principal charges and legal problems. Jackson formulated the Four Power London Agreement of August 8, 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis (AJIL, Vol. 39 (1945) Supp. p. 257), chose Nuremberg as the site for the first trial, and made the administrative preparations as Chief of the International Prosecuting Authority. Nineteen governments later ratified the London Agreement; among the military opponents of the German Reich, Canada and South Africa were noticeable by their absence. The International Military Tribunal was composed of four judges, one from each of the four major Allied Powers. The British member, Lord Justice Sir Geoffrey Lawrence (later Lord Oaksey), was chosen as Chief Judge. The remaining members of the Court were: Attorney-General Francis Biddle for the United States, Professor Donnedieu de Vabres of the University of Paris for France, and General J.T. Nikitchenko, Vice-President of the Soviet Supreme Court, for the Soviet Union. The Tribunal conceived itself to be a duly constituted international court (→ International Courts and Tribunals); in reality it was an inter-Allied occupation court, since Germany had not agreed to the creation of such an international entity. The trial before the International Military Tribunal was the sole European case tried before an inter-Allied tribunal. Its counterpart in the Far East was the 1946 → Tokyo Trial of the World War II Japanese leadership before a military tribunal in which eleven nations were represented.

3. Proceedings Before the International Military Tribunal

The London Agreement included the Charter of the Tribunal, which contained major substantive and procedural law components (→ Procedure of International Courts and Tribunals). It covered the elements of the offences as well as the punishments therefor; certain legal problems of a basic nature were touched upon, and indications concerning the applicable procedural rules were supplied.

As to → crimes against peace, Art. 6(a) of the Charter mentioned a "common plan or conspiracy". The United States had placed special emphasis on the inclusion of criminal liability for "conspiracy" in the Charter; the indictment alleged a conspiracy to commit crimes against peace, war crimes, and → crimes against humanity on the part of all leaders of the Third Reich. The Tribunal's Judgment played down this charge; it restricted criminal liability to the conspiracy to wage a war of → aggression based on the Charter's literal terms and required clear visibility of the criminal goal and a close temporal connection between the plan and its execution. This point played no role whatsoever in the subsequent trials.

One of the dominant legal aspects of the Nuremberg Trials is the individual criminal responsibility for actually waging wars of aggression, which was made punishable in Art. 6(a) of the Charter as a crime against peace (→ Responsibility of Individuals in International Law). The Judgment spoke of twelve wars of aggression by the German Reich, which – astonishingly – were not further specified. In context, the wars against Poland, France, Great Britain, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the Soviet Union, and the United States were meant. Although at that time no definition for the international law concept of aggression existed, it must be conceded that, in almost all of the above cases, they were wars of aggression under any thinkable concept. Doubt exists only in the cases of Norway and the United States: in Norway because its imminent occupation (→ Occupation, Belligerent; → Occupation, Pacific) was contemplated by Great Britain as a base for launching attacks against Germany from the northern flank, and the German invasion was conceived only to avoid this most dangerous situation; and in the case of the United States, since this country had taken, in breach of her obligations of neutrality (→ Neutrality, Concept and General Rules), effective steps to aid Great Britain militarily far in advance of the German declaration of war. The war against Great Britain and France, however, was clearly one of aggression, notwithstanding the fact that these countries declared war on Germany first; it was evident beforehand that an attack on Poland was a simultaneous attack on her Western allies (→ Alliance). The disputed point was whether a war of aggression was punishable as a crime under the existing state of international law in 1939. The answer to this question was conclusive for the evaluation of the defence's thesis that the criminalization of aggressive war would create an *ex post facto* law in violation of democratic constitutional principles. The Judgment of the Court affirmed individual liability for the crime against peace on the basis of the Charter – which was characterized as "decisive and binding upon the Tribunal" – and also, in supporting dicta, on the basis of already existent international law. The latter ground for the decision is very questionable, since this legal norm existed neither in written nor in unwritten international law prior to 1945. Another disputed legal question involved the scope of individual responsibility for the conduct of a war of aggression. Fleet Admiral Dönitz was unexpectedly convicted on this point, although he had been promoted to Naval Commander-in-Chief only in January 1943; the Tribunal supported this decision with the reasoning that "Dönitz was consulted almost continuously by Hitler".

Art. 6(b) of the Charter defined war crimes as including murder, ill-treatment, or deportation of civilians to → forced labour or for any other purpose (→ Civilian Population, Protection), wanton destruction of cities, towns or villages, and devastation not justified by → military necessity (→ Indiscriminate Attack). It is well established that international law allows the enemy to punish war criminals, even after the cessation of hostilities, and the Charter only repeated here what is generally accepted international law. The degree of punishment meted

out by the Tribunal certainly exceeded traditional practice, but cannot be criticized in such cases where it was directed against especially odious practices.

The concept of "crimes against humanity", found in Charter Art. 6(c), was advanced for the first time in the Nuremberg Trials and created a number of academic disputes. The Charter gave as examples: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population (i.e., that of the accused's own nation as well), before or during the war, and persecution on political, racial or religious grounds, whether or not in violation of the domestic law of the country where perpetrated. The intent of this criminal provision was to penalize systematic acts of violence committed also in peace-time against the citizens or permanent residents of Axis countries as well as those against allied populations, specifically the persecution of Jews (→ Genocide). The Tribunal judged only those crimes committed after the war had already begun, but here too made an important contribution to the concept of responsibility for violations of international law, since it included certain crimes committed by Germans against other Germans or against the populations of Axis countries (e.g. Hungarian Jews). The problem of retroactive application was at most a formal one, since the named crimes were punishable, although under other names, at all times under the legislation of all the countries involved.

In Arts. 9 and 10 the Charter further provided that certain groups or organizations could be declared to be criminal, thereby paving the way for the subsequent conviction of their members on grounds of individual liability for the collective criminality of organizations.

Among the general legal problems touched on by the Charter, the most important was the individual's criminal liability for violations of international law. The Judgment characterized as the "very essence of the Charter" that "individuals have international duties" (→ Individuals in International Law), and so henceforth the punishment of individual persons would coexist as a new → sanction next to the classic international law sanction of the → responsibility of States for their → internationally wrongful acts. The Tribunal also affirmed the supremacy of international over national law (→ International Law and Municipal Law); the international duties involved here were so important that they "transcend the national obligations of obedience". The theory of sovereign acts (→ Acts of State) had been expressly rejected in Art. 7 of the Charter; the Judgment adopted this legal viewpoint in its reasoning that no one could "obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law". Committing acts under orders was only recognized in Art. 8 of the Charter as a mitigating circumstance to be considered in sentencing, while the Judgment, not in strict harmony with the subtleties of criminal law doctrine, placed the question of duress in the foreground and then asked "whether moral choice was in fact possible".

Arts. 12 to 25 of the Charter contained procedural provisions which were, in accordance with Art. 13, augmented by the Tribunal's Rules of Procedure of October 29, 1945. The judges attempted at all stages of the trial to do justice and to judge fairly and evenly. It must, on the other hand, be said that the prosecution violated these principles on occasion, for instance by attempting to place the burden of responsibility for the Katyn murders on the defendants. The accused and their German defence attorneys were operating at a disadvantage due to the prosecution's command of a great bulk of factual material (including captured German documents), obtained because the prosecution had access to archives around the world, as well as all official means to secure the testimony of witnesses. The prosecution was also able to work with the advantage of having had a considerably earlier start. Also disadvantageous to the defence was the adoption of the specifically Anglo-American procedural system whereby the prosecution is an adversary in the trial and accordingly only argues the case for proving those matters alleged in the indictment. The cross-examination of witnesses and the statements of the accused as witnesses (with the corresponding duties) were novelties to the German defence. The proceedings were not, however, governed solely by Anglo-American law, since the procedure also contained continental-European elements: specifically, the principles

of the admissibility of all relevant evidence and of the unfettered, subjective weighing of the evidence (*freie Beweiswürdigung*).

4. Subsequent Trials

Allied Control Council Law No. 10 of December 20, 1945 (Official Gazette of the Control Council for Germany, No. 3 of January 31, 1946, p. 50) created the legal basis for the subsequent war crimes trials conducted by the Occupying Powers in Germany. It was based on the Charter of the International Military Tribunal, with two noteworthy departures: "invasions of other countries" were included in crimes against peace to enable punishment for the → annexations of Austria and Czechoslovakia, and crimes against humanity were so formulated that they extended to the period preceding 1939. Control Council Law No. 10 empowered the commanders of the four occupied zones to create courts for the trial of those who had committed acts punishable thereunder and to specify procedural rules for trial. The American Military Government issued Ordinance No. 7 of October 18, 1946 (Military Government Gazette, Germany, United States Zone, Issue B, p. 10) for that purpose. The American Brigadier-General Telford Taylor was appointed Chief Prosecutor. Six military courts were created, each with a panel of three judges. The judges were predominantly from intermediate courts or courts of last resort of American states and were civilians. The courts which tried the subsequent cases were even less supranational bodies than the International Military Tribunal, being instead purely American occupation courts.

(a) Doctors' Trial (Trial of Karl Brandt and 22 others). Case I chiefly involved human experimentation on concentration camp inmates and → prisoners of war, and the killing of the mentally ill in German hospitals and nursing homes at the outset of and during World War II (known as the euthanasia programme). The Court postulated ten basic rules for scientific experimentation on human beings, comparing the behaviour of the accused physicians with these measures. The whole problem is still unsettled and remains an area of medico-legal controversy. The defence's attempt to secure review of the judgment by the United States Supreme Court was rejected due to lack of jurisdiction.

(b) Justice Trial (Trial of Josef Alstötter and others). Case III involved isolated instances of perversion of the law, the unlawful persecution of Jews and political opponents, and the drafting of unlawful statutes and regulations such as the *Nacht-und-Nebel-Erlaß* (a decree which allowed the secret arrest of opponents in occupied countries), extensive use of which was made against the French → resistance movement. The judgment's most significant legal point is the rejection of the defence of conflicting duties.

(c) Nazi Race Policy Trials: three trials of SS functionaries and policemen. The leading functionaries of the SS Central Office for Economic and Administrative Matters (*Wirtschafts- und Verwaltungshauptamt der SS*) were tried in the Pohl Trial (Case IV) for their responsibility in the killing, enslavement, and cruel treatment of the inmates of concentration camps, which were administered by that Office. The RuSHA Trial (Trial of Ulrich Greifelt and others, Case VIII) was directed against the chief figures of the SS Central Office for Racial and Settlement Matters (*Rasse- und Siedlungshauptamt der SS*) and other organizations which attempted to realize the thorough implementation of the racial policies of National Socialism, particularly in occupied countries. The most horrifying evidence of atrocities of all the Nuremberg Trials was laid bare in the *Einsatzgruppen* Trial (Trial of Otto Ohlendorf and others, Case IX) against the leaders and members of the so-called Execution Squad. These military units of the Reich Central Office for Security (*Reichssicherheitshauptamt*) were deployed to exterminate Jews and political opponents in the occupied areas behind and on the Eastern Front. Approximately one million human beings were killed by these squads under terrible circumstances.

(d) Economic Trials: three trials against the leaders of German industry. The Flick Trial (Case V) dealt with the employment of impressed foreign workers in the German war industries; of legal significance here was the recognition, for the first time, of necessity as a valid defence in face of the State's terror. Here too, the United States Supreme Court rejected a petition for review due to lack of jurisdiction. The Krupp Trial (Case X) was directed against the proprietor and leading managers of the Krupp Company. Of special noteworthiness in determining the range of per-

sons responsible for the commission of crimes against peace is the fact that all accused were acquitted of this particular charge. Convictions for war crimes followed on grounds of the economic consolidation of power in occupied areas, the employment of forced labour, and the utilization of prisoners of war in the armaments industry. The *IG-Farben* Trial (Trial of Carl Krauch and others, Case VI) of 26 leaders in the management of the firm also ended in acquittals with respect to crimes against peace and guilty verdicts against some of the accused on counts of having employed concentration camp inmates and having economically exploited the occupied countries.

(e) Military Trials: two trials against members of the military leadership. The Hostages Trial (Trial of Wilhelm List and others, Case VII) focused primarily on the taking of → hostages and the killing of civilians by way of → reprisals for attacks on German troops by partisans in Yugoslavia and Greece (cf. → Guerrilla Forces). The judgment held both to be permissible as "extreme means" under certain strictly limited circumstances. Partisan irregular troops who did not fulfil the conditions of Art. 1 of the Hague Regulations respecting the Laws and Customs of War on Land (→ Hague Peace Conferences of 1899 and 1907) were not recognized by the Court as → combatants and therefore could not claim treatment as prisoners of war. It was accepted in the judgment that the large-scale destruction carried out by retreating German troops in northern Finland and Norway was justified by reason of → military necessity. The trial of the Wehrmacht High Command (Trial of Wilhelm von Leeb and others, Case XII) produced another noteworthy limitation on the range of possible guilty parties for crimes against peace. Although the accused as a group included military leaders who had occupied leading positions before the war, they were all – in contrast to the conviction of Admiral Dönitz in the main proceeding – acquitted of this charge because they did not "find themselves in a position to shape or influence... policy". The convictions for war crimes were primarily based on the execution of the "Commissar" order ("no quarter for this group") and the "Commando" order ("no quarter for groups fighting behind the front-line").

(f) Government Trials. The responsibility of the political leadership was examined in two trials. Luftwaffe Field-Marshal Milch (Case II), the sole accused to be tried without co-defendants at Nuremberg, was convicted for support of the forced labour programme in his capacity as a member of the Central Planning Board. The sentence of life imprisonment appears relatively se ere in comparison to subsequent Nuremberg sentences. This is perhaps explainable in the light of the fact that this was the first case to reach judgment before this court, and the court therefore lacked a realistic measure for assessing the relationship between guilt and punishment. The last and the largest of these trials was that of certain high foreign service officers, ministers and other governmental servants; for that reason, it is referred to as the Ministries Trial, or the *Wilhelmstraße* Trial (Trial of Ernst von Weizsäcker and others, Case XI). Three leading Foreign Office officials, a Reichsminister, and a Secretary of State were convicted of crimes against peace. The convictions of the Foreign Secretaries von Weizsäcker and Wörmann were, however, quashed some months later upon a written rectifying motion of the Court. The annexations of Austria and Czechoslovakia were held to be crimes against peace – in contrast to the Judgment of the International Military Tribunal – since "invasions" were involved.

5. Evaluation

The Nuremberg Judgments are the most important component of the nascent → international criminal law. Although the courts were not supranational bodies, but rather only occupation courts, their judgments are important contributions to the interpretation of the applicable international law. As judgments concerning defeated enemies, they have remained an isolated phenomenon to this date.

The → United Nations' attempts to incorporate the norms of the London Charter and the Nuremberg Judgment regarding criminal responsibility for crimes against peace, war crimes, and crimes against humanity *en bloc* in positive, binding international law have not yet been successful. A → United Nations General Assembly resolution of December 11, 1946 (UN GA Res. 95 (I)) affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal", but the effect of this is mere approval of the course of

action taken by the Allied Powers against the former German leadership as the just and appropriate (under the circumstances) application of criminal law by the victors against the vanquished. It expressed a desire that this law would be applied generally in the future. Yet the criminal law of the Nuremberg Charter was not made generally binding.

A second resolution of November 21, 1947 (UN GA Res. 177(II)) did not even contain a renewed affirmation of Nuremberg's legal principles; instead it only charged the newly-created → International Law Commission with their formulation and with the elaboration of a draft Code of Offences against the Peace and Security of Mankind (→ Codification of International Law). This body presented in 1950 a formulation of the Nuremberg law in the form of seven principles (YILC (1950 II) p. 374). In 1954 the draft of the Code of Offences against the Peace and Security of Mankind was published in the Commission's final form (YILC (1954 II) p. 149). None of these texts, however, was ever definitively adopted by the General Assembly or any individual State. On the contrary, the General Assembly in 1957 tabled the entire matter pending the resumption of work on a definition of aggression. Following the passage of Resolution 3314 (XXIX) by the General Assembly on December 14, 1974 (adopting a definition of aggression; see → Aggression), the Sixth Committee of the UN General Assembly resumed work on the Draft Code of Offences against the Peace and Security of Mankind in December 1978. The member States were first requested to comment on the draft, which very few have done to this date. This is easily understandable, however, since the definition of aggression was only a guideline for the → United Nations Security Council and contained very little substance on criminal law. A comprehensive code on the basis of the London Charter and the Nuremberg Judgment has not yet been achieved and appears unlikely in light of the present state of world affairs.

If a situation similar to that following World War II arises and war crimes trials are conducted again, authority would undoubtedly be sought primarily in the Nuremberg Judgments. The Nuremberg courts decided of necessity many questions of law which are still debated; for that reason, their judgment roused ample criticism from all sides. It would, nevertheless, be unjust and beside the point to dismiss them as an expression of political bias or revenge. It is a milestone in the development of international law that such grave crimes as occurred in World War II were punished in 13 court judgments following trials in which the accused enjoyed the full right to a defence. Even though many crimes committed on the Allied side remained unatoned for and in some cases unjust sentences were pronounced as a result of human shortcomings, the example of Nuremberg is a landmark in the law when viewed as a whole. One only regrets that it has not been followed. The trials are slowly fading from memory and are thus losing their imperative force as precedents.

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November–1 October 1946, 42 vols. (1947).

Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 15 vols. (1946–1951).

United Nations War Crimes Commission, Law Reports of Trials of War Criminals, 15 vols. (1947–1949).

History of the United Nations War Crimes Commission (1948).

The Charter and Judgment of the Nuremberg Tribunal, History and Analyses, Memorandum by the Secretary-General to the United Nations General Assembly, UN Doc. A/CN. 4/5 (1949).

United States Department of State, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (1949).

United States National Archives and Record Service, Records of the United States Nuremberg War Crimes Trials (1973–1979).

S. GLUECK, War Criminals, their Prosecution and Punishment (1944).

H. LAUTERPACHT, The Law of Nations and Punishment of War Crimes, BYIL, Vol. 21 (1944) 58–96.

F. BIDDLE, The Nuremberg Trial, Virginia Law Review, Vol. 33 (1947) 679–696.

J. DESCHEEMAEKER, Le Tribunal militaire international des grands criminels de guerre (1947).

H. DONNEDIEU DE VABRES, Le procès de Nuremberg devant les principes modernes du droit pénal international, RdC, Vol. 70 (1947 I) 477–582.

G.A. FINCH, The Nuremberg Trial and International Law, AJIL, Vol. 41 (1947) 20–37.

W. GREWE and O. KÜSTER, Nürnberg als Rechtsfrage (1947).

R.H. JACKSON, The Nürnberg Case (1947).

H. KELSEN, Will the Judgment in the Nuremberg Trials

Constitute a Precedent in International Law?, International Law Quarterly, Vol. 1 (1947) 153–171.
LORD OAKSEY, The Nuremberg Trials and the Progress of International Law (1947).
F.B. SCHICK, The Nuremberg Trial and the International Law of the Future, AJIL, Vol. 41 (1947) 770–794.
H.L. STIMSON, The Nuremberg Trial, Landmark in Law, Foreign Affairs, Vol. 25 (1946–1947) 179–189.
H. WECHSLER, The Issues of Nuremberg Trial, Political Science Quarterly, Vol. 62 (1947) 11–26.
Q. WRIGHT, The Law of the Nuremberg Trial, AJIL, Vol. 41 (1947) 38–72.
H. KRAUS, Kontrollratsgesetz Nr. 10 (1948).
H. VON MANGOLDT, Das Kriegsverbrechen und seine Verfolgung in Vergangenheit und Gegenwart, JIR, Vol. 1 (1948) 283–334.
H. MOSLER, Die Kriegshandlung im rechtswidrigen Kriege, JIR, Vol. 1 (1948) 335–357.
G. SCHWARZENBERGER, The Judgment of Nuremberg, Year Book of World Affairs, Vol. 2 (1948) 94–124.
H. VON WEBER, Die strafrechtliche Verantwortlichkeit für Handeln auf Befehl, Monatsschrift für Deutsches Recht, Vol. 2 (1948) 34–42.
O. KRANZBÜHLER, Rückblick auf Nürnberg (1949).
M. MERLE, Le procès de Nuremberg et le châtiment des criminels de guerre (1949).
T. TAYLOR, Nuremberg Trials, War Crimes and International Law (1949).
C. HAENSEL, Das Gericht vertagt sich, Aus dem Tagebuch eines Nürnberger Verteidigers (1950).
LORD HANKEY, Politics, Trials and Errors (1950).
O. KRANZBÜHLER, Nürnberg als Rechtsproblem, in: Um Recht und Gerechtigkeit, Festgabe für Erich Kaufmann (1950) 219–237.
G. SCHWARZENBERGER, The Problem of an International Criminal Law, Current Legal Problems, Vol. 3 (1950) 263–296.
V. VON DER LIPPE, Nürnberger Tagebuchnotizen, November 1945 bis Oktober 1946 (1951).
H.M. MASCHKE, Das Krupp-Urteil und das Problem der "Plünderung" (1951).
K. HEINZE and K. SCHILLING, Die Rechtsprechung der Nürnberger Militärtribunale (1952).
H.-H. JESCHECK, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht, Eine Studie zu den Nürnberger Prozessen (1952).
S. GLASER, Les lois de Nuremberg et le droit international, Schweizerische Zeitschrift für Strafrecht, Vol. 68 (1953) 321–359.
C.A. POMPE, Aggressive War, An International Crime (1953).
E. TRAPP, Die kriegsrechtliche Bedeutung der Nürnberger Urteile (1957).
A. VON KNIERIEM, The Nuremberg Trials (1959).
T. VON WILMOWSKY, Warum wurde Krupp verurteilt?, Legende und Justizirrtum (3rd ed. 1962).
R.K. WOETZEL, The Nuremberg Trials in International Law, With a postlude on the Eichmann case (1962).
H.-H. JESCHECK, Etat actuel et perspectives d'avenir des projets dans le domaine du droit international pénal, Revue internationale de droit pénal, Vol. 35 (1964) 83–106.
O. TRIFFTERER, Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg (1966).
T. TAYLOR, Nuremberg and Vietnam, An American Tragedy (1970).
E. DAVIDSON, The Nuremberg Fallacy, Wars and War Crimes since World War II (1973).
J.B. HERZOG, Nuremberg, Un échec fructueux? (1975).
G. LEVASSEUR, Nuremberg and What is Left of It, Review of Contemporary Law (1976) 13–23.
B.V.A. RÖLING, Criminal Responsibility for Violations of the Laws of War, RevBelge, Vol. 12 (1976) 8–26.
B.F. SMITH, Reaching Judgments at Nuremberg (1976).
W. MASER, Nürnberg, Tribunal der Sieger (1977).
L. GELBERG, Die Nürnberger Prinzipien und das moderne Völkerrecht, Demokratie und Recht (1978) 177–187.
A.M.S. NEAVE, Nuremberg, a Personal Record of the Trial of the Major Nazi War Criminals in 1945–1946 (1978).
J. HEYDECKER and J. LEEB, Der Nürnberger Prozeß (2nd ed. 1979).
J.R. LEWIS, Uncertain Judgment, Bibliography of War Crimes Trials (1979).
B. FERENCZ, An International Criminal Court, 2 vols. (1980).
H.-H. JESCHECK, Entwicklung, gegenwärtiger Stand und Zukunftsaussichten des internationalen Strafrechts, Goltdammer's Archiv (1981), No. 2.

HANS-HEINRICH JESCHECK

NYON AGREEMENT (1937)

1. Historical Background

In the initial phase of the → Spanish Civil War numerous non-Spanish vessels were attacked by → submarines and → aircraft whose identity could not be ascertained. The victims of these attacks were in most cases trading vessels (→ Merchant Ships; → Neutral Trading) which were carrying provisions for the Spanish Republican Government, so that the attacks lay in the objective interests of the insurrection led by General Francesco Franco. All of the countries coming into consideration as perpetrator of the attacks denied the accusations against them.

As a result, France, Germany, Italy and the United Kingdom on June 12, 1937 concluded an agreement for the supervision of the sea which, however, never came into effect as it was denounced a few days later by Germany and Italy. Subsequently, attacks by the unidentifiable

submarines and aircraft increased considerably, especially upon non-Spanish → warships and trading vessels. Between August 6, 1937 and September 2, 1937 at least six British ships (including the destroyer *Havock*), three Russian, three French, three Spanish, two Greek, one Danish and one Italian ship were attacked; of these, seven sank. Nearly all were on the → high seas. It appears that the responsibility for most of the attacks may be attributed to Italy. German ships were not attacked during this phase of intensified military conflict on the seas; however, prior to this period two attempts by an unknown assailant had been made to torpedo the patrolling cruiser *Leipzig* (between June 15 and 18, 1937).

2. The Conference

Because of the incidents described above, the French and British governments on September 6, 1937 invited the governments of Albania, Egypt, Germany, Greece, Italy, Romania, the Soviet Union, Turkey and Yugoslavia to attend a so-called Mediterranean Conference in Nyon, Switzerland, which began on September 10, 1937. Germany, Italy and Albania either declined or did not react to the invitation; Portugal and Poland protested against not being invited. The Soviet Union demanded in vain that the Spanish Republican Government be invited, which itself vigorously petitioned for inclusion.

On September 14, 1937 the eight States participating at the conference concluded the International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines, also called the Nyon Agreement or Nyon Arrangement (→ Collective Measures; → Piracy). On September 17, 1937 in Geneva, the same parties concluded the International Agreement for Collective Measures against Piratical Acts in the Mediterranean by Surface Vessels and Aircrafts (Supplementary to the Nyon Agreement).

3. Contents of the Agreements

The Nyon and Geneva Agreements actually represent one unit. Art. I of the Geneva Agreement declared it to be an integral part of the Nyon Agreement, as it merely expanded the latter's range of application and modified its → sanctions. The → preamble to the Nyon Agreement established, first of all, that the "attacks . . . committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties" constituted a violation of international law, as laid down in Part IV of the Treaty of London of April 22, 1930 (LNTS, Vol. 112, p. 65). One cannot doubt the correctness of this assertion (*contra* in part Schmitz, p. 6), in so far as the law of war is to be considered at all applicable, whether directly or by analogy (→ Sea Warfare; → War, Laws of; → Neutrality, Concept and General Rules; → Neutrality in Sea Warfare). Art. 22 of the Treaty of London refers solely to "established rules of international law" with regard to visit and search of ships (→ Ships, Visit and Search) as well as to the protection of crew and passengers, and extends these rules to include submarines. Even this extension could undoubtedly be viewed as being in accordance with → customary international law as of 1937. It had been already included in the Treaty of Washington, which the naval victors of World War I (France, Great Britain, Italy, Japan and the United States) signed on February 6, 1922 and was reiterated in the London Procès-Verbal of November 6, 1936 (LNTS, Vol. 173, p. 353) which referred to Art. 22 of the 1930 Treaty of London and which 15 countries, including Germany and the Soviet Union, had signed.

The application of the Treaty of London to the events off the Spanish coast was questionable in so far as this Treaty dealt exclusively with international → armed conflict, while the Spanish Civil War did not constitute a → war as understood in international law at that time. But such submarine attacks would also be forbidden under the international customary law of peace.

The preamble of the Nyon Agreement termed these acts "contrary to the most elementary dictates of humanity", adding that they "should be justly treated as acts of piracy". This passage evoked strong criticism, especially from German-speaking scholars. It has been pointed out repeatedly that a subjective fact, namely the intention of extracting plunder, is inherent in the concept of piracy in international law. This was not the case in the submarine attacks during the Spanish Civil War. Moreover, there was no room here for the legal consequences of universal

jurisdiction. Both arguments are correct – and irrelevant. The Nyon Agreement did not propose an expansion of the legal concept of piracy (as was indeed attempted in other contexts by Anglo-American writers). It merely postulated that certain acts should be treated as piratical acts, and even regulated the sanctions for these acts (Arts. 2 and 3); it in no way made reference to the existing legal classification of piracy. This is also evident in the statement by the Russian Foreign Minister Maxim Litvinov, who had spoken of "State piracy" at the conference in Nyon. "Piracy" normally refers to the acts of private citizens, not of States.

Finally, the preamble of the Nyon Agreement clearly stated that the conclusion of the treaty did not imply that any of the parties concerned in the Spanish Civil War was to be considered a belligerent (→ Recognition of Insurgency), a clause which can only be understood in the overall context of the so-called non-interference policy of the European powers (→ Non-Intervention, Principle of). There is therefore no room for assuming implied → recognition of belligerency.

The operative portion of the Nyon Agreement provided that those submarines which, in violation of the 1930 Treaty of London, attacked ships not operating under the Spanish flag "shall be counter-attacked, and, if possible, destroyed" (Arts. I and II). This also applied to "any submarine encountered in the vicinity of a position where a ship . . . has recently been attacked . . . in circumstances which give valid grounds for the belief that the submarine was guilty of the attack" (Art. III). The breadth of this formulation encroached considerably upon the freedom of navigation (→ Navigation, Freedom of) of those States not participating in the Treaty, and transformed the Mediterranean into a mare clausum, at least for submarines, as each emerging submarine had to reckon with the application of that rule.

These measures could not be justified *vis-à-vis* third parties by violations of either the Treaty of London or the non-codified laws of naval war. But there could be a justification in individual cases, if the aim of the measure was to secure freedom of navigation, as provided by the general law of peace-time. Exact knowledge of the circumstances surrounding each case would certainly be necessary (→ Self-Defence; → Collective Self-Defence).

In order to implement the Nyon Agreement, the parties divided the Mediterranean into zones in which their fleets assumed responsibility for the protection of ships' passage (Art. IV). The principal burden was placed upon the fleets of the United Kingdom and France, while the other signatories of the treaty were to operate only in their own → territorial waters.

The Geneva Agreement, as a supplement to the Nyon Agreement, was applicable to "any attack by a surface vessel or an aircraft upon any merchant vessel in the Mediterranean not belonging to either of the conflicting Spanish parties, when such attack is in violation of the humanitarian principles embodied in the rules . . . referred to in Part IV of the Treaty of London" (Art. II). The consequences provided in Art. III are opening fire (in air attacks) and intervening to resist the vessel (regarding surface vessels).

4. Evaluation and Significance

The Nyon and Geneva Agreements were to a large extent able to achieve their goal of contributing to the pacification of the Mediterranean during the Spanish Civil War. A modification of the supervisory zones established in the Nyon Agreement was undertaken on September 30, 1937 with the inclusion of Italy, which had refused to participate in the Conference in Nyon, but whose patrols took part in the supervision beginning on November 10, 1937. There was a rapid decrease in attacks upon ships in the Mediterranean for the remainder of the Spanish Civil War.

Politically, the Agreements signified a continuation of the non-interference policy of the European powers, a policy which proved to be more advantageous to Franco's forces than to those of the Republican Government. The Agreements document this attitude clearly with the application of law of war norms to a conflict which was still formally treated as an internal matter. It is plain that the avowed humanitarianism in the preamble to the Nyon Agreement was not the deciding factor in this case, but rather the needs of the States bordering on the Mediterranean for self-protection relative to their merchant ships and their military interests. An

arrangement truly pledged to humanitarianism would not have shut Spanish ships out of its protective zone, and would not have allowed the Republican Government to be excluded from the conference. (Complaints of the Republican Government are documented in the League of Nations Official Journal, Vol. 18 (1937), p. 916 and p. 944; some of these complaints were deemed justified by the Council of the League of Nations, *ibid.*)

The Nyon and Geneva Agreements deserve recognition beyond their historical interest, because they represent an early system of → collective security by nations bordering a common maritime zone. This stimulates comparison with similar efforts in security policies and regional cooperation in other areas, be they the Mediterranean, the → Baltic Sea or the Persian Gulf (→ Regional Arrangements and the UN Charter).

The Nyon Arrangement, September 14th, 1937 [and] Agreement supplementary to the Nyon Arrangement, Geneva, September 17th, 1937, LNTS, Vol. 181 (1937) 135–152.

G.A. FINCH, Piracy in the Mediterranean, AJIL, Vol. 31 (1937) 659–665.

R. GENET, The Charge of Piracy in the Spanish Civil War, AJIL, Vol. 32 (1938) 253–263.

The Nyon Arrangements, Piracy by Treaty?, BYIL, Vol. 19 (1938) 198–208.

E. SCHMITZ, Die Abmachungen von Nyon und Genf, ZaöRV, Vol. 8 (1938) 1–22.

A. SCHULZ, Seekriegsrechtliche Fragen im spanischen Bürgerkrieg, Thesis, University of Königsberg (1938) 131–136.

A. VAN WYNEN THOMAS and A.J. THOMAS, JR., International Legal Aspects of the Civil War in Spain, 1936–1939, in: R.A. Falk (ed.), The International Law of Civil War (1971) 111, 141–165.

PHILIP KUNIG

OBSERVER STATUS *see* International Organizations, Observer Status

OBSERVERS

1. Concept

Observers acting in a military context constitute an instrument of → international controls. A distinction may be made with respect to their various functions: observers intervening in an → armed conflict in order to ensure respect for the rules of humanitarian law (→ Humanitarian Law and Armed Conflict); observers acting before armed conflicts with a view to reducing the risk of their breaking out (→ Arms Control; → Disarmament; → Demilitarization; → Peace, Means to Safeguard); and observers checking the situation after the cessation of hostilities in an armed conflict in order to prevent their renewal (→ Armistice; → Suspension of Hostilities). Attempts at classification are generally based on the degree of → internationalization (e.g. national observers named by parties, observation by third parties, agents of international organizations), and of → reciprocity.

2. Protection of Victims of Armed Conflicts

(a) Historical evolution

The Geneva Convention relative to the Treatment of Prisoners of War of 1929 (LNTS, Vol. 118, p. 343) was the first international treaty to provide for inspections of places where → prisoners of war are held (Art. 86; → Geneva Red Cross Conventions and Protocols). It built upon the precedents established since the Spanish-American War (1898), which was the first conflict during which prisoner barracks were visited by representatives of a → protecting power. The new inspection practice was consolidated during World War I. It was also then that the → International Committee of the Red Cross (ICRC) laid the foundations for its now traditional action in favour of prisoners of war. In the 1929 Convention, however, the humanitarian activity of the ICRC was made subject to "the consent of the interested belligerents" (Art. 88).

The Geneva Conventions of 1949 relative to the Treatment of Prisoners of War, and to the Protection of Civilian Persons in Time of War (Conventions III and IV; UNTS, Vol. 75, p. 135 and p. 287; → Civilian Population, Protection), extended the inspection prerogative of the protecting powers to the delegates of the ICRC. The ensuing near-paralysis of the protecting power system was largely offset by the role of a *de facto* substitute assumed by the ICRC. There are relatively few cases (although some highly controversial ones, e.g. → Palestine) in which the question of applying Geneva Convention IV has arisen (→ Israel and the Arab States). ICRC protection efforts

have generally been accepted. However, serious restrictions on access to civilian detainees (→ Internment) were imposed during the war over Bangladesh in 1971. With regard to prisoners of war, ICRC inspections have been permitted in the vast majority of conflicts since 1949. The main exceptions were the prisoners of war held in North → Korea and → China between 1950 and 1953, before ratification of the 1949 Geneva Conventions by China and North Korea, and the captured United States pilots during the → Vietnam War. North Vietnam cited its reservation to Geneva Convention III in which it had declared that prisoners of war prosecuted for and convicted of → war crimes "shall not benefit from the present Convention" (→ Treaties, Reservations).

(b) Current legal situation

Under Art. 126 of Convention III and Art. 143 of Convention IV of 1949, representatives or delegates of the protecting powers are entitled to go to all places where → protected persons (i.e. prisoners of war, persons in the hands of a party to the conflict or an occupying power of which they are not nationals) are detained and to interview them without witnesses. The 1977 Protocol I additional to the Geneva Conventions of 1949 (ILM, Vol. 16 (1977) p. 1391) has reinforced the mandatory system of those Conventions with regard to the appointment of protecting powers, while rather complicating the rules for the introduction of official substitutes.

The ICRC has the same right to visit prisoners of war and civilian internees as the protecting powers or their substitutes, subject only to the detaining State's approval of the delegates chosen. Art. 81 of Additional Protocol I has given new emphasis to the States' obligation to grant to the ICRC the facilities enabling it to carry out its humanitarian functions. However, the ICRC does not insist upon undertaking activities against the wishes of the parties to a conflict. Its right to offer its services is not only recognized for international armed conflicts (identically worded Art. 9 of Geneva Conventions I, II and III and Art. 10 of Convention IV) but also for armed conflicts not of an international character (common Art. 3). Thus, ICRC supervision has been accepted in numerous → civil wars (e.g. Nigeria-Biafra 1967–1970).

3. Reducing the Risk of Armed Conflict

(a) Historical evolution and types of observation

States may agree to resort to the method of on-site observation in order to acquire information to ensure that accepted restrictions on their armaments policies are being respected. Observers thus constitute a means of verifying the implementation of arms control agreements (→ Verification of Facts) such as those directed against certain categories of weapons (→ Weapons, Prohibited), certain military activities, or a certain deployment of forces (e.g. creation of non-military areas; → Demarcation Line). The idea is to deter governments from violating their commitments due to the risk of timely detection (→ International Obligations, Means to Secure Performance). It appears to have first found expression in the preliminary peace treaty between Bolivia and Peru of 1831 (CTS, Vol. 82, p. 149), providing for the reduction of armies, the stationing of the remaining forces and the mutual inspection thereof. The unilateral arms control and inspection clauses in the → Peace Treaties after World War I are exceptional. It was only after World War II that mutually acceptable institutions of international arms control observation were introduced on a larger scale. In the 1970s, they began to include inviting observers to military manoeuvres (voluntary confidence-building measure listed in the Final Act of the 1975 → Helsinki Conference on Security and Cooperation in Europe).

(b) Current legal situation

States are normally reluctant to grant foreign observers access to their territory for arms control purposes (→ Territorial Sovereignty). For the United States and the Soviet Union, no such international legal obligation is in force. Their bilateral Treaty on Underground Nuclear Explosions for Peaceful Purposes of 1976 (ILM, Vol. 15 (1976) p. 891; → Nuclear Tests), which provided for certain mutual inspection rights, has not been ratified. Their other arms control agreements (cf. → Strategic Arms Limitation Talks (SALT)) have relied on national means of verification (→ Military Reconnaissance; → Satellites in Space) excluding on-site inspec-

tion. Some of the multilateral agreements do not even include any verification clause whatsoever, e.g. the Partial Test Ban Treaty of 1963 (UNTS, Vol. 480, p. 43), the Biological Weapons Convention of 1972 (ILM, Vol. 11 (1972) p. 309; → Biological Warfare) and the Environmental Modification Convention of 1977 (ILM, Vol. 16 (1977) p. 88).

A unique exception among the agreements aimed at universal application in territories under national jurisdiction is the Nuclear → Non-Proliferation Treaty of 1968 (UNTS, Vol. 729, p. 161). It makes use of a highly advanced safeguards system for preventing diversion of nuclear energy from peaceful purposes to nuclear explosive devices; this system is based on an international institutionalized procedure involving direct inspections in non-nuclear-weapon States by → International Atomic Energy Agency (IAEA) officials individually acceptable to the State (→ Nuclear Warfare and Weapons).

The other multilateral arms control agreements providing for observation govern areas beyond national jurisdiction (→ Jurisdiction of States). The right of inspection is recognized for States parties in the → Outer Space Treaty of 1967 ("on a basis of reciprocity"; UNTS, Vol. 610, p. 205), in the Moon Treaty of 1979 (without reciprocity clause; ILM, Vol. 18 (1979) p. 1434), the Sea-Bed Treaty of 1971 (with an assistance clause; ILM, Vol. 10 (1971) p. 145; → Sea-Bed and Subsoil), and finally in the Antarctic Treaty of 1959 (restricted to parties enjoying consultative status, UNTS, Vol. 402, p. 71; → Antarctica). For technological reasons, the vast majority of States are obviously unable to exercise their right of inspection effectively.

At the regional level, arms control agreements have met with less verification problems. The Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America of 1967 (UNTS, Vol. 634, p. 281), provides for IAEA safeguards (→ Nuclear-Free Zones; → Regional Cooperation and Organization: American States). Special inspections may also be carried out by regional inspectors. The → Western European Union (WEU) relies exclusively on its Agency for the Control of Armaments (see Paris Protocol IV of 1954 on that Agency, UNTS, Vol. 211, p. 376). The effectiveness of the inspections undertaken by those officials has been frequently cast into doubt.

4. Preventing Renewal of Hostilities

Since World War II, the use of observers for the supervision of cease-fires and troop disengagements has become a common practice. Observation tasks have been carried out – on the whole with little success – by joint teams and third parties (in particular by international commissions, e.g. the Korean Armistice Agreement of 1953, UN Doc. S/3079, the Indochina armistice agreements of 1954, RGDIP, Vol. 58 (1955) p. 315, p. 330 and p. 338, and the 1973 Agreement on Ending the War and Restoring Peace in Vietnam, ILM, Vol. 12 (1973) p. 48). The most important and effective observation efforts since World War II have been undertaken by → United Nations Forces acting in the framework of what has come to be known as the → United Nations Peacekeeping System.

5. Status of Observers

The diplomatic and consular staff of protecting powers enjoy the customary privileges and immunities (→ Diplomatic Agents and Missions, Privileges and Immunities). Privileges and immunities are also granted to IAEA and WEU inspectors as well as to UN Forces (→ International Organizations, Privileges and Immunities), and to other observers when stipulated in the applicable agreements (e.g. Korean Armistice, Vietnam Agreement of 1973).

Stockholm International Peace Research Institute, World Armaments and Disarmaments, SIPRI Yearbook, Vol. 1 et seq. (1968) to date.

G. FISCHER and D. VIGNES, L'inspection internationale (1976).

D.P. FORSYTHE, Humanitarian Politics (1977) 132–196.

Stockholm International Peace Research Institute, Strategic Disarmament, Verification and National Security (1977) 10–39.

H.S. LEVIE, Prisoners of War in International Armed Conflict (1978) 278–293, 307–314.

Stockholm International Peace Research Institute, Arms Control, A Survey and Appraisal of Multilateral Agreements (1978).

G. ABI-SAAB, The Implementation of Humanitarian Law, in: A. Cassese (ed.), The New Humanitarian Law of Armed Conflict (1979) 310–346.

NORBERT J. PRILL

OCCUPATION AFTER ARMISTICE

After the active phase of an → armed conflict has been brought to a close by an → armistice or some other kind of cease-fire arrangement (e.g. a → United Nations Security Council resolution followed by the actual cessation of hostilities), one party may continue to occupy (or newly occupy by virtue of the armistice agreement) parts of the adversary's territory. Examples are the German occupation of parts of France after the armistices of 1871 and 1940, the Allied occupation of Italy after the armistice of 1943 and the occupation of Syrian (Golan Heights), Egyptian (Sinai Peninsula) and Jordanian/Palestinian (West Bank) territories by → Israel after the cease-fire in 1967 and after the disengagement agreements following the Yom Kippur War in 1973 (→ Israeli-Occupied Territories). The continued occupation of parts of the Sinai Peninsula after the Peace Treaty between Israel and Egypt in 1978 theoretically would have to be qualified as a case of pacific occupation, although in practice its legal régime does not differ from that obtaining before the Treaty's conclusion (→ Occupation, Pacific).

In so far as occupation is based on an armistice agreement, it can be distinguished from a "normal" belligerent occupation because belligerent occupation is typically brought about against the will of the occupied country (→ Occupation, Belligerent). While belligerent occupation is not based on an agreement, occupation after armistice is, at least to a certain extent. The rights and duties of an occupying power after armistice may thus be determined by two different sources. On the one hand, occupation after armistice is the result of an armed conflict and thus constitutes belligerent occupation, peaceful relations not having been restored among the parties. On the other hand, the armistice agreement or, where relevant, the armistice or cease-fire resolution (→ Suspension of Hostilities) may create a new legal basis for the occupation and may modify the applicable legal régime.

Certain armistice agreements concluded during World Wars I and II, for example, provided for the occupation by enemy forces of parts of the territory of a party (Austria, Armistice of November 3, 1918, British and Foreign State Papers, Vol. 111, p. 591; Germany, Armistice of November 11, 1918, *ibid.*, p. 613; Hungary, Armistice of November 13, 1918, *ibid.*, p. 624; Turkey, Armistice of October 31, 1918, *ibid.*, p. 611; France, Armistice of June 22, 1940, AJIL, Vol. 34 (1940) p. 173; Italy, Armistice of September 3, 1943, AJIL, Vol. 40, Supp. (1946) p. 1). The relevant agreements usually contained a clause stipulating that the occupant had all the rights of an occupying power, but they also provided for additional duties of support and cooperation on the part of the occupied country – elements which could not exist in the case of a "normal" belligerent occupation. Thus, the French Government obligated itself under the 1940 armistice agreement "to support with every means" the regulations resulting from Germany's exercising her occupation rights, and "to carry them out with the aid of the French administration" (Art. III). France was to bear the cost of maintaining German occupation troops on French soil (Art. XVIII). Similar provisions could be found in the "armistice conditions" for Germany after World War I (Arts. V and IX).

The presence of troops belonging to one of the parties to an armistice agreement on the territory of the other is not called "occupation" in all cases. The armistice agreements of 1944 with Romania (AJIL, Vol. 29 (1945) p. 88), Bulgaria (*ibid.*, p. 93) and Hungary (*ibid.*, p. 97) did not use the term "occupation", although they provided for the presence and freedom of movement of Allied, and in particular of Soviet forces, in the territories in question, placing the civil administration under Soviet direction (e.g. Art. 17 of the Romanian armistice), and imposing on the countries significant obligations to provide cash payments and services (Arts. 3 and 10 of the Romanian armistice, Arts. 3, 15 and 17 of the Bulgarian armistice). Under the Italian armistice of 1943, on the other hand, the Allied forces were entitled "to occupy" certain parts of Italian territory (Art. 18). Whether (and if so, in what sense) the status of the foreign (allied) forces differed from each other in these cases is doubtful.

Since World War II, the practice of armistice agreements has been completely different. Many of these agreements have provided for → demarcation lines between the opposing forces. But they are completely silent on the legal characterization

of the presence of forces of the various parties in the territory controlled by them under the armistice agreement. No mention is made of the rights of an occupant. That question remains open, and the answer must be sought by using legal criteria outside the armistice agreements. None of the most recent armistice agreements should be regarded as providing a legal basis for a right of occupation.

After the 1949 armistice agreements between → Israel and the Arab States, for example, the Israeli side of the demarcation line became the territory of the State of Israel. Transjordania later annexed (→ Annexation) the parts of the former → Palestine Mandate (→ Mandates) controlled by her forces (the West Bank), while Egypt administered its part of the former Mandate territory (the → Gaza Strip) without doing so. After the cease-fire in 1967, it became a matter of controversy whether the Israeli presence in the West Bank and the Gaza Strip constituted a belligerent occupation because of the disputed status of the territories concerned. Her presence in the Sinai Peninsula, however, clearly constituted a belligerent occupation. After the Yom Kippur War, the disengagement agreements between Israel on the one hand and Egypt and Syria on the other provided for lines of demarcation situated on Egyptian and Syrian territory respectively (Agreement between Israel and Egypt of June 5, 1974: UN Doc. S/11198, ILM, Vol. 13 (1974) p. 23; Agreement between Israel and Syria of January 18, 1974: UN Doc. S/11302, ILM, Vol. 13 (1974) p. 880). But it would be to misinterpret the intentions of the Arab parties, at the very least, to construe the agreements as conferring a right of occupation upon Israel of the territories controlled by her. That occupation remained what it was before the disengagement agreements, namely belligerent occupation, the legal régime not being affected by the agreements. It is submitted that this legal situation has even not been altered by the 1978 Peace Treaty between Egypt and Israel, as far as the occupation by Israel of the Sinai Peninsula during the transitional period is concerned.

An armistice must be distinguished from a complete → surrender such as the surrender of Germany and Japan at the end of World War II. Occupation after surrender of the armed forces as a whole is governed by rules different from those discussed above. In the case of the occupation of Germany and Japan, the occupying powers enjoyed rights of occupation going beyond those obtaining in cases of belligerent occupation or armistice after occupation (→ Germany, Occupation after World War II).

F. BERBER, Probleme des neuen Waffenstillstandsrechts (1943) [includes German texts of armistice agreements].

M. BOTHE and D. FLECK, Die Feuereinstellung, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, Sixième Congrès international, La Haye, 22–25 mai 1973 (1974) 53–88.

J.H. ROMAN, Interpretation und völkerrechtliche Bedeutung des Sinai-Abkommens zwischen Israel und Ägypten vom 4. September 1975 (1978).

K. OBRADOVIĆ, Le système d'occupation israélienne des territoires arabes vu sous l'optique de droit des conflits armés, in: H. Köchler (ed.), The Legal Aspects of the Palestine Problem, With Special Regard to the Question of Jerusalem (1981) 192–212.

M. BOTHE, Israeli Measures in Occupied Territories in the Light of International Humanitarian Law, *ibid.*, 213–218.

MICHAEL BOTHE

OCCUPATION, BELLIGERENT

1. Introduction

Occupation in legal terms means the assumption or holding of possession. In international law, the term is also used in the sense of assuming possession of no man's land with a view to establishing a sovereign title to it. Nowadays, this kind of occupation plays no practical role.

Occupation in the sense of international law is traditionally used for the holding of possession in the sense of actual control of the territory of another State (or of parts of it). If this control is gained by the use of military force (→ Use of Force), the occupation is called belligerent. If the State to which the territory belongs agrees to the occupation, it is traditionally called a pacific occupation (→ Occupation, Pacific). Occupation after an armistice may also be agreed to, but as the result of an → armed conflict it nevertheless possesses essential elements of a belligerent occupation (→ Occupation after Armistice).

2. *Development of Rules*

Efforts to regulate the laws of war since the middle of the 19th century have produced the rules for belligerent occupation (→ War, Laws of; → War, Laws of, History; → Land Warfare). The Lieber Code of 1863 contained a number of relevant provisions, as did the Brussels Declaration of 1874. Important parts of the law of belligerent occupation have been codified in the Hague Regulations on Land Warfare annexed to Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land (Arts. 42–56; → Hague Peace Conferences of 1899 and 1907). This law was considerably developed by Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War (→ Geneva Red Cross Conventions and Protocols) which was based on the experiences of World War II. The major part of the Convention applies to belligerent occupation. The 1977 Protocol I additional to the Geneva Conventions only adds a few details to Convention IV.

3. *Concept of Belligerent Occupation*

Traditionally, belligerent occupation used to be defined as occupation occurring while a state of → war between the Parties existed. The Geneva Conventions, however, "apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance" (Art. 2, para. 2, common to the four Conventions). According to Art. 2, para. 1, the application of the Conventions does not require the existence of a state of war. This conforms with the general tendency in international law to apply the laws of war once an armed conflict erupts, regardless of the fine legal points of how a state of war is created or terminated.

Belligerent occupation is control of foreign territory. Until the final outcome of a conflict, the → annexation of one party's territory conquered by the other party is unlawful. A → State does not cease to exist as a legal entity even if its entire territory is occupied by the enemy. The government, in such cases, as a rule, will be in exile (→ Government-in-Exile). The unclear status of an occupied territory does not prevent the applicability of the rules of belligerent occupation. The application of humanitarian law cannot be made to depend on such legal niceties as the recognition of legal titles to territory (→ Humanitarian Law and Armed Conflict). It is sufficient that the territory in question did not belong to the occupying power when the conflict broke out. Regarding this problem (and in particular the Israeli denial of an obligation to apply Geneva Convention IV in the territories occupied by it; → Israeli-Occupied Territories), a provision was adopted in Protocol I to the effect that the Conventions and the Protocol apply to the fight of peoples, in the exercise of their right to → self-determination, against, *inter alia*, "alien occupation" (Art. 1, para. 4). This addition, however, did not really solve the whole problem, since in cases of unclear territorial status, it may also be possible to argue that an occupation is not "alien".

The authority exercised by an occupying power is, as far as international law is concerned, a *de facto*, not a *de jure* authority. International law does not grant rights to the occupying power, but limits the occupant's exercise of its *de facto* powers. In particular, there is no international legal duty of obedience for the population of an occupied territory towards the occupying power. The occupying power's ability to enforce respect for its legitimate interests is not an authority to create law. The ability to enforce respect springs instead from superior military power and from the factual capacity to compel obedience (Baxter). The occupying power is allowed to enforce obedience of its orders within the limits of Geneva Convention IV and the Hague Regulations, but this does not make violations against these orders → internationally wrongful acts; it only makes non-compliance risky. Insofar as the authority exercised by the occupant is a legal authority, it is an authority created by the legal system of the occupying power. The Hague Regulations and Geneva Convention IV indeed presuppose that the occupant imposes its will by means of a legal order of its own (which will as a rule be technically distinct from the legal order in force in the national territory of the occupying power (but see also section 4 (a) *infra*)).

The application of the law of belligerent occupation begins after an invasion, with the establishment of actual control over the territory. It ends when the occupation is in fact terminated

(Art. 3 (b) of Protocol I, which supersedes Art. 6 of Geneva Convention IV), by the withdrawal of the occupying power or by a determination of the final fate of the territory after the re-establishment of peaceful relations between the parties. Pending such conclusive solutions, the régime of belligerent occupation may be modified by ceasefire or → armistice arrangements (→ Suspension of Hostilities).

In exceptional circumstances, the application of the law of belligerent occupation may also end with the final defeat of the occupied country, when all its forces have surrendered and there is no government-in-exile purporting to continue the fight (→ Surrender; → Debellatio). In this situation, annexation would no longer be unlawful. This was the situation of Germany in 1945. Instead of annexation, however, a special occupation régime was then established by the Allied Powers (→ Germany, Occupation after World War II).

In non-international armed conflicts, a situation to which the law of belligerent occupation could be applicable is possible only in exceptional circumstances (→ Civil War; → Recognition of Insurgency). Where the established government or the insurgents gain control over territory not previously held by them, this does not lead to an occupation of foreign territory. The situation could, however, be different where the forces of a secessionist government enter territory not claimed by the → secession. The treaty provisions applicable to non-international armed conflict are silent on this question (1977 Protocol II additional to the Geneva Conventions).

4. Régime of Belligerent Occupation

(a) Administration

The occupying power, once its control is established, becomes responsible for the well-being of the inhabitants of the occupied territory. It has a duty of good government. This means, *inter alia*: it has to restore and ensure public order and safety as far as possible (Hague Regulations, Art. 43). It is responsible for the maintenance of decent living conditions. Thus, it has to ensure the food and medical supplies of the population (Geneva Convention IV, Art. 55) and to ensure and maintain the medical and hospital establishments and services, public health and hygiene (Art. 56) as well as the care and education of children (Art. 50).

In fulfilling its responsibilities, the occupying power must, unless absolutely prevented, respect the laws in force in the occupied country (Hague Regulations, Art. 43). Thus, the occupant may issue only such laws and decrees which are necessary from the viewpoint of military security (→ Military Necessity). Rules on public order and safety will usually have to be established by the occupant. Rules of private law will mostly remain unaltered. Constitutional and administrative norms as well as penal laws of the occupied State may be repealed by the occupant to the extent that the military purpose of the occupation necessitates a change. To the extent that the administration of the country, on local and/or on higher levels, continues to function, the occupying power must cooperate with it (e.g. Geneva Convention IV, Arts. 50, 56).

The occupying power may not alter the status of the officials of the occupied country, although exceptionally it may remove them from office. The officials themselves are not legally obligated to remain in office. National → Red Cross societies and → civil defence organizations should be able to pursue their activities; the occupying power should not require any prejudicial changes in the personnel or structure of these institutions (Geneva Convention IV, Art. 63; Protocol I, Art. 63), and should grant them the facilities necessary for the performance of their tasks (Protocol I, Arts. 63 and 81). If the population is inadequately supplied, the occupying power must accept → relief actions (Geneva Convention IV, Art. 59).

Although in principle law enforcement also remains a local responsibility and the local courts must be allowed to continue to function, the occupying power may enforce the penal laws it is entitled to enact before its own courts, which, however, must sit in the occupied territory (except for courts of appeal) and respect certain procedural safeguards and certain limitations on punishment (Geneva Convention IV, Arts. 64 to 77).

(b) Legal position of the inhabitants

There are two basic duties of the occupying power towards the inhabitants of the occupied territory: it must not require any allegiance from the population and must respect certain of their

fundamental rights (Hague Regulations, Arts. 45 and 46).

Thus there is a prohibition on requiring any oath of allegiance and an obligation not to require anyone to take part in military operations of the occupying power. Even propaganda for voluntary enlistment in the forces of that power is prohibited (→ War, Use of Propaganda in). An important protection for the maintenance of the national identity of the occupied territory is the prohibition of transfers of the civilian population of the occupying power into the territories it occupies (Geneva Convention IV, Art. 49) (→ Forced Resettlement).

As to fundamental rights, family rights, personal honour and dignity, physical integrity, life, private property, religious convictions and liberty must be respected (Hague Regulations, Art. 46; Geneva Convention IV, Arts. 27, 32; Protocol I, Arts. 11, 75; → Civilian Population, Protection; → Human Rights). The taking of → hostages and use of → collective punishments are prohibited. Under certain conditions and subject to procedural safeguards, inhabitants of the occupied country may, however, be interned for security reasons (→ Internment). They then enjoy a status similar to that of → prisoners of war.

The possibility of requiring → forced labour is restricted (Geneva Convention IV, Art. 51), and, in particular, the work required must be carried out in the occupied territory itself. Practices such as those used in World War II to employ the civilian population of occupied countries as a reservoir of labour for the requirements of the occupying power elsewhere are thus illegal. Forcible individual or mass transfers from the occupied territory to any other country are forbidden, subject to really unavoidable exceptions (Geneva Convention IV, Art. 49; → Population, Expulsion and Transfer).

(c) *Property and taxation*

Private property must be respected and may not be confiscated (Hague Regulations, Art. 46). → Requisitions in kind and services for the needs of the army in occupation, however, are in certain circumstances possible against payment (Hague Regulations, Art. 52; → Contributions). If private property constitutes → war material, however, it may, in theory, be seized (Hague Regulations, Art. 53; → Sequestration) subject to payment of compensation or restoration after the war (→ War Damages). Additional restrictions on requisition apply to civilian medical units (Geneva Convention IV, Art. 57; Protocol I, Art. 14) and civil defence organizations (Protocol I, Art. 63).

The occupying power may levy taxes, dues or tolls according to the pre-existing rules of the territory and use them for the expenses of the administration of the occupied territory (Hague Regulations, Art. 48). Additional taxes or contributions may only be levied for military necessities or the administration of the territory (Hague Regulations, Art. 49).

As to public property, the property of local government units is treated as private property (Hague Regulations, Arts. 52 and 56). As to State property, the occupying power is regarded as the administrator or usufructuary of immovable property. As to movable State property, cash, funds, and anything which could be requisitioned from private individuals together with all war material may be seized without compensation (→ Booty in Land Warfare; → War, Effect on Contracts).

R.R. BAXTER, The Duty of Obedience to the Belligerent Occupant, BYIL, Vol. 27 (1950) 235–266.

O.M. UHLER, Der völkerrechtliche Schutz der Bevölkerung eines besetzten Gebietes gegen Maßnahmen der Okkupationsmacht (1950).

E. CASTRÉN, The Present Law of War and Neutrality (1954).

J.S. PICTET (ed.), The Geneva Conventions of 12 August 1949, Commentary, Vol. 4 (1956).

M. GREENSPAN, The Modern Law of Land Warfare (1959).

J. STONE, Legal Controls of International Conflict (2nd ed. 1959).

O. DEBBASCH, L'occupation militaire, pouvoirs reconnus aux forces armées hors de leur territoire national (1962).

MICHAEL BOTHE

OCCUPATION OF THE RHINELAND AFTER WORLD WAR I *see* Rhineland Occupation after World War I

OCCUPATION, PACIFIC

1. Concept and Legal Development

In traditional international legal doctrine, pacific occupation used to be defined as a military occupation of the territory of a foreign State with-

out the existence of a state of → war, (→ Occupation, Belligerent). Within the notion of pacific occupation, a distinction was made between occupation based on agreement and coercive occupation. The distinction nowadays serves no useful purpose.

As to occupation without agreement, the threshold question involves the right to occupy another country. Such occupation of foreign territory constitutes a → use of force. This use of force may be legal (e.g. as → self-defence) or illegal; whether a state of war exists or not is irrelevant for the purposes of this question (→ War, Laws of). The law applicable to an occupation without agreement is today the law of belligerent occupation (see common Art. 2, para. 2 of the Geneva Conventions of 1949; → Geneva Red Cross Conventions and Protocols). Thus, the notion of "pacific" coercive occupation as distinguished from belligerent occupation does not have any current practical significance.

As to occupation by agreement, the scope of this notion is hard to determine because the historic phenomena discussed under this heading vary as to their political context and significance. Cases cited are occupation by virtue of a → peace treaty as a lien for the fulfilment of the loser's obligations (→ Rhineland Occupation after World War I) and occupation involving a → protectorate. These are cases where the agreement, as a rule, is imposed upon a weaker State by a stronger State. But forces of one State may also be present in another State by virtue of a treaty of → alliance. One would hesitate to call this an occupation because any control of foreign territory and any possession excluding the territory's legitimate authority is absent (→ Territorial Sovereignty; → Sovereignty). However, the distinction between forces occupying and forces visiting a country is hard to draw. The practice of certain States of procuring themselves invitations to assist the host government and then taking over essential leadership functions in the host country will certainly not be called an occupation by the immediate actors concerned, but may well be deemed such by outside observers (e.g. the Soviet presence in Afghanistan after 1980). Because of the variable political context, no specific rules govern the occupation or the presence of foreign armed forces. The distinction between occupation and other forms of foreign armed forces' presence is only of limited, if any, legal significance.

2. Pacific Occupation by Agreement

The legality of the presence of foreign armed forces will follow from the agreement (→ Military Forces Abroad; → Military Bases on Foreign Territory). This is true unless the agreement is void as having been given under duress (Art. 51 or 52 of the → Vienna Convention on the Law of Treaties) or as being in conflict with a norm of → *jus cogens*.

The rights and duties of the forces and their members will also be determined by the agreement which, where a question is unresolved by an express provision, has to be interpreted in context. Here, the different political purposes of the presence may have a certain legal significance. As a rule, the receiving State will be deemed to grant at least implicitly such rights and facilities to the foreign forces as are necessary for them to fulfil the functions assigned to them by the agreement. Certain general rules of customary law also apply. One is the rule that everybody or everything present on the territory of a State is subject to the law of this State. This also applies not only to foreign States and their agents but also, in the case of armed forces of international organizations, to these organizations and their agents (→ United Nations Forces; → United Nations Peacekeeping System). Foreign armed forces present on the territory of a State have to respect the laws of that State. They do not have extraterritorial status. This principle may, however, be expressly or implicitly waived by the agreement.

An important restriction of this principle is the rule of jurisdictional immunity of States for acts *jure imperii*, and activities of armed forces usually belong to this category (→ Sovereign Immunity). In addition, the relations between a State and its agents are exclusively determined by the law of that State, even if the agents act outside the State (exceptions being made for agents having the nationality of the State where they act). Thus, the law of the receiving State does not apply to the internal administration and discipline of the foreign armed forces present on its territory. Under → customary international law the members

of the forces also enjoy immunity for their official acts. The rules of State responsibility also apply between the sending State and the receiving State (→ States, Fundamental Rights and Duties; → Responsibility of States: General Principles). In the case of armed forces of international organizations, the rules on the privileges and immunities of the organization and its agents will also apply to these forces (→ International Organizations, Privileges and Immunities).

L. CAVARÉ, Quelques notions générales sur l'occupation pacifique, RGDIP, Vol. 31 (1924) 339–371.

O. DEBBASCH, L'occupation militaire, pouvoirs reconnus aux forces armées hors de leur territoire national (1962).

M. BOTHE, Streitkräfte internationaler Organisationen (1968).

MICHAEL BOTHE

OPEN TOWNS

The laws of war currently in force contain no specific provision defining open towns (→ War, Laws of). The best definition available is found in Art. 16 of the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (→ Civilian Population, Protection), which the → International Committee of the Red Cross presented at the 19th International Conference of the Red Cross in New Delhi in 1957.

These rules were submitted to many governments for examination, but they were virtually ignored. Later, at the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977), these rules were further discussed and supplemented. The two 1977 Protocols additional to the Geneva Conventions of 1949 (→ Geneva Red Cross Conventions and Protocols) contain numerous provisions designed to exempt → civilian objects from attack (Arts. 48 to 60 of the Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I); Arts. 13 to 16 of the Protocol relating to the Protection of Victims of Non-International Conflicts (Protocol II)). Although the term "open town" was abandoned, Art. 59 of Protocol I introduces the modern concept of "non-defended locality", which may be "any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party". Such a locality must satisfy the following conditions:

> "(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
>
> (b) no hostile use shall be made of fixed military installations or establishments;
>
> (c) no acts of hostility shall be committed by the authorities or by the population; and
>
> (d) no activities in support of military operations shall be undertaken." (→ Combatants; → Military Objectives.)

These conditions substantially conform to the qualifications for "open towns" as formulated in the draft rules. The Protocols were opened for signature on December 10, 1977 and entered into force on December 7, 1978. Yet only 13 States, none a major power, had ratified or acceded to them by late 1981 (→ Treaties, Conclusion and Coming into Effect).

Although the term "open town" is quite old, the actual practice of belligerents in 19th and 20th century → armed conflicts shows that no consensus ever existed as to what places were to be regarded as open towns. Thus no precise rules of → customary international law have developed in this field.

Generally speaking, an open town was a specific locality which a belligerent unilaterally declared to be "open" and which, if the adverse party agreed, was to be spared → bombardment, precisely because it could be occupied without resistance (→ Occupation, Belligerent). Recognition was voluntary and depended on → reciprocity or on humanitarian or similar considerations (→ Humanitarian Law and Armed Conflict).

At the heart of the problem of giving immunity from attack to a particular locality is the fundamental rule of war that a belligerent must be allowed to deny its enemy the use of military resources. If the town is "open", i.e. not defended, it can be spared unnecessary destruction. Thus the Brussels Conference in its Declaration of August 27, 1874 laid down the rule that "open towns" must not be attacked (Art. 15).

→ Sea warfare presents other problems.

Whereas the commander of an army can take possession of an undefended place and thus deny the enemy the use of its military resources, a naval commander normally can only deny the enemy such resources by destroying them with shell fire. Thus, while Art. 25 of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907) forbade "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended", and Art. 1 of Hague Convention IX of 1907 concerning Bombardment by Naval Forces in Time of War contained a similar prohibition, Art. 2 of the latter Convention added a rule permitting naval bombardment of specified military objectives. These considerations apply with even greater force to the circumstances of → air warfare. When the Hague Air Warfare Rules were drawn up in 1923, the criterion of the undefended town was abandoned altogether and that of the military objective was substituted. Art. 22 of those Rules provides:

> "Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited."

Aerial bombardment is legitimate only when directed at a military objective (Art. 24(1)). Moreover, the "bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited" (Art. 24(3)). Where bombardment of the objectives would entail indiscriminate bombardment of the civilian population, it was also forbidden by these rules (→ Proportionality). Unfortunately, the Air Warfare Rules were never adopted by States. In the absence of a ratified convention, exemption from bombardment could not be obtained in World War II by unilateral declaration of a town as an open town. As with → safety zones and neutralized areas (→ Neutralization), exemption depended solely on the consent of the belligerents. It is perhaps significant regarding the state of the law in this area that the bombardment of towns declared to be "open" did not play a significant role at the → Nuremberg Trials.

The concern to protect the civilian population and civilian objects from militarily unjustifiable attack led to the adoption of Geneva Convention IV of August 12, 1949 relative to the Protection of Civilian Persons in Time of War (UNTS, Vol. 75, p. 287). Arts. 14 and 15 and Annex I provide for the establishment of hospital and safety zones and neutralized zones.

The first of the 1977 Protocols provides in Art. 52 that civilian objects shall not be the object of attack or of → reprisals, and that military objectives shall be limited to:

> "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

Art. 53 complements the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (→ Cultural Property, Protection in Armed Conflict). Protection of objects indispensable to the survival of the civilian population is provided in Art. 54, while Art. 56 forbids attacks upon "works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations".

With respect to "non-defended localities", Art. 59 of the 1954 Convention forbids attack "by any means whatsoever". Any party to a conflict may address a declaration to the adverse party, defining as precisely as possible the limits of the non-defended locality. The adverse party is required to acknowledge receipt of the declaration and to treat the locality as a non-defended locality.

Although these articles help to clarify the state of the laws of war, there remain ambiguities and considerable practical problems, mainly concerned with drawing the line between civilian objects and military objectives. Moreover, in the case of → nuclear warfare it is unlikely that non-defended localities would be respected, given the probable strategic aims of a nuclear attack.

E. SCHMITZ, Die offene Stadt im geltenden Kriegsrecht, ZaöRV, Vol. 10 (1940/41) 618–628.

R.Y.J., Open Towns, BYIL, Vol. 22 (1945) 258–264.

M. SIBERT, Remarques et suggestions sur la protection des populations civiles contre les bombardements aériens, RGDIP, Vol. 59 (1955) 177–192.

A. DE SMET, Les lieux de refuge comme moyen de protection des populations civiles contre les bom-

bardements aériens, L'aéronef militaire et le Droit des Gens, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre (1963) 112–115.

J. TROMM, Open Steden, Militair-rechtelijk tijdschrift, Vol. 59 (1966) 321–343.

B. HARTWIG, Die Konvention zum Schutz von Kulturgut bei bewaffneten Konflikten, Neue Zeitschrift für Wehrrecht, Vol. 9 (1967) 97–102.

H. DE SAUSSURE, The Laws of Air Warfare, Are there Any?, JAG Law Review, Vol. 12 (1970) 242–251.

W. BORN, Die offene Stadt, Schutzzonen und Guerrillakämpfer (1978).

ALFRED M. DE ZAYAS

OPERATIONAL ZONES *see* War Zones

PACIFIC BLOCKADE *see* Blockade, Pacific

PACIFIC OCCUPATION *see* Occupation, Pacific

PACIFISM

The work "pacifism" first came to be used at the beginning of the 20th century, but the concept may be as old as humanity itself. As a concept, pacifism has been subject to a number of interpretations over time. In the times of civil unrest and lawlessness which surrounded the emergence of the nation-States of Europe, pacifism emerged as a reaction to the view that war was preferable to peace (→ Peace, Historical Movements towards). In the modern era of the → United Nations (Art. 4 of the → United Nations Charter opens UN membership to "peace-loving states"), every government is in theory committed to the ideal of peace over war, and is in that sense pacifist.

At present, the term "pacifist" is commonly used to describe those who are willing to pay any price for the maintenance of peace. In the nuclear age such attitudes are understandable: A nuclear war (→ Nuclear Warfare and Weapons) between the world's two great military alliances might mean the end of modern civilization. Every reasonable man wants to prevent that. But there are different views on how to secure the maintenance of peace (→ Peace, Proposals for the Preservation of; → Peace, Means to Safeguard). Some trust military power as the indispensable means of keeping the peace, that is, through deterrence. Others, and these are the ones called the pacifists today, trust only non-military, non-violent means to prevent war. A close link now exists clearly between the ideas of pacifism and anti-militarism.

Pacifism can be based on religious and on ethical foundations. The Christian pacifism of Anabaptists, Quakers and Mennonites can be traced back to Christ's Sermon on the Mount. Whether religiously or ethically based, pacifism flows logically from believing that a command of a religious or ethical nature must be accepted unconditionally. Non-violence then becomes a matter of conscience. The recognition of the conscientious objector against military service started in many countries with the recognition of religious objections, and was gradually widened to include conscientious scruples based on ethical and humanitarian grounds.

Pacifism, especially in its anti-militaristic form, received in the 19th century strong impetus from the socialist movement, which regarded national military force as the most potent means of opposing and suppressing the working class and of countering their actions (demonstrations, strikes).

Modern pacifism is based on the conviction that with the introduction of weapons of mass destruction, especially atomic weapons, war has become unbearable and can no longer be regarded as a rational means of national policy. This pacifism is not based solely on emotions or idealistic values. It is in large part the result of a cost-benefit analysis. It is a rational, prudential pacifism, no longer based on good will but on good sense. It leads to the opinion that the function of armed power should be reduced and restricted to its only rational use: to prevent another State from using its national armed forces (→ Use of Force). Thus, armed forces still have the limited function of upholding the prohibition of war as laid down in Art. 2(4) of the UN Charter, by threatening with military resistance any case of armed attack (Art. 51). Some people draw further-going conclusions from the fact that modern "defensive" weapons can only be used at the risk of mutual annihilation. They argue for the abolition of all national arsenals, by general and complete → disarmament, as advocated in several resolutions of the → United Nations General Assembly. The most radical conclusion is the willingness to disarm unilaterally, and to accept

the political consequences of such military powerlessness. One particular school of thought holds that national military power can be replaced by the power of non-violent action, non-cooperation and social defence. The prospect of these steps, it is hoped, would deter the would-be aggressor. If war and an occupation (→ Occupation, Belligerent) occurred, the measures of non-violent resistance would then compel the occupant to behave decently, if not to withdraw.

Much of the history of pacifism is linked to the ascendency of the value-system of Christianity. In the first centuries of Christianity, it was forbidden to Christians to serve in the Roman army, partly because of its paganistic rituals. The Christians were also striving towards creating quite another kind of society than that which the army was designed to protect, and they regarded the army as the instrument of upholding the traditional order. During those years, however, the concept of the *pax romana* had come to the fore: the concept of peace maintained by the legions of Rome in the conquered territories. It represented the pacifism of a successful imperialist State under which a stable peace became the predominant value after the conquests had been made. Similar developments had taken place in India, under the emperor Asoka in the third century B.C.: first the conquest, then the pacification and thereafter the introduction of the value of peace within the established *imperium*.

The situation in Rome changed with the conversion of the first Christian emperor Constantine (A.D. 311). The concept of a *bellum justum* was received into Christian thinking against the background of Christian pacifism. Thus, exceptions came to be allowed against the Christians' outright prohibition of war and fighting. The concept of a *bellum justum* as a justification for warfare reached its culmination in the launching of the Crusades in the Middle Ages.

After the discovery of the Americas and the Spanish wars of conquest, the *bellum justum* concept was revived (especially by Francisco de Vitoria) as a protest against prevailing policy. The doctrine was further developed in the → natural law theories of the 17th century (notably by Hugo Grotius). In the 18th century this natural law contained a revolutionary flavour, based as it was on the interests of an emerging bourgeoisie reacting against prevailing feudal structures. The quest for peace within commercial and industrial circles was later called "Manchester Pacifism". It was based on rational calculations and contended that a country's interests could be better served by economic power than by military might.

The positive law of nations, based on treaties and customs, started from the principle of the → sovereignty of the nation-State. This sovereignty implied that a nation-State had the exclusive competence to decide whether a war it had undertaken was a *bellum justum* (→ War, Laws of, History). Gradually, the opinion prevailed that a decision about war or peace was a prerogative of sovereignty. Thus, for all practical purposes, the right to start war was recognized. Art. 2 of the 1907 Hague Convention I for the Pacific Settlement of International Disputes is a clear expression of the then existing *jus ad bellum*: "In case of serious disagreement or dispute, before an appeal to arms, the contracting Powers agree to have recourse as far as circumstances allow, to the good offices or mediation of one or more friendly powers" (→ Peaceful Settlement of Disputes; → Hague Peace Conferences of 1899 and 1907; → Good Offices; → Conciliation and Mediation).

The 20th century saw renewed attempts to outlaw war. The → Drago-Porter Convention (Hague Convention II of 1907) tried to restrict the freedom to wage war for the collection of debts. In the Covenant of the → League of Nations war was considered "a matter of concern" to the whole League (Art. 11), but it did not contain a ban on the use of force. It declared disarmament to be a precondition of peace, but the colonial system (→ Colonies) which necessarily depended on armed force was maintained. In the → Kellogg-Briand Pact (1928) a prohibition of war was formulated, but → self-defence was allowed, and it was left exclusively to every State to decide whether reasons of self-defence entitled it to go to war.

A total prohibition of war is declared in the UN Charter (Art. 2(4)). That Charter recognizes only one circumstance in which a State may decide to use violence: as self-defence against an armed attack (Art. 51). The 1974 Definition of → Aggression (UN GA Res. 3314 (XXIX)) reaffirms and clarifies the ban on the use of force as laid down in the Charter. Now, political or

economic reasons can never legitimize the use of force. This legal position, which radically restricts the freedom of the sovereign nation-State to use its armed force, is commensurate with existing military realities. The existing weapons of mass destruction would lead to the mutual annihilation of those States who possess and use them, and the survival of humanity itself would be at stake if the available nuclear weapons were used. Yet the possibility of dangerous conflict is growing. Ideological and economic conflicts may tempt States to threaten or to use force if those conflicts are considered to endanger their → vital interests. In these circumstances the possibility always exists that the State so threatened will take no notice of its obligation to refrain from the use of force.

Thus, at present, States are not inclined to base their security on the legal prohibition of war, tending instead to the cultivation of national and regional armed force, aimed at strengthening peace and security through a → balance of power. The international decentralized society of sovereign nation-States, which have no effective authority or power above them, does not encourage trust in the ban on the use of force. This situation leads to competition in stockpiling arms, and the constant struggle to capture a commanding lead in the "arms race" carries with it the danger of the arms being used.

Those striving for peace recognize the danger inherent in this method of maintaining peace. Hence the endeavour to stop the arms race, and to arrive at agreements concerning → arms control and → disarmament. Those agreements can rest on mutual processes of unilateral action or on bilateral, regional or global treaties. Measures of arms control aim at preventing national or regional armed force from becoming dysfunctional. The technological innovations in arms may contribute to a situation in which the arms contribute to the danger of violent conflict by putting a premium on haste, as in the case of the existence of a disarming first-strike capability or the capacity to launch an effective surprise attack.

In this view, armed force sould be restricted to a military force sufficient to fulfill its only legitimate function: deterring attack or resisting attack. Hence the striving for the progressive development of international law concerning arms control and disarmament, based on this ground rule: The right to possess arms is not unlimited (→ War, Laws of). This right to possess arms should be linked with the right to use arms in → self-defence, leading to the prohibition of offensive or destabilizing or excessive armed force.

Pacifists do not confine their interest to non-violence or to restriction of the possession of armed force, but also seek more reliable structures for the ordering of international society.

Plans to organize the world in such a way that peaceful relations would be secured were developed quite early in history. The aim was to safeguard peace through organization. Among the best known are the peace projects of King Podiebrad in the 14th century, of Cardinal Nicholas of Cusa in the 15th (a kind of league of nations based on peaceful → coexistence), of Emeric Crusé and the Duc de Sully in the 17th, and of the Abbé de Saint Pierre in the 18th, century. Analysis of these plans shows that in most cases they served the power and the interests of their proponent States. Though under the guise of world interest and global justice, most of the proposed organizations could be characterized as *organisationes pro domo*. In any case, they were European plans, aiming at the unity of Europe and excluding Turkey – when indeed the proposed organization did not have the ulterior motive of fighting the Turks.

The League of Nations was the first established world peace organization. After World War II it was succeeded by the UN. This organization, built upon the concept of national sovereignty, has been too weak to be able to maintain the peace. The Cold War prevented the realization of → collective security. Moreover, the organization has developed from being a peace organization into a kind of welfare organization. Growing emphasis on a new concept of global justice and the universal applicability of → human rights (→ Human Rights, Activities of Universal Organizations) has led to the reintroduction of the concept of *bellum justum*. The General Assembly approved the use of force in the struggle against colonial domination and → apartheid. Among pacifists, this new development was greeted variously. Some groups concede that violent struggle is justified for the → self-determination of peoples, while others take a more rigid line, maintaining that the principle of non-violent

action applies to these instances as well.

The attempts to effect social change in a non-violent manner, as practised in India by Gandhi and in the United States by Martin Luther King, were influential throughout the world and have served as a model to aim for in many other countries. Gandhi was not a pure pacifist, as may be seen by examining his attitude to both world wars. His struggles against the caste system and for independence were based on the concept of "satyagraha": the power flowing from truth and love. Max Weber called this ethic of non-violence a "pariah ethic", the typical mode of action of the powerless causing the oppressor through an attitude of endurance and suffering to have a bad conscience. Gandhi's action in India was successful, partly because of the character and nature of the British Government. His advice to the Jews in the 1930s to adopt the same practice against Hitler was rejected, and with good reason, by Martin Buber. A theory and practice like Gandhi's could only expect success against a régime possessing at least a modicum of humanity. King's campaign in America partly met with success. In a struggle such as his, violence can easily occur, as attested by the murder of King.

Some pacifists are convinced that non-violent resistance could be effectively used to ensure national security. They hold that social defence could be an alternative to military defence. The unemployability of modern weapons led Sir Stephen King-Hall to turn to non-violent social defence as a pacifist's credo. This amounts to the doctrine that non-violence is, in a sense, a power to hurt, and that the prospect of this power of non-cooperation and passive resistance may deter a would-be aggressor and may induce it to give up its aggressive plans. If economic exploitation of the conquered territory were its aim, complete refusal of cooperation from the local population would prevent it from reaching its goals.

The power of non-violent resistance, of passive non-cooperation, within a State structure is enormous. By total passive resistance the power of a government can be broken down because this power rests on the obedience of the governed. But the power of an aggressor does not rest on the obedience of the people it wishes to attack. Military powerlessness, as a consequence of unilateral disarmament, would make the other State's power supreme, and might contribute to the aggressor's misbehaviour.

Undisputed is the power of non-violent resistance during an occupation. Such resistance would probably lead to ruthless reaction on the part of the occupant. It is still an open question whether a sufficient number would continue with non-cooperative resistance under a brutal and cruel régime. To expect heroism from a large proportion of a population may be unwarranted.

S. KING-HALL, Defence in the Nuclear Age (1958).
D.A. MARTIN, Pacifism, An Historical and Sociological Study (1965).
A. NAESS, Gandhi and the Nuclear Age (1965).
M. MERK, Pacifisme et internationalisme (1966).
P. BROCK, Twentieth-Century Pacifism (1970).
T. EBERT, Gewaltfreier Aufstand, Alternative zum Bürgerkrieg (1970).
T.K. MAHADEVAN, Truth and Nonviolence (1970).
G. SHAPP, The Politics of Non-Violent Action (1973).
J. GALTUNG, On the Strategy of Nonmilitary Defense, in: J. Galtung, Peace, War and Defense (1976) 378–426.

BERT V.A. RÖLING

PARIS DECLARATION ON SEA WARFARE *see* Prize Law

PARIS PEACE CONFERENCE OF 1856 *see* Crimean War and Paris Peace Treaty (1853–1856); Neutral Trading

PARIS PEACE CONFERENCE OF 1919–1920 *see* Versailles Peace Treaty (1919); Neuilly Peace Treaty (1919); Saint-Germain Peace Treaty (1919); Trianon Peace Treaty (1920); Peace Treaties after World War I

PARLEMENTAIRES *see* Flag of Truce

PARTISANS *see* Resistance Movements

PEACE AND WAR

1. Peace

International peace is a condition in which States maintain order and justice, solve their problems by cooperation, and eliminate violence. It is a condition in which States respect each other's → sovereignty and equality (→ States, Sovereign Equality), refrain from → intervention and the threat or → use of force and cooperate with one another in accordance with the → trea-

ties they have concluded. Peace is further characterized by the application of orderly procedures which imply a measure of organization. Peace is based on the independence of one nation from another; therefore, categories such as peace founded on the → hegemony of one State over others, or peace that is established by the forcible creation of a multinational empire (e.g. *pax romana*), have no place in contemporary international law.

As order and justice cannot exist without law, there is an interdependence between → international law and peace. Application and enforcement of international law depend on peace, while peace is made a reality through the functioning of law. This truism is not contradicted by the existence in international law of rules that regulate the conduct of States at → war (→ War, Laws of; → Armed Conflict, Fundamental Rules). These rules emerged when the place of war in law was different from what it is today; the law of nations was then one of war and peace. At present the laws of war serve mainly humanitarian purposes because they diminish the evils of military violence once it has been resorted to (→ Humanitarian Law and Armed Conflict; → Civilian Population, Protection). And a peace-oriented international community cannot exclude use of armed force to apply → sanctions or to combat → aggression. Hence the law on the conduct of war is also concerned with domains other than strictly humanitarian ones.

Nonetheless, in spite of legal regulation of → armed conflict, peace and war are not interchangeable relationships which the law puts on an equal footing. Peace is the aim and the normal condition of existence of the international community; war is not. That is a sufficient reason why peace cannot be adequately defined as the absence of war. But the primary cause for rejecting this negative definition is that peace is not tranquility alone, but consists in positive values such as those enumerated above.

The → United Nations General Assembly (UN GA) has listed the component elements of peace in several resolutions (Res. 290 (IV) of December 1, 1949, Essentials of peace; 380 (V) of November 17, 1950, Peace through deeds; 1236 (XII) of December 14, 1957, Peaceful and Neighbourly relations among States).

2. *War*

(*a*) *Definition*

War is a contention between two or more States in which their armed forces are engaged in mutual acts of violence. These acts usually combine with other measures harmful to the enemy, particularly in the economic field (→ Economic Warfare). The purpose of war is to defeat the adversary in order to impose on him such terms of peace as the victor is prepared to grant. Resort to violence attests to the hostile attitude of at least one party. In fact, no war occurs without a certain intensification of animosity by one State towards another. More often than not, the animosity is mutual.

In order to constitute war in the sense of international law, these components must be regarded as war by at least one party to the armed conflict. When all parties refuse to treat the fighting as war, there is no war in the sense of international law. The international legal notion of war combines the foregoing elements with the intention and decision of at least one party to engage in war and to be at war; there must be a will, an intention, to wage war (*animus belligerandi*). It suffices that only one party regards armed violence in progress as war. The hesitation or contrary view of the other party is then ineffective: the state of war now exists between them.

On the other hand, the attitude of third States is not decisive; they may enforce rights and duties of neutrality (→ Neutrality, Concept and General Rules), but if the parties persist in sharing a different view, such one-sided application of neutrality laws will not turn the conflict into a war.

Whether a determination by an international organization is conclusive remains debatable. Under its Covenant, the → League of Nations was competent to determine the existence of war. Yet the finding of the League Assembly relating to Japanese military action against → China in 1937 did not create a state of war between the two countries. The → United Nations Charter empowers the → United Nations Security Council to determine the existence of "any threat to the peace, breach of the peace, or act of aggression" (Art. 39; → Peace, Threat to). "War" is not mentioned in that provision, but it could fall

under the second and/or third heading; any war is a breach of the peace. However, the question is one of qualifying a breach of the peace specifically as war; the UN may prefer to avoid such a qualification or may find it redundant (see UN SC Res. 82–84 (1950) of June 25 and 27, 1950 and UN GA Res. 498 (V) of February 1, 1951 regarding hostilities in → Korea).

Intention as a factor in bringing about war is the core of the notion of state of war. If a nation declares war on another, or if a nation uses military force against another and the latter considers this an act of war, then a state of war exists between them with all the consequences following from international law (→ War, Effect on Contracts; → War, Effect on Treaties). The state of war must be distinguished from hostilities, which consist of the actual application of violence and coercion by the armed forces of the contending nations against each other.

The international legal concept of war is made up of these two parts: state of war and hostilities. They need not coincide in time. The state of war results from a → declaration of war, but some time may still pass before hostilities ensue between the parties. Similarly, it may take a long time before hostilities lead to a state of war (e.g. Japanese operations against China, 1931–1941).

In coalition wars in which only some participants fight (→ Alliance; → Collective Security), no hostilities need take place between certain belligerents, as occurred between the German Reich and several Latin American countries during World War II. And when a general → armistice interrupts hostilities, the state of war is not thereby affected (→ Suspension of Hostilities). Each war constitutes an armed conflict (with the marginal exception of the relationship between non-fighting adversaries in a coalition war), but not every armed conflict is a war. No war exists when a state of war has not ensued from armed conflict, or when none of the parties has the intention to institute a state of war. Hence armed conflict is a notion that is broader than war.

There are many instances of military action which the States involved did not, for one reason or another, treat legally as war: the Greco-Bulgarian hostilities of 1925; military operations by Soviet forces on Chinese territory in 1929; fighting between Japan and China which started in 1931 in Manchuria and subsequently spread to other parts of China to evolve into a state of war only in 1941; hostilities between the Soviet Union and Japan in 1938–1939; entry of Soviet troops into Poland in 1939 (but simultaneous fighting between German and Polish forces constituted war); fighting between troops of the United States and of the People's Republic of China in Korea (1950–1953); armed conflict between China and India (1959–1962); fighting between India and Pakistan in → Kashmir (1965); United States military activities against the forces and the territory of the Democratic Republic of → Vietnam (1964–1973) and against the territory of Cambodia (1970); and military operations between the two Vietnamese States.

Thus the attitude adopted by the adversaries will place their armed conflict beyond the legal category of war in spite of the objective standard of fact. However, this latitude does not mean that the operation of the laws of war can be put in doubt. The traditional reference to "war" should not be misleading: the rules on the conduct of hostilities and the protection of war victims govern the use of armed violence between States irrespective of whether they are qualified as war or not (→ Geneva Red Cross Conventions and Protocols).

As an element of war, armed violence must be mutual. Unilateral acts of force do not by themselves create a relationship of war, but they may lead to it. In particular, war may result from the institution of pacific blockade (→ Blockade, Pacific), military → intervention, or forcible → reprisals. Further, to constitute war, fighting must be of some continuity and duration. An isolated incident in which military units of two States are engaged is not war, although it may result in it.

Finally, it should be borne in mind that the meaning of war in international law is not necessarily identical with that of municipal law and its various branches, for example, insurance law.

(*b*) *Place of war in law*

The early writers divided the causes of war into just and unjust; consequently, there was a similar division of the wars themselves. A cause that was just gave the monarch (then embodying the State) the right to resort to war, the *jus ad bellum*. The

essence of the medieval doctrine was that monarchs in variously defined circumstances (i.e. when there was a just cause), could lawfully wage war. From Grotius to Vattel, the classical writers maintained the distinction between just and unjust causes of war, though they concentrated on the law governing the conduct of war, *jus in bello*. The interest of classical writers in the *jus in bello* did not mean that they regarded any war as permissible.

However, international law historically never succeeded in defining precisely the lawful causes of war. It neither condoned nor tolerated a license to go to war, yet the generality of the criteria left much freedom to States. The result was that war was often a lawful means of settling international disputes. It was either a remedy for encroachment of a right or an instrumentality for bringing about a change in the existing legal position. War could play this double role because of a basic gap in the system of international law: the absence of generally obligatory procedures and mechanisms for the → peaceful settlement of disputes and for → peaceful change.

There were some early neutrality treaties and treaty restrictions on the right to resort to war (→ Drago-Porter Convention (1907); → Bryan Treaties (1913/1914); see also → Peace, Historical Movements towards; → Peace, Proposals for the Preservation of). But it was only with the setting up of the League of Nations that the legal place and function of war began to undergo a significant modification. The League Covenant outlawed war in certain specific circumstances. What was more important, it provided an organization and procedures intended to prevent war and to bring about non-forcible solutions of inter-State disputes. The outlawry of all wars of aggression came with the → Kellogg-Briand Pact (1928). War ceased to be a lawful instrument of national policy for the enforcement or change of legal rights, except in case of → self-defence or defence of others. And wars of aggression or in violation of treaties became criminal (→ Crimes against Peace; → Nuremberg Trials).

By prohibiting use of force the UN Charter (Art. 2(4)) in itself bans resort to war. The right of individual or collective self-defence remains unimpaired, while the UN Security Council may take military action under Art. 42. The law and practice of the UN has given rise to elastic procedures of peaceful settlement and peacekeeping (→ Peace, Means to Safeguard).

Though war is no longer a legal condition or relationship equal to peace (States cannot choose between peace and war), it is still a legal condition in the more limited sense that its consequences and conduct are regulated by law.

3. Intermediate Status

The dichotomy of peace and war has been criticized in contemporary legal writings as an oversimplification of actual relations among States. According to McDougal and Feliciano, "this dichotomy is hardly a faithful reflection of the fluid and complex process of coercion in the contemporary world arena or of the equally complex process of legal authority".

Beside peace and war Jessup has distinguished a third category, the "legal state of intermediacy". In his view its features are: "a basic condition of hostility and strain" between the opposing parties; "the issues would be of so fundamental and deep-rooted a character that no solution of a single tangible issue could terminate it"; and, "there would be a reluctance on both sides to go to war, or at least there would be the absence of a decision to resort to war". These features are political rather than legal, except for the absence of war. They do not create a status legally different from peace, however precarious and uncertain the peace might be, such as the "Cold War" between the Soviet Union and the Western Powers.

It there is an armed conflict without a state of war, i.e. if the armed forces of two or more States are engaged in fighting against each other but at the same time maintain some peaceful relations (e.g. diplomatic, consular, contractual), then the legal position deviates from both peace and war (→ Consular Relations; → Diplomatic Relations, Establishment and Severance). For the phenomenon of armed conflict is contrary to peace, while the laws of war by definition regulate non-peaceful relations. War, on the other hand, terminates peace and leaves no room for the operation of the law of peaceful relations. Although what happens between States does not always fully fit in with peace or war, this does not render these two concepts and their distinction superfluous.

Q. WRIGHT, A Study of War, 2 vols. (1942).
F. GROB, The Relativity of War and Peace; A Study in Law, History and Politics (1949).
H. RUMPF, Der Unterschied zwischen Krieg und Frieden, AVR, Vol. 2 (1950) 40–50.
P.C. JESSUP, Intermediacy, NordTIR, Acta scandinavica juris gentium, Vol. 23 (1953) 16–26.
H. WEHBERG, Krieg und Eroberung im Wandel des Völkerrechts (1953).
P.C. JESSUP, Should International Law Recognize an Intermediate Status between Peace and War?, AJIL, Vol. 48 (1954) 98–103.
L.M. MORENO QUINTANA, El tercer estado del derecho internacional, in: H.K.E.L. Keller (ed.), Völkerrecht und Völkerpflicht (1954) 35–40.
M.S. MCDOUGAL, Peace and War, Factual Continuum with Multiple Legal Consequences, AJIL, Vol. 49 (1955) 63–68.
L. KOTZSCH, The Concept of War in Contemporary History and International Law (1956).
G.I. TUNKIN, Co-Existence and International Law, RdC, Vol. 95 (1958 III) 1–81.
R.R. BAXTER, The Definition of War, RevEgypt, Vol. 16 (1960) 1–14.
M.S. MCDOUGAL and F.P. FELICIANO, Law and Minimum World Public Order, The Legal Regulation of International Coercion (1961).
R. ARON, Paix et guerre entre les nations (3rd ed. 1962).
Q. WRIGHT, The Role of International Law in the Elimination of War (1962).
I. BROWNLIE, International Law and the Use of Force by States (1963).
LORD MCNAIR and A.D. WATTS, The Legal Effects of War (4th ed. 1967).

KRZYSZTOF SKUBISZEWSKI

PEACE, HISTORICAL MOVEMENTS TOWARDS

A. Types of Peace Movements. – B. Intellectual Peace Movements: 1. The Middle Ages and Early Modern Period. 2. Humanistic and Religious Writers (1500–1650). 3. Concrete Political Plans (1600–1750). 4. Abstract-General Plans of the 18th Century. 5. New Religious and Speculative Thinking about Peace (1690–1815). 6. Rational-Economic Schools (1780–1840). – C. Modern Political Peace Movements: 1. 19th Century Conferences and Literature. 2. Aspects of Peace Movements in the 20th Century.

A. Types of Peace Movements

The term "peace movement", strictly speaking, signifies the endeavours of small or large groups of persons to avoid and to ban → armed conflicts involving their countries and others, and to found international institutions to secure and maintain peace (→ Peace and War; → Peace, Means to Safeguard). Peace movements in this sense are possible only within a political process that guarantees freedom of speech and, even more so, freedom of association, prerequisites which have generally existed for no more than two centuries in a few countries. As far as current international law is concerned, these movements would seem in theory to have fulfilled a major part of their *raison d'être* with the adoption of the → Kellogg-Briand Pact (1928) and the prohibition of the → use of force in the → United Nations Charter.

In a broader sense, however, the term "peace movement" may also be considered as an intellectual phenomenon, i.e. a movement appearing in the sciences, the social sciences, philosophy, law and literature which seeks nothing less than the avoidance of war, using various methods to bring about a conciliation of interests among States. It further aims to change the mental attitudes not only of those who govern States but also of those governed so that the inclination towards war can be eliminated or at least reduced to a minimum. For the most part, the supporters of this intellectual movement attempt to create ethical or (especially within the organizational sphere) legal rules (→ Peace, Proposals for the Preservation of). The intellectual peace movement, which began in the Middle Ages, drew inspiration from humanism and rationalism as well as from idealistic, romantic, utilitarian-economic, and materialistic philosophies. In all of its various manifestations, the intellectual peace movement succoured and paved the way for political peace movements. Both political and intellectual movements towards peace have had effects on politics and international law, though the purely intellectual movements have done so to a different and lesser extent.

This article focuses on movements towards peace, mainly from the historical perspective. When war became outlawed in this century as a means of international relations, the movement towards peace continued, but it necessarily changed its character. Thus, in recent decades, consideration of the state of general international law has moved into the background, while other phenomena directed to more specific events and issues have become dominant. These more recent

manifestations of the movements towards peace fall largely outside the scope of a treatment of the rules of current international law, although it must be recognized that the → arms control and → disarmament issues, for instance, have to a certain extent already entered the international law sphere. Nevertheless, for the purposes of this article, it is justified to limit the considerations mainly to historical aspects. The more recent developments have neither found expression in ways easily related to current categories of international law nor have they, in general, been accepted by the international community to an extent which would lift them out of the intellectual and political sphere into the sphere of international law.

B. Intellectual Peace Movements

1. The Middle Ages and Early Modern Period

The basis for the gradual development of the idea of peace may be found, at least in essence, in the writings of several medieval authors. The prominent religious authors of the Middle Ages, especially of the high scholasticism, abominated → war. Though they considered war in the *civitas terrena* as unavoidable, they wanted to limit and regulate it (*bellum injustum*): St. Augustine (De civitate Dei, 413–426); Thomas Aquinus (Summa theologica, about 1266–1273, Summa contra gentiles, 1255–1264); William of Ockham (Dialogus de potestate Papae et Imperatoris, about 1334–1343), as well as Spanish late scholastics: Francisco de Vitoria (De iure belli hispanorum in barbaros, 1529); Dimingo de Soto (De iustitia et de iure, 1556); Ferdinand Vasquez (Controvérsarium illustrium libris tres, 1559); Francisco Suarez (De legibus ac Deo legislatore, 1613); Baltasar de Ayala (De iure et officiis bellicis, 1582). Among the medieval writers on temporal law, Baldus de Ubaldis, who followed the Decretum Gratiani (1349) has to be mentioned in particular (Commentaria in Corpus iuris civilis, therein Codex, liber 1–11, 1585).

During the same period, political, though still unfocused, peace plans came into being. These plans were not abstract generalities; they were aimed at specific objectives for specific reasons (for example settling the Turkish Wars), and showed similar structures.

Special reference must be made here to the ideas of Cardinal Pierre Dubois, adviser to Philip le Bel. His plan for a European system to secure the peace (1306) was in opposition to a Europe of Emperors and Popes and called instead for a European federal order under the auspices of dukes. Similarly, around 1460, King Georg Podiebrad of Bohemia suggested an alliance of princes to save the world's order from the infidels and create peace in the Occident, providing for the judicial punishment of peace-breakers as nova *jure de natura*.

In the early modern period, the well-known creaters of the modern, systematic, self-supporting law of nations such as Grotius, Gentilis, Bynkershoek, and later Vattel and others (→ History of the Law of Nations; → War, Laws of, History) dealt with the maintenance of peace by using arguments, which although religious, were rational. In accordance with the prevailing state of the law of nations, however, none of these authors fundamentally disapproved of war, which was seen as inevitably reflecting the inherited imperfections of human nature.

2. Humanistic and Religious Writers (1500–1650)

The first and the most thoroughgoing philosopher of the humanistic and religious strivers toward peace during the era of the Reformation's intellectual renewal is Erasmus of Rotterdam (Enchiridon militis christiani, 1503; Quaerela pacis, 1518). The ideas of Erasmus were taken up and developed further by Johannes Ludovicus Vives (1526) and Josse van Chlichthove (1535). The writings of Theophrastus Paracelsus whose thoughts of perpetual peace (Philosophia adepta, later than 1537) are in a kindred spirit, although conceived from a different viewpoint. Sebastian Frank wrote popularly in German, aiming at a broad renewal of the Christian conscience (Ketzerchronik, 1531; Guldin Arch, 1538; Kriegsbüchlin des frides, 1539); his condemnation of war as such already shows resemblances to modern anti-war argumentation. Andrzej Frycz Modrzewski (Commentarium de republica emendanda, libri 5, 1554) was a more thoroughgoing Christian peace philosopher, as was Amos Comenius (Angelus pacis, 1668).

As compared with these writers, who generally

disapproved of war as a political device, developments in the 17th century must to some extent be considered a step backwards.

3. Concrete Political Plans (1600–1750)

The so-called "Great Design" of King Henry IV of France stemmed from his cabinet secretary, the Duc de Sully. This plan was put into Sully's last will and testament in 1617, as revised in 1638, but it was not published until 1662, 22 years after his death. The plan was intended to eliminate war in the West by means of an alliance between sovereigns and States regardless of their different Christian denominations, and was thus conceived as a *république chrétienne* against expansionist ambitions of the Turks. The inner structure of this republic was to be based upon the legal equality between States as well as actual relative equality, to be effected through territorial adjustments. Notwithstanding the celebrity and stimulating impact of Sully's plan, the provisions for the leading role to be played by the French King would indicate that the plan was not a peace plan in the loftiest sense.

At around the same time, as Sully's plan was written, Abbé Emeric Crucé's work on "Le Nouveau Cynée" (1623) appeared. While independent of Sully's plan, it is parallel to it in an organizational sense. Crucé's plan provided for a permanent Congress of Envoys and a court of → arbitration at Venice; for these organs, in line with canon law, the principle of majority rule was to be accepted. Anticipating rationalistic ideas, the organization was supposed to embrace all of the world's sovereigns. In contrast to previous plans, Turkey was not to be excluded, and the Turkish Sultan was to rank second only to the Pope. A militaristic quality is reflected in Crucé's idea of a military supervision by sea and by land of his "freedom of commerce".

Leibniz is praised by some as having been a strong advocate of peace; this may be justified from an intellectual standpoint and in individual instances. He was, however, not opposed to war, nor even disposed to limit its general function. Thus in 1672 Leibniz proposed to Louis XIV that he secure the Eastern trade route to ensure peace within Europe. His emphasis on the peace functions of the *Römisches Reich Deutscher Nation* is misleading, since it was motivated by the same sort of political considerations as the proposal to secure the trade route. Thus, although Leibniz was concerned with peace, his work needs to be distinguished from movements towards peace.

Abbé de Saint-Pierre's works on everlasting peace in Europe (1713, 1716, 1729) created a literary sensation. Basically, they harkened back to the peace plans of Henry IV by proposing a union of sovereigns. Abbé de Saint-Pierre was, however, more realistic: Recognizing the States' natural right of inviolability, he did not envisage territorial adjustments, but only the settlement of existing legal disputes. Utilitarian thinking governed all of the details of his plans; he appealed to the sovereign's real interests, portraying the shortcomings of wars and the advantages of peace. The union's organ, the Congress of Envoys, ignoring the history of → diplomacy, was to have decision-making functions; this idea, however, was unrealistic and contradictory. Unlike his predecessor Sully, Abbé de Saint-Pierre did not grant France a political preponderance in his ideas. However, Leibniz, in his role as a diplomat, rejected the plan in 1714; King Frederick the Great of Prussia later followed suit. Voltaire, too, rejected it in "La paix perpétuelle" (1769). Voltaire's writing contains only his well-known critique of European conditions rather than any peace proposals. He must nevertheless be numbered among the confirmed opponents of war.

During the 17th and the 18th centuries, several works, based upon rational *jus naturale*, contained the concept of a peace secured by means of international law: The alliance of sovereigns, supranational organs, the principle of majority rule, the equality and integrity of States, the settlement of previous points of controversy, and unrestricted world trade all received attention. In short, peace was to be attained by means of law. The basic structure of all the plans was monarchic. Democracy, as a process which encourages peace, was either not explored or expressly rejected (Crucé). A condemnation of war in principle was not yet to be found.

4. Abstract-General Plans of the 18th Century

The impact of rationalism did not immediately lead to a rejection of war as an option in politics. Jean-Jacques Rousseau revised Saint-Pierre's writings and in 1761 published an "Extrait". Later, however, he strongly criticized it (Con-

fessions, 1782, book 9). Rousseau nevertheless agreed with the concept of a federation of States and emphasized that the States would not thereby lose any → sovereignty, given their taking part in the entirety and conforming with his concept of the *volonté générale*. On the other hand, Rousseau regarded the federation's competence to use coercive measures as a means for uniting and providing security for the member States. The fragment "Etat de guerre" provides further evidence for considering Rousseau not a pacifist (→ Pacifism), but rather a peace-loving circumscriber of war.

In the 18th century, rationalistic thinking about peace reached its peak with Immanuel Kant's presentation of a new point of view. It was the result of Kant's re-evaluation, over many years, of Rousseau's ideas. Although Kant initially viewed Rousseau's rationalist thinking as extremist (and later viewed Rousseau himself as an unrealistic enthusiast) he finally accepted Rousseau's aim of a federalist union. Without belabouring the contradictions inherent in Rousseau's constructs, Kant developed a new formulation (Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht, 1784; Vom Ewigen Frieden, 1784/1795). Though the basic principle again was the idea of an alliance of peace or a league of nations, it was to be formed not by sovereigns but by States (i.e. governments). Peace as an ethical imperative (Vorrede zur Metaphysik der Sitten, 1797) formed the basis for an unconditional demand for peace. From a realistic point of view, however, Kant took war into account and considered the laws of war and established procedures for entering into peace treaties to be indispensable (→ Peace Treaties). Like the other writers mentioned in this section, Kant was both a theoretical circumscriber of war and an ethical adversary of war. In essence, Kant's thinking laid the foundations for the modern peace movement. In Germany as well as in Switzerland, the Age of Enlightenment brought forth further peace plans of lesser significance: E. Toze (1752); J.F. v. Palthen (1758); and J.G. Schindler (also known as Schinly) (1788).

5. New Religious and Speculative Thinking about Peace (1690–1815)

Because of Great Britain's geographical location, the Anglo-Saxon contribution to the ideas of peace arose at a relatively late stage. Though influenced by religion, British thinking drew attention to economic arguments for peace, thanks to the contribution made by Quaker thought.

William Penn (the founder of Pennsylvania), having seen Dutch and German provinces ravaged by war in 1677, wrote the "Essay towards the Present and Future Peace of Europe" (1693). Penn's Essay was morally related to Sebastian Frank's spiritualism, and its organizational proposals resembled those of Emeric Crucé. The Quaker spirit gave rise to a strong emphasis on the economic advantages of peace (e.g. unrestricted world trade), and a belief that the killing of men, even in the course of war, was a violation of the Christian conscience. To ensure a reign of peace between States, Penn proposed a federal union, a European Diet. The numbers of representatives each State would send to the parliament was to be determined by reference to the State's income. Penn's idea of a parliament with broad powers did not allow for other counterbalancing powers of the sort proposed by John Locke. However, the parliament was not to hamper free trade; on the contrary, the promotion of peace was to facilitate it and to allow travelling without needing a passport. In Penn's view, man's secular fortune was quite compatible with religious-ethical ideas; the provision for this external fortune through the promotion of peace paralleled the ideas of Penn's countryman Jeremy Bentham (see section 6 *infra*). The "Epistle of Love and Friendly Advice to the Ambassadors of Europe met at Nimeguen" (1678), written by the Quaker theologian Robert Barclay, was directed at individuals, and was not a general peace plan. John Beller's "Some Reasons for an European State" had already pointed out its limitations by 1710.

The French Revolution and the early period of Romanticism (Herder) gave rise to new peace plans on the continent. In 1797, Friederich Gentz addressed a letter to the new King of Prussia which received a warm reception and anticipated the 19th century balance of power doctrines. Gentz also wrote an article, "Über den ewigen Frieden" (1801), which became widely known. In his "Grundriss des Völker- und Weltbürgerrechts" (1797), the philosopher Johann Gottlieb Fichte supported similar ideas. Johann Joseph von Görres' Friedensplan (1798) and Friedrich Freiherr

von Hardenberg (known as Novalis) in "Die Christenheit und Europa" (1808), were also supporters; both found the characteristic idea of peace to be a religious one. Jean Paul's "Friedensschrift" (1808) accepted the unification of Europe by Napoleon. All of these writings at the turn of the century were dominated by a romantic attitude towards the world.

The → Vienna Congress (1815) aroused hopes for a permanent peace in Europe. In a post-revolutionary but not solely restorationist France, the Comte de Saint-Simon, a utopian socialist, and Augustin Thierry put the case for a European community of States with a parliament consisting of two houses, in the book "De la réorganisation de la société européenne" (1814), based upon Saint-Simon's "Lettres d'un habitant de Genève à ses contemporains" (1803). A late descendent of this school was P.J. Proudhon with his proposal for a federative Europe; because of its basis in anarchism, Proudhon's thinking in part is inconsistent (Du principe fédératif, 1863).

6. Rational-Economic Schools (1780–1840)

The emphasis upon the economic and social advantages of peace on the basis of religious motivation, as already manifested in Penn's writings, was further developed by the leading utilitarian philosopher Jeremy Bentham. His work "Principles of International Law" contained the "Plan for an Universal and Perpetual Peace". The work was written in 1786/1789, but for personal and political reasons Bentham's work was published only posthumously (1843). Contrary to the (then) common and traditional glorification of war, Bentham considered war as the greatest evil. The greatest good for the greatest number of men was to be reached by avoiding, or even eliminating, war. Bentham's plans thus provide for an international court of justice or an international court of arbitration. Such a court was to form the basis for the automatic development of a Congress of States. This Congress would enforce the court's judgments by identifying the States acting in violation of them; with a free press, public opinion would make waging war impossible, but in the rare instances of out-and-out contempt of court, war remained as an ultimate method of enforcement. Bentham's plan was based purely on rational rather than religious grounds.

The liberal economist Richard Cobden followed Bentham's political ideas, but always in connection with concrete, pragmatic causes (i.e. the Manchester School, free trade and the Anti-Corn Law League). Apart from a few publications (e.g. the piece entitled "Russia" (1836)), Cobden's contributions consisted of speeches delivered to the House of Commons, for example against mercantilism, against gunboat diplomacy, and proposing the formation of a court of arbitration. In contrast to Bentham's ideas, Cobden's speeches encompassed traditional Christian ethics, an element which links Cobden with the peace societies of the first third of the 19th century.

C. Modern Political Peace Movements

1. 19th Century Conferences and Literature

(a) At the beginning of the 19th century, after a long period of war, the political peace movement commenced. The Quakers' ideas formed its intellectual basis, and private organizations (Massachusetts Peace Society, 1815; Peace Society, 1816, London) its practical basis. The number of peace societies in the United States grew rapidly, and in 1828, on William Ladd's initiative, they merged to form the American Peace Society, with Ladd serving as the Society's first president. In 1840, Ladd wrote the "Essay on a Congress of Nations", proposing, for the first time, a world parliament. In deference to the member States' sovereignty, resolutions were to be adopted by unanimous vote. In this early stage of development, the dichotomy between religious utopianism and pragmatism in the peace movements was already apparent. The Quakers sought to eliminate war on moral grounds; and radical Quakers opposed even defensive wars. Independent of the Quakers were those who attempted carefully and pragmatically considered organizational innovations. This latter approach was clearly reflected in "War and Peace" (1842) written by William Jay, son of John Jay, the first Chief Justice of the United States Supreme Court. In this work, the ideas of the Latin American States' peace conference at Panama (1826) are thoroughly and systematically elaborated. J.B. Sartorious' "Organon des vollkommenen Friedens" was published in Zurich in 1835; Sar-

torious' polemic against the → Holy Alliance was combined with the proposal of a court of arbitration on every continent. The intellectual spirit of the British peace societies is reflected in R. Macnamara's "Peace Permanent and Universal" (1841). S. Pecquer's "De la paix" (1842) has a similar Christian ethical content.

P.R. Marchand's proposals for an everlasting peace (1842) clearly owe a debt to the old plans from Sully to Saint-Pierre. Proposed was an alliance of European States: the emphasis was on the major powers (→ Great Powers), with France playing the paramount role, although this was to be moderated by appointing Russia to the presidency and establishing Alexandria as the seat of the alliance. The Quakers' supranational attitude led to the foundation of the Société de la morale chrétienne (1821) which, in 1842, formally merged with the peace societies.

The middle of the 19th century saw numerous congresses of the peace societies in Europe and America taking place and gaining wide publicity. Organizationally, the foundation of the Ligue internationale de la paix et de la liberté in Paris (1876) and, almost at the same time, of the Internationale Gesellschaft der Friedensfreunde in Germany were the outward results of these activities. The controversies within the peace societies, however, continued to exist. Whereas one tendency in the peace movement was a traditional, pragmatic one, the other, represented in particular by the Quakers, relied on religious arguments and often made utopian proposals. The best known congress at Frankfurt in 1850 developed the distinction between direct and indirect means for the preservation of peace. It inspired Victor Hugo to call for "Les Etats Unis de l'Europe" (1851). (In 1849, Hugo had already opened the Paris Congress with a trend-setting speech).

After the Franco-German war of 1870, more far-reaching concepts of peace emerged in both the socialist and the liberal camps. The Anti-War Resolution of Lausanne called for a free league of nations together with an emancipation of the working-class. The Ligue internationale de la paix et de la liberté developed similar demands with revolutionary tendencies. Its leading members were Victor Hugo and Giuseppe Garibaldi, and Charles Lemonnier published a work under Hugo's motto "Les Etats Unis de l'Europe". Sully's and Saint-Pierre's ideas were now based upon the idea of the rights of the people. The right to decide upon war and peace was to belong to the people themselves, not to their governments, even though they might have proved to be as blood-thirsty as kings.

Later on, the Ligue was to be expanded beyond Europe. The Congress of the Ligue held in 1889 rather cautiously mentions the necessity of permanent arbitration. The International Peace Bureau, the European peace associations' umbrella organization, was founded in 1891 in Berne (since 1919 it has had its seat in Geneva). The World Peace Congresses of Rome (1891) and of Budapest (1896) formulated organizational plans for maintaining peace. The churches in Europe rather hesitantly took up these questions of foreign policy, even though at the end of the 19th century the Pope's encyclical "Praeclara gratulationis" (1894) was addressed in general terms.

On the literary level, the peace movement's collective programmes were served by the efforts of writers who for the most part had a legal education: James Lorimer's "The Institutes of the Law of Nations" (1884) emphasized and distinguished Ladd's proposals by suggesting a world federation of States, patterned on the Constitution of the United States instead of on an omnipotent world parliament. The obstacles against arbitration were to be surmounted by distinguishing between solely political controversies and issues of law. Johann Caspar Bluntschli thought of a more limited and looser organization: "Die Organisation des europäischen Staatenvereins" (1878). The German philosopher Konstantin Frantz proposed an International Academy of History and Politics ("Der Foederalismus als universale Idee", Anhang, 1879). This idea has today been put into practice by a number of peace institutes.

In T.W. Stead's "The United States of Europe on the Eve of the Parliament of Peace" (1898), a useful survey of the thought of the outstanding minds of the peace movement in those days, emphasized the pragmatic philosophers. The highly personal work by Bertha von Suttner "Die Waffen nieder" (1889) was emotional and sometimes utopian. Outstanding individuals such as Alfred H. Fried (with whom von Suttner founded

the Deutsche Friedensgesellschaft, 1892) and Ludwig Quidde wrote against war as a political option. Their articles appeared in "Friedens-Warte", the organ of the Deutsche Friedensgesellschaft. This society was later joined by Hans Wehberg, who made a substantial contribution (Das Problem eines internationalen Staatsgerichtshofs, 1912). In 1938, Bart de Ligt wrote his impressive outline "Inleiding tot de Wetenschap van de Vrede" for the Académie de la Paix, Paris.

(b) The effect of the peace movement on governments was not direct. It can be deduced, however, from the manner in which pending questions on the laws of war were treated. The Paris Peace Treaty of 1856 led to the Paris Declaration and to the regulation of → sea warfare (→ Crimean War and Paris Peace Treaty (1853–56)). Just as Henry Dunant's private solicitude for war victims led to the Geneva Convention of 1864 (→ Humanitarian Law and Armed Conflict), the peace movement, together with the exposition on the destructive power of modern weapons by the Russian J. von Bloch (Der Krieg, 1897) and the foundation of the Nobel Peace Prize (1896), was instrumental in prompting further developments. Nicholas II of Russia and the circular → note of his minister of foreign affairs, Count Mouravieff, led to the Hague Peace Conference of 1889; the Second Conference of 1907 was initiated by United States President Theodore Roosevelt (→ Hague Peace Conferences of 1899 and 1907). The attitude taken by the Conferences followed the lines favoured by the pragmatic school within the peace movement and resulted, *inter alia*, in Convention I for the Pacific Settlement of International Disputes (1899) (renewed and made more precise in 1907). Following Ladd and Lorimer, political and legal issues were separated. Arbitration was to settle only those political controversies which the States did not consider domestic matters (→ Domestic Jurisdiction).

2. *Aspects of Peace Movements in the 20th Century*

World War I interrupted the peace movement's development and influence. Thereafter, however, the victorious powers took up ideas of the peace movement. United States President Woodrow → Wilson's Fourteen Points of January 8, 1918 included his demand for a league of nations. His proposals were neither fully recognized in the Paris Treaties (→ Peace Treaties after World War I) nor were they ratified by the United States Senate. The → League of Nations was not entirely consistent with the basic notions of the peace movements; its Covenant imposed only weak obligations on member States and established inadequate institutional competence to maintain peace. War as a whole remained a means of politics; → sanctions against aggressors were foreseen only after the commencement of a war, in practice often with little effect (e.g. in the Italo-Ethiopian War, 1936). It was not until the Kellogg-Briand Pact (1928) that war became prohibited under the law of nations. This Pact lacked, however, any sanctions and was therefore ineffective. The intellectual preparatory work of the peace movements influenced the formulation of the Four Freedoms contained in the → Atlantic Charter of 1941 (which, apart from these aspects, is a rather bland political document). The same is true with regard to the conferences of the main Allied powers in Tehran and Moscow in 1943 (→ Tehran Conference) and in Yalta in 1945 (→ Yalta Conference). The discussions on the → United Nations (→ Dumbarton Oaks Conference (1944); San Francisco Conference (1945)) and the various drafts for its creation clearly reflect many of the ideas of the peace movement's moderate school. Thus, Chapters VI and VII of the → United Nations Charter deal with the obligations of States to settle conflicts peacefully, and establish the competence of the UN to prevent conflicts (→ Peaceful Settlement of Disputes; → United Nations Peacekeeping System). Moreover, the UN Charter bans → use of force except in cases of → self-defence.

The limited efficacy of the UN in the practical maintenance of peace, especially with regard to wars in the Third World, makes further private activities necessary (→ Non-Governmental Organizations). The religious dimension has proved to be of lasting importance. On the part of the Roman Catholic Church, this dimension was manifested in 1920 and 1922 by two encyclicals (Pax Christo and Ubi arcano), reaffirmed by Pacem in terris (1963). Today, organizations of laymen are numbered among the most effective advocates of the idea of peace, e.g. the Roman

Catholic Pax Christi movement and the Protestant ecumenical Council of Churches. Many of the organizations founded before World War I or shortly thereafter, for example the large Anglo-Saxon societies and the Geneva International Peace Bureau, still exist.

The peace movements' emphasis has shifted, however, to institutionalized research. This trend began immediately after World War I on a modest scale mainly in the United States (L. Richardson, Quincy Wright). As early as 1919, the International Research Council was founded; it was succeeded, in 1931, by the International Research Council of Scientific Unions. Today, the main subject of scientific research focuses on the prevention of war. Throughout the world, a large number of institutions now focus on research for peace. Fourteen of them work on an international level. They have their seats in several States, including the United States, several Western European countries and Yugoslavia. At the national level (including Eastern bloc States as well as the large countries of the Third World), there are now more than 130 research institutions (listed by the Deutsche Gesellschaft für Friedens- und Konfliktforschung, Bonn, 1981).

The historical dualism in the history of peace movements, between pragmatic and idealistic-religious (and from the 19th century on, also ideological) schools still exists. It is today expressed in different notions of peace that form the basis and the ultimate goals of research now being undertaken: Peace is characterized on the one hand by the absence and avoidance of war, and on the other by the absence and elimination of institutionalized violence. Several academic disciplines take part in both lines of research: political science, sociology, psychology, history, the sciences, all are applied for the purposes of peace research. The analysis and classification of critical, dangerous and endangered areas in the collective lives of peoples and States, seen both on the psychological and the physical levels, is the proper subject of all of the peace research institutions in their work toward their ultimate goal of attaining peace.

H. MARKGRAF, Über Georg von Podiebrads Projekt eines christlichen Fürstenbundes zur Vertreibung der Türken aus Europa und Herstellung des allgemeinen Friedens innerhalb der Christenheit, Sybels Historische Zeitschrift, Vol. 21 (1869).

E. NYS, Histoire littéraire du droit international, A propos de la Paix perpétuelle de l'abbé de Saint-Pierre, Emeric Crucé et Ernest, Landgrave de Hesse-Rheinfels, Revue de droit internationale et de législation comparée, Vol. 22 (1890) 371–384.

A. SMITH, An Inquiry into the Nature and Causes of the Wealth of Nations (1893).

F. STAUDINGER, Kants Traktat vom ewigen Frieden (1897).

H. DIETZEL, Weltwirschaft und Volkswirtschaft (1900).

A.H. FRIED, Handbuch der Friedensbewegung, 2 vols. (1911).

W. SCHÜCKING, Der Staatenbund der Haager Konferenzen (1912).

H. LAMMASCH, Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfang (1914).

O. KRAUS and C. KLATSCHER, Jeremy Bentham's Grundsätze für ein künftiges Völkerrecht und einen dauernden Frieden (1915).

J. TER MEULEN, Der Gedanke der internationalen Organisation in seiner Entwicklung, 2 vols. (1917–1929).

P.L. LUCAS, Un plan de paix générale et de liberté du commerce au XVIIe siècle, Le Nouveau Cynée d'Emeric Crucé (1919).

J. TER MEULEN, Les Français à la recherche d'une société des nations depuis le roi Henri IV jusqu'au combattants de 1914 (1920).

C. BRINKMANN, Richard Cobden und das Manchestertum (1924).

W. SCHÜCKING and H. WEHBERG, Die Satzung des Völkerbundes (1924).

G.H. WALZ, Die Staatsidee des Rationalismus und der Romantik und der Staatsphilosophie Fichtes (1928).

A. VERDROSS, Règles générales du droit international de la paix, RdC, Vol. 30 (1929 V) 271–517.

P. RITTER, Leibniz' Ägyptischer Plan (1930).

A.C.F. BEALES, The History of Peace, A Short Account of the Organised Movements for International Peace (1931).

W.E. RAPPARD, The Beginnings of the World Government (1931).

L. GROSS, Der logische Widerspruch im Pazifismus und die Änderung der Völkerbundsatzung, Zeitschrift für öffentliches Recht, Vol. 12 (1932) 687–736.

R. MOE, Le prix Nobel de la paix et l'Institut Nobel norvégien (1932).

H. WEHBERG, Die internationale Friedensbewegung vor dem Ausbruch des Weltkrieges, Friedens-Warte, Vol. 32 (1932).

B. MIRKINE-GUETZÉVICH, Le droit constitutionnel et l'organisation de la paix, RdC, Vol. 45 (1933 III) 667–773.

H. ROGGE, Nationale Friedenspolitik (1934).

H. KÄMPF, Pierre Dubois und die geistigen Grundlagen des französischen Nationalbewußtseins um 1300 (1935).

G. SCHWARZENBERGER, William Ladd (1935).

L. QUIDDE, Pazifismus und Patriotismus, Friedens-Warte, Vol. 36 (1936) 189–197.
J. TER MEULEN, J. HUIZINGA and G. BERLAGE, Bibliographie du mouvement de la paix avant 1899 (1936).
A. WEGNER, Geschichte des Völkerrechts (1936).
E.V. SOULEYMAN, The Vision of World Peace in Seventeenth and Eighteenth Century France (1941, Repr. 1972).
L.H. MONASTIER, William Penn, aventurier de la paix (1944).
H.-J. SCHLOCHAUER, Das Problem der Friedenssicherung in seiner ideengeschichtlichen und völkerrechtlichen Entwicklung (1946).
G. MANN, Friedrich von Gentz (1947).
W. WENGLER, Friedenssicherung und Weltordnung (1947).
R. BARKELEY, Die deutsche Friedensbewegung (1948).
E. FOGELKLOU, William Penn (1948).
G. KEATON and G. SCHWARZENBERGER, Jeremy Bentham and the Law (1948).
H. WEHBERG, Die deutsche Friedensbewegung von 1870–1933, Friedens-Warte, Vol. 48 (1948) 247–259.
E. WYNNER and G. LLOYD, Searchlight on Peace Plans (1949).
F.M. STRATMANN, Krieg und Christentum heute (1950).
H. WEHBERG, Zum Gedenken an Henry Golay, Generalsekretär des Internationalen Friedensbüros, Friedens-Warte, Vol. 50 (1950) 266–269.
H. WEHBERG, L'interdiction du recours à la force, RdC, Vol. 78 (1951 I) 1–121.
K. VON RAUMER, Ewiger Friede (1953).
H.-J. SCHLOCHAUER, Die Idee des ewigen Friedens (1953).
Handboek voor de Vredesbeweging (1954).
R. REDSLOB, Le problème de la paix (1954).
F. SIEGMUND-SCHULTZE, Die deutsche Friedensbewegung 1945–1953 (1954).
L. TAPARELLI D'AZEGLIO, Esame critico degli ordini rappresentativi nella società moderna, 2 vols. (2nd ed. 1954).
A. SCHWEITZER, Das Problem des Friedens in der heutigen Welt (1955).
H. STEINSDORFER, Emeric Crucé, Le Nouveau Cynée (1955).
H.H. WALZ, Der politische Auftrag des Protestantismus in Europa (1955).
W. DIGNATH, Friedensbewegung, in: Die Religion in Geschichte und Gegenwart, Vol. 2 (3rd ed. 1958).
K. KAISER, Friedensforschung in der Bundesrepublik (1970).
W. MOMMSEN, Der moderne Imperialismus (1971).
E.O. CZEMPIEL, Schwerpunkte und Ziele der Friedensforschung (1972).
J. DELBRÜCK, Modelle eines gesamteuropäischen Sicherheitssystems, Jahrbuch für Friedens- und Konfliktforschung, Vol. 2 (1972) 87–104.
J. DELBRÜCK, Staats- und völkerrechtliche Probleme der Friedensforschung, in: Der geplante Frieden (1972) 149–165.
K. VON RAUMER, Friedensrufe und Friedenspläne seit der Renaissance, in: Der geplante Frieden (1972) 19–41.
F.K. SCHEER, Die Anfänge der Friedensforschung in der historischen Friedensbewegung Deutschlands (1972).
W. VON BREDOW (ed.), Zum Charakter internationaler Konflikte (1973).
E.O. CZEMPIEL, Friedenssicherung und Aggressivität (1973).
B. WILMS, Entspannung und friedliche Koexistenz (1974).
J. GALTUNG, Essays in Peace Research, 5 vols. (1975–1980).
W.D. EBERWEIN and P. REICHEL, Friedens- und Konfliktforschung (1976).
E. KRIPPENDORF, Friedensforschung (1976).
D.S. PATTERSON, Toward a Warless World, The travail of the American Peace Movement 1887–1914 (1976).
W. MOMMSEN, Imperialismustheorien (1977).
C. DEBENEDETTI, Origins of the Modern American Peace Movement, 1915–1929 (1978).
V. RITTBERGER, Abrüstungspolitik in der Bundesrepublik Deutschland (1979).
P. REICHEL, Einleitung zu Forschungs- und Förderungseinrichtungen der Friedensforschung (1981).

HANS-ULRICH SCUPIN

PEACE, MEANS TO SAFEGUARD

1. Concept

Peace can be safeguarded by preventing the outbreak of → war or, if war has actually started, by stopping the hostilities as quickly as possible (→ Armistice; → Suspension of Hostilities). Any international dispute can escalate into a threat to the peace or a breach of the peace if no steps are taken to settle it promptly (→ Peace, Threat to). That is why the international community has devised various means for the → peaceful settlement of disputes.

2. Prohibition and Prevention of Use of Force

Several attempts have been made to discourage resort to force by proscribing war and the → use of force. Thus more than 60 countries accepted the → Kellogg-Briand Pact (1928), in which they condemned recourse to war for the solution of international controversies and renounced war as "an instrument of national policy in their relations with one another". Even more broadly, in Art. 2(3) and (4) of the → United Nations Charter all member States agreed to "settle their inter-

national disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered", and to "refrain in their international relations, from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

However, as neither the Kellogg-Briand Pact nor the UN Charter restricted the "inherent right of individual or collective self-defence" (Art. 51) any wars waged subsequent to their respective dates of adoption were claimed to be not acts of → aggression but rather acts of → self-defence. Such claims were made both in World War II and in many other, smaller but often devastating, wars thereafter.

Another preventive measure is to threaten those responsible for an act of aggression with appropriate punishment. Thus the unratified but influential → Geneva Protocol for the Pacific Settlement of International Disputes (1924), which was unanimously approved by the Assembly of the → League of Nations, labelled a war of aggression "an international crime". The International Military Tribunal at Nuremberg (1946) (→ Nuremberg Trials) used this instrument, among others, as a basis for asserting that "resort to a war of aggression is not merely illegal, but is criminal" (→ Crimes against Peace). Several defendants at the Nuremberg and → Tokyo trials were condemned to death for this and other → war crimes. The → United Nations General Assembly in 1946 unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" (Res. 95 (I)). But later attempts to formulate a "draft code of offences against the peace and security of mankind" (→ Codification of International Law) and to establish an → international criminal court to try them did not succeed. The subject was, however, revived in 1978 after a definition of aggression was adopted by the General Assembly in 1974 (UN GA Res. 3314 (XXIX) of December 14, 1974).

3. Sanctions

The framers of the League of Nations Covenant and the UN Charter, knowing that mere prohibitions and threats of punishment do not suffice to prevent violations of the law, made an effort to establish a system of → sanctions to be imposed on the violators (→ Collective Measures). The League Covenant provided for the severance of economic relations with the aggressor and the contribution of armed forces by members to enforce the Covenant's tenets. Accordingly, economic sanctions were imposed on Italy after she invaded Ethiopia in 1935, but those sanctions were not sufficiently comprehensive and were terminated before Italy could feel their full effect. In December of 1939 the League Council ousted the Soviet Union from membership because of her refusal to halt the invasion of Finland.

The UN Charter's improvements in the system of sanctions include the following:

(a) the → United Nations Security Council is granted the power to determine that a threat to the peace, breach of the peace, or act of aggression exists (Art. 39);

(b) the Council can – by a vote of nine out of fifteen members, including the concurring votes of the five permanent members of the Council – recommend, or even decide, with binding force for all UN members, on measures to be taken to maintain or restore international peace and security (Arts. 25, 27(3), 39);

(c) the Council is given the choice between the use of armed force and measures not involving force, such choice depending on the gravity of the situation (Arts. 41 and 42);

(d) the measures not involving the use of armed force – complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations (Art. 41; → Diplomatic Relations, Establishment and Severance) – become binding upon UN members when thus decided by the Council (and were actually applied, with moderate success, in the case of Rhodesia (→ Rhodesia/Zimbabwe) between 1966 and 1979: UN SC Res. 232 (1966) and Res. 253 (1968), revoked by Res. 460 (1979));

(e) a two-step procedure in case of military sanctions which requires not only a decision of the Security Council but also a prior agreement between the Council and member States. The members merely undertake "to make available to

the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security" (Art. 43(1)). In order to facilitate action in an emergency, they also agree to "hold immediately available national air-force contingents for combined international enforcement action" (Art. 45), subject again to the special agreements to be concluded.

4. UN Peacekeeping

The Security Council was not able, however, to lay down the principles upon which the agreements to be concluded between itself and the member States were to be based, as the Western Powers and the Soviet Union could not reach an accord on the control over, and the composition of, the forces In dispute were whether the → United Nations Secretary-General or the Security Council should control the forces and whether each State should contribute on the basis of equality or capability. Consequently, no such forces were available when in June 1950 North Korea invaded South Korea (→ Korea). Nevertheless, several States complied with a recommendation of the Council to provide military assistance to South Korea under UN command. While this action was made possible by the absence of the Soviet Union from the Security Council when the critical votes were taken, upon return of the Soviet Union to the Council, no further Council action was possible when in November 1950 Chinese troops joined the North Koreans (→ China; → Intervention).

To enable the UN to act even if a permanent member should block action in the Security Council (→ Veto), the General Assembly adopted in November 1950 the → Uniting for Peace Resolution (Res. 377 (V)), which authorized the General Assembly in such a situation to make "appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security". After the General Assembly found that the People's Republic of China had "engaged in aggression in Korea", the Assembly recommended an → embargo on the shipment to China and North Korea of arms, petroleum and other items.

The Uniting for Peace Resolution also provided a basis for UN peacekeeping activities designed to assist in restoring peace (→ United Nations Peacekeeping System). As the → International Court of Justice pointed out in its → advisory opinion on → Certain Expenses of the United Nations, the responsibility of the Security Council for the maintenance of international peace is "primary", but not exclusive. The General Assembly is authorized under Art. 14 of the UN Charter to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations". While the Court considered that under Art. 12 of the Charter the General Assembly is obliged to refer to the Security Council any questions requiring "coercive or enforcement action", it ruled that the Assembly has the power "to organize peacekeeping operations, at the request, or with the consent, of the States concerned". (ICJ Reports 1962, p. 151, at pp. 163–65, 172).

When military actions were taken by Israel, France and the United Kingdom in 1956 against Egypt in the Sinai Peninsula and the → Suez Canal area, the General Assembly, with the consent of all the States concerned, established a United Nations Emergency Force (UNEF; → United Nations Forces). The purpose of the UNEF was not to enforce a withdrawal of foreign forces from Egypt, but only to secure a cessation of hostilities, to monitor the withdrawal of foreign forces and thereafter to ensure scrupulous observance of the armistice agreement between Israel and Egypt. In particular, its task was to prevent raids across armistice lines and to safeguard freedom of navigation (→ Navigation, Freedom of) through the Straits of Tiran. The force functioned effectively until May 1967, when it was withdrawn upon request of the Egyptian Government. This withdrawal was followed by a renewal of hostilities in the Middle East and the occupation by Israel of the → Gaza Strip, the Sinai Peninsula, the Jordanian territory west of the Jordan River and the Golan Heights in Syria (→ Israel and the

Arab States; → Israeli-Occupied Territories). When hostilities erupted again in 1973, another UNEF was established by the Security Council, on the cease-fire line between Egypt and Israel. A year later, the Security Council also established a United Nations Disengagement Observer Force (UNDOF) to help maintain the disengagement and cease-fire agreement between Israel and Syria.

Another peacekeeping force was created by the Security Council in 1960 on request of the Government of the Congo to deal with the crisis in that country, caused by a mutiny of its armed forces and the intervention of Belgium to restore order and protect its citizens (→ Humanitarian Intervention; → Decolonization). By assisting in restoration and maintenance of law and order in the Congo, the United Nations Operation in the Congo (known by its French abbreviation, ONUC) enabled the Belgian troops to withdraw, and prevented intervention by other States in Congolese affairs. Later, the UN agreed to safeguard the unity of the Congo, and in order to prevent the occurrence of → civil war, to take measures to prevent clashes, if necessary using force as a last resort. As the Security Council also ordered "the immediate withdrawal and evacuation from the Congo of all foreign military, paramilitary and advisory personnel not under the United Nations command, and all mercenaries", the Secretary-General was authorized "to take vigorous action, including the use of requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation" of such foreign personnel and → mercenaries (UN SC Res. 169 (1961) of November 24, 1961). After several clashes between the UN Force and the forces of the secessionist province of Katanga (→ Secession), in December 1962 and January 1963 the UN Force took strong military action which resulted in the expulsion of mercenaries and the reintegration of Katanga. Thus, for the first time, the UN actually used a peacekeeping force for military purposes. This was done, however, only with the consent of the government concerned (the Central Government of the Congo).

The UN has also conducted a prolonged peacekeeping operation in Cyprus (UNFICYP), which since 1964 has maintained a tenuous cease-fire there between the Greek and Turkish communities. A similarly difficult situation resulting in many casualties has been faced by a United Nations Interim Force in the Lebanon (UNIFIL), established in 1978 to provide security in the southern border region of the Lebanon and to prevent clashes between Palestinian, Syrian, Israeli and certain Israeli-supported Lebanese forces.

Thus, though the UN never established the forces envisaged in Arts. 41 to 50 of the Charter, it devised a new type of peacekeeping force. This has enabled first the General Assembly and later the Security Council to interpose a neutral force between belligerents and to restore and maintain peace in situations where an actual breach of the peace has occurred and might have led to a large conflagration.

In addition to relatively large peace forces, the UN has on several occasions employed groups of → observers, of which the most successful has been operating in Kashmir since 1950. The one most faced with difficulties has been the Truce Supervision Organization positioned on the borders between Israel and its Arab neighbours, functioning since 1948.

5. Regional Arrangements

The Charter also envisages the use of → regional arrangements for maintaining peace in various regions of the world (Arts. 52 to 54). Such a regional system was first established in the Americas through the → Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro (1947) and was confirmed by the Charter of the → Organization of American States (OAS) (Bogotá, 1948, revised by the Protocol of Buenos Aires, 1967).

The OAS has developed a variety of means for dealing with threats to peace arising in the Western Hemisphere. The Rio Treaty allows it to deal not only with an armed attack by any State on an American State, in which case → collective self-defence under Art. 51 of the UN Charter is allowed, but also with other situations in which "the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict"

(Art. 6 of the Rio Treaty). In either case, a special organ of consultation can decide by a two-thirds vote (without any veto possible) on the measures to be taken to assist the victim of the aggression. Such decisions may include economic sanctions and use of armed force. They are binding on all the parties to the Rio Treaty, with the sole exception that no State shall be required to use armed force without its consent.

An Inter-American Peace Committee, functioning under various names since 1940, adopted its Statute in 1950; in 1967 its name was changed to "Inter-American Committee on Peaceful Settlement". It has been given a broad mandate to keep "constant vigilance to insure that States between which any dispute exists or may arise, of any nature whatsoever, may solve it as quickly as possible". The Committee may take action at the request of any American State, offer its → good offices to the parties to the dispute, suggest the measures and steps which may be conducive to a settlement (e.g. → Arbitration; → Conciliation and Mediation), and, with the consent of the government concerned, carry out an investigation of the facts in dispute in the territory of any party (→ Fact-Finding and Inquiry).

On a number of occasions, the various OAS institutions have taken an active part in stopping hostilities between American States, limiting foreign participation in civil wars, and even establishing a peacekeeping force (as was done in the Dominican Republic in 1965). Some difficulties have arisen with respect to overlapping activities of regional and global institutions, the OAS insisting that under Arts. 33 and 52 of the UN Charter, parties should resort first to regional institutions and refer a matter to the Security Council only after regional efforts have been exhausted without success. (This happened, for instance, in the Guatemalan situation in 1954.)

The → Organization of African Unity (OAU) has also been active in safeguarding peace in Africa, helping to settle some disputes and preventing others from exploding into full-scale wars. In 1964 Belgian paratroopers were transported to Stanleyville in the Congo by United States military aircraft, with the consent of the Congolese Government, in order to rescue more than a thousand foreigners whose lives were endangered by a local rebellion. When the OAU made a → protest against this "intervention" in African affairs, which constituted a threat to the peace and security of the African continent, the Security Council used this occasion to express preference for regional action to deal with regional problems. In particular, the Council pointed out that the OAU "should be able, in the context of Article 52 of the Charter of the United Nations, to help find a peaceful solution to all the problems and disputes affecting peace and security in the continent of Africa", and encouraged the OAU "to pursue its efforts to help the Government of the Democratic Republic of the Congo to achieve national reconciliation" (Res. 199, December 30, 1964). Similarly, in later years, the UN has relied on the OAU in dealing with the question of Western Sahara (see e.g. UN GA Res. 35/19, November 11, 1980).

One of the oldest regional organizations, the League of Arab States (→ Arab States, League of) was originally less concerned with intraregional conflicts, but in recent years it has taken a more active part in attempting to resolve conflicts among its members. In particular, it authorized Syria to establish a peacekeeping force in the northern Lebanon to prevent intercommunal strife.

Apart from the OAS model, combining peacekeeping and collective self-defence, there are other collective self-defence organizations with limited geographic scope. The most prominent of them are the → North Atlantic Treaty Organization (NATO), established in 1949, and its Eastern European parallel, the → Warsaw Treaty Organization, set up in 1955 by the Treaty of Friendship, Cooperation and Mutual Assistance. Both arrangements are anchored on Art. 51 of the UN Charter. They provide that in case of an armed attack on one or more of them, each party, in the exercise of its right of individual or collective self-defence, will assist the attacked party or parties by forthwith taking, individually or in agreement with other parties to the treaty, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the area. Joint military commands have been established in both the NATO and Warsaw Pact areas, and certain military forces have been earmarked for action under these treaties. The Warsaw Pact was invoked by the Eastern European coun-

tries in connection with military action taken by them in Hungary in 1956 and in Czechoslovakia in 1968. It was contended in the UN, however, that this action constituted an illegal intervention in the domestic affairs of those nations, and did not fall under the collective self-defence exception of the Charter.

6. Conclusion

The means to safeguard peace developed after World War II constitute a notable improvement on the pre-war situation, but they have not yet reached the stage of actually safeguarding peace in all situations. Further proposals on the subject are discussed in → Peace, Proposals for the Preservation of.

D. DAVIES, The Problem of the Twentieth Century (1931).

P.S. WILD, Sanctions and Treaty Enforcement (1934).

A.E. HIGHLEY, The Actions of the States Members of the League of Nations in Application of Sanctions against Italy (1938).

Royal Institute of International Affairs, The Character of International Sanctions and Their Application (1938).

W.E. RAPPARD, The Quest for Peace since the World War (1940).

D.W. BOWETT, Self-Defence in International Law (1958).

J. STONE, Legal Controls of International Conflict (2nd ed. 1959).

M. MCDOUGAL and F. FELICIANO, Law and Minimum World Public Order, The Legal Regulation of International Coercion (1961).

O. SCHACHTER, Legal Aspects of the United Nations' Action in the Congo, AJIL, Vol. 55 (1961) 1–28.

I. BROWNLIE, International Law and the Use of Force by States (1963).

A.L. BURNS and N. HEATHCOTE, Peace-Keeping by UN Forces (1963).

A. VAN WYNEN THOMAS and A.J. THOMAS, JR., The Organization of American States (1963).

D.W. BOWETT, United Nations Forces, A Legal Study of United Nations Practice (1964).

P. FRYDENBERG (ed)., Peace-Keeping, Experience and Evaluation (1964).

M.E. JIMÉNEZ DE ARÉCHAGA, La coordination des systèmes de l'ONU et de l'Organisation des Etats Américains pour le règlement pacifique des différends et la sécurité collective, RdC, Vol. 111 (1964 I) 423–526.

R.S.J. MACDONALD, The Developing Relationship between Superior and Subordinate Political Bodies at the International Level, A Note on the Experience of the United Nations and the Organization of American States, CanYIL, Vol. 2 (1964) 21–54.

Pan American Union, Inter-American Treaty of Reciprocal Assistance, Applications 1948–1964, 2 vols. (1964).

R.B. RUSSELL, United Nations Experience with Military Forces, Political and Legal Aspects (1964).

E.W. LEFEVER, Crisis in the Congo, A United Nations Force in Action (1965).

G.O.W. MUELLER and E.M. WISE (eds.), International Criminal Law (1965) 225–371, 513–627.

G. CONNELL-SMITH, The Inter-American System (1966).

Inter-American Institute of International Legal Studies, The Inter-American System, Its Development and Strengthening (1966).

J.A. STEGENGA, The United Nations Force in Cyprus (1968).

R. HIGGINS, United Nations Peacekeeping, 1946–1967, 3 vols. (1969–1980).

J. STONE and R.K. WOETZEL (eds.), Towards a Feasible International Criminal Court (1970).

L. FABIAN, Soldiers without Enemies, Preparing the United Nations for Peacekeeping (1971).

J.N. MOORE, The Role of Regional Arrangements in the Maintenance of World Order, in: C.E. Black and R.A. Falk (eds.), The Future of the International Legal Order, Vol. 3, Conflict Management (1971) 122–164.

M.C. BASSIOUNI and V. NANDA, A Treatise on International Criminal Law, 2 vols. (1972).

I.J. RIKHYE, M. HARBOTTLE and B. EGGE, Thin Blue Line, International Peacekeeping and its Future (1974).

M.C. BASSIOUNI, International Criminal Law, A Draft International Criminal Code (1980).

B.B. FERENCZ, An International Criminal Court, A Step toward World Peace, 2 vols. (1980).

LOUIS B. SOHN

PEACE MOVEMENTS *see* Peace, Historical Movements towards

PEACE OF BREST-LITOVSK *see* Brest-Litovsk, Peace of

PEACE, PROPOSALS FOR THE PRESERVATION OF

The history of humanity is full of wars, large and small, with short interludes of peace (→ Peace and War). Since ancient times, statesmen and scholars, philosophers and poets, as well as the common people who suffered most from the ravages of → war, have dreamt about reducing the number and taming the ferocity of wars, and lengthening the periods of peace (→ Peace, Historical Movements towards). Amenophis IV

(Akhenaton) in Egypt (14th century B.C.), Lao-tse and Confucius in China (6th and 5th centuries B.C.), and Asoka in India 3rd century B.C.) were among the precursors of those promoting the idea that mankind should be united to maintain peace.

In medieval Europe and the early centuries of the modern age, the idea of preserving peace among the European States was combined with maintaining a common front against the infidels. Pierre Dubois of France and King George Podebrady of Bohemia in the 15th century, King Henry IV of France (or more probably his adviser the Duc de Sully) in the early 1600s, and the Abbé de Saint-Pierre in the early 1700s combined plans for the unification or confederation of Europe with crusades against the Arab occupiers of the Holy Land or against the Turks engulfing the Balkans and knocking at the gates of Central Europe. More idealistic proposals came from the pens of great philosophers like Erasmus of Rotterdam (Quaerella pacis (1518)), Emeric Crucé (Le Nouveau Cynée (1623)), Jean-Jacques Rousseau (in his 1761 revision of Saint-Pierre's Projet de paix perpétuelle), Immanuel Kant (Zum ewigen Frieden (1795)), and Jeremy Bentham (A Plan for an Universal and Perpetual Peace, written in 1789 but published only in 1843). From among the statesmen of the period, the most outstanding is the plan of William Penn, the founder of Pennsylvania, the Quaker colony in the Americas (Essay towards the Present and Future Peace of Europe (1693)).

The idea of a conference of kings and princes, or of their representatives, who would together decide the affairs of the world, was common to many of the early proposals. It was carefully worked out by William Ladd (Essay on a Congress of Nations (1840)), and became, together with proposals for international → arbitration, the basic ingredient of the resolutions of the peace congresses which started meeting in the 1840s, and of the programmes of the many peace societies which blossomed throughout the world in the second half of the 19th century.

The many proposals for the preservation of peace developed during the 19th century and the first two decades of the 20th century found their practical embodiment in the Covenant of the → League of Nations. But there were "gaps" in the Covenant and various efforts were made to fill them; for instance, through the → Kellogg-Briand Pact (1928), whereby the signatories renounced war "as an instrument of national policy", and agreed that the settlement of all disputes "shall never be sought except by pacific means".

Nevertheless, in the 1930s Japan invaded first Manchuria and then → China, Germany rearmed in violation of the → Versailles Peace Treaty (1919), and Italy conquered Ethiopia. In all these cases the League proved ineffectual; and it took no action in 1939 when Germany attacked Poland and started another global war.

After World War II, the → United Nations was established with the aim to "save succeeding generations from the scourge of war" (preambular para. 1, → United Nations Charter) and to "take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace" (Art. 1(1); → Peace, Threat to). While the → United Nations Security Council was empowered to make decisions binding on all member States with respect to measures necessary "to maintain or restore international peace and security" (Art. 39), the requirement of unanimity of the five great powers (Art. 27(3); → Veto) made it difficult for the Council to act decisively in many of the crises which arose after 1945. By the → Uniting for Peace Resolution (Res. 377 (V) of November 3, 1950), the → United Nations General Assembly decided that it had the power to act in the case of a breach of the peace or act of → aggression, "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of peace and security" (→ Peace, Means to Safeguard). Although the recommendations of the General Assembly in this area are not binding, members complying with them may be considered as acting consistently with the purposes of the United Nations, and their activities thereunder do not constitute violations of Art. 2(4) of the Charter. The armed forces, which were to be put at the disposal of the United Nations for enforcing its decisions, could not be constituted because the major powers failed to agree on conditions under which the forces were to be used (→ United Nations Forces).

The frightful destructive power of the atom

bomb was manifested at the end of World War II when the United States devastated the Japanese cities of Hiroshima and Nagasaki. In spite of this awesome example, little progress has been made by the UN in controlling → nuclear warfare and weapons, or any other weapons (→ Arms Control; → Weapons, Prohibited). The work of many successive → negotiations results only in a few limited agreements, such as the one relating to → nuclear tests.

It is not surprising, therefore, that the creation of the UN did not stop the centuries-old search for a workable plan to preserve peace. As early as October 1945, a group of Americans meeting in Dublin, New Hampshire, drafted proposals for amending the UN Charter in order to reconstitute the UN as "a World Federal Government with limited but definite and adequate powers for the prevention of war". This was the beginning of the new world federalist movement which soon spread to other countries and culminated in a World Association of World Federalists. Over the years, some groups, dissatisfied with the federalist approach, split from the main movement and established separate organizations with different programmes. Other approaches to the problems of world peace have also developed.

Among the world federalists there are two main factions: the minimalists and the maximalists. The members of the first group are willing to start with the existing UN and to help develop it into a world federal government with powers primarily limited to the preservation of peace. They put an emphasis on curbing the arms race, establishing international peacekeeping forces strong enough to deal with any violations of a → disarmament agreement or acts of aggression, and developing effective means for the → peaceful settlement of international disputes. According to them, if the world can live in peace for a prolonged period of time, other problems may be solved more easily.

The maximalists do not believe that the UN can ever be transformed into a world federal government. They contend that the UN is an organization of governments, which are not likely to agree to reduce their own powers even for the sake of world peace. According to them it is necessary to start with a clean slate, and to establish a world government of the people, bypassing somehow the governments. This can be done, for instance, by arranging a World Constitutional Convention, composed of delegates elected directly, even if only unofficially, by all the peoples of the world. After these delegates agree on a world constitution, it would be brought back to the people for approval and would come into effect when approved by a large majority of mankind. The maximalists also believe that this goal can be achieved only if the plan can be made sufficiently attractive to everybody. They point out that only in some countries do people worry about peace; in others people are more concerned about their daily bread, a roof over their heads and a satisfying job. A world government must have strong powers not only to maintain peace but also to provide economic and social well-being for all the peoples of the world. Peace is not sufficient; it must be supplemented by justice and equity, especially in the economic sphere (→ International Economic Order).

The most radical draft for a maximalist world constitution was prepared by the Chicago Committee to Frame a World Constitution, under the direction of Robert M. Hutchins and G.A. Borgese (Preliminary Draft of a World Constitution (1948)). Everett Lee Millard has combined the maximalist viewpoint with a revision of the UN Charter (Freedom in a Federal World (5th ed. 1970)). The World Constitution and Parliament Association, through a privately elected World Constituent Assembly, prepared "A Constitution for the Federation of the Earth" (2nd ed. 1977).

The minimalist viewpoint was developed in great detail, in the form of an article by article revision of the UN Charter drafted by Grenville Clark and Louis B. Sohn (World Peace through World Law). While their proposals were originally strictly limited to the maintenance of peace, these authors subsequently also proposed a World Development Authority, which would utilize a large proportion of savings achieved through disarmament for the purpose of accelerating economic growth in the developing areas of the world (→ Developing States).

A more moderate view of Charter revision was taken by the Commission to Study the Organization of Peace, a United States-based non-governmental organization, which suggested more than a hundred steps which might be taken to strengthen the UN. Many of these proposals

would not require an amendment of the Charter, but would nevertheless make the UN strong enough so that all States would feel secure. All States would have to disarm sufficiently so that none would be able to challenge the authority of the UN to maintain international peace (The United Nations: The Next Twenty-Five Years (1969)).

Two other approaches have found vocal supporters: the functional and the regional approaches. The functionalists argue that a frontal assault on the existing system of sovereign States is not likely to succeed (→ Sovereignty). Governments are willing, however, to relinquish certain powers to those international institutions which make easier the management of the world economy (→ International Organizations, General Principles). They have learned over more than one hundred years of specialized international cooperation to rely on the assistance of the → Universal Postal Union in delivering the mail around the world, and on similar services of the → International Telecommunication Union. The → World Health Organization and the → International Civil Aviation Organization have been given even some quasi-legislative powers in order to prevent the spread of diseases and to ensure the smooth functioning of international air services. There are many other organizations dealing with subjects of general concern: labour problems, education, food and agriculture, maritime navigation, nuclear energy, weather, etc. The network of these organizations is constantly growing, and their powers are slowly increasing. The peoples of the world will discover some day that these organizations control their lives in many important areas and that some new international political machinery will have to be established to provide the necessary checks and balances. According to this view, world government thus may creep upon us quietly, almost imperceptibly. The main exponents of this view have been David Mitrany (A Working Peace System (1943; rev. ed. 1966)) and Ernest B. Haas (Beyond the Nation-State: Functionalism and International Organization (1964)).

The regional approach has two main subdivisions. According to one view, it is not possible to have a government embracing the whole globe, as various countries are in different stages of ideological, political, economic and social development, and it is not possible to mix them together under one system of government. In particular, this group believes that one should start with the Western democracies and combine them into an Atlantic Union. Such a powerful unit would then attract first other democracies and then might even lead other countries, run by autocratic régimes of the left or of the right, to abandon their régimes in order to be admitted to the economically and politically attractive union of democracies. This idea was started in the early days of World War II by Clarence Streit (Union Now (1939)), and has been pursued by a variety of organizations concerned with Atlantic Union or the Atlantic Community.

Other regionalists believe that national governments might be more willing to relinquish some of their powers to regional organizations which include nations of a similar stage of development, rather than to a world government which might be dominated by nations of other continents with different value systems. They point to the success of such → supranational organizations as the → European Economic Community and the accomplishments of the → Council of Europe and of other regional and subregional organizations (such as the → Organization of American States, the → Andean Common Market or the → Organization of African Unity). They expect that, apart from the super powers, the countries in various regions of the world will coalesce into supranational units which then might agree to a global structure representing regions rather than States. This idea has been popular among European authors for a long time, and found its expression also in the maximalist Chicago Draft Constitution (1948), mentioned previously. More recently, it found favour in the various models of world order developed under the auspices of the Institute for World Order (Saul H. Mendlovitz (ed.), On the Creation of a Just World Order (1975)).

The UN Charter itself originally provided, in Art. 109(3), for a review conference to be arranged before or at the latest at the tenth annual session of the General Assembly. However, in 1955 the Assembly, recognizing that "such a review should be conducted under auspicious international circumstances", decided merely that a special committee should consider

the matter (Res. 992 (X) of November 21, 1955). For the next 20 years very little progress was made, but in 1975 the Assembly resolved to establish a Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (Res. 3499 (XXX) of December 15, 1975). The Committee decided to focus its attention first on provisions relating to the → peaceful settlement of disputes, and later on the problems connected with the maintenance of international peace and security, and to consider primarily those proposals for the strengthening of the United Nations which did not require amending the Charter; but by the end of 1981 it had not reached consensus on any such proposals. (For the main proposals, see GAOR, 31st session, Supp. 33, p. 192 (1977); GAOR, 35th session, Supp. 33, pp. 54 and 74 (1980); and GAOR, 36th session, Supp. 33, pp. 64, 71 (1981).)

While the UN constitutes the highest embodiment of the aspirations of the peoples of the world for peace and justice, it has not been able to prevent all wars, even between small countries, and has not yet devised means for dealing with → civil wars which often reflect the ideological divisions in the modern world. Thus there is still room for improving the international system for the preservation of peace and for the presentation of further proposals to achieve this goal. The ingenuity of mankind to devise new means of waging war needs to be matched with the ingenuity of mankind to devise means to maintain international peace and security.

W.A. PHILLIPS, The Confederation of Europe (1914).
J. TER MEULEN, Der Gedanke der internationalen Organisation in seiner Entwicklung, 2 vols. (1917–1929).
C.L. LANGE and A. SCHOU, Histoire de l'internationalisme, 2 vols. (1919–1954).
E. YORK, Leagues of Nations, Ancient, Mediaeval and Modern (1919).
E.V. SOULEYMAN, The Vision of World Peace in Seventeenth- and Eighteenth-Century France (1941).
S.J. HEMLEBEN, Plans for World Peace Through Six Centuries (1943).
L. LEDERMANN, Les précurseurs de l'organisation internationale (1945).
E. REVES, The Anatomy of Peace (1945).
E. WYNNER and G. LLOYD, Searchlight on Peace Plans (2nd ed. 1949).
H.-J. SCHLOCHAUER, Die Idee des ewigen Friedens (1953).
Commission to Study the Organization of Peace, Charter Review Conference (1955).
F.O. WILCOX and C.M. MARCY, Proposals for Changes in the United Nations Charter (1955).
E.R. GOODMAN, The Soviet Design for a World State (1960).
C. STREIT, Freedom's Frontier, Atlantic Union Now (1961).
E.M. BORGESE (ed.), A Constitution for the World (1965).
G. CLARK and L.B. SOHN, World Peace Through World Law, Two Alternative Plans (3rd ed. 1966).
A. WOLFERS, et al., The United States in a Disarmed World (1966).
J.G. STARKE, An Introduction to the Science of Peace (Irenology) (1968).
C. CHATFIELD (ed.), Peace Movements in America (1973).
R. KOTARI, Footsteps into the Future (1974).
R.A. FALK, A Study of Future Worlds (1975).
D. MITRANY, The Functional Theory of Politics (1975).
A.M. MAZRUI, A World Federation of Cultures, An African Perspective (1976).
G. LAGOS and H.H. GODOY, Revolution of Being, A Latin American View of the Future (1977).
C.M. STANLEY, Managing Global Problems (1979).
A. FONSECA PIMENTAL, Democratic World Government and the United Nations (1980).
J.R. HUNTLEY, Uniting the Democracies: Institutions of the Emerging Atlantic-Pacific System (1980).

LOUIS B. SOHN

PEACE SETTLEMENTS AFTER WORLD WAR II

1. Conceptual Background

The legal situation after World War II may be observed from many perspectives. Generally, termination of the state of → war as well as commencement of peaceful relations are events extending over relatively long periods (→ Peace and War). A state of war may begin by unilateral action (→ Unilateral Acts in International Law) of a State through an express → declaration or through the opening of hostilities with the consequence that *jus in bello* becomes applicable (→ War, Laws of, History). Termination of the state of war, however, needs the mutual consent of the belligerent States, i.e. the extinction of the *animus belligerendi*. A unilateral termination may suffice if one of the belligerents has ceased to exist as a State by reason of → *debellatio* or on other grounds (→ States, Extinction). The transition from the state of war to the state of peace generally begins with an → armistice, which

nevertheless does not terminate the state of war in every respect, so that only active hostilities, but not yet all other belligerent actions (→ Suspension of Hostilities), become unlawful. Military actions may begin anew if the end of the armistice can be lawfully declared. → Negotiations usually begin after the entry into effect of the armistice, and the conclusion of a → peace treaty then terminates the state of war not only factually but also legally.

On the other hand, the state of peace may also be established without the conclusion of a peace treaty; restoration of peace in Germany is an example after World War II. If a peace treaty is not concluded, but the state of war is ended by respective declarations, particular rules may be stipulated to deal with disputed problems arising from the conflict. Thus peace settlements may be established without concluding a comprehensive and final peace treaty settling all points in dispute. It therefore may occur that those particular settlements make unnecessary the conclusion of a later peace treaty. This may be because further settlements would be without substance, or because some questions remain unsettled and are better left to a later treaty, or because subsequent events eliminate the necessity of a peace treaty. Thus peace settlements may be established by peace treaty but also by more tentative or less formal agreements.

2. Peace Treaties after World War II

Clear and final peace settlements were reached in all those cases where peace treaties could be concluded among the belligerent States relatively soon after World War II. Examples are the peace treaties relating to several East European States and Italy, which entered into force as early as 1947 (→ Peace Treaties of 1947), and the → Peace Treaty with Japan (1951). A peace treaty with Austria seemed inappropriate under international law, since she did not participate autonomously in the war. Whether or not the → Austrian State Treaty of 1955 must be qualified as a peace settlement, or as functioning in that sense, remains an open question; it suffices to state that all problems arising from the war regarding Austria have been settled, including the establishment of her new neutral status (→ Neutrality, Concept and General Rules; → Permanent Neutrality of States).

3. Settlements concerning the Federal Republic of Germany

No peace treaty has been concluded with the German Reich as a former belligerent. The → Potsdam Agreements on Germany (1945) were not meant to be a peace settlement, but they paved the way toward the termination of the state of war and the beginning of the state of peace. The position has been taken that the German Reich disappeared by *debellatio*, but this particular view has not prevailed because the victorious States did not desire → annexation.

The overwhelming view took the position that the German Reich persisted as a → subject of international law. This view is also supported by the fact that nearly all enemy States declared the end of the state of war with Germany. If the German Reich had no longer existed, any declaration of that kind would have been meaningless. These declarations, issued by most of the belligerent States in the years from 1951 to 1955, were aimed at terminating the state of war. They found expression through various methods, by → notification, national legislation, conclusion of treaties other than peace treaties, and establishment of diplomatic relations (→ Diplomatic Relations, Establishment and Severance). In some cases, corresponding declarations were issued by the Government of the Federal Republic of Germany; in others, her consent could be presumed. This method of terminating the state of war resulted in applicability of the international law of peace, so that, for instance, new → sequestrations of → enemy property were no longer permitted.

A comprehensive settlement of all questions arising from the war and concerning Germany as a whole has not been possible because just after the German military → surrender, Germany was divided into four zones of occupation (→ Germany, Occupation after World War II). The three Western zones (administered by France, the United Kingdom and the United States) later formed the territory of the Federal Republic of Germany, and the Soviet zone that of the German Democratic Republic (GDR). The formal foundations of these States were laid in 1949 – i.e. before the formal, expressly declared termination of the state of war by the victors. Despite the fact that the intention to reach a final settlement of the questions arising from the war by a peace

treaty has still not been abandoned, settlements on particular issues have been arranged. Three kinds of peace settlements may be distinguished: settlements between the three Western Powers and the Federal Republic, those between the Soviet Union and the GDR, and those arranged by the four victorious powers in cooperation with the Federal Republic and the GDR.

The peace settlements between the three Western Powers and the Federal Republic developed step by step. Only the most important arrangements and unilateral declarations may be mentioned here. The approval of the new constitution of the Federal Republic in 1949 by the occupying Western Powers could perhaps be seen as a kind of peace settlement, because the preconditions for peaceful and normal → international relations were thus created. Shortly thereafter, the Western Powers' restriction of the occupation régime in 1951 permitted the exercise of limited → sovereignty by the Federal Republic.

The most important event regarding peace settlements may be seen in the conclusion of the → Bonn and Paris Agreements on Germany (1952 and 1954). Under the Convention on Relations between the Three Powers and the Federal Republic (the General Agreement or *Deutschlandvertrag*), the Federal Republic received the full sovereignty of a State; in view of the overwhelmingly accepted concept of identity between the German Reich and the Federal Republic, one can state that Germany has regained her sovereignty. Yet, in spite of the general transfer of sovereignty, decisive restrictions imposed by reservations in the treaty persisted, so that a complete status of peace has not yet been reestablished. The occupation powers remain entitled to make final decisions about the reunification of both parts of Germany, the status of → Berlin, and the conclusion of a final peace treaty. Similar reservations are also found in later treaties between the Federal Republic and the Soviet Union, Poland, Czechoslovakia and the GDR (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)), because all these arrangements stipulate that former valid rights of the victorious powers should remain unaffected.

Despite a more general settlement under the General Agreement, there remained the necessity to settle certain important questions which typically also form part of a peace treaty. Those particular problems have been dealt with by the Convention on the Settlement of Matters arising out of the War and the Occupation (1954). Through that treaty the Federal Republic waived claims which otherwise could have arisen from measures taken against German property abroad. This → waiver was related to satisfaction of German → reparations after World War II, which were in part arranged by this treaty and which in part had been effected by unilateral acts of the occupation powers. An agreement between the occupying Western Powers and the Soviet Union relating to German reparations had been envisaged, but on account of the East-West conflict and the division of Germany it could not be realized. The → London Agreement on German External Debts of 1953 also formed part of the peace settlements at that time.

Furthermore, some corrections of the western boundary of the Federal Republic were stipulated (→ Boundary Settlements between Germany and her Western Neighbour States after World War II; → Boundaries). The determination of the status of the → Saar Territory must also be seen as a kind of peace settlement after it was reestablished as a part of the territory of the Federal Republic by a referendum. The eastern boundaries of Germany, still awaiting a final peace treaty, have not yet been fixed by a peaceful settlement. Although the Federal Republic waived for herself territorial claims by concluding some treaties with socialist States, this waiver does not relate to Germany as a whole because the Federal Republic is not competent to dispose of these territories without the consent of the Western Powers. The Western Powers' right of co-determination on these questions forms part of their reservations which are mentioned above.

A comprehensive peace settlement between the Federal Republic and the States of the Eastern bloc has also not yet been achieved. The already-mentioned treaties with socialist States contain a waiver of the → use of force and of any unilateral attempt to alter the existing boundaries. Nevertheless, they do not express a final → recognition of the German boundaries, and above all they do not restrict the principle of → self-determination of the German nation. It can, however, be said that these treaties at least establish a provisional peace settlement.

4. Settlements concerning the German Democratic Republic

Settlements similar to those arranged between the Western Occupation Powers and the Federal Republic have also been established between the Soviet Union and the German Democratic Republic (GDR). In 1954 and 1955 the Soviet Union transferred full sovereignty to the GDR with the restriction that a final settlement of questions relating to Germany as a whole would need the consent of the Soviet Union. The GDR and Poland agreed by a bilateral treaty to fix their boundaries in keeping with the principle of non-use of force as similarly laid down in the Federal Republic's treaties with the socialist States. The problems of reparations between the GDR and the States of the Eastern bloc have been only partly dealt with, since a settlement concerning Germany as a whole could not be reached.

The status of the German territory beyond the → Oder-Neisse Line has also not found a final settlement. The Government of the GDR recognizes that this territory forms part of Poland, but this recognition cannot produce a final status notwithstanding the Federal Republic's waiver on her own behalf of any territorial claims.

5. Settlements concerning Berlin

The city of Berlin represents a German territory whose status remained fairly untouched by the peace settlements just described; its situation under international military occupation law (→ Military Government) has up to now not been altered in principle. On the one hand, the Soviet Union and the GDR maintain that the Eastern part of Berlin in its capacity as the capital of the GDR forms part of the territory of the GDR. On the other hand, such a unilateral change in Berlin's status from an occupied territory to GDR national territory has not been recognized by the Western Powers.

However, a somewhat provisional peace settlement has been reached through conclusion of the Quadripartite Agreement of September 3, 1971 in which the parties undertook the obligation not to modify the status of the city without the consent of all the parties concerned. Therefore, if the Western Powers were to try to incorporate West Berlin into the Federal Republic and to put this part of the city under the government of the Federal Republic, the Soviet Union would be entitled to resit by invoking the Quadripartite Agreement. Thus the treaty clause stating that Berlin cannot be governed by the Federal Republic legally confirms the status now existing, in spite of the fact that a peace settlement can hardly be seen in this arrangement.

6. Settlements relating to Bloc Systems

The creation of two German States resulted in both parts of Germany being included in the respective political and economic treaty systems of the Western and Eastern blocs. The Federal Republic became a partner of the → Western European Union, the → North Atlantic Treaty Organization, the → Council of Europe and the → European Communities. Similar events occurred regarding the GDR, which joined the → Council for Mutual Economic Assistance and the → Warsaw Treaty Organization (→ Alliance).

It is doubtful whether the participation of both German States in these treaty systems can be seen as a peace settlement. A certain consolidation of friendly relations with the bloc partners may be achieved, but regarding the problem of German reunification (whose solution is seen by many political observers as an important guarantee of peace), this participation in bloc treaties may not produce an easing of the situation. The same may be true regarding membership in the → United Nations, which both German States have gained. This fact too can be seen as a consequence of the recognition of the GDR as a sovereign State. It remains unclear, however, whether Art. 107 of the → United Nations Charter preserves its applicability after the entry of both German States into the UN (→ Enemy States Clause in the United Nations Charter). Under this provision, the victors in World War II are not obliged to apply the mechanisms of the UN Charter in matters concerning Germany as a former enemy State. The maintenance of this provision would also mean that in this regard a final peace settlement has not yet been established.

7. Evaluation

For all those States which are parties to a peace treaty, a final settlement is created. Since such a

peace treaty has not been concluded with Germany, the particular relations which have been established and the particular arrangements which have been unilaterally ordered cannot be qualified as a final peace settlement. It may, however, be questioned what substance a peace treaty finally settling all relations could have, since typical problems normally governed by a peace treaty have already been settled between the two parts of Germany and the victor States.

It therefore appears that there remains only the question of Germany as a whole to be answered by a final peace treaty; but in that very respect the conflicting positions of East and West work in a decisive measure. Under the view of the Eastern bloc and especially of the Soviet Union, further peace settlements seem to be unnecessary, making a formal peace treaty avoidable. For this Eastern bloc position, it seems decisive that the division of Germany be seen as final, in particular with reliance on the argument that the conclusion of the treaty of December 21, 1972 between the Federal Republic and the GDR put an end to that question. This view includes the contention that the status of the territories beyond the Oder-Neisse Line and → German nationality questions have found final resolution.

For the Western Powers' position, however, the division of Germany cannot be seen as final. By concluding the Paris Agreements of 1954, these powers incurred the obligation to act politically together with the Federal Republic toward the goal of reunifying the two parts of Germany (Art. 7 of the General Agreement), so that consequently they must envisage a final peace treaty. The right of self-determination of the German nation must also be seen as in opposition to the concept that a final peace status has already been reached. Nevertheless, the above-described conflicting positions hinder attainment of a clear resolution of the state of affairs concerning peace settlements with Germany after World War II.

Report on the Tripartite Conference at Berlin, August 2, 1945, DeptStateBull, Vol. 13 (1945) 153–161.

Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, Brussels, March 17, 1948, UNTS, Vol. 19 (1948) 51–63.

North Atlantic Treaty, Washington, April 4, 1949, UNTS, Vol. 34 (1949) 243–255.

Statute of the Council of Europe, London, May 5, 1949, UNTS, Vol. 87 (1951) 103–129.

Agreement concerning the Demarcation of the Established and Existing Polish-German State Frontier, Zgorzelec, July 6, 1950, UNTS, Vol. 319 (1959) 93–113.

Treaty instituting the European Coal and Steel Community, Paris, April 18, 1951, UNTS, Vol. 261 (1957) 141–319.

Convention on Relations between the Three Powers and the Federal Republic of Germany, Paris, October 23, 1954, UNTS, Vol. 331 (1959) 327–366.

Convention on the Settlement of Matters Arising out of the War and the Occupation, Paris, October 23, 1954, UNTS, Vol. 332 (1959) 219–386.

Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, Paris, October 23, 1954, UNTS, Vol. 331 (1959) 253–258.

Agreement on German External Debts, London, February 27, 1953, UNTS, Vol. 333 (1959) 3–449.

Treaty of Friendship, Co-operation and Mutual Assistance, Warsaw, May 14, 1955, UNTS, Vol. 219 (1955) 3–33.

Treaty concerning Relations between the Union of Soviet Socialist Republics and the German Democratic Republic, Moscow, September 20, 1955, UNTS, Vol. 226 (1956) 201–213.

Treaty regarding Rectification of the Belgian-German Frontier and the Settlement of Various Problems concerning the Two Countries, Brussels, September 24, 1956, UNTS, Vol. 314 (1958) 195–251.

Treaty establishing the European Economic Community, Rome, March 25, 1957, UNTS, Vol. 298 (1958) 3–165.

Treaty establishing the European Atomic Energy Community, Rome, March 25, 1957, UNTS, Vol. 298 (1958) 176–266.

Convention relating to Certain Institutions Common to the European Communities, Rome, March 25, 1957, UNTS, Vol. 298 (1958) 267–274.

Charter of the Council for Mutual Economic Assistance, Sofia, December 14, 1959, UNTS, Vol. 368 (1960) 253–285.

Netherlands and Federal Republic of Germany, General Treaty for the Settlement of Frontier Questions and Other Problems Outstanding between the Two Countries, The Hague, April 8, 1960, UNTS, Vol. 508 (1964) 14–273; Vol. 509 (1964) 2–267.

Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics, Moscow, August 12, 1970, ILM, Vol. 9 (1970) 1026–1030.

Poland and Federal Republic of Germany, Agreement concerning the Basis for Normalization of their Mutual Relations, Warsaw, December 7, 1970, UNTS, Vol. 830 (1972) 327–335.

Quadripartite Agreement, Berlin, September 3, 1971, ILM, Vol. 10 (1971) 895–900; Vol. 11 (1972) 734–736.

Federal Republic of Germany and German Democratic Republic, Treaty on the Basis of Intra-German Relations, East Berlin, December 21, 1972, ILM, Vol. 12 (1973) 16–24.

Vertrag über die gegenseitigen Beziehungen zwischen

der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik, Prag, 11. Dezember 1973, Bundesgesetzblatt (1974 II) 990–997.

H. MOSLER and K. DOEHRING, Die Beendigung des Kriegszustandes mit Deutschland nach dem Zweiten Weltkrieg (1963).

KARL DOEHRING

PEACE, THREAT TO

The promotion of peaceful relations among its subjects has traditionally been regarded as the main objective and justification of → international law. As the "classical" decentralized international legal order and the → League of Nations only partly achieved this goal, a new system of → collective security was established by the → United Nations Charter. This new system meets the prerequisites for the success of collective security to a much higher degree than its predecessor. The virtual universality of membership should have the consequence of deterring any potential aggressor from actually launching an illegal attack (→ Aggression). The comprehensive prohibition of the threat or → use of force and the clear-cut obligation to participate in → sanctions serve to close legal loopholes. The → United Nations Security Council, whose limited membership assures flexibility, is authorized not only to coordinate but also to order binding enforcement measures.

The key provision which sets the system of collective security in motion is Art. 39 of the UN Charter: Before making recommendations or deciding upon non-military or military sanctions, "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression". These three terms are also found in Art. 1(1) of the Charter in which the maintenance of international peace and security is laid down as the first purpose of the UN.

Since the majority of the authors of the Charter felt that the Security Council should determine the occurrence of those three situations endangering international peace on the merits of each concrete case, the three terms in question were not defined in the constituent instrument. The → United Nations General Assembly eventually adopted a definition of aggression in Resolution 3314 (XXIX) of December 14, 1974. Moreover, there seems to be no doubt that an act of aggression is a more serious violation of international law than a breach of the peace, which in turn is a narrower concept than a threat to the peace.

In point of fact, such threats can emerge without resort to the force of arms. They could even be brought about by behaviour which is not contrary to international law. Nonetheless, under Art. 2(7) of the Charter, a State involved in a threat to the peace cannot prevent the UN from applying enforcement measures under Chapter VII by claiming that the matter falls within its own → domestic jurisdiction. Moreover, a determination that a threat to the peace exists does not automatically entail allocation of responsibility to any of the parties concerned. The UN can thus try to prevent international tension from escalating into → armed conflict.

Although the Security Council as a rule prefers not to base its activities on any of the Charter's specific provisions, it did, for instance, discuss in the initial years 1946–1948 the policies of the Franco régime in Spain, the Greek frontier incidents and the situation in → Palestine as possible threats to international peace. The Council failed, however, to reach agreement on the existence of a threat to the peace within the meaning of Art. 39 of the Charter, except at a later stage of the Palestine question.

The issue of determining the existence of a threat to the peace came to a head in 1966 when the Security Council decided to impose far-reaching sanctions in Resolutions 221 (1966) and 232 (1966) aimed at precipitating the end of white minority rule in Southern Rhodesia (→ Rhodesia/Zimbabwe). Those opposing these economic enforcement measures argued that even if the activities of the white régime violated international boundaries of Rhodesia (→ Territorial Sovereignty) and hence did not menace international peace. Most commentators, however, seem to have endorsed the viewpoint underlying the Council's resolutions that the violation of fundamental → human rights and of the principle of → self-determination of peoples has international implications in today's interdependent world.

Another illustration of divergent opinions on

the occurrence of a threat to the peace was provided more recently by the debate in the Security Council in January 1980 on the dispute between Iran and the United States. After two previous resolutions of the Council calling on the Iranian Government to immediately release all United States citizens held as → hostages in Iran, and after an order of the → International Court of Justice (ICJ) to the same effect had remained unheeded (→ United States Diplomatic and Consular Staff in Tehran Case), the United States submitted a draft resolution denouncing the detention of the hostages as a continuing threat to international peace and security. Expressly invoking Arts. 39 and 41 of the Charter, the United States demanded mandatory economic and diplomatic sanctions against Iran in order to obtain the liberation and safe departure of its citizens. Although the Soviet Union's representative to the Security Council admitted that Iran had committed a breach of international law (→ Diplomatic Agents and Missions, Privileges and Immunities; → Internationally Wrongful Acts), he did not consider this violation a threat to international peace and security. In his opinion, the United States–Iranian conflict was merely bilateral and did not fall within the purview of Chapter VII of the Charter. Consequently, enforcement measures would be unjustified. By casting its → veto, the Soviet Union prevented the adoption of the United States' draft resolution.

Although primary responsibility for maintaining international peace and security is conferred upon the Security Council in Art. 24 of the Charter, the General Assembly plays at least a subsidiary role in this respect. The powers of the General Assembly are, however, limited to addressing non-binding resolutions to its members. An attempt to further strengthen its position in this field was made by the adoption of the → Uniting for Peace Resolution (UN GA Res. 377 (V)) in 1950. Should the Security Council, blocked by the veto of one of its permanent members, fail to exercise its primary responsibility in situations envisaged in Art. 39, the General Assembly was to make the appropriate recommendations for → collective measures. The controversy over the legality of this Resolution has become largely irrelevant, as a result of the admission of numerous young States from the Third World to the UN and the consequent loss of the West's automatic majority. The major powers have therefore again shifted the centre of gravity of the collective security system back to the Security Council.

Nevertheless, the plenary organ of the UN has often dealt with questions related to peace and security by virtue of its competence under Arts. 10 to 14. Members have tended to adopt a broad perspective in this respect, especially in connection with self-determination of peoples and human rights. In particular, the General Assembly has regarded the situations in Southern Africa as threats to international peace. Its calls for sanctions, however, have been generally ignored by the Security Council. The General Assembly has also tried to facilitate the peaceful settlement between parties to conflicts endangering international peace on numerous occasions (→ Peaceful Settlement of Disputes).

One further shortcoming in the League of Nations system was remedied in the UN Charter by authorizing the → United Nations Secretary-General to bring to the attention of the Security Council any matter which, in his opinion, may threaten the maintenance of international peace and security. The chief executive of the UN has, however, rarely exercised his competence under Art. 99 of the Charter, although he did request, for example, a Council meeting during the Congo crisis in 1960 and another in November 1979 to deal with the detention of United States hostages in Iran. Yet resort to Art. 99 is only the most obvious manifestation of the UN chief executive's much wider activities aimed at maintaining or restoring international peace. By virtue of their "inherent powers", secretaries-general have tried to alleviate international tension by frequently offering their → good offices and mediation (→ Conciliation and Mediation).

The other main organs of the UN also contribute to removing threats to the peace: the ICJ mainly by passing binding judgments on inter-State disputes on the basis of international law (→ International Courts and Tribunals; → Judicial Settlement of International Disputes), the Trusteeship Council (→ United Nations Trusteeship System) and, above all, the → United Nations Economic and Social Council

(ECOSOC) by tackling the very roots of international friction. In addition, States are under a general obligation to solve their conflicts peacefully with whatever means they choose.

The bulk of traditional international law as well as the UN Charter emphasize (to use the terminology of "critical" peace research) "negative" peace, that is, the absence of direct, physical violence. On the other hand, ECOSOC, under the authority of the General Assembly, is specifically charged with promoting "positive" peace, i.e. social justice, on a worldwide scale. Particularly noteworthy is the link between the respect for human rights and peaceful relations among nations expressly recognized in Art. 55 of the UN Charter. The nations of the Third World stress that lasting peace cannot be achieved without at least satisfying the "basic needs" in → developing States (→ International Law of Development). The "socialist" camp regards the concrete implementation of human rights as a domestic matter depending on the socio-economic system of the State concerned but approves of international action against systematic, large-scale denials of those rights such as → apartheid, because such violations of international law are said to constitute threats to the peace under Art. 39 of the UN Charter (→ Socialist Conceptions of International Law).

Modern international law has thus achieved some progress in the direction of both "negative" and "positive" peace. But disagreement among the permanent members of the Security Council has, as a rule, also paralyzed the UN system of collective security if "mere" threats to the peace are at issue. The weaknesses of the instruments of → peaceful change in general and the reluctance of the industrial States in particular to take substantial steps towards a new → international economic order (→ Economic Law, International) based on global equality and justice as demanded by the Third World have so far prevented the elimination of some of the real causes from which threats to the peace arise. Many factors point to continuing international instability. While economic and social interdependence is increasing, so is the fragmentation in world politics. Current tensions in the ethnic, religious, ideological and economic areas do not augur well for the disappearance of threats to international peace in the foreseeable future.

Repertory of Practice of United Nations Organs, Vol. 2, Articles 23 to 54 of the Charter (1955); Supp. 2, Articles 9 to 54 (1964); Vol. 5, Articles 92 to 111 of the Charter (1955); Supp. 3, Articles 92 to 111 of the Charter (1973).

C.G. FENWICK, When is There A Threat to the Peace? – Rhodesia, AJIL, Vol. 61 (1967) 753–755.

M.S. MCDOUGAL and M.W. REISMAN, Rhodesia and the United Nations, The Lawfulness of International Concern, AJIL, Vol. 62 (1968) 1–19.

J. GALTUNG, Gewalt, Frieden und Friedensforschung, in: D. Senghaas (ed.), Kritische Friedensforschung (1971) 55–104.

H. NEUHOLD, Internationale Konflikte, Verbotene und erlaubte Mittel ihrer Austragung (1977).

HANSPETER NEUHOLD

PEACE TREATIES

1. Historical Development. 2. Function: (a) Termination of war. (b) Restoring friendly relations. 3. Negotiation and Conclusion: (a) Participants. (b) Negotiating procedure. (c) Preliminaries. (d) Relevance of compulsion. 4. Structure and Scope of the Treaty Document: (a) General order of contents. (b) Preamble. (c) Political and territorial clauses. (d) Financial, economic and juridical clauses. 5. Safeguards and Guarantees. 6. Revision and Peaceful Change. 7. Current Significance. 8. Philosophy of Peacemaking.

1. Historical Development

Termination of → war by conclusion of a peace treaty is one of the oldest institutions of international law. A famous example from a period which knew an international order with the characteristics of a truly → international law is the peace treaty concluded circa 1280 B.C. between the Egyptian Pharaoh, Rameses II, and Hattusilis II, the King of the Hittites. In addition to the → armistices and temporary peace settlements, which prevailed in the termination of disputes of the Greek *polis* with rival communities, the political system of ancient Greece was also familiar with a general type of peace treaty. Not only the participants in the preceding hostilities but also third parties were included in these, and they regularly stipulated a joint commitment to → sanctions against the perpetrator of a breach of the peace.

In his definition of *jus gentium*, Isidore of Seville (c. 560–636) mentioned *paces* as one of the

elements of international law. In medieval practice, peace was closely interwoven with the legal institutions of feudalism. Christian theology, linking the concepts of peace with justice, deeply influenced the meaning of peace (→ Peace, Historical Movements towards), but with the schisms of the Reformation, it became increasingly difficult to agree on a concept of *justitia* as *fundamentum pacis*. Philosophers like Spinoza and Hobbes laid the emphasis on peace as a state of assured internal order, the *pax civilis*. Peace between States could only be conceived as an interruption of the normal *bellum omnium (civitatum) contra omnes* by means of a treaty. Whereas most of the classic proponents of the rationalist → natural law theory continued to regard peace as the normal relationship between States, they agreed with Hobbes in viewing peace as the product of contractual arrangements. *Status pacis* and *pactum pacis* became identical.

With peace and justice thus categorized separately, it became the main function of a peace treaty to terminate hostilities and violence, to settle controversial claims by compromise or renunciation, and to establish a new order which, regardless of right or wrong, insured stability, security and tranquillity. However, peace continued to be considered as more than a mere state of non-violence, an absence of armed hostilities, or a period of non-belligerency (→ Peace and War). The task and function of a peace treaty was to achieve a durable accommodation and reconciliation between former enemies, and oblivion and amnesty for their citizens who perpetrated acts of hostility, violence, offence, injury or damnification ("perpetua oblivio et amnestia", Art. II, Instrumentum Pacis Osnabrugense, 1648; → Amnesty Clause). Good neighbour relations and friendship were to be restored ("fida vicinitas et secura studiorum pacis atque amicitiae cultura revirescant et florescant", Art. I, Instrumentum Pacis Osnabrugense).

In another sense the major peace treaties of modern times tried to achieve more than the cessation of hostilities; they endeavoured to construct a new political order on the European Continent. It is this that gives the Westphalian Peace Treaties of Münster and Osnabrück (→ Westphalia, Peace of (1648)) their historical reputation, a reputation which at times has been exaggerated by claims that they gave birth to modern international law and upon which doubt has been cast by modern research.

Similarly, the Peace Treaties of Utrecht (1713), Aix-la-Chapelle (1748), Vienna (→ Vienna Congress (1815)), Paris (→ Crimean War and Paris Peace Treaty (1853–1856)), and → Versailles (together with the → Saint-Germain, → Trianon, → Neuilly and → Lausanne Peace Treaties, 1919–1923) in turn modified and renewed the European political order. They were general peace treaties, in most cases including States which had not participated in the preceding war, but were at the same time indispensable for the establishment of a workable and effective political system. Significantly, these general peace treaties often included principles and rules which were considered to be essential for a stable and viable political system, such as the equality in law of the Catholic and Protestant religions and the principle *cuius regio eius religio* linked with the right of emigration (Peace of Westphalia). This ended the period of religious wars. Another instance is the principle of the → balance of power in Europe, which was expressly mentioned in the Peace Treaty of Utrecht (Art. 2): "ad firmandam stabiliendamque Pacem ac Tranquillitatem Christiani Orbis, iusto Potentiae Aequilibrio, quod optimum et maxima solidum mutuae Amicitiae at duraturae undiquaque Concordiae fundamentum est." This was tacitly also contained in the Vienna peace settlement of 1815. The Paris Peace Treaties of 1919 included the Covenant of the → League of Nations, by which a new type of international organization for peacekeeping and the maintenance of the → *status quo* was created.

Another significant feature of these general peace treaties was that they constituted or confirmed rules of general international law. The Final Act of the Vienna Congress (Arts. 108 to 117) included a "Règlement pour la libre navigation des rivières" (→ International Rivers; → Navigation, Freedom of), another document with respect to the *cérémoniel diplomatique* (→ Diplomacy), and an annex which included a "Déclaration contre la traite des nègres" (→ Slavery).

The Paris Peace Treaty of 1856 incorporated

Turkey into the *droit public de l'Europe*; that peace conference adopted the "Déclaration sur le droit de guerre maritime' (→ Sea Warfare; → War, Laws of, History).

2. *Function*

(*a*) *Termination of war*

Legally, the main purpose of a peace treaty is the termination of a state of war and the restoration of normal friendly relations between the former belligerents based on a settlement of matters arising out of the war. But a peace treaty is not the only way to terminate a war; there are other means to bring about this effect.

Quincy Wright, who tried to count all wars and peace treaties from the end of the 15th century on, concluded that overall, less than half were ended formally by a treaty of peace. But with increasing frequency until World War I, wars were ended by peace treaty: one third in the 16th and 17th centuries, half in the 18th century, two-thirds in the 19th century and six-sevenths in the first two decades of the 20th century. Since 1920, however, when the concept and the practice of war changed radically, wars have usually begun without a declaration of war and ended without a peace treaty.

Apart from the conclusion of a peace treaty, war can be terminated by a → suspension of hostilities accompanied by action implying the intention of mutual peaceful intercourse, e.g. the establishment of diplomatic relations or the conclusion of other types of treaties (e.g.: Sweden-Poland (1716); Spain-France (1720); Persia-Russia (1801); France-Mexico (1867); Prussia-Liechtenstein (1866); → Germany-United States Peace Treaty (1921)). A unilateral → declaration (→ Unilateral Acts in International Law) on the termination of war requires a concurrent declaration from the other side or at least acceptance or → acquiescence; in any case such declarations legally have only declaratory meaning and do not constitute a new legal status. (Russia's unilateral declaration on the termination of the war on February 10, 1918 was not accepted by Germany, which continued hostilities; the Joint Resolution of the United States Congress of July 2, 1921 was accepted by Germany and confirmed by the Peace Treaty of August 25, 1921.

A third way to terminate war was, according to the "classical" system of international law, the complete defeat of one party (→ Debellatio) with occupation of its territory and an act extinguishing the legal existence of the defeated nation as a sovereign State (→ Annexation; → Dismemberment; → States, Extinction). In the 19th century Prussia and Italy defeated a number of small German and Italian principalities and incorporated them by annexation. Great Britain acted similarly *vis-à-vis* the Boer States in South Africa (1900), as did Italy with respect to Ethiopia (1935/1936).

Since the end of World War II, no clear-cut annexation of a defeated nation has so far taken place. In the case of Germany, complete defeat and unconditional → surrender were not followed by annexation. The Berlin Declarations of June 5, 1945, by which the four occupying powers assumed supreme authority, stated expressly that this assumption of power did "not effect the annexation of Germany". Moreover, the state of war between Germany and its adversaries continued beyond the signature of the military surrender.

War is not terminated by a belligerent entering into hostilities against its previous allies as a co-belligerent of its former enemies. This applied to Italy and some other partners of the Axis Powers, who became signatories of the → Peace Treaties of 1947. But as these Treaties entered into force irrespective of their ratification by the former allies of the Axis, they are regarded as unilateral declarations of peace stipulated by the principal powers.

Termination of a state of war by peace treaty constitutes a new situation only for purposes of international law. It is not identical with the end of the war in domestic law. For all intra-State purposes it has to be enacted by domestic legislation (→ International Law and Municipal Law).

(*b*) *Restoring friendly relations*

Re-establishment of diplomatic relations is a normal consequence of a peace treaty, but not an automatic one (→ Diplomatic Relations, Establishment and Severance). It has to be especially agreed upon. Also, it sometimes precedes a peace treaty. (Diplomatic relations between the Soviet Union and the Federal Republic of Germany

were agreed upon in 1955 regardless of the absence of a peace treaty.)

Another consequence usually is the expiration or repeal of war legislation restricting trade and free intercourse between the former belligerents (→ Trading with the Enemy).

Disputes which were at the roots of the preceding war are often decided *ipso facto* by the outcome of the war (power rivalry, threatening military strength, encircling → alliances). As far as they concern territorial claims, the peace treaty has to dispose of them. Matters arising out of the war (→ war crimes, exchange of → prisoners of war, → war damages, → restitution of seized property) also have to be settled.

The fate of private contracts as well as of State treaties, suspended by the war, has to be decided (→ War, Effect on Contracts; → War, Effect on Treaties). Often → mixed commissions or → arbitration tribunals are instituted in order to help find equitable solutions.

3. *Negotiation and Conclusion*

(*a*) *Participants*

Normally the belligerents are the parties to negotiate and conclude a peace treaty, either bilaterally or multilaterally (→ Negotiation). Sometimes non-belligerents enter into the process. This applies in particular when a peace treaty aims at establishing a broad new political order, as the great European peace settlements from 1648 to 1919 did. (Even the Paris Peace Treaty of 1856 which ended the Crimean War was signed by non-belligerents Austria and Prussia.)

A separate peace treaty concluded by one partner of a belligerent coalition is legally valid even if it violates a previous contractual commitment to abstain from such action. But very often separate peace treaties lack political stability. (Russia's and Romania's separate peace treaties of → Brest-Litovsk and Bucharest (1918) were cancelled by Arts. 116 and 292 of the Versailles Peace Treaty.) During the Berlin crisis of 1958–1962 the Soviet Union threatened to conclude a separate Peace Treaty with the German Democratic Republic, but did not follow suit.

(*b*) *Negotiating procedure*

Multilateral peace settlements are normally negotiated at a collective peace conference (Münster and Osnabrück (1642–1648), Vienna and Paris (1814–1815), Paris (1919–1920)). Sometimes the negotiating position of the vanquished nation is severely restricted. At the Paris Peace Conference (1919–1920), the German delegation was only permitted to submit written remonstrations to the allied draft treaty (whereupon the treaty was denounced in Germany as a *Diktatfrieden*). A similar procedure was applied in the drafting of the Peace Treaties of 1947. In Vienna in 1815, Talleyrand succeeded in preventing a discriminatory procedure from being applied against defeated France. France was allowed to join the → Great Powers at once who reserved the important decisions for themselves within the group of *puissances principales de l'Europe*. Similarly at the Paris Peace Conference of 1919, the smaller nations on the Allied side were restricted to a minor role, whereas all important decisions were taken by the Supreme Council of the Principal Allied and Associated Powers.

A negotiating procedure based exclusively on written correspondence between all signatories is exceptional. It was applied for the preparation of the San Francisco → Peace Treaty with Japan (1951).

(*c*) *Preliminaries*

An → armistice or a military capitulation (whether or not it is "unconditional surrender") has in principle no legal bearing on the termination of a state of war and the conditions of a peace treaty. A preliminary peace treaty can terminate a state of war (partially or in general) and can prejudice the conditions of peace. The preliminary peace treaty of September 18, 1897, preceding the Peace Treaty of Constantinople of December 4, 1897 between Greece and Turkey, provided in Art. 6: "L'état de guerre entre la Turquie et la Grèce cessera aussitôt que le présent Acte aura été signé." But in most cases, the main purpose of peace preliminaries consists in preparing and facilitating a definite peace treaty by committing the parties to a general framework of peace conditions. Legally speaking, they represent a → *pactum de contrahendo* on the outline of the future peace treaty. From the beginning of the 18th century it became customary to open up peace negotiations in this way.

At the end of World War I, peace preliminaries were agreed upon by an exchange of → notes. This process was completed by a note from the American Secretary of State Robert Lansing of November 5, 1918 to the German Government, in which he communicated that the Allies had accepted President → Wilson's Fourteen Points as the basis for a peace treaty. German criticism of the Versailles Treaty, in so far as it was legally formulated, was founded on its far-reaching deviation from this basis.

At the end of World War II, the general situation did not lend itself to an agreement on peace preliminaries. As the territorial decisions of the Peace Treaties of 1947 were already anticipated in the armistices which the Soviet Union had concluded with Bulgaria, Finland, Hungary and Romania, and as the armistices in → Korea (1953) and → Vietnam (1954) went beyond the military questions and hinted at the future political structure of the region, it is sometimes assumed that armistices may take over the function of preliminary peace treaties.

But there is also an important example of peace preliminaries from the most recent period: On September 17, 1978, President Anwar Al-Sadat of Egypt and Prime Minister Menachem Begin of Israel agreed on a document entitled "A Framework for the Conclusion of a Peace Treaty between Egypt and Israel". It was preceded by a document, signed also by President Carter of the United States called "A Framework for Peace in the Middle East". Together, the two documents represent the preliminaries for a broad peace settlement in the Middle East as well as for a bilateral peace treaty between Israel and Egypt (→ Israel and the Arab States). They prove that preliminary agreements for a peace settlement are as relevant as ever in international affairs.

(*d*) *Relevance of compulsion*

All peace treaties, concluded to end a war in which one side was defeated, emerge from a situation of *de facto* inequality, where pressure can be exerted and the vanquished party can be forced to accept the conditions dictated by the victor. It has been the traditional rule of international law that only direct force used against the person of the negotiator or the plenipotentiary to sign the treaty document can void it (→ Treaties, Validity). The 1969 → Vienna Convention on the Law of Treaties in Art. 51 confirmed this rule as far as coercion against persons is concerned. But against the traditional practice, Art. 52 extended this rule to treaties whose conclusion has been procured by the threat or → use of force in violation of the principles of the → United Nations Charter. Whether or not this controversial provision will be generally accepted in practice and whether it can effectively militate against a given power situation resulting from war remains an open question. Whether the international legal order will be more disturbed than improved by the provision is also in doubt.

4. *Structure and Scope of the Treaty Document*

(*a*) *General order of contents*

Usually treaty documents follow a traditional scheme which has developed since the Middle Ages: They open up with a general → preamble setting out the motives and goals of the contracting parties, they attribute guilt or stipulate amnesty and forgiveness, and they promise peace and friendship for the future. The central part of the text consists of a general peace clause (terminating the state of war and restoring friendly relations) and more detailed territorial and political clauses; they are followed by provisions dealing with financial, economic and juridical questions. Sometimes special arrangements are provided for safeguarding and guaranteeing the execution of the treaty and for settling disputes arising out of the interpretation and application of the treaty. Final clauses generally deal with ratification, the date of effectiveness, and the authentic language(s) (→ Treaties, Conclusion and Entry into Force).

(*b*) *Preamble*

The ancient formula of a "permanent peace" – ("Pax sit Christiana, universalis, perpetua", Osnabrück (1648)) – has been replaced in modern treaties by more modest expressions like "durable" or "stable" peace. The amnesty clause, which almost entirely faded away, was in a striking though exceptional way revived by the peace treaty between Saudi Arabia and Yemen of May 20, 1934. Corresponding to the weakening of the idea of amnesty, attributions of guilt have in-

creased, in particular in those treaties which were inspired by the idea to punish the vanquished, e.g. the 1947 Treaties. A Japanese commitment to comply with the principles of the UN Charter is mentioned in the preamble of the 1951 Peace Treaty. Sometimes the termination of the war is stated in the preamble, as was the practice in the 1947 Peace Treaties.

(c) *Political and territorial clauses*

Significant in the post-World-War II period were clauses in which the vanquished promised to suppress fascism, to punish war criminals, to abstain from prosecuting collaborators with the victors and to respect → human rights.

Cession of territory is usually accompanied by safeguards for the protection of those inhabitants who became a minority within the nation to which they are transferred (→ Minorities). Often they are granted an option of nationality. Limited autonomy was promised, for instance, to the German-speaking population of the Italian provinces of Bolzano and Trento (ceded by Austria (1919); Arts. 64 to 69 of the Saint-Germain Peace Treaty; Art. 10 and Annex IV of the Italian Peace Treaty of 1947; Art. 7 of the → Austrian State Treaty of 1955).

→ Plebiscites as an instrument of → self-determination, provided for and exercised according to the → Peace Treaties after World War I, have not, with very few exceptions, been applied after World War II, even though Art. 1(2) of the UN Charter proclaimed the principle of self-determination of peoples.

There are also clauses which seek to regulate a State's future relations with adjoining States. For example, Austria had to undertake to maintain her independence (Art. 88, Saint-Germain Treaty) and to refrain from any political or economic union (→ Customs Union) with Germany (Art. 4 of the Austrian State Treaty).

(d) *Financial, economic and juridical clauses*

Such clauses form an ever increasing part of modern peace treaties. Instead of the traditional war indemnity, the central concept of 20th century peace settlements is the principle of → reparations, which are intended as compensation for all war damages including those of the civilian population, irrespective of the legality of their cause. In view of the considerable international financial troubles caused by the reparation régime imposed by the 1919 Peace Treaties, new methods of reparation were applied after World War II (→ Reparations after World War II). They included the dismantlement and removal of industrial equipment, the payment of reparations out of current production and the liquidation of external assets. In accordance with Chapter VI of the Bonn Convention on the Settlement of Matters arising out of the War and the Occupation, the problem of reparation was to be settled by the peace treaty between Germany and its former enemies or by earlier agreements (with a unified Germany) (→ Bonn and Paris Agreements on Germany (1952 and 1954)).

Amongst the juridical clauses, the most important ones usually refer to the treatment of private pre-war contracts and the revival of State treaties suspended by the war.

Disputes arising out of some economic and juridical parts of the 1947 Peace Treaties were to be referred to mixed conciliation commissions (→ Mixed Claims Commissions). The Peace Treaty with Japan authorized any one signatory to submit any dispute concerning the interpretation or execution of any treaty provision to the → International Court of Justice for decision (Art. 22).

5. *Safeguards and Guarantees*

Archaic forms of safeguarding the execution of peace treaties, such as affirmation upon oath by one side or both, taking of → hostages, etc., have been replaced in modern times by more rational and practical arrangements like → demilitarization (in general or with respect to specific zones), arms limitation, → neutralization, the prohibition of alliances, the occupation of territory, the stationing of international peacekeeping forces (→ International Military Force; → United Nations Peacekeeping System), and by guarantees given by third parties, particularly by great powers. The Versailles Peace Treaty in its Part XIV, "Guarantees for the Execution", provided for a military occupation of German territory west of the Rhine for 15 years (→ Rhineland Occupation after World War I). A broader zone was demilitarized. Armed forces were restricted to an army of 100 000 soldiers. The League of Nations was entrusted with supervisory powers. The 1947

Peace Treaty with Italy provided for restrictions of the Italian armed forces and their equipment, the destruction or removal of fortifications and military installations, and the demilitarization of certain areas. It has been argued that guarantees by third powers are no longer current practice, but this has been disproved by recent developments: Not only did the President of the United States sign the Egyptian-Israeli Peace Treaty as a "witness", but he also, on behalf of the United States, assumed substantial guarantees for the execution of the Treaty (Exchange of Letters and Memorandum of Understanding of March 26, 1979). UN peacekeeping forces and UN → observers are entrusted with supervising functions (→ United Nations Forces).

6. Revision and Peaceful Change

Usually peace treaties do not provide revision clauses. They tend to aim at the preservation of the → *status quo*. This renders their alteration more difficult but does not exclude it if the signatories unanimously agree. Between the two world wars dissatisfaction with the peace settlement of 1919 was expressed in a long-standing but inconclusive debate about revision and → peaceful change of the peace treaties. The revision clause of the Bonn Convention on Relations of 1952/1954 (Art. 10; see section 7 *infra* is indicative of the settlement's provisional character, for it is not equivalent to a peace treaty (→ Treaties, Revision).

7. Current Significance

Since World War I, the institution of the peace treaty has been in decline. In their preambles, the Paris Peace Treaties of 1919 contained lofty proclamations that war "should be replaced by a firm, just and durable peace" But in reality the treaties showed nowhere a sincere endeavour for accommodation, reconciliation or for the establishment of a sound and balanced post-war order.

There was no amnesty clause in the Versailles Treaty, but, instead, a statement made on the vanquished side's war guilt and an obligation placed upon it to extradite the head of State and other persons indicted for war crimes (Arts. 227 to 230). The Covenant of the League of Nations did not provide any procedure or machinery for the pursuit of justice. Its basic concept was the protection of the principle of → *uti possidetis*. In every legal system this is considered a necessary first step, complemented by a second one, where the legal justification for being in actual possession has to be examined and a corresponding decision has to be taken. But no such procedure was ever adopted within the institutional framework of the League of Nations.

After World War II, the victors were unable to agree on a general peace treaty, although they had envisaged one at the Potsdam Conference (July 17 to August 2, 1945) (→ Potsdam Agreements on Germany (1945)). In 1947, after lengthy negotiations, they concluded separate peace treaties with Bulgaria, Finland, Italy, Hungary and Romania. In 1951, on the initiative of the United States, a Peace Treaty with Japan was signed in San Francisco, but the Soviet Union refused to adhere to the Treaty. Later on, although quite a number of regional wars took place, the only peace treaty of importance was brought about by the treaty between the Arab Republic of Egypt and the State of Israel, signed in Washington on March 26, 1979. The Korean War ended with the Military Armistice signed at Panmunjom on July 27, 1953. The first ("French") phase of the Indochina war was terminated by three agreements on the cessation of hostilities in Vietnam, Laos and Cambodia, signed in Geneva on July 20, 1954; the second ("American") phase by an "Agreement on ending the War and restoring Peace in Vietnam", signed in Paris on January 27, 1973, then confirmed and guaranteed by an international Conference (February 26 to March 2, 1973). Elements of an armistice and a peace treaty were combined in this instrument. The third ("Vietnamese") phase ended with the collapse of the South Vietnamese Army and State in April 1975.

In the Far East, Japan concluded a Peace Treaty with the Republic of China represented by Chiang Kai-Shek's government on Taiwan (signed on April 28, 1952, it entered into force on August 5, 1952). After the → recognition of the People's Republic of → China, Peking asked for a new peace treaty. But very soon it became obvious that the Chinese Government was more interested in an instrument of political cooperation. This spared Tokyo the embarrassment of cancelling the preceding peace treaty with the Kuomintang government. On August 12, 1978, a "Treaty

of Peace and Friendship" was signed in Peking, but it was not a peace treaty in the strict legal sense. It did not touch on the question of the termination of a state of war. It did not mention the only territorial dispute between the two countries, concerning jurisdiction over the Senkaku Islands. Its effectiveness was limited to ten years; after that date, it will remain in force, if notice of termination is not given (→ Treaties, Termination). The treaty's substance is political: it deals with → non-aggression, → non-intervention, good neighbour relations, promotion of exchanges, and the development of economic and cultural relations (cf. → Treaties of Friendship, Commerce and Navigation). The most delicate provision (because of Soviet sensitivity) was the so-called → hegemony clause in Art. 2.

Soviet-Japanese talks on a peace treaty are deadlocked because of Soviet unwillingness to negotiate with Japan over her claims to the "Northern Territories" (→ Kurile Islands).

The most important peace settlement after World War II, a treaty with Germany, was never accomplished. As a kind of substitute, the Bonn Convention on Relations between the Three Powers and the Federal Republic of Germany was signed on May 26, 1952; in a revised version, it was incorporated in the Paris Agreements of October 23, 1954 and came into force on May 5, 1955. As the state of war had already been terminated by a unilateral declaration of the Three Powers in 1953 it was the main purpose of this Convention to terminate the occupation régime, restore full → sovereignty to the Federal Republic and settle a number of questions which normally are dealt with in a peace treaty. The provisional character of this contractual arrangement was expressly stipulated; in Art. 7 of the Convention on Relations the parties agreed that an essential aim of their common policy was "a peace settlement for the whole of Germany, freely negotiated between Germany and her former enemies, which should lay the foundation for a lasting peace".

On the other side, the Soviet Union from 1947 onwards called for a German peace treaty. In diplomatic notes and at Four Power Conferences she submitted complete draft peace treaties to be first concluded with an all-German government, later at the Geneva Conference of 1959, with the Governments of two separate German States. At the climax of the → Berlin crisis of 1961 she threatened to conclude a separate peace treaty with the German Democratic Republic (GDR). Such a treaty would in effect have ended the Four Power arrangements and their occupation rights. Access to Berlin would have come under the exclusive jurisdiction of the GDR – including passage through the air corridors to West Berlin (→ Air, Sovereignty over the; → Air Law; → Overflight). Because of these implications the threat to conclude a separate peace treaty was taken very seriously on the Western side. However, it never materialized.

8. Philosophy of Peacemaking

The "Dictionnaire de la terminologie du droit international", published in 1960 under the patronage of the Union académique internationale, defined "peace" as "absence de guerre": "Etat de paix: situation existant entre deux ou plusieurs Etats qui ne sont pas ou ne sont plus en guerre" (p. 435). Significantly, this definition encompasses only the negative half of the term peace; the other, positive half, the re-establishment of friendly political, economic, cultural relations, is completely ignored. This kind of a shrinking concept of peace indicates that peacemaking has, in our century, become a "lost art" (von Hentig).

The teaching of Immanuel Kant shows the prerequisites of a just and lasting peace: It is not a natural state of affairs, it has to be instituted.

A treaty deserves to be called a peace treaty only if it eliminates the causes for a future war. It has to be a general settlement of disputes, and allow for a new beginning in the mutual relationship of the contracting parties, without reverting to past conflicts. Amnesty and oblivion are essential elements of such a settlement, whereas humiliation, punishment and discrimination are inimical to stable conditions of peace.

Most peace treaties of our century have deviated from these principles. The price paid for this deviation was the instability and short duration of the peace settlement. Finally, more and more wars have come to an end without any peace treaty at all.

The decline of the institution of the peace treaty is illustrated by the fact that most modern text books, apart from quoting special provisions

from individual treaties, do not even mention it. Research work on the historical and systematic perspectives of this important institution are confined to specialized monographs.

If peace is to be stabilized the art of peace-making and framing adequate peace treaties has to be learned anew.

G. DE GARDEN, Histoire générale des traités de paix et autres transactions principales entre toutes les Puissances de l'Europe depuis la paix de Westphalie, 15 vols. (1848–1887).

C. PHILLIPSON, Termination of War and Treaties of Peace (1916).

J.L. KUNZ, Die Revision der Pariser Friedensverträge (1932).

R. BERNARD, L'armistice dans les guerres internationales (1947).

P. DROST, Contracts and Peace Treaties (1948).

G.G. FITZMAURICE, The Juridical Clauses of the Peace Treaties, RdC, Vol. 73 (1948 II) 255–367.

E. WOLF, Vorkriegsverträge in Friedensverträgen (1949).

H. VON HENTIG, Der Friedensschluß (1952).

D. OTTENSOOSER, Termination of War by Unilateral Declaration, BYIL, Vol. 29 (1952) 435–442.

A. LEISS and R. DENNET, European Peace Treaties after World War II (1954).

U. SCHEUNER, Der fehlende Friede, in: Mensch und Staat in Recht und Geschichte, Festschrift für Herbert Kraus (1954) 190–206.

F. DICKMANN, Der Westfälische Friede (1959).

H. KRAUS, Friedensverträge, in: Internationale Gegenwartsfragen, Ausgewählte Schriften (1963) 79–145.

H. MOSLER and K. DOEHRING, Die Beendigung des Kriegszustandes mit Deutschland nach dem Zweiten Weltkrieg (1963).

U. SCHEUNER, Die großen Friedensschlüsse als Grundlage der europäischen Staatenordnung zwischen 1648 und 1815, in: Spiegel der Geschichte, Festgabe für Max Braubach (1964).

P.A. HAUSMANN, Friedenspräliminarien in der Völkerrechtsgeschichte, ZaöRV, Vol. 25 (1965) 657–692.

Q. WRIGHT, A Study of War (2nd ed. 1965).

J. STONE, De victoribus victis, The International Law Commission and Imposed Treaties of Peace, Virginia Journal of International Law, Vol. 8 (1968) 356–373.

Q. WRIGHT, How Hostilities Have Ended, Peace Treaties and Alternatives, Annals of the American Academy of Political Science, Vol. 392 (1970) 51–61.

R.F. RANDLE, The Origin of Peace, A Study of Peace Making and the Structure of Peace Settlements (1973).

W. JANSSEN, Krieg und Frieden in der Geschichte des europäischen Denkens (1975).

J. FISCH, Krieg und Frieden im Friedensvertrag (1979).

WILHELM G. GREWE

PEACE TREATIES AFTER WORLD WAR I

A. General Survey

The foundation of the Italian and German States in 1871 changed the European system of States. The powerful Prussian German State took the place of the German federation. The multinational empires of the Ottomans, Tsars and the Austro-Hungarian monarchs were threatened by numerous national minorities striving towards autonomy or independence. In 1879, Germany concluded an → alliance with Austria-Hungary, a union of two States containing nine nationalities. Against this Central European bloc (which was joined by Italy and Romania), France and the multinational Russian State formed an Entente which from 1907 Great Britain showed more and more signs of joining. After Austria-Hungary, with German assent, had declared war on Serbia, Germany declared war on Russia on August 1, 1914 and, after an → ultimatum of short duration, she invaded Belgium, Luxembourg and France. Italy and Romania declared their neutrality, and also characterized the actions of their Central Power allies as aggressive preventive → war. As early as 1914, British Foreign Secretary Grey predicted that the expanding war would assume Napoleonic proportions. Because of their violations of Belgium's → permanent neutrality, Great Britain declared war on Germany and Austria-Hungary. Her action was followed by declarations of war by Japan (1914), Italy (1915) and Romania (1916). The Ottoman Empire in 1914 and Bulgaria in 1915 became the fourth and fifth Central Powers. In 1917 the United States and China joined the Allies, although they only declared war on Germany and Austria-Hungary.

The peace treaties after World War I began with the separate peace between the four Central Powers and Soviet Russia, the Ukraine, Finland and Romania respectively. This prepared the ground for the later → peace treaties between Soviet Russia and the successor States in the western area of the former Tsarist empire.

After the military collapse of the five Central Powers, the Paris Peace Conference of 1919/1920

formulated the new order for Central Europe in the → Versailles Peace Treaty (1919), the → Saint-Germain Peace Treaty (1919), the → Neuilly Peace Treaty (1919) and the → Trianon Peace Treaty (1920). Germany remained a united entity. In the place of the Austro-Hungarian Empire came the successor States of Czechoslovakia, Yugoslavia, and the Republic of Austria (as a new State); Poland and Italy received large parts of the former kingdoms of Austria and Hungary. A reduced Hungary retained its identity with the Kingdom of Hungary.

The Allies did not recognize the Soviet-Russian régime against which Tsarist officers kindled a → civil war and in which the new States in the western area of the former Tsarist Empire became entangled. The Allies supported the anti-Bolshevik forces and themselves intervened militarily. The Soviet Government, however, emerged victorious from the civil war, and the successor States of the Tsarist Empire, Estonia, Lithuania, Latvia, Finland and Poland in 1920/1921 concluded peace treaties with it. The situation created by the lack of a treaty between Germany and the Soviet Government, following Germany's abrogation of the Brest-Litovsk Peace Treaty (→ Brest-Litovsk, Peace of (1918)), in Art. 116 of the Versailles Treaty was normalized by the → Rapallo Treaty of 1922.

The Sèvres Peace Treaty worked out at the Paris Peace Conference for the Ottoman Empire proposed its virtual disintegration. In fact, the Arabian provinces were placed under British and French → mandates. In Asia Minor, however, the opposition organized by Kemal Pasha, later known as Atatürk, against the advancing Allies was successful, particularly against the Greeks, and in 1923 Turkey signed the → Lausanne Peace Treaty which was considerably more favourable to her.

Thus, the peace treaties between 1918 and 1923 are best organized in the following four categories: the peace treaties of the Central Powers in the East in 1918; the peace treaties of the Allies with the Central Powers in 1919/1920; the peace treaties of Soviet Russia with the successor States of the former Tsarist Empire of 1920/1921; and the treaties regulating the succession to the Ottoman Empire of 1920 to 1923.

B. Specific Categories of Treaties

1. Central Powers' Peace Treaties in the East (1918)

The course of the war had brought German and Austro-Hungarian troops and Ottoman units fighting with them deep into Russian territory. From mid-1916 the High Command (Hindenburg and Ludendorff) energetically advocated a German push eastwards; Germany's allies were obliged to conform to their decisions. At the instigation of Ludendorff, Germany and Austria-Hungary on November 6, 1916 proclaimed an independent kingdom of Poland over Polish territory formerly belonging to Russia, unmindful of the fact that although the principle of → self-determination would certainly work against the multinational entities, it would later work against Prussian Germany, which had a minority of some three million Poles, in addition to French and Danish → minorities in the west. However, what was envisaged was a Hohenzollern or Habsburg monarch for Poland.

The communist revolution of November 6 and 7, 1917 brought to power a Soviet Government which offered a universal peace. The Central Powers immediately recognized this government (→ Recognition) and on December 15, 1917 concluded an → armistice with it, beginning peace negotiations on December 22, 1917. The Ukrainian central council (Rada), formed in Kiev in 1917, also sent a delegation which demanded a peace treaty on its own behalf. This was rejected by the Soviet delegation, who then withdrew. On January 18, 1918 the "bourgeois" Rada proclaimed the "free, sovereign Republic of the Ukraine" which was recognized by the Central Powers, and a peace treaty was concluded.

(a) Ukraine

Under the Brest-Litovsk Peace Treaty between the Ukraine and the Central Powers of February 9, 1918 (CTS, Vol. 223, p. 43), the Russian-Austrian border in Galicia continued to serve as the Ukraine's western border. Both sides waived their claims for the compensation of war costs, since the Ukraine was a new State. In an additional treaty, the Ukraine bound itself to deliver yearly

to the Central Powers sufficient grain for a million loaves of bread. As the Rada was unable to face the Soviet Union's forces on its own, forces from the Central Powers occupied the country. The pro-German General Skoropadski became the hetman of the Ukraine.

(*b*) *Soviet Russia*

Because of the German advance on St. Petersburg, the Soviet Government had moved its seat to Moscow; under military pressure, the Soviet delegation returned to Brest-Litovsk and on March 3, 1918 signed the Peace Treaty between Soviet Russia and the Central Powers (CTS, Vol. 223, p. 80). The Soviet Government left the territories of Finland, Poland, Lithuania, Latvia and Estonia to be regulated by the Central Powers, and ceded Ardahan, Kars and Batum to the Ottoman Empire. In an additional treaty of August 27, 1918, it recognized Georgia as an independent State (CTS, Vol. 224, p. 66). Altogether, the Soviet Russians signed away 1 400 000 square kilometres of formerly Tsarist territory containing a population of 35 million. → War damages totalling 6000 million gold marks were imposed on Soviet Russia. Any manifestation of agitation and propaganda was mutually prohibited. Trade relations were taken up again, relations which in the first difficult year of the Soviet Government's existence proved very useful.

(*c*) *Finland*

On December 3, 1917, the Finnish National Assembly declared the independence of Finland. On December 31, 1917 this was explicitly recognized by the Government of Soviet Russia, followed by the Governments of the Scandinavian States and France. The workers of Finland rose in revolt, and the "red garden" claimed more and more territory. On March 1, 1918, the Government of Soviet Russia concluded a treaty of friendship with a Socialist Worker's Republic in Finland. On March 7, 1918 the Finnish Government signed a peace treaty with Germany in Berlin (CTS, Vol. 223, p. 109). This provided for the mutual waiving of war damages, compensation in civil matters, the restoration of private rights, and the return of confiscated → merchant ships and cargoes. The provisions guaranteeing the independence of Finland (→ Guarantee) came close to an alliance. The leftist revolt was only put down by the Finnish Army under Mannerheim in late April with the (requested) support of German troops under von der Goltz. The (conservative) Finnish Senate then elected Prince Friedrich Karl von Hessen, Kaiser Wilhelm II's brother-in-law, to be King of Finland.

On May 29, 1918 Austria-Hungary concluded a treaty with Finland (CTS, Vol. 223, p. 376), stating that both sides mutually waived their war costs. An additional treaty of the same date regulated the countries' economic relations.

(*d*) *Romania*

The Russian armistice compelled Romania, whose greater part since 1916 had been under Central Powers' occupation (→ Occupation, Belligerent), to conclude on December 9, 1917 an armistice in Foksani and on March 5, 1918 (CTS, Vol. 223, p. 107) the preliminary peace of Buftea. The length of the negotiations was a result of competing interests between the five Central Powers. The political peace treaty between Romania and the Central Powers was signed in Bucharest on May 7, 1918 (CTS, Vol. 223, p. 241) and restored diplomatic relations between the countries (Chapters I and II). Romania was obliged to cede southern Dobruja to Bulgaria and border areas ("border rectifications" measuring 4000 square kilometres) to Hungary. Northern Dobruja was supposed to remain under the administration of the Central Powers, but Romania was to be allowed an access to the sea (Chapter III). In the meantime, Romania had occupied Russian Bessarabian Kishinev, at the request of a Moldavian home-rule council in Kishinev. Without the consent of Soviet Russia or Soviet Ukraine, but with the agreement of the Central Powers on April 11, 1918, Romania annexed the territory (→ Annexation). The special agreement on individual economic questions passed the exploitation of the greater part of Romania's oil resources to a German-controlled company. These provisions would have resulted in an enormous economic and political dependence on the part of Romania on the Central Powers, and in particular on Germany.

(e) *Baltic States*

In Lithuania, which from 1915 had been under German occupation, a national assembly (Taryba) elected in 1917 declared the independence of Lithuania on February 16, 1918 and offered the throne to Wilhelm von Urach, Duke of Württemberg. Despite the development of movements towards full national independence in Latvia and Estonia, which in the meantime had been occupied by German troops, a convention dominated by Baltic inhabitants of German extraction on March 8, 1918 offered the Duchy of Courland to the German Kaiser. On April 14, 1918 it was resolved to form a monarchical State of Livia, Estonia, Riga and the island of Oesel which was to be united under the person of Kaiser Wilhelm II and to stand under the protection of Germany (→ Protecting Power).

(f) *Final outcome*

Thus an enormous perimeter of → protectorates ranging from Finland, via the Baltic States, Poland, and the Ukraine to as far as the Caucasus, extended in front of the territories of Germany and her allies. Just when the High Command's eastern plan seemed to be fulfilling itself, the military collapse of the Central Powers occurred. Together with the Ottoman Empire, they had made a fortress which had overextended itself. Despite Russia falling out of the military equation, the Central Powers were unable to withstand the continuous military and economic pressure brought to bear on them by the Allied and Associated Powers from 1917 onwards. One after the other, the Central Powers were obliged to seek an armistice: Bulgaria on September 29, 1918 in Prilep, the Ottoman Empire on October 30 in Mudros, Austria-Hungary (on behalf of both States) on November 3 in Padua, Germany on November 11 in Compiègne, and Hungary (on its own behalf) on November 13 in Belgrade. These agreements already contained the stipulation requiring the Central Powers to recognize as invalid any agreements since the start of the war made with Russia or any State or government whose territory once formed a part of Russia, as well as agreements made with Romania. The peace treaty made with Romania had not been ratified, so that oil production remained until the end of the war under the administration of the Central Powers' military authorities. The above stipulation was used in all the peace treaties between the Allies and the Central Powers.

2. *Allied Peace Treaties with the Central Powers (1919–1920)*

The German war for ascendency in Europe ended with Germany's defeat and the dissolution of both of the multinational empires allied with her. The Paris Peace Conference was concerned with founding the → League of Nations and the new order in Central Europe and the Near East. With regard to Central Europe, peace treaties were concluded with Germany (the Versailles Peace Treaty), the Republic of Austria (the Saint-Germain Peace Treaty), Hungary (the Trianon Peace Treaty) and Bulgaria (the Neuilly Peace Treaty). As they are treated in separate articles, only a general summary of these four treaties is proposed here.

The list of participants in the Paris Peace Conference bears evidence of the important changes in the system of States in comparison with the period of 1871 to 1914. The executive committee of the Conference, the "Big Five", comprised France, Great Britain, Italy and two non-European States, the United States and Japan. Besides Great Britain, Canada, Australia, South Africa, New Zealand and India figured as States parties to the treaty (and later as members of the League of Nations) – an indication of the coming decentralization of the multinational British Empire.

The place of the belligerent States of Serbia and Montenegro was taken by the Serbo-Croat-Slovene State; as late as the second half of 1918 Czechoslovakia and Poland were raised to the status of belligerent allies. However, the seat of one great European Power, Russia, remained unoccupied. Directly after Germany's capitulation, the Government of Soviet Russia had declared the Peace of Brest-Litovsk invalid, but had recognized the emancipation of the peoples in the western territories of formerly Tsarist Russia. The communism proclaimed by Moscow won for it many adherents, both within many European States and elsewhere. Before and during the Paris Peace Conference, a number of communist rebel-

lions and a soviet government in Bavaria (in April 1919) were put down, while in Hungary a soviet government (from March to August 1919) was removed by allied military → intervention.

The policy followed by the Allies *vis-à-vis* the Soviet Russian Government was one of → non-recognition and military intervention. The belligerency of Allies-supported "White Russian" units continued during the Paris Peace Conference.

(*a*) *Germany*

Although under the Versailles Peace Treaty of June 28, 1919 Germany was obliged to cede some border areas and lost her → colonies, she retained her national integrity and with it the possibility of rising again. As early as 1926, Germany was accepted into the League of Nations and received a permanent seat on the League Council. The various governments of the Weimar Republic finally succeeded in placing the "reparations problem" in abeyance (→ Dawes Plan; → Young Plan). The treaties with the Republic of Austria, Hungary and Bulgaria were patterned on the Versailles Peace Treaty. For further details see → Versailles Peace Treaty (1919).

(*b*) *Austria*

The Danubian monarchy came about in 1526 through the joining of Austria (corresponding at that time approximately with the area of the Austrian Republic of 1918) with the Kingdom of Bohemia and Hungary. From 1867 the Danubian monarchy was a union between the Austrian Empire (comprising Bohemia and other countries) and Hungary, the "dual monarchy" of Austria-Hungary. On October 28, 1918, the independent Czechoslovakian State was proclaimed and, in Vienna on October 30, 1918, independent German-Austria. This division brought the Austrian Empire to an end, dissolving the union with Hungary. The three historic elements in the Danubian monarchy went their separate ways. In view of the area's geographical and strategic importance, Art. 88 of the Saint-Germain Peace Treaty of September 10, 1919 declared the independence of the new Republic of Austria to be "inalienable", any changes in its status requiring the agreement of the Council of the League of Nations. In the Trianon Peace Treaty an identical provision in Art. 73 was adopted to apply to Hungary. Apart from the separating off of the → South Tyrol, the Länder of Austria proper remained unaltered.

(*c*) *Hungary*

As a result of the Hungarian soviet government in existence from March to August 1919 and its aftermath, the Trianon Peace Treaty between Hungary and the Allies was delayed until June 4, 1920. Hungary ceded large areas to Czechoslovakia, Romania, Yugoslavia and, in the west, some 4000 square kilometres to the Republic of Austria. However, on the territory of the former kingdom, now reduced to one-third of its former size, national minorities still remained present, and three and a half million Magyars found themselves in the other successor States. The special status provided for the new Austrian and smaller Hungarian States in the Saint-Germain and Trianon Treaties respectively was not only designed to prevent the *Anschluß* (junction) of Austria or Hungary with Germany, but also any union with another country (and in particular a renewed combination of Austria with Hungary and a restoration of the Habsburgs) without the agreement of the Council of the League of Nations. This was to consolidate the independence of the new successor States. Plans to replace the Danubian monarchy with a Danubian confederation – to include Czechoslovakia, Romania and Yugoslavia with the participation of the Republic of Austria and Hungary – were considered many times subsequently, but came to nothing.

(*d*) *Bulgaria*

Under the Neuilly Peace Treaty between Bulgaria and the Allies of November 27, 1919, Bulgaria again lost southern Dobruja to Romania, and Thrace to Greece. Of note is that the Reparations Commission for Bulgaria reduced the original assessment of war damages payable by three-quarters. This reduced sum was commensurate with the country's economic strength and was paid punctually by Bulgaria.

(*e*) *Peace Treaties between the United States and the Central Powers*

The last year of the war and the decisions of the

Paris Peace Conference were considerably influenced by the United States under President Woodrow Wilson, by the well-known "Fourteen Points" programme (→ Wilson's Fourteen Points), and by Wilson's sponsorship in particular of the founding of the League of Nations. However, the Peace Treaties of Versailles, Saint-Germain and Trianon were not ratified by the United States Senate, in part because of the provisions placing obligations on the United States by means of the Covenant of the League of Nations. The United States thus concluded peace treaties on its own behalf with the Republic of Austria on August 24, 1921 (LNTS, Vol. 7, p. 156), with Germany on August 25, 1921 (→ Germany-United States Peace Treaty (1921); LNTS, Vol. 12, p. 192) and with Hungary on August 29, 1921 (LNTS, Vol. 48, p. 191). These treaties did not contain provisions on the League Covenant or the political provisions. The rights envisaged for the Allies in the Treaties of Versailles, Saint-Germain and Trianon, including → reparations, were claimed in full by the United States.

The Paris Conference did not regulate the borders of the Western successor States of formerly Tsarist Russia nor their relations with Soviet Russia and the Soviet Ukraine. These peace treaties are thus collected together in a special category below.

3. *Peace Treaties between Soviet Russia and the Successor States*

Soon after the October Revolution, the Soviet Russian Government under V.I. Lenin recognized the emancipation of the peoples living in the west of the former Tsarist Empire, under the assumption, however, that these would use their independence to transform their new States into Soviet Republics. Tendencies of this nature received encouragement and support from the Soviet Russian Government. For their part, the Allies intervened in the Russian civil war by supporting various White Russian units and, after the Central Powers' military collapse, also by fleet action in the Baltic and the Black Seas. They also gave support to the successor States and their "bourgeois" governments. Soviet troops finally defeated the White Russian units. After various developments and battles, the new States finally concluded peace treaties with Soviet Russia. These peace treaties remained in force with the Union of Socialist Soviet Republics, as it became in 1922/1923 with the union of the Russian, Ukrainian, Byelorussian and Transcaucasian Soviet Republics.

(*a*) *Estonia*

On February 24, 1918 the Estonians announced their separate existence and declared their independence on November 12, 1918. They maintained this position against the German "Freikorps" (who were engaged in operations in the Baltic region even after the German armistice of November 11, 1918) against White Russian units, and finally against Soviet Russian intervention. In the Peace Treaty between Estonia and Soviet Russia of February 2, 1920 in Tartu (Dorpat) (LNTS, Vol. 11, p. 29), Soviet Russia recognized the independence of the Estonians within their ethnographical boundaries and renounced "voluntarily and for ever all rights of sovereignty formerly held by Russia over the Esthonian people and territory".

(*b*) *Lithuania*

In Lithuania, a communist government was set up after the withdrawal of German forces in January 1919. This was driven out in April 1919 by Polish forces under General Pilsudski. During the war between Poland and Soviet Russia, Lithuania concluded a peace treaty with Russia in Moscow on July 12, 1920 (LNTS, Vol. 3, p. 105). It contained Soviet Russia's recognition of the independence of Lithuania and Russia's renunciation of all sovereign rights over her, as in the treaty with Estonia. According to this peace treaty, Lithuania also included the cities of Vilna and Grodno. On October 9, 1920, Poland occupied central Lithuania (which contained both cities). On March 15, 1923, after lengthy diplomatic negotiations, the Paris Conference of Ambassadors allotted the terrritory to Poland. Right up until 1938 Lithuania refused to recognize this.

(*c*) *Latvia*

The independent Republic of Latvia was declared on November 18, 1918. A Latvian soviet government ruling in Riga from January to May 1919 was driven out by the German-Baltic land army under von der Goltz in May 1919. The land

army established a pro-German Latvian government. In the battle of Wenden, however, it suffered defeat at the hands of the forces of the legitimate Ulmani government of Latvia. Von der Goltz now placed the land army under the command of a White Russian officer; the latter proceeded to lay → siege on Riga. The Latvian government declared itself in a state of war with Germany and finally, with the help of Estonian forces, managed to regain all its national territory. On August 11, 1920, Latvia concluded a peace treaty with Soviet Russia in Riga, in which the Soviet Russians recognized the independence of Latvia (LNTS, Vol. 2, p. 195).

(*d*) *Finland*

The Peace Treaty between Finland and the Soviet Russia of October 14, 1920 (LNTS, Vol. 3, p. 91), signed in Tartu, ended the state of war that had existed between the two countries since the intervention of Soviet units in the Finnish civil war of 1918. Carelia remained within the framework of the Russian Soviet Republic, which ceded Petsamo to Finland on condition the territory remain open for the transit of trade goods between the Soviet State and Norway.

(*e*) *Poland*

Together with Ukrainian units, Polish forces under Petulyura overran Kiev at the beginning of May 1920. The Soviet counter-offensive came within reach of Lvov (Lemberg) and Warsaw.

Acting as mediator, Lloyd George proposed a border between Poland and the Soviet Republics along the so-called → Curzon Line which accorded approximately to ethnographic conditions. Pilsudski's counter-offensive in response drove the Soviet forces back. After the Riga Armistice of October 12, 1920, an extensive peace treaty was concluded between Poland and the Soviet Republics of Russia and the Ukraine on March 18, 1921 in Riga (LNTS, Vol. 6, p. 51). The two sides recognized the independence of the Soviet Ukraine and Soviet Byelorussia. Poland received some 115000 square kilometres on her side of the Curzon Line, containing almost four million inhabitants (Art. II). The treaty further laid down protection for national minorities and religious groups (Art. VII), the mutual → waiver of war costs and war damages claims (Art. VIII) and the return of Polish cultural artifacts taken away by Russia in 1772 (Art. XI). Poland in addition received the sum of 30 million roubles in gold in compensation for her loss of title to her active participation in the economic life of Russia.

(*f*) *Concluding remarks*

With this series of peace treaties, the regulation under international law of the successor States of the former Tsarist Empire in the West was completed. The evacuation of the White Russian units by English and French ships also brought allied intervention in the civil war in European Russia to an end.

Still remaining to be mentioned is the Rapallo Treaty between Germany and Soviet Russia of April 16, 1922 (LNTS, Vol. 19, p. 247). Apart from the armistice of December 6, 1917, the relationship between Germany and the Soviet Republics was characterized by the absence of a treaty after the abrogation of the Peace Treaties of Brest-Litovsk. The Rapallo Treaty normalized the relations between the two States, and both sides mutually waived their claims to war damages.

What the Soviet leadership regarded as certain, the coming and spreading of communist revolution within other States, never took place. But the foundation of the Soviet Union had managed to survive in extraordinarily difficult circumstances.

4. Treaties regulating the Succession of the Ottoman Empire

The Ottoman Empire had concluded the Armistice of Mudros with the Allies on October 30, 1918. Agreement was delayed by differences between the Allies over the division of Asia Minor and the Arabian colonies within the Ottoman Empire. The Arabian territories were occupied by English and Arabian troops; in April 1919 Italy landed in Anatolia, in April and May 1919 Greece landed in Smyrna, and in March 1920 an Allied force landed in Constantinople.

Under the Peace Treaty between the Ottoman Empire and the Allies signed on August 10, 1920 at Sèvres, the Sublime Porte divested itself of the Arabian provinces, Asia Minor was divided off into the allied → sphere of influence, and the Sultan-Caliph was only left with the territory

around Constantinople. Although the Sèvres Peace Treaty was never ratified, the League of Nations approved the mandate treaties with Great Britain and France concerning the former Ottoman provinces of Mesopotamia (Iraq), → Palestine, Transjordan, Syria and the Lebanon.

In the intervening time, Kemal Atatürk moved Turkey's capital city to Ankara and again took up the war against the Allies, in particular against Greece. At the same time, he forced the independent State of Armenia back to the pre-war Ottoman-Russian border. Independent Armenia had been made a partner to the Sèvres Peace Treaty by the Allies and had received to her credit important parts of northern Asia Minor (the so-called Wilson Line). Under the Turkish-Armenian Peace of Alexandropol of December 2, 1920, Armenia returned this territory to Atatürk's Turkey. This was followed by the treaty of friendship between Turkey and Soviet Russia of March 16, 1921 in Ankara, which declared the treaties between the Tsarist Empire and the Porte invalid, and annulled the existing debts. The capitulations (→ Consular Jurisdiction) were cancelled.

After the heavy defeat of the Greeks in Sakaria in August 1921 in Asia Minor, France unilaterally entered into a treaty with Turkey in Ankara on October 20, 1921 (LNTS, Vol. 54, p. 177), under which the state of war between the parties ceased. France then withdrew her forces from Cilicia and agreed a more favourable boundary line between Turkey and the French-mandated territory of Syria. As Kemal Atatürk prepared to occupy the straits (→ Dardanelles, Sea of Marmara, Bosphorus) as well, the Allies agreed upon the Mudanya Armistice of October 11, 1922 with him. Atatürk's supporters took over the administration in Constantinople and the last Sultan fled to Malta. The peace negotiations beginning in November 2, 1922 led to the Lausanne Peace Treaty between Turkey and the Allies of July 24, 1923 (LNTS, Vol. 28, p. 12). Unlike the Republic of Austria, Turkey, the State arising out of the dissolved Ottoman Empire, was not obliged to pay → reparations. The system of mandates over the Arabian provinces was not mentioned as such in the Lausanne Treaty. The boundary with Syria drawn up with France on October 20, 1921 was confirmed, and the determination of the boundary with Iraq was reserved for later negotiations (→ Interpretation of Treaty of Lausanne (Advisory Opinion)).

World War I lasted over four years. Just as long was needed to come to terms with the irrevocable departures of the great historic multinational monarchs, the Orthodox Tsars, the Danubian monarchs and the Ottoman Sultan-Caliphs, and with the new international orders in Eastern Europe, Central Europe and the Near East.

La République de Lettonie, Documents, traités et lois (1922).
R. VON DER GOLTZ, Meine Sendung in Finnland und im Baltikum (1922).
H. KRAUS, Grundriss der Geschichte des estnischen Volkes (1932) 221–242.
A. HAUSNER, Die Polenpolitik der Mittelmächte (1935).
Royal Institute of International Affairs, The Baltic States, A Survey of the Political and Economic Structure and the Foreign Relations of Estonia, Latvia and Lithuania (1938).
W.P. POTJOMKIN, Geschichte der Diplomatie, Vols. 2–3 (1947).
C.R. JURGELA, History of the Lithuanian Nation (1948).
A. BILMANIS, History of Latvia (1951).
J. DEGRAS (ed.), Soviet Documents on Foreign Policy 1917–1941, Vol. 1 (1951).
O. HALECKI, Borderlands of Western Civilisation (1952).
B. MEISSNER, Die Sowjetunion, die baltischen Staaten und das Völkerrecht (1956).
N. ULUOCAK (ed.), Studies in Commemoration of the Lausanne Peace Treaty on its 50th Anniversary (1978).
A. HILLGRUBER, Die gescheiterte Großmacht, Eine Skizze des Deutschen Reiches 1871–1945 (1980) 31–76.
For further references see the bibliographies in the articles on the individual peace treaties mentioned in the text.

STEPHAN VEROSTA

PEACE TREATIES OF 1947

A. Background. – B. Signature. – C. Ratification and Entry into Force. – D. Structure. – E. Contents: 1. Preambles. 2. Territorial Clauses. 3. Political Clauses. 4. War Criminals. 5. Military Clauses. 6. Economic and Financial Clauses. 7. Interpretation. – F. Execution: 1. Territorial Clauses. 2. Political Clauses. 3. Clauses relating to the Danube. 4. Military Clauses. 5. Economic Clauses. – G. Revision.

A. Background

The peace treaties signed in Paris on February 10, 1947 between the "Allied and Associated

Powers" on the one hand and Germany's former wartime allies Bulgaria, Finland, Hungary, Italy and Romania, on the other were intended as a first step towards realizing a general system of → peace treaties. It was planned that they should provide a model for subsequent peace treaties with the major Axis Powers, Germany and Japan (→ Germany, Legal Status after World War II; → Peace Treaty with Japan (1951)) and with Austria (→ Austrian State Treaty (1955)). Their preparation was entrusted to the Council of Foreign Ministers in accordance with the → Potsdam Agreement of August 2, 1945 (Section IX).

In the period between September 1945, when it had its first meeting in London, and mid-July 1946, when it concluded its Paris session, the Council prepared detailed drafts. These were then discussed at the Paris Conference of Twenty-One States (attended by Australia, Belgium, Brazil, Byelorussia, Canada, China Czechoslovakia, Ethiopia, France, Greece, India, the Netherlands, New Zealand, Norway, Poland, the Soviet Union, the Ukraine, the Union of South Africa, the United Kingdom, the United States and Yugoslavia) from July 29 to October 15, 1946 and were moulded into their final form at a session of the Council of Foreign Ministers in New York between October and December 1946. The States affected were accorded the status of → observers at the Paris Conference, but Finland chose not to attend. Albania, Austria, Cuba, Egypt, Iran, Iraq and Mexico were invited to submit their views on the draft treaties.

A considerable amount of time and effort was devoted to procedural questions both during the preliminary discussions among the foreign ministers and at the conference. In particular, a disproportionate amount of time was spent discussing the extent to which China and France should participate in the → negotiations, which States should be granted a vote when it came to adopting the individual treaties, how the various committees should be composed, and who should preside over them. The growing tensions between East and West were even then clearly apparent.

B. Signature

Of all the States which attended the Conference, 20 signed the treaty with Italy, i.e. all except Norway; twelve States (Australia, Byelorussia, Czechoslovakia, Greece, India, New Zealand, South Africa, the Soviet Union, the Ukraine, the United Kingdom, the United States and Yugoslavia) signed the treaty with Bulgaria; twelve States (the same States, with the addition of Canada and with the exception of Greece) signed the treaty with Hungary; eleven States (the same States, again including Canada but excluding Greece and Yugoslavia) signed the treaty with Romania; ten States (the same as for Romania except for the United States) signed the treaty with Finland. The formal ceremony of signature took place in Paris on February 10, 1947.

The treaties could be acceded to by any member State of the → United Nations which on February 10, 1947 was still in a state of → war with the country in question. Albania, Iraq, Mexico and Pakistan availed themselves of this right as regards the treaty with Italy. Some of the provisions (the economic provisions laid out in Arts. 84 and 85 of the treaty with Italy and the corresponding articles of the other treaties) were to apply not only to the signatories but also to States which had merely broken off → diplomatic relations with the nation in question.

C. Ratification and Entry into Force

It was provided in the final clauses of the treaties that they should come into force immediately after ratification by the major Allied Powers (→ Treaties, Conclusion and Entry into Force); the other signatories, including the former enemy States, were also called upon to ratify. The treaty with Italy therefore came into force after the deposit of ratifications by France, the Soviet Union, the United Kingdom and the United States; those with Bulgaria, Hungary and Romania after the deposit of ratifications by the Soviet Union, the United Kingdom and the United States; and that with Finland after the deposit of ratifications by the Soviet Union and the United Kingdom. Although Bulgaria, Finland and Italy ratified their respective treaties (Italy only after a stormy parliamentary debate), Hungary and Romania declined to perform this act of purely declaratory significance. Pursuant to a proposal by the Soviet Union, a final date of September 15, 1947 was set for depositing ratifications in Paris (treaty with Italy) and Moscow (treaties with Bul-

garia, Finland, Hungary and Romania). This deadline was met in the case of all five treaties. They have therefore been in force since September 15, 1947.

D. Structure

The overall concept of the treaties must be seen in the context of the parties' desire to emphasize the political and legal principles of the UN. This comes out most clearly in the → preambles and in the general clauses at the beginnings of the political sections which guarantee the internal democratization of the vanquished countries on the basis of fundamental → human rights and prohibit the resurgence of fascist or militaristic movements. The provisions on → war crimes are based on the principles underlying the → Nuremberg trials. A direct link can also be seen between the reparations clauses and the principles formulated in the Allied declaration of January 5, 1943 concerning forced transfers of property in enemy-controlled territory.

The framework of the treaties closely resembles that of the → Versailles Peace Treaty. Apart from the territorial clauses and a few other provisions which concern unique geographic features of the country in question, the structure of the various sections is basically the same in all five treaties. The treaty with Italy, however, contains in addition a number of annexes which relate to geographical questions (e.g. the special status of → Trieste), the fate of the former → colonies, questions of → State succession and details concerning the dismantling of the Italian navy. The treaties with Bulgaria, Hungary and Romania contain an additional clause concerning navigation on the → Danube.

E. Contents

1. Preambles

Reference to the responsibility of the individual States for engaging in a war of → aggression, coupled with the acknowledgment that they later withdrew from the → alliance with Germany, forms the basis for the actual peace terms.

2. Territorial Clauses

(a) Bulgaria. The frontiers (→ Boundaries) were to be those which existed on January 1, 1941 (Art. 1). This meant an implicit acknowledgment of the cession of southern Dobruja by Romania to Bulgaria under the Treaty of Craiova of September 7, 1940. On the other hand, Bulgaria's claims to Western Thrace and access to the → Aegean Sea were rejected.

(b) Finland. The frontiers were to be those which existed on January 1, 1941 (Art. 1). Consistent with the Finnish-Soviet → armistice agreement of September 19, 1944, this meant confirmation of the Finnish-Soviet Peace Treaty of March 12, 1940, in which Finland had ceded certain areas to the Soviet Union, in particular the Carelian peninsula and Vyborg (→ Eastern Carelia (Request for Advisory Opinion)), the western and northern banks of the Ladoga Lake, the territory east of Merkärvi, and parts of the Rybachi and Sredny peninsulas. Finland also had to return to the Soviet Union the province of Petsamo, which she had acquired in 1920 (Art. 2).

(c) Hungary. The frontiers were to be those which existed on January 1, 1938 (Art. 1). This meant that Hungary lost all the territorial gains that she had made in the period 1938 to 1940, namely northern Transylvania, which she had recovered from Romania after having been forced to cede it pursuant to the → Trianon Peace Treaty (1920), and the Slovakian frontier areas that had been assigned to her in the Vienna Award of the Axis Powers of November 2, 1938 (cf. → Munich Agreement (1938)).

(d) Italy. In general, the frontiers were to be those which existed on January 1, 1938. At the same time, provision was made for considerable changes: Various Alpine regions were to be ceded to France (Art. 2 and Annexes II and III); Yugoslavia was to receive parts of Venezia Giulia (Art. 3 and Annex V), Zara, Pelagosa and other islands lying off the coast of Yugoslavia (Art. 11); the Free Territory of Trieste was to be established (Arts. 21 and 22; Art. 4, Annexes VI to X; cf. → Free Cities); the Dodecanese islands were to be ceded to Greece, who pledged permanent → demilitarization (Art. 14); Italy renounced all claims to → territorial sovereignty over her former colonies in Africa, including property, rights and interests (Art. 23 and Annex XI); the independence of Ethiopia and Albania was recognized (Arts. 33 and 27); the island of Saseno was ceded to Albania (Art. 28); and Italy undertook

to enter into agreements with Austria to guarantee free movement of passenger and freight traffic between North and East Tyrol (Art. 10 and Annex IV).

(e) Romania. The frontiers were to be those which existed on January 1, 1941, except for that between Romania and Hungary (Art. 1). This meant confirmation of the Soviet-Romanian agreement of June 28, 1940, i.e. the Soviet-Romanian exchange of → notes of June 26–28, 1940 by which the Soviet Union had forced Romania to accept the seizure of Bessarabia and Bukovina. Romania also confirmed the Soviet-Czechoslovak agreement of June 29, 1945 (Art. 1), which had incorporated the Carpatho-Ukraine into the Ukrainian Soviet Republic. As regards the Romanian-Hungarian frontier, it was to revert to that which existed on January 1, 1938 (Art. 2). This meant that Romania regained sovereignty over Siebenbürgen (northern Transylvania), which had been transferred by the Axis Powers to Hungary by the Vienna Award of August 30, 1940.

3. Political Clauses

The sections of the peace treaties appearing under this heading contain a wide variety of provisions. Some of them more closely resemble territorial provisions. In addition, the political sections contain the similarly worded articles (e.g. Arts. 15 to 18 of the treaty with Italy) concerning the → guarantee of basic human rights, amnesty (→ Amnesty Clause), and internal guarantees against the resurgence of fascist tendencies. They also contain those articles (e.g. Arts. 19 and 20 of the treaty with Italy) which provide for legislation on minority rights (→ Minorities), → nationality and the right of → option. Under this heading are also to be found the provisions on the acceptance, recognition and revival of international agreements (Arts. 39 to 44 of the treaty with Italy) and the renunciation of rights under certain bilateral agreements (for example, Italy with regard to China; Arts. 24 to 26) and multilateral agreements (Italy with regard to Tangier, the → Dardanelles and the Congo Basin; Arts. 39 to 44).

4. War Criminals

This question is regulated in Art. 5 of the treaty with Bulgaria, Art. 9 of the treaty with Finland, Art. 6 of the treaty with Hungary Art. 45 of the treaty with Italy, and Art. 6 of the treaty with Romania. The relevant provisions implicitly bind the countries concerned to the principles governing the statute of the International Military Tribunal (→ Responsibility of Individuals in International Law).

5. Military Clauses

(a) Reduction in armaments. All five treaties contain extensive provisions concerning reductions in armaments and limitations on the land, naval and air forces of the countries concerned (→ Disarmament; → Arms Control).

(b) Demilitarization. As a general guarantee and not merely as a safeguard against renewed aggression by the former enemy States, the following islands were to be completely demilitarized: Pelagosa, which was to be ceded by Italy to Yugoslavia (Art. 11), the smaller Pelagian Islands and Pianosa, which were to remain with Italy (Art. 49), the Dodecanese Islands ceded by Italy to Greece (Art. 14) and Pentallaria in the western Mediterranean (Art. 49). Sardinia and Sicily were to be partly demilitarized (Art. 50). The treaty with Finland reconfirmed the demilitarization of the → Aaland Islands (Art. 5).

(c) Mine clearance. The treaties with Italy (Art. 72) and Finland (Art. 16) required these countries to join the International Organisation for Mine Clearance of European Waters (→ Mines).

(d) Prevention of German and Japanese rearmament. All five treaties (e.g. Arts. 68 to 70 of the treaty with Italy) required the former enemy States to cooperate with the Allied and Associated Powers in order to ensure that Germany and Japan could not take steps to rearm outside their own territories.

(e) Prisoners of war. → Prisoners of war were to be repatriated "as soon as possible" in accordance with special bilateral arrangements (Art. 71 of the treaty with Italy and similar provisions in the treaties with Bulgaria, Hungary and Romania; → Repatriation). All the treaties, including that with Finland, contained → waivers on claims arising from earlier conventions on prisoners of war (e.g. Art. 76(5) of the treaty with Italy). This question was thus removed from the scope of general international law.

(f) Withdrawal of Allied forces. The treaties with Italy (Arts. 14 and 73) and Bulgaria (Art. 20)

provided for the withdrawal of Allied forces from Italian and Bulgarian territory and the Dodecanese within a period of 90 days after the coming into force of the respective treaties. The corresponding provisions of the treaties with Hungary (Art. 22) and Romania (Art. 21) reserved to the Soviet Union the right to retain on the territories of these States "such armed forces as it may need for the maintenance of the lines of communication of the Soviet Army with the Soviet zone of occupation in Austria". The stationing of Allied forces in the Free Territory of Trieste was regulated separately in Annex VII to the treaty with Italy (Arts. 5 to 7).

6. Economic and Financial Clauses

The provisions concerning economic and financial matters arising out of the war and the conclusion of peace are of special significance both from the points of view of content and of the amount of space devoted to them (Parts VI to X and Annexes X, XIV to XVII of the treaty with Italy; Parts V and VI and Annexes IV to VI of the treaties with Bulgaria, Hungary and Romania; Parts IV and V and Annexes IV to VI of the treaty with Finland). They are basically the same in all five treaties.

(a) Reparations. → Reparations were to be paid mainly on the basis of existing assets and current production. The payments were to be made over periods ranging from two to eight years. In addition Italy was to transfer to the Soviet Union assets which she held in Bulgaria, Hungary and Romania (Art. 74(2)(b)). In all the treaties, the former enemy States accepted the → expropriation within their territory of German public and private assets (→ Aliens, Property; e.g. Art. 77 of the treaty with Italy). The total amount of reparations was fixed at $360 million for Italy, $300 million each for Finland, Hungary and Romania and $70 million for Bulgaria. Italy had to pay reparations to Albania, Ethiopia, Greece, the Soviet Union and Yugoslavia; Bulgaria to Greece and Yugoslavia; Finland to the Soviet Union; Hungary to Czechoslovakia, the Soviet Union and Yugoslavia; and Romania to the Soviet Union. The Western Allies renounced reparation claims (→ Reparations after World War II).

(b) Restitution. Property which had to be restored (→ Restitution) was defined as "all identifiable property at present in Italy [Bulgaria, Hungary, or Romania respectively] which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession".

(c) Property of member States of the United Nations and their nationals. All property, rights and interests in the former enemy States were to be restored as they existed on certain dates (April 24, 1941 for Bulgaria; June 22, 1941 for Finland; June 10, 1940 for Italy; September 1, 1939 for Hungary and Romania). Any legal transactions concerning such property after those dates were to be invalidated. In cases where such property could not be restored, or could only partially be restored, compensation was to be paid. Disputes regarding restitution were to be decided by conciliation commissions (→ Conciliation and Mediation; → Mixed Commissions), e.g. the → Conciliation Commissions Established pursuant to Art. 83 of the Peace Treaty with Italy of 1947.

(d) Property of former enemy States or their nationals in the territory of Allied and Associated Powers. The regulation of this question which, in scope, belongs within the section on reparations, but which is dealt with separately in the treaties, consisted mainly in granting to each of the Allied and Associated Powers the right to "seize, retain, liquidate" or otherwise dispose of enemy property within its territory without indemnification (e.g. Art. 79 of the treaty with Italy). Excepted from this rule were industrial, literary and artistic property to which the special provisions contained in Annex XV of the treaty with Italy (Annex IV of the other treaties) applied; these, however, reserved to the Allies the right to dispose of industrial property rights which had come into their possession during the course of the war. Also exempted from seizure were government property used for consular or diplomatic purposes (→ Diplomatic Agents and Missions), property belonging to religious bodies or private charitable institutions, submarine cables (→ Cables, Submarine), property of former enemy nationals permitted to reside in Allied territory, and property acquired after certain dates (October 28,

1944 for Bulgaria, January 20, 1945 for Hungary, September 3, 1943 for Italy, September 12, 1944 for Romania). Seized → enemy property was to be credited against reparation claims, but no such restriction was placed on the enjoyment of industrial, artistic or literary property rights claimed by the Allies. A separate annex (Annex XVII of the treaty with Italy, Annex VI of the other treaties) was devoted to the possibility of revising the judgments of prize (→ Prize Law) and other courts which had affected the ownership rights of Allied nationals.

(e) Regulation of debts and renunciation of claims. All the peace treaties (with the exception of that with Finland) confirm the continuing validity of pre-war debts and obligations of all the contracting parties and their nationals (e.g. Art. 81 of the treaty with Italy). All the treaties (including that with Finland) contain waivers on claims on behalf of the government of the former enemy State or its nationals against the Allied and Associated Powers arising directly out of the war or the occupation (→ Occupation, Belligerent). Compensation was, however, to be paid to persons who furnished supplies or services on → requisition to the occupying forces (e.g. Art. 76 of the treaty with Italy). All the treaties (with the exception of that with Finland) provide that all claims of the former enemy States or their nationals against Germany or German nationals which had been made after September 1, 1939 and were still outstanding on May 8, 1945 should be annulled (e.g. Art. 77(4) of the treaty with Italy).

7. Interpretation

For a period of 18 months from the coming into force of the treaties, all matters concerning their execution and interpretation were to be dealt with by the major Allied Powers acting through their ambassadors in the various capital cities, i.e. in Rome by the ambassadors of France, Great Britain, the Soviet Union and the United States, in Sofia, Budapest and Bucharest by the ambassadors of Great Britain, the Soviet Union and the United States, and in Helsinki by the ambassadors of Great Britain and the Soviet Union. Any dispute concerning interpretation, which could not be settled by diplomatic negotiations or by the ambassadors concerned, was to be referred to a commission composed of one representative of each party and another member selected from nationals of a third country (→ Arbitration). The third member was to be selected by mutual agreement of the two parties to the dispute or, failing such agreement, by the → United Nations Secretary-General.

F. Execution

1. Territorial Clauses

The territorial provisions of the peace treaties were, as far as European territories were concerned, carried out as specified, though in some cases supplementary agreements were necessary to settle technical details. The Finnish-Soviet frontier was finally settled by a bilateral agreement of December 9, 1948. More problems arose in delimiting the final frontiers of Italy's former colonies in Africa (→ Decolonization), a matter which had been entrusted to the four Allied Powers according to Art. 23 and Annex XI of the treaty with Italy. The territories, with the exception of the Fezzan area of Libya which came under French administration, were at first administered by the British.

It was not, however, possible for the → Great Powers to reach agreement as to the final settlement before the deadline named in the treaty, i.e. September 15, 1948; in accordance with Annex XI, para. 3, the question was then referred to the → United Nations General Assembly. After fruitless debates during its third session in 1949, the General Assembly finally decided the fate of the individual colonies by its Resolution 289 (IV) of 1950 and various supplementary resolutions; during this period administration was partially transferred to the UN. Libya was granted independence in stages and was declared finally independent on December 24, 1951. → Eritrea was linked in a federation with Ethiopia on September 11, 1952. What was formally Italian Somaliland became an Italian trust territory. The provisions concerning Trieste were executed in full.

2. Political Clauses

The execution of these provisions, which had their genesis in the mentality prevailing directly after the war, was considerably influenced in the individual countries by the general political

development after 1947, especially where internal politics were concerned. In April 1949, Australia, Canada, the United Kingdom, New Zealand and the United States, as signatories of the peace treaties, drew the attention of the UN General Assembly to the fact that the governments of Bulgaria, Hungary and Romania were not fulfilling the obligations they had undertaken under the treaties concerning the guarantee of fundamental human rights. The General Assembly thereupon requested an → advisory opinion from the → International Court of Justice. The advisory opinion was delivered in two parts on March 30 and July 18, 1950 (→ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania).

3. Clauses relating to the Danube

The clauses in the treaties with Bulgaria, Hungary and Romania relating to the Danube provided the initiative for the Danube Convention which was signed in Belgrade on August 18, 1948.

4. Military Clauses

The military provisions of the peace treaties were, owing to the general political development, gradually whittled away, and in some cases the result was the reverse of what had been intended.

One of the first projects to be abandoned was the demilitarization of Italy. In February 1948 the naval commission consisting of representatives of the Four Powers decided on the apportionment of the Italian navy. France and the Soviet Union took delivery of those ships and the equipment allotted to them. Great Britain and the United States waived claims to their share and merely demanded that the ships should be scrapped. In April 1949 Italy became a founding member of the → North Atlantic Treaty Organization and thereafter, having regard to Art. 46 of the peace treaty, considered herself released from her obligations under the military clauses of the treaty.

For all practical purposes Bulgaria, Hungary and Romania had already substantially abrogated the military provisions in 1948 when they signed treaties of mutual assistance with the Soviet Union (→ Collective Security; → Collective Self-Defence), a move that was confirmed when they joined the → Warsaw Treaty Organization in 1955. Only Finland, in accordance with her decision to pursue a policy of → neutrality, carried out in full her obligations under the military clauses of the peace treaty, notwithstanding the treaty of mutual assistance concluded with the Soviet Union on April 6, 1948.

5. Economic Clauses

Whereas the provisions relating to restitution, property rights and debts were executed, the reparation provisions in all five treaties were later revised. First, at the request of the governments of Bulgaria, Hungary and Romania, the Soviet Union reduced here reparations claims against these States by a half in June and July 1948. In February 1949 a similar agreement between Finland and the Soviet Union reduced Finland's obligations by the same proportion. By an agreement of December 11, 1948 with the Soviet Union, Italy was successful in having the transfer of her assets in Bulgaria, Hungary and Romania to the Soviet Union, in accordance with Art. 74(A) (2) (b) of the peace treaty, set off against her reparation payments. When on April 4, 1950 the Soviet Union in a note of → protest complained to the Italian Government of delays in the payment of reparations, Italy replied that the Soviet Union had underestimated the value of these assets. On February 8, 1952, Italy unilaterally declared herself absolved from any further reparation payments to the Soviet Union under the peace treaty (→ Unilateral Acts in International Law); she justified this move by claiming that the Soviet Union had resisted her legitimate claims for a revision of the peace treaties (→ Treaties, Revision) and had opposed her application for membership in the UN. The Soviet Union rejected this unilateral declaration in a note dated February 27, 1952.

G. Revision

In conformity with the nature of peace treaties, the 1947 treaties contained no provision for revision. Art. 46 of the treaty with Italy left room for revision of the military clauses to a limited extent. With this in mind, Italy had from the very start expressed her hope that these clauses would be revised at an early date. She repeatedly asked for revision, addressing her first official note on this matter to the United States on July 17, 1951. Similar requests were then addressed to the other

Western Great Powers, and on December 8, 1951 a note detailing her claims was distributed to all the signatory States.

Once all the Western States had announced their agreement, Italy, without waiting for the Soviet reply, announced that she considered that the "revision has been implemented". In a note dated February 28, 1952, the Soviet Union declared that she would accept Italy's terms on condition that she withdrew from NATO. Italy replied with a unilateral denunciation of the peace treaty on February 8, 1952, thus in effect withdrawing from her obligations to pay further reparations to the Soviet Union. The other former enemy States made no formal application for revision of the peace treaties signed by them.

Treaty of Peace with Bulgaria, UNTS, Vol. 4 (1949) 21–133.

Treaty of Peace with Finland, UNTS, Vol. 48 (1950) 203–303.

Treaty of Peace with Hungary, UNTS, Vol. 41 (1949) 135–262.

Treaty of Peace with Italy, UNTS, Vol. 49–50 (1950).

Treaty of Peace with Romania, UNTS, Vol. 42 (1949) 3–124.

Recueil des documents de la Conférence de Paris, Palais du Luxembourg, 29 juillet–15 octobre 1946 (1946).

United States Department of State, Making the Peace Treaties 1941–1947 (1947).

United States Department of State, Paris Peace Conference 1946, Selected Documents (1948).

I. PICHON, La question de Libye dans le règlement de la paix (1945).

J. CAMPBELL, The European Territorial Settlement, Foreign Affairs, Vol. 26 (1947) 196–218.

M. DOMKE, Settlement of Disputes Provisions in Axis Satellite Peace Treaties, AJIL, Vol. 41 (1947) 911–920.

J.L. KUNZ, Nationality and Option Clauses in the Italian Peace Treaty of 1947, AJIL, Vol. 41 (1947) 622–631.

A. MARTIN, Private Property, Rights and Interests in the Paris Peace Treaties, BYIL, Vol. 24 (1947) 273–300.

G. VEDOVATO, Il trattato di pace con l'Italia (1947).

G. FITZMAURICE, The Juridical Clauses of the Peace Treaties, RdC, Vol. 73 (1948 II) 259–367.

J.L. KUNZ, The Free Territory of Trieste, Western Political Quarterly, Vol. 1 (1948) 99–112.

W. ROTHOLZ, Finnlands völkerrechtliches Schicksal seit 1917, AVR, Vol. 1 (1948/1949) 450–470.

F. WOLFF, The Problems of Pre-War Contracts in the Peace Treaties of Paris 1947, Transactions of the Grotius Society for the Year 1947, Vol. 33 (1948) 213–228.

E. SZLECHTER, Le statut juridique des habitants des territoires réunis à la France par le Traité de Paris du 10 février 1947, RGDIP, Vol. 53 (1949) 341–358.

F. PICK, Peacemaking in Perspective (1950).

F. SARUBBI, Il trattato di pace con l'Italia e la sorte dei beni italiani in Etiopia, Rivista di studi politici internazionali, Vol. 17 (1950) 27–38.

M. ETHRIDGE and C.E. BLACK, Negotiating on the Balkans, 1945–1947, in: R. Dennett and J.E. Johnson (eds.), Negotiating with the Russians (1951) 171–206.

A. KANE, Some Unsolved Problems regarding War Damage Claims under Article 78 of the Treaty of Peace with Italy, AJIL, Vol. 45 (1951) 357–367.

G.H. BECKER, The Disposition of Italian Colonies 1941 to 1951, Thesis, University of Geneva (1952).

C.A. COLLIARD, Les anciennes colonies italiennes, Revue juridique et politique de l'union française, Vol. 6 (1952) 246–286.

L. GARCÍA ARIAS, El tratado de paz con Finlandia, Cuadernos de política internacional, Vol. 9 (1952) 181–202.

W. SCHÄTZEL, Die Haltung der Sowjetunion bei der Abfassung und Ausführung der Friedensverträge, in: *idem*, Untersuchungen zur Lösung der Deutschen Frage (1952) 82–105.

A. TAMARO, La condanna dell'Italia nel trattato di pace (1952).

F. DOMINEDO, Itinerari della pace (1953).

S. KERTESZ, Diplomacy in a Whirlpool, Hungary between Nazi Germany and Soviet Russia (1953).

E. CLUREA, Le traité de paix avec la Roumanie du 10 février 1947 (1954).

A. LEISS and R. DENNETT, European Peace Treaties after World War II (1954).

N. KOGAN, Italy and the Allies (1956).

A.F. ROLLE, Italy and the Frontier after World War II, World Affairs Quarterly, Vol. 10 (1960) 332–348.

D. ANGEL, Réparation en vertu du traité de paix avec l'Italie, Thesis, University of Geneva (1967).

B. CIALDEA, L'Italia e il trattato di pace, in: M. Bonanni (ed.), La politica estera della Repubblica italiana, Vol. 2 (1967) 349–418.

D. STÜBLER, Der Pariser Frieden mit Italien (1947), Zeitschrift für Geschichtswissenschaft, Vol. 16 (1968) 1546–1562.

G. SACERDOTI, L'assimilazione degli ebrei italiani ai cittadini delle Nazioni Unite nell'applicazione del trattato di pace, RivDirInt, Vol. 55 (1972) 454–477.

G. VEDOVATO, La revisione del trattato di pace con l'Italia, Rivista di studi politici internazionali, Vol. 41 (1974) 375–444.

P. DRAKIDES, Le sort actuel des démilitarisations en Méditerranée (Italie, Grèce), RevHellén, Vol. 30 (1977) 42–81.

V. KUTIKOV, Le trentième anniversaire de la conclusion du traité de paix entre la Bulgarie et les Puissances Alliées et Associées (1947–1977), Etudes balkaniques, Vol. 13 (1977) 13–28.

P. PASTORELLI, La questione del confine italo-austriaco alla Conferenza della pace, Storia e politica, Vol. 16 (1977) 44–106.

ELLINOR VON PUTTKAMER

PEACE TREATY WITH JAPAN (1951)

1. Historical Background

The Treaty of Peace with Japan which was signed in San Francisco on September 8, 1951 (UNTS, Vol. 136, p. 45) ended the state of → war that had existed between Japan and most of the Allies in World War II. During the first two years of the war, Japan had remained officially neutral (→ Neutrality, Concept and General Rules), but she finally entered the war on the side of the Axis by her attack on the American naval base at Pearl Harbour, Hawaii, on December 7, 1941. Having different interests from those of the other Axis States, Japan continued fighting after Germany had capitulated in May 1945. But following the dropping of atomic bombs on Hiroshima and Nagasaki on August 6 and 9, 1945, Japan declared her readiness to capitulate (→ Surrender) by accepting the declaration which the United States, Great Britain and China had issued at Potsdam on July 26, 1945 and to which the Soviet Union had adhered upon joining the Far Eastern war on August 8, 1945. The instrument of surrender was formally signed in Tokyo Bay on September 2, 1945.

Since the United States was the principal occupying power (→ Occupation, Belligerent; cf. → Occupation after Armistice), she also had the main part in the making of the peace treaty. This became an urgent matter by the proclamation of the People's Republic of China on October 1, 1949 and the outbreak of the Korean war on June 25, 1950 (→ Korea). The particular Far Eastern situation that emerged from these events explains three characteristics of the peace treaty with Japan which distinguish it from other → peace treaties and particularly from the earlier → peace settlements after World War II, such as the → peace treaties of 1947. Firstly, the treaty was drafted in the course of diplomatic → negotiations, so that the later peace conference had merely a recording function. Secondly, the peace was concluded as a separate peace without the involvement of China and the Soviet Union: China could not participate since the United States and Great Britain disagreed on the essential question of whether China was to be represented by the Government of the Republic of China or by the Government of the People's Republic of China; the Soviet Union did not participate because of the non-participation of the People's Republic of China and for various other reasons. Thirdly, the peace was concluded as a peace of reconciliation which aimed at cementing cooperation between States which had been enemies during the war. Therefore some States regarded the proposals of the United States as being too generous and too liberal. Their objections could, however, be overcome by the Mutual Defence Treaty between the United States and the Philippines of August 30, 1951 (UNTS, Vol. 177, p. 133) and the Security Treaty between Australia, New Zealand and the United States (→ ANZUS Pact (1951)) of September 1, 1951 (UNTS, Vol. 131, p. 83) (→ Collective Security; → Collective Self-Defence). Both treaties were conceived as parts of a Pacific security system which also comprised the Security Treaty between the United States and Japan (UNTS, Vol, 136, p. 211), signed at the same place and on the same date as the peace treaty (→ Regional Cooperation and Organization: Pacific Region).

2. Signature, Ratification and Entry into Force

The Peace Conference of San Francisco met from September 4 to 8, 1951 and was attended by 52 States, 49 of which signed the treaty. Three States which attended the conference – the Soviet Union, Poland and Czechoslovakia – did not sign the treaty. The 49 States which signed it were: Argentina, Australia, Belgium, Bolivia, Brazil, Cambodia, Canada, Ceylon, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Indonesia, Iran, Iraq, Laos, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, Saudi Arabia, Syria, Turkey, South Africa, the United Kingdom, the United States, Uruguay, Venezuela, Vietnam and Japan. For Japan, the United States, the United Kingdom, France and seven other States, the treaty came into force after ratification by them on April 28, 1952 (→ Treaties, Conclusion and Entry into Force). Ratification by and entry into

force for nearly all the remaining States followed soon afterwards.

Some of the signatories to the peace treaty also signed a protocol which was designed to normalize commercial relations with Japan and which regulated questions concerning contracts, periods of prescription and negotiable instruments, and the question of contracts of insurance (UNTS, Vol. 136, p. 165); the protocol did not require ratification and entered into force for these States at the same time as the peace treaty.

3. Content: Major Provisions and Problems

The treaty consists of a → preamble and seven chapters: Peace (Chap. I, Art. 1), Territory (Chap. II, Arts. 2 to 4), Security (Chap. III, Arts. 5 and 6), Political and Economic Clauses (Chap. IV, Arts. 7 to 13), Claims and Property (Chap. V, Arts. 14 to 21), Settlement of Disputes (Chap. VI, Art. 22), and Final Clauses (Chap. VII, Arts. 23 to 27).

(a) The peace clause (Chap. I) terminated the state of war between Japan and each of the Allied Powers as from the date on which the treaty came into force; the Allied Powers recognized the full → sovereignty of the Japanese people over Japan and her → territorial waters (Art. 1).

(b) The territorial provisions (Chap. II) contain the severest terms of the treaty. They confined Japan's territory to essentially the four principal islands. Japan renounced, in Art. 2, sovereignty over Korea – whose independence was recognized – including the islands of Quelpart, Port Hamilton and Dagelet; over the islands of Formosa (→ Taiwan) and the Pescadores; and over the → Kurile Islands and that portion of Sakhalin and the islands adjacent to it over which Japan had acquired sovereignty as a consequence of the treaty of Portsmouth of 1907 (→ Territory, Acquisition). She moreover renounced all rights possessed under the → mandate system of the → League of Nations and accepted the action of the → United Nations Security Council by which the → United Nations trusteeship system was extended to the → Pacific Islands formerly under Japanese mandate. Lastly, she renounced all claims in connection with any part of → Antarctica and all rights to the → Spratly Archipelago and the → Paracel Archipelago (also Art. 2). Since the Soviet Union and China did not participate in the treaty, no express provision was made concerning the acquisition of Formosa and the Pescadores by China or of Southern Sakhalin and the adjacent islands by the Soviet Union. Japan committed herself, in Art. 3, to concur in any proposal of the United States to the → United Nations to place under the UN trusteeship system – with the United States as the sole administering authority – Nansei Shotō south of 29° latitude north (including the Ryukyu Islands with Okinawa Guntō, and the Daito Islands), Nanpo Shotō south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands), Parece Vela, and Marcus Island. Pending the affirmative action on such a proposal, the United States was to have the right to exercise all powers of administration, legislation and jurisdiction over the territory, including territorial waters, and over the inhabitants of these islands. Japan recognized the dispositions of Japanese property made by or pursuant to directives of the United States → military government in the areas referred to in Arts. 2 and 3. Subject to such dispositions, special arrangements were to be entered into to resolve questions of commercial and other claims; Allied property in the areas renounced by Art. 2 was to be returned (Art. 4).

(c) The security clauses (Chap. III) are – in distinction to the territorial provisions – the most generous and liberal terms of the treaty. Japan accepted the obligations set forth in Art. 2 of the → United Nations Charter although she was then not yet a member of the UN; similarly, the Allied Powers confirmed that they would be guided by the principles of that document in their relations with Japan. Japan's right of individual or collective self-defence was recognized (Art. 5). Subject to any agreements with Japan, all occupation forces of the Allied Powers had to be withdrawn, and requisitioned property used by them had to be returned (Art. 6; → Requisitions). No obligations of → disarmament or of armament restrictions were imposed on Japan by the treaty. And although Art. 9 of her 1946 constitution – which provides that land, sea and air forces would never be maintained – has never been repealed, the present state of Japanese rearmament could therefore be achieved without violating the treaty.

(d) The political and economic clauses (Chap. IV) provided that the Allied Powers would decide on the question of the continuation or revival of bilateral pre-war treaties with Japan (Art. 7; → War, Effect on Treaties); Japan recognized the force of all treaties for terminating the state of war initiated on September 1, 1939 and accepted the arrangements for dissolving the League of Nations and the → Permanent Court of International Justice. She also renounced all her rights and interests derived from being a signatory power of the → Saint-Germain Peace Treaty of 1919 and of the Straits Agreements of Montreux of 1936 (→ Dardanelles, Sea of Marmara, Bosphorus) and renounced her rights and interests under Art. 16 of the → Lausanne Peace Treaty (1923) with Turkey. Japan further renounced all rights and obligations resulting from the Agreement between Germany and the Creditor Powers of January 20, 1930 and its Annexes (→ Young Plan), the Convention of the same date respecting the → Bank for International Settlements and the Statutes of the Bank (Art. 8). She undertook to enter into → negotiations for the conclusion of agreements concerning fisheries (Art. 9; → Fishery Zones and Limits). She renounced all special rights and interests in China including all benefits and privileges resulting from the final Peking Protocol of September 7, 1901 (Art. 10). Acceptance of the judgments of the International Military Tribunal for the Far East and of other Allied → war crimes courts was also stipulated (Art. 11; → Tokyo Trial; → Nuremberg Trials). In Art. 12, Japan declared her readiness to enter into negotiations for the conclusion of agreements on trading, maritime and other commercial matters; pending the conclusion of such agreements she was obliged to accord most-favoured-nation treatment (→ Most-Favoured-Nation Clause) or national treatment under the condition of → reciprocity. She also undertook to ensure that external purchases and sales of trading enterprises of the State were based solely on commercial considerations (Art. 12). A similar clause concerns the field of international civil aviation (Art. 13; → Air Law; → Air Transport Agreements).

(e) The claims and property provisions (Chap. V) concern, *inter alia*, the problem of → reparations (→ Reparations after World War II). They recognized that Japan should pay reparations to the Allied Powers but also recognized that she was not able to make complete compensation for all damage and suffering; therefore Japan undertook to enter into negotiations over the matter with those Allied Powers whose territories had been occupied and damaged by Japanese forces. Moreover, she recognized – with certain exceptions – the right of the Allied Powers to dispose of Japanese property outside Japan which was subject to Allied jurisdiction at the time of the coming into force of the peace treaty (→ Enemy Property). Except as otherwise provided by the peace treaty, the Allied Powers waived all their claims and the claims of their nationals arising out of Japanese war actions as well as claims for direct military costs of occupation (Art. 14; → Waiver). Allied property which was in Japan at any time between December 7, 1941 and September 2, 1945 had to be returned upon application, unless the owner had freely disposed of it (i.e. without duress or fraud); special rules concerned industrial, literary and artistic property rights and the compensation to be paid for property which could not be returned (Art. 15). Japanese assets in countries which were neutral or which were at war with any of the Allied Powers were, with certain exceptions, to be transferred to the → International Committee of the Red Cross for the indemnification of those members of the armed forces of the Allied Powers who had suffered undue hardships while → prisoners of war of Japan (Art. 16). The Japanese further undertook, upon request, to review decisions of Japanese prize courts (→ Prize Law) in cases involving ownership rights of nationals of Allied Powers (Art. 17). Without prejudice to Art. 14, it was recognized that the state of war had not affected the duty to pay pecuniary debts arising out of obligations and contracts (including bonds) which had been acquired before the state of war began (→ War, Effect on Contracts). Japan affirmed her liability for the pre-war external debt of the Japanese State and the debts of certain corporate bodies (Art. 18). She waived, however, all Japanese claims against the Allied Powers and her own nationals arising out of the war or war actions. Subject to reciprocal renunciation and to the provisions of Arts. 16 and 20, she also waived all

Japanese claims against Germany or German nationals, except claims in respect of contracts entered into and rights acquired before September 1, 1939, and claims arising out of trade and financial relations after September 2, 1945 (Art. 19). Japan undertook to ensure the disposition of German assets in Japan as determined by the powers entitled under the Potsdam Protocol (Art. 20). Lastly, China and Korea were declared entitled to certain benefits of the treaty, although they were not among its signatory powers (Art. 21).

(f) Disputes (Chap. VI) concerning the interpretation or execution of the peace treaty which were not resolved by a special claims tribunal or by other agreed means were to be referred at the request of any party to the → International Court of Justice for settlement (Art. 22).

(g) The final clauses (Chap. VII) contain the usual provisions on ratification, deposit and entry into force (Arts. 23, 24 and 27). The Allied Powers were defined here as "the States at war with Japan, or any State which previously formed part of the territory of a State named in Art. 23, provided that in each case the State concerned has signed and ratified the Treaty". Japan declared her readiness to conclude bilateral treaties of peace on substantially the same terms with any State which was not a signatory to the peace treaty and which fulfilled certain additional conditions (Art. 26).

4. Further Developments

Japan concluded several agreements with the Allied Powers for the purpose of the implementation of the peace treaty. Some but not all of the Allied Powers became parties to the multilateral Agreement for the Settlement of Disputes arising under Art. 15(a) of the Treaty of Peace with Japan (June 12, 1952; UNTS, Vol. 138, p. 183) (→ Property Commissions Established pursuant to Art. 15(a) of Peace Treaty with Japan (1951)). Under Art. 14 of the peace treaty, bilateral reparations agreements were concluded with the Philippines (May 9, 1956; UNTS, Vol. 285, p. 3) and Vietnam (May 19, 1959; UNTS, Vol. 373, p. 101), while Cambodia, Ceylon, Laos and Pakistan renounced their claims for reparations.

The substance of the territorial provisions of the peace treaty was considerably revised. All the territories within the scope of Art. 3 were successively returned to Japan by three agreements concluded with the United States: the Agreement concerning the Amami Islands (December 24, 1953; UNTS, Vol. 222, p. 193), the Agreement concerning Nanpo Shotō and other islands (April 5, 1968; UNTS, Vol. 683, p. 285), and the Agreement concerning the Ryukyu Islands and the Daito Islands (June 17, 1971; UNTS, Vol. 841, p. 249).

Japan has remained a member of the Pacific security system led by the United States. The Security Treaty between the United States and Japan which was concluded together with the peace treaty was later replaced by the Treaty of Mutual Co-operation and Security (January 19, 1960; UNTS, Vol. 373, p. 179).

5. Other Peace Settlements with Japan

The multilateral peace treaty signed on September 8, 1951 was followed by the bilateral peace treaties with the Republic of China (April 28, 1952; UNTS, Vol. 138, p. 3), India (June 9, 1952; British and Foreign State Papers, Vol. 159, p. 469), Burma (November 5, 1954; UNTS, Vol. 251, p. 201) and Indonesia (January 20, 1958, UNTS, Vol. 324, p. 227); Indonesia had signed but did not ratify the multilateral peace treaty. The peace settlement with China was completed by a joint statement (September 29, 1972) and a peace and friendship treaty with the People's Republic of China (August 12, 1978; ILM, Vol. 17 (1978) p. 1054).

Japan and the Soviet Union issued a joint declaration (October 19, 1956; UNTS, Vol. 263, p. 99) by which they terminated the state of war and resumed diplomatic relations (→ Diplomatic Relations, Establishment and Severance); a peace treaty has to date not yet been concluded, since no accord could be reached on territorial issues, particularly regarding the Kurile Islands. The normalization of relations with Poland and Czechoslovakia was effected by an agreement (February 8, 1957; UNTS, Vol. 318, p. 251) and a protocol (February 13, 1957; UNTS, Vol. 300, p. 119). With Italy, a former ally of Japan which had entered the war against Japan in July 1945, and with Yugoslavia, exchanges of → notes (September 27, 1951 and January 23/February 27, 1952) led to normalization.

Treaty of Peace with Japan (with two declarations), Signed at San Francisco, on 8 September 1951, UNTS, Vol. 136 (1952) 45–164.

United States Department of State, Conference for the Conclusion and Signature of the Treaty of Peace with Japan, With Supplement (1951).

S.D. METZGER, The Liberal Japanese Peace Treaty, Cornell Law Quarterly, Vol. 37 (1951–1952) 382–402.

R.J. ZANARD, An Introduction to the Japanese Peace Treaty and Allied Documents, Georgetown Law Journal, Vol. 40 (1951–1952) 91–109.

L.C. GREEN, Making Peace with Japan, Yearbook of World Affairs, Vol. 6 (1952) 1–35.

E. MENZEL, Der Friedensvertrag mit Japan, Europa-Archiv, Vol. 7 (1952) 5261–5266, 5355–5368.

D.P. O'CONNELL, Legal Aspects of the Peace Treaty with Japan, BYIL, Vol. 29 (1952) 423–435.

E.J. LEWE VAN ADUARD, Japan from Surrender to Peace (1953).

G. TIXIER, Le traité de paix avec le Japon, RGDIP, Vol. 58 (1954) 325–334.

P. OSTWALD, Japans Weg von Genf nach San Francisco (1955).

B.C. COHEN, The Political Process and Foreign Policy, The Making of the Japanese Peace Settlement (1957).

Y. TAKANO, The Territorial Problems between Japan and the Soviet Union, Japanese Annual of International Law, Vol. 3 (1959) 52–64.

L. FOCSANEANU, Les traités de paix du Japon, AFDI, Vol. 6 (1960) 256–290.

A. WATANABE, The Okinawa Problem, A Chapter in Japan-UN Relations (1970).

Z. OHIRA, Japan's Northern Territories after World War II, in: Multitudo Legum Ius Unum, Festschrift für Wilhelm Wengler, Vol. 1 (1973) 337–349.

J.J. STEPHAN, The Kuril Islands, Russo-Japanese Frontier in the Pacific (1974).

R.E. WARD and F.J. SHULMAN, The Allied Occupation of Japan, An Annotated Bibliography of Western Language Materials (1974).

D.J. MENDEL, Okinawan Reversion in Retrospect, Pacific Affairs, Vol. 48 (1975) 398–412.

W.R. SLOMANSON, Judicial Review of War Renunciation in the Naganuma Nike Case, Juggling the Constitutional Crisis in Japan, Cornell International Law Journal, Vol. 9 (1975) 24–49.

V.H. COELHO, Japan's Postwar Peace Settlements (1978).

L. FOSCANEANU, Le traité de paix et d'amitié entre la République Populaire de Chine et le Japon (signé à Pékin, le 12 août 1978), AFDI, Vol. 24 (1978) 186–216.

K. HIROBE, Waiver of War Claims in Japan, Problems relating to Article 19(a) of the Treaty of Peace with Japan, Japanese Annual of International Law, Vol. 22 (1978) 38–53.

C.J. LEE, The Making of the Sino-Japanese Peace and Friendship Treaty, Pacific Affairs, Vol. 52 (1979) 420–445.

D. COLARD, Vers un nouvel ordre politique international, Le traité de paix et d'amitié sino-japonais du 12 août 1978, Etudes Internationales, Vol. 11 (1980) 3–42.

WERNER MORVAY

PELEUS, THE

On the night of March 13/14, 1944 the German → submarine *U-852* sank the *Peleus*, a Greek → merchant ship under British charter, in the Atlantic near the equator, between Freetown, Sierra Leone and the Island of Ascension. Many of the survivors climbed aboard rafts or floating wreckage. The submarine cruised around the scene for approximately five hours after the sinking, and the survivors and the wreckage were made the objects of machine-gun and hand-grenade attacks. All of the survivors were either killed or died subsequently of their wounds or by drowning, except for three who managed to conceal themselves and who were rescued five weeks later.

After the war the captain of the *U-852*, Lieutenant-Commander Eck – who had ordered the shooting and the throwing of hand grenades – and some crew members who had carried out his orders were tried for → war crimes before a British Military Tribunal in Hamburg from October 17 to 19, 1945. Eck's defence was principally based upon the claim that it was operationally necessary for him to eliminate all traces of the sinking in order to save the U-boat from Allied air surveillance, which had shortly before led to the discovery and sinking in the Atlantic of four sister submarines. Eck had known that he was well within the range of Allied land-based aircraft. In his trial he did not, however, invoke Admiral Dönitz's *Laconia* order (→ Submarine Warfare) as a superior order governing his action. The other accused relied principally upon a plea of superior orders, specifically, Eck's orders to them. All were found guilty. Eck and two of his officers were executed.

The judgment followed the precedent of the *Llandovery Castle* case, decided by the German Reichsgericht in Leipzig in 1921. This court had ruled that, since the laws of war (→ War, Laws of) constitute a compromise between the requirements of → military necessity and the

principles of humanity, operational necessity is not a valid defence for their violation, unless this is especially provided for in codified rules or under → customary international law. Military necessity in this case was considered to be an unconvincing claim because, instead of following the usual procedure of leaving the scene of a sinking vessel at high speed, the U-boat remained there for five hours. It was also held that the plea of superior orders could not justify the actions of the other defendants as those orders to kill helpless survivors (→ Wounded, Sick and Shipwrecked) were obviously illegal upon their face according to any civilized norms (→ Responsibility of Individuals in International Law).

United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Vol. I (1947) 1–21.

W.T. MALLISON, Submarines in General and Limited War (1968) 139–142.

KARL ZEMANEK

PERFIDY

1. Notion; Legal Status

It is a well-established general principle of international law that "the right of belligerents to adopt means of injuring the enemy is not unlimited". This principle, codified in Art. 22 of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Hague Conventions II of 1899 and IV of 1907, and reaffirmed in the basic rule contained in Art. 35 of Protocol I additional to the Geneva Conventions of 1949, sets up general restrictions on permissible methods of warfare (→ Hague Peace Conferences of 1899 and 1907; → Geneva Red Cross Conventions and Protocols).

According to these general restrictions, the law of international → armed conflict has developed specific rules prohibiting perfidious methods of warfare (→ Armed Conflict, Fundamental Rules; → War, Laws of). Such specific rules, combined with a definition of perfidy, are primarily to be found in Art. 37 of Protocol I of 1977. This provision defines perfidy as "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence". A perfidious act is, therefore, of such a kind as to be incompatible with the bona fides principle (→ Good Faith).

Perfidious acts are constituted by two elements: Firstly, the act in question must be objectively appropriate to cause or at least to induce the confidence of an adversary. This confidence is not an abstract one. It must be directed to a precisely specified legal situation, that is, the legal protection to which the adversary himself is entitled to or which he, on the other hand, is obliged to grant by law. The legal protection must be prescribed by rules of international law applicable in international armed conflict; protection under other rules of → international law or under internal or domestic law is not included in the definition. Secondly, the definition contains a subjective element. The act inviting confidence must be carried out intentionally in order to mislead the adversary into relying upon a situation's legality.

Art. 37 of Protocol I enumerates some examples of perfidy, the common denominator of which is the simulation of a legally protected status or situation:

"(a) the feigning of an intent to negotiate under a flag of truce or of a surrender" (the bearer of a → flag of truce has the right to inviolability under Art. 32 of the Hague Regulations; a person who clearly expresses an intention to → surrender is or should be recognized as *hors de combat* and shall not be made the object of an attack under Art. 41 of Protocol I and Art. 23(c) of the Hague Regulations);

"(b) the feigning of an incapacitation by wounds or sickness" (a person is *hors de combat* if he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself, Art. 41 of Protocol I; see also Art. 12 of Geneva Convention I (→ Wounded, Sick and Shipwrecked));

"(c) the feigning of civilian, non-combatant status" (it is prohibited to make civilians the object of attacks, Art. 51 of Protocol I; see also Art. 27 of the Geneva Convention IV (→ Civilian Population, Protection));

"(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties

to the conflict" (persons who are authorized to make use of those signs, emblems or uniforms are not → combatants within the ambit of Art. 43 of Protocol I and shall accordingly not be made the object of attacks).

This list, however, is not exhaustive. Simulating a legally protected status by using other internationally recognized protective emblems, signs or signals such as the distinctive emblems of the → Red Cross or the Red Crescent, or the international distinctive sign of → civil defence, or light signals and radio signals of medical units, etc. also constitutes perfidy (→ Emblems, Internationally Protected).

The limitation of the protection thus given to "the rules of international law applicable in armed conflict" (Art. 37 of Protocol I) excludes some acts from the definition of perfidy which are, in the ordinary meaning of the term, perfidious. Feigning to be a member of the adversary's armed forces by using its flags or military emblems, insignia or uniforms is doubtless a misleading act. But the confidence thereby induced is not directed, as prescribed in the legal definition, to a "protection under the rules of international law applicable in armed conflict", for the relations between members of the same party to the conflict are governed by the internal law of that party. Thus, making use of the uniform of the adverse party will not invite the confidence of an adversary and lead him to believe that he is obliged to accord protection under international law. This would seem to be a weakness of the definition, in particular because such acts of feigning in practice occur rather often in armed conflicts.

2. Prohibition of Perfidy

In the international law of armed conflict, there is no basic prohibition of perfidy as such. Accordingly Art. 37 of Protocol I does not prohibit perfidy *per se*, but only in proximate connection with other acts of violation, by stating that "it is prohibited to kill, injure or capture an adversary by resort to perfidy", as defined above. Thus, a perfidious act is only prohibited if it is combined with the further act of killing, injuring or capturing an adversary. The causality between the perfidious act and the violating act must be stated in order to prove a breach of the prohibition.

The prohibition of perfidy as contained in Protocol I is, therefore, to be regarded at the same time as a positive and a negative result of the progressive development of international law. This prohibition has ended the long-lasting academic discussion whether some of the provisions of the Hague Regulations constitute prohibitions of specific perfidious acts. The prohibition to "kill or wound treacherously individuals belonging to the hostile nation or army" (Art. 23(b) of the Hague Regulations) is, in its scope, overruled by the new Art. 37 of Protocol I. The prohibition on making "improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention" (Art. 23(f) of the Hague Regulations) has been replaced and partially modified by Arts. 38 and 39 of Protocol I, in relation to which the prohibition of perfidy contained in Art. 37 is a specific provision. Art. 34 of the Hague Regulations, according to which the envoy bearing a flag of truce loses his rights of inviolability if he provokes or commits an act of treachery, is to be regarded as a complementary provision to Arts. 37 and 38 of Protocol I.

Thus taking into account the general definition of perfidy and its legal connection with the acts of violence listed in Art. 37(1) of Protocol I – a construction which taken as a whole forms the prohibition – leads to the conclusion that the only prohibition of perfidy contained in positive international law is to be found in Art. 37 of Protocol I. This clarification in Art. 37 is to be taken as an improvement over the controversy which obtained before Protocol I existed. Earlier, it had been contested whether there was a general prohibition of perfidy or whether specific provisions of the Hague Law could be regarded as examples of such a prohibition. Now in Protocol I there is one specific prohibition of perfidy.

On the other hand, the limited scope of the prohibition laid down in Art. 37 of Protocol I constitutes a weakness in a provision dedicated to prohibiting perfidious violence. Its scope is confined to perfidious killing, injuring or capturing, thus leaving the question open whether the scope of the prohibition is restricted only to accomplished acts, or whether it is extended to acts committed against an adversary with intent to kill,

injure or capture him, but which do not achieve any of these results. The ordinary meaning of the wording seems to support the first alternative. An interpretation in the light of the purpose of the prohibition, however, endorses the second alternative; the purpose of the prohibition is to forestall one activity consisting of two legally and factually combined acts, that is to say, the perfidious act and the consecutive act of violence. If the first act is accomplished with the evident intent to commit the second one, then the prohibition is already infringed. This interpretation is supported by the preparatory works for the article. With respect to the "intent to betray" confidence, the Report of the Geneva Conference states that "the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence" (Conference Doc. 236/Rev. 1, para. 16). The betrayal of confidence is already accomplished by the first act, the perfidious act.

Furthermore, the limitation of the scope to killing, injuring or capturing excludes from the prohibition the infliction of other damage on the adversary by resort to perfidy. Thus, the prohibition of perfidy does not prohibit, for instance, the destruction of a → military objective by resorting to perfidy, without causing harm to persons.

The acts constituting perfidious behaviour may, of course, be prohibited by other provisions, for example concerning the improper use of certain emblems (see section 1 *supra*). But violations of these prohibitions even by "perfidious" acts in the ordinary meaning of the term do not fall under the prohibition of perfidy if they do not lead, or are not at least intended to lead, to the killing, injuring or capturing of an adversary.

It might be regarded as an academic question whether an act is prohibited because it is perfidious or because it is contrary to other legal standards. There are, however, far-reaching consequences to this question. The perfidious use in violation of Art. 37 of distinctive emblems (e.g. the Red Cross) or other protective signs recognized by the Geneva Conventions or Protocol I constitutes, according to Art. 85 of this Protocol, a grave breach. For example, bombing a militarily important bridge by an aircraft carrying the Red Cross emblem would only be a violation of Art. 38 of Protocol I (→ Air Warfare; → Bombardment), assuming no harm to enemy personnel; bombing of military personnel of the adverse party by the same aircraft would be a grave breach.

The new rules concerning perfidy have not changed the existing and generally recognized rules of international law applicable to → espionage. If espionage is combined with a perfidious act, and this may frequently happen in practice, then the prohibition of perfidy is nevertheless only infringed in cases involving the killing or injuring of an adversary.

3. Conclusions

The fact that Art. 37 has been accepted by the vast majority of States indicates that there is no → customary international law prohibition of perfidy with a wider scope than that of Art. 37. Taking into account the historical sources condemning perfidy (the rules of chivalry and good faith in wartime), it must be stated that the prohibition of perfidious killing, injuring or capturing of an adversary falls short of a general prohibition of perfidy. Art. 37 shows that States have not been prepared to outlaw perfidy as such. This limited prohibition, therefore, may be taken as an example of the low ethical standards which characterize present practice in the conduct of hostilities within armed conflicts. As to the distinction between ruses of war and perfidy see → War, Ruses.

International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary (1973) 33–44.

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Report of the Third Committee, Vol. 15 (1978) 380–383.

D. FLECK, Kriegslisten und Perfidieverbot, in: D. Fleck (ed.), Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte (1973) 105–148.

F. KALSHOVEN, The Law of Warfare (1973) 101–105.

M. BOTHE, K. IPSEN and K.J. PARTSCH, Die Genfer Konferenz über humanitäres Völkerrecht, ZaöRV, Vol. 38 (1978) 24–28.

P. BRETTON, Le problème des "méthodes et moyens de guerre ou de combat" dans les Protocoles additionnels aux Conventions de Genève du 12 août 1949, RGDIP, Vol. 82 (1978) 33–81, at pp. 39–41, 71.

E. ROSENBLAD, International Humanitarian Law of Armed Conflict (1979) 97–99.

W. VOIT, Humanitäre Aspekte der Regeln über Perfidie und Kriegslist, Neue Zeitschrift für Wehrrecht, Vol. 22 (1980) 19–25.

M. BOTHE, K.J. PARTSCH and W.A. SOLF, New Rules for Victims of Armed Conflicts (1982).

KNUT IPSEN

PERMANENT NEUTRALITY OF STATES

1. Concept and Sources

(a) Concept

By "permanent neutrality" is meant the special international status of a State which results from a legally binding obligation accepted by that State to remain permanently neutral and the recognition of this obligation by other States. In contrast to simple neutrality, the State in question cannot choose whether or not to participate in a particular → armed conflict (→ Neutrality, Concept and General Rules; → Neutrality Laws). It cannot abandon its neutral status on its own initiative, without at least having consulted the powers which have recognized its permanent neutrality, and certainly not on short notice. On the other hand, the obligation ceases if the neutral State becomes the victim of an act of → aggression. Permanent neutrality applies *vis-à-vis* all States and for all conflicts.

As in the case of Sweden, a State may pursue a policy of permanent neutrality without the basis of a legally binding commitment. If this policy is pursued over a long period, it will be accorded a high degree of political significance and its effect will be similar to that of legally established permanent neutrality. It is not, however, accompanied by specific rights or duties. For this reason, Swedish writers and statesmen prefer to use the term "alliance-free" (→ Alliance). A neutral policy of this type is also pursued by Finland and Ireland.

A distinction must also be drawn between, on the one hand, legally-binding or factual neutrality and, on the other, non-alignment or neutralism (→ Non-Aligned States).

The only countries which at present possess the full status of permanent neutrality are Switzerland and → Austria.

The Final Act of Helsinki of August 1, 1975 (→ Helsinki Conference and Final Act on Security and Cooperation in Europe) has, in the principle of sovereign equality, confirmed the right of States to neutrality.

(b) Sources

Each permanently neutral State has a particular legal basis in international law. Neutrality is based either on a treaty or on a unilateral act of the neutral State, which has been recognized by other States. The latter case applies as far as Austria is concerned; Switzerland's neutrality is confirmed under both sources. With regard to Switzerland, the → International Law Commission implicitly assumed that her neutral status has become an element of → customary international law (Reports of the 16th session, 1964, p. 12, and the 18th session, 1966, p. 64). The same may well be argued in the case of Austria.

2. Permanently Neutral States

(a) Historical instances before 1920

Cracow: According to Art. 3 of the Final Act of the → Vienna Congress of June 9, 1815, which was based on an agreement concluded on May 3, 1815 by Russia, Austria and Prussia, Cracow was declared a → free city enjoying the status of permanent neutrality ("cité libre, indépendante, strictement neutre") under the protection of the three powers. The incorporation of the city into Austria ended this status in 1846.

Congo Free State: The Final Act of the → Berlin West Africa Conference of February 26, 1885 declared the area of the Congo Basin, which was delimited in Art. 1, to be neutral as long as the States exercising rights of → sovereignty in the area pledged themselves to be neutral and continued to observe their neutral duties (Art. 10). On the basis of this provision, → notification of the permanent neutrality of the Independent Free State of the Congo was issued on August 1, 1885. This status continued when the territory was transferred to Belgium in 1908. According to Art. 11, in case of war the Congo Basin was to be placed under a neutral régime to be agreed upon among the parties. This was not observed in World War I. The status of neutrality was abrogated in a multilateral treaty dated September 10, 1919, which superseded the Berlin Final Act.

Albania: According to the intention of six major powers during the → Balkan Wars of 1912–1913, Albania was to be placed under a régime of guaranteed neutrality (resolution of the London → Conference of Ambassadors of July 29, 1913). However, this plan was never realized and thus suffered the same fate as the project elaborated in 1910 at a conference of delegates from Russia, Norway and Sweden, at which it was decided that → Spitzbergen (Svalbard) should remain *terra nullius* and be accorded the status of permanent neutrality. A multilateral treaty signed in Paris on February 9, 1920 acknowledged Norway's claim to → territorial sovereignty over Spitzbergen.

Belgium: After the → secession of Belgium from the Netherlands in 1830, she was placed under a régime of permanent neutrality by the Treaty of London of November 15, 1831 (signed without the participation of the Netherlands). The Netherlands eventually confirmed Belgium's independence and neutral status in a treaty dated April 19, 1839. Belgium's neutrality was to be guaranteed by Austria, France, Great Britain, Prussia and Russia. As it proved impossible to preserve Belgium's neutral status in World War I, her permanent neutrality was abrogated in Art. 31 of the → Versailles Peace Treaty (1919).

Luxembourg: In a multilateral treaty of May 11, 1867, it was stipulated that Luxembourg, an independent country but with close ties to the Netherlands (until 1890, the Dutch King was also Grand Duke of Luxembourg), should become an "Etat perpétuellement neutre" with the obligation to maintain this status. Her neutrality was placed under the collective → guarantee of Austria, France, Great Britain, Prussia and Russia. At the same time, provision was made for the → demilitarization of Luxembourg, which was at that time occupied by troops of the German Confederation (→ Occupation, Pacific). Art. 40 of the Versailles Peace Treaty put an end to the neutralization of Luxembourg. In 1920 she became a member of the → League of Nations without claiming special status on the ground of neutrality.

(*b*) *Vatican State*

By the → Lateran Treaty of February 11, 1929, Italy acknowledged the sovereignty of the → Holy See over the Vatican State (Art. 26). The Treaty established the neutrality and inviolability of the territory (Art. 24). The Holy See was thus committed to a neutral status, but without any corresponding guarantee on the part of the Italian Government.

(*c*) *Laos*

By a governmental declaration of July 9, 1962, Laos undertook to preserve a neutral status. This declaration was confirmed by the interested powers in a statement issued in Geneva on July 23, 1962 and in an agreement between the Laos Government and the "patriotic forces" on the re-establishment of peace and national unity in Laos on February 21, 1973. The Treaty of Peace and Cooperation between Laos and → Vietnam of July 18, 1977 represented the formal demise of Laotian neutrality, which had in any case always been largely illusory.

(*d*) *Switzerland*

Since the beginning of the 16th century, Switzerland has remained aloof from active participation in European conflicts and has thus established a tradition of neutrality which has come to be accepted as the hallmark of the Confederation. It was strengthened and secured by the establishment of buffer zones beyond the frontiers of the Confederation (Burgundy's Franche-Comté, the Bishopric of Basle, and Upper Savoy). After strains placed on her neutrality during the Napoleonic era, Switzerland's neutral status was acknowledged at the Vienna Congress of 1815. The declaration of March 20, 1815, by which eight powers accepted and guaranteed Swiss neutrality, was formally adopted by Switzerland, on May 27, 1815. This was followed by the drafting of the "Acte portant reconnaissance et garantie de la neutralité perpétuelle de la Suisse et de l'inviolabilité de son territoire", which was accepted by France, Austria, Great Britain, Prussia and Russia on November 20, 1815. This Act did not create Swiss neutrality (as did the 1839 Treaty for Belgium), but simply accorded it recognition as an established principle. The guarantees contained in it were recognized anew by the contracting powers in Art. 435 of the Versailles Treaty, Art. 375 of the → Saint-Germain Peace Treaty, Art. 358 of the → Trianon Peace Treaty and Art. 291 of the → Neuilly Peace Treaty. For the position of

Switzerland in the → League of Nations, see → Neutrality, Concept and General Rules.

The 1815 guarantee, which also covers the inviolability and independence of the country, grants to Switzerland the right to assistance if her neutral status should be violated; however, according to a declaration of the Swiss Federal Council of 1917, Switzerland alone has the right to decide when such assistance is to be invoked ("La Confédération revendique pour elle seule le droit de décider si, et dans quelles conditions, il lui conviendrait de faire appel au concours des Puissances étrangères"). The Act of 1815 imposes upon Switzerland no obligation to defend or maintain her neutrality. Her duty to counter any violation of her neutrality can, however, be inferred from general principles. A decision to abandon the status of neutrality would require → consultation with the other signatory States.

(*e*) *Austria*

Following the dissolution of the Danubian Monarchy in 1918 into its three historic entities which had been confederated since 1526 (Austria, Bohemia and Hungary), the Paris Peace Conference in 1919 recognized the successor States as independent. For the Republic of Austria, the Status of permanent neutrality according to the Swiss model was suggested as early as 1919 by France and by certain Austrians, especially Heinrich Lammasch, a famous international lawyer and the last prime minister of imperial Austria. But permanent neutrality seemed unacceptable to those who aimed either at a union with Germany or at a confederation of the Danubian States. Under Art. 88 of the → Saint-Germain Peace Treaty (1919), the independence of Austria was declared inalienable except with the consent of the Council of the League of Nations. Moreover, Austria undertook to abstain from any act which might directly, indirectly, or by any means whatever compromise her independence, and such conduct is precisely one of the main duties of a permanently neutral State. A clause worded identically to Art. 88 was inserted for Hungary in Art. 73 of the → Trianon Peace Treaty (1920). Thus Austria and Hungary became isolated, and the newly established political order in Central Europe could not undergo a change without the consent of the Council of the League of Nations.

After the seizure of power by Hitler in Germany (1933), Austrian social democratic leaders, earlier supporters of the *Anschluß*, finally realized the importance to Europe of Austria's independence and advocated the status of permanent neutrality for Austria. The illegal → annexation of Austria by Germany (March 1938) was declared null and void by the Four Powers in the Moscow Declaration on the independence of Austria of October 30, 1943. After the liberation of Austria (1945), Karl Renner, President of the Republic of Austria, claimed permanent neutrality for Austria as early as April 1946. Because of the tensions of the "cold war", quadripartite Allied control in Austria terminated only by the often-delayed signature of the → Austrian State Treaty on May 15, 1955, under which the Four Powers pledged themselves to respect the → territorial integrity and political independence of Austria. At the Conference of Berlin (February 1954), Austria had made a declaration to join no military alliances and to permit no military bases on her territory (→ Military Bases on Foreign Territory). In the course of Austro-Soviet negotiations, Austria agreed to make a declaration of permanent neutrality according to the Swiss model, and the Soviet Union committed herself to recognize such a declaration (Moscow Memorandum of April 15, 1955). Austria then obtained the consent of France, Great Britain, and the United States, whose Secretary of State had declared at the Berlin Conference that a voluntary assumption of the status of permanent neutrality by Austria would be accepted by the United States (→ Unilateral Acts in International Law).

After the entry into force of the Austrian State Treaty, with the last Allied soldier having left her territory, Austria by the Constitutional Law of October 26, 1955 declared

> "of her own free will herewith her perpetual neutrality, which she is resolved to maintain and defend with all the means at her disposal.... Austria will never in the future accede to any military alliances nor permit the establishment of military bases of foreign States on her territory."

That law was notified to the other States with the request of → recognition. The Four Powers, having agreed upon a common text, in identical → notes recognized the perpetual neutrality of

Austria. The → United Nations, considering the status of permanent neutrality as being compatible with the → United Nations Charter, admitted Austria as a member on December 14, 1955 (→ International Organizations, Membership). Austria's permanent neutrality has since been recognized by all States, including the People's Republic of China, and has thus become a part of customary international law.

3. Rights and Obligations of States Concerned

Rights and obligations are inherent in permanent neutrality, even in peace-time. The neutral State has the right to respect for its neutrality and independence. Its obligations are as follows: to refrain from initiating an armed conflict; to defend its neutrality and independence; to do everything in its power to avoid becoming involved in an armed conflict, and to refrain from any action which could have this consequence – in other words, to pursue a consistent policy of neutrality *erga omnes*.

The manner in which such a policy is pursued is left to the discretion of the neutral State in question. The details will therefore vary from State to State. In this connection, two conflicting principles should be borne in mind. On the one hand, neutrality must, as a limit on the freedom of action of the State, be restrictively interpreted, and it is obviously not in the neutral State's interest gratuitously to restrict its own freedom of action. On the other hand, a State will often undertake more than the basic obligations demanded by its neutral status for political reasons, i.e. to enhance the confidence of other States in its policy of neutrality.

Neutrality is a means of preserving the independence of a neutral State. Conversely, independence is a necessary prerequisite for permanent neutrality. It follows that a neutral State may not enter into any agreement which could commit it to participation in an armed conflict, e.g. an alliance. It must remain impartial in conflicts between third States; this does not mean, however, that its attitude cannot conform in particular cases to that of other States. It must not accept any substantial limitations of its independence, whether of a political or an economic nature (e.g. membership in a → customs union or an economic union), if by so doing it becomes dependent upon a particular State, or a bloc of States, more than another (→ Economic Communities and Groups; → Permanent Neutrality and Economic Integration). Participation in international conferences and organizations is permissible as long as they are of a predominantly economic, cultural or technical nature. If they are of a political nature, participation is acceptable only if all the political groupings concerned are represented by their leading exponents (global or regional). Otherwise, permanent neutrality does not commit a State to the pursuit of a passive foreign policy (→ Diplomacy). It is quite free to promote its own interests, to take what it sees to be the correct attitude in matters of dispute, and to react against any violations of → international law, even when this means temporarily aligning itself with other States. It also has the right to offer → good offices or mediation (→ Conciliation and Mediation), even during hostilities (Art. 3 of the Hague Convention on the Pacific Settlement of International Disputes; → Hague Peace Conferences of 1899 and 1907).

4. Permanent Neutrality and the United Nations

The general rules regarding the relationship between permanent neutrality and the UN are the same as in the case of simple neutrality, and are described in the article on → Neutrality, Concept and General Rules. In addition, participation in UN → sanctions would seem to be incompatible with permanent neutrality, if this could lead to involvement in an armed conflict. This would contradict the essence of permanent neutrality. The above is certainly true of participation in military measures; when other measures are contemplated, each case has to be examined on its merits. It is hardly possible to lay down general rules for the policy of neutrality – firstly, because such a policy must be left to the discretion of the neutral State in question and, secondly, because each concrete situation varies from the next and presents different problems. When military actions are not → war in the legal sense, the neutral State does not necessarily have to observe the normal rules of neutrality. The policy of neutrality is here more important than are the laws of neutrality.

According to Arts. 43 and 48 of the UN Charter, the → United Nations Security Council may exclude certain States from participation in sanctions. In addition, the UN may recognize per-

manent neutrality either explicitly or implicitly. The latter is the case as far as Austria, Finland and Sweden are concerned. The Swiss Federal Council decided to join the UN only on the condition that Switzerland's status of permanent neutrality be respected; moreover, the Swiss Federal Assembly and a majority of the population and of the cantons have to give their consent. Apart from sanctions, what has already been said about participation in international organizations and conferences also applies to cooperation in the work of the UN and to the stand to be taken when disputes arise within the organization.

5. *Significance*

Permanent neutrality to the neutral State means a guarantee of its independence, and to other States the assurance that it will remain aloof and at peace in all future conflicts. The neutral State may not fall under the influence of or become dependent on another State, and its territory must not become a theatre of war (→ War, Theatre of). The policy of neutrality should avoid attracting hostile actions of other powers. In this way, conflicts can be contained; permanent neutrality is an example *par excellence* of a means to preserve peace (→ Peace, Means to Safeguard). The larger the number of permanently neutral States, the smaller will be both the number and extent of conflicts. At the same time, a stable and calculable factor is introduced into the political system. The neutral State can, moreover, preserve a link between parties in conflict. It is especially well qualified to act as a mediator and to perform humanitarian acts.

Even if it is recognized that an increase in the number of permanently neutral States would considerably advance the cause of peace and stability, a number of political requirements must nevertheless be fulfilled before a policy of permanent neutrality can be embraced. If these are absent, it cannot in the long run be maintained. The requirements are as follows:

(a) The State in question must be small or of medium size. Permanent neutrality would not seem a feasible policy for a major power.

(b) The neutral State should not constitute a major object of policy for another State and should lie geographically in a "marginal zone".

(c) It should be able to defend itself against all attacks, the decisive factor in the end being not the absolute but the relative power relationship. Permanent neutrality can only be an armed one.

(d) It must forego expansionist goals.

(e) It must enjoy a high degree of internal integration. If a neutral State is split by profound divergences among its own population, other States will sooner or later intervene (→ Intervention); such is the lesson of the Laos experiment.

(f) There is no place for an ideological or visionary foreign policy. In this respect, however, a distinction must be drawn between the → State and its citizens; what applies for the State should not stand in the way of the individual's freedom of opinion.

General Literature

D. BINDSCHEDLER-ROBERT, L'Union soviétique face au droit international et à la neutralité, Revue économique et sociale, Vol. 21 (1963) 121–142.

D. BINDSCHEDLER-ROBERT, Völkerrecht und Neutralität in sowjetischer Sicht, Österreichische Zeitschrift für Aussenpolitik, Vol. 5 (1965) 144–163.

A. GREBER, Die dauernde Neutralität und das kollektive Sicherheitssystem der Vereinten Nationen (1967).

H.R. KURZ, Bewaffnete Neutralität (1967).

U. PLESSOW, Neutralität und Assoziation mit der EWG (1967).

K. ZEMANEK, Der völkerrechtliche Status der dauernden Neutralität und seine Rückwirkungen auf das interne Recht des dauernd neutralen Staates, Juristische Blätter, Vol. 89 (1967) 281–298.

G. HAFNER, Die permanente Neutralität in der sowjetischen Völkerrechtslehre, Eine Analyse, Österreichische Zeitschrift für öffentliches Recht, Vol. 19 (1969) 215–258.

L. WILDHABER, Die Mitgliedschaft dauernd neutraler Staaten im UNO-Sicherheitsrat, Österreichische Zeitschrift für Aussenpolitik, Vol. 11 (1971) 131–145.

D. SCHINDLER, Dauernde Neutralität, in: Handbuch der schweizerischen Aussenpolitik (1975) 159–180.

E. SPANNOCCHI, Gegenüberstellung der Handhabung der militärischen Neutralität in Österreich und der Schweiz, Österreichische Zeitschrift für Aussenpolitik, Vol. 15 (1975) 131–148.

A. AEBI, Der Beitrag neutraler Staaten zur Friedenssicherung (1976).

R.L. BINDSCHEDLER, Neutralitätspolitik und Sicherheitspolitik, Österreichische Zeitschrift für Aussenpolitik, Vol. 16 (1976) 339–354.

K. ZEMANEK, "Zeitgemässe" Neutralität?, Österreichische Zeitschrift für Aussenpolitik, Vol. 16 (1976) 339–354.

M. SCHWEITZER, Dauernde Neutralität und europäische Integration (1977).

K. ZEMANEK, Dauernd neutrale Staaten in den Vereinten Nationen, Österreichische Zeitschrift für Aussenpolitik, Vol. 18 (1978) 265–274.
H. NEUHOLD, Permanent Neutrality and Non-alignment, Similarities and Differences, Österreichische Zeitschrift für Aussenpolitik, Vol. 19 (1979) 79–99.
R.L. BINDSCHEDLER, Ständige Neutralität und Neutralismus (Blockfreiheit), in: Völkerrecht und Rechtsphilosophie, Internationale Festschrift für Stephan Verosta (1980) 313–321.
H.R. KUNZ, Die Militärallianz des dauernd neutralen Staates, in: Innen- und Aussenpolitik, Festschrift für Walther Hofer (1980) 459–482.
D. SCHINDLER, Die Lehre von den Vorwirkungen der Neutralität, in: Festschrift für Rudolf Bindschedler (1980) 563–582.

Switzerland

C. GORGÉ, La neutralité helvétique (1947).
M. HUBER, Neutralität und Neutralitätspolitik, Schweiz-JIR, Vol. 5 (1948) 9–28.
D. ROBERT, Etude sur la neutralité suisse (1950).
Begriff der Neutralität, Verwaltungsentscheide der Bundesbehörden, Vol. 24 (1954) 9–13.
Neutralität und Souveränität, Verwaltungsentscheide der Bundesbehörden, Vol. 29 (1959–1960) 9–12.
E. BONJOUR, Geschichte der schweizerischen Neutralität, Vols. 1–2 (2nd ed. 1965), Vols. 3–6 (1967–1970).
D. FREI, Neutralität, Ideal oder Kalkül? (1967).
R.L. BINDSCHEDLER, Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinigten Nationen, besonders im Falle Rhodesiens, ZaöRV, Vol. 28 (1968) 1–15.
J. PERNET, Die schweizerische Neutralität im Hinblick auf einen Beitritt zur EWG (1971).
P. HOFACHER, Die schweizerische Neutralität zwischen Krieg und Frieden (1972).
B. STETTLER, Die Stellung der Schweiz zum Sanktionssystem des Völkerbundes (1977).
Botschaft [of the Swiss Federal Council] über den Beitritt der Schweiz zur Organisation der Vereinten Nationen vom 21. Dezember 1981 (1982).

Austria

H. BALTE, Probleme der Neutralität betrachtet am österreichischen Beispiel (1962).
S. VEROSTA, Die dauernde Neutralität (1967).
A. VERDROSS, Österreichs Neutralität im Beitrag zum Frieden der Welt, in: H.R. Klecatsky (ed.), Die Republik Österreich (1968) 279–299.
K. ZEMANEK, Das Problem der Beteiligung des immerwährend neutralen Österreichs an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens, ZaöRV, Vol. 28 (1968) 16–32.
G. HANDL, Zur Frage der Vereinbarkeit von Rüstungsbeschränkung und dauernder Neutralität, Österreichische Zeitschrift für Aussenpolitik, Vol. 9 (1969) 211–227.
I. SEIDL-HOHENVELDERN, Österreich und die EWG, JIR, Vol. 14 (1969) 128–152.
F. ERMACORA, Zwanzig Jahre österreichische Neutralität (1975).
K. GINTHER, Neutralität und Neutralitätspolitik (1975).
P. JANKOWITSCH, Österreich im Sicherheitsrat, Österreichische Zeitschrift für Aussenpolitik, Vol. 15 (1975) 67–85.
B. KREISKY, Neutralität und Koexistenz (1975).
K. GINTHER, Wandlungen der österreichischen Neutralitätspolitik, Europa-Archiv, Vol. 31 (1976) 275–282.
A. VERDROSS, Die immerwährende Neutralität Österreichs (1978).
K. HERNDL, Die Mitgliedschaft Österreichs im Sicherheitsrat der Vereinten Nationen (1973/1974), in: Festschrift für Rudolf Bindschedler (1980) 51–70.
S. VEROSTA, Das französische Angebot der dauernden Neutralität an Österreich im Jahre 1919, in: Festschrift für Rudolf Bindschedler (1980) 51–70.

Scandinavia

C. GERMOZ, La neutralité de la Suède au cours de la dernière guerre (1939–1945), Revue d'Histoire Diplomatique, Vol. 78 (1964) 174–181.
M. JAKOBSON, Finnish Neutrality (1968).
U. KEKKONEN, Neutrality, The Finnish Position (1970).
H. BLIX and M. JAKOBSON, Die Erfahrungen Schwedens und Finnlands als neutrale Staaten in der UNO (1974).
U. WAGNER, Finnlands Neutralität (1974).
G. GILLESEN, Finnlands behinderte Neutralität, Europa-Archiv, Vol. 30 (1975) 361–368.
S. ÅSTRÖM, Sweden's Policy of Neutrality (1977).
W.M. CARLGREN, Swedish Foreign Policy during the Second World War (1977).
L. GRUCHMANN, Schweden im Zweiten Weltkrieg, Vierteljahreshefte für Zeitgeschichte, Vol. 25 (1977) 591–657.
D. WOKER, Die skandinavischen Neutralen (1978).

Laos

J. CZYZAK and S. SALANS, The International Conference on the Settlement of the Laotian Question and the Geneva Agreement of 1962, AJIL, Vol. 57 (1963) 300–317.
H. NEUHOLD, La neutralité du Laos, Österreichische Zeitschrift für öffentliches Recht, Vol. 19 (1969) 187–206.
M. STARGARDT, The Problem of Neutrality in South-East Asia (1972).
S. KHAIMUK, Les projets de neutralisation de l'Asie du Sudest (1973).
D. WILSON, The Neutralization of Southeast Asia (1975).

For further references see the bibliography of the article, Permanent Neutrality and Economic Integration.

RUDOLF L. BINDSCHEDLER

PILLAGE

1. Notion

"Pillage" and the terms "plundering", "looting" and "sacking" are used synonymously; unfortunately none has been defined adequately for the purposes of international law. Difficulties resulting from the term have surfaced most prominently in evaluating the → Nuremberg Trials. An attempt to clarify the term "pillage" by examining historical examples, linguistic usage and military regulations yields the following definitions: (a) in a narrow sense, the unauthorized appropriation or obtaining by force of property (→ Enemy Property) in order to confer possession of it on oneself or on a third party; (b) in a wider sense, the unauthorized imposition of measures for → contributions or → sequestrations, or an abuse of the permissible levy of → requisitions (e.g. for private purposes), each done either through taking advantage of the circumstances of war or through abuse of military strength. In the traditional sense, pillage implied an element of violence. The notion of appropriation or obtaining against the owner's will (presumed or expressed), with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war.

2. Historical Evolution of Legal Rules

In former times, the right to seize enemy property on the battlefield (→ Booty in Land Warfare) and during an *occupatio bellica* (→ Occupation, Belligerent) constituted a recognized right during → war. Soldiers were promised the opportunity to plunder a conquered city as an incentive or were rewarded with this licence after battle. In the 19th century, under the influence of the Rousseau-Portalis Doctrine (→ War, Laws of, History), the principle came to prevail that only the national armed forces and the State's means of waging war were to be the direct objects of legitimate war operations. In conjunction with the development of the doctrine of vested rights, private property of inhabitants became protected against confiscations. Earlier forms of wartime impositions, such as contributions and collective fines, came to be subject to detailed regulations (→ Humanitarian Law and Armed Conflict). The development of such rules led from isolated bilateral agreements in the 18th and early 19th centuries to the Lieber Code of 1863, the 1874 Brussels Declaration, the 1880 Oxford Manual (texts in: D. Schindler and J. Toman (eds.), The Laws of Armed Conflict (2nd ed. 1981)) and finally the → Hague Peace Conferences of 1899 and 1907.

The Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 1907 postulate the principle of respect for private property and expressly prohibit any act of pillage (Arts. 28 and 47). Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (→ Geneva Red Cross Conventions and Protocols; → Civilian Population, Protection) reiterates the ban on pillage (Art. 33). Arts. 146 and 147 oblige the signatories to institute legislative action and to implement the necessary provisions for the prevention of prohibited acts such as pillage and for the punishment of offenders (cf. Art. 4 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954). These rules are universally recognized as having binding force.

3. Current Legal Situation

The basic principle is contained in Art. 46, para. 1 of the Hague Regulations: private property must be respected. It is not stated, however, in which manner the rights listed therein are to be respected. The principle is subject to numerous restrictions, the most prominent being the limited rights to levy contributions, requisitions and to make sequestrations (see Hague Regulations, Arts. 43, 48, 49, 51 to 53). The respect for property is reinforced by Art. 46, para. 2 and Art. 47, which complement each other and are systematically interlinked with Art. 46, para. 1. The first prohibits confiscation of private property. Confiscation, like the term "pillage", is not defined. It is understood to be the → expropriation without indemnification of private property by a unilateral act of → sovereignty not justified by → military necessity on the part of the occupying power, and its incorporation into the national property of that power (see also Arts. 146 and 147 of Geneva Convention IV).

The prohibition of pillage in Art. 47 of the

Hague Regulations, by contrast, has historically been directed against individual theft and sacking, as this has been found detrimental to military discipline and to the efficient control of military operations, as well as contrary to military honour. It is in this light that Art. 28 must be viewed. Its wording is referable back to Art. 32(a) of the Oxford Manual, whereas Art. 47 came as a later, and more general provision. Art. 28 formally prohibits pillage of a town or place, even when taken by assault (for naval warfare, see Art. 7 of Hague Convention IX of 1907 concerning Bombardment by Naval Forces in Time of War), whereas Art. 47 applies to all occupied enemy territory. The prohibition of pillage in Art. 33 of Geneva Convention IV applies to the entire territories of the parties involved in the conflict and to any person, without restriction. Its applicability is so far-reaching and absolute as also to cover officially authorized or ordered forms of plundering when the appropriation of property, private or public, is not "imperatively demanded" by military necessity, and is carried out on a large scale in an illegal and arbitrary manner (see Hague Regulations, Art. 23(g) and Geneva Convention IV, Arts. 146 and 147).

4. Special Problems

The above rules would equally have to be applied to the taking away of private property in the interest of the economy of the occupying power. The appropriation of items of equipment, foodstuffs, means of transportation or fuels to satisfy the current needs of troops is not considered to be plunder. Therefore, as long as these measures are taken to an extent proportionate to actual requirements (→ Proportionality), and there is no other possibility of procurement (particularly by regular requisitioning), these measures are legitimate.

Devastation is also not to be considered as pillage (→ Land Warfare; → Indiscriminate Attack).

The attempt made by the International Military Court in the Nuremberg Trials to extend, on the basis of the Hague Regulations, the notion of pillage to any kind of removal of objects from enemy territory not justified as an exercise of a right to seize booty or by way of requisition ("exploitation", "spoliation"), was justly met with protest. On the other hand, Art. 6(b) of the Charter of the International Military Tribunal and Art. II (1)(b) of Control Council Law No. 10 which established pillage to be a punishable → war crime (→ Rauter Case) were in accord with the legal situation at that time. This principle was later confirmed by the Geneva Conventions.

E.H. FEILCHENFELD, The International Economic Law of Belligerent Occupation (1942).
H.G. ANGER, "Ausbeutung" besetzter Gebiete (1950).
H.M. MASCHKE, Das Krupp-Urteil und das Problem der Plünderung (1951).

ARMIN A. STEINKAMM

POSTLIMINIUM

The term "*postliminium*" originated in Roman law. When a Roman citizen was taken into captivity by the enemy during war, he was made a slave. Numerous personal and property rights which had been earned or possessed previously were suspended: they were inoperative for the duration of his captivity, but were revived as soon as the prisoner crossed the "threshold" (*limen*) of the Roman Empire, thereby regaining the status of a Roman citizen. This legal process of restoration to former status was termed "*postliminium*". Details, especially those concerning the range of the rights affected during captivity (for example, marriage was not affected) changed during the course of the development of Roman law.

The term was adopted in the international law of war (→ War, Laws of) for situations involving States analogous to those covered by the rules described above. The term appeared in the writings of Grotius (De jure belli ac pacis, Book 3, Chapter 9), and was primarily used to describe the legal consequences upon termination of belligerent occupation (→ Occupation, Belligerent). The fact that in Roman law the period of suspension of rights only applied to a segment of the affected individual's rights indicates also that under international law *postliminium* does not represent a sharply outlined legal institution from which legal consequences in all cases may be deduced. The term, rather, merely describes a legal process whose applicability to each case must be examined by reference to recognized

classes of legal rights. This approach is especially necessary considering the transposition of the term into international law, where analogies to national laws should be used cautiously because of the structural and systematic peculiarities of international law.

Discussion of the content and area of application of the doctrine of *postliminium* is conducted in many textbooks. This is particularly evident in English and American writings and others in the same tradition (see, for example, the conflicting views of Oppenheim/Lauterpacht and Hall). However, the term has essentially been abandoned outside this tradition. The proponents of a uniform principle of *postliminium* agree that this term cannot be applied in the case of → annexation or → secession, but only in the case of a belligerent occupation (for example, the occupation of Belgium by the German Third Reich and the occupation of Burma by Japan during World War II). Furthermore, it is significant that statements relevant to this notion are not contained either in the provisions concerning the occupation of territories (Arts. 42 to 56) of the Hague Regulations respecting the Laws and Customs of War on Land annexed to the 1907 Convention IV of the same name (→ Hague Peace Conferences of 1899 and 1907) or in the provisions of Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War (→ Geneva Red Cross Conventions and Protocols). Finally, proponents of the applicability of *postliminium* also agree that the provisions of a → peace treaty or any other treaty (e.g. → Bonn and Paris Agreements on Germany (1952 and 1954)) always take precedence over a doctrine of *postliminium* (which is at best valid as → customary international law).

There is disagreement as to which acts of the occupation forces (law making, administrative measures, judicial decisions) in which areas (i.e. law of personal status, financial administration, personal property and real estate) and with which exceptions (contestable in the law of the sea (→ Law of the Sea, History)) effectively alter the legal situation created by the previous exercise of sovereign power by the State whose territory is occupied. Do these acts of the occupying power cease to have effect *ipso jure* upon the reinstatement of the former power? Must the former law be legislated for once again, or is a declaratory statement sufficient? There is the additional question of whether one must differentiate between legitimate and unjustified occupation; if this is answered affirmatively, does the differentiation have any effect upon the validity of the acts of the occupation forces?

This level of discussion illustrates that today one cannot speak of a practicable theory of *postliminium*. Due to a lack of relevant practical examples, it will hardly be possible to develop such a theory, nor does it seem that it would in any event be useful. If, at the conclusion of an occupation on the termination of war (→ Peace and War; → War), questions concerning the validity of acts of the occupying power have not been resolved in a treaty, it will not be possible to fall back upon a uniformly recognized principle. Rather, one must endeavour to determine, with a view to the specific legal question of the validity of the occupant's acts, which rule of customary law exists in the practice of States.

W.E. HALL, A Treatise on International Law (8th ed. by A.P. Higgins, 1924) 577–585.

E.H. FEILCHENFELD, The International Economic Law of Belligerent Occupation (1942).

F. CASTBERG, Postliminium (1944).

L. OPPENHEIM, International Law, Vol. 2 (7th ed. by H. Lauterpacht, 1952) 616–620.

V.D. MAHAJAN, Public International Law (5th ed. 1973) 658–660.

F. MÜNCH, Das Völkerrecht der militärischen Besetzung vor nationalen Gerichten, in: I. von Münch (ed.), Staatsrecht, Völkerrecht, Europarecht, Festschrift für H.-J. Schlochauer (1981).

PHILIP KUNIG

POTSDAM AGREEMENTS ON GERMANY (1945)

1. Historical Background

After the unconditional → surrender of the German Armed Forces on May 8, 1945 and the "assumption of supreme authority with respect to Germany" by the Allied Powers according to the declaration of June 5, 1945, the three heads of government of the Soviet Union, the United States, and the United Kingdom met in Potsdam near Berlin for their last major war conference (→ Germany, Occupation after World War II;

→ Germany, Legal Status after World War II). From July 17 to August 2, 1945 Stalin, Truman and the successive British Prime Ministers Churchill and (from July 28) Attlee discussed matters relating to the defeat of Germany and her allies in Europe as well as to the continuing war with Japan.

The agreement reached at the Berlin (Potsdam) Conference is contained in two documents. A Report on the Conference was published immediately, bearing the signatures of the three heads of government (DeptStateBull, Vol. 13 (1945), p. 153). A German version of this Report appeared in the Supplement to the Official Gazette of the Control Council on April 30, 1946. In 1947 a Protocol of the Proceedings of the Berlin Conference was published by the United States and Great Britain (Department of State Press Release No. 238 of March 24, 1947). This Protocol was introduced by a statement signed by the three heads of government which reads: "There is attached hereto the agreed protocol of the Berlin Conference."

While the two documents are identical in most respects as far as Germany is concerned, they differ in some parts. The Report begins with an introductory statement which does not appear in the Protocol. Since this section is numbered I in the Report, all other sections in this document are numbered by one figure higher than in the Protocol. The Protocol includes a lengthy statement on the disposal of the German Navy and Merchant Marine, whereas the Report refers only in a brief paragraph to the agreement reached. In addition, the Protocol deals in sections XIV to XX with problems not mentioned in the Report. It seems that the participants saw the distinction between the two documents as follows: The Protocol was to be a complete account of all decisions, agreements or problems dealt with, while the Report, which was referred to during the discussions as the "Communiqué", was to contain only the important conclusions which would govern the policy of the Three Powers in the future (see Minutes of the 13th Plenary Meeting, Foreign Relations, Vol. 2, p. 586). The following description takes into account both documents.

2. Content

As far as Germany was concerned, the three heads of government reached conclusions on the following matters during the Berlin (Potsdam) Conference: The establishment of a Council of Foreign Ministers, the political and economic principles to govern the treatment of Germany in the initial control period, → reparations from Germany (→ Reparations after World War II), the disposal of the German Navy and Merchant Marine, the City of Koenigsberg and the adjacent area, war criminals (→ War Crimes), the western frontier of Poland, and the orderly transfer of German populations. As can be seen from this survey, a wide variety of subjects was covered by the decisions taken at the Conference. While many of the conclusions were of a rather vague nature to serve as guidelines for the occupation policy of the Three Powers (e.g.: "So far as is practicable, there shall be uniformity of treatment of the German population throughout Germany."), there were also detailed arrangements concerning reparations, the German Navy and Merchant Marine, and the territories to come under Soviet and Polish administration.

The political principles for the occupation of Germany may be summarized as complete → disarmament, → demilitarization, and elimination of the National Socialist Party and its institutions on the one hand, and reconstruction of German political life on a democratic basis on the other. No central German government was to be established "for the time being", but "certain essential central German administrative departments" were to act under the direction of the Control Council.

Germany's economy was to be decentralized, and all her war potential eliminated. Germany was to be treated as a "single economic unit", and common policies for production, wages and prices were to be established. A system of controls for the German economy was agreed upon.

The reparation claims of the Soviet Union were to be met by removals from its zone of occupation, from German external assets and also from percentages of industrial capital equipment to be removed from the Western zones of occupation. The Soviet Union undertook to settle the reparation claims of Poland from her own share. The reparation claims of the United States, the United Kingdom, and all other countries were to be met from the Western zones and external assets.

Regarding territorial questions, two important decisions were taken, both subject to the express qualification that they were agreed pending the final determination of territorial questions at the peace settlement (→ Peace Settlements after World War II). According to the first decision, the City of Koenigsberg and the area adjacent to it (contained within a line running from a point on the eastern shore of the Bay of → Danzig to the meeting point of the frontiers of Lithuania, Poland and East Prussia) was to be "placed under the administration" of the Soviet Union. The Conference agreed in principle to the ultimate "transfer" of this area to the Soviet Union. As stated in the Protocol and in the Report, the President of the United States and the British Prime Minister declared that they would support this proposal at the forthcoming peace settlement. The second decision concerned Poland. While the heads of government reaffirmed "their opinion that the final delimitation of the western frontier of Poland should await the peace settlement", they agreed that:

> "pending the final determination of Poland's western frontier, the former German territories east of a line running from the Baltic Sea immediately west of Swinemunde, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier, . . . shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet zone of occupation in Germany." (→ Oder-Neisse Line).

In the Chapter entitled "Orderly Transfer of German Populations", the three governments recognized that "the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken". It was added: "They agree that any transfers that take place should be effected in an orderly and humane manner." The governments concerned were requested to suspend further expulsions pending examination of the possible distribution of these Germans among the several zones of occupation (→ Population, Expulsion and Transfer).

3. Attitude of France

France, although a member of the Control Council and in charge of one of the four zones of occupation, was not represented at the Berlin (Potsdam) Conference. Unlike the Agreement on Control Machinery in Germany of November 14, 1944 and the Protocol on Zones of Occupation and Administration of the "Greater Berlin" Area of September 12, 1944, which were formally amended to include France (by Amending Agreements of May 1, 1945 and July 26, 1945 respectively), the Potsdam Protocol and Communiqué were never signed on behalf of France. The Protocol contained in section I(B) an agreed letter of invitation to be addressed to the Governments of France and China with the proposal to join the Council of Foreign Ministers. France accepted this invitation. Formal French statements show that France was also informed about the other decisions taken at Potsdam. The French Government accepted the provision for the aims of occupation including those concerning the German eastern frontier. France objected, however, to the establishment of central German departments, and to several other parts of the Protocol, including the economic principles. France was therefore never bound by the entirety of the decisions taken at the Potsdam Conference.

4. Implementation of the Decisions

The degree to which the decisions agreed upon by the three heads of government were in fact implemented differs considerably. Central administrative departments for Germany could not be established after France had objected to them. The political and economic principles were widely disregarded, especially after the breakdown of the Control Council. The reparations from Germany were partly regulated in accordance with the Protocol. The disposal of the German Navy and Merchant Marine was implemented as provided and the section on war criminals was executed by special agreements (→ Nuremberg Trials). The German territories in the East were placed under Soviet and Polish administration. The administering powers incorporated these territories as finally transferred to them soon afterwards and claimed territorial sovereignty over them. The "transfer" of German populations continued to take place to a large extent not in "an orderly and humane manner", but under extremely harsh conditions.

5. Legal Qualification

The Protocol and the Report or Communiqué, both signed by the three heads of government, were not treated as international → treaties in the formal legal sense. They did not receive the consent of the United States Senate, required for "treaties" under the United States Constitution (→ Treaties, Conclusion and Entry into Force). What is more important, however, is that they were not published in the United States or British official Treaty Series but only in the United States Department of State Bulletin, other publications of the Department of State, and in the series British and Foreign State Papers. Thus, it is apparent that they were not looked upon in the same way as regular → executive agreements. The Agreements on Control Machinery in Germany and Zones of Occupation, including the Amending Agreements, and the Agreement of July 26, 1945 concluded in London while the Potsdam Conference was being held, were all published in the United States and British Treaty Series. (A formal requirement of registering the Agreements with the → United Nations under Art. 102 of the → United Nations Charter did not exist since the Charter was not yet in force; cf. → Treaties, Registration and Publication.) That the Potsdam Agreements were not published in the official Treaty Series does not of course affect their validity as an international treaty if in any case they had this nature (→ Treaties, Validity). As the → International Court of Justice has remarked, whether a communiqué is an international agreement depends on "the nature of the act or transaction to which the Communiqué gives expression". The Court "must have regard above all to its actual terms and to the particular circumstances in which it was drawn up" (ICJ Reports 1978, p. 1 at p. 39; → Aegean Sea Continental Shelf Case). In this respect, no difference exists between the state of international law in 1945 and 1978. The actual terms of the Potsdam Communiqué (or Report) and Protocol seem to indicate that parts of them were understood as binding international legal agreements. For instance, the second sentence in section II of the Report reads: "The text of the agreement for the establishment of the Council of Foreign Ministers is as follows: . . . ." In Chapter IX(b) it is stated: "The following agreement was reached on the western frontier of Poland." In both cases the circumstances indicate that not only political agreements but international legal instruments were required. In the first case this is shown by the necessity of creating an institution, the Council of Foreign Ministers, and in the second, by the administration of territory at issue.

Indeed, later developments show that the parties considered the Potsdam Agreements as containing binding international legal agreements. The Soviet Union accused the Western Powers of having violated the "Potsdam Agreement" in the Note on Berlin of November 27, 1958 (→ Note), and in consequence thereof declared null and void the agreement on zones of occupation and the administration of Berlin of September 12, 1944 (DeptStateBull, Vol. 40 (1959) p. 81). The United States rebutted the Soviet argument that it had violated the Potsdam Agreements and added that the issue was irrelevant for the Protocol of September 12, 1944, "since the two agreements related to different subjects and were in no way interdependent" (United States Department of State, the Soviet Note on Berlin: An Analysis, p. 36 at p. 45). The United States did not deny that international legal obligations followed from the Potsdam Agreements. The position of the Soviet Union as to the legal qualification of the agreements reached at Potsdam is also shown by Art. 9 of the Treaty of Friendship between the Soviet Union and the German Democratic Republic of June 12, 1964, which reads: "This Treaty shall not affect the rights or obligations of the Parties under bilateral or other international agreements at present in force, including the Potsdam Agreement." (UNTS, Vol. 553, p. 249.)

6. Political Consequences

The Potsdam decisions concerning Germany were seen at the time as a preparatory step towards a peace settlement with Germany. Such a settlement became impossible after the breakdown of the Control Council as the supreme organ for the occupation of Germany and after the development of the so-called "Cold War" between East and West. This has led to a tendency to take for political purposes the Potsdam Conference as a sort of quasi-peace conference. The provisional territorial decisions taken at the Conference in particular have been interpreted as

final settlements by those interested in this outcome. The Soviet Union, Poland and the German Democratic Republic have all interpreted the Agreements according to which the territories east of the Oder and Neisse were to be administered by the Soviet Union and Poland, as transferring → territorial sovereignty over these territories. The Western Powers have relied on the wording which makes it clear that a final settlement is still outstanding. They have not denied, however, that the decisions taken at Potsdam were to be seen as preparatory steps for a peace settlement.

7. Legal Consequences

(a) For the parties: In so far as legal obligations arising from the Potsdam Agreements have not been implemented or become obsolete, they still bind the three States which concluded them. France is bound to the extent that she has given her consent. It therefore follows that the provisional territorial settlements reached at Potsdam cannot be put into question by the parties.

(b) For Germany: The Potsdam Agreements were never signed or accepted by a government recognized to be acting for Germany as a → subject of international law as she existed in 1945. Since German territory was under belligerent occupation in 1945, the decisions reached at Potsdam could have legal consequences for Germany as far as they were covered by the international law of belligerent occupation and transformed into measures of the occupation authorities (→ Occupation, Belligerent). It is clear, however, that many of the measures agreed upon concerning the international status of Germany, the "administration" of German territory in contrast to occupation, and the transfer of German populations went far beyond what was recognized as legal in 1945 under the rules of belligerent occupation. According to the legal position adopted by the Allies occupying Germany in 1945, this occupation was in their view not bound by the general rules of belligerent occupation. This position was never formally recognized by a government representing Germany as a whole.

(c) For the German Democratic Republic: The German Democratic Republic has recognized the binding force of the Potsdam Agreements for Germany since the beginning of her existence. In the treaty with Poland of July 6, 1950 the German Democratic Republic recognized that the existing frontier along the Oder and Neisse is the "State frontier" between Poland and Germany (→ Boundaries).

(d) For the Federal Republic of Germany: The Federal Republic of Germany has never recognized the binding force of the Potsdam Agreements as such. She has, however, respected legal consequences flowing from the Agreements. Thus, the Polish and Soviet administration of the territories east of the Oder and Neisse have never been put into question by the Federal Republic of Germany (see J.A. Frowein, Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages, JIR, Vol. 18 (1975) p. 17). In the Treaty on Normalization of December 7, 1970 (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)), the Federal Republic and Poland stated that the frontier line (*Grenzlinie*) whose geographical configuration was laid down in Chapter IX of the decisions of the Potsdam conference constitutes the "western State frontier" of the Peoples' Republic of Poland. The parties carefully avoided stating that the Potsdam Agreements had any legal consequences to that effect. Art. IV of this Treaty stipulates that not only agreements concluded by the parties but also those concerning them are not affected by it. This wording clearly refers to the Potsdam Agreement on the territories in question concerning both Poland and Germany and shows that the Federal Republic of Germany, although recognizing that the Oder-Neisse frontier is the Polish frontier up to which Polish → sovereignty reaches, did not want to prejudice a later peace settlement. Concerning the transfer of the German populations, the Federal Republic of Germany has expressly stated that it does not recognize the lawfulness of the transfer or of the measures connected therewith (Bulletin des Presse- und Informationsamtes der Bundesregierung, December 8, 1970, p. 1814).

(e) For Poland: Poland is not a party to the Potsdam Agreements, although as stated in the Chapter on Poland, the Polish Provisional Government did present its views to the Berlin Conference. The "accessions of territory in the north and west which Poland should receive", as

agreed at the → Yalta Conference (1945), was mentioned as the basis for the provisional arrangement. In case of dispute, Poland could rely upon these → declarations. It would seem that a → consensus was reached between the three heads of government and the Polish Provisional Government which can be characterized as an international agreement contained in this part of the Potsdam Protocol. According to this Agreement, Poland could take over the administration of the territories in question. This was to be seen as a preparatory step for the accession of territory, without, however, a final consensus on the exact delimitation of the western frontier of Poland. A Polish claim against the parties to the Potsdam Agreements initially existed only as to "substantial accession of territory", without any final determination as to the Oder-Neisse frontier. After all the parties to the Potsdam Agreements have given their consent to the treaties by which both German States recognized this frontier, Poland could probably rely on the principle of → estoppel to reject any alteration of its western frontier at a peace settlement (K. Skubiszewski, Poland's Western Frontier and the 1970 Treaties, AJIL, Vol. 67 (1973) p. 30).

8. Conclusion

The decisions of the three heads of government agreed at Potsdam were recorded in a manner much less formal than most international treaties, including executive agreements They appeared in a Report and a Protocol. The legal basis for the decisions remains doubtful, especially as far as the provisional territorial arrangements and the agreement on population transfer is concerned. Nevertheless, the political and legal consequences of the decisions were far-reaching indeed. As sometimes occurs in history, the will of the victorious powers, expressed in a rather dubious manner, considerably predetermined post-war developments and international relations. The facts that only three years after Potsdam the → alliance existing during the war had broken up, and that a peace settlement on Germany has never been agreed, have added to the importance of the Potsdam Conference. The provisional territorial arrangements agreed upon at Potsdam became the basis for the detachment from Germany of vast parts of her former territory, especially of the old German provinces of East Prussia and Silesia.

Foreign Relations of the United States, Conference of Berlin (Potsdam) 1945, 2 vols. (1960).

Documents français relatif à l'Allemagne, août-février 1947 (1947).

A. FISCHER (ed.), Teheran, Yalta, Potsdam, Die sowjetischen Protokolle von den Kriegskonferenzen der "großen Drei" (1968).

A. KLAFKOWSKI, The Potsdam Agreement (1963).

F. FAUST, Das Potsdamer Abkommen und seine völkerrechtliche Bedeutung (4th ed. 1969).

S. KRÜLLE, Die völkerrechtlichen Aspekte des Oder-Neiße-Problems (1970).

C.L. MEE, JR., Meeting at Potsdam (1975).

F. KLEIN and B. MEISSNER (eds.), Das Potsdamer Abkommen und die Deutschlandfrage, Vol. 1, Geschichte und rechtliche Grundfragen (1977).

A.M. DE ZAYAS, Nemesis at Potsdam (1977).

JOCHEN ABR. FROWEIN

PRISONERS OF WAR

1. Concept

The laws of war make a cardinal distinction between lawful (or privileged) and unlawful → combatants. The distinction has been applied in practice in many instances, e.g. in the *Ex parte* → Quirin case of 1942. Lawful combatants, while exposing themselves to the risks of war in combat conditions, are entitled to the status of prisoners of war when captured *hors de combat* either by choice (through → surrender) or by force of circumstances (being → wounded, sick or shipwrecked).

The status of prisoners of war entails special rights and duties. The focal point of this status is that persons upon whom it is conferred may be interned (→ Internment), yet the detaining power is obligated to preserve their lives and health. The underlying idea is not as self-evident as it may appear to be. Throughout almost the entire span of history, when combatants fell into enemy hands, they were liable to be put to death or to be sold into → slavery. Only since the beginning of the 19th century has it been the rule in international theory as well as practice that lawful combatants are entitled to protection when captured by the adversary. Nowadays, the norms derived from this basic tenet are specified in the

first three Geneva Conventions of 1949 for the Protection of War Victims (→ Geneva Red Cross Conventions and Protocols). In general, these Conventions may be viewed as declaratory of → customary international law.

2. Definition

The Geneva Conventions (in particular Art. 4 of Geneva Convention III relative to the Treatment of Prisoners of War) enumerate eight categories of persons entitled to the status of prisoners of war. These are:

(a) Members of the armed forces of the belligerent States (including → militias and volunteer corps forming part of these forces). This principal category covers regular forces of all types, including draftees and reservists. The Conventions do not explicitly lay down any prerequisites for regular forces to be entitled to the status of prisoners of war. This is apparently due to a presumption that regular forces fulfil the conditions which must be met by irregular forces (see the next category below). But, as demonstrated by the United Kingdom's Privy Council decision in the 1968 case of Mohamed Ali v. Public Prosecutor [1969] 1 A.C. 430, the presumption is rebuttable.

(b) Members of other militias and volunteer corps, including → resistance movements (sometimes referred to as "irregular forces"). This is an increasingly important category, especially in conditions of guerrilla warfare. The Conventions expressly set several cumulative conditions which must be met by irregular forces in order to be eligible for the status of prisoners of war (otherwise, they would be regarded as unlawful combatants). Four of the conditions, in fact, appeared earlier in the Hague Regulations respecting the Laws and Customs of War on Land annexed to Convention II of 1899 and Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907). These require that irregular forces (i) be commanded by a person responsible for his subordinates; (ii) have a fixed distinctive sign recognizable at a distance; (iii) carry arms openly; and (iv) conduct their operations in accordance with the laws of war. Two further conditions for qualifying for prisoner-of-war status are easily to be deduced from the text of the Geneva Conventions: (v) being organized; and (vi) belonging to a party to the conflict. The Privy Council in effect ruled in its 1967 decision in Public Prosecutor v. Koi [1968] A.C. 829, that there is still another condition implicit in the Conventions: (vii) lack of duty of allegiance to the detaining power (that is to say, the person claiming the benefits of a prisoner of war must not be a national of the detaining power).

The gist of the various conditions is that lawful combatants must not be *francs-tireurs* (i.e. individuals conducting a "private" war), nor disguise themselves as civilians, and must generally observe the laws of war (→ War, Laws of). While these basic requirements make a lot of sense, their detailed enumeration in the Conventions creates an onerous undertaking for → guerrilla forces. Thus, most of the resistance movements of World War II probably would have failed to satisfy all the necessary conditions. Attempts have therefore been made in recent years to alleviate the situation. These initiatives culminated in 1977 in Art. 44 of the Protocol additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I). However, the language of this complicated stipulation on combatants and prisoners of war is rather obscure, and its meaning controversial. A likely interpretation is that the only remaining general condition for combatants to be lawful ones is that they must carry arms openly during military engagements and while visibly deploying prior to the launching of attacks. If this solution is accepted in the practice of States, the fundamental distinction between lawful and unlawful combatants will lose much of its validity. Interestingly enough, Protocol I at the same time expressly endorses in Art. 46 the traditional position that spies do not have a right to the status of prisoners of war (→ Espionage), and in Art. 47 even creates a new category of unlawful combatants, that of → mercenaries.

(c) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power. This category was created in the Geneva Conventions of 1949 in the light of the experience of the "Free French" forces during World War II. Even though Germany recognized the Vichy Government of France, it had to accord prisoner-of-war

status to the regular forces headed by General de Gaulle.

(d) Non-combatants who accompany the armed forces, provided that they have special authorization from the armed forces. This includes civilian members of military aircraft crews, → war correspondents, supply contractors, and members of labour units or welfare services.

(e) Members of crews of the merchant marine and of civil aircraft of the belligerent States when these individuals do not benefit from a treatment more favourable than that accorded to prisoners of war. Such favourable treatment was envisaged under the 1907 Hague Convention XI relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War. However, in actuality this Convention's dispositions were not applied in the two world wars; hence the need for the special category in the Geneva Conventions.

(f) Inhabitants of a non-occupied territory who engage in a *levée en masse*. This encompasses those who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units. They must carry arms openly and respect the laws of war (two of the seven conditions listed for the second category listed above). In time the invading forces may be repelled (thanks to the spontaneous resistance of the inhabitants), or they may overcome the resistance (despite the *levée en masse*). Alternatively, the battle lines may stabilize, thereby presenting an opportunity for organization into regular forces. Either way, the circumstances justifying a *levée en masse* will soon disappear.

(g) Members of armed forces in an occupied territory (→ Occupation, Belligerent) who are demobilized or released from internment by the occupying power, and then detained on suspicion that they may attempt to rejoin their armed forces elsewhere. When former combatants are interned (or reinterned) by an occupying power merely because of their military experience and of the apprehension that they are liable to cross the lines, they must be treated as prisoners of war and not as civilian internees.

(h) Persons belonging to one of the previous categories who arrive in the territory of a neutral power. When, under the laws of neutrality (→ Neutrality, Concept and General Rules), members of armed forces must undergo internment for the duration of the war, they are to be treated no less favourably than prisoners of war.

Apart from the eight categories of persons entitled to the status of prisoners of war, there is a separate grouping of medical personnel and chaplains. These persons may not be taken prisoners of war. Nevertheless, under the Geneva Conventions, they may be temporarily retained when the state of health, the spiritual needs and the number of prisoners of war so require. While being retained, they enjoy, as a minimum, the status of prisoners of war.

3. Rights and Duties

Geneva Convention III spells out in detail the rights and duties derived from the status of prisoner of war. The primary requirement is to keep the detainees alive and in good health. They must be treated humanely and are entitled to protection against acts of violence, intimidation or insults. Women prisoners of war have a right to special protection. Scientific or medical experiments are prohibited unless they are carried out in the interest of the prisoner of war and are consistent with generally accepted medical standards. Measures of → reprisals against prisoners of war are forbidden. Hence, even if one belligerent commits unlawful acts against enemy prisoners of war, the adversary may not retaliate by perpetrating similar acts.

A prisoner of war is obliged to give only his name, rank, date of birth and serial number, and any attempt to compel him to reveal more information about himself or his armed forces is strictly forbidden. In particular it is illegal to torture a prisoner of war physically or mentally, to threaten him or to subject him to a degrading treatment with a view to eliciting such information. Nevertheless, there is no prohibition on obtaining information voluntarily given by prisoners of war.

Personal effects (except arms, military equipment and military documents) as well as metal helmets, gas masks, badges of rank, decorations and identity documents must be left in the possession of prisoners of war. It is, however, permissible to take away from them, in exchange for

a receipt, money and valuables which are to be kept in custody.

(*a*) *Conditions of confinement*

As soon as possible after their capture, prisoners of war must be evacuated to camps situated far from the combat zone. The evacuation has to be effected humanely: "death marches" are patently proscribed. Prisoner-of-war camps are designed for internment and, of course, may be fenced. They must be located on land in a healthy area where the climate is not injurious: camps in a swamp area, for instance, are disallowed. Prisoners of war are to be quartered under conditions similar to those of the armed forces of the detaining power, with allowance made for the customs of the prisoners.

Prisoners of war are entitled to food rations of sufficient quantity, quality and variety to keep them in good health (due account being taken of their habitual diet). It is important to stress that this is the case irrespective of the type of food made available to the armed forces or the civilians of the detaining power. A general shortage of food cannot be an excuse to starve prisoners of war. Moreover, canteens must be installed in all camps, where prisoners may purchase foodstuffs, soap, tobacco and so on.

The detaining power has to supply adequate clothing, underwear and footwear to prisoners of war. It must also take the necessary measures to protect their health by conforming to rules of hygiene as well as by providing medical treatment and hospitals. Prisoners are to enjoy freedom of religious worship and are entitled to educational, recreational and sports activities. A special role in this context is played by the prisoners' representatives. These are either the most senior officers among the prisoners or, in camps where there are no officers, freely elected representatives.

Prisoners of war may be compelled to work, provided that they are physically fit (taking into account age and sex). Officers, however, are exempt from this duty, while non-commissioned officers may only be required to do supervisory work. When special officers' camps are set up, other ranks have to be assigned to them to ensure services. Obviously, if the detaining power has in its custody large numbers of prisoners of war, they may have considerable economic significance as a labour force. Still, prisoners of war must not be employed in assignments which are dangerous (such as removal of → mines), or unhealthy or degrading, unless they have volunteered to do so. Work must come within the scope of the permissible categories specified in the Convention, which also incorporates detailed provisions relating to working conditions, pay, rest, etc.

Immediately upon capture, and no later than one week after arrival in a camp, every prisoner of war has a right to send a card both to his family and to the Central Prisoners of War Agency. This Agency is administered by the → International Committee of the Red Cross. The Agency collects and transmits up-to-date information about the fate of prisoners of war. The necessary information arrives from, *inter alia*, national information bureaus which all belligerents must set up.

Prisoners of war may send and receive letters and cards. They are entitled to receive individual parcels and collective shipments containing foodstuffs, clothing, medical supplies, books, religious articles, scientific equipment, examination papers, musical instruments and sports materials. All mail and consignments may, however, be examined and censored.

(*b*) *Discipline*

Prisoners of war are subject to the laws and regulations in force in the armed forces of the detaining power, and that power may take judicial or administrative measures in respect of any offences against such laws and regulations. Disciplinary punishments which may be imposed on prisoners of war are fines, discontinuance of privileges granted over and above the minimum required by Geneva Convention III, fatigue duties (not applicable to officers), and confinement, in no case exceeding 30 days. Judicial penalties (for criminal offences, such as killing a camp sentry) must be identical to those imposed on members of the armed forces of the detaining power, but prisoners of war may not be subjected to → collective punishments for individual acts, or to corporal punishment, torture or other cruelty. Capital punishment is allowed in appropriate circumstances, but the attention of the court must be particularly called to the fact that the accused does not owe allegiance to the detaining power, and the sentence is not to be executed before the

expiration of a period of six months. Trials must be conducted before an impartial military court where the accused has a right to defence by counsel; confessions must not be induced, the rule of *nullum crimen sine lege* will apply; the prisoner is also entitled to freedom from double jeopardy (→ Criminal Law, International Aspects).

If a prisoner of war attempts to escape, weapons may be used against him, but only after prior warning. A prisoner attempting to escape who is recaptured is liable only to disciplinary punishment for the escape, even if it is a repeated offence. That is to say, the maximal penalty is confinement for 30 days, and by no means the death sentence. Escaped prisoners may, however, be prosecuted for offences committed in the course of the escape (not consisting of the escape *per se*), and they may then be sentenced to an appropriate judical penalty commensurate with the gravity of the offence. An escape is deemed to have succeeded when the prisoner gets beyond the reach of the detaining power – to wit, when he joins the armed forces or a ship flying the flag of his country or one of its allies – or when he leaves the territory under control of the detaining power and its allies. If the escape succeeds, but the escapee is recaptured at a later stage, he is not liable to any punishment in respect of the escape. It is therefore clear that, under the laws of war, an escape by a prisoner of war is not illegal, though the prisoner acts at his own peril.

4. Release and Repatriation

Under Geneva Convention III, prisoners of war can be released in a number of ways, some of which are mandatory whereas others are optional.

Prisoners of war may be released wholly (i.e. enabling them to leave the territory of the detaining power), or partially (i.e. allowing them to stay outside a camp, albeit within that territory), on parole. Parole means a prisoner's freely given promise not to bear arms against the detaining power (in case of unqualified release) or not to escape (in case of partial release). Such a promise binds both the released prisoner and his country. Yet the validity of the promise is contingent on its conformity with the laws and regulations of the prisoner's country. Many countries indeed do not permit members of their captured armed forces to be released on parole.

Belligerents may conclude an agreement concerning the → repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity. Such an agreement is called a "cartel", and it usually takes the shape of an exchange of prisoners based on numbers and ranks. Prisoners repatriated in a cartel may not be employed on active military service.

Belligerents also have to endeavour to make arrangements for the accommodation in neutral countries of certain types of sick and wounded prisoners of war whose prospects of recovery would as a result be augmented. Such arrangements, which obviously require the consent of the neutral power, are clearly discretionary. Again, repatriated prisoners may not be employed on active military service.

Certain other types of sick and wounded prisoners of war whose physical or mental fitness is so gravely diminished that they are incurable or not likely to recover within one year must be sent back to their country in the course of hostilities, regardless of number or rank, provided that repatriation is not imposed on prisoners against their will. Once more, repatriated prisoners may not be employed on active military service.

Most importantly, under Art. 118 of Geneva Convention III, prisoners of war must be released and repatriated without delay after the cessation of active hostilities. This obligatory provision applies to all prisoners irrespective of their state of health, numbers or rank. The article expressly states that in the absence of stipulations to the above effect in any agreement concluded between the belligerents with a view to the cessation of hostilities, or failing such an agreement, each detaining power must implement repatriation without delay on a unilateral basis.

Art. 118 refrains from specifying that repatriation cannot be imposed on prisoners of war against their will, although such a rider appears in the Convention in the context of seriously wounded and sick prisoners (see the previous category discussed above). In fact, when a proposal was made in the Geneva Conference of 1949 to add this rider to Art. 118, it was rejected for fear that it would serve as an escape clause for a detaining power unwilling to release prisoners of war.

The problem of compulsory repatriation is most

pronounced in the case of → deserters who are liable to be tried on return and severely punished. But it arises in many other instances when prisoners do not choose to return to their homes because of ideological, political or other reasons.

The question whether prisoners of war can be forced to accept repatriation proved a major stumbling block in the course of the negotiations leading to → armistice in → Korea, owing to a massive refusal on the part of North Korean and Chinese prisoners of war to return to their countries. Ultimately, the Panmunjom Agreement on Prisoners of War (AJIL, Vol. 47 (1953), Supp. 180) was concluded a few weeks before the armistice. Under this instrument, repatriation was accomplished on the basis of the will of prisoners, but the free exercise of that will was supervised by a Neutral Nations Repatriation Commission (→ Mixed Commissions). This formula presented a successful solution to an intricate issue.

The most crucial question is determining at what point in time the duty to release (and repatriate) prisoners of war comes into effect. Art. 118 stipulates that the release of prisoners of war must be accomplished upon the cessation of active hostilities without waiting for a → peace treaty or even an armistice agreement, namely, without waiting for the termination of the → war. This is an unqualified obligation, and the release of prisoners of war cannot be postponed for any reason whatever.

It must be appreciated that as long as active hostilities continue, a release of all prisoners of war may be disadvantageous to the belligerent holding a larger number of them, inasmuch as under Art. 118 there is no prohibition on their return to active military service. Hence Art. 118 emphasizes the point of cessation (as distinct from mere suspension) of active hostilities (→ Suspension of Hostilities). Only at this point does the duty to release prisoners of war come into effect. It is not always easy to determine when active hostilities come to an end. But the best definition, perhaps, is offered by Schwarzenberger: "when, in good faith, neither side expects a resumption of hostilities" (A Manual of International Law (6th ed. 1976), p. 175).

5. State Responsibility

As a general principle, prisoners of war are in the hands of the enemy power, and not in those of the military units or individuals who have captured them. Responsibility for the treatment of prisoners of war is dual: it is borne both by every individual (thus, any soldier killing or maltreating a prisoner of war is guilty of a → war crime) and by the detaining power. That power incurs responsibility for the fate of each prisoner of war from the first to the last moment of captivity. Responsibility extends not only to camps or rear echelons but also to the combat zone. The killing of an enemy soldier who has surrendered entails State responsibility, even if it is committed in the heat of battle without orders or in direct disobedience to orders (→ Responsibility of States: General Principles).

Under Geneva Convention III, a detaining power may transfer prisoners of war to an allied State (→ Alliance), provided that State is a contracting Party to the Convention and is willing as well as able to apply it. Such a transfer places responsibility on the power accepting the prisoners under its custody without divesting the original detaining power of its own responsibility.

Geneva Convention relative to the Treatment of Prisoners of War, UNTS, Vol. 75 (1949) 135–285.

L. NURICK, The Distinction between Combatant and Non-Combatant in the Law of War, AJIL, Vol. 39 (1945) 680–697.

L. NURICK and R.W. BARRETT, Legality of Guerrilla Forces under the Laws of War, AJIL, Vol. 40 (1946) 563–583.

R.R. BAXTER, So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs, BYIL, Vol. 28 (1951) 323–345.

L.B. SCHAPIRO, Repatriation of Deserters, BYIL, Vol. 29 (1952) 310–324.

J.P. CHARMATZ and H.M. WIT, Repatriation of Prisoners of War and the 1949 Geneva Convention, Yale Law Journal, Vol. 62 (1952–1953) 391–415.

R.R. BAXTER, Asylum to Prisoners of War, BYIL, Vol. 30 (1953) 489–498.

J.A.C. GUTTERIDGE, The Repatriation of Prisoners of War, ICLQ, Vol. 2 (1953) 207–216.

J. MAYDA, The Korean Repatriation Problem and International Law, AJIL, Vol. 47 (1953) 414–438.

J. DE PREUX (ed.), Commentary III, Geneva Convention relative to the Treatment of Prisoners of War (1960).

D.D. SMITH, The Geneva Prisoner of War Convention: An Appraisal, New York University Law Review, Vol. 42 (1967) 880–914.

R.R. BAXTER, The Privy Council on the Qualifications of Belligerents, AJIL, Vol. 63 (1969) 290–296.

G. SCHWARZENBERGER, Human Rights and Guerrilla Warfare, Israel Yearbook on Human Rights, Vol. 1 (1971) 246–257.

D.E. GRAHAM, Repatriation of Prisoners of War during Hostilities–A Task Unsuited for the Private Citizenry, International Lawyer, Vol. 8 (1974) 832–858.

L.C. GREEN, The Status of Mercenaries in International Law, Israel Yearbook on Human Rights, Vol. 8 (1978) 9–62.

R. LAPIDOTH, Qui a droit au statut de prisonnier de guerre?, RGDIP, Vol. 82 (1978) 170–210.

H.S. LEVIE, Prisoners of War in International Armed Conflict [and] Documents on Prisoners of War, 2 vols. (1978–1979).

Y. DINSTEIN, The New Geneva Protocols: A Step Forward or Backward?, Year Book of World Affairs, Vol. 33 (1979) 265–283.

G. ALDRICH, New Life for the Laws of War, AJIL, Vol. 75 (1981) 764–783.

YORAM DINSTEIN

PRIVATEERING

1. Letters of Marque; Letters of Reprisal

The origins of privateering are to be found partly in the particular circumstances of → sea warfare as it was waged in former times, and partly in the medieval legal system. Sea warfare has always been primarily → economic warfare. Since, on the one hand, medieval States could not maintain large navies, and, on the other hand, sea warfare was essential for disrupting enemy trade, these States supplemented their regular forces by assigning to private merchants commissions (letters of marque) which entitled them to attack enemy trading vessels (→ Merchant Ships). Under State supervision, these "privateers" were permitted to arm ships which could then attack enemy and neutral shipping according to the rules of sea warfare (→ Neutrality in Sea Warfare; → Neutral Trading). The privateers were required to bring captured ships or their cargo into a port of their home country and submit to the ruling of an admiralty court or prize court (→ Prize Law). If the court awarded the ship or its cargo to the privateer, it became his property. From the twelfth century onwards, numerous maritime States passed legislation regulating the activities of privateers.

A distinction must be drawn between privateering (a branch of sea warfare) and the system of asserting private rights through → reprisals, though in practice there were many affinities, and the terms "letters of marque" and "letters of reprisal" were often used synonymously. In the case of letters of reprisal, it was not so much a question of private individuals taking an active part in hostilities but rather of their reasserting rights infringed by means of officially permitted acts against a foreign State and the property of its citizens at sea. A prerequisite for such action was that the individual in question had suffered a wrong at the hands of a foreign State or its citizens and, because of a → denial of justice or other defects in the procedural system, had failed to gain redress in the courts of the foreign State. After the government of the home country had examined and confirmed the justice of the claim, it granted to the victim letters of reprisal which permitted him to seize public and private ships of the country which directly or indirectly through its citizens had inflicted the damage, until the sum specified as the amount of his loss was recovered. In this institution can be seen a special form of the common medieval practice, according to which the citizens of a town or country could be made answerable outside their home territory for a perversion or denial of justice by their rulers.

This practice of indiscriminate reprisals against private individuals is evidence of the imperfect development of the notion of the legal distinction between the body politic and its members (→ Individuals in International Law). The individual citizens were made responsible for the actions of the community as a whole. Remnants of this attitude survive even in present-day international law, namely, in the extension of sea warfare to enemy trade, in the general vulnerability of → enemy property in belligerent States, and in the → reparation clauses in → peace treaties which relate to private as well as public property. In former times, there was a legal connection between privateering and reprisals to the extent that → war itself was regarded as retaliation for a wrong suffered and thus as a legally sanctioned assertion of rights (→ War, Laws of, History). However, reprisals could also be taken in times of peace and did not necessarily constitute a belligerent act.

It was hardly to be avoided that the practice of issuing letters of marque and letters of reprisal should give rise to much abuse (→ Abuse of Rights). Attacks on neutrals (→ Neutrality,

Concept and General Rules), the → use of force after the termination of hostilities (→ Armistice), raids on trade routes, and the general insecurity of shipping which, well beyond the Middle Ages, could only move with comparative safety under armed escort (→ Convoy) were the results. In many cases the exercise of such "rights" was barely distinguishable from → piracy. These commissions, especially the letters of reprisal which were issued even in times of peace, blurred the lines between war and peace (→ Peace and War). Numerous international disputes and conflicts were caused by these licenced attacks on foreign and neutral trading vessels.

2. Restrictions

After the Renaissance period, attempts were made to define the limits of privateering more strictly. Several bilateral treaties (e.g. the treaty between Great Britain and the Netherlands of December 1, 1674 and the → Jay Treaty of 1794, in Art. 19) stipulated that, before receiving their commissions, commanders of privateers had to deposit securities in their home State, against which claims for damages caused by unlawful attacks could be made. In an attempt to stamp out unscrupulous exploitation and plundering (→ Pillage), States decreed that, on pain of strict punishment, captured ships and cargoes should be brought into port and submitted to the jurisdiction of prize courts. Similarly, writers on international law expressed the view that privateers could only acquire valid title to booty (→ Booty in Sea Warfare) after ship and cargo had been brought into port and a court award in their favour had been given. A fixed proportion of the booty was taken by the State.

Even into the 19th century, it remained the practice of neutral States, by treaty or tacit consent, to allow prizes to be brought into their ports, although this met with a growing amount of criticism. The same applied to the fitting out of privateers in neutral → ports, which was permitted by the Law Officers of the British Crown as late as 1828. The publicity surrounding the → *Alabama* arbitration, although admittedly involving a warship, shows that such an attitude had already fallen out of favour. The opposition to the practice of issuing commissions to foreign ships or ships with foreign crews also gradually hardened. Nevertheless, when Great Britain was negotiating with Spain in 1866, she still maintained that foreigners could be engaged in the crew of a privateer.

3. Abolition

Whereas the practice of issuing letters of reprisal ceased in the 18th century, privateering went through a period of revival during the French Revolutionary Wars. Operating from American ports, French privateers waged a war of plunder against Great Britain until, in 1798, the United States began to take steps against the French marauders since her own trade was suffering. In Art. 23 of a treaty of friendship and commerce dated September 10, 1785, Prussia and the United States had already agreed not to grant or issue any more commissions to private armed vessels (→ Treaties of Friendship, Commerce and Navigation).

After 1815, none of the major powers issued such commissions. When the 1856 Declaration of Paris stated: "Privateering is and remains abolished", it therefore merely confirmed an already established situation. This provision was originally binding only on the signatories of the Declaration; accordingly, at the outbreak of war with the United States on April 23, 1898, Spain expressly maintained her right to issue letters of marque, though in fact this right was never exercised. The United States had already repudiated the practice of privateering; Spain eventually acceded to the Declaration of Paris in 1908. It is now generally accepted that the provision governing the abolition of privateering has become a universal rule of international law (→ Sources of International Law).

H.W. MALKIN, The Inner History of the Declaration of Paris, BYIL, Vol. 8 (1927) 1–44.

G. CLARK, The English Practice with regard to Reprisals by Private Persons, AJIL, Vol. 27 (1933) 694–723.

Neutrality, Its History, Economics and Law, Vol. 1, by P. Jessup and F. Déak (1935); Vol. 2, The Napoleonic Period, by W.A. Phillips (1936).

R. PARES, Colonial Blockade and Neutral Rights 1739–1763 (1938, Repr. 1975) 1–76.

LORD MCNAIR, International Law Opinions, Vol. 3 (1956) 81–98.

O. ANDERSON, Some Further Light on the Inner History of the Declaration of Paris, Law Quarterly Review, Vol. 76 (1960) 379–385.

K.R. ANDREWS, Elizabethan Privateering (1964).

ULRICH SCHEUNER

PRIZE LAW

1. Concept

The English word "prize" is derived from the French word "*prise*" which in turn comes from the Latin verb "*prehendere*", "to seize". It came to be used especially in connection with the seizure of ships, and hence the Oxford English Dictionary gives as one of the most common definitions of "prize": "a ship or property captured at sea in virtue of the rights of war; a legal capture at sea." Therefore, in principle, prize law is that part of → international law which is concerned with the capture of property (→ Enemy Property) at sea.

This definition of "prize" must be amplified and qualified in a number of respects. First, prize law is concerned only with lawful captures, i.e. captures made in the exercise of the rights, known as "belligerent rights", which international law permits to States engaged in → war and to certain other entities which have been recognized as having such rights. For example, in a → civil war the party opposing the established government, as well as that government, may be recognized as having such rights (e.g. in the → American Civil War (1861–1865); → Recognition of Belligerency; → Recognition of Insurgency). Interference of any kind with foreign shipping in time of peace can never be justified in terms of prize law (→ Passage, Right of; → Admiralty Law).

Secondly, although ships are the usual objects of prize, they are not the only objects. Other objects of prize include ships' cargo as well as → aircraft and goods carried in them. The connection with ships is maintained, however, in that the capture must normally be at sea, although prize courts have occasionally held captures of boats on inland lakes or on rivers, and even on beaches, to be valid prize. The same doctrine has been applied to oil pumped ashore from a ship and stored in tanks. Indeed it has been held that "the ordinary prize jurisdiction of the admiralty extends to all captures made on the sea, *jure belli*; to captures in foreign ports and harbours; to captures made on land by naval forces, and upon surrenders to naval forces; and this whether the property so captured be goods, ships or mere choses in action" (Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.) p. 28, quoted in part in the *Frederick VIII*, [1917] P. 43, 45).

2. Relation to Evolution of the Laws of War

The distinction between what is lawful prize and what is not is difficult to apply. Yet it is extremely important because, under the rules applicable to → sea warfare, enemy private property is subject to capture unless it falls within the categories specified in Hague Convention XI of 1907 relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (→ Hague Peace Conferences of 1899 and 1907). In contrast, under the rules applicable to → land warfare, private property cannot be confiscated, although it may be subject to → requisition on terms laid down in the Regulations annexed to Hague Convention IV of 1907 respecting the Laws and Customs of War on Land.

Prize law is that branch of international law which is concerned with → economic warfare at sea. It constitutes a very important aspect of maritime warfare, although it is not often concerned with actual combat between opposing naval forces. Historically, prize law played an important role in the development of the law of the sea, particularly as regards the breadth of → territorial waters (→ Law of the Sea, History).

Although a branch of international law, it is administered by municipal courts known as prize courts (→ International Law and Municipal Law).

(a) Prize court proposal

At the Second Hague Peace Conference in 1907 an attempt was made through Convention XII to create an → International Prize Court. This Convention never came into force; if it had, there would have been the possibility of an appeal to the International Prize Court from the decisions of national prize courts in certain cases. The main reason for the failure to implement this Convention was disagreement over the content of the rules of prize law. A conference was held in London in 1908–1909 with a view to remedying this deficiency, but in its turn the resulting Declaration of London concerning the Laws of Naval War was never brought officially into force (→ London Naval Conference of 1908/1909).

This failure had serious consequences because in both world wars the belligerents followed their own conceptions of the rules of prize law and imposed very severe measures on both enemy and neutral commerce (→ Neutrality in Sea Warfare), justifying these measures on the ground that the opposing belligerent was not conforming to the correct rules. Included in these measures were the declaration of → war zones, the extension of the concept of → contraband goods far beyond what was conceived in the Declaration of London, and steps taken against the enemy's exports as well as its imports, so as to deprive it of foreign exchange (e.g. → Blockade).

(*b*) *Declaration of Paris*

The occasion on which the international community came nearest to agreement on the rules of prize law was at the Congress of Paris. This Congress, which brought about the end of the Crimean War through the Treaty of Paris, signed on March 30, 1856, also led to the signature of the Declaration of Paris on April 16 of that year (→ Crimean War and Paris Peace Treaty (1853–1856)). From the point of view of prize law this Declaration is so important that its main provisions must be cited in their original French text:

"1. La course est et demeure abolie;
2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre;
3. La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi;
4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi."

("1. Privateering is, and remains, abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.")

It was also stated that, although the signatory governments would bring the Declaration to the attention of governments not represented at the Congress and would look forward to the principles of the Declaration becoming generally adopted, it was only to be binding upon the powers acceding to it. Despite this, the United States originally declined to accede to the Declaration, objecting that it could not do so unless private property at sea would be protected by international law from seizure by public armed vessels as well as by privateers (→ Privateering). Subsequently, however, the United States conformed to the principles of the Declaration and, in the absence of any other treaty having comparable stature, these principles remain of considerable importance.

This being so, it is relevant to consider the preparatory work (*travaux préparatoires*) which led to the adoption of the Declaration of Paris. When it seemed likely that war would break out between Great Britain and France on the one hand and Russia on the other hand, particular importance attached to the attitude adopted by Denmark, Sweden and Norway. On January 2, 1854 these powers announced their intention to remain neutral and to admit the → warships (with certain exceptions) and → merchant ships of the belligerents to their → ports, but to exclude privateers. From the points of view of the British and French Governments this announcement, particularly as regards the exclusion of privateers, was very satisfactory, even though it was accompanied by a hint that the Baltic Powers expected that their commerce with the belligerents would not be affected save in the case of blockades declared and effectively implemented in accordance with recognized rules. It was therefore important for Great Britain and France to conduct their policies regarding the exercise of belligerent rights in a manner which would be found acceptable by the Baltic Powers. A more immediate problem for them, however, was to coordinate their own policies concerning the exercise of belligerent rights, having regard to their divergent past practices. This was achieved through the British Government's announcement that it would waive the right it had hitherto claimed to seize enemy goods on neutral ships and through the French Government's announcement that it would waive the right it had hitherto claimed to seize neutral goods on enemy ships. In

both cases, however, the → waivers did not apply to contraband.

The essential feature of the Declaration of Paris, though only applicable to powers accepting it, was therefore that it enacted into general law the principles behind these two waivers. Since the rule concerning blockades was not controversial, the key question at the Congress of Paris was what concession should be obtained in return for the waivers. For the British Government the indispensable concession was the abolition of privateering. This was a concession which the United States, not represented at Paris, was not prepared to make, save in return for a concession which the British Government in turn was not prepared to make, namely the abolition of the right to seize private property at sea. Indeed the record of the → negotiations shows that while Great Britain, the major maritime power of the time, was reluctantly prepared to give up its right to seize enemy goods on neutral ships, because it believed that such a right was no longer enforceable under modern conditions, its readiness to make concessions had to stop short of conceding the abolition of the right to seize private property at sea.

(c) *Unresolved issues*

The principles of the Declaration of Paris remain of considerable importance. This is partly due to their very simplicity and partly because they enshrine the basic idea that, save for recognized exceptions such as blockade, contraband and unneutral service, a neutral power should in time of war be allowed to carry on commerce with all belligerents. Time has shown, however, that it is not possible to regulate all the questions of prize law through the provisions of the Declaration of Paris, commendably brief and clear though those are.

A major gap concerns the very nature of "contraband", a term which the Declaration did not attempt to define. (The London Declaration of 1909 did attempt such a definition, but this was soon found to be inadequate and would be of little assistance today.) According to the traditional principles of international law, goods were considered to be contraband if (a) they had an enemy destination and (b) they were susceptible of belligerent use by the enemy. In the absence of treaties, however, it was left to the belligerent powers themselves to decide how these principles should be applied.

The weakness of the Declaration of Paris as a general statement of the law came to light as early as the American Civil War; it was of little significance that the United States was not itself a party to the Declaration. The United States Supreme Court upheld the condemnation of a cargo of non-contraband goods seized on a British ship bound from London to Nassau in the Bahamas, a British colony (The *Springbok* v. United States, 5 Wall. 1, 72 U.S. 480 (1866)) and also the condemnation of a cargo of contraband goods seized on a British ship bound from London to Matamoras, a port on the Mexican side of the Rio Grande (The *Peterhoff* v. United States, 5 Wall. 28, 72 U.S. 564 (1866)).

The *Springbok* case may be regarded as an application of the doctrine of "continuous voyage" to the law of blockade, thus implying that neutral coasts may be blockaded if the goods concerned are intended to reach the enemy. The *Peterhoff* case demonstrates that a prize court may hold that contraband goods have an enemy destination even though they are consigned to a neutral port.

British prize courts applied these principles in both world wars. In the case of The *Kim*, [1915] P. 215, cargoes were condemned as contraband even though consigned to Copenhagen, then a neutral port. The prize court decided the case on the basis of statistical evidence, it having been shown that the imports were far above Denmark's normal peace-time requirements.

Since the Declaration of Paris there has been no serious attempt to argue that privateering is lawful. That institution has in any case become obsolete for technical reasons, but acute controversy has arisen as to whether the arming of merchant ships (→ Merchant Ships, Armed) is lawful or whether this practice contravenes the prohibition of privateering found in the Declaration of Paris.

3. *Current Situation*

For several reasons it is extremely difficult to state all the rules of prize law.

Firstly, the nature of war has changed drastically since a century and a quarter ago. Secondly,

the principles of the Declaration were largely violated in both world wars, the violations being allegedly justified on the ground of → reprisals. Thirdly, prize law, in order to be effective, requires a substantial number of neutral States determined to stand up to the belligerents in defence of → neutral trading. It also requires, even on the part of the belligerents, a desire not to interfere with international commerce more than is absolutely necessary. These conditions are not likely to be found in modern total war. Fourthly, having regard to the → United Nations Charter, the status of neutrality itself is uncertain (→ Neutrality, Concept and General Rules).

Such hostilities as have occurred since 1945 throw little light on the attitude of States, and particularly the → Great Powers, to prize law. An interesting development occurred on April 9, 1966 when the → United Nations Security Council adopted Resolution 221, in which the Council, having determined that the situation resulting from the possibility of substantial supplies of oil reaching Southern Rhodesia (→ Rhodesia/Zimbabwe) through Beira, a port in Mozambique (then a Portuguese → colony), constituted a threat to the peace, called upon "the Government of the United Kingdom to prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia", and empowered the United Kingdom "to arrest and detain the tanker known as the *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there". Insofar as this Resolution authorized the United Kingdom to take measures against foreign shipping which that country could certainly not have taken under the law in peace-time, it may be regarded as a step towards a possible internationalization of prize law. Such internationalization is indeed envisaged by the UN Charter which in Art. 42 provides for the Security Council to take "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security", including "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations". However, unlike traditional prize law, which has worked out elaborate rules for the ultimate disposition of private property seized in prize, both the UN Charter and Security Council Resolution 221 are completely silent on this point.

4. Proceedings in Prize

(a) Prize courts

The nature of prize courts varies from country to country. In some countries they form part of the regular judicial system; in others they are included among the administrative tribunals; in still others they are of a mixed character, the members of the prize courts including naval officers and persons experienced in merchant shipping.

Other nations will usually recognize the decrees of prize courts, although sometimes the decisions of these courts have been reviewed by → mixed commissions after the termination of hostilities.

The Peace Treaty concluded between the Allies and Italy (→ Peace Treaties of 1947) gave the Allies the right to recommend the revision of Italian prize decisions not considered to be in conformity with international law, and the Italian Government undertook to give effect to any such recommendation. Individual nationals of United Nations member States were also permitted to submit the judgments of Italian prize courts to the Italian authorities for review; if the Italian authorities acknowledged that such individuals had suffered injury, the Italian Government undertook to afford them relief.

(b) "Seizure" and "capture" distinguished

Although procedure in prize differs from country to country, certain common principles are observed. It is useful to distinguish between "seizure" and "capture", although often these processes are confused. Certain ships and goods are liable to "capture", which means that property in them vests immediately in the capturing nation. In these cases prize court proceedings are not strictly necessary, although often they take place in order to satisfy requirements of municipal law. In other cases property in ships and goods that have been "seized in prize" only changes hands after "condemnation" by a prize court.

The following ships are liable to "capture" in the sense described above: (i) enemy warships, fleet auxiliaries and other → State ships; (ii) all

ships, enemy or neutral, which take a direct part in hostilities on the enemy side.

The following ships are liable in the first instance to seizure only:

(i) All enemy ships not liable to "capture", except ships exempted for some special reason. Such exempted ships include → hospital ships (covered by Geneva Convention II of 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; → Geneva Red Cross Conventions and Protocols) and → fishing boats used exclusively for fishing along the coast (→ Coastal Fisheries), small boats employed in local trade, and vessels charged with religious, scientific or philanthropic missions (covered by Hague Convention XI of 1907 relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War).

(ii) Neutral ships involved in activities which may be of assistance to the enemy. These include breach of blockade, carriage of contraband and various forms of "unneutral service", such as carrying persons or dispatches on behalf of the enemy or being under the control of the enemy.

As for goods, all → war material found at sea – and occasionally on land – by naval forces, and which belongs to the enemy, is liable to capture as → booty in sea warfare. Other goods, however, are liable to seizure only. These include: enemy-owned goods in enemy ships, other than ships exempt from capture or seizure; enemy-owned goods in neutral ships liable to capture or seizure; all goods found in ships engaged in breaking a blockade; and contraband goods. Property rights in such goods only pass to the capturing nation upon condemnation by a prize court.

(c) *Visit and search*

Proceedings in prize start with the seizure of a vessel. In the case of vessels flying a neutral flag the vessel may be ordered to submit to a visit and search (→ Ships, Visit and Search). The belligerent right of visit and search is distinct from the peace-time right, which is covered by Art. 22 of the 1958 Geneva Convention on the High Seas (→ Conferences on the Law of the Sea), and the main purpose of which is to verify the vessel's flag (→ Flag, Right to Fly), particularly as an aid to the suppression of → piracy and slave-trading (→ Slavery).

The belligerent's right of visit and search may be exercised in time of war only, and then only by the warships of the belligerents either on the → high seas or in the territorial waters of either belligerent; it may not be exercised in the territorial waters of neutral States. The purpose of the visit is to check whether a vessel that is flying a neutral flag really is a neutral vessel and, if so, whether there is a reasonable suspicion that it is engaged in some form of activity, such as breach of blockade, transport of contraband or unneutral service, that could lead to condemnation of the vessel or goods on board by a prize court.

This belligerent right of visit and search may not be exercised against neutral warships. Whether it may be exercised against other neutral → State ships, or against merchant ships sailing under the protection of a neutral warship (→ Convoy), is a matter of controversy. The right is exercised initially through the examination of the ship's papers. If suspicion remains, the vessel may be searched. Because of the difficulty of carrying out a search at sea in modern war, principally because of → submarine warfare, the practice has developed of diverting and ordering ships into ports (→ Ships, Diverting and Ordering into Port). In extreme cases a neutral prize may be sunk at sea, although the conditions under which this may be done are extremely controversial. According to the London Naval Procès-Verbal of November 6, 1936:

> "except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit and search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety."

A further development caused partly by the difficulty of carrying out searches at sea has been the practice of issuing various forms of passes, such as "navicerts", "ship's warrants" or "letters of assurance" in respect of ships and their cargoes (cf. → Safe-Conduct and Safe Passage). These documents are issued to neutral shipping companies upon guarantees that they will not engage in activities which assist the enemy. The posses-

sion of such a document does not itself guarantee against seizure in prize, although the absence of one will certainly be regarded as a cause of suspicion, and possibly even as a ground for condemnation. The disadvantage of this system is that while the possession of such a document by a neutral vessel will save much inconvenience from one belligerent, it may cause the opposing belligerent to treat such possession as in itself an unneutral act and therefore as a ground for condemnation.

(*d*) *Embargo*

Distinguishable from seizure in prize is the right of → embargo. There are various forms of embargo, some of which may be used in peacetime, but the belligerent's right of embargo is the right to seize neutral property in case of → military necessity. Neutral property thus seized may include ships and their cargoes.

Unlike prize, which requires the engaging by a neutral in some activity which a belligerent is entitled to regard as an offence, all that is required to justify an embargo – which is similar to the right of → angary (*jus angariae*) – is the belligerent's necessity. However, the exercise of the right of angary requires the payment of compensation to the owner of the neutral property appropriated, whereas when goods are condemned by a prize court, no compensation is payable.

Declaration of Paris, Paris, April 16, 1856, in: L. Friedmann (ed.), The Law of War, A Documentary History, Vol. 1 (1972) 156–157.

Restrictions with Regard to Right of Capture in Naval War (Hague XI), The Hague, October 18, 1907, ibid., 364–369.

Geneva Convention on the High Seas, 1958, UNTS, Vol. 450 (1963) 82–103.

SIR ERLE RICHARDS, The British Prize Courts and the War, BYIL, Vol. 1 (1920–21) 11–34.

J.H.W. VERZIJL, Le droit des prises de la grande guerre (1924).

J.W. GARNER, Prize Law during the World War (1927).

H.W. MALKIN, The Inner History of the Declaration of Paris, BYIL, Vol. 8 (1927) 1–44.

A.M. MCDIARMID, American Civil War Precedents, AJIL, Vol. 33 (1939) 220–259.

J.L. KUNZ, British Prize Cases, 1939–1941, AJIL, Vol. 36 (1942) 204–228.

A.P. SERENI, Italian Prize Courts (1866–1942), AJIL, Vol. 37 (1943) 248–261.

G.G. FITZMAURICE, Some Aspects of Modern Contraband Control and the Law of Prize, BYIL, Vol. 22 (1945) 73–95.

A.W. KNAUTH, Prize Law Reconsidered, Columbia Law Review, Vol. 46 (1946) 69–93.

S.W.D. ROWSON, Italian Prize Law 1940–43, BYIL, Vol. 23 (1946) 282–302.

S.W.D. ROWSON, Prize Law during the Second World War, BYIL, Vol. 24 (1947) 160–215.

A. GERVAIS, Le droit des prises maritimes dans la seconde guerre mondiale, Jurisprudence française [britannique, italienne, allemande], RGDIP, Vol. 52 (1948) 88–161; Vol. 53 (1949) 201–274; Vol. 54 (1950) 251–316; Vol. 55 (1951) 481–543.

C.J. COLOMBOS, A Treatise on the Law of Prize (1949).

H.A. SMITH, The Law and Custom of the Sea (2nd ed. 1950) 69–212.

R.W. TUCKER, The Law of War and Neutrality at Sea (1955).

O. ANDERSON, Some Further Light on the Inner History of the Declaration of Paris, Law Quarterly Review, Vol. 76 (1960) 379–385.

G. KATEVENIS, The Law of Maritime War, Considerations on the Law of Prize Jurisdiction over the Enemy's Ships in Time of War, Revue de droit pénal militaire, Vol. 4 (1965) 359–368.

C.J. COLOMBOS, International Law of the Sea (6th ed. 1967).

G. SCHWARZENBERGER, International Law as applied by International Courts and Tribunals, Vol. 2, The Law of Armed Conflict (1968), 361–402; 592–669.

S.L. BERNATH, Squall across the Atlantic, American Civil War Prize Cases and Diplomacy (1970).

L. SICO, "Toute prise doit être jugée", il giudizio delle prede nel diritto internazionale (1971).

D. STEINICKE, Handelsschiffahrt und Prisenrecht (1973).

P. GUTTINGER, Réflexions sur la jurisprudence des prises maritimes de la seconde guerre mondiale, RGDIP, Vol. 79 (1975) 25–91.

H. DIETZ, Völkerrecht und deutsche Prisenrecht-sprechung im Zweiten Weltkrieg (1979).

D.H.N. JOHNSON

PROHIBITED WEAPONS *see* Weapons, Prohibited

PROPAGANDA, USE OF IN WAR *see* War, Use of Propaganda in

PROPERTY RIGHTS IN WAR *see* Angary, Right of; Contraband; Enemy Property; Prize Law; Requisitions; Sequestration; War, Effect on Contracts; War Damages

PROPOSALS FOR THE PRESERVATION OF PEACE *see* Peace, Proposals for the Preservation of

PROTECTION OF CIVILIANS *see* Civilian Population, Protection

PSYCHOLOGICAL WARFARE *see* War, Use of Propaganda in

QUIRIN, EX PARTE

In June 1942 – six months after Germany had declared war on the United States – eight German soldiers, among them Richard Quirin, were put ashore on Long Island, New York and Ponte Vedra Beach, Florida from German → submarines. Their mission was to perform acts of sabotage (→ Warfare, Methods and Means) on power lines, bridges, railway and communication systems and other war facilities as well as on war industries in the United States. While landing, the eight men wore uniforms of the German marines or at least parts of such uniforms (→ Flags and Uniforms in War). However, these uniforms were immediately buried together with some military equipment near the landing places. All of the men were German citizens, except one who contended to have United States → nationality. They had all previously lived in the United States for some time before being specially trained in Germany for sabotage and → espionage operations. Within two weeks of their landing, they were all arrested while in civilian clothing, before they had done any damage.

On July 2, 1942 a military commission was appointed by order of the President of the United States (7 Federal Register 5103) – acting as both President and Commander-in-Chief of the American army and navy – to try the men on charges of violations of the laws of war (→ War, Laws of) and the United States Articles of War (10 U.S.C. §§ 1471–1593, repealed 1950). On the same day, the President proclaimed that all persons "charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war" under the direction of any nation at war with the United States "shall be subject to the law of war and to the jurisdiction of military tribunals". (Proclamation 2561, 7 Federal Register 5101).

Pursuant to the presidential order, the trial of the eight soldiers before the military commission was initiated in Washington, D.C. on July 3, 1942. Seven of the men thereupon applied to the United States District Court for the District of Columbia for leave to file petitions for habeas corpus. Upon denial of the motions by that Court (47 F. Supp. 431), further motions and writs were presented to the Supreme Court. The question for decision was whether it was in conformity to the laws and Constitution of the United States to place the petitioners on trial before a military commission for the offences with which they were charged.

In its decision of July 31, 1942 (317 U.S. 1) the Supreme Court held that a violation of the law of war was an offence which the President was authorized to order to be tried by a military commission notwithstanding the alleged American citizenship of one petitioner. The Court reasoned that by the Articles of War, especially Art. 15, Congress had provided – within its constitutional powers – for the trial of offences against the laws of war by military commissions and that the President by his order and proclamation had only invoked that law.

Apart from this aspect of the case, the Supreme Court also gave its opinion on the question of whether the offences charged as having been committed by the eight German soldiers were to be qualified as violations of the law of war. The Supreme Court held that entering the United States secretly and in civilian dress, acting on behalf of a belligerent enemy nation with the intention of committing acts of sabotage, espionage and other hostile acts, would constitute an offence against the laws of war. Referring to Art. 1 of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Hague Conventions II of 1899 and IV of 1907 (→ Land Warfare; → Hague Peace Conferences of 1899 and 1907) as evidence of the distinction which "by universal agreement and practice, the law of war draws... between those who are lawful and unlawful combatants", the Supreme Court classified the petitioners as unlawful → combatants. The Supreme Court thus adopted the point of view that the petitioners were not entitled to any protection due to → prisoners of war. The Supreme Court deemed the fact that the petitioners had not entered the theatre (→ War, Theatre of) or zone of active military fighting as irrelevant for the petitioners' qualification as spies under Art. 29 of the Hague Regulations of 1907 which states, *inter alia*, that a person is a spy if he "clandestinely or on false pretenses... obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of

communicating it to the hostile party". With respect to modern methods of warfare, the Court implicitly held that the whole of the United States may well be considered as being within the field of active operations even though the actual fighting took place on foreign soil. The petitioners were later sentenced to death by the military commission and executed.

The significance of this case can be seen in the Supreme Court's legal approach to espionage in the framework of the laws of war. The Supreme Court's conclusion that the spy is automatically an offender of the law of war and hence an unlawful combatant was without precedent in the jurisprudence of the Supreme Court. Its opinion is based on the assumption that, despite the general practice of espionage by all belligerent States, under international law it is the right of all States to provide for the punishment of captured enemy spies. In fact, State practice and Arts. 29 to 31 of the 1907 Hague Regulations endorse this assumption. The case is thus a notable example of the broad interpretation of Art. 29 of the Hague Regulations by the Supreme Court with respect to its field of operation. It should be noted that according to Art. 46 of the 1977 Protocol I additional to the Geneva Conventions of 1949, spies are similarly not entitled to prisoner-of-war status (→ Geneva Red Cross Conventions and Protocols).

Supreme Court of the United States, Case of the German Saboteurs, AJIL, Vol. 37 (1943) 152–171.

M.L. COWEN, The Military Commission in 1942, Virginia Law Review, Vol. 29 (1942–1943) 317–338.

G.T. SCHILLING, Saboteurs and the Jurisdiction of Military Commissions, Michigan Law Review, Vol. 41 (1942–1943) 481–495.

C.C. HYDE, Aspects of the Saboteur Cases, AJIL, Vol. 37 (1943) 88–91.

R.R. BAXTER, So-Called "Unprivileged Belligerency", Spies, Guerrillas and Saboteurs, BYIL, Vol. 28 (1951) 323–345.

MATTHIAS HÖPFNER

R. v. BOTTRILL, EX PARTE KÜCHENMEISTER

Carl Walter Küchenmeister, a German national, arrived in England in 1928 and in 1931 was granted the right of permanent residence. A few years later he married a British woman and the children of the marriage were all born in England. In May 1939 he applied for British → nationality. However, in August of the same year, the British authorities asked him to leave the country and he went to Eire. In December 1939 the British Home Office informed him that he could return to Britain to appear before an advisory committee on the question of his → internment. He returned to Britain and, after the hearing, was sent to Australia where he was interned until 1945. In that year he was brought back to Britain and placed in the internment camp at Beltane School.

Küchenmeister applied for a writ of habeas corpus naming the commandant of the internment camp, Richard Bottrill. This was refused by the Divisional Court of the King's Bench Division of the High Court in its judgment of April 3, 1946 ([1946] 1 All E.R. 635) on the ground that, notwithstanding Germany's unconditional → surrender, the applicant was an alien enemy (→ Enemies and Enemy Subjects) and could not therefore apply for a writ of habeas corpus. The Court based its decision on a certificate issued by the Secretary of State for Foreign Affairs, Ernest Bevin, of April 2, 1946, which stated:

"(1) Under para. 5 of the preamble to the declaration, dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, the United States of America, the Union of Socialist Soviet Republics and France assumed 'supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority. The assumption, for the purpose stated above, of the said authority and powers does not effect the annexation of Germany'.

(2) That in consequence of this declaration, Germany still exists as a state and German nationality as a nationality, but the Allied Control Commission is the agency through which the Government of Germany is carried on.

(3) No treaty of peace or declaration by the Allied Powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany, although,

as provided in the declaration of surrender, all active hostilities have ceased."

Küchenmeister appealed against the decision of the Divisional Court. He submitted that when Germany surrendered, all government except that of the Allied Control Commission ceased to exist. A state of → war (→ Peace and War) between two States was only conceivable if each of them had its own government. The earlier decision of the King's Bench Division in the case of R. v. Vine Street Police Station Superintendent (*ex parte* Liebermann) ([1916] 1 K.B. 268), according to which a civilian alien enemy became a → prisoner of war on his internment, could not be considered as a precedent, as war was still in progress at the time and a civilian was in a position to render assistance to the enemy.

In its decision of July 30, 1946 ([1947] K.B. 41), the Court of Appeal denied the appeal. The Court was of the opinion that a state of war still existed between Germany and Great Britain. The right to take measures against alien enemies during wartime remained the prerogative of the executive and could not be challenged by the courts.

The case is significant for several reasons. With its comments on Germany's legal status (→ Germany, Legal Status after World War II), the Divisional Court was the first court in England to confirm that there had been no → annexation of Germany and that she continued to exist as a State. It is thus in line with the findings – without specifically mentioning them – of the Swiss High Court for the Canton of Zurich of December 1, 1945 (Schweizerische Juristenzeitung, Vol. 42 (1946) p. 89; Annual Digest, Vol. 13 (1946) p. 187; SchweizJIR, Vol. 3 (1946) p. 204, with concurring note by D. Schindler) and of the Austrian Supreme Court of January 24, 1946 (Juristische Blätter, Vol. 68 (1946) p. 142).

It should, however, be pointed out that both when confirming the continued existence of the German State and German nationality and when recognizing a continuing state of war, the Court did not rely on its own reasoning but rather on the Foreign Secretary's certificate of April 2, 1946, even though the petitioner had maintained that there was a contradiction between the Foreign Secretary's certificate and the declaration of surrender of June 5, 1945. This followed the practice of British courts of accepting the statements of the Foreign Office as conclusive as in, for example, the *Arantzazu Mendi* ([1932] 2 K.B. 544), Duff Development Company, Ltd. v. Government of Kelantan ([1924] A.C. 797), the *Parlement Belge* ([1880] P.D. 197), and the *Porto Alexandre* (LR [1920] P.D. 30) (on this point, see Lyons). An evaluation of the certificate itself confirms that, as regards Germany's legal status after World War II, it corresponds not only to contemporary State practice but also to the prevailing view of international law theorists. Nor can there be a valid objection to the statement that, in spite of the termination of hostilities, a state of war still existed (but cf. the opposing view in F.A. Mann, The Present Legal Status of Germany, International Law Quarterly, Vol. 1 (1947) 314–335, at pp. 334–335). It is debatable though whether the relevant passages in the judgment can be considered as statements on international law (as opposed to statements on municipal law). The termination of war does not necessarily coincide with the cessation of active hostilities (→ War, Laws of; → Suspension of Hostilities). The view that a state of war cannot exist between two countries when the government of one of them has ceased to exist is not supported by State practice. In such cases the state of war can only be terminated by an executive proclamation by the victor – although admittedly there is always the danger that this State may improperly delay such a proclamation, and thus prolong the state of war unnecessarily. Judgments similar to R. v. Bottrill regarding the end of World War II were handed down by the Supreme Court of New Zealand in 1946 in the case of *In re* Hourigan (New Zealand Law Reports (1946) p. 1) and by the Supreme Court of the United States in 1948 in Ludecke v. Watkins ([1948] 335 U.S. 160).

Regarding the admissibility of habeas corpus proceedings in a case concerning internment, the court had no need to raise points of international law, since municipal law was exclusively applicable (cf., however, the current legal situation under Art. 43 of the Geneva Convention IV of 1949 relating to the protection of civilians; → Geneva Red Cross Conventions and Protocols).

More than ten years after the judgment of the High Court, Küchenmeister was again the subject of an important British judicial decision. When changing aeroplanes at London airport on a flight

from Amsterdam to Dublin, he was detained by the British immigration authorities as there was a ban on his entering the country. In the case of Küchenmeister v. Home Office and Another (Queen's Bench Division [1958] 1 All E.R. 485), the High Court decided on January 29, 1958 in favour of the plaintiff, holding his detention to be illegal, and awarding him → damages.

A.B. LYONS, The Conclusiveness of the Foreign Office Certificate, BYIL, Vol. 23 (1946) 240–281.

E. SCHWELB, The Legal Status of Germany, AJIL, Vol. 40 (1946) 811–812.

Enemy Aliens, Termination of War, Unconditional Surrender, University of Pennsylvania Law Review, Vol. 95 (1946/47) 416–419.

C. PARRY, The Status of Germany and of German Internees, Modern Law Review, Vol. 10 (1947) 403–410.

R.v. BOTTRILL, ex p. Kuechenmeister, International Law Quarterly, Vol. 1 (1947) 243–247.

F.A. MANN, Germany's Present Legal Status Revisited, ICLQ, Vol. 16 (1967) 760–799.

INGO VON MÜNCH

RAPALLO TREATY (1922)

The Rapallo Treaty between Germany and the Russian Socialist Federal Soviet Republic (RSFSR) was signed on April 16, 1922 at the Italian seaside resort of Rapallo near Genoa (LNTS, Vol. 19, p. 247). By an additional agreement of November 5, 1922 (LNTS, Vol. 26, p. 387) all the other, then existing Soviet Republics (which, by a treaty of December 30, 1922, were to unite with the RSFSR into the Union of Socialist Soviet Republics (USSR)) acceded to the Rapallo Treaty.

The Rapallo Treaty comprises only six short articles. It settled questions which had arisen during the state of → war between the German Reich and Russia in World War I. The parties to the Treaty reciprocally waived compensation for war costs and → war damages (Art. 1) (→ Reciprocity; → Waiver); by this stipulation Soviet Russia renounced all compensation claims which were reserved to her by Art. 116, para. 3 of the → Versailles Peace Treaty of 1919.

Germany in turn renounced all claims arising from the application of laws and measures of the RSFSR to German citizens as well as to rights of the German Reich and of the German *Länder*, under the condition, however, that the RSFSR not satisfy similar claims of third States (Art. 2) (→ States, Equal Treatment). Thus, Germany abstained from raising claims arising from Russian nationalizations (→ Aliens, Property; → Expropriation and Nationalization). The German Reich and the RSFSR resumed diplomatic and → consular relations (Art. 3) (→ Diplomatic Relations, Establishment and Severance) and agreed upon the most-favoured-nation principle (→ Most-Favoured-Nation Clause) with respect to the general legal position of their citizens (→ Aliens) and to the States' trade and economic relations (Art. 4).

The Rapallo Treaty represents a landmark in German-Russian relations in the period between the two world wars. After the breakdown of the German Imperial Government, the RSFSR on November 13, 1918 denounced the → Brest-Litovsk Peace Treaty of 1918. In the Versailles Peace Treaty (Art. 116, para. 2), Germany had to accept the abrogation of the Brest-Litovsk Treaty "and of all other treaties, conventions and agreements entered into by her with the Maximalist Government in Russia". For these reasons, there was a treaty-free situation between the two powers. It was the desire to bring this situation to an end, as well as the special position of the two countries in the European State system at that time – both States were somewhat like outcasts – that led to the conclusion of the Rapallo Treaty.

As early as December 1921 the Russian Government initiated → negotiations. These negotiations led to a draft treaty in April 1922. Russian Commissioner for Foreign Affairs, Georgi Chicherin, visiting Berlin, wanted to sign this draft, but the Germans, especially Foreign Minister Walther Rathenau, refused because they wanted to avoid a conflict with the Western Powers.

At the Genoa conference convened on April 10, 1922 to discuss measures for the economic reconstruction of Central and Eastern Europe, the German delegation was completely excluded from the main negotiations, which were conducted in secret. Knowing that British-Russian talks were going on, the Germans feared that there might be an arrangement between the Russians and the West to the detriment of Germany, espe-

cially with regard to Art. 116 of the Versailles Treaty. In this situation the German delegation decided to accept the unexpected Russian invitation of April 16, 1922 to resume negotiations. In the evening of the same day Chicherin and Rathenau signed the treaty. The signature of the Rapallo Treaty came as a complete surprise to all the nations gathered at Genoa, and caused deep after-effects reflecting controversial judgments on German foreign policy.

For several years the relations between Germany and the Soviet Union continued "to be based on the Treaty of Rapallo". Such were the opening words of the Berlin Treaty between Germany and the Soviet Union of April 24, 1926 (LNTS, Vol. 53, p. 387). The Berlin Treaty was concluded in the aftermath of the general regulation of the basic relations between Germany and her western neighbours in the Pact of Locarno of October 1925 (→ Locarno Treaties (1925)). The Soviet Union was not at this time a member of the → League of Nations. She was solicitous about the possibility that Germany, on the basis of the Locarno Pact and her entry into the League of Nations, might participate in → sanctions according to Arts. 16 and 17 of the League Covenant against the Soviet Union. The Berlin Treaty was concluded in order to dissipate these anxieties. It provided for a mutual duty of neutrality (→ Neutrality, Concept and General Rules) in case one of the contracting parties, despite its peaceful attitude, should be attacked by one or several third powers (Art. 2). Both countries pledged not to take part in any economic or financial → boycott of the other (Art. 3), and they undertook to promote an understanding with regard to all political and economic questions jointly affecting their countries (Art. 1, para. 2). In an appended exchange of → notes, it was declared that Germany could never be obligated to take part in any measures against the Soviet Union instituted under the authority of Art. 16 of the League Covenant.

The Rapallo Treaty became a dead letter in the period of alienation between the Soviet Union and Germany during the first six years of the Nazi régime, culminating in the treaties of mutual assistance between the Soviet Union and France (May 2, 1935) and the Soviet Union and Czechoslovakia (May 16, 1936), and the Anti-Comintern Pact between Germany and Japan (November 25, 1936). The Rapallo Treaty was last mentioned, however indirectly, in a treaty instrument in the German-Russian Non-Aggression Treaty of August 23, 1939 (Reichsgesetzblatt, 1939 II, p. 968), which was concluded bearing in mind "the principal provisions" of the Berlin Treaty of April 24, 1926. The Rapallo Treaty terminated on June 22, 1941 when Nazi Germany launched her → aggression against the Soviet Union (→ War, Effect on Treaties).

Germany and Russian Soviet Republic Agreement signed at Rapallo, April 26, 1922, LNTS, Vol. 19 (1922) 247–252.

E. CARR, German-Soviet Relations between the two World Wars, 1919–1939 (1951).

G. HILGER and A.G. MEYER, The Incompatible Allies (1953).

F. KLEIN, Die diplomatischen Beziehungen Deutschlands zur Sowjetunion 1917–1932 (1953).

I.K. KOBLJAKOV, From Brest to Rapallo (1954) [in Russian].

T. SCHIEDER, Die Probleme des Rapallo-Vertrages, Eine Studie über die deutsch-sowjetischen Beziehungen 1922–1926 (1956).

G. FREUND, Unholy Alliance, Russian-German Relations from the Treaty of Brest-Litovsk to the Treaty of Berlin (1957).

H. HELBIG, Die Träger der Rapallo-Politik (1958).

G. ROSENFELD, Sowjetrußland und Deutschland 1917–1922 (1960).

I.A. ROSENKO, The Treaty of Rapallo, An Important Victory for Lenin's Peace Policy, in: Vestnik Leningradskogo Universiteta, Serija Istorii, jazyka i literatury, No. 2 (1960) 61–74 [in Russian].

A. ANDERLE, Die deutsche Rapallo-Politik (1962).

A. ANDERLE (ed.), Rapallo und die friedliche Koexistenz (1963).

K.D. ERDMANN, Deutschland, Rapallo und der Westen, Vierteljahreshefte für Zeitgeschichte, Vol. 11 (1963) 105–165.

K. ROSENBAUM, Community of Fate, German-Soviet Diplomatic Relations 1922–1928 (1965).

I.A. ROSENKO, Soviet-German Relations 1921–1922 (1965) [in Russian].

T. SCHIEDER, Die Entstehungsgeschichte des Rapallo-Vertrages, Historische Zeitschrift, Vol. 204 (1967) 545–609.

Deutsch-sowjetische Beziehungen von den Verhandlungen in Brest-Litowsk bis zum Abschluß des Rapallo-Vertrages, 2 vols. (1967–1971).

F.A. KRIMMACHER and H. LANGE, Krieg und Frieden, Geschichte der deutsch-sowjetischen Beziehungen (1970).

H.G. LINKE, Deutsch-sowjetische Beziehungen bis Rapallo (1970).

M. WALSDORFF, Westorientierung und Ostpolitik, Stresemanns Rußlandpolitik in der Locarno-Ära (1971).

W. EICHWEDE, Der Eintritt Sowjetrußlands in die internationale Politik, 1921–1927, in: Osteuropa-Handbuch, Vol. 3, Part 2 (1972) 150–212.

A.A. ACHTAMZJAN, Rapallo Policy, Soviet-German Diplomatic Relations 1922–1932 (1974) [in Russian].

G. KIERSCH, Frankreichs Reaktion auf die westdeutsche Ostpolitik, in: E. Jahn (ed.), Die Ostpolitik der BRD (1974) 181–206.

R. BOURNAZEL, Rapallo, Naissance d'un mythe (1976).

K. HILDEBRAND, Das Deutsche Reich und die Sowjetunion im internationalen System 1918–1932 (1977).

G.V. IGNATENKO, The Great October Revolution and Contemporary International Law, in: Sovetskij Ežegodnik Mezdunarodnogo Prava 1977 (1979) 11–36 [in Russian].

THEODOR SCHWEISFURTH

RAUTER CASE

1. The Facts

General of the Police and *SS-Obergruppenführer* Hans Albin Rauter was the chief police officer as well as General Commissioner for Internal Security in the occupied Netherlands (→ Occupation, Belligerent) from June 1940 until March 1945. He was found guilty of → war crimes and was sentenced to death by the Hague Special Tribunal in its judgment of May 4, 1948. He was found guilty of committing the following acts: ordering the → deportation of approximately 110 000 Dutch Jews, of whom only 6000 returned; the impressment and transportation of 300 000 Dutch nationals to Germany for → forced labour in war industries; the widespread plunder of private property (→ Pillage); the deportation of more than 5000 Dutch students; the imprisonment of innocent relatives of Dutch police officers who had joined the Resistance (→ Resistance Movements); the application of unlawful → collective punishment. He was also held responsible for the murder of innocent Dutch citizens by the *SS* (→ Responsibility of Individuals in International Law).

2. The Court's Decision

The judgment applied Art. 27(a) of the Dutch Extraordinary Penal Law Decree enacted on July 10, 1947. Art. 27(a) referred to Art. 6 of the London Agreement of August 8, 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis (→ Nuremberg Trials). According to this Dutch provision, persons who, in the service of the enemy, had committed war crimes or → crimes against humanity in the sense of the London Agreement, were to be punished according to the applicable or most closely analogous provision of Dutch criminal law. The accused's appeal was dismissed by the Hague Special Court of Cassation (Bijzondere Raad van Cassatie) in its Judgment of January 1, 1949 (Nederlandse Jurisprudentie (1949) p. 144, with annotation by Röling, p. 161). The accused's application to reopen the proceedings (based on the United Nations Declaration of Human Rights; → Human Rights, Universal Declaration (1948)) was refused by the trial court. He was executed soon afterwards.

The Special Court of Cassation, whose members included such recognized authorities in criminal and public international law as Professor Bert V.A. Röling, Professor Willem P.J. Pompe, and Professor Jan H.W. Verzijl, based its findings on the following significant points.

(a) Proper forum and applicable law

In accordance with international law, Dutch courts are able to apply Dutch (municipal) criminal law when trying cases involving the enemy's war crimes. In so doing, they act as national agents of the enforcement machinery of international criminal law; this system is necessary in the absence of an → international criminal court. (This position is presently recognized by Art. 85 of Geneva Convention III of 1949 relating to the Treatment of Prisoners of War). The Court interpreted Art. 63 of the forerunner Geneva Convention of 1929 on → prisoners of war restrictively. According to this provision, prisoners of war could only be tried before the same courts, and must have been able to enjoy the same procedural rights, as members of the armed forces of the custodial power. The Court limited the field of application of Art. 63 to crimes committed while in captivity. In so doing, the otherwise exclusive jurisdiction of military tribunals (they being the ones before which members of the Dutch armed forces would normally appear) was curtailed, and the civilian court was thus entitled to assert its own jurisdiction to decide the case.

This aspect of international law has progressed

further in the meantime. The guarantees of Arts. 84, para. 1, and 87 of Convention III of 1949, regarding the competence of the court and penalties available to it, apply specifically to the trial of war crimes committed prior to captivity. Of particularly far-reaching consequence here is the view of the Special Court of Cassation that international → treaties take precedence over the municipal law of the States parties, even where that municipal law existed beforehand and is statutory (→ International Law and Municipal Law). This thesis, which had also been disputed in the Netherlands, was accepted by the legislature (Staten-Generaal) in 1953 in an amendment to this effect of Art. 66 of the Dutch Constitution (Grondwet). The Court's opinion thus set the stage for a legislative enactment which itself was a substantial and exemplary step in the development of public international law.

(*b*) *Rights and duties of the occupying power*

Rauter sought to justify his conduct in part with the argument that the actions of the Dutch Resistance against the occupying power were unlawful. the Court's opinion dismissed this claim by countering that the → surrender of the Dutch armed forces on May 15, 1940 imposed no duties on the government-in-exile in London, the remaining combat-ready naval and air forces, or the general population. This view is correct in that the capitulation concerned itself only with the cessation of hostilities and with the disarmament of the surrendering armed forces. It is questionable, however, if it is maintained in addition that the general population was subject to no legal duties *vis-à-vis* the German authorities in their role as organs of the occupying power. The Hague Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 1907 (→ Land Warfare; → Hague Peace Conferences of 1899 and 1907) as well as, today, Geneva Convention IV of 1949 relating to the Protection of Civilians assume that a populace must obey the reasonable directives of the occupying power (→ Occupation, Belligerent). Decisive here, however, was that the occupying power itself, through its cruel and arbitrary acts, had destroyed the legal basis upon which it could require the population to maintain order.

(*c*) *Reprisals*

The Court's refusal to treat Rauter's actions as → reprisals was justified, since reprisals may only be directed by a State against a State which has violated international law. The Netherlands, however, without having committed any violation of international law, were attacked by the German Reich. Regarding the acts of terror directed against the civilian population, the Court was correctly of the opinion that even if treated as retributive measures, they were unjustifiable, since they exceeded the bounds of measures allowed for in Art. 50 of the Hague Regulations: These measures were applied indiscriminately against the innocent, and the occupying power, through its own violations of the law, had driven the activist sections of the population to resist violently. The restrictive interpretation of Art. 50 in the Court's decision is noteworthy and salutary. It is doubtful, however, that the article is observed in this way in contemporary practice in → armed conflicts.

(*d*) *Criminal liability*

Rauter argued further that his conviction and sentence violated the basic principle of law *nullum crimen, nulla poena sine lege* (→ General Principles of Law). The Special Court of Cassation correctly dismissed this plea, since Rauter's deeds – independent of Art. 27(a) of the Dutch Extraordinary Penal Law – were in any event illegal and punishable. The accused sought authority in a principle whose chief function, according to the Court, was to provide the necessary degree of certainty as to what exactly the law forbade. In this context, the Court maintained that the superior principle of substantive justice had to prevail over the procedural principle of certainty of law in such cases. The Special Court of Cassation applied this questionable thesis (compare the presently applicable Art. 99 of Geneva Convention III) also to the measure of punishment once criminal liability had been determined. Herein lies the judgment's weak point, since the death penalty was thus introduced retroactively. In any case, the Court ignored Art. 1(2) of the Dutch Criminal Code, which also forbade the retrospective application of provisions for increased punishment. The Court's viewpoint

is, however, supported by a considerable body of opinion in academic literature on international law which argues for the application of the death penalty for grave war crimes.

In supporting its imposition of the death penalty, the Special Court of Cassation forcefully expressed the view that the application of criminal law to war crimes is not chiefly concerned with the protection of national interests, but rather seeks to express the horror and shock to the conscience of the civilized community of nations ("*ten diepste geschokte rechtsbesef der volkerengemeenschap*").

(*e*) *Plea of extraordinary circumstances*

In dealing with the defence of the extraordinary circumstances of war (a national state of emergency), the Court decisively rejected the maxim that *Kriegsräson geht vor Kriegsmanier* (necessity in war has precedence over the manner of warfare), a viewpoint which the German literature on international law itself had abandoned subsequent to the Hague Regulations of 1907. This notwithstanding, it is clear that during World War II the Germans behaved in countless cases as though it applied.

(*f*) *Plea of superior orders*

The defence of personal necessity was also rightly rejected, since Rauter was at no time under duress. In dealing with the contention that Rauter was "only following orders", the Special Court of Cassation applied Art. 47 of the German Military Criminal Code of 1872 as amended in 1940, deciding that the accused was fully conscious of the illegality of his acts. A German court would have had to reach the same conclusion. It is noteworthy that the Special Court of Cassation sought authority in German military law here, rejecting the application of both Art. 43 of the Dutch Criminal Code – which would have led to the same result – and of Art. 8 of the London Agreement of 1945.

Bijzondere Raad van Cassatie, 12 Jan. 1949, Arrest Lz. Rauter, Rechtsvragen rond art. 27a B.B.S., Nederlandse Jurisprudentie (1949) 144–166.

Rijksinstituut voor Oorlogsdocumentatie, Het Process Rauter (1952) [with English summary].

Trial of Hans Albin Rauter, Law Reports of Trials of War Criminals, Vol. 14 (1949) 89–138.

In re Rauter, Annual Digest, Vol. 16 (1949) 526–548.

R.W. MOUTON, Oorlogsmisdrijven en het Internationale Recht (1947) 354–358.

W.M.E. NOACH, De bijzondere rechtspleging (1948) 119–166.

G. LUMMERT, Die Strafverfahren gegen Deutsche im Ausland wegen Kriegsverbrechens (1949) 106.

W.P.J. POMPE, Some Observations on the Jurisprudence of the Special Court of Cassation in the Netherlands, Symbolae J.H.W. Verzijl (1958) 272–274.

B.V.A. RÖLING, The Law of War and the National Jurisdiction since 1945, RdC, Vol. 100 (1960 II) 323–456.

B.V.A. RÖLING, Criminal Responsibility for Violations of the Laws of War, RevBelge, Vol. 12 (1976) 8–26.

HANS-HEINRICH JESCHECK

RECOGNITION OF BELLIGERENCY

1. Definition

During the last century the rules developed for → recognition of States and governments were partially extended to cover → civil war situations. Third States or incumbent governments thought it expedient to recognize rebel or revolutionary authorities ("insurgents") as belligerents whenever hostilities carried on inside the territory of a State had assumed the intensity, duration and proportions equivalent to those encountered in regular wars as traditionally defined by international law (→ War; → Armed Conflict).

Application of the rule regarding recognition of belligerency, as developed by custom, presupposes the existence of: (a) a government recognized in international law as the lawful government, fighting against insurgents on its territory; and (b) insurgents, i.e. rebel or revolutionary forces under a responsible and organized command, which actually control and administer a sizeable portion of the territory of the internationally recognized State in question, and furthermore conduct the hostilities in accordance with the laws of war. In addition, the question of the status of belligerency arises only when the recognizing States are compelled to determine their attitude towards the conflict in question. When one of these conditions is not met, recognition is premature, and, in the opinion of most

writers on the topic constitutes a breach of international obligations (→ Internationally Wrongful Acts), giving rise to State responsibility (→ Responsibility of States: General Principles).

Recognition of belligerency has to be distinguished clearly from recognition of *de jure* or → *de facto* governments, as well as from mere → recognition of insurgency. While *de jure* and *de facto* recognition affect relations between States generally (concerning diplomatic and political relations, conclusion of → treaties, etc.), the status of a recognized belligerent is strictly confined to the period of actual warfare. If the insurgents are ultimately defeated, their belligerent status lapses automatically; if their insurrection is successful, they fulfil the objective criteria for being fully recognized as *de facto* or *de jure* governments. Recognition of belligerency, therefore, is distinct from recognition of governments as such, although it is predicated on the fact that both parties to the dispute are governments. Nevertheless, the ensemble of rights and duties connected with the status of belligerency is clearly determined or at least determinable. By contrast, recognition of insurgency creates a lesser status, even more provisional in nature and more limited both in content and scope of application.

2. *Purpose*

Recognition of belligerency is granted primarily for the purpose of bringing the laws of war (→ War, Laws of), and in particular the rules of → humanitarian law in armed conflict into operation (→ Warfare, Methods and Means). It is also intended to settle relations with third States to the extent necessary for protecting their own nationals and other vested interests. Once insurgents are treated as belligerents, responsibility of the lawful government for acts committed in the territory held by the insurgents ceases, as long as the incumbent government can show that it has done everything in its power to quell the insurrection.

3. *State Practice*

(*a*) *Evolution of the rule*

The practice of recognizing insurgents as regular belligerents was developed during the 19th century when only sovereign States (→ Sovereignty) were considered → subjects of international law, and when the term "war" was synonymous with armed conflict between such States. In the course of that century, however, an increasing number of civil wars broke out. By their sheer impact, extent and duration they reached the dimensions of classical wars and compelled third States to determine their relations towards the rebel forces, at least for the period of actual warfare. These transitory relations were formalized by according belligerent status to insurgents. Recognition of belligerency could be declared expressly by foreign States (e.g. in 1891 Bolivia formally recognized Chilean insurgents) or by the incumbent government itself.

Most instances of recognition of belligerency have concerned implied recognition, usually by declarations of neutrality (→ Neutrality, Concept and General Rules) or → acquiescence in confiscation of → contraband or in → blockade maintained by one of the belligerents. The most famous instance of implied recognition by express declaration of neutrality was the British declaration of 1861 during the → American Civil War (1861–1865). Significantly, this declaration was made only after the United States Government had implicitly recognized the belligerency of the Confederate states by imposing a blockade. Other instances are a series of Latin American revolutions throughout the 19th century, when independence from Spanish colonial rule was sought (→ Decolonization). In general, third States did not declare their neutrality expressly, but either assumed an attitude of impartiality or specifically enjoined their nationals to avoid involvement in the conflict. Thus, during the Greek revolution of 1821–1829, Great Britain recognized the belligerency of the insurgents only in 1824 by declaring that strict neutrality would be observed and that a blockade imposed by both disputants would be honoured. The incumbent government could continue to regard the conflict as a purely internal uprising subject to criminal prosecution, but found itself under increasing moral pressure to apply humanitarian rules of warfare to such insurgents if the conflict dragged on. Numerous national court decisions reaffirmed this customary rule. The rule was further supported inferentially by the practice of States openly denying recognition of belligerency in appropriate cases, as for

example, when the United States refused recognition to insurgents in Colombia (1885), Haiti (1889) and Brazil (1893).

In this first period, recognition of belligerency depended largely on the subjective decision of third States or of the incumbent governments. Whether there also existed a duty to recognize belligerency when all conditions were fulfilled, and whether such recognition once granted could be withdrawn, remained matters of controversy. The answer largely depended on whichever doctrinal position was adopted in relation to the constitutive, concessionary or declaratory theories of recognition. Relevant State practice, although relatively scarce, could be adduced for each of those doctrinal positions.

(*b*) *Decline of the practice*

A second period starting after World War I saw the decline of the practice to the point of virtual obsolescence. Against the background of the concept of classical warfare rapidly dissolving under drastically changed forms of armed conflict, recognition of belligerency was considered an increasingly cumbersome instrument. The formal pledges of renunciation of the → use of force as laid down in the → Kellogg-Briand Pact of 1928 and other pre-World-War-II instruments, as well as the post-war general prohibition of the use of force in Art. 2(4) of the → United Nations Charter and a comprehensive ban on → aggression, completely outlawed war in the classical sense, except for → self-defence and → collective measures under Chapter VII of the UN Charter.

Resort was made to other forms of warfare (→ Guerrilla Forces), and the tenuous line between international and non-international armed conflicts became increasingly blurred, as third States directly or indirectly intervened in armed conflicts initially started as non-international disputes (→ Intervention). The best example for the change of attitude regarding the virtues of recognizing belligerents is the → Spanish Civil War (1936–1939). Although all conditions for recognition of belligerency were fulfilled, neither the Republican nor the Nationalist governments were so recognized by the Western Powers, because they generally considered that conflict as an international war. Yet a number of States would have been prepared to accord belligerent status to the disputants, had foreign volunteers on either side been withdrawn.

(*c*) *Emergence of a new approach*

The decline of the traditional subjective approach to belligerent recognition coincided with the ascendancy of an approach relying on purely objective criteria. At first merely a precondition for recognition, this new approach gradually gained predominance, until after World War II it had virtually replaced recognition of belligerency as such. The underlying idea was to define civil war situations objectively, in order to be able to bring into operation a minimum set of humanitarian rules of armed conflict. This approach had roots going back to the Hague Regulations respecting the Laws and Customs of War on Land (→ Land Warfare), annexed to Hague Convention IV of 1907, which codified detailed rules of the *jus in bello*, although by Art. II the Convention was restricted to States party to the Convention (→ Hague Peace Conferences of 1899 and 1907). However, the famous → Martens' clause in the → preamble to that Convention laid down that certain minimum humanitarian rules were to be applied in other conflicts as well. It confirmed the customary rule that even

> "in cases not included in the Regulations ... the inhabitants and the belligerents remain under the protection of the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

This modest beginning was enlarged upon in the four Geneva conventions of August 12, 1949 (→ Geneva Red Cross Conventions and Protocols). Common Art. 3 of those Conventions, described as a "miniature convention" for armed conflicts of a non-international character, contains minimum rules of humane treatment to be accorded automatically to "all persons taking no active part in the hostilities". Although this did not cover much ground, recognition of belligerency for humanitarian purposes became no longer necessary to the extent that these Conventions applied. The last sentence of Art. 3, however, made it clear that its provisions "shall not affect the legal status of the Parties to the

conflict". This clearly left open an option for belligerent recognition in suitable cases.

Common Art. 3, however, only covers non-international armed conflicts in the territory of contracting parties, and it does not provide a clear definition of an "armed conflict not of an international character". Nor does it contain provisions about → prisoners of war, or about the kind of combat. It merely asserts the right of impartial humanitarian organizations (e.g. the → International Committee of the Red Cross) to offer their services without any correlative duty. By Art. 4 of Geneva Convention III relative to the Treatment of Prisoners of War, prisoner-of-war status was extended also to members of → resistance movements belonging to a party to the conflict, and even to members of armed forces professing allegiance to unrecognized authorities. Recognition of belligerency could thus be bypassed with respect to this special category of combatants who had played such a prominent role during World War II.

4. Recent Developments

Well over a hundred armed conflicts since 1949 have demonstrated the need for further development of the objective approach based on humanitarian concerns, particularly because there have been no undisputed instances since then of recognition of belligerency. The insurgents in the Algerian War of Independence (1954–1962; → Decolonization: French Territories) and the Biafran Secessionist War (1967–1970), fought against fierce opposition of the incumbents, claimed belligerent recognition, but surely more reliance was placed on the application of common Art. 3 of the Geneva Conventions.

The 1977 Protocols additional to the Geneva Conventions of 1949 have carried the objective approach further. Art. 1, para. 4 of Protocol I extends the meaning of international armed conflicts to embrace → wars of national liberation (→ Liberation Movements) and thereby includes combatants who previously could only be protected if recognized as belligerents. More important still, Art. 1 of Protocol II now defines non-international armed conflicts by negatively differentiating them from conflicts between States, wars of national liberation, and from purely "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence". Art. 1 lists positively all those criteria that formerly had to be met by insurgents if belligerent status was in question. Many combatants who were previously recognized only exceptionally will in future have recognition as a matter of course. However, as Protocol II is the result of a difficult compromise, the formula of Art. 1 leaves a number of lacunae or threshold questions, such as when internal disturbances or tensions reach the level of armed conflict, and for how long combat must last to amount to more than sporadic violence, or what degree of organization combatants must show. Moreover, Protocol II lacks a clear rule such as that provided in Art. 96(2) of Protocol I which replaces the need for belligerent recognition because it operates even in relation to non-signatories accepting and applying it. State practice will have to show whether common Art. 3 of the 1949 Geneva Conventions can still fill the gap in Protocol II.

5. Current Significance

The decline of the practice of granting recognition of belligerency is largely due to the fact that its main premises have fallen away. The rule depended for its operation of States preferring, in cases of internal conflict, to stand aloof and to preserve strict neutrality. In the age of loose bipolarity after World War II, the new premises tied up with the concept of intervention in its various forms, are not conducive to recognition of belligerency developed in and for the balance-of-power era.

Recognition of belligerency can be regarded as almost superseded in its humanitarian reach, and some would even go so far as to assume that it has fallen into desuetude. However, it may yet play a useful role, whenever lawful governments or third States think fit to resort to it. Third States in particular may utilize the rule in order to bring into operation the established rules concerning the settlement of the consequences of armed conflict relating, for example, to the fate of property rights (→ Enemy Property), commercial undertakings, validity of treaties (→ War, Effect on Treaties), etc. It must be stressed, however, that in State practice during the last 30 years the rules of warfare and the secondary consequences of armed conflicts have not been applied automat-

ically as a result of recognition of belligerency, but instead have tended to be applied on a case-by-case basis founded on → reciprocity.

N.J. PADELFORD, International Law and Diplomacy in the Spanish Civil Strife (1939).
H. LAUTERPACHT, Recognition in International Law (1948) 175–200.
T.C. CHEN, The International Law of Recognition (1951) 303–397.
R.R. OGLESBY, Internal War and the Search for Normative Order (1971).
J.E. BOND, The Rules of Riot, Internal Conflict and the Law of War (1974).
V. DUCULESCO, Effet de la reconnaissance de l'état de belligérance par les tiers, y compris les organisations internationales, sur le statut juridique des conflits armés à caractère non international, RGDIP, Vol. 79 (1975) 125–151.
J. VERHOEVEN, La reconnaissance internationale dans la pratique contemporaine (1975) 100–167.
A.V. LOMBARDI, Bürgerkrieg und Völkerrecht, Die Anwendbarkeit völkerrechtlicher Normen in nichtzwischenstaatlichen bewaffneten Konflikten (1976).
A. ROSAS, The Legal Status of Prisoners of War (1976) 15–42, 85–125, 140–218.
C. ZORGBIBE, De la théorie classique de la reconnaissance de belligérance à l'article 3 des Conventions de Genève, in: Droit humanitaire et conflits armés (1976) 83–93.
R.R. BAXTER, Modernizing the Law of War, Military Law Review, Vol. 78 (1977) 165–183.
J.C. STASSEN, Intervention in Internal Wars, Traditional Norms and Contemporary Trends, SAYIL, Vol. 3 (1977) 65–84.
M. BOTHE, K. IPSEN and K.J. PARTSCH, Die Genfer Konferenzen über humanitäres Völkerrecht, ZaöRV, Vol. 38 (1978) 1–85.
O. KIMMINICH, Schutz der Menschen in bewaffneten Konflikten (1979) 80–129.
M. BOTHE, K.J. PARTSCH and W. SOLF, New Rules for Victims of Armed Conflicts (1982).

EIBE H. RIEDEL

RECOGNITION OF INSURGENCY

1. Definition, Purpose and Scope

Recognition of insurgency is a unilateral act (→ Unilateral Acts in International Law) by which a State acknowledges a factual relationship between itself and insurgents fighting against the incumbent government of another State. It may be necessitated by the existence of an internal → armed conflict which has lasted for some time, and in which the insurgents have achieved a measure of success and control part of the territory of a State (cf. → Civil War; → Wars of National Liberation). Legal rights and duties between the insurgents and third States are created by recognition of insurgency only to the extent specifically granted and agreed upon. Notwithstanding recognition of insurgency by third States, the incumbent government is entitled to treat insurgents as traitors or common criminals.

In contrast to recognition of insurgency → recognition of belligerency establishes a common régime of rights and duties which comes into effect irrespective of the will of a particular State. The existence of this rule is, however, disputed; while a few writers deny a difference between insurgency and belligerency (O'Connell, Verhoeven), and others see in insurgency merely a factual description having no direct legal consequences (Padelford, Chen), most others agree that an intermediate position between rebellion and recognized belligerency does exist as a legal status (Lauterpacht, McNair/Watts, Falk, Oglesby, Stassen).

Recognition of insurgency may be appropriate when one or more of the relatively strict conditions for recognition of belligerency is not met, and when the recognizing State wishes to treat the insurgents other than as common criminals (→ Combatants; → War, Laws of). For this reason, they may negotiate with the insurgents, on a very provisional and transitory basis only, in order to safeguard their own national interests, such as protecting property, other individual rights or commercial interests, or securing humane treatment for prisoners (→ Prisoners of War; → Humanitarian Law and Armed Conflict). Recognizing States may also pass legislation enjoining foreign enlistment (e.g. → Foreign Legion; → Mercenaries) and thus involvement of their own nationals in the conflict. They may also take precautions to avoid being used as bases of support for hostilities against the incumbent government. Insurgents, on account of their not having a generally defined legal personality in international law (→ Subjects of International Law), might simply be treated as pirates; however, with some exceptions, they have not been so regarded in State practice, because in-

surgents usually lack an intention of personal gain, the *animus furandi* of → piracy.

As regards acts committed by the insurgents against nationals of the recognizing State, responsibility no longer rests with the incumbent government, provided that it has with diligence attempted to suppress the insurrection (→ Responsibility of States: General Principles). Third States need not remain neutral; they can render assistance to the established government, but may not actively support the insurgents (→ Neutrality, Concept and General Rules). All writers are agreed that this latter rule has been increasingly disregarded.

2. State Practice

There have been fewer instances of recognition of insurgency than of recognition of belligerency, and most occurred during the 19th century. During the various colonial rebellions leading to Cuban independence (1868–1898) (→ Colonies; → Decolonization), various United States administrations indicated in a number of proclamations that, while not wishing to recognize the insurgents as belligerents, they would recognize them as insurgents. A number of United States court decisions regarded these official pronouncements as sufficient ground for applying American → neutrality laws, and for acknowledging a difference between insurgency and belligerency. A less clear example of recognition of insurgency may be seen in the Chilean revolution of 1891, where the British and other governments refused to recognize the insurgents as belligerents, yet apparently acquiesced (→ Acquiescence) in the exercise of some belligerent rights by the insurgents.

During the → Spanish Civil War (1936–1939), Great Britain, while not recognizing either side to the conflict as belligerents, eventually recognized the insurgents as the "insurgent" or "nationalist" → *de facto* government (→ Recognition) of the portion of Spain under their effective control. English courts subsequently felt bound to recognize legislation passed by the insurgents in their territory, and in the case of the *Arantzazu Mendi* ([1932] 2 K.B. 544) the court held that the recognized *de facto* government must be treated as a government of a foreign sovereign → State (→ Sovereignty; → Representatives of States in International Relations), with resulting jurisdictional immunities even *vis-a-vis* the incumbent Republican government. However, the view seems preferable that this was not an instance of recognized insurgency but of a *de facto* government, clearly a higher status than that of insurgency.

3. Current Significance

For the same reasons that instances of recognition of belligerency have not occurred since World War II, States have also no longer resorted to formal recognition of insurgency (see → Recognition of Belligerency, section 3 (b) and (c)). Moreover, the realization that the rule was developed in and for another era, when the subjective approach to matters of recognition still prevailed, may have proved detrimental to the rule. The lack of precise delimitation of the rule, which could have given rise to a common régime of clearly defined rights and duties, may have enhanced the search for objective criteria governing those conflict situations. Furthermore, the application of the rule – whose precise contents have always been disputed – has largely been rendered superfluous by the post-war pattern of case-by-case settlement of → international relations between insurgents and third States.

Thus, France and Mexico in 1981 issued a joint declaration by which they recognized that an → alliance of liberation movements in El Salvador "constitutes a representative political force, prepared to assume obligations and to exercise the rights that derive therefrom". (Letters to the President of the Security Council, UN Doc. S/14659, of August 28, 1981). Applying the criteria developed in section 1 above, the declaration, while primarily designed to urge internal settlement of the crisis situation without external intervention, also contains preconditions for the recognition of insurgency. Clearly, France and Mexico do not wish to treat the insurgents as common criminals, and therefore recognized that insurgency might be considered a fitting legal status. Furthermore, although specific obligations resting on the insurgents cannot be detected in the declaration, recognition of their preparedness "to assume obligations and to exercise rights that derive therefrom" could nevertheless be interpreted as amounting to full recognition of in-

surgency, provided that some supporting facts for those obligations could be adduced. Such supporting facts might be, for instance, → guarantees by the insurgents for the protection of property, other individual rights, or commercial interests of France and Mexico, or the unequivocal acceptance of humanitarian law obligations.

Bearing in mind the provisional and transitory nature of recognition of insurgency, and the fact that States nowadays usually prefer a case-by-case settlement to a clear-cut rule, the line from mere policy statement to full legal recognition of insurgency may, in fact, have been crossed in the case of El Salvador. This case also shows that despite little or no State practice, recognition of insurgency should be preserved as a legal option, ready for implementation in suitable instances. States may, if they see fit, resort to recognition of insurgency as an intermediate status between rebellion and belligerency, wherever that distinction proves helpful in regulating their affairs.

N.J. PADELFORD, International Law and Diplomacy in the Spanish Civil Strife (1939).

H. LAUTERPACHT, Recognition in International Law (1948) 270–310.

T.C. CHEN, The International Law of Recognition (1951) 398–407.

R.A. FALK, Janus Tormented, the International Law of Internal War, in: J.N. Rosenau, International Aspects of Civil Strife (1964) 185–248.

LORD McNAIR and A.D. WATTS, The Legal Effects of War (4th ed. 1966) 30–34.

D.P. O CONNELL, International Law, Vol. I (2nd ed. 1970) 148–153.

R.R. OGLESBY, Internal War and the Search for Normative Order (1971).

J.E. BOND, The Rules of Riot, Internal Conflict and the Law of War (1974).

J. VERHOEVEN, La reconnaissance internationale dans la pratique contemporaine (1975) 100–167.

J.C. STASSEN, Intervention in Internal Wars, Traditional Norms and Contemporary Trends, SAYIL, Vol. 3 (1977) 65–84.

EIBE H. RIEDEL

REGION OF WAR *see* War, Theatre of

RELIEF ACTIONS

1. Introduction; Historic Development

Modern communications tend quickly to spread news of disasters and the consequent human suffering around the world. The sympathy and compassion thus aroused have led to many relief actions being started to help the victims of such disasters. Disasters may be natural, i.e. earthquakes, floods, hurricanes, or man-made, e.g. major explosions, oil spills, fires or the consequences of → armed conflicts (→ Humanitarian Law and Armed Conflict). Early examples of an international relief action in favour of a disaster-stricken population were those undertaken in Messina (1908) and in Tokyo (1923), after earthquakes.

Since ancient times, civilian populations have suffered the effects of → blockades and → sieges (→ Civilian Population, Protection). Modern armed conflicts affect civilian populations to a much greater extent than in earlier times by causing destruction which is not limited to → military objectives and, further and probably more importantly, disrupting the normal chains of supply of goods and services on which life in a highly developed society depends. The effects in underdeveloped societies, where the satisfaction of basic needs is in jeopardy anyway, are graver still. Hence have come the enormous relief measure requirements posed by the effects of recent armed conflicts on civilian populations. Frequently, people are driven out of their homes and become → refugees and prisoners; → prisoners of war and internees may also be in need of outside help (→ Internment).

Relief actions for the victims of the → Spanish Civil War were the first major example of international relief in armed conflict. During World War II, relief actions were undertaken by the → International Committee of the Red Cross (ICRC), first in aid of the population in occupied territories, and later also within the territory of the belligerent countries themselves (→ Occupation, Belligerent). Since World War II, armed conflicts have deprived people of the most basic requirements for sustaining life, often in the world's poorest areas, where relief actions of unprecedented dimensions have had to be undertaken (e.g. Biafra, Bangladesh, Kampuchea). Major natural disasters, especially earthquakes, have also prompted important relief actions in recent years.

The problem of relief, nowadays, does not lie in a lack of sympathy or good will: Insufficient information leads to the wrong sort of help being

offered, and the national pride of certain recipient States does not allow them to admit their inability to cope with the consequences of a disaster. In times of armed conflict, the fear of one side that relief provided to the other side might influence the outcome of the conflict constitutes a major obstacle to relief actions. In addition, a number of practical problems (e.g. entry formalities for persons and goods, uncooperative local authorities, corrupt distribution practices) make relief actions difficult.

2. *Development of International Regulations*

Attempts to provide a legal framework for the provision of international relief were first made in the 1920s (e.g. → Refugees, League of Nations Offices). Proposals were made, and resolutions adopted, at various Red Cross Conferences to ease the restrictions caused by blockades and sieges for access to certain vital supplies, especially medicaments, for blockaded and besieged areas. In 1927, the International Relief Union was founded, an international organization whose purpose was to grant relief to populations striken by disasters caused by *force majeure*. The activities of that organization were not, however, continued after World War II. It was formally dissolved in 1967. The → United Nations Economic and Social Council has dealt with questions of relief on several occasions. In 1971, the → United Nations General Assembly passed a resolution on the relief question (Res. 2816 (XXVI)) and established the office of the United Nations Disaster Relief Coordinator (UNDRO). His task is to promote better relief preparedness in disaster-prone areas and to coordinate disaster relief activities within the → United Nations family. Major relief actions have also been undertaken by the United Nations High Commissioner for Refugees (UNHCR) (→ Refugees, United Nations High Commissioner) and the United Nations International Children's Emergency Fund (UNICEF) (→ United Nations Children's Fund).

As to regional intergovernmental organization, the → Organization of American States has established an Interamerican Fund for Assistance in Emergency Situations. Proposals made in the → Council of Europe for a European convention on relief have so far not led to any significant action.

A major framework for granting and coordinating relief is the International Red Cross. The bases of these actions are the internal rules of the → Red Cross, such as the relevant resolutions of International Red Cross Conferences, as well as the → Geneva Red Cross Conventions and Protocols, analyzed in greater detail below. An agreement between the ICRC and the League of Red Cross Societies provides for a distribution of tasks between the two institutions. While the ICRC is mainly responsible for relief in times of armed conflict, the League takes the lead with respect to relief in cases of natural disasters. The main function of the League in these cases is the transmission of requests or other information on disasters to national Red Cross societies which are in a position to undertake relief actions or provide relief supplies, and the coordination of such relief.

As to relief actions in times of armed conflict, provisions for relief in favour of interned persons or prisoners of war have a long tradition (Art. 54 of the Brussels Declaration of 1874, Arts. 15 and 58 of the 1899 and 1907 Hague Regulations annexed to Conventions II and IV respecting the Laws and Customs of War on Land, Art. 12 of Hague Convention V of 1907 (→ Hague Peace Conferences of 1899 and 1907), Art. 98 of Geneva Convention II of 1929, Arts. 72 and 73 of Geneva Convention III of 1949, and Arts. 108 to 110 of Geneva Convention IV of 1949). With respect to relief in favour of the civilian population, Geneva Convention IV of 1949 contains two different regulations, one on relief in case of a siege or blockade (Art. 23), and another for relief in favour of the population of occupied territory (Arts. 59 to 62). While the provisions concerning occupied territory are considered to be *grosso modo* satisfactory, Art. 23 contains regrettable restrictions on relief action. In addition, Convention IV contains no provision on relief for the population in other cases (non-occupied and non-besieged territory). These lacunae and deficiencies have been remedied by the 1977 Protocol I additional to the Geneva Conventions of 1949. In the case of a non-international armed conflict, Art. 3 common to the 1949 Geneva Conventions provides that an impartial humanitarian body "may offer its services to the Parties to the

conflict". This includes the permission to offer relief actions. Art. 18 of the 1977 Protocol II additional to the Geneva Conventions adds that relief actions shall be undertaken "subject to the consent of the High Contracting Party concerned".

3. Pre-Disaster Obligations

There is no general or regional international framework treaty on relief. Thus, no rule prescribes that States must prepare for cases of disaster, be it as potential donors or potential victims, although many resolutions of international organizations call for better disaster preparedness. The international institutions of the Red Cross, however, are under a duty to be prepared to fulfil their role in case of disaster. It is also one of the tasks of the United Nations Disaster Relief Coordinator to promote technical cooperation for disaster preparedness and prevention in → developing States. A number of countries have established special disaster relief units which are prepared and equipped to provide relief in foreign countries.

4. Initiation and Acceptance of Relief Actions

Relief actions may be undertaken by States, by international organizations (within the limits of the functions attributed to them by their constituent documents), by the ICRC, by international → non-governmental organizations, in particular the League of Red Cross Societies (other examples: Caritas Internationalis, International Union for Child Welfare, Oxfam, World Council of Churches), and private organizations not of an international character, such as national voluntary aid societies. The following considerations concerning the right to undertake or the duty to accept relief actions apply mainly to actions undertaken by States and organizations having international personality (which includes the ICRC).

As relief often involves questions of national pride, it is not a matter of course that any State is entitled to offer relief. A possible limit to the right to offer relief is the duty not to intervene in the internal affairs of another country (→ States, Sovereign Equality). But the offer of relief which is really needed, and which is granted without any political strings cannot constitute an illegal → intervention.

As to whether there is not only a right, but also a duty to offer relief, a distinction must be made between times of peace and times of armed conflict. In times of peace, there is no legal obligation for a country to undertake, or to contribute to, relief actions in favour of another country (except in cases of specific bilateral agreements, in particular concerning disasters in border areas). The concepts of international solidarity and the international protection of → human rights are discussed as a possible basis for such an obligation, but it cannot be proven that the moral obligation which may be derived from these principles has developed into a legal one (→ Human Rights and Humanitarian Law).

In times of armed conflict, Geneva Convention IV does not provide for an obligation to undertake relief actions. Art. 70 of Protocol I and Art. 18 of Protocol II, however, provide that under certain conditions, relief actions "shall be undertaken". This, it is submitted, implies a duty for those parties to the Protocols which are in a position to do so to undertake relief actions in favour of a stricken country or at least to contribute to them. The generality of the formula used in the article would be reduced to an unjustified extent if it were merely interpreted as an obligation of a potential recipient to accept relief (→ States, Fundamental Rights and Duties).

As to the duty to accept relief, a distinction must also be made between times of peace and times of armed conflict. In times of peace, it is still doubtful whether, and if so to what extent, such a duty exists. Cases are reported where offers of relief have been rejected, and available information does not reveal whether it has been argued that such rejection was illegal. It also seems difficult or at least premature to argue first that there is a general principle of the internal law of States requiring them to maintain the basic living conditions of their citizens, and then that this principle leads to corresponding international obligations of the States as a general principle "of law recognized by civilized nations" by virtue of Art. 38(1)(c) of the Statute of the → International Court of Justice. The best argument in favour of a duty to accept relief is that the obligation to promote the respect for human rights – and in

particular the duty under Art. 2 of the United Nations Covenant on Economic, Social and Cultural Rights to take steps with a view to achieving progressively the full realization of the rights recognized in that Treaty (→ Human Rights Covenants), which include the right to an adequate standard of living, the right to be free from hunger, and the right to health – implies an obligation to accept outside relief where otherwise the enjoyment of these rights is put in jeopardy (cf. → International Economic Order).

In times of armed conflict, Art. 59 of Geneva Convention IV clearly provides for an obligation of the occupying power to accept relief if the population of an occupied territory, in whole or in part, is inadequately supplied. As to non-occupied territory under the control of a party to the conflict, relief actions "shall be undertaken" (Protocol I, Art. 70, Protocol II, Art. 18(2)). This clearly implies an obligation to accept relief offers meeting the requirements mentioned in the article: The population must be inadequately supplied, that is to say, relief must be needed; the relief action must be humanitarian and impartial in character; and it must be conducted without any adverse distinction. The most important qualification is that this obligation is "subject to the agreement of the Parties concerned in such relief actions" (Protocol I, Art. 70). If the obligation stipulated in the provision is to have any meaning, a party is not free to refuse such agreement. It may do so only for valid and compelling reasons, not arbitrarily. In cases of non-international armed conflict, the same holds true for the consent of the established government to relief actions in favour of the civilian population in areas controlled by that government. As to the position of the adversary of the party receiving relief, considerations of neutrality have to be taken into account (→ Neutrality, Concept and General Rules). Relief offers have to be "impartial". But the fact that a relief action only benefits one party to a conflict in need does not make that action "partial", nor does it constitute an unneutral service.

Except in transit cases, the agreement of the adversary of the party which is to receive relief is not necessary. Art. 70 of Protocol I provides that relief actions shall be undertaken "subject to the agreement of the Parties concerned". It seems beyond argument that the "Parties concerned" are only the one furnishing, the one receiving, and the one providing transit for relief. Art. 18(2) of Protocol II, however, requires "the consent of the High Contracting Party concerned". This has been interpreted as requiring the consent of the established government in any case where insurgents receive relief, even if the relief consignments do not have to pass through areas effectively controlled by that government. It is submitted, however, that the better interpretation is the one which provides a solution parallel to the one obtaining in an international conflict: that a party is "concerned" only where relief has to pass through territory controlled by it. If one does not accept this interpretation, the duty that relief actions "shall be undertaken" would apply to the established government and that government is under an obligation to grant its consent. This duty is strengthened by Art. 14 of Protocol II which forbids the starvation of civilians as a method of combat. A refusal also may not be based on the argument that the proposed relief action, if it is of an exclusively humanitarian and impartial nature, constitutes an intervention in the internal affairs of the country. It would be absurd to consider actions which are obligatory for the parties concerned as an illegal intervention.

5. Transit of Relief

In times of peace, the considerations presented above as to the duty to undertake relief actions apply also to the transit of relief. However, a refusal to grant the right of transit may be at least regarded as an → unfriendly act.

In times of armed conflict, elaborate rules exist. A right of free passage is established by Art. 59 of Geneva Convention IV (concerning relief for occupied territory) and Art. 70(2) of Protocol I (concerning relief for non-occupied territory). The latter provision replaces the restrictive conditions for transit of relief supplies contained in Art. 23 of Convention IV. The parties granting free passage may prescribe certain technical arrangements (including search in order to be satisfied that the relief consignments are indeed what they are declared to be), but they may not divert them from their purpose nor delay them, except in case of urgent necessity in the interest of the civilian population concerned. They may also make their

permission conditional on certain arrangements concerning the final distribution of relief.

6. *Execution of Relief Actions*

The execution of relief actions involves a number of problems, *inter alia*: conditions of entry of relief supplies and their distribution, the rights and duties of the organization or State furnishing relief in the receiving country (i.e. their privileges and immunities, freedom of movement and communications), the status of relief personnel (i.e. their conditions of entry, privileges and immunities, protection), financial questions, reparation of → damages, liaison and settlement of disputes, coordination between various donor countries or organizations. In times of peace, only a few general rules are relevant to these questions, such as rules on the status of international organizations (e.g. their privileges and immunities; → International Organizations, Privileges and Immunities), and of States (→ Sovereign Immunity) and of their agents (→ Diplomatic Agents and Missions, Privileges and Immunities), as well as those on international responsibility (→ Responsibility of States: General Principles). To the extent that such general rules do not apply, or do not provide adequate solutions, solutions must be found by agreement between the parties concerned.

In times of international armed conflict, most of the general rules mentioned remain relevant. In addition, some specific rules are contained in Geneva Convention IV and Protocol I. The receiving party is under a duty to facilitate relief actions "by all means at its disposal" (Convention IV, Art. 59, concerning the occupying power) or to "protect relief consignments and facilitate their rapid distribution" (Protocol I, Art. 70(4)). In the case of relief actions undertaken by the ICRC, the League of Red Cross Societies, national Red Cross or other voluntary aid societies, the duty of the receiving State to grant assistance and cooperation results from Art. 81 of Protocol I. Convention IV (Art. 69) provides for the exemption of relief consignments from all taxes, charges and customs duties (→ Customs Law, International). The distribution in occupied territory shall be made with the cooperation and under the supervision of the → protecting power, or another neutral power, the ICRC or another impartial humanitarian body. In the case of non-occupied territory, supervision of distribution by the protecting power can be required as a condition of granting transit. The parties concerned shall encourage and facilitate effective international coordination of relief actions (Protocol I, Art. 70).

Relief actions may be accompanied by personnel, if necessary, subject to the agreement of the receiving party (Protocol I, Art. 71). They are to be respected and protected and are entitled to the assistance of the receiving State in carrying out their work (→ Protected Persons). Temporary limitations on their activities and freedom of movement are only permissible in case of imperative → military necessity. On the other hand, personnel in relief actions must abstain from any activity incompatible with, or exceeding the terms of, the action's humanitarian mission, and must respect certain security requirements of the receiving party. Persons violating this obligation may be declared *persona non grata*.

Relief actions may also take the form of medical assistance. In this case, they are to be respected as medical units and their personnel as medical personnel (→ Wounded, Sick and Shipwrecked; → Medical Transportation).

7. *Relief for Prisoners of War and Internees*

Prisoners of war and internees are entitled to receive individual or collective relief shipments containing, in particular, food-stuffs, clothing, medical supplies and articles of a religious, educational or recreational character. These shipments shall be exempt from import, customs and other duties, including postal fees. A protecting power or the ICRC may arrange for the transportation of such shipments, if necessary. The distribution of collective shipments has to be made by prisoners' representatives, if they so demand.

Convention and Statute establishing an International Relief Union, July 12, 1927, LNTS, Vol. 135 (1932–1933) 247–273.

UN GA Res. 2675 (XXV) of December 9, 1970; 2816 (XXVI) of December 14, 1971; 3243 (XXIX) of November 29 1974; 3440 (XXX) of December 9, 1975; 31/173 of December 21, 1976; 32/56 of December 8, 1977; 33/22 of November 29, 1978.

ECOSOC Res. 2102 (LXIII) of August 3, 1977; 1978/41 of August 1, 1978; 1979/59 of August 3, 1979.

Res. XXIV, XXV and XXVI of the 21st International Conference of the Red Cross, Istanbul, September 1969.

League of Red Cross Societies, Red Cross Disaster Relief Handbook (1976).

League of Red Cross Societies, Results of Appeals Launched and the Main Emergency Relief Actions Co-ordinated by the League of Red Cross Societies (1919 to date).

Bericht des Bundesrates an die Bundesversammlung betreffend die Schaffung eines Freiwilligenkorps für Katastrophenhilfe im Ausland, 11 August 1971. [Swiss] Bundesblatt, 1971 II, 493–515.

C. GEORGE, L'Union internationale de secours (1938).

J. PICTET (ed.), The Geneva Conventions of 12 August, Commentary 1949, 4 vols. (1952–1960), esp. Vol. 4, 191–198, 343–354.

M. BOTHE, Rechtsprobleme humanitärer Hilfsaktionen zugunsten der Zivilbevölkerung bei bewaffneten Konflikten, in: D. Fleck (ed.), Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte (1973) 24–80.

E. VITTA, Le azioni internazionali di soccorso umanitario, in: Studi in onore di Giorgio Balladore Pallieri, Vol. 2 (1978) 658–670.

R. SOCINI LEYENDECKER, Le azioni di soccorso nel diritto internazionale umanitario (1979).

International Law Association, Comité de droit médical et humanitaire, Rapport spécial sur un projet d'accord-type relatif aux actions de secours humanitaires, Report of the 59th Conference, Belgrade (1980).

International Institute of Humanitarian Law, Congress on International Solidarity and Humanitarian Actions, San Remo, September 1980 (1980) esp. 165–204, 363–374.

M. BOTHE, K.J. PARTSCH and W. SOLF, New Rules for Victims of Armed Conflicts (1982) 426–439, 693–697.

MICHAEL BOTHE

REPARATIONS

1. Doctrine and Practice prior to World War I

In ancient times it was the lot of vanquished peoples to pay tribute to the victors. The duty to pay war indemnities derives from this custom. Since around the end of the 18th century victors have almost always obtained indemnities from their defeated foes. These indemnities were intended to cover the victor's war costs.

Towards the middle of the 16th century Vitoria held the victor to be entitled to impose a tribute on the vanquished, which should not only constitute a → reparation for internationally wrongful acts, but should also serve as punishment and atonement. Gentilis held the victor entitled to recover its war costs (→ History of the Law of Nations). Many modern authors, without going into details, admit a right to war indemnities. Their view is that the victorious State is entitled to demand payments covering its general war costs after exhaustion of its own resources. However, these authors object to the excessive war indemnity claims that appear in numerous → peace treaties. In addition to the view of indemnities as a means of refunding the victor his general war costs, there is also a school of thought which sees indemnities as reparation for the commission of → war crimes and → internationally wrongful acts.

2. Reparation Clauses in the Peace Treaties of 1919

After World War I the Allies replaced the term "war indemnity" by "reparations" (→ Versailles Peace Treaty (1919); → Neuilly Peace Treaty (1919); → Trianon Peace Treaty (1920); → Lausanne Peace Treaty (1923)). The Allies thereby sought to give expression to their aim of making the vanquished pay for all the damage caused to their civilian population, including damage caused by lawful acts of warfare. The Allies also required the Central powers to refund pensions paid to Allied war victims, to cover expenditures incurred by the Allies for the maintenance of → prisoners of war and to pay for destroyed Allied-owned State Property "insofar as such property was not used for military purposes". In addition, Germany had to compensate Belgium for the war loans she issued. The Central Powers, especially Germany, considered these claims to be over and beyond the conditions listed in → Wilson's Fourteen Points. Yet the Allies held themselves morally entitled to bring these claims. They based these claims on Germany's exclusive responsibility for the outbreak of war (→ Responsibility of States: General Principles).

The Versailles Peace Treaty did not state the amount of reparations payable by Germany. This task was left to the Inter-Allied Reparation Commission. The Treaty did, however, provide for the delivery of the gold held by the Reichsbank, together with Germany's merchant fleet, external assets (→ Enemy Property) and patents. Germany was also required to furnish materials

for the devastated areas. The value of these deliveries was to be credited towards the reparation claims. Germany was required to compensate the German owners of the assets concerned. Moreover, the Treaty provided → sanctions for non-compliance with the duties thus imposed.

The transfer problem (→ Payments, International Regulation) was left open in general. The United States, having failed to ratify the Versailles Peace Treaty, obtained their title to reparations in the → Germany-United States Peace Treaty of 1921. Some of the measures against German external assets and patents were rescinded at a later date. The United States in particular released individual German assets valued at $10000 or less.

The amount and the modalities of payment of German reparations became the object of tough bargaining between the Allies and Germany in numerous conferences. These problems were complicated by the link existing in fact, though not in law, between German reparations and Inter-Allied war debts, payable mainly to the United States. In conferences between 1920 and 1924 France tried to obtain Germany's full compliance with the reparation duties she had assumed at Versailles. The peak of this effort was her occupation of the Ruhr in January to September 1923, beyond the borders of the Rhineland already occupied by the Allies to ensure such compliance (→ Rhineland Occupation after World War I). By 1924 Great Britain and the United States had come to the fore with their efforts to find a compromise between full satisfaction of the reparation claims and Germany's ability to pay. The → Dawes Plan of 1924 provided the payment of annuities by Germany to the Allies. The total amounts were left open for the time being and the annuities were to be related to Germany's ability to pay. The Allies were to use these Reichsmark remittances for purchases in Germany. Insofar as such purchases might endanger the German curreny, the Allies were to invest these amounts in Germany.

Since the results of the Dawes Plan were unsatisfactory, the Hague Conference of 1930 replaced it with the → Young Plan. This plan was the first to be elaborated with the participation of German experts. The Young Plan established the total amount of reparations to be paid by Germany in 59 non-variable annuities in foreign currency via the → Bank for International Settlements. The plan provided for the possibility of a → moratorium concerning the transfer and payment of some of these annuities. The Young Plan as well as the Dawes Plan were linked with loans to the German Reich. A part of the Young Plan annuities was paid out of these loans, thus becoming "privatized".

The world economic crisis of 1931 (which goes back to the stock market crash in New York on October 25, 1929) led to a one-year moratorium concerning international payments (the so-called Hoover moratorium). The Lausanne Conference of 1932 ended reparation payments by Germany upon her delivery to the Bank for International Settlements of redeemable bonds in the amount of 3000 million Reichsmarks (→ Lump Sum Agreements); moreover, Germany was required to continue servicing the Young and Dawes loans. The amounts in reparations actually paid over by Germany were estimated by the Allies at 21807 million Goldmarks; according to German estimates, the total amounted to 67673 million Goldmarks.

The reparations required of Germany's Allies in World War I were settled in the relevant peace treaties on a similar basis, i.e. the seizure of external assets, the provision of materials, and the payment in instalments of a total amount to be determined subsequently by the Reparation Commission. The reparations imposed on Turkey by the Sèvres Peace Treaty were cancelled by the Lausanne Peace Treaty of 1923. In 1923 Austria obtained a 20 years' moratorium on reparation payments. These were cancelled altogether by the Hague Conference of 1930. The same conference linked the settlement of the outstanding reparations due from Hungary to the solution of the Optants Dispute (→ Hungarian-Romanian Land Reform Dispute) and further reduced the amount of reparations required of Bulgaria.

3. Reparations after World War II

The imposition of reparations after World War I provided an unsatisfactory experience to all concerned. World trade currents were disturbed to such a degree that → reparations after World War II followed another pattern. In the → London Agreement on German External Debts of

1953, the Federal Republic of Germany agreed to resume servicing the Young and Dawes loans. However, the creditors took account of the fact that the territory of the Federal Republic of Germany was considerably smaller than that of the German Reich (→ Germany, Legal Status after World War II) and therefore agreed to waive parts of their claims (→ Waiver). When a dispute arose regarding replacement of the gold clause in the original Young Loan with currency clauses, the Arbitral Tribunal on German External Debts held that the terms agreed in 1953 should be interpreted in the light of the economic conditions then prevailing (→ Young Plan Loans Arbitration).

J.M. KEYNES, The Economic Consequences of the Peace (1920).
J.M. KEYNES, A Revision of the Treaty (1922).
H. BERGMANN, Der Weg der Reparationen (1926).
KASTL-LIESMANN, Das Transferproblem (1926).
H. BERGMANN, Deutschland und der Young-Plan (1930).
M. SERING, Deutschland unter dem Dawes-Plan (1930).
H. SCHACHT, Das Ende der Reparationen (1931).
R. CASTILLON, Les réparations allemandes, Deux expériences, 1919–1932, 1945–1952 (1953).
B. GRAEFRATH, Zur Geschichte der Reparationen (1954).
H. JANSSEN, The Return of Seized Private Property to German, Austrian and Hungarian Nationals in 1928 (1955).
B. GESCHER, Die Vereinigten Staaten von Nordamerika und die Reparationen 1920–1924 (1956).
D. ARTAUD, La question des dettes inter-alliées et la reconstruction de l'Europe (1917–1929) (1978).
H.J. RUPIEPER, The Cuno Government and Reparations 1922–1923 (1979).
M. TRACHTENBERG, Reparation in World Politics, France and European Economic Diplomacy, 1916–1923 (1980).

IGNAZ SEIDL-HOHENVELDERN

REPARATIONS AFTER WORLD WAR II

1. German Reparations

(a) Common Allied actions

The problem of → reparations was raised for the first time in World War II at the Quebec Conference of 1944. The Conference discussed the Morgenthau Plan, which proposed to reduce Germany to an agrarian State, to dismantle German industry and to seize German external assets for reparation purposes. At the → Yalta Conference (1945) the Allies agreed on the principle of exacting reparations from Germany. So as to avoid transfer problems such as those which occurred regarding reparations after World War I, reparations were to be furnished in kind: (a) by the dismantling of German industries; (b) by deliveries to be taken from German current production; and (c) by use of German labour in Allied countries. The aim of this reparation policy was not only to obtain compensation for damages suffered as a result of the war (→ War Damages). The dismantling was intended to weaken Germany's industrial power, and hence, its potential for waging war. It was also to act as a safeguard against her possible future → aggressions.

Details concerning reparations were to be worked out by an Inter-Allied Reparations Commission. Preference was to be given to the claims of the States which had suffered the most during the war. The United States and the Soviet Union proposed to exact reparations of $20 000 million, half of which was to go to the Soviet Union. The United Kingdom objected to this proposal

The → Potsdam Agreements on Germany of August 2, 1945 decentralized the collection of reparations, although according to that Agreement Germany was to be treated as a single economic unit. By this decentralization, which foreshadowed the coming East-West partition of Europe, the Allies overcame the difficulty presented by the Soviet Union's seizure and dismantling of certain assets in its zone of occupation (→ Germany, Occupation after World War II). The Soviet Union considered these assets as war booty (→ Booty in Land Warfare), whereas the United States maintained that they should have been considered as satisfaction of part of the reparations due to the Soviets. In Potsdam the Soviet Union was granted the exclusive right to exact deliveries from current production and to dismantle industries in its zone of occupation, as well as the right to all German external assets in Bulgaria, Finland, Hungary, Romania and in the Eastern part of Austria. The Soviet Union was, moreover, to be entitled at no cost to a ten per cent share of the industrial equipment dismantled in the Western zones of occupation and to a further fifteen per cent in exchange for an

equivalent value in raw materials. The Soviets agreed to settle the reparation claims of Poland out of its own share of reparations (Soviet-Polish Agreement of August 16, 1945). The reparation claims of the Western Allies were to be satisfied out of assets in their own zones of occupation and by German external assets in the rest of the world, including assets in neutral countries.

At a meeting of the Reparations Commission in Moscow (June/July 1945) it had been agreed that reparations should be taken out of current production, and only after the occupation costs, the subsistence of the German population, and German imports had been paid for out of such production. The Western Allies and the Soviet Union soon disagreed on this point. They also differed on other aspects of the reparations issue, for example whether certain goods taken by Germans prior to 1945 should be considered as German external assets or as belonging to their former non-German owners (→ Restitution).

(*b*) *Reparations in the Western occupation zones and in the Federal Republic of Germany*

The Paris Reparation Agreement of January 14, 1946 (UNTS, Vol. 555, p. 69) was intended to establish a uniform reparation policy on the distribution of the Western share of reparations among all the Allies, excluding the Soviet Union and Poland. The agreement did not establish the total amount of reparations to be exacted, nor did it set any time-limits for reparation measures. The agreement merely provided for the distribution of assets as they came in, a process which was to be handled by an Inter-Allied Reparation Agency.

The return of monetary gold which Germany had taken from occupied countries was entrusted to a Tripartite Claims Commission consisting of one representative each of France, the United Kingdom and the United States (→ Monetary Gold Case; → Mixed Commissions).

The plan adopted on March 27, 1946 by the Allied Control Council in Germany for the dismantling of German industries was intended to reduce German overall industrial production to 50 per cent of the pre-war level and German steel production even further, namely, to 30.5 per cent of that level. The dismantling of German industries in the Western zones was scaled down between 1947 and 1949. Transfer of a share of the dismantled equipment to the Soviet Union was discontinued by 1947 as, according to the Western Allies, she had already exacted the equivalent reparations out of current production and by dismantling in excess of the limits agreed upon. Radical dismantling of German industry also appeared inconsistent with the Federal Republic of Germany's participation in the → European Recovery Programme.

In Chapter VI of the Convention on the Settlement of Matters arising out of the War and the Occupation (the "Settlement Convention"; → Bonn and Paris Agreements on Germany (1952 and 1954)), France, the United Kingdom and the United States kept open the reparations problem, which was to "be settled by the peace treaty with Germany and its former enemies or by earlier agreements concerning this matter". However, the Three Powers waived their right to exact reparations from current production. The dismantling of German industries had come to an end.

German external assets in neutral countries were obtained for the purposes of reparation after the original resistance of these countries had been overcome by the threat of freezing neutral assets held in Allied countries (Washington Agreements with Switzerland of May 25, 1946 and Sweden of July 18, 1945). The solution eventually adopted saw the release of parts of these assets to their German owners, and the consequent payment of a lump sum to the Inter-Allied Reparation Agency (e.g. the German-Swiss Agreement of August 26, 1952 and the German-Swedish Agreement of March 22, 1956). German assets in Austria were ceded to Austria in the → Austrian State Treaty of May 15, 1955, by the Soviet Union against Austria's payment of more than $200 million, and free of charge by the Western Allies. In the Austro-German Property Treaty of June 15, 1957, German property up to a value of 260 000 Schillings (at that time worth $10 000) was handed back to its former German owners, provided they were natural persons. Educational, cultural, charitable and religious German property was handed back without these restrictions. The Federal Republic of Germany obtained the release of these assets by concessions to Austria, mainly by acknowledging certain claims which had arisen during World War II by Austrian

nationals against German private debtors (see also → Austro-German Property Treaty (1957), Arbitral Tribunal).

In Chapter VI of the Settlement Convention the Federal Republic of Germany agreed to raise no objection to past or future measures dealing with German external assets seized for the purpose of reparation or restitution, and to ensure compensation to former owners of such assets. The Reparation Damages Law of February 12, 1969 (Bundesgesetzblatt, 1969 I, p. 105) granted compensation only to natural persons, subject to the principles of the Equalization of Burdens Law of August 14, 1952 (Bundesgesetzblatt, 1952 I, p. 446). Compensation thus remained well below the real value of the assets concerned. The Federal Constitutional Court (Decision of January 13, 1976, Entscheidungen des Bundesverfassungsgerichts, Vol. 41, p. 126) held this compatible with the property protection clause of the Basic Law of the Federal Republic of Germany. Payments equal to the total loss suffered by owners were impossible, as the interest of the Federal Republic as a whole had to be considered, and such payments might have led to State bankruptcy.

When the Inter-Allied Reparation Agency wound up its work in 1959, it valued the assets it had distributed at $530 million (at 1938 values). However, the Agency's rules of accounting allowed valuation below the real value of the goods concerned. The accounts of the Agency failed to reflect the full value of German patents, trade marks or copyrights, for which licences were granted by Allied States either free of charge or below their real value. The Agreement of September 10, 1952 (UNTS, Vol. 162, p. 205) between the Federal Republic of Germany and Israel also involved reparations in their wider sense. Parts of the DM 3450 million paid pursuant to this Agreement were destined for victims of anti-Jewish acts committed in German-occupied territories (→ Genocide), but these sums were not included in the Agency's accounts. In other cases as well, assets presumably taken as reparations were not reported to the Agency. Germany's total reparation effort thus by 1959 far exceeded the sum of $530 million.

In the → London Agreement on German External Debts of February 27, 1953, the Federal Republic agreed to resume service of the loans taken out by the German Reich to facilitate payment of the annuities on Allied reparation claims after World War I (→ Versailles Peace Treaty (1919); → Peace Treaties after World War I; → State Debts; → Young Plan). Germany failed to obtain in exchange either a waiver of further claims for reparations after World War II or the release of small German external assets in the United States, which she had won in post-World-War-I practice. The partners to the Agreement merely agreed to defer consideration of claims arising out of World War II made against Germany by countries which either were at war with or were occupied by Germany during the war (→ Occupation, Belligerent), and claims of their nationals, "until the final settlement of the problem of reparation". Similar claims by nationals and their countries which had not been at war with or occupied by Germany were to receive no better treatment without the prior agreement of France, the United Kingdom and the United States. Similar claims by Austria and by the States allied with Germany in World War II were waived by the Austrian State Treaty and by the → Peace Treaties of 1947, except to the extent that these treaties allowed their settlement (→ Peace Settlements after World War II). The provisional character of the decision to "defer the consideration" of all such claims is shown by the revision clause of Art. 25 of the Agreement, which provides for a review of the Agreement "on the reunification of Germany". The Agreement thus conforms to the provisions in the Bonn and Paris Agreements on Germany, reserving the final settlement of reparation questions for a → peace treaty with Germany.

The London Agreement was ratified by, *inter alia*, France, the United Kingdom and the United States. The fact that Austria, Finland, Greece, Israel, Liechtenstein, Luxembourg, Norway and Yugoslavia also ratified this Agreement had an influence on the outcome of claims brought by these States against the Federal Republic of Germany. The Soviet Union, Czechoslovakia and Poland did not adhere to the Agreement.

The London Agreement on German External Debts appears to have prevented those countries which ratified it from bringing further reparation claims against the Federal Republic "until the final settlement of the problem of reparation".

However, as evidenced in the Agreement, Germany's creditors considerably reduced even their commercial claims against Germany in order not to overtax her capacity to pay. The Agreement's clauses referring to claims arising out of the war can be construed as seeking to spare the Federal Republic from having to satisfy such claims, including those made by States which had not adhered to the Agreement.

The economic recovery of the Federal Republic of Germany far exceeded expectations held out for her in 1953. This fact encouraged countries which had been occupied by Germany to submit new claims, by-passing the reparations deferment clause of the Agreement. The Federal Republic acceded to some of these claims by paying the countries → lump sums in settlement of claims made by nationals who had been victims of National-Socialist persecutions. An Agreement with Poland of October 9, 1975 providing payment for a pensions and accident insurance, and two Agreements with Yugoslavia of October 16, 1956 and December 10, 1974 granting → economic aid, were motivated by a desire to settle claims arising out of past events. Yet on account of the deferment clause, the partners to these agreements declined to recognize these as reparation payments.

(c) *Reparations in the Soviet occupation zone and in the German Democratic Republic*

In the Soviet occupation zone in Germany as well as in the countries occupied by the Soviet Union, reparations were exacted out of current production and by dismantling at a rate alleged excessive by the Western powers. Other assets were claimed as war booty. After 1947 the Soviet Union stopped dismantling in favour of leaving the equipment in place and exploiting the firm concerned as a Soviet State enterprise, or investing its share of the equipment in a joint State enterprise between the Soviet Union and the State concerned. In the German Democratic Republic most of these enterprises subsequently became her own national enterprises ("volkseigene Betriebe"). In an Agreement of August 22, 1953 with the German Democratic Republic, the Soviet Union, with the consent of Poland, waived all further reparation claims against "Germany" as of January 1, 1954. A Polish Declaration made when she signed the Warsaw Treaty with the Federal Republic of Germany on December 7, 1970 confirmed that this Polish waiver of 1953 had put an end to Polish reparation claims against the Federal Republic of Germany.

2. Reparations in the Peace Treaties of 1947

The Allied Peace Treaties with Bulgaria, Finland, Italy, Romania and Hungary provided for reparations of $360 million by Italy, of $300 million by Finland, Hungary and Romania, and of $70 million by Bulgaria. Payment was to be made in kind over several years. Italy was allowed to value the goods at current world market prices; the other countries had to use 1938 world market prices, increased by a certain percentage. The Peace Treaty with Italy further provided that deliveries from current production should not endanger Italian economic reconstruction. Parts of these reparation claims were subsequently forgiven. Only Finland has paid its reparations in full.

3. Japanese Reparations

Prior to the → Peace Treaty with Japan (1951), Japanese excess industrial capacities were dismantled for reparation purposes. This Advance Transfer Program was discontinued in 1949. The Peace Treaty provided for the satisfaction of reparation claims out of Japanese external assets, deliveries in kind and the furnishing of services. All States parties which had not been occupied by Japan waived their reparation claims, as did India and Nationalist → China in their separate peace treaties of June 9, 1952 and of April 28, 1952, respectively, and the Soviet Union in a Joint Declaration of October 1956. Japanese external assets in neutral countries were allotted for distribution to the International → Red Cross. Japan concluded bilateral Reparation Agreements with Burma on November 5, 1954 (UNTS, Vol. 251, p. 215), with the Philippines on May 9, 1956 (UNTS, Vol. 285, p. 3), with Indonesia on January 20, 1958 (UNTS, Vol. 324, p. 247), and with South Vietnam on May 13, 1959 (UNTS, Vol. 373, p. 101). The Agreements provided for the furnishing of equipment for the industrialization of the recipient country and for services. Assets thus transferred were not to be exported to third

countries. The Agreements also provided for the training of personnel from the recipient countries. In addition to these commitments, Japan also paid "quasi-reparations" to Laos and Cambodia, which formally had waived their rights to reparations. The aim of all these agreements was to promote the development of the recipient countries. Thus, some of the commitments concerned were continued as development aid after the agreements had been fulfilled.

O. BÖHMER, K. DUDEN and H. JANSSEN (eds.), Deutsches Vermögen im Ausland, Internationale Vereinbarungen und ausländische Gesetzgebung, 3 vols. (1951–1955).

G.J. ROOS, Zur Konfiskation privater deutscher Auslandsvermögen (1956).

G. ERLER, Das Rechtsproblem der Bundesentschädigung für innerdeutsche Reparationsdemontagen (1958).

T. VEITER, Die Rechtsstellung des fremden, insbesondere des deutschen Privateigentums in Österreich (1958).

G. PLÖCHL and J. VLCEK, Die Rechtsvorschriften über das deutsche Eigentum in Österreich samt den einschlägigen Nebenbestimmungen (1959).

F.A. MANN, Zum Privatrecht der deutschen Reparationsleistung (1962).

I. SEIDL-HOHENVELDERN and H.P. IPSEN, Entschädigungspflicht der Bundesrepublik für reparationsentzogenes Auslandsvermögen (1962).

B. WOLFF, Zur Frage der Abgeltung von Reparationsschäden unter besonderer Berücksichtigung der Entstehungsgeschichte des Sechsten Teils des Überleitungsvertrages (1963).

D. ANGEL, Réparation en vertu du traité de paix avec l'Italie, Thesis, University of Geneva (1967).

K. PFEIFFER, Gleichheitsgrundsatz und Reparationsentschädigung (1968).

I. SEIDL-HOHENVELDERN, La réparation des dommages subis par les nationaux à l'étranger à la suite de bouleversements politiques, Revue internationale de droit comparé, Vol. 21 (1969) 763–778.

H. SEIFERT, Die Reparationen Japans (1971).

B. KUKLICK, American Policy and the Division of Germany, The Clash with Russia over Reparations (1972).

K. SCHWERIN, German Compensation for Victims of Nazi Persecution, Northeastern University Law Review, Vol. 67 (1972) 479–527.

H. RUMPF, Die deutsche Frage und die Reparationen, ZaöRV, Vol. 33 (1973), 344–369.

P.H. OSSENBACH, Reparationsschäden und Eigentumsschutz gemäß dem 1. Zusatzprotokoll zur Europäischen Menschenrechtskonvention, Thesis, University of Cologne (1976).

H.J. HAHN, Staatsvertraglicher Verzicht auf Vermögensrechte und verfassungsrechtlicher Eigentumsschutz, in: Festschrift für H. Ranshofer (1977) 59–76.

H.D. KREIKAMP, Deutsches Vermögen in den Vereinigten Staaten (1979).

O. NÜBEL, Die amerikanische Reparationspolitik gegenüber Deutschland (1980).

G. ZIEGER, Das Thema der Reparationen im Hinblick auf die besondere Lage Deutschlands, Recht der Internationalen Wirtschaft, Vol. 26 (1980) 10–19.

IGNAZ SEIDL-HOHENVELDERN

REQUISITIONS

1. Concept; Sources

The power to requisition denotes the right of an occupant State (→ Occupation, Belligerent), to use the resources of the occupied territory and the services of the persons subject to the occupation régime for the maintenance of its military forces, in return for cash compensation or against the issuance of a receipt. In a broader sense, this power of the occupant State is the corollary to its obligation to preserve → public order and safety in the occupied territory and to ensure food and medical supply of the population (cf. Art. 43 of the Hague Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907, and Art. 55 of Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War (→ Hague Peace Conferences of 1899 and 1907; → Geneva Red Cross Conventions and Protocols; → War, Laws of).

Historically, the rules governing requisitions developed in the 18th century, only after international law had recognized the protection of private property (→ Enemy Property) during wartime. Previously, under the old maxims "warfare pays for itself" and "*vivre sur l'ennemi*", the military forces had been permitted to take enemy private property wherever and whenever it was found in war (→ War, Laws of, History). The modern rules applicable to requisitions developed in response both to the tendency favouring protection of private property and to the problems which had arisen for the occupant State when persons in the occupied territory attempted to prevent loss of their property and uncompensated use of their personal services.

Rules relating to the power of requisitioning were included in the first modern documents

attempting a regulation of the laws of war (see e.g. Art. 38 of the Instructions for the Government of Armies of the United States in the Field of 1863 (Lieber Code); Art. 42 of the Final Protocol on the Project of an International Declaration concerning the Laws and Customs of War signed in Brussels in 1874; and Arts. 54 to 60 of the Oxford Manual adopted in 1880 by the → Institut de Droit International). The Hague Conventions of 1899 and 1907 led for the first time to broadly accepted written rules regarding requisitions; these rules must today be considered as reflecting → customary international law. They were further developed in the 1949 Geneva Conventions and the 1977 Protocols thereto.

2. Requisitions in Kind; Requisition of Services

Art. 52 of the Hague Regulations of 1907 provides for requisitions in kind and requisition of services. Thus, the occupant State has the power to acquire title to the property, the power to use property for a limited time, and the power to requisition the services of the persons subject to the occupation régime.

Whenever the occupant makes use of the power to requisition, it subjects the person affected to its occupation power. Inasmuch as transactions are made in the form of contracts (sales, leases, service agreements), the rules on requisition are inapplicable. However, a use of the power to requisition must be assumed when the occupant leaves the person affected no choice about the transaction as such, even though it negotiates over some of its elements.

(a) Requisitions in kind. The fact that the power to requisition is limited to the duration of the occupation implies a certain limitation of the occupant State regarding the rights it may acquire. With regard to public property, Art. 55 of the Hague Regulations provides explicitly that the occupant State is regarded only as administrator and usufructuary of real estate; this rule also governs the requisitioning of private property. With respect to movables, it is generally assumed that it is in the discretion of the occupant State whether it wants to acquire title of the property or whether it assumes only temporary control.

(b) Requisition of services. With regard to the requisition of services, Art. 52 of the Hague Regulations provides only that inhabitants are not to be involved in the obligation of taking part in the military operations against their own country. By the end of World War II it had become clear that additional safeguards were necessary in this context. Geneva Convention IV of 1949 attempts to prevent a recurrence of the occupation practices which characterized World War II. Thus, Art. 51 of that Convention generally prohibits compelling inhabitants to serve in armed or auxiliary forces of the occupant State; the term "armed forces" must be understood in a wide sense, but it permits assignment of work to police forces which are active in the public interest of the inhabitants or in fire brigades. Pressure and propaganda aimed at securing voluntary enlistment are no longer permitted (→ War, Use of Propaganda in). Moreover, only persons over 18 years of age may be forced to work. Art. 51 in this context repeats that the requisition of services may only serve the needs of the army of occupation and the interest of the inhabitants. With respect to the place at which the service is to be rendered, it is now agreed that the occupied territory itself forms the outer boundaries. If at all possible, a person is to keep his or her usual place of employment. The work must be proportionate to the physical and intellectual capacities of the persons concerned. Moreover, the labour laws in force in the occupied territory must be observed by the occupant State. Finally, the requisition of labour must not lead to a mobilization of workers in an organization of a military or even semi-military character.

The importance attributed to all these rules has been underlined in Art. 52 of Geneva Convention IV, which provides that the right of any worker to apply to the representative of the → protecting power for its intervention shall not be impaired.

3. General Limitations

(a) Needs of the army. All objects needed by an army are subject to the power of requisitioning, e.g. food, fuel, machines, industrial plants (for individual cases, see Greenspan, p. 300, and Friedman, p. 147). From this general rule, certain exceptions have been made in agreements reached after World War II. In particular, the care for the health of civilians in occupied ter-

ritory sets certain limits (→ Civilian Population, Protection). While Art. 54(3)(a) of the 1977 Protocol I additional to Geneva Conventions of 1949 permits the requisition of, *inter alia*, foodstuffs, crops and drinking water installations for use as sustenance by the army, Art. 54(3)(b) prohibits such removal, if it may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement. Art. 57 of Geneva Convention IV prescribes that civilian hospitals may be requisitioned only temporarily and only "in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation". (For similar regulations regarding buildings of aid societies, see Art. 16, para. 3 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field; and Art. 34 of its successor, Geneva Convention I of 1949; → Relief Actions; → Wounded, Sick and Shipwrecked.) Materials and stores of civilian hospitals cannot be requisitioned as long as they are needed for the civilian population. The protection of the civilian population has been further extended in Art. 14 of Additional Protocol I of 1977, according to which civilian medical units (as defined in Art. 8), their *matériel*, or the services of their personnel are to a large extent exempt from the power to requisition. Comparable regulations are found in Art. 63(4) of the same Protocol with regard to buildings or *matériel* belonging to or used by → civil defence organizations.

Beyond these specific limitations on the power to requisition, the occupant State must observe the restraints inherent in the general concept. Thus, cultural property is not considered as subject to requisition power (→ Cultural Property, Protection in Armed Conflict); moreover, luxury goods such as cigarettes or alcohol do not form a "need of the army" and cannot be requisitioned. The transfer of money is subject to the rules on → contributions, while → war materials are subject to treatment as → booty. Also, the general needs for the waging of war on the part of the occupant State, beyond the specific needs of the occupant army, may not be fulfilled by way of requisitions. Similarly, as pointed out in the → Nuremberg Trials, the general exploitation of the occupied territory for the purposes of the domestic economy of the occupant State cannot be justified by rules on requisitions.

To what extent the needs of family members of the military forces can be seen as "needs of the army" has not yet been entirely resolved. Neither is there a clear consensus on the applicability of the rules on requisition to those needs which arise during the preparations for the attack upon territory adjacent to the one occupied.

(b) → Proportionality to the resources of the country. Art. 52 of the Hague Regulations requires that requisitions be in proportion to the resources of the country occupied. This implies a limitation determined by a consideration of the needs of the civilian population and of the overall resources of the occupied territory. Art. 52 does not, however, imply that requisitions may take place only after the possibilities of the occupant army to be supplied by the home State have been exhausted.

As long as the needs of the civilian population are met, requisition is legitimate in so far as it is in proportion to the total resources of the occupied territory. If these needs are not met, the situation is reversed and the occupant State is under an obligation to ensure food and medical supplies to the fullest extent of the means available to it (Art. 55 of Geneva Convention IV); this requires a fair balancing of the needs of the occupant State and those of the persons subject to the occupation régime.

(c) Limitations of time and space. The laws on requisition are applicable when the territory is actually under the authority of the hostile army (Art. 42 of the Hague Regulations). Geographically, these laws apply within that territory where such authority has been established and can effectively be exercised; however, requisitions may also be demanded within the theatre of war (→ War, Theatre of). All objects situated within this territory are subject to requisition, regardless of the → nationality of their owners (with respect to railway material coming from neutral territory, see Art. 19 of the Hague Convention V of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; → Neutral Nationals).

4. Procedure

According to Art. 52 of the Hague Regulations, requisitions shall only be demanded on the authority of the commander in the territory occupied (for details, see Greenspan, p. 302). However, the occupant is also free to demand the cooperation of the local authorities; if this cooperation is refused, the occupant may use force in order to achieve compliance with its demands. However, Art. 23 of the (unadopted) Hague Rules of Air Warfare of 1923 (AJIL, Vol. 17, Supp. (1923) p. 245, Vol. 31, Supp. (1938) p. 1), prohibits aerial → bombardment for the purpose of enforcing compliance with requisitions (→ Air Warfare); see also Art. 3 of Hague Convention IX of 1907 concerning Bombardment by Naval Forces in Time of War (→ Sea Warfare).

5. Compensation

The very concept of requisitions is founded upon the rules governing the protection of private property during wartime. Nevertheless, the rules of international law with regard to the determination of State liability (→ Responsibility of States: General Principles) and the timing of compensation have remained unsatisfactorily vague (for examples of practice, see Wortley, pp. 97–98). Under Art. 52, para. 3 of the Hague Regulations, requisitions in kind shall "as far as possible" be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. This has been interpreted in practice to imply that the determination of State liability is to be made in the → peace treaty at the end of the → war. Not surprisingly, this has meant in effect that the defeated power is ultimately obliged to assume liability on the level of international law, regardless of its war status as occupant or occupied State.

State practice has not confirmed the rule enunciated in 1926 by the German-Greek Tribunal in the Karmutyacas case (Recueil des décisions des Tribunaux arbitraux mixtes, Vol. 12 (1926) p. 17), according to which requisitions are unlawful if not compensated by the occupant State immediately or as soon as possible after being made. During World War II, receipts for requisitions sometimes covered up instances of → pillage. And yet, the rules adopted in the Geneva Conventions still do not amount to a strict obligation on the part of the occupant State to pay compensation: "Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods" (Geneva Convention IV, Art. 55, para. 2). This vagueness is all the more regrettable since the assumption of liability on the part of the defeated power on the level of international law does not necessarily lead to compensation of the owners affected. In fact, it may only preclude claims on the part of the occupied State against the occupant State without at the same time compelling the occupied State to compensate the inhabitants affected.

With respect to the amount of compensation due, the practice in the 19th and the earlier 20th century was not entirely uniform (see the cases discussed in Staats, pp. 105–113), but there was a tendency to pay full market value. More recently, this issue has not been further clarified, having been overshadowed by the regulations agreed upon in peace treaties.

E. ALBRECHT, Requisition von neutralem Privateigentum, insbesondere von Schiffen (1912).

F. SCHOLZ, Privateigentum im besetzten und unbesetzten Feindesland (1919).

G. DAENIKER, Der Schutz des feindlichen Privateigentums in Landkrieg, Thesis, University of Zurich (1922).

B. SCHENK GRAF VON STAUFFENBERG, Vertragliche Beziehungen des Okkupanten zu den Landeseinwohnern, ZaöRV, Vol. 2, Part I (1931) 86–119.

E. FEILCHENFELD, The International Economic Law of Belligerent Occupation (1942).

L.H. WOOLSEY, The Forced Transfer of Property in Enemy Occupied Territories, AJIL, Vol. 37 (1943) 282–286.

M.K. WISE, Requisition in France and Italy (1944).

J. ROBINSON, Transfer of Property in Enemy Occupied Territory, AJIL, Vol. 39 (1945) 216–230.

D. GRABER, The Development of the Law of Belligerent Occupation 1863–1914 (1949) 192–256.

W. RENTROP, Requisitionen, Besatzungsschäden und ihre Bezahlung (1950).

S. FRIEDMANN, Expropriation in International Law (1953).

M. GREENSPAN, The Modern Law of Warfare (1959) 300–304.

B. WORTLEY, Expropriation in Public International Law (1959).

I. STAATS, Ausländisches Privatvermögen in der internationalen Rechtsprechung (1966) 102–118.

RUDOLF DOLZER

RESISTANCE MOVEMENTS

1. Definition

Resistance movements are groups of persons who take up arms and fight, usually by guerrilla methods, against an enemy occupant, without being formally incorporated into the army of the occupied country (→ Guerrilla Forces; → Occupation, Belligerent). This phenomenon assumed particular relevance during World War II, when in many countries under military occupation, in particular France, Italy and Yugoslavia, members of the population – also called partisans – engaged in belligerent hostilities against the regular armed forces of the occupant.

2. Legal Regulation before 1949

Traditional international law on this subject (→ Customary International Law) goes back to the Hague Regulations on Land Warfare of 1899 and 1907, annexed to Conventions II and IV respecting the Laws and Customs of War on Land (→ Hague Peace Conferences of 1899 and 1907; → Land Warfare). These regulations did not grant any special status to partisans fighting in a territory subject to military occupation. With regard to the invasion of enemy territory by one of the belligerents, that law only considered as lawful → combatants those inhabitants of an as yet unoccupied territory who, on the approach of the enemy, spontaneously took up arms to resist the invading troops without having had time to organize themselves (*levée en masse*). Under Art. 2 of the Hague Regulations, in this case the fighting population was entitled to belligerent status if they carried arms openly and respected the laws and customs of war (→ War, Laws of; → Armed Conflict, Fundamental Rules). Once the territory was occupied by the enemy, no military action by members of the civilian population was allowed or recognized as legitimate. Art. 43 stated that:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Consequently, martial law was applicable to partisans engaging in armed hostilities against the occupant.

3. Geneva Convention III of 1949

The spread of partisan warfare during World War II led the → International Committee of the Red Cross to suggest that new rules should be enacted on the international level in order to take account of the importance acquired by resistance movements, and to give them some type of international status in international → armed conflict (→ Geneva Red Cross Conventions and Protocols). As a result of the pressure of the ICRC, the Geneva Diplomatic Conference of 1949, after lengthy discussions (de Preux, Commentary on Art. 4, pp. 53–56), adopted a rule by which partisans were included among other lawful combatants. This rule was inserted into Geneva Convention III of 1949 relative to the Treatment of Prisoners of War, after the rejection of a proposal for a specific provision applicable only to resistance movements operating in occupied territory. Art. 4 A(2), includes among those who are to be considered as → prisoners of war after having fallen into the hands of the enemy, the following:

> "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war."

This provision effectively grants partisans combatant status and consequently entitles them to prisoner-of-war status on capture, on condition that they fulfil these stringent requirements, already provided for in Art. 1 of the Hague Regulations for → militias and volunteer corps.

In addition to these conditions, the Geneva Convention requires that a resistance movement belong to a party to the conflict; the link can be formal, e.g. expressed by a formal → recognition

or → declaration, or it can be *de facto*, as was the case during World War II, when the Allies indicated their support for certain resistance movements by delivering them arms, military equipment and other supplies (→ War Materials). Art. 4 also requires that the group of partisans be "organized"; this is a condition that only in part coincides with the requirement that the partisans be "commanded by a person responsible for his subordinates". The requirement of being "organized" means, *inter alia*, that the partisans should not be isolated groups of individuals fighting under a commander, but should also form a military organization embracing various fighting units and having a chain of command, however rudimentary, and an overall structure unifying the members of the resistance movement.

A careful examination of the various conditions laid down in Art. 4 A(2) was made in the Kassem case by the Israeli Military Court sitting at Ramallah (Judgment of April 13, 1969; ILR, Vol. 42 (1971) p. 470).

To compensate partly for the very stringent requirements that resistance movements must fulfil, Art. 4 A(2) broadens the notion of partisans as it evolved *de facto* in the course of World War II. Indeed, it grants belligerent rights not only to partisans fighting in their own country against the enemy occupant, but also to those who operate against the adversary in its own territory and perhaps even in the territory of a third country which is occupied by the adversary.

Whenever members of resistance movements do not live up to the conditions set forth in Art. 4 A(2), they are to be considered as unprivileged combatants and consequently do not qualify as prisoners of war upon capture. However, they are then covered by Geneva Convention IV of 1949 regarding protection of civilians (→ Civilian Population, Protection). Art. 5, para. 2 of this Convention provides that:

> "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such a person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." (→ Protected Persons; → Espionage).

Art. 5, para. 3 states that "such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention". And by virtue of Art. 68, para. 2, the death sentence can be imposed only if the offences committed by partisans were punishable by death under the law of the occupied territory in force before the occupation began.

4. Deficiencies of the 1949 Regulation

It has been rightly pointed out by various commentators that by imposing excessively strict conditions, Art. 4 of Convention III turns out to be unworkable. It proves very difficult, if not impossible, for a resistance movement to comply with its requirements without departing from the fighting methods to which partisans usually resort (guerrilla warfare). As was stated by Esgain and Solf:

> "on analysis . . . it becomes clear that as a practical matter the prerequisites that members of such movements, or partisans, bear distinctive insignia recognizable at a distance and that they carry arms openly, preclude [the] effective utilization [of pre-existing international law]. Only rarely will members of organized resistance movements in effectively controlled territories be able to comply with all the conditions which are prerequisite to entitlement under the GPW Convention, for to accomplish their mission they must work secretly, wear no uniforms, conceal their weapons, and withhold their identity prior to their strike." (p. 550; → Flags and Uniforms in War; cf. → Perfidy).

5. Additional Protocol I of 1977

The spread of guerrilla fighting and the consequent need to reconcile two conflicting demands – that of granting guerrillas certain rights as combatants, and the necessity to protect civilians from possible adverse consequences of anti-guerrilla fighting by regular armies – led the Geneva Diplomatic Conference on the Reaffirmation of the Humanitarian Law of Armed Conflict in 1977 to revise the international rules relating to lawful combatants (→ Humanitarian Law and Armed Conflict). The results were the 1977 Protocols I and II additional to the Geneva Conventions. Resistance movements benefited

from this general revision, for the loosening of the traditional strict conditions for combatant status applies to them too.

Some of the traditional conditions (that of being organized under a responsible command and having an internal disciplinary system, that of connection with and dependence on a party to the conflict, and that of compliance with the rules of warfare) are still provided for in the article on armed forces in the Additional Protocol I (Art. 43(1)). However, the requirement for combatants to distinguish themselves from civilians was modified. Art. 44(3) provides as follows:

> "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."

It follows that in "normal" situations combatants must distinguish themselves from civilians (by wearing a fixed distinctive sign recognizable at a distance and carrying arms openly) only while engaged in military attacks or in operations preparatory to such attacks. The requirement of distinction from civilians is thus limited in time.

The above provision relaxes even more the condition of combatants distinguishing themselves with respect to "special" situations. As is apparent from the debates preceding and following the adoption of the rule, these include armed hostilities in occupied territories (hence belligerent activities by resistance movements) and → wars of national liberation. With regard to such situations, the only requirement left is that of carrying arms openly during the military engagement or before the launching of a military attack and in preparation for it, as long as a combatant is visible to the adversary (to the naked eye or by using ordinary field glasses).

The 1977 Additional Protocol I is to apply only between belligerents that are parties both to the Geneva Conventions of 1949 and to the Protocol itself (see Art. 96 of Protocol I). Consequently, Geneva Convention III remains applicable between signatory States which are not yet parties to Protocol I.

R. BAXTER, The Duty of Obedience to the Belligerent Occupant, BYIL, Vol. 27 (1950) 235–266.

R. BAXTER, So-called 'Unprivileged Belligerency', Spies, Guerrillas and Saboteurs, BYIL, Vol. 28 (1951) 222–345.

G. BALLADORE PALLIERI, Diritto bellico (1954) 155–157.

E. CASTRÉN, The Present Law of War and Neutrality (1954) 148–149.

J.H. SCHMID, Die völkerrechtliche Stellung der Partisanen im Kriege (1956).

M. GREENSPAN, The Modern Law of Land Warfare (1959) 95–109.

J. DE PREUX (ed.), Commentary III, Geneva Convention relative to the Treatment of Prisoners of War (1960) 52–61.

A.J. ESGAIN and W.A. SOLF, The 1949 Geneva Convention relative to the Treatment of Prisoners of War, Its Principles, Innovations, and Deficiencies, North Carolina Law Review, Vol. 41 (1963) 536–596, at pp. 549–551.

G.I.A.D. DRAPER, The Geneva Conventions of 1949, RdC, Vol. 114 (1965 I) 59–165, at pp. 110–113.

F. KALSHOVEN, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, The Diplomatic Conference, Geneva 1974–1977, Part I, Combatants and Civilians, Netherlands Yearbook of International Law, Vol. 8 (1977) 107–135.

M. BOTHE, K. IPSEN and K.J. PARTSCH, Die Genfer Konferenz über humanitäres Völkerrecht, ZaöRV, Vol. 38 (1978) 31–33.

R. LAPIDOTH, Qui a droit au statut de prisonnier de guerre?, RGDIP, Vol. 92 (1978) 186–210.

A. CASSESE, A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict, in: A. Cassese (ed.), The New Humanitarian Law of Armed Conflict (1979) 461–501, at pp. 470–474.

J.J.A. SALMON, Les guerres de libération nationale, in: A. Cassese (ed.), ibid., 55–112, at pp. 104–112.

ANTONIO CASSESE

RHINELAND OCCUPATION AFTER WORLD WAR I

The → Armistice of November 11, 1918, with which the actions of World War I were brought to

an end, gave the Allied and Associated Powers the right to occupy the German territory west of the → Rhine and the bridgeheads on the right bank of the Rhine near Keh. Coblenz, and Cologne (→ Occupation after Armistice). The Allied Supreme Command wanted to be able to mount an offensive into Germany's interior in the case of a revival of hostilities. The military occupation was undertaken in December 1919 by Belgium, France, Great Britain, and the United States.

These armistice regulations were confirmed in the → Versailles Peace Treaty (Art. 212), which became effective on January 20, 1920 (→ Peace Treaties after World War I; → Peace Treaties). Implementing regulations were included in the Versailles Treaty (Arts. 428 to 432) and the Rhineland Convention (CTS, Vol. 225, p. 407), which was signed at the same time. For the United States, which did not ratify either of the treaties, the → Germany-United States Peace Treaty of August 25, 1921 was of decisive importance in that it secured for them all rights equivalent to those found in the relevant sections of the Versailles Treaty.

The occupation was characterized "as a guarantee for the execution of the present Treaty by Germany" (Versailles Treaty, Art. 428) and was scheduled for a period of 15 years. The occupied territory was divided into four zones: (1) a zone occupied by France with its headquarters in Mainz (including the bridgehead near Kehl, but excluding the → Saar Territory), (2) and American area of control around Coblenz, (3) a British zone around Cologne, and (4) a Belgian zone with its administrative centre in Aachen (Aix-la-Chapelle). Under the general presumption that the provisions of the Treaty would be carried out faithfully, a gradual withdrawal in three stages, one stage every five years, was planned. The United States withdrew from their area of control as early as the beginning of 1923.

Some revolts took place in the Ruhr region in connection with the Kapp *putsch* of March 1920. These caused the Government of the Reich to ask the Allies to approve use of its military forces to crush the uprising in that part of the Ruhr region which was in the demilitarized zone; Art. 42 of the Versailles Treaty had laid down a demilitarized zone extending to a range of 50 kilometres east of the Rhine (→ Demilitarization). France interpreted Germany's sending military forces into the Ruhr region as a violation of the Treaty. On April 6, 1920, without informing Great Britain, France occupied the Main region, including Frankfurt am Main, Bad Homburg, Hanau, Darmstadt, and Dieburg. After the Government of the Reich had reduced its armed forces in the demilitarized zone, the French troops, who had been joined by Belgian forces, withdrew on May 17.

To enforce the → reparations claims at the London Conference (February 21 to March 7, 1921) French and Belgian forces occupied Düsseldorf, Duisburg, and Ruhrort and set up a → customs frontier on March 8, 1921. On January 11, 1923 French and Belgian forces occupied the Ruhr region after the Reparation Commission had declared that Germany had intentionally violated her supply obligations; the British had voted against this declaration. In February of the following year France, asserting more German violations, occupied the towns of Offenburg and Appenweier. Additional areas east of the Rhine were occupied in the same year.

German reactions to the occupation of the Ruhr region took the form of passive resistance and cessation of reparation payments to France and Belgium. The collapse of the German currency and economy resulted in the suspension of all reparations in the autumn of 1923. A committee of experts was appointed to investigate the insolvency of Germany, and their conclusion in the so-called Dawes Report formed the basis of the London Agreement of August 16, 1924 (→ Dawes Plan). This agreement rearranged German reparation liabilities and abolished the internal German customs frontier which had been established after the occupation of the Ruhr region. The → Locarno Treaty (1925) amounted to a *détente* among the Western powers. It brought them together in a → non-aggression pact and confirmed both the western border and the demilitarization of the Rhineland according to the provisions of the Versailles Treaty. By the end of August 1925, the occupation of the Ruhr region had ceased. The first withdrawal from the occupied part of the Rhineland did not take place until the end of January 1926. Another part was cleared of Allied occupying powers towards the

end of November 1929. The withdrawal from the Rhineland came to an early end on June 30, 1930, when the Dawes Plan was succeeded by the → Young Plan. Its acceptance in the Protocol of The Hague of August 30, 1929 (LNTS, Vol. 104, p. 474) was connected with an agreement on the withdrawal of forces from the Rhineland. The Hague Agreement of January 20, 1930 (LNTS, Vol. 104, p. 244) brought the Young Plan formally into force. With the commercialization of German reparation obligations, the right of the victors to occupy German territory as a → sanction under the Versailles Peace Treaty was brought to an end. The → Bank of International Settlements superseded the Reparation Commission.

The legal rules applicable to the Rhineland occupation, undertaken on the basis of the armistice, were contained in Arts. 42 to 56 of the Hague Regulations annexed to Hague Convention IV of 1907 respecting the Laws and Customs of War on Land (→ Occupation, Belligerent; → Hague Peace Conferences of 1899 and 1907). After the Versailles Treaty and the Rhineland Convention came into force, the occupation became pacific (→ Occupation, Pacific). → Territorial sovereignty did not pass to the occupying powers, but in principle was left with Germany as long as the rights of the occupying powers were not restricted. Thus, → extradition in the legal sense was not an issue when the occupation authorities demanded delivery of accused persons from the unoccupied territory (see note from Clémenceau, President of the Paris Peace Conference of July 29, 1919 to the Government of the Reich). The right of occupation, according to Art. 428 of the Versailles Treaty, was aimed at securing that the Treaty terms were realized (→ International Obligations, Means to Secure Performance).

The occupying powers' supreme authority was the Inter-Allied Rhineland High Commission with its headquarters in Coblenz. Belgium, France, Great Britain, and the United States were each represented with one High Commissioner. The Inter-Allied Supreme Commander was under the control of this civil authority. The civil administration remained in the hands of the German authorities. A Reichskommissar was accredited to the High Commission as a representative of the Reich. He was assisted by a parliamentary committee which comprised representatives from the Reichstag and the Parliaments of the Länder involved. The High Commission had power to issue ordinances so far as was necessary to secure the maintenance, safety and requirements of the Allied and Associated forces (Art. 3(a) of the Rhineland Convention). It directed that German laws or regulations could only become valid after registration, and upon expiry of a ten-day review period (Arts. 7 and 8, Ordinance No. 1, January 10, 1920). The Allied authorities also claimed their own military and criminal jurisdiction. In a civil case, military persons could be sued in the existing German courts, but the judgments were subject to review by the occupying force (Ordinance No. 2, January 10, 1920). In the field of administration, there also existed rights of the occupying powers to control and to intervene (Ordinance No. 3, January 10, 1920). Establishing the High Commission indicated the occupying powers' wish to exercise their rights together, though this did not preclude each power from exercising individual rights of occupation in their respective zones of occupation.

The short occupation of the Main region, the area of Düsseldorf, Duisburg, and Ruhrort, the towns of Offenburg and Appenweier and other regions east of the Rhine, was described as a sanction against the German violations of their reparation and neutrality obligations (→ Neutrality, Concept and General Rules). The French Government in these circumstances referred to a rule in the Versailles Treaty according to which the Allied and Associated Powers were empowered, in cases of voluntary default by Germany, to take measures in the shape of economic and financial prohibitions, → reprisals and in general such other measures as the respective Governments might determine to be necessary in the circumstances (Part VIII, Annex II, para. 18). The deduction of such a drastic measure from the general closing sentence of this kind of regulation dealing with much milder economic and financial sanctions remains unconvincing. After all, there was a whole section (Part XIV: Arts. 428 to 433) on → guarantees for the execution of the Peace Treaty, including the occupation of the Rhineland.

The demilitarization of both sides of the Rhine ceased in May 1935. The Government of the

Reich regarded the conclusion of the French-Soviet Treaty of May 2, 1935 as a violation of the Locarno Treaty and ordered German forces to enter the Rhineland. The Council of the → League of Nations, in a resolution dated March 19, 1936 condemned this as a violation of Arts. 42 and 43 of the Versailles Treaty.

Bulletin officiel de la Haute commission inter-alliée des territoires rhénans – Official Gazette of the Inter-Allied High Commission, 4 vols. (1920–1923).

E. ISAY, Der Begriff der "außerordentlichen Maßnahmen" im Friedensvertrag von Versailles (1922).

K. HEYLAND, Die Rechtsstellung der besetzten Rheinlande nach dem Versailler Friedensvertrag und dem Rheinlandabkommen (1923).

W. VOGELS, Die Verträge über Besetzung und Räumung des Rheinlandes und die Ordonnanzen der Interalliierten Rheinlandoberkommission in Coblenz (1925).

H.J. HELD, Under dem Friedensvertrag von Versailles nach Locarno und Genf, Jahrbuch des öffentlichen Rechts, Vol. 15 (1927) 313–462.

E. FRAENKEL, Military Occupation and the Rule of Law, Occupation Government in the Rhineland, 1918–1923 (1944).

K.L. NELSON, Victors Divided, America and the Allies in Germany 1918–1928 (1975).

J.T. EMMERSON, The Rhineland Crisis, March 7, 1936 (1977).

GOTTFRIED ZIEGER

RIGHT OF ANGARY *see* Angary, Right of

RUSES OF WAR *see* War, Ruses

SAFE-CONDUCT AND SAFE PASSAGE

1. Definitions

A "safe-conduct" is a written permit given by a belligerent in an → armed conflict to a person (of enemy character or not) allowing him or her to proceed to a given place for a certain purpose. A "safeguard" is a grant of protection against the use of its forces given by a belligerent party in favour of subjects or property of another belligerent party (→ Enemy Property). By "safe passage" is meant the protection given to one or more individuals (usually by means of a military passport), by order of a military commander of belligerent forces, to stay or to travel unmolested within the territory occupied by these forces (→ Occupation, Belligerent).

The term "navicert" is a shortened form for "navigational certificate". A navicert is a certificate issued by a belligerent to a neutral national as evidence that there is no objection to a certain cargo being transported to a neutral → port (cargo navicert) or that the whole cargo of the ship consists of goods under navicert (ship navicert) (→ Neutral Trading; → Neutrality in Sea Warfare).

2. Purposes

Belligerents may be interested in certain subjects, ships, or goods moving from a given place to another for special purposes. So, for example, ambassadors in times of → war usually receive safe-conducts for returning home (→ Diplomacy); representatives of an enemy government may be provided with a safe-conduct to enter a town under → siege for purposes of engaging in → negotiations. The safe-conduct document sets forth the conditions of the protection, which may be withdrawn if abused by the recipient.

The safeguard form of protection consists of a written order by a belligerent officer, addressed to the armed forces of the grantor, protecting the grantee against their operations. The protection may relate to an enemy subject or to enemy property. Safeguards are particularly useful in an assault, or immediately after a place has been captured, or at the end of a battle, to protect the designated persons and property from destruction by an over-excited soldiery.

The terms "safe passage", "safe-conduct" and "safeguard" are often used interchangeably. What has been said regarding safe-conduct and safeguard therefore applies to safe passage as well. A safe passage is granted by a special passport issued by an authority of a belligerent. The purposes of the navicert system relate to its functions during World Wars I and II, as discussed in the next section.

3. Historical Background

During wartime, in spite of a general cessation of intercourse between the regions occupied by opposing belligerents, often one party is interested in allowing the persons, vessels or other property of enemies or neutrals to enter or to leave the region occupied, or to be otherwise exempted or protected (→ War, Laws of, His-

tory). Thus in the English-Swedish Treaty of Upsala (1654) both parties accepted a sea passport guaranteeing their ships holding such passports free passage (→ Passage, Right of). The same system of *litterae salvi conductus* was adopted in the Treaty between Spain and France of November 16, 1659 (for further examples see Stödter, p. 12). These passports were issued by neutral governments (→ Neutrality, Concept and General Rules) to prove the innocent character of their merchants' vessels and cargo and to inhibit their search and capture (→ Ships, Visit and Search). However, as fraud and corruption could seldom be prevented, the belligerents were usually rather reluctant to recognize such passports, and in the end this system fell out of use.

The second half of the 18th century saw introduction of the licence system. This system was based on belligerents' needs to grant their merchants exemptions from the Anglo-American → trading with the enemy laws (see Lord Stowell in The *Goede Hoop*, Edwards 327). This licence system played a prominent role on both sides during the Napoleonic wars, especially in connection with the continental → blockade. Based on this past experience, in World War I the British Government introduced the navicert system. This was "in substance a system whereby particular consignments of goods were given what might be called a commercial passport before they were shipped; this passport, which derived its name from the code-word 'navicert', insured the consignment an undisturbed passage" (Ritchie, p. 1).

The navicert system operated throughout the last two years of World War I. Within the framework of Allied → economic warfare, it was combined with other control measures and was extended more or less world-wide. In some ways, it resembled the licence system of the Napoleonic wars. The immediate purpose of the licence system was different, but it had the same ultimate objective as the navicert, that of regulating the trade of neutrals. Of course, the consequence of this development was to make the old established law of visit and search superfluous: "The navicert system was used as one aspect of a more general system which to a large extent was designed to afford a substitute for the traditional system of visit and search on the high seas" (Jessup, p. 508). In World War I, Germany adopted the practice of issuing safe-conducts for ships, especially in trade with Sweden (Steinicke, Das Navicertsystem, p. 277).

After the outbreak of World War II, the navicert system was introduced anew by Great Britain in November 1939. The Order in Council of July 31, 1940 advanced it a step further. This Order formally declared that goods that were not covered by a valid navicert would be liable to seizure. A cargo navicert was defined in the Order as "a pass issuable by the appropriate British or Allied authority in the neutral country of shipment in respect of goods consigned to any port or place from which they might reach the enemy, to the effect that, so far as is known at the date of issue, there is no objection to the consignment". The ship navicert was defined as "a pass issuable to a vessel in respect of a given voyage by the appropriate British or Allied authority at all principal British, Allied or neutral ports, if that authority is satisfied that the vessel is duly qualified to receive it". Ship navicerts were made compulsory. All ships sailing to Europe without them were treated as blockade runners liable to seizure in prize (→ Prize Law). The compulsory navicert system was combined with a quota system for neutrals whose territory was adjacent to enemy territory. All important commodities were strictly rationed for European neutrals. Certificates of origin and interest were linked to the navicerts.

At the same time, Great Britain introduced the ship's warrant system. This scheme was both a method of → sanction for the compulsory navicert system and a method of obtaining the services of neutral ships. In order to secure a ship's warrant, shipowners had to comply with the regulations of economic warfare and had to pledge themselves not to sail to and from navicert designated regions without a ship navicert. In return, their ships were guaranteed world-wide access to British-controlled facilities (i.e. bunkers, dry-docks, repairyards, stores and insurance), which were otherwise closed to neutral shipowners. Without ship's warrants, they were barred from international seaborne trade. One year later, the United States also introduced a similar ship's warrant system.

As from August 1, 1942 the British navicert

system was linked to the ship's warrant scheme. No navicerts were issued to ships which did not possess a ship's warrant. The shipowner whose fleet as a whole did not have ship warrants did not get navicerts, which meant receiving no cargo. Far-reaching obligations had to be accepted by the shipowner, who was practically deprived of any commercial flexibility. The same applied to shippers:

> "Offered originally as a convenience to a neutral shipper as an alternate to the delays incident to contraband detention, the navicert system developed into a complete control of neutral trade. No import of a commodity would be navicerted if it exceeded the quota or if either the consignor or consignee were objectionable. Even the 'end use' within the neutral country was controlled if desirable. Exports were similarly rigidly controlled." (Lovitt, p. 601).

At the beginning of World War II, Germany established a *laissez-passer* for neutral ships, analogous to the British navicert (Steinicke, Das Navicertsystem, p. 277), but without the far-reaching control system connected with ship navicerts and ship's warrants.

4. Evaluation

In future wars, belligerents will always see an advantage in granting enemy or neutral subjects exemptions from military actions for particular reasons. One may therefore expect that, as in the past, passports, safe-conducts and safeguards will play a role, even if limited as to date. The role of the navicert system in a future war can scarcely be overestimated, notwithstanding the fact that its legal basis in → international law remains dubious. The United States War Department Rules of Land Warfare of 1940 (paras. 326 to 337) made extensive reference to passports, safe-conducts and safeguards, in spite of a general prohibition of intercourse. However, when Germany issued safe-conducts for ships in World War I, the United States reserved the right to deal with neutral vessles which had accepted such safe-conducts. Having accepted German control, these ships were considered by the United States to have lost their neutral character. France published a decree of August 27, 1918 (Journal officiel, August 8, 1918, p. 613) according to which neutral vessels which placed themselves under enemy control were considered, in the absence of proof to the contrary, to be navigating in the interest of the enemy and were on that account liable to capture and condemnation. A similar decree was published by Italy (October 10, 1918, Gazzetta ufficiale, November 25, 1918, No. 277).

At the beginning of World War II, neutral governments (Switzerland, Sweden, Netherlands, Japan, Belgium) maintained their opposition to the reintroduction of the navicert system and prohibited their subjects from submitting to investigations by foreign authorities. Italy and Spain emphasized the inconsistency of the navicert system with international law as it was then accepted. The German Government in 1940 warned neutrals against accepting British navicerts and thereby, in Germany's view, committing unneutral assistance. The German Supreme Prize Tribunal decided that the acceptance of a British ship's warrant constituted subjection of a vessel to the enemy's control and therefore, according to the German Prize Ordinance of August 28, 1939 (Art. 38(3)), this constituted unneutral assistance (The *Ole Wegger* and other vessels, 1942; Annual Digest, Vol. 12 (1943–1945), p. 532; similar judgments: The *Pelagos*, May 8, 1942; The *Solglimt*, May 8, 1942; The *Polykarp*, December 10, 1943).

The acceptance of enemy control by a neutral → merchant ship has traditionally been considered an act of unneutral service (United States Department of the Navy, Law of Naval Warfare (1955, amended 1959), section 501(b)).

> "Normally, a belligerent has no right to regulate neutral trade through the device of subjecting this trade to a legal liability to seizure merely for the reason that the neutral trader has not obtained the belligerent's prior approval. Nor may neutrals safely expect that an enemy will fail to treat such compliance with one belligerent's regulations – even though made 'compulsory' – as an act of unneutral service." (Tucker, p. 315).

The prevailing view is that "to sail under a navicert, especially when the obtaining of such a document has not been made legally necessary by the other belligerent, involves a real degree of unneutral service on the part of the vessel so sailing" (Rowson, p. 180; Bruns, p. 95; Stödter, *passim*).

Neutrality, as well as → sovereignty, is without any doubt infringed by the exercise of measures of supervision and control by officials of a belligerent in neutral territory. Belligerents are obliged to refrain from any official acts with military purposes in neutral countries (see, however, Oppenheim/Lauterpacht, International Law, Vol. 2 (7th ed. 1952), p. 855, note 3). The general rule in → sea warfare is: "There is no principle in international law which gives to a belligerent a right to interfere with neutral trade whenever it appears to the belligerent that such trade might in some way benefit his enemy." (Jessup, p. 514).

Although this rule has been accepted in the past, it is today difficult to evaluate the impact of the practices in World Wars I and II upon traditional international law. Bearing in mind the Anglo-German chain of → reprisals and counter-reprisals, one has "to recognise that retaliation, which can be an effective sanction of the law of war, may also serve as a powerful instrument for undermining or changing the law of war" (J. Stone, Legal Controls of International Conflict (1959), p. 355). Belligerents have always tried to justify their departure from traditional law with the right of reprisal, and this can be regarded as an affirmation of the continued validity of traditional law (Tucker, p. 31). On the other hand, it is contended that traditional rules of naval warfare have become inapplicable in the light of the changed conditions of such warfare (Oppenheim/Lauterpacht, op. cit., p. 796). However, one has to accept that the law will continue its classical role in naval warfare if it is not overtaken by a global conflict in which scarcely any rules of law would remain unchanged (O'Connell, p. 51).

H. RITCHIE, The "Navicert" System during the World War (1938).

P.C. JESSUP (reporter), Rights and Duties of Neutral States in Naval and Aerial War, AJIL, Vol. 33, Supp. (1939) 166–793, at pp. 505–515.

V. BRUNS, Der britische Wirtschaftskrieg und das geltende Seekriegsrecht (1940).

R STÖDTER, Handelskontrolle im Seekrieg (1940).

J.V. LOVITT, The Allied Blockade, DeptStateBull, Vol. 11 (1944) 597–601, 615.

M. MOOS, The Navicert in World War II, AJIL, Vol. 38 (1944) 115–119.

H.E. DUTTWYLER, Der Seekrieg und die Wirtschaftspolitik des neutralen Staates (1945).

G.G. FITZMAURICE, Some Aspects of Modern Contraband Control and the Law of Prize, BYIL, Vol. 22 (1945) 73–95, at pp. 83–89.

S.W.D. ROWSON, Prize Law during the Second World War, BYIL, Vol. 24 (1947) 160–215, at pp. 196–200.

R.W. TUCKER, The Law of War and Neutrality at Sea (1955).

D. STEINICKE, Das Navicertsystem (1966).

D. STEINICKE, Wirtschaftskrieg und Seekrieg (1970).

D.P. O'CONNELL, The Influence of Law on Sea Power (1975).

U. SCHEUNER, Entwicklungen im Seekriegsrecht seit dem zweiten Weltkrieg, in: Recht über See, Festschrift für Rolf Stödter (1979) 287–313.

ROLF STÖDTER

SAFETY ZONES

1. Safety Zones in Land Warfare

Protective measures in favour of persons who are not → combatants in the theatre of war (→ War, Theatre of) figure as a central subject in the → humanitarian law of armed conflict (→ War, Laws of; → Civilian Population, Protection).

There have been numerous proposals over the years to establish neutralized zones where mainly wounded and sick persons (→ Wounded, Sick and Shipwrecked) and also civilians could take shelter. They have come from Henry Dunant, the founder of the → International Committee of the Red Cross (ICRC), under whose auspices several → Geneva Red Cross Conventions were drafted, from State delegations participating at the → Hague Peace Conferences of 1899 and 1907, and furthermore from experts and private persons (e.g. proposals by Georges Saint Paul regarding the so-called "*lieux de Genève*").

A draft convention for the protection of the civilian populations against new engines of war was drawn up by the → International Law Association in 1938 (Report of the 40th Conference, Amsterdam, p. 41). This draft explicitly called for the declaration of safety zones for the non-belligerent portion of the civilian population. Such zones were to consist of either a camp specially erected for that purpose or an undefended town (→ Open Towns), port, village or building, which was to be immune from attack or → bombardment by whatever means and thus not to be considered as a → military objective.

Examples of safety zones may be cited from practice in different parts of the world: zones in Shanghai and Nanking (1937/1938), and in Madrid during the → Spanish Civil War. Unfortunately, other attempts to establish safety zones have frequently failed, e.g. between the Soviet Union and Finland on November 30, 1939, and in → Palestine in 1948. A generally binding legal instrument on safety zones did not exist until 1949 when Geneva Convention IV relative to the Protection of Civilian Persons in Time of War was opened for signature. Under Art. 14, in time of peace or after the outbreak of hostilities, the parties thereto may establish in their own territory or in occupied areas (→ Occupation, Belligerent) safety zones and localities to protect wounded, sick and aged persons, children, expectant mothers and mothers of children under seven years of age from the effects of war. Neutralized zones may be established, intended to shelter wounded and sick combatants as well as non-combatants, including civilians who take no part in hostilities and who, while residing in the zones, perform no work of a military character (Art. 15). It seems evident that, for political reasons, it will be highly impractical to establish safety zones in times of peace. Moreover, there have been very few and not particularly convincing examples of the neutralization of localities, e.g. the Grand Hotel in Dacca in 1971.

The 1977 Protocol additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) provides for the creation of mutually agreed zones to be kept free from military operations (Art. 60; → Demilitarization). States may also unilaterally declare (→ Unilateral Acts in International Law) as non-defended localities uninhabited places near or in a zone where armed forces are in contact, which are open to occupation by an adverse party and not used in any way in support of military operations (Art. 59). This provision on non-defended sites complements Hague Convention IV of 1907 and Art. 25 of the Hague Regulations of Land Warfare annexed thereto, which prohibits any sort of attack against such places.

2. The American Security Zone

A different type of safety zone set up in pursuit of national interest was the American security zone proclaimed shortly after the outbreak of World War II in Europe. In order to stress her non-involvement in the war, the United States sought cooperation of the other American republics in affirmation of stricter rules of neutrality (→ Neutrality, Concept and General Rules). At the conference held in Panama (September/October 1939; cf. → Collective Security) they achieved a General Declaration of Neutrality stating that:

> "in the presence of the possible threat to security of the American Continent . . . [and] as a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American Continent which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation."

The waters declared as neutral and to be held free from → sea warfare (→ Neutrality in Sea Warfare) varied in extent from 50 to nearly 300 miles (→ High Seas; → Zones of Peace at Sea). Though this zone was evidently not conceived as a barred zone in the narrow sense, in a → note of October 13, 1939 the British Admiralty emphasized that a security zone must not be construed to extend beyond the limits of → territorial waters. Thus the note did not contest the right of a coastal State to exclude its own territorial waters from the theatre of war.

After the battle of the River Plate and the scuttling of the German battleship → *Graf Spee* off Montevideo, Uruguay, the American republics in January 1940 voiced a joint → protest to Great Britain, France and Germany against violation of American neutral waters. Great Britain maintained her point of view that "abandonment by the belligerents of their legitimate rights is not one which on any basis of international law could be imposed on them by unilateral action" (cf. → Acquiescence; → Waiver). The replies of the French and German Governments followed a similar line of argument.

Regarding the position of the security zone in international law, United States Under-Secretary of State Sumner Welles stated on October 20, 1939 that its creation should be considered as a

practical measure and as a statement of principle, rather than as a formal proposal for the modification of international law. Indeed, the deliberate neutralization of parts of the high seas does not seem to be justified by international law and common practice.

J. PICTET, Le droit humanitaire et la protection des victimes de la guerre (1963) 127–129.
J. SCHMITT, Die Zulässigkeit von Sperrgebieten im Seekrieg, Das geltende Seekriegsrecht in Einzeldarstellungen (1966) 42–43.
C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967) 669.
J. GRAF VON RITTBERG, Schutzzonen für die Zivilbevölkerung, Thesis, University of Mainz (1969) 31–32, 77–90, 114–125, 148–151.
K. IPSEN, Die "offene Stadt" und die Schutzzonen des Genfer Rechts, in: D. Fleck (ed.), Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte (1973) 180–184.
M. BOTHE, K. IPSEN and K.J. PARTSCH, Die Genfer Konferenz über humanitäres Völkerrecht, Verlauf und Ergebnisse, ZaöRV, Vol. 38 (1978) 45–46, 118–120.

WOLFGANG HEIDELMEYER

SAINT-GERMAIN PEACE TREATY (1919)

1. Historical Setting

After the collapse of Bulgaria in September 1918, the military situation of Austria-Hungary became so critical that, on October 4, a → note was sent to the President of the United States Woodrow Wilson, accepting his Fourteen Points of January 1918 (→ Wilson's Fourteen Points) and requesting his intercession with the other members of the Entente to agree upon an → armistice (→ War; → Peace and War). Wilson's reply on October 21 declared that national autonomy (Point Ten of the Fourteen Points) could no longer be regarded as the basis of peace.

To preserve the unity of the Austro-Hungarian Empire, the Emporer Karl I had issued a proclamation on October 16, calling upon his peoples to transform it into a federal State in conformity with the principle of nationality (→ Self-Determination). Since no reference was made to the Hungarian part of the monarchy, the declaration was insufficient. The Czechs, Moravians and Slovaks, the Poles and the Croats and Slovenes broke away and formed new States or joined existing ones. On October 21, even the German members of the Imperial Reichsrat formed a Provisional National Assembly for German-Austria, and later, on October 30, proclaimed the independence of German-Austria. The last initiative of the common Austro-Hungarian government was to send an emissary to the Italian military headquarters on October 27. The armistice was finally concluded on November 3; but the Empire no longer existed, the Hungarians having declared their complete independence (→ Secession). On November 11, the Emperor Karl renounced all part in the government of German-Austria, which was proclaimed a republic on the following day.

2. Paris Peace Conference and the Treaty of 1919

The Paris Peace Conference was convened in January 1919 to draft the texts of the peace treaties with Germany (→ Versailles Peace Treaty) and the other Central Powers (→ Peace Treaties after World War I). Apart from the Versailles and the Saint-Germain treaties, treaties were signed with Bulgaria (→ Neuilly Peace Treaty), Hungary (→ Trianon Peace Treaty) and Turkey (Sèvres Peace Treaty; see → Lausanne Peace Treaty). All five treaties were similarly constructed and in some parts the wording was identical.

During the negotiations in Paris, the Austrian delegation took the legal position that the Empire had perished by → dismemberment, and had disappeared as a → subject of international law (→ States, Extinction); this was intended to avoid questions of Austrian responsibility for the war and its consequences. German-Austria, one of the successor States (→ State Succession), had originated with a revolutionary act of the Provisional National Assembly, and was in no way legally identical to the former monarchy. Austria's interest in participating in the Peace Conference was thus seen as not to conclude peace with anyone but rather to settle competing territorial claims, taking into account the right of self-determination of the German-speaking inhabitants of the former monarchy's territories.

The view of the Allies, as expressed in a draft treaty handed to the Austrian delegation on May

2, was that Austria was not a new State but an old one stripped only of certain outlying provinces. Moreover, the inclusion of the German-populated Sudetenland in Austria was held to be impossible for geographical reasons. In fulfilment of Allied promises made in the Treaty of London of 1915, Italy was given *inter alia* the German-speaking → South Tyrol with a strategic frontier on the Brenner Pass. On the other hand, Yugoslavian claims to Southern Carinthia were first deferred and later defeated in a → plebiscite held in 1920. The German-speaking part of Western Hungary – with the exception of Ödenburg (Sopron), which remained Hungarian following a dubious plebiscite in 1921 – was transferred to Austria.

A statute of November 12, 1918 had declared German-Austria to be a part of the German Republic. However, the Allies were opposed to any enlargement of Germany. Art. 88 of the Treaty of Saint-Germain declared her independence to be inalienable; even the reference to the German character of Austria in the name had to be dropped. Art. 80 of the Versailles Peace Treaty similarly prohibited Germany from merging with Austria.

The Treaty of Saint-Germain was signed on September 10, 1919 and came into force on July 16, 1920. One of the few achievements of the Austrian delegation was the designation of the pact as a "State" rather than a "Peace" Treaty (→ Peace Treaties). Yet it imposed upon Austria the responsibility for the debts (→ State Debts) of the Austrian monarchy, as well as the duty to pay → reparations for war losses suffered by the Allied and Associated Powers.

Like the other treaties signed in the vicinity of Paris, the Saint-Germain Treaty contained the Covenant of the → League of Nations and the Constitution of the → International Labour Organisation. Arts. 62 to 69 dealt with the protection of → minorities, which were guaranteed equality regardless of language and religion. Austria – which had now become a landlocked country – was allowed a long-service voluntary armed force of no more than 30000 men.

3. Subsequent Development

While the reparation system never really worked, Art. 88 had greater effect. Austria's obligation to remain independent, which had been assumed in return for a loan granted by the League of Nations and was also contained in Geneva Protocol I on the "Restoration of Austria" of October 4, 1922 (LNTS, Vol. 12, p. 391), conferred upon Austria a status of what has been called quasi-neutrality (→ Neutralization; → Neutrality, Concept and General Rules). Thus, the → Permanent Court of International Justice declared the project of a → customs union with Germany to be inconsistent with Austria's special status (→ Customs Régime between Germany and Austria (Advisory Opinion)). This did not, of course, prevent the *Anschluß* by Hitler in 1938. Austria was proclaimed independent again on April 27, 1945 and regained complete → sovereignty through the State Treaty of May 15, 1955 (→ Austrian State Treaty; → Peace Settlements after World War II), which now, together with her subsequent declaration of → permanent neutrality, defines her international position. The protection of minorities was widened in the 1955 State Treaty. Therefore, the question of whether the provisions of the 1919 Treaty respecting minorities are still in force seems to be moot (cf. → Treaties, Termination; → Treaties, Revision).

Treaty of Peace between the Allied and Associated Powers and Austria, Signed at Saint-Germain-en-Laye, September 10, 1919, British and Foreign State Papers, Vol. 112 (1919) 317–498; Martens NRG3, Vol. 11 (1923) 691–839.

Bericht über die Tätigkeit der deutsch-österreichischen Friedensdelegation in St. Germain-en-Laye, 2 vols. (1919).

A. VERDROSS, Der Friedensvertrag von St. Germain-en-Laye, Jahrbuch des öffentlichen Rechts der Gegenwart, Vol. 10 (1921) 474–485.

N. ALMOND and R.H. LUTZ (eds.), The Treaty of St. Germain, A Documentary History of its Territorial and Political Clauses (1935).

J.C. ROBERTS, Austria at the Paris Peace Conference (1956).

S. VEROSTA, Die internationale Stellung Österreichs seit 1918; in: 1918–1968, Österreich, 50 Jahre Republik (1968) 59–80.

R. NECK, Die österreichische Friedensdelegation in St. Germain, Scrinium, Vol. 11 (1974) 34–46.

HERIBERT FRANZ KÖCK

ST. PETERSBURG DECLARATION (1868)

see Bombardment; Humanitarian Law and

Armed Conflict; War, Laws of; Warfare, Methods and Means

SCHIFFAHRT-TREUHAND v. PROCURATOR-GENERAL

When British and Allied naval forces occupied Germany at the end of World War II, they found, on May 7, 1945, the motor vessel *Hermes* lying grounded in the port of Emden; they also found four partially constructed hulls, namely hulls 347 and 348 in Lübeck (on May 3, 1945) and hulls 506 and 507 in Flensburg (on May 10, 1945). Prize proceedings (→ Prize Law) for these objects were first instituted in 1947, by which time construction had been completed. The Crown first based its claim on affidavits filed at the start of the proceedings, but later maintained that the seizure of the three ports in May 1945 constituted *ipso facto* the seizure of the structures discovered there. The German owners were represented in the proceedings. On May 10, 1951, Lord Merriman, President of the Prize Court set up in World War II, condemned the five ships (The *Hermes* and Other Hulls (L.R. [1951] P 347)). On appeal, this decision was upheld in both substance and reasoning by the Judicial Committee of the Privy Council on January 12, 1953 (L.R. [1953] A.C. 232).

The Court primarily had to answer three questions: (a) Was the capture of a → port sufficient grounds for a ship to become a prize subject even though there was no intention to seize particular objects in prize? (b) Could a ship still under construction be considered as a proper subject of prize? (c) Could the right to seize in prize be exercised after the German → surrender of May 8, 1945?

As to the first question, the Court referred to earlier decisions (The *Progress* ([1810] 1 Edw. 210); The *Edward and Mary* ([1801] 3 C. Rob. 305)) which supported the view that "the physical capture of a ship is the same thing as taking her in prize". It therefore accepted the finding of the Court of Appeal in The *Bellaman* ([1948] 2 All E.R. 679) that ships and other objects in ports were captured at the same time as the ports themselves; the intention to seize particular objects need not be shown. This is a broader concept than that adopted by the Hamburg Prize Court in 1941 in *Lotsendampfer Nr. 19* (RGDIP, Vol. 52 (1948) p. 296), in which the various steps taken with regard to the seizure of the wreck were examined in detail.

The second question concerned only the four ships under construction. Of relevance here was the distinction between the rules of → land warfare and → sea warfare. According to the Hague Regulations on Land Warfare annexed to Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907), private property is not liable to confiscation (→ Enemy Property); according to prize law, however, privately-owned ships are subject to seizure by naval forces. The question therefore to be answered was: "On which side of the dividing line do the Flensburg and Lübeck structures fall?" The Court held that the applicability of prize law begins at that point where the confiscated structure, because of its future value to the enemy, must be regarded as "maritime property in a maritime town". This ruling leaves open the question of when exactly a hull can properly be regarded as a ship (cf. Whiteman, Digest of International Law, Vol. 10 (1968) p. 712).

The question of whether the right of prize could be exercised after the German surrender related only to the Flensburg hulls, but was politically the most significant problem. The Court found that the right of prize was suspended on June 5, 1945, the day of the Berlin Declaration (AJIL, Vol. 39, Supp. (1945) p. 171) and consequently rejected the affidavits filed in 1947. It distinguished between → armistice and surrender, emphasizing that it was not the German Government but the German High Command which had surrendered on May 8, 1945. The victor could continue to invoke *jus belli* (→ War, Laws of), especially as there were grounds for expecting continued German resistance.

This case shows the trend towards the broadening of the concept of prize law, especially where the capture of prizes in ports is concerned.

The Hermes and Other Structures, ILR, Vol. 18 (1951) 704–725.

Schiffahrt-Treuhand and Others v. Her Majesty's Procurator-General, ILR, Vol. 20 (1953) 667–677.

U. SCHEUNER (Case note), AVR, Vol. 4 (1953–1954) 364–336.

ULRICH SCHEUNER

SEA WARFARE

1. Concept; History. 2. Theatre of War. 3. Categorization of Vessels: (a) Warships; (b) Merchant ships; (c) Hospital ships. 4. Categorization of Cargoes: (a) General rule; (b) Contraband. 5. Blockade. 6. Prize Proceedings. 7. Submarine Warfare. 8. Arming Merchant Ships. 9. Deception. 10. Mines. 11. Targets Other than Ships. 12. Persons *hors de combat*. 13. Conclusion.

1. Concept; History

The laws of sea warfare differ in many respects from the laws of → land warfare because of the special circumstances prevailing at sea. First of all, it is important to bear in mind that war at sea is often more dangerous than war on land since the human being, as a land creature, cannot survive for long at sea unless he is either on board a vessel or sustained by life-preserving means such as a raft or a life belt. Secondly, land warfare is essentially limited to a specified front line, whereas sea warfare may be conducted on the other side of the planet from the theatre of land warfare. Thirdly, whereas land warfare need not directly affect neutral countries (→ Neutrality, Concept and General Rules), sea warfare is almost bound to have a detrimental impact on neutral shipping (→ Neutrality in Sea Warfare). The impact is particularly pernicious when the → armed conflict has global dimensions, but even a localized war is likely to have adverse results for neutrals, sometimes at great distances from the land combat zone (→ Neutral Trading).

Sea warfare has changed its face over the centuries. Wood has been superseded by steel plates. Oars and sails have been replaced by motors and even by nuclear power (→ Nuclear Ships). Greek fire and broadside discharges have given way to missiles. Changes in technology have placed in question a number of time-honoured rules of sea warfare (→ War, Laws of, History). Still, these rules are often adapted with surprising ease to altered circumstances.

Many of the laws of sea warfare are to this day part of → customary international law. However, codification covers a large segment of the corpus of legal norms which govern the field (→ Codification of International Law). In fact, the first multilateral international convention pertaining to the laws of war relates to maritime warfare: the famous Declaration of Paris of 1856 (Schindler/Toman, p. 699; → Prize Law). Other conventions were adopted by the → Hague Peace Conferences of 1899 and 1907. Another key instrument is the Declaration drafted by the → London Naval Conference of 1908/1909. Even though the 1909 London Declaration concerning the Laws of Naval War (Schindler/Toman, p. 757) never entered into force, most of its provisions are considered declaratory of general international law. A further significant document is the 1936 London Procès-Verbal relating to the Rules of Submarine Warfare Set Forth in Part IV of the 1930 Treaty of London (Schindler/Toman, p. 795). And Geneva Convention II of 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (→ Geneva Red Cross Conventions and Protocols) is of pivotal importance. But there is a palpable need for a fresh look at the laws of sea warfare. Regrettably, this need has not been eliminated by the 1977 Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which, with few exceptions, concentrates on land and air warfare.

2. Theatre of War

Sea warfare may take place in any section of the → high seas, as well as in the → internal waters or the → territorial waters of the belligerent parties (→ War, Theatre of). On the other hand, sea warfare is prohibited in the internal or territorial waters of neutral States (which are excluded from the theatre of war), though belligerent vessels – including → warships – may enter these waters subject to certain conditions.

In so far as the internal waters of the belligerents are concerned, the laws of war are without doubt applicable in waters belonging geographically to the sea (such as → bays and gulfs). It is not always clear, however, whether the laws of war on land or the laws of sea warfare prevail in lakes, rivers and similar bodies.

3. Categorization of Vessels

The laws of sea warfare draw two cardinal distinctions between different types of vessels. The first distinction differentiates between enemy and neutral ships. The second distinction

differentiates between warships, → merchant ships and → hospital ships.

(*a*) *Warships*

Warships are armed government ships (including → submarines), as well as auxiliary (unarmed) naval vessels, with the exception of hospital ships. Warships also include light craft such as torpedo or missile boats.

A belligerent warship may attack and sink any enemy warship without previous warning. Should the enemy warship be overtaken, it becomes upon capture property of the captor State (→ Booty in Sea Warfare).

(*b*) *Merchant ships*

Merchant ships, for the purpose of the laws of war at sea, are all vessels which are neither warships nor hospital ships, including tankers not belonging to the navy, freighters, passenger liners, mailships, → fishing boats and even yachts and speed boats. Yet, it is a matter of controversy whether merchant ships owned by the government retain their status as merchant ships or are to be classified as warships.

Belligerent warships may not attack and sink enemy merchant ships without prior warning. In principle, warships are only entitled to stop, visit, search and seize enemy merchant ships (→ Ships, Visit and Search), bringing them into port for prize proceedings (see also section 6 below).

Hague Convention XI relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War exempts from capture: vessels used exclusively for fishing along the coast (as distinct from deep-sea fishing); small boats employed in local trade; and vessels engaged in religious, scientific or philanthropic missions.

When an enemy merchant ship is seized, it must be taken to port with a view to conducting condemnation proceedings before a prize court. Yet there are exigencies of → military necessity in which the warship is not free to accompany the seized merchant ship to port. In such instances, the practice has evolved of sinking the seized ship, provided that the crew, the passengers and the vessel's papers have first been placed in safety. Inasmuch as reasons of military necessity are concerned, the commander of the warship has a broad discretion in the matter. But, after the merchant ship has been sunk, prize proceedings must be conducted so as to determine whether it was really permissible to seize and sink it. The status of a merchant ship in these circumstances may appear to be identical to that of a warship, since both may be sunk. Yet, there is a crucial difference between the two cases. A warship constitutes a legitimate target for attack and may be sunk with all hands on board. A merchant ship, by contrast, may only be sunk after the crew and passengers have been safely evacuated.

The visit and search of a merchant ship (enemy or neutral) by a warship is conducted in order to verify the flag (→ Flag, Right to Fly), to check the ship's papers and to examine the cargo. Enemy merchant ships are seized and captured as prize. Neutral merchant ships are ordinarily immune from capture. They can be seized and captured in four exceptional situations only: (i) refusal to stop or to permit visit or search; (ii) violation of a → blockade (see section 5 below); (iii) carrying → contraband (see section 4(b) below); and (iv) unneutral service. In any event, the prior visit and search of merchant ships (whether neutral or enemy) is a condition to be met before seizure and capture. In the past, visit and search were conducted by the crew of the warship on the open sea, but of late the danger presented by submarines and → aircraft to such a warship (which has to stop for a prolonged period of time) has increased. Consequently, modern practice is to divert the merchant ship from its course, and send it into port for a thorough search (→ Ships, Diverting and Ordering into Port).

The general governing principle here is that every ship is vested with the nationality of the State whose flag it is flying (→ Ships, Nationality and Status). Hence, the enemy or neutral character of a ship is generally determined by the flag which it is entitled to hoist. It follows that if a ship owned by → neutral nationals is flying the enemy flag, it can be considered an enemy ship with all the attendant consequences.

(*c*) *Hospital ships*

Hospital ships are vessels built or especially equipped solely with a view to assisting, treating and transporting the → wounded, sick and shipwrecked. A hospital ship may be a merchant ship converted for that specific goal. But, once such

conversion is accomplished, the vessel cannot be put to any other use throughout the duration of hostilities.

Geneva Convention II of 1949 lays down that military hospital ships may in no circumstances be attacked or captured, provided that their names and descriptions have been conveyed in advance to the belligerents. The Convention also accords protection to non-military hospital ships utilized by national → Red Cross societies, officially recognized relief societies or private persons in receipt of an official commission if there has been prior → notification to the belligerents. Protocol I of 1977 extends the protection provided in the Convention to hospital ships carrying wounded, sick and shipwrecked civilians (and not only → combatants).

Hospital ships (including lifeboats) must be marked with the Red Cross emblem (→ Emblems, Internationally Protected), and they may not be used for any military purpose. Belligerents are entitled to search a hospital ship to ascertain that it is operating within the limits set by international → humanitarian law in armed conflicts. Where necessary they may even force it to take a certain course, control the use of its means of communication, detain it for a period not exceeding seven days, and put a commissioner on board to see that instructions issued to it are carried out.

The protection to which hospital ships are entitled ceases if they are used to commit, outside their humanitarian duties, acts harmful to the enemy. But this cessation of protection is contingent on due warning being given and, if the other side does not heed it, the passage of a reasonable period before the cessation comes into effect. When a hospital ship is in a port which falls into the hands of the enemy, it must be permitted to leave that port.

The immunity of a hospital ship from attack and capture does not mean that wounded, sick or shipwrecked combatants on board are immune from being taken → prisoners of war. A warship encountering an enemy hospital ship is entitled to demand that wounded, sick or shipwrecked combatants on board be surrendered, provided that they are in a fit state to be moved and that the warship can provide adequate facilities for any medical treatment necessary.

4. Categorization of Cargoes

(a) General rule

The laws of sea warfare distinguish between a merchant ship and its cargo. An enemy merchant ship may carry neutral cargoes and, vice versa, a neutral merchant ship may transport enemy cargoes. There are four potential cases that must be examined:

(i) Enemy cargo on an enemy merchant ship. Such cargo can always be seized and captured as prize.

(ii) Enemy cargo on a neutral merchant ship. With the exception of contraband, the neutral flag covers enemy goods. That is to say, a belligerent may not seize enemy cargo carried by a neutral merchant ship (which is immune from seizure) unless it constitutes contraband.

(iii) Neutral cargo on a neutral merchant ship. Neutral cargo carried by a neutral merchant ship (which is immune from seizure) may not be seized unless it constitutes contraband.

(iv) Neutral cargo on an enemy merchant ship. Excepting contraband, neutral goods carried under an enemy flag are not liable to capture. In other words, the status of neutral cargo does not change whether such cargo is carried by an enemy merchant ship (which is subject to capture itself) or by a neutral merchant ship (which is immune from capture). In both instances the cargo must not be seized or captured unless it constitutes contraband.

The neutral or enemy character of goods carried on board an enemy merchant ship is determined by the neutral or enemy character of their owners. There is, however, a presumption that goods found on board an enemy ship are enemy goods. The transfer of ownership of goods effected after the outbreak of hostilities, while the goods are *en route* to their destination, does not modify their enemy character.

(b) Contraband

Contraband consists of any cargo useful for purposes of war and destined to the enemy. Traditional international law makes sharp distinctions between the categories of absolute contraband, conditional (or relative) contraband, and free items which cannot be contraband at all.

Absolute contraband covers items which by

their very nature are designed for use in war, e.g. weapons, ammunition, military equipment and machinery for the production or repair of → war materials. Conditional (or relative) contraband comprises articles susceptible of use in war as well as for purposes of peace, such as foodstuffs, clothing, vehicles and fuel. The London Declaration of 1909 contains two lists of items, one for each category, and these lists would in theory enter in force automatically in the case of war. Each belligerent is, however, entitled to publish an appropriate declaration in which it detracts from the two lists or adds to them, provided that any addition must consist of items used for purposes of war, either exclusively (in the case of absolute contraband) or in proper circumstances (in the case of conditional contraband). The London Declaration also enumerates articles which may never be declared contraband, including raw materials, but this enumeration has not gained acceptance in State practice. Raw materials in particular are potentially of tremendous military significance, and the tendency is towards classifying them as contraband.

Absolute contraband may be captured if it is destined to territory belonging to or occupied by the enemy (→ Occupation, Belligerent) or to the enemy armed forces. Under the London Declaration, it is immaterial whether the carriage of the goods is direct or entails trans-shipment and continued transport (in another way) by sea or land. The Declaration thus endorses the doctrine of "continuous voyage" in so far as absolute contraband is concerned. The continuous voyage here is the voyage of the cargo as distinct from that of the ship. The determining factor therefore is not the immediate destination of the ship (which is the apparent destination of the cargo), but the ultimate and genuine destination of the cargo.

Conditional contraband may be captured only if it is destined for the use of the armed forces or of a government department of the enemy State. Thus, where conditional contraband (in contradistinction to absolute contraband) is concerned, it is not enough that the articles are destined for territory belonging to or occupied by the enemy. It is necessary to show that the articles are destined specifically for use by the enemy armed forces or government, and not for the civilian population. Furthermore, under the London Declaration the doctrine of "continuous voyage" does not apply to conditional contraband. This rejection of the continuous voyage doctrine as regards conditional contraband has not, however, been accepted in the practice of States.

In any event, the modern trend, as clearly and consistently demonstrated in the two world wars, is to blur the distinction between absolute and conditional contraband, and to apply to both categories the rules of absolute contraband. Nevertheless, even today it is not permissible to brand all cargoes indiscriminately as contraband (absolute or conditional). There are still quite a few free articles which cannot be subsumed under the heading of contraband.

Absolute or conditional contraband may be captured anywhere within the theatre of war, at any stage in the ship's voyage. Yet a vessel carrying contraband may only be captured during the act. Capture on the ground of transport of contraband on a previous voyage is excluded.

A cargo consisting of contraband may be condemned. It is also permitted to condemn goods which are not by themselves contraband if they are found on board the same vessel and belong to the same owners as the contraband. As for the ship itself, it may be condemned if the contraband (reckoned either by value, weight, volume or freight) forms more than half the cargo. In the last two instances it is customary to say that the contraband "infects" the rest of the cargo or the ship. In all cases condemnation is carried out by decree of a prize court.

5. Blockade

The purpose of a → blockade is to prevent transit (entry or exit) of any ship from or to enemy → ports or coasts, irrespective of the nature of the cargo carried on board. A blockade applies even to cargoes destined for the civilian population, and should this population be dependent on the importation of foodstuffs for its survival, the blockade may utilize the populace's suffering as a lever to pressure the enemy into → surrender. This is the case notwithstanding Art. 54 of Protocol I of 1977 which forbids the starvation of civilians as a method of warfare, since the prohibition does not seem to apply to sea warfare. On the other hand, Geneva Convention IV relative to the Protection of Civilian

Persons in Time of War requires free passage – under certain conditions – of all consignments of medical or hospital stores and objects necessary for religious worship exclusively intended for the civilian population, as well as essential foodstuffs, clothing and (pharmaceutical) tonics intended for children, expectant mothers and maternity cases (→ Relief Actions).

Protocol I adds in Art. 70 that if the civilian population of any territory under the control of a belligerent power – other than an occupied territory – is not adequately provided with clothing, bedding, means of shelter and other supplies essential to its survival, relief actions which are humanitarian and impartial in character are to be undertaken subject to the agreement of the parties concerned in such relief actions. Like Convention IV, Protocol I refrains from referring specifically to the situation of a blockade. The Protocol's provision is broader in scope in that it encompasses various supplies destined to all civilians. The Protocol stresses that it covers, *inter alia*, relief consignments destined for the civilian population of the enemy. But, unlike supplies dealt with in Convention IV, consignments regulated by the Protocol are contingent on the agreement of the parties concerned. Needless to say, once the agreement of the parties forms a condition to the implementation of provisions regarding relief consignments, the provisions lose much of their practical significance.

A blockade is primarily relevant neither to enemy ships (which, as indicated, may be seized anyway) nor to ships flying the flag of the blockading power (which can be and usually are forbidden to engage in → trading with the enemy). The actual effect of blockades falls on neutral ships, which can thereby be precluded from trading with the enemy. Although a blockade affects all vessels, it is customary to permit neutral warships to cross the blockade line, so that the real application of a blockade is limited to neutral merchant ships.

The imposition of a valid blockade is dependent on the concurrent fulfilment of three conditions: effectiveness, non-discrimination and communication of an appropriate declaration.

(a) Effectiveness. A blockade, in order to be binding, must be effective. The basis for this condition is the desire to exclude reliance on a mere "paper blockade", a fictional blockade by declaration only, as a belligerent is not entitled to proscribe neutral trading with the enemy unless it is prepared actually to enforce the blockade. It is forbidden sporadically to capture neutral ships trading with the enemy when the coastline as a whole is wide open.

How then is the effectiveness of a blockade guaranteed? There is no need to station a cordon of ships like a wall around a port or along a coast; it is sufficient to maintain a permanent system of patrol. For this purpose use of submarines and aircraft as well as surface ships is allowed. In addition, minefields may be established. Yet the laying of → mines alone, without constant supervision by vessels and planes, does not suffice for the maintenance of an effective blockade. It is not clear whether a blockade may be enforced only by submarines, or only by aircraft, without surface ships.

The effectiveness of a blockade must be examined on the merits of each case, taking into account geographical and other circumstances. At times, one warship will suffice to impose an effective blockade (for example, if a small and isolated port is involved), whereas on other occasions a full-fledged squadron will not be adequate (by way of illustration, if thousands of miles of coastline are to be guarded). When a blockade is imposed on a whole coastline, it may be maintained at a distance. Obviously, the degree of effectiveness of a blockade is a relative standard. The main question is whether there is a reasonable expectation that a ship attempting to breach the blockade will indeed by intercepted; the fact that a single ship managed to break through a blockade does not make it ineffective.

(b) Non-discrimination. A blockade must be applied impartially to the ships of all nations. Hence, it is forbidden to impose a blockade against ships of one neutral State while permitting the vessels of another to trade with the enemy (→ States, Equal Treatment). Moreover, the blockading country cannot empower its own ships to cross the blockade line and trade with the enemy, while at the same time banning such trade by neutral States.

(c) Appropriate declaration. A blockade is binding only if an appropriate declaration – specifying the time when the blockade begins, its pre-

cise geographical limits, and the period within which neutral vessels inside the blockaded area may come out – is made and conveyed both to the enemy and to neutral States. A similar declaration must be issued when the blockade is raised. Nevertheless, a blockade may be terminated regardless of declarations. As soon as the blockading fleet evacuates the area so that the blockade ceases to be effective, it comes to an end. Should it be desired to re-establish the blockade, a new declaration is required.

When a neutral ship tries to breach a legitimate blockade, it may be captured. Such capture, however, is contingent on the neutral ship's (i.e. its captain's) actual or presumptive knowledge of the blockade.

A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy. The blockading force must not bar access to neutral ports and coasts, or capture for breach of blockade a neutral ship on its way to a non-blockaded port. This rule is particularly important when the blockade covers a large area, and a neutral State in its entirety is situated behind the blockade line (the classical example is that of the Netherlands during World War I). The London Declaration explicitly forbids the capture of a neutral ship bound for a neutral port, even if it intends to proceed from that port to an enemy port or if the ultimate destination of the cargo (carried at this stage to a neutral port) is the enemy country. The Declaration thereby rejects the application of the doctrine of "continuous voyage" to the enforcement of a blockade.

The capture of a neutral ship seeking to breach a blockade is permissible only during the act. The later seizure of a vessel merely because it breached (or endeavoured to breach) a blockade in the past is forbidden, and preventive capture before the ship reaches the blockade line is ruled out. Capture must be effected within the area of operations of the blockading force. Nevertheless, → hot pursuit of a vessel breaching or attempting to breach a blockade is authorized even beyond the area of operations, provided that it commenced in that area. The pursuit must be immediate and continuous. If it is abandoned, the escaping ship may not be captured subsequently.

When a neutral ship is legitimately captured for breach (or attempted breach) of a blockade, it may be condemned with its cargo unless the cargo owner did not know and could not have known of the intention to breach the blockade. The condemnation must be decreed by a prize court.

6. Prize Proceedings

If the conditions required for the capture of an enemy or neutral merchant ship or its cargo have been satisfied, it is necessary to initiate the appropriate judicial proceedings before the prize courts that each belligerent sets up in its ports. The aim of prize proceedings is to determine whether the capture of the ship and cargo was legal. Should it have been legal, the court will then issue a decree condemning the ship and cargo and vesting the title to them in the State. It must be emphasized that the confiscation of a prize is invalid in the absence of a court's decree. But once such a decree is issued, title vested on the basis of it is valid *erga omnes* (even *vis-à-vis* enemy and neutral States), and the captor country is entitled to dispose of the property by transferring it to new owners. Condemnation causes to be forfeited not only prior ownership but even any previous charge attaching to the property, and the captor State acquires (and transfers if there is a transfer) a clean title. If the prize court decides that the capture of the ship or the cargo was illegal, it is necessary to release either or both of them. Moreover, the interested parties should be compensated for the seizure and the losses sustained (such as loss of profits from the ship's services), unless there were good reasons for the capture.

A prize court is a national court. Yet, as the British Privy Council laid down in 1916 in The *Zamora* [1916] 2 A.C. 77, this domestic court must apply international rather than national law (→ International Law and Municipal Law). The Second Hague Peace Conference of 1907 formulated Convention XII relative to the Creation of an → International Prize Court, with the intention of instituting an appeal procedure against the judgments of national prize courts before a special international tribunal. Appeals could have been lodged by a neutral State or by a national of either a neutral or an enemy State. The Convention, however, never came into force and the International Prize Court failed to materialize.

7. *Submarine Warfare*

→ Submarine warfare creates special problems which emanate from the unique nature of a submarine as a warship. Evidently, a submarine, like any other warship, may capture an enemy merchant ship and lead it to port for confiscation in prize proceedings (or sink it in the event of military necessity, after having removed the crew and passengers). But if a submarine wishes to do this, it must surface. And when a submarine surfaces, it exposes itself to damage by a light gun, with which a merchant ship may be equipped, or by ramming. In the course of both world wars → war zones were established, entry into which by any vessels – enemy warships, enemy merchant ships and even neutral ships – was at their peril, and in which submarines torpedoed from a distance and sank many merchant ships with all hands on board. This practice manifestly negated the fundamental distinction between merchant ships and warships. By way of response, the → convoy system developed with merchant ships sailing as a group escorted by destroyers and submarine pursuit craft. The convoy system further increased the danger of surfacing for submarines wishing to capture merchant ships, and in fact left them no choice but to torpedo merchant ships from a distance.

The 1922 Washington Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare (Schindler/Toman, p. 789) declared that a submarine is not under any circumstances exempt from the universal rule that a merchant ship must not be attacked unless it refuses to submit to visit and search after warning, and must not be destroyed unless the crew and passengers have first been placed in safety. The Treaty adds that if a submarine cannot capture a merchant ship in conformity with this rule, it must desist from attack and from seizure, and must permit the merchant ship to proceed unmolested.

The Washington Treaty did not come into force. In its stead, the London Treaty for the Limitation and Reduction of Naval Armament (Schindler/Toman, p. 793) was formulated in 1930, and in Art. 22 it confirms the general principle that submarines, in their action with regard to merchant ships, must conform to the rules of international law to which surface vessels are subject. Art. 22 further provides that except in the case of persistent refusal to stop on being duly summoned or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink a merchant ship without having first placed passengers, crew and ship's papers in a place of safety. The article specifies that the ship's boats are not regarded as a place of safety unless the safety of the passengers and the crew is assured, in the existing sea and weather conditions, by the proximity of land or the presence of another vessel which is in a position to take them aboard.

Since only some of the major naval powers were signatories to the 1930 Treaty, a special Procès-Verbal was signed in London, in 1936, reiterating the provisions of Art. 22. Most of the principal maritime powers, including Germany, became contracting parties to this Procès-Verbal. Nevertheless, when World War II broke out, Germany once more resorted to the *modus operandi* of sinking merchant ships from a distance by the use of U-boats. In the → Nuremberg Trials the German Admirals Dönitz and Raeder were charged with → war crimes because they had waged unrestricted submarine warfare contrary to the Procès-Verbal. In its judgment (Friedman, Vol. 2, p. 922) the International Military Tribunal stated explicitly that it was not prepared to punish them for the conduct of submarine warfare against British armed merchant ships. The judgment implies that a submarine may strike from a distance at enemy merchant ships which are equipped with guns or protected by escorting warships in a convoy. It is clear, all the same, that the sinking of other enemy merchant ships (i.e. unarmed merchant ships not travelling in a convoy), and *a fortiori* neutral ships, is interdicted. There are those who contend that a submarine may also sink an enemy merchant ship from a distance if it faces a danger of being attacked by aircraft should it surface. Since such danger exists at all times, this contention cannot be accepted.

8. *Arming Merchant Ships*

Until the 19th century, States used to commission, by letters of marque, private persons called privateers (or corsairs as distinct from pirates (→ Piracy)) to attack enemy merchant ships (→ Privateering). The 1856 Declaration of

Paris proclaims that privateering is, and remains, abolished. Privateers will nowadays be considered unlawful → combatants.

Notwithstanding the prohibition of privateering, a belligerent may in certain circumstances convert a merchant ship into a warship. This topic is dealt with in Hague Convention VII of 1907 relating to the Conversion of Merchant Ships into War-Ships. The Convention subjects such conversion to six conditions: (a) the converted ship must be put under the authority, control and responsibility of the State whose flag it flies (that is, it cannot continue to be a private ship); (b) the converted ship must bear the external distinguishing marks of warships of that State; (c) the ship's commander must be a naval officer in the service of the State; (d) the crew must be under military discipline; (e) the converted ship must respect the laws and customs of war; and (f) the State performing the conversion must announce it as soon as possible in the list of warships.

The objective of all these conditions is to draw a clear-cut line between privateers and converted merchant ships. The trouble is that the Convention does not settle two questions which are pivotal to the observance of the distinction, to wit, whether conversion can be effected anywhere and at any time, and whether the vessel may be reconverted into a merchant ship before the termination of the war. If the answer to both questions is affirmative, the consequence is that a merchant ship can actually be converted into a warship whenever it encounters an easy prey on the open sea, and it can immediately thereafter reconvert itself into a merchant ship. In that case the difference between privateers and converted merchant ships becomes nominal.

Another question arising in the present context is whether an unconverted merchant ship encountering an enemy warship must meekly submit to seizure. The prevailing view is that a merchant ship ordered to stop may refuse to do so and try to escape. Moreover, with a view to enabling merchant ships to resist capture, some maritime powers (particulary Great Britain) have taken the step of arming them with light guns. The legality of this measure is debatable (→ Merchant Ships, Armed). The difficulty here is two-fold. First, placing armaments on board a merchant ship may enable it not only to protect itself but also to attack weaker craft belonging to the enemy, thus contravening the prohibition of privateering. Secondly, the problem has a special dimension linked to submarine warfare. As noted, when a submarine surfaces with a view to stopping a merchant ship, it exposes itself and becomes vulnerable to damage even by light guns, so that any armaments on board that ship may seriously jeopardize the submarine. For that reason it must be concluded that a merchant ship attempting to evade or resist an enemy warship acts at its peril. In such a case, it is thought that the warship may attack and sink it (together with its crew and passengers) as if it were a warship. Still, a merchant ship's resistance to capture is not to be regarded as unlawful combat. Should members of its crew fall into enemy hands, they would be entitled to the status of → prisoners of war.

9. Deception

The general rule is that whereas *ruses de guerre* (→ War. Ruses) are permitted, → perfidy is forbidden. The problem, however, is to determine what constitute acceptable ruses of war. Camouflage (achieved, for example, by fitting dummy funnels and decks to disguise a warship as a merchant ship or as a neutral vessel) is allowed. On the other hand, an improper use of a white flag (to feign surrender) is banned (→ Flag of Truce). But, unlike the laws of land warfare, the laws of sea warfare permit a warship to fly a false flag, – of a neutral State or of the enemy – at any stage (pursuit, escape or ambush) before opening fire. The only condition is that the warship must show its true colours prior to going into action. It is less clear whether the method of hoisting a deceptive flag is permitted to merchant ships, but it is the commonly held view that it is. For that reason, among others, warships resort to stopping neutral merchant ships; verification of the flag is a necessary procedure. Protocol I of 1977 additional to the Geneva Conventions pronounces expressly that its provisions prohibiting the use of false flags and emblems (of the enemy, a neutral State or the → United Nations) do not affect the conduct of armed conflict at sea.

10. Mines

The use of naval → mines creates particular

problems because they are likely to endanger neutral shipping, hospital ships and the like. Since the whole of the open sea is open to maritime warfare, the use of naval mines broadens the effects of hostilities on neutral States and restricts the freedom of navigation (→ Navigation, Freedom of) of their ships even when these are employed in trade not relating to the war. Moreover, inasmuch as naval mines may be swept away by currents, waves and winds, there is also a danger that they will reach the territorial or internal waters of a neutral State (i.e. beyond the theatre of war). To cope with these problems, the 1907 Hague Conference adopted Convention VIII relative to the Laying of Automatic Submarine Contact Mines. The key provisions of the Convention are as follows:

(a) It is prohibited to lay unanchored automatic contact mines (floating mines not secured by an anchor to keep them in place), unless they are so constructed as to become harmless at the most one hour after whoever laid them ceases to control them. The one-hour deactivation period is designed to enable one warship escaping another to sow behind it a trail of unanchored mines (against the pursuing ship), and nevertheless to guarantee that the mines will not present a menace to shipping when the chase is over. The rule regarding the laying of submarine mines is unequivocal: Subject to the special exception stated, it is strictly forbidden to lay automatic contact mines which are liable to be swept away from one spot to another.

(b) The Convention further proscribes the laying of anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings. This is actually a clarification of the anchoring provision. It is not enough for automatic contact mines to be secured to an anchor (i.e., a heavy weight) which holds them in place. Should the mine become disconnected from its moorings, it must be able to disarm itself.

(c) As a complementary rule, the Convention forbids using torpedoes which do not become harmless when they have missed their mark.

(d) The Convention disallows the laying of any automatic contact mines (even anchored ones) off the coasts and ports of the enemy with the sole object of intercepting commerical shipping. The underlying idea is that it is permissible to lay anchored automatic contact mines without restriction, for defensive purposes, near the coasts of the State placing them. On the other hand, use of such mines offensively near enemy shores is allowed only for military ends and not for impeding civilian trade. The stipulation is not easy to implement, inasmuch as it is hard to tell whether the laying of mines off enemy shores is done for the sole object of intercepting commercial shipping or with a view to attaining other goals. This subjective element of the intention of the belligerent laying the mines does not necessarily come to light from the objective circumstances. In any event, the Convention only refers to the laying of mines off coasts. An attempt was made in the course of the Hague Conference to limit the use of mines to territorial and internal waters, but ultimately no restrictive clause was adopted. From the absence of a limitation one can deduce that the placing of anchored mines in the open sea is permissible, and this, without doubt, has been the practice of States.

(e) Notwithstanding the above, the Convention sets forth that when automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping. The Convention further states that belligerents must undertake to do their utmost to render such mines harmless within a limited time. Should the mines cease to be under surveillance, the belligerents must address a notice of the danger zones to all concerned as soon as military exigencies permit.

As noted, in the course of the two world wars the practice evolved of setting up closed "war zones" in large areas of the open sea. Here permanent minefields were established and entry into the "war zone" was prohibited to all ships (including neutral vessels) except through specified and regulated lanes. Any ship that diverted from these lanes within the zones ran the risk of running into mines or being attacked without warning by aircraft and submarines. Evidently, to the extent that the closure of war zones is allowed (and this is disputed), regulated lanes must be left open for the legitimate passage of neutral ships.

Since the adoption of the Hague Convention, sophisticated mines, particularly magnetic and acoustic ones, have come into use. These explode at a distance (without contact) or home in on a

ship. According to one viewpoint, the provisions of the Convention are restricted to contact mines and do not apply to these sophisticated mines, which were not in existence in 1907. There is, however, no reason why these provisions should not be apposite to magnetic and acoustic mines. The rule must be that the use of any mines is permissible only if they are anchored (even though the anchor may enable them to home in on a ship within a given range) and on condition that they become harmless as soon as they are disconnected from their moorings.

Another category encompasses electric mines, which existed even at the time of the Hague Conference. These are controlled by human beings from some observation post, and explode only when triggered from afar. The use of these mines, although generally limited by the nature of the supervision to the vicinity of the coast (where the observation post is located), does not present any problem since they do not explode indiscriminately. One merely has to examine whether or not the electric mine was directed at a legitimate target for attack (→ Military Objectives).

11. Targets Other than Ships

Enemy targets at sea need not necessarily only be ships. In war it is permitted, for instance, to cut submarine cables (→ Cables, Submarine) connecting the enemy State with other countries (or several portions of the enemy State, like the mainland and an island). It is also permissible to destroy → lighthouses.

An important question arises in respect of coastal → bombardment. Hague Convention IX concerning Bombardment by Naval Forces in Time of War rules out the bombardment by naval forces of ports, towns, villages, habitations or buildings which are not defended (cf. → Open Towns). The Convention further excludes the bombardment of a port only because it is screened by automatic contact mines. It follows that a place is not considered defended unless the defence is formed ashore through fortifications and military units. The idea is that, should the enemy fleet land forces on shore, they will be able to gain control of the port without encountering resistance, and there is consequently no need to shell the locality first.

The Convention allows a demand made to the authorities of an undefended locality that they furnish those supplies necessary for the actual needs of the naval force before them (as distinct from the enemy navy in its entirety), provided that the demand is in proportion to the local resources (→ Proportionality). The necessary supplies must be paid for in cash or recorded by receipts attesting an outstanding debt (which must be defrayed at a later stage). If the supplies are not furnished, despite the demand, the locality may be bombarded (even though it is undefended). On the other hand, the Convention interdicts the bombardment of an undefended place for the nonpayment of money → contributions. Thus, it is permissible to bombard an undefended place in order to obtain essential provisions, without which the fleet is unable to function, but not to raise funds.

The prohibition against coastal bombardment does not apply to military or naval installations, stores of weapons and ammunition, factories that can be used for the needs of the army or navy, and warships lying in port. These are military objectives which can be bombarded, either after due warning to the local authorities that they should destroy them themselves within a reasonable time, or without prior warning in case of → military necessity. It ought to be stressed that these rules apply only to military targets located in undefended places since in defended places they may be bombarded in any case. The Convention expressly states that the fleet incurs no responsibility for unavoidable losses sustained by the bombardment, but it must take all necessary measures for causing the least damage to the undefended locality.

In all instances of naval bombardment, whether the place is defended or undefended, two conditions must be complied with. First, the commander of the attacking force must do his utmost to warn the local authorities in advance. Secondly, medical installations, cultural property (→ Cultural Property, Protection in Armed Conflict) and the like are immune from destruction.

12. Persons hors de combat

The categories of persons who are *hors de combat* at sea comprise those who have laid down their weapons, → wounded, sick and ship-

wrecked. As for the wounded and sick, the expression covers not only those injured in the course of sea warfare, but also those transported from land battlefields. The term "shipwrecked" includes survivors of aeroplane crashes (whether a person parachutes into the water from an aircraft or the aircraft makes a forced landing at sea). To be considered as shipwrecked, these persons need not actually be floating on the water but may be on rafts and perhaps even have reached an isolated island. This group also includes not only survivors of ships that have been sunk, but even those aboard a disabled vessel. Further, it is immaterial whether the ship that was "wrecked" sank in battle, in an accident or in a storm. Lastly, since the term "shipwrecked" complements the words "wounded and sick", the person in question may be in perfectly good health.

Persons who are *hors de combat* must not be attacked, provided that they refrain from any act of hostility. When lawful combatants who are *hors de combat* fall into enemy hands, they must be considered and treated as prisoners of war.

13. Conclusion

In large part, the laws of sea warfare make sense only as a form of → economic warfare. As a result, these laws have a unique impact on the rights and duties of neutrals. Not surprisingly, history is replete with cases in which neutral States were drawn into the vortex of war because of disputes with belligerents over the exercise of belligerent rights. Consequently, in local wars belligerents often choose not to insist on their rights in so far as they affect neutrals: they decline to impose blockades, forego the visit and search of neutral merchant ships, and so forth. Nevertheless, even when the laws of sea warfare are not availed of in their entirety, they continue to exist. And when a major armed conflict spreads around the planet, these laws show their full potential. As with some of the laws of land warfare, there are a number of traditional rules of sea warfare which are now virtually extinct. A good example is that of Hague Convention VI relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, which has not been observed in the modern practice of States. But, by and large, the laws of sea warfare are as apposite today as they have been in the past.

J.B SCOTT (ed.), The Hague Conventions and Declarations of 1899 and 1907 (1915).

L. FRIEDMAN (ed.), The Law of War, A Documentary History, 2 vols. (1972).

D. SCHINDLER and J. TOMAN (eds.), The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents (2nd ed. 1981).

R.J.R. GOFFIN, Submarine Cables in Time of War, Law Quarterly Review, Vol. 15 (1899) 145–154.

J.M. GOVER, Comparative Views of Contraband, Journal of the Society of Comparative Legislation (New Series), Vol. 2 (1900) 118–130.

W.R. KENNEDY, Some Points in the Law of Blockade, Journal of the Society of Comparative Legislation (New Series), Vol. 9 (1908) 239–251.

J.B. SCOTT, Status of Enemy Merchant Ships, AJIL, Vol. 2 (1908) 259–270.

G.G. WILSON, Conversion of Merchant Ships into War Ships, AJIL, Vol. 2 (1908) 271–275.

A.P. HIGGINS, Hospital Ships and the Carriage of Passengers and Crews of Destroyed Prizes, Law Quarterly Review, Vol. 26 (1910) 408–414.

D.P. MYERS, The Legal Basis of the Rules of Blockade in the Declaration of London, AJIL, Vol. 4 (1910) 571–595.

N. BENTWICH, The Declaration of London (1911).

J.W. GARNER, Some Questions of International Law in the European War: Blockades, AJIL, Vol. 9 (1915) 818–857.

G.G. PHILLIMORE, Contraband of War, Journal of the Society of Comparative Legislation (New Series), Vol. 15 (1915) 223–238.

A. HOLTZOFF, Some Phases of the Law of Blockade, AJIL, Vol. 10 (1916) 53–64.

J.B. SCOTT, The Execution of Captain Fryatt, AJIL, Vol. 10 (1916) 865–877.

A.P. HIGGINS, Submarine Warfare, BYIL, Vol. 1 (1920–1921) 149–165.

M.O. HUDSON, Seizures in Land and Naval Warfare Distinguished, AJIL, Vol. 16 (1922) 375–390.

H.W. MALKIN, Blockade in Modern Conditions, BYIL, Vol. 3 (1922–1923) 87–98.

H.E. RICHARDS, Contraband, BYIL, Vol. 3 (1922–1923) 1–16.

S.A. HERZOG, When Does Title to Prize Pass?, AJIL, Vol. 18 (1924) 483–506.

A.P. HIGGINS, Ships of War as Prize, BYIL, Vol. 6 (1925) 103–110.

A.P. HIGGINS, Visit, Search and Detention, BYIL, Vol. 7 (1926) 43–53.

O.H. MOOTHAM, The Doctrine of Continuous Voyage, 1756–1815, BYIL, Vol. 8 (1927) 62–80.

J.W. GARNER, Violations of Maritime Law by the Allied Powers during the World War, AJIL, Vol. 25 (1931) 26–49.

H.A. SMITH, Le développement moderne des lois de la guerre maritime, RdC, Vol. 63 (1938 I) 603–692.

R. SANDFORD, Evolution du droit de la guerre maritime et aérienne, RdC, Vol. 68 (1939) 555–686.

H.A. SMITH, The Declaration of Paris in Modern War, Law Quarterly Review, Vol. 55 (1939) 237–249.
G.G. FITZMAURICE, Some Aspects of Modern Contraband Control and the Law of Prize BYIL, Vol. 22 (1945) 73–95.
A.W. KNAUTH, Prize Law Reconsidered, Columbia Law Review, Vol. 46 (1946) 69–93.
S.W.D. ROWSON, Modern Blockade, Some Legal Aspects, BYIL, Vol. 23 (1946) 346–353.
J.C. MOSSOP, Hospital Ships in the Second World War, BYIL, Vol. 24 (1947) 160–215.
S.W.D. ROWSON, Prize Law during the Second World War, BYIL, Vol. 24 (1947) 160–215.
R.W. TUCKER, The Law of War and Neutrality at Sea (1957).
H.A. SMITH, The Law and Custom of the Sea (3rd ed. 1959).
J.S. PICTET (ed.), Commentary II, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1960).
T.D. BROWN, World War Prize Law Applied in a Limited War Situation, Egyptian Restrictions on Neutral Shipping with Israel, Minnesota Law Review, Vol. 50 (1965–1966) 849–873.
C.J. COLOMBOS, International Law of the Sea (6th ed. 1967).
D.P. O'CONNELL, International Law and Contemporary Naval Operations, BYIL, Vol. 44 (1970) 19–85.
H.S. LEVIE, Mine Warfare and International Law, Naval War College Review, Vol. 24 (1972) 27–35.
U. SCHEUNER, Einwirkungen der modernen Entwicklung des Seekriegsrechts und Seerechts, in: D. Mahncke and H.-P. Schwarz (eds.), Seemacht und Außenpolitik (1974) 59–80.
P. GUTTINGER, Réflexions sur la jurisprudence des prises maritimes de la seconde guerre mondiale, RGDIP, Vol. 79 (1975) 25–91.
D.P. O'CONNELL, The Influence of War on Sea Power (1975).
U. SCHEUNER, Entwicklungen im Seekriegsrecht seit dem zweiten Weltkrieg, in: Recht über See, Festschrift, Rolf Stödter zum 70. Geburtstag (1979) 287–313.
Y. DINSTEIN, The Laws of War at Sea, Israel Yearbook on Human Rights, Vol. 10 (1980) 38–69.

YORAM DINSTEIN

SECURITY ZONES *see* Safety Zones

SEIZURE *see* Requisitions; Neutrality in Sea Warfare

SELF-DEFENCE

1. Notion

All legal systems allow their members to protect themselves, by force if necessary, against certain serious violations of their rights. The function and importance of this right of self-defence, however, depends on the organization of any given legal system. In a system in which law enforcement is centralized, self-defence is an exceptional, closely circumscribed remedy of last resort. On the other hand, in a legal system lacking centralized law enforcement, self-defence plays a much broader role. Consequently, the very notion of self-defence and its importance have changed considerably within the development of → international law during the last centuries (→ History of the Law of Nations). A broad understanding of self-defence as legitimate protection against a wide variety of violations of State rights and interests (→ States, Fundamental Rights and Duties) – often understood to be identical with → self-preservation – has given way to a much narrower concept of self-defence as a restricted exception to the general prohibition of the → use of force in a system of → collective security.

2. Historical Evolution

The history of the concept of self-defence is closely related to the history of the laws of → war (→ War, Laws of, History). Under the medieval and → natural law theories of *bellum justum*, self-defence was the most important reason for a just war.

In the period up to World War I, during which the right of States to go to war (*jus ad bellum*) was accepted as inherent in their → sovereignty, the concept of self-defence lost some of its relevance, since in such a system the right to use force in self-defence could not be doubted. Yet self-defence as a concept continued to play a prominent role in State practice and international legal theory. Despite the general acceptance of a sovereign right to go to war, this right was scarcely invoked in practice, but governments justified war to national and international audiences in terms of self-defence or → self-help. Accordingly, a legal literature which recognized a *jus ad bellum* still acknowledged a system of justifications for the use of force which included self-defence.

Self-defence was even more important as a justification for the use of force in measures short of war (→ Blockade, Pacific; → Intervention;

→ Naval Demonstration), which were more strictly regulated by international law than war. Therefore, State practice with regard to measures short of war provided the most important contribution to a more precise definition of the limits of legitimate self-defence in this period (→ Caroline, The). While self-defence could be invoked then for a wider variety of reasons than today (including those that would today be classified as self-help or self-preservation), and allowed for greater freedom of action (including the right to take preventive action), the requirement of → proportionality of self-defence as to means and ends was elaborated in these instances (see also → Reprisals).

The concept of self-defence acquired a completely new meaning in the 20th century with the progressive outlawing of war and the use of force as a means of national policy (→ League of Nations; → Geneva Protocol for the Pacific Settlement of Disputes (1924); → Kellogg-Briand Pact (1928); → Saavedra Lamas Treaty (1933). This culminated in the → United Nations Charter's general prohibition of the use of force and the creation of a system of collective security. Self-defence had now to be distinguished from self-help, which at least in principle was no longer regarded as a legitimate ground for the use of force, and its definition and construction had to take into consideration its exceptional nature in such a system.

3. Self-Defence under UN Charter Art. 51

The → United Nations system of collective security is based on a general prohibition of the use of force (Art. 2(4)) and a concentration on the legitimate use of force in the → United Nations Security Council (Arts. 39 to 51; for the subsidiary role of the → United Nations General Assembly see → Uniting for Peace Resolution). By reserving the right of individual and collective self-defence, Art. 51 provides the major exception to this system, its exceptional nature being underlined by a strict limitation of the right of self-defence.

Under Art. 51, self-defence is permissible only in the case of an "armed attack" (→ Armed Conflict, Fundamental Rules). While this term has a well-established basic meaning (i.e. the armed violation of the → territorial integrity and political independence of another State, or of its ships and → aircraft on the → high seas), doubtful borderline cases remain. The efforts of the General Assembly to define → aggression (UN Res. 3314 (XXIX)) have not resolved every open question, even if the terms "armed attack" and "aggression" are assumed to be identical. That assumption has not gone undisputed, even though the term "*agression armée*" in the French version of Art. 51 appears as the equivalent of "armed attack".

While Arts. 2(4) and 51 forbid preventive action in principle, there might be factual situations in which a pre-emptive strike against imminent attack is justified as self-defence (possibly the Israeli position at the outbreak of the Six Days War). Res. 3314 recognizes this possibility by regarding the first use of armed force only as prima facie evidence of an act of aggression (Art. 2). The question concerning the conditions under which the support given by a State to armed bands committing acts of violence in another State allows self-defence against the supporting State cannot be resolved by the vague compromise of Art. 3(g) of the Resolution. Again, it will depend on the facts of the individual case whether the contribution of the supporting State is important enough to allow the assumption of an "armed attack" on its part.

Art. 51 respects the principal peacekeeping role of the Security Council by linking the exercise of self-defence to actions of the Council. Self-defence is construed as a provisional remedy available only until the Council has taken appropriate measures. Self-defence measures have to be reported to the Council, whose rights under its responsibility for international peace and security are reserved.

The limitation of the right of self-defence by the principle of proportionality had already been well established under general international customary law and has to be regarded as implicit in the very notion of self-defence. Though it is not specifically mentioned in Art. 51, proportionality is to be maintained even more strictly under the Charter. The status of self-defence as an exception to the fundamental prohibition of the use of force asks for a construction of Art. 51 that restricts the permissible use of force to a necessary minimum. Self-defence is therefore restricted to the preservation or restoration of the → *status*

quo ante (proportionality as to the end), and the means employed in the exercise of self-defence have to be necessary and proportional to the violation that gave rise to the right of self-defence. Understood this way, the proportionality rule will often allow a more precise evaluation of doubtful cases than an evaluation in terms of "armed attack". The rule supports the view that preventive action in principle is impermissible, as the use of force will not regularly be a proportional response to mere preparations. In cases of indirect aggression (for example, giving support to armed bands or irregulars; → Mercenaries), the proportionality rule will usually not justify direct action against the supporting State, while it might allow attacks on the bases of such groups of foreign territory.

4. Self-Defence beyond Art. 51?

By restricting the right of self-defence to cases of armed attack, Art. 51 leaves a gap between acts violating rights of States illegally, and acts against which self-defence is permissible. There have been attempts at closing this gap by claiming the existence of a customary right of self-defence beyond Art. 51 (Bowett and others).

While the right of self-defence is indeed part of → customary international law and is recognized as not having been created by the Charter by the wording of Art. 51 ("inherent right") it is doubtful whether the right of self-defence can be expanded beyond Art. 51. It can be argued that State practice had come to restrict the right of self-defence to cases of armed attack even before the founding of the UN, so that the customary right of self-defence and self-defence under Art. 51 have been identical from the outset (Brownlie). Even if one doubts a clearly established State practice to this effect at such an early point, it has to be admitted that the development of customary international law pointed in this direction (e.g. the Kellogg-Briand Pact, the Geneva Protocol for the Pacific Settlement of Disputes, and the Saavedra Lamas Treaty). Arts. 2(4) and 51 of the UN Charter have brought this development to its logical conclusion. With their nearly universal acceptance, they have also structured the understanding of international customary law. Subsequent State practice (e.g. national constitutions outlawing the use of force; see also → Regional Arrangements and the UN Charter) underline this development.

Art. 51 thus delineates the boundaries of legitimate self-defence not only for the purposes of the UN Charter, but also in general international law. This leaves no room for invoking a right of self-defence if rights of a State are violated in a way other than by armed attack (e.g. by an illegal act against its nationals in a foreign country; → Humanitarian Intervention). If such violations cannot be resolved peacefully, or through the intervention of international organs, the offended State might have a right of self-help, but in principle this does not allow a resort to force. This should hold true in spite of the fact that the system of collective security as provided for in the UN Charter has to a large extent proved ineffective in view of the East-West conflict and the ensuing weakness of the Security Council.

J.L. KUNZ, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, AJIL, Vol. 41 (1947) 872–879.

H. WEHBERG, L'interdiction du recours à la force, le principe et les problèmes qui se posent, RdC, Vol. 78 (1951 I) 7–115.

H.A.H. AL CHALABI, La légitime défense en droit international (1952).

C.H.M. WALDOCK, The Regulation of the Use of Force by Individual States in International Law, RdC, Vol. 81 (1952 II) 455–517.

D.W. BOWETT, Self-Defence in International Law (1958).

M.S. McDOUGAL and F. FELICIANO, Legal Regulation of Resort to International Coercion, Aggression and Self-Defense in Policy Perspective, Yale Law Journal, Vol. 68 (1958–1959) 1057–1165.

R. HIGGINS, The Legal Limits to the Use of Force by Sovereign States, United Nations Practice, BYIL, Vol. 37 (1961) 269–319.

I. BROWNLIE, International Law and the Use of Force by States (1963).

W. WENGLER, Das völkerrechtliche Gewaltverbot (1967).

K. SKUBISZEWSKI, Use of Force by States, Collective Security, Law of War and Neutrality, in: M. Sørensen (ed.), Manual of Public International Law (1968) 739–843.

L. WILDHABER, Gewaltverbot und Selbstverteidigung, in: W. Schaumann (ed.), Völkerrechtliches Gewaltverbot und Friedenssicherung (1971) 147–173.

T. BRUHA, Die Definition der Aggression (1980).

BRUN-OTTO BRYDE

SELF-HELP

1. Notion

There is no clearly established use of the term "self-help" in international law. In a broad sense, self-help – the unilateral protection and enforcement of rights – characterizes one of four possible ways of managing an international conflict. The others are inaction (which could also encompass withdrawal), → negotiation between the parties in dispute, and enlisting the help of a third party as a go-between (→ Good Offices), mediator (→ Conciliation and Mediation; → Fact-Finding and Inquiry), arbitrator (→ Arbitration) or judge (→ International Courts and Tribunals). The legal literature indeed often uses the term "self-help" in a broad sense not so much as an independent concept but rather as a heading under which various traditional doctrines of international law allowing unilateral measures in international conflicts are treated (for example → self-defence; → reprisal; → intervention; → retorsion; → non-recognition; blockade (→ Blockade, Pacific) or termination of contracts (→ War, Effect on Contracts)). Some authors, on the other hand, distinguish self-help from self-defence (see also → Corfu Channel Case), and in its most narrow sense the term "self-help" is occasionally used as a residual concept for situations not covered by any of the specific self-help provisions.

However, the modern development of international law demands a more discriminating terminology, especially regarding a distinction between self-help and self-defence. Both are potential justifications for acts that would otherwise be illegal, and both are reactions to a prior violation of → international law. They are thereby distinguishable from acts justified in circumstances of necessity where no other State is responsible (→ Self-Preservation). But modern international law restricts the right of self-defence to cases of an armed attack (Art. 51 of the → United Nations Charter), and for this narrowly defined situation creates an exception to the general prohibition of the → use of force. The term "self-help" should therefore be reserved to reactions against violations of a State's rights that do not occur in the form of an armed attack. In contrast to cases of self-defence, these reactions need not be confined to the preservation or restoration of the → *status quo ante*, but may aim to create lawful conditions. In principle, they may not include the resort to force (→ Aggression). While self-help has to be distinguished from self-defence, its relationship to such categories as reprisals or retorsions is different. There may be situations justifying self-help not covered by any of these categories. On the other hand, these categories can serve ends differing from self-help (for example, punitive or retributive ends). If they are employed in self-help, the boundaries of legitimate self-help, as they have been developed in international law under the influence of the UN Charter, also define the limits of their legitimate use. Thus the concept of self-help has a significance in its own right.

2. Historical Development

In classical international law, which recognized few restraints on the pursuit of national policy and lacked efficient institutions for the peaceful resolution of conflicts, the States' own right to protect and enforce their rights by all means available to them was not in doubt. War and measures short of war were considered legitimate forms of self-help. Self-help was therefore a major source of → armed conflict and usually resulted in the will of the stronger party being imposed on the weaker one. Thus reducing self-help and replacing it by methods of → peaceful settlement of disputes has been a major aim behind efforts to build a more just and peaceful world order.

On the one hand, → war and the use of force in general were progressively outlawed as legitimate means of self-help. An important step in this direction was Hague Convention II of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (→ Hague Peace Conferences of 1899 and 1907; → Drago-Porter Convention), even though the more far-reaching attempts of Latin American jurists to outlaw the use of force completely in enforcing payment of → State debts (the Drago doctrine) failed. More generally, the outlawing of war and the use of force as a means of national policy (in the Covenant of the → League of Nations, the → Geneva Protocol for the Pacific Settlement of International Disputes and the → Kellogg-Briand

Pact), culminating in the UN Charter's prohibition of the use of force (Art. 2(4)) also restricted the means employable within the confines of self-help.

On the positive side, alternatives to self-help in the form of international institutions for the pacific settlement of disputes were created and developed (→ Arbitration and Conciliation Treaties; → General Act for the Pacific Settlement of International Disputes (1928 and 1949)). Here too, the Hague Conferences of 1899 and 1907 marked an important step and the UN Charter's general obligation to settle disputes peacefully (Arts. 2(3) and 33) has brought a new quality to the structure of the international legal system.

3. Self-Help and Peaceful Settlement of Disputes

Art. 2(3) of the UN Charter requires all members "to settle their international disputes by peaceful means". While Chapter VI of the Charter, devoted to the "Pacific Settlement of Disputes", restricts the concern of the → United Nations to disputes "the continuance of which is likely to endanger the maintenance of international peace and Security" (Art. 33), the obligation of the members under Art. 2(3) is not similarly qualified. This obligation goes beyond a mere refraining from armed force. The opposite view would make Art. 2(3) a weak redundancy in the light of Art. 2(4). The principle of peaceful settlement of disputes has been further developed in the → Friendly Relations Resolution (UN GA Res. 2625 (XXV)), in global and regional conventions (→ Regional Arrangements and the UN Charter) and in bilateral treaties. It can today be regarded as part of → customary international law. This principle fundamentally restricts all forms of self-help. While a legal system lacking a central authority cannot rule out self-help completely, it can make it a subsidiary remedy available only when efforts at a peaceful settlement have failed. This is exactly what Art. 2(3) of the UN Charter does. Without prescribing a specific course of action, it requires all members to attempt first a peaceful resolution of conflicts; only failing this may they resort to unilateral methods of self-help.

4. Self-Help Techniques

There is no exhaustive list of the means employable in self-help. While the use of force is in principle forbidden (see section 5 *infra*), a wide variety of diplomatic, political and economic measures may be employed to bring about a situation that conforms with law (→ International Obligations, Means to Secure Performance). International legal theory distinguishes means that are not illegal but merely → unfriendly acts (e.g. retorsion) from those that are illegal and only justified by a prior violation of law on the part of the other party (e.g. reprisal). In the light of the principle of peaceful settlement of disputes, this distinction has to be qualified. The obligation under Art. 2(3) of the UN Charter may even be violated by an exchange of unfriendly acts, thus making employment of "retorsions" subject to the sort of limitations comparable to those applicable to reprisals. The understanding of self-help as a limited exception to the principle of peaceful settlement of disputes also calls for a new definition of the → proportionality principle developed in the law of reprisals (→ Naulilaa Arbitration (Portugal v. Germany)). While the classical law of reprisals considered proportionality mainly as involving the relationship between the violation suffered and the one inflicted, this understanding of self-help confines all self-help acts to those necessary for the protection or enforcement of the offended State's rights.

5. Self-Help involving the Use of Force

A strict construction of both the UN Charter and the modern customary law influenced by it leads to the conclusion that the use of force in self-help is forbidden. The general prohibition of the use of force has only a limited number of exceptions. Apart from the historically obsolete rights under Arts. 53(1) and 107 (→ Enemy States Clause in the United Nations Charter) and acts authorized by certain UN organs (→ Sanctions; → Collective Security), the only exception is the right of individual and → collective self-defence as defined in Art. 51 of the Charter. As this right under Art. 51 is restricted to cases of armed attack, the use of force as an impermissible reaction to any other violation of rights appears an

unavoidable conclusion. However logically unimpeachable this statement of the law may be, States have since 1945 resorted to numerous acts of self-help involving the use of force. While most of these acts were clearly illegal, in some cases the reasons for using force were so compelling that the actions have met with considerable sympathy from large parts of the international community. Raids to free → hostages being held in gross violation of international law (the successful Israeli rescue attempt in Entebbe and the abortive American one in Iran) are cases in point. Such occasional resort to minor forms of force is especially understandable in light of the ineffectiveness of the system of law enforcement through the → United Nations Security Council, which in theory should serve as a corollary to the prohibition of the use of force by individual States. The Security Council is blocked by the contradictory interests of the permanent members, even in very clear cases of violation of international law.

Yet the use of force in such instances has always generated so much controversy that it cannot be considered the nucleus for the development of new customary authorizations for the use of force and the recognition of exceptions to Art. 2(4) of the UN Charter. Neither could such a qualification of the absolute prohibition under Art. 2(4) be welcomed on policy grounds. Claims to protect the lives of nationals or diplomatic personnel have often, in history, served as pretexts for intervention (→ Humanitarian Intervention). But while the progress reached in international law in ruling out forcible self-help must be preserved, it must also be admitted that, given the present stage in the development of international society, there will be instances where the resort to force will be difficult to condemn in certain circumstances. The → International Court of Justice's *obiter dictum* in the → United States Diplomatic and Consular Staff in Tehran Case (ICJ Rep. 1980, p. 3 at p. 43) underscored these difficulties by carefully balancing "understanding" for and "concern" over the American action (per contra, Judge Morozov in his dissenting opinion, ibid., p. 52).

L.M. DRAGO, Cobro coercitivo de deudas públicas (1906).

G. DAHM, Das Verbot der Gewaltanwendung nach Art. 2(4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten, JIR, Vol. 11 (1962) 48–72.

I. BROWNLIE, International Law and the Use of Force by States (1963).

W.A. KEWENIG, Gewaltverbot und noch zulässige Machteinwirkung und Interventionsmittel, in: W. Schaumann (ed.), Völkerrechtliches Gewaltverbot und Friedenssicherung (1971).

D.W. BOWETT, Reprisals Involing Recourse to Armed Force, AJIL, Vol. 66 (1972) 1–36.

U. BEYERLIN, Die israelische Befreiungsaktion in völkerrechtlicher Sicht, ZaöRV, Vol. 37 (1977) 213–243.

U.O. UMOZURIKE, The Israeli in Entebbe – Rescue or Aggression?, Verfassung und Recht in Übersee, Vol. 12 (1979) 383–392.

F.A. BOYLE, International Law in Time of Crisis, From the Entebbe Raid to the Hostages Convention, Northwestern University Law Review, Vol. 75 (1980) 769–856.

BRUN-OTTO BRYDE

SELF-PRESERVATION

1. Definition

The term "self-preservation" has been used, mainly before 1945, to designate a number of different rules authorizing in exceptional circumstances one State's interference or → intervention affecting the rights and interests of another. Learned authors and State practice have both invoked the principle (e.g. → Caroline, The; for other examples see Oppenheim/Lauterpacht). The various rules associated with self-preservation – necessity, → reprisals, → self-defence and → self-help – have undergone quite different developments since the adoption of the prohibition of the threat or → use of force in the → United Nations Charter (Art. 2(4)). It is open to question whether this makes it necessary to abandon this "vague and obsolete" term (as per Brownlie, p. 255), which has been largely discarded in the terminology of modern international law, and to replace it by such terms as "necessity", "self-help" or "self-defence" in a broader sense.

Even if one admits that according to present international law there is no "all overriding right of self-preservation" (Schwarzenberger, p. 136), there is no obstacle to speaking of the "idea of self-preservation" to form a basis for different forms of intervention. Whether these forms ac-

cording to present law are unlawful, excusable, or even legitimate has to be examined separately for each of them. It is in this larger sense that the term "self-preservation" is understood here.

As other articles are devoted to the forms of intervention mentioned above, it is sufficient here to indicate how and to what extent the idea of self-preservation forms a legitimate basis for these kinds of intervention, and whether other principles, e.g. → sovereignty, → non-intervention or the prohibition of the use of force, prevail to exclude such an application of this idea.

There are three main situations in which the idea of self-preservation is invoked: (1) in a state of objective emergency created neither by the acting nor by the target State; (2) in the case of an armed attack (→ Aggression) against the territory or sovereignty of the acting State by the target State (i.e. measures of self-defence); and (3) in the case of countermeasures taken by the acting State in response to an already completed unlawful act of the other side in order to prevent repetition of such acts. If these countermeasures would otherwise constitute unlawful acts, they are called reprisals; if they would be lawful → unfriendly acts, one speaks of → retorsions.

Whereas situation (1) can be clearly distinguished from situations (2) and (3), there are considerable difficulties concerning a distinction between the latter two. In 1964 the United Kingdom Government showed much optimism when it stated: "There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisal'; the other, which is expressly contemplated and authorized by the [UN] Charter, is self-defence against armed attack", (UN SC Official Records, 19th year, 1109th meeting, April 7, 1964, pp. 4–5).

In the literature learned authors have been less optimistic. Some deny any difference between these two forms of self-help. Others say that both forms are at least very similar or that there have been "intermingled cases". Quite a number of cases are cited in which the acting States took divergent positions (Kalshoven, pp. 26–27, 291–293). The problem raised is of importance in those situations where norms of positive law require a different treatment for self-defence on the one hand and reprisals on the other hand.

2. Self-Help in Armed Conflict

When States are involved in an actual → armed conflict, both countermeasures can be taken: Self-defence is legitimate according to Art. 51 of the UN Charter and reprisals are not generally prohibited. It is true, however, that there is very limited room for reprisals according to the Geneva Conventions of 1949 and the 1977 Protocols additional thereto (→ Geneva Red Cross Conventions and Protocols). Reprisals against the → wounded, sick and shipwrecked, against → prisoners of war, against the civilian population (→ Civilian Population, Protection) and against certain → civilian objects are prohibited (Protocol I, Arts. 20, 51–56). No general prohibition of reprisals has, however, been enacted for situations in which the other party to a conflict has not respected the rules of humanitarian law (→ Humanitarian Law and Armed Conflict). Reprisals can in the main be regarded as legitimate if they are directed against → combatants of the other side provided that permissible means and methods of combat are chosen.

The provisions of the → Friendly Relations Resolution (UN GA Res. 2625 (XXV) of October 24, 1970) and of Art. 1(a) II of the Final Act of the → Helsinki Conference on Security and Cooperation in Europe of 1975 outlawing generally any use of reprisals do not apply in the case of an actual armed conflict (see Bothe, Partsch and Solf, Section 2.7.2 on Protocol I, Art. 51 with references to different opinions expressed at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in 1976).

3. Self-Help in Peace-Time

In peace-time the situation is different. Self-defence against an armed attack remains legitimate; armed reprisals, however, are regarded as illegal according to a practice of the → United Nations Security Council, reflected in the Friendly Relations Resolution, and also in Art. 1(a) II of the Final Act of the Helsinki Conference. Under these circumstances a distinction between these two forms of self-help – self-defence and reprisals – is of the utmost importance. Both have some common preconditions: The target State must be guilty of a prior → internationally

wrongful act against the claimant State, and the claimant's use of force must be limited to the necessary measures (→ Proportionality).

In some cases a distinction may be found on the basis of the time element. Measures of self-defence can be taken immediately after the attack has begun, whereas reprisals always require an attempt to resolve the conflict by peaceful means (→ Peaceful Settlement of Disputes). If, however, a measure of self-defence is taken with a certain delay, a question arises whether the intentions of the acting State are relevant for the determination of the nature and character of the measures taken.

The practice of the UN Security Council is ambiguous. Instead of condemning all reprisals during peace-time as illegitimate, in various cases the Council has applied the criteria elaborated for the taking of reprisals during an → armed conflict. It has, for instance, investigated whether the reprisals had been directed against those who had committed a breach of international law and whether the rule of proportionality had been observed (Bowett, Reprisals, pp. 10–16). In this way the distinction between self-defence measures and reprisals is blurred. If during peace-time all reprisals with the use of force are prohibited, they cannot then be regarded as legitimate if the prerequisites valid for reprisals during an armed conflict are met.

4. Self-Preservation in States of Emergency

The last problem to be treated here is whether a State which finds itself in a state of emergency which has been created not by another State but rather by internal difficulties, natural catastrophes or similar events may base its measures on the idea of self-preservation, assuming such measures would not be allowed under general or conventional international law.

A common standard regarding the doctrine of "necessity" does not exist for the internal legal order of States. Common law countries are rather reluctant to recognize an excuse for illegal acts on the basis of the idea of self-preservation. Civil law countries are much more liberal (France: *légitime défense/cas de nécessité*; Germany: *Notwehr/Notstand*) and may authorize or excuse acts otherwise regarded as illegal.

On the international level it is highly questionable whether a modern doctrine of necessity can be based on cases decided at a time when this doctrine was even used to resolve problems between nations on the basis of the use of force. It could be argued that if this doctrine is no longer applicable to cases involving the use of force, it could also no longer apply in other fields. This argument, however, is not convincing. The use of force today has to be based on the UN Charter. This does not affect the validity of the doctrine of necessity in other areas.

Under positive international law it has to be asked to which kind of cases the doctrine of necessity still applies. The cases of attempting to justify a refusal to fulfil financial obligations on the basis of necessity (see Ago, paras. 22–28, 42) are not entirely convincing. In these cases, most of which were decided many years ago, the problem of *force majeure* was involved. More convincing are several recent cases in which States based the measures on necessity in the interest of the protection of the environment (Ago, paras. 34–37; cf. → Environment, International Protection; → Transfrontier Pollution).

Furthermore, Art. 4 of the International Covenant on Civil and Political Rights (1966), an instrument of a general character, embodies the idea of necessity in a general way. It allows State parties to suspend certain guarantees of → human rights in a state of emergency which threatens the life of the nation. It requires more than endangering only a State's → vital interests. From this provision a strong argument can be made in favour of the survival of the idea of necessity in international law.

On this basis the rapporteur of the → International Law Commission (Ago, para. 81) was able to formulate a definition which meets the requirements of present-day international law. His formulation of Art. 33 for a proposed convention on State responsibility (→ Responsibility of States; General Principles) expressly excludes the application of any plea of necessity against peremptory norms of general international law, in particular against the prohibition of aggression. Likewise, the application of the necessity doctrine is disallowed if a conventional instrument explicitly or implicitly excludes its application. On the other hand, a plea of necessity should not only be open in cases where the existence of a State is

threatened, but also when "the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril" and the act "does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard".

The results of this very thorough investigation are neither revolutionary nor radical. Its traditional approach is convincing because of its realism.

L. OPPENHEIM, International Law, Vol. 1 (8th ed. by H. Lauterpacht, 1955) 298–304.
D.W. BOWETT, Self-Defence in International Law (1958).
I. BROWNLIE, International Law and the Use of Force by States (1963).
W. WENGLER, Das völkerrechtliche Gewaltverbot (1967).
G. SCHWARZENBERGER, International Law as Applied by International Courts and Tribunals, Vol. 2 (1968).
F. KALSHOVEN, Belligerent Reprisals (1971).
W.A. KEWENIG, Gewaltverbot und noch zulässige Machteinwirkung und Interventionsmittel, in: W. Schaumann (ed.), Völkerrechtliches Gewaltverbot und Friedenssicherung (1971).
D.W. BOWETT, Reprisals Involving Recourse to Armed Force, AJIL, Vol. 66 (1972) 1–36.
R. AGO, State of Necessity [Chap. V, Sec. 5 of the International Law Commission's Eighth Report on State Responsibility], UN Doc. A/CN. 4/318/Add. 5 (1980).
M. BOTHE, K.J. PARTSCH and W.A. SOLF, New Rules for Victims of Armed Conflicts (1982).

KARL JOSEF PARTSCH

SEQUESTRATION

1. Concept

The term "sequestration" denotes actions ordered by a State under its municipal law which are directed at persons subject to its jurisdiction (→ Jurisdiction of States). Although differences exist between the domestic legal orders concerning the field of application, the prerequisites and the consequences of sequestration, one may discern a common element at the core of the concept: a State order by which it assumes temporary control over an object of private property without transfer of title. Moreover, the term is used in municipal law to refer only to such actions which entail no duty on the part of the State to compensate the owner of the property. Other terms are sometimes used interchangeably with "sequestration", including → "internment", "seizure", and "holding in custody".

Alien property is subject to sequestration measures in the same manner as property held by nationals, to the extent that international law is not thereby violated (→ Aliens, Property; → Enemy Property). Special problems of international law arise when the sequestration measures are of a nature which limits their application to → aliens. Wartime measures against enemy aliens or peace-time measures intended as actions to counter activities of the alien owner's home State or to influence this State fall into this category (→ Enemies and Enemy Subjects).

Due to the fact that sequestration measures may serve different purposes and may be ordered under varying circumstances, no single régime of law exists which governs all types of sequestrations. The most important distinction lies between wartime measures and measures during peacetime (→ Peace and War).

2. Wartime Measures

(a) During the 19th century, enemy private property enjoyed considerable protection (see, for instance, Section II of the Instructions for the Government of Armies of the United States in the Field of 1863 (Lieber Code); Art. 6 of the Project of an International Declaration concerning the Laws and Customs of War signed in Brussells in 1874 (Declaration of Brussels): Arts. 54 to 60 of the Oxford Manual adopted in 1880 by the → Institut de Droit International (→ War, Laws of, History)). Under Art. 23(g) of the 1907 Hague Regulations annexed to Hague Convention IV respecting the Laws and Customs of War on Land, it is forbidden to seize the enemy's property in the absence of an imperative demand of the necessities of war (→ Military Necessity). The second sentence of Art. 46 flatly prohibits the confiscation of private property. Even though the practice of the Allied Powers during the two world wars cast doubt on the state of the law, it must be assumed that Art. 46 today still reflects the existing rule (→ Hague Peace Conferences of 1899 and 1907; → Land Warfare; → War, Laws of). According to Art. 297(e) of the → Versailles Peace Treaty, sequestration measures of the defeated powers adopted during World War I were classified as "extraordinary war measures".

This entailed the conclusion that compensation to the owner was due regardless of the legality of the sequestration in question.

On the level of → customary international law, however, it has been beyond doubt over the past decades that enemy private property may be sequestrated (see the I.V.E.M. case (1952) before the Franco-Italian Conciliation Commission (→ Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947; RIAA, Vol. 13, p. 326, at p. 346) and the Heidsieck case (1958) before the → Arbitral Commission on Property, Rights and Interests in Germany (Decisions of the Commission, Vol. 1, p. 71, at p. 75)). Thus, the rules concerning sequestration are still accepted as a compromise between the interests of the belligerent State in preventing the use of enemy property against itself and the enemy alien's interest in retaining his ownership rights.

(b) The purpose of sequestration measures is therefore limited to ensuring that enemy property is not used directly or indirectly against the State in which the property is situated. This purpose hardly permits a full transfer of title. Nevertheless, in some domestic legal orders it has been assumed that the "vesting" of enemy property results in such a transfer of title (see, e.g., for the United States, Stoehr v. Wallace, 255 U.S. 239 (1920); Gmo. Niehaus & C. v. U.S., 373 F. 2d 944 (1967); for the United Kingdom, Bank voor Handel en Scheepvart v. Administrator of Hungarian Property, [1954] A.C. 584; for the Netherlands, Under-Secretary of State for Finance v. X., ILR, Vol. 22 (1955), p. 911; for Mexico, *In re* Peters, ibid., p. 913; for Ecuador, Carstanjen v. Government of Ecuador, ibid., p. 915). Where a transfer of title was assumed, this may have been based on the erroneous view that confiscation of private enemy property was lawful. Alternatively, it may have been assumed in advance in these cases that the → peace treaties would preclude the return of the property to the enemy alien.

The sequestrating State is under an obligation to respect the interests of the alien owner during the time of sequestration; damages to the property result in an obligation to compensate the owner (for details see Re Rizzo, ILR, Vol. 22 (1955) p. 317, and J. Staats, Ausländisches Privatvermögen in der internationalen Rechtsprechung (1966) p. 212; → Responsibility of States: General Principles; → Reparation for Internationally Wrongful Acts). At the end of the war, the sequestrated property must be promptly returned at the request of the owner.

(c) Sequestration of alien property must be distinguished from → requisition and → angary. Whereas sequestration serves to prevent the use of the property by the owner, requisition and angary aim at its use by the belligerent State. The distinction raises problems where land is in question. With respect to the land itself, no problem arises in clear cases of sequestration; with respect to the fruits of the land, a requisition may have to be assumed when these fruits are used by the State.

(d) The rules regarding sequestration of enemy property have only limited relevance for → sea warfare (but see the 1907 Hague Convention VI relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities). Even though the rights of a State are generally much more limited on the → high seas than on land or in → territorial waters, customary international law has developed in a way which permits the confiscation of enemy property on the high seas; this anomaly is due to the impact of the Anglo-American concept of → economic warfare on → sea warfare (→ Booty in Sea Warfare). The rules regarding sequestration may apply under certain circumstances, for example during the time which elapses between the seizure of the ship and the prize proceedings (→ Prize Law). However, more recent State practice tends to permit the use of the ship by the seizing State for its own purposes even before the prize proceedings.

(e) Property of a neutral alien in a belligerent State is, within the limits of international law, subject to the same treatment as that of nationals of the belligerent State; sequestration on the ground of the alien's neutral status is not permitted (→ Neutral Nationals). Conversely, property belonging to nationals of a belligerent is in principle not subject to sequestration in the territory of a neutral State (→ Neutrality, Concept and General Rules). However, sequestration of enemy private property in belligerent-occupied territory is lawful (→ Occupation, Belligerent).

(f) Occasionally, the home State of the alien requests the host State to sequester property of

the home-State's nationals. Such a situation occurred during World War II when the United States respected a request by China to take steps to secure that Chinese property would not fall into the hands of Japan. It is, however, not clear whether the obligations of the host State to preserve the property under such circumstances are as strict as those concerning enemy property in the absence of specific treaty provisions.

(g) Traditionally, the rights *in bello* of belligerents were accorded on the basis of equality, as a consequence of the notion that the waging of war was an expression of the → sovereignty of a State (→ States, Sovereign Equality). In the light of the prohibition of the → use of force under modern international law, however, it has become questionable whether the rule of equality still applies. An anomaly becomes apparent when considering that the laws of warfare expand the rights of States beyond their peace-time rights, and that it would seem inconsistent to prohibit the use of force and simultaneously to facilitate war-making on the part of an aggressor by way of extending its rights *in bello* (→ Aggression); this consideration, however, does not apply to the rules of → humanitarian law in armed conflict. In other areas, such as the regulation of the status of alien property, this argument might be contradicted by practical considerations such as recognition that every rule has a limiting effect, and that it might be useful from a policy viewpoint to grant limited rights instead of placing the aggressor completely outside the law. Ultimately, however, such an argument may not be convincing: An aggressor violating the basic norm regarding the use of force probably will not place high priority on the observation of the *jus in bello*. Thus, the modern laws of war may afford no rights concerning alien property to the aggressor. Future practice will show whether such reasoning is limited to regulations after the end of a war or whether it also applies during a war.

3. Peace-Time Measures

During peace-time, sequestration of alien property has also occurred under various circumstances.

(a) Where "sequestration" serves as a step toward → expropriation of alien property, the rules governing expropriation apply to the sequestration measures as well. This follows from the fact that sequestration in the strict sense must entail the eventual return of the property.

(b) Sequestration has also occurred as a countermeasure to acts of the alien's home State which entail responsibility toward the alien's host State. This may serve to secure the payment of → damages incurred by the affected individuals of the host State. Depending upon the circumstances, sequestration in such situations could also be a means to induce the rectification of an → internationally wrongful act, e.g. by reversing an illegal expropriatory act or by the freeing of a prisoner held illegally (cf. → Internment). Finally, sequestration could also be a purely retaliatory action. Where a State secures the payment of damages or attempts to induce another State to reverse an illegal act, international law has so far not prohibited sequestration measures (→ Reprisal). The most recent case in point was the United States' reaction to the taking of hostages in Tehran (→ United States Diplomatic and Consular Staff in Tehran Case). When the case was referred to the → International Court of Justice, the Court questioned the legality of American military countermeasures, but in no way disapproved of the freezing of Iranian assets in the United States.

Within the limits described above, a State need not wait until after an illegal act against its interests has occurred to consider sequestration measures. When such an illegal act is imminent, the State concerned may sequestrate the property of the aliens if it cannot be excluded that the property in question might be removed from its territory by the time the illegal act would have occurred.

(c) International law does not permit, in the absence of a wrong of the alien's home State, sequestration of alien property for the sole purpose of exercising pressure upon the owner's home State. The issue has in the past been debated in particular with respect to the sequestration of foreign → merchant ships (often called "embargo"; for details see E. Lindemeyer, Schiffsembargo und Handelsembargo (1975), pp. 29 et seq ; → Embargo).

(d) Difficult issues may be raised where a State subjects alien property to sequestration during peace-time under circumstances unrelated to the owner's alien status. In such a case, a short period of sequestration of the property belonging to

nationals and to aliens will not present particular problems under international law. However, if the power of disposition is withheld from the alien for a longer period, the alien will at some point acquire a right to compensation. Clear answers in this area can hardly be stated until there are more definite rules as to what constitutes an expropriation in international law.

(e) The applicable rules referred to above date from the period in international law in which the individual was not recognized as a → subject of international law (→ Individuals in International Law). During this period the alien was seen as an integral part of his home State. The gradual change of international law in this respect has not yet reached the point where legal problems are raised by the infliction of → sanctions upon an alien who was not involved in the wrong committed by his home State. However, it would appear possible that the increasing emphasis upon the individual's rights in international law could necessitate a reassessment of this problem in the future.

F. SCHOLZ, Privateigentum im besetzten und unbesetzten Feindesland (1919).
E. KADEN, Le séquestre des entreprises ennemies (1923).
J. GATHINGS, International Law and American Treatment of Alien Enemy Property (1940).
M. DOMKE, Trading with the Enemy in World War II (1943).
Enemy Property, Law and Contemporary Problems, Vol. 11 (1945) 1–199.
M. DOMKE, The Control of Alien Property (1947).
K. SEELIGER, Das ausländische Privateigentum in der Schweiz (1949).
M. VERSCHELDEN, Les séquestres (1951).
H. BAADE, Die Behandlung des feindlichen Privatvermögens in den Vereinigten Staaten von Amerika (1952).
H. KREIKAMP, Deutsches Vermögen in den Vereinigten Staaten (1979).

RUDOLF DOLZER

SÈVRES PEACE TREATY *see* Lausanne Peace Treaty (1923)

SHIPS, DIVERTING AND ORDERING INTO PORT

The diverting and ordering of ships into → port arises when a belligerent's → warship requests or, in certain circumstances, forces an enemy or neutral → merchant ship to change course for a nearby port. The port may belong to the belligerent, one of its allies, or, in special cases (→ Neutrality in Sea Warfare), it may be a neutral port. The diverting and ordering of a ship into port is part of → prize law and the visit and search of ships (→ Ships, Visit and Search). Like the latter, the transaction serves to establish facts which justify, in the case of enemy ships, their capture, or in the case of neutral ships, the confiscation of their cargoes.

The diverting and ordering of ships into port is lawful if stopping and searching the vessel on the → high seas is impossible or impracticable. This would be the case for example, if the danger of attack by air (→ Air Warfare) or by → submarine existed, the nature of the vessel or cargo made an examination difficult, the receipt of outside information confirmed a suspicion of running → contraband or of some other neutrality violation, or bad weather conditions prevailed. Given the expansion and improvements in news and information media, the importance of outside information has increased considerably. Where neutrals' ships have been unlawfully diverted or unjustifiably delayed, they may claim → damages (→ Carthage The, and The Manouba).

In the changed conditions of modern → sea warfare, which make an investigation of cargoes on the high seas practically impossible, it was England that founded the practice of diverting and ordering ships into port (the so-called Kirkwall practice, AJIL, Vol. 9, Supp. (1915) p. 60, at p. 94, see The *Zamora* [1916] 2 A.C. 77 (P.C.); The *Bernisse* and The *Elve* [1921] 1 A.C. 463). The prize courts of Germany, Italy and France followed suit (The *Bertha Elizabeth* (1915); The *Niobe* (1915); The *Barcelo*; The *Rioja*, see Colombos, A Treatise on the Law of Prize, pp. 288–289; The *Attiki*, Annual Digest, Vol. 12 (1943–1945) p. 473). Even the United States, which firmly expressed itself against the practice during World War I, now recognizes it as a firmly established rule based on the practice of belligerents in both world wars (United States Department of the Navy, Law of Naval Warfare, Section 502(b)5, note 14). The binding effect in international law of this rule is confirmed by the prize rules in most States: (Great Britain (1939) Art. 2; France (1934) Art. 107; Italy (1938) Art. 182; German Reich (1934) Arts. 60 et seq.; Japan

(1942) Art. 20 (see the compilation by Hecker/Tomson, Völkerrecht und Prisenrecht (1965)). The mere fact of the modernization of sea warfare has not, however, allowed the mutually dependent legal requirements to fall into desuetude.

If taken as a general measure against all neutral sea-trade, the diverting and ordering into port should not be justified in the light of prize law, but as a provision of → reprisal. The system developed by the Allies during World War II of superintending neutral trade using preliminary controls, navicerts and ship's warrants was similar to a → blockade. It was justified by referring to the violations committed by the German Reich against the laws of sea warfare (The *Zamora*, *supra*; The *Leonora* [1919] A.C. 974; The *Stigstad* [1919] A.C. 274).

As a rule, tactical or technical realities preclude submarines and → aircraft from stopping and searching a neutral merchant ship on the high seas. This gives rise to legal problems where diverting and ordering into port is concerned. Whereas the London Procès-Verbal of 1936 made submarines subject to "established rules of international Law" (→ Submarine Warfare), up until now, aircraft have not been regulated. According to the laws of prize, which only allow a diverting and ordering into port on special grounds, the belligerent must in principle be able to stop and search a ship on the high seas. Thus, although submarines cannot be ruled out entirely for these purposes, aircraft are simply technically incapable of a stop and search action on the high seas. It follows that aircraft cannot *a priori* take prize law measures by themselves against ships. They can only be lawfully used in sea warfare as auxiliaries to warships exercising the right to divert and order ships into port. No legal objections have appeared against this practice (AJIL, Vol. 33 (1939) p. 587), and the legal position has remained unchanged.

Since 1945, the powers involved in sea warfare have not been able to use the law of prize because they have not been recognized as belligerents. In the Algerian conflict (→ Decolonization: French Territories), France referred to a general right of → self-defence to justify her diverting and ordering ships into port. With the exception of Egypt, no seafaring power has changed its prize law. Thus, given the unchanged legal position, → international law has yet to take into account that the usual methods in modern sea warfare, involving combined air, sea and submarine operations, have greatly improved the possibilities of effective sea-trading controls.

C.J. COLOMBOS, A Treatise on the Law of Prize (3rd ed. 1949) 287–290.

C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967) 772–775.

Z. ROTOCKI, Aircraft and Prize Law in Sea Warfare, Polish Yearbook of International Law, Vol. 4 (1971) 187–208.

R. OTTMÜLLER, Die Anwendung von Seekriegsrecht in militärischen Konflikten seit 1945 (1978).

U. SCHEUNER, Entwicklungen im Seekriegsrecht, in: Recht über See, Festschrift für Rolf Stödter (1979) 287–313.

JOACHIM WOLF

SHIPS, VISIT AND SEARCH

1. Concept

The right of belligerents to visit and search → merchant ships, whether of enemy or neutral registry, is part of the customary law of → sea warfare. It enables belligerents both to seize enemy ships and cargoes which are generally subject to capture (→ Prize Law) and to prevent neutral ships (→ Neutrality in Sea Warfare) from carrying → contraband, breaching a → blockade or performing unneutral services, all of which can be special grounds for capture. Although the capture of an enemy merchant ship is regarded as a lawful act of war, → customary international law requires prior visitation in order to ascertain the enemy character of the ship and her cargo (→ Enemy Property). Enemy → warships may be attacked without visit, whereas neutral warships may not be visited. Merchant ships which have been granted a safe conduct (→ Safe-Conduct and Safe Passage) are exempt from capture but may be visited.

During a state of → war (including the time during which an → armistice is in effect), visit and search may only be carried out by a belligerent's warships on the → high seas or within its own → territorial waters, but not in neutral waters. The right of visit and search restricts the general principle according to which a vessel on the high

seas shall be subject to the exclusive jurisdiction of the flag State (→ Jurisdiction of States; → Flag, Right to Fly). A right of visit and search to enforce an → embargo laid upon enemy or neutral ships has not received general recognition, although it may be justifiable as a → reprisal.

2. *Procedure*

While customary law does not lay down detailed rules of procedure, traditional practices reached a large degree of uniformity that is reflected in the special instructions issued by maritime States to their naval forces. For the purpose of visit, a warship is required to show her flag and to notify her intention to stop a merchant ship by firing a blank shot or by using flag signals, sirens or radio communication. On the high seas, the visit is carried out under the command of an officer who boards the merchant ship and examines the ship's papers. Adverse evidence furnished by papers against a ship (regarding her nationality, cargo, etc.) justifies her immediate seizure. If doubts persist, a search of the ship and her cargo may be ordered. If there is no reasonable ground for capture, the ship must be released. Otherwise, the ship may be seized and sent or conducted into port for prize court proceedings (→ Prize Law).

An enemy vessel has no duty to submit to visit. It may attempt flight and, according to the prevailing opinion, resist visit (→ Merchant Ships, Armed). Resistance, however, permits the warship to attack and to destroy such a vessel without first ensuring the safety of passengers and crew. A neutral vessel may attempt to evade a visit but may not offer forcible resistance. Sailing under enemy → convoy is regarded as a form of resistance. Evasion and resistance justify the → use of force necessary to require submission. Resistance (though not evasion) of neutral ships may lead to confiscation (→ Expropriation and Nationalization) of vessel and cargo (Art. 63 of the (unratified) Declaration of London of 1909; → London Naval Conference of 1908/1909).

3. *Special Problems*

While the legality of visit and search by → submarines and military → aircraft has been sanctioned by customary law, both world wars have witnessed a continuing controversy over the claim that the special characteristics of submarines and aircraft may serve to justify a departure from the specific rules governing visit and search by surface vessels (→ Submarine Warfare; → Air Warfare). According to the prevailing doctrine, customary law requires submarines and aircraft to conform to the rules applicable to surface vessels. In so far as their means to board are limited, they can, it seems, only exercise the right of diversion into port (→ Ships, Diverting and Ordering into Port).

A party to a → civil war is entitled to visit and search on the high seas only on condition that it has been accorded belligerent status by the visited vessel's flag State (→ Recognition of Belligerency; → Recognition of Insurgency). During the Algerian civil war – the only case of extended and sustained visit and search after World War II – France did not justify her operations against foreign ships on the doctrine of belligerency but relied on the right of → self-defence.

Because of their economic and strategic importance as well as their narrowness, international → straits (Gibraltar, Hormuz) may become areas where interested powers may decide that there are strong strategic reasons for visiting neutral ships. Since visit and search is essentially a policing procedure which does not restrict the general right of → passage through straits, such a practice seems to be justified, provided that it does not violate the sovereign rights of a bordering State (→ Sovereignty).

4. *Significance*

During the world wars, the significance of visit and search was considerably reduced by the introduction of more comprehensive means of → economic warfare aimed at controlling seaborne trade (→ Neutral Trading; → Trading with the Enemy). On the high seas, the significance of visit is further diminished by the hazard of attacks from submarines, aircraft and modern weapons such as cruise missiles. In practice, the use of modern communication systems will reduce the value of information gathered from a ship's papers. But visit, it is submitted, will remain an indispensable legal step in observing the general duty not to sink a merchant ship without having first placed passengers, crew and ship's

papers in a place of safety. Non-compliance may result in → war crimes charges if the responsible parties are brought to trial. A precedent for this is the charging of Admiral Karl Dönitz for this offence at the → Nuremberg Trials.

A.P. HIGGINS, Le droit de visite et de capture dans la guerre maritime, RdC, Vol. 11 (1926 I) 65–170.
J.L. FRASCONA, Visit, Search and Seizure on the High Seas (1938).
H. HECKER and E. TOMSON (eds.), Völkerrecht und Prisenrecht (1965).
L. LUCCHINI, Actes de contrainte exercés par la France en Haute Mer au cours des opérations en Algérie, AFDI, Vol. 12 (1966) 805–821.
C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967) 753–776.

ONDOLF ROJAHN

SHIPWRECKED PERSONS *see* Wounded, Sick and Shipwrecked; Sea Warfare

SIEGE

1. Notion

Siege is a method of → land warfare in which the attacker attempts to capture a defended place by encircling and wearing down the defenders through use of artillery and air → bombardment and by blocking off all outside sources of supply. Defended places include any position held by enemy → combatants, including a city surrounded by detached defence positions if the city can be considered jointly with the defence position as an indivisible whole. A siege may come to an end with the → surrender of the defenders, or the assault and belligerent occupation (→ Occupation, Belligerent) of the place. It may also be abandoned by an unsuccessful besieger or lifted by outside forces friendly to the defenders.

2. Development of Legal Rules

(a) General

As populated places under siege were often regarded as single → military objectives, in the past they had only minimal legal protection against the effects of → indiscriminate attacks other than that implicit in the principles of → military necessity and → proportionality (→ Armed Conflict, Fundamental Rules). Civilians not engaged in defence work became the principal victims of starvation under siege, as theirs was usually the lowest priority in the distribution of food supplies.

(b) Restraints under positive international law

Military and civilian → wounded, sick and shipwrecked, religious and medical personnel, military medical units and all hospitals within a besieged place are today entitled to the respect and protection provided under the → Geneva Red Cross Conventions and Protocols (→ Humanitarian Law and Armed Conflict). Cultural objects not used for military purposes must also be respected (Art. 27 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of the same name; 1954 Hague Convention for the Protection of Cultural Objects; → Hague Peace Conferences of 1899 and 1907; → War, Laws of; → Cultural Property, Protection in Armed Conflict). Agreement for the establishment of neutralized zones or → safety zones as refuges for the wounded and sick and certain civilians (usually arranged with the assistance of the → International Committee of the Red Cross) are encouraged by Art. 15 of Geneva Convention IV. Art. 26 of the Hague Regulations requires a warning before bombardment in order to afford civilians an opportunity to take shelter or to be evacuated. Art. 17 of Geneva Convention IV encourages agreements for the evacuation of specially → protected persons, a practice sometimes allowed when bombardment was planned (e.g. Strasbourg, 1870; Khorramshahr, 1980), but seldom allowed when starvation was used to coerce surrender. Indeed, the right of the besieger to drive back attempting evacuees was confirmed at the → Nuremberg Trials (U.S. v. von Leeb and others).

Art. 23 of Convention IV obliges the besieger, subject to rigorous conditions designed to prevent abuse, to allow free passage of relief supplies (→ Relief Actions) for the benefit of certain civilians deemed to be incapable of making any substantial contribution to the defence effort. But a besieged occupation force is under a legal obligation to ensure the adequate supply of medical stores and food for protected civilians, and to arrange for relief actions if necessary (Geneva Convention IV, Arts. 55, 59 to 61). → Pillage is

prohibited under all circumstances (Hague Regulations, Arts. 28 to 47; Geneva Convention IV, Art. 33; → Civilian Population, Protection; → Civilian Objects).

3. Current Legal Situation; Special Problems

The 1977 Protocols additional to the Geneva Conventions of 1949 introduce important changes in the rules concerning the two principal methods of conducting sieges.

(a) Starvation

Art. 54 of Protocol I and Art. 14 of Protocol II prohibit starvation of civilians as a method of warfare (→ Warfare, Methods and Means), thus reversing a previously accepted practice characteristic of sieges and → blockades (→ Economic warfare). Specifically, Art. 54 prohibits attacks and other destructive acts against sustenance resources, but only when the specific purpose of the act is to deny these resources for their sustenance value to civilians or to both civilians and combatants. This prohibition does not apply where these resources are allocated exclusively to the armed forces, nor does it apply to scorched earth destruction by defenders within their own national territory, in areas controlled by them, when required by imperative military necessity. The right of the besieger to interdict the free passage of food, medical supplies and other relief supplies intended for needy civilians in besieged places is limited by Art. 70 of Protocol I. Subject to effective controls to prevent abuse, this article provides for relief actions in non-occupied territory comparable to those provided for protected civilians in occupied territory (Geneva Convention IV, Arts. 55, 59 to 61).

Under art. 70 of Protocol I, all civilians as defined in Art. 50(1) of that Protocol are entitled to benefit from relief actions. This includes the essential labour force of the besieged place and even the civilians serving the armed forces, who are entitled to be treated as → prisoners of war under Art. 4 A(4) and (5) of Geneva Convention III. Priority in the distribution of relief supplies, however, is provided for specially protected persons who are assumed to be incapable of making a significant contribution to the military effort, including the wounded and sick, children, expectant and nursing mothers, and maternity cases. It remains to be resolved in the future whether besieging forces will permit free passage of relief supplies to besieged places without effective guarantees that they will not be distributed to civilians taking a direct part in the military effort.

(b) Bombardment

Art. 51 of Protocol I prohibits indiscriminate attacks, including the aerial bombardment of populated places if military objectives therein can be attacked separately (→ Air Warfare; cf. → Open Towns).

4. Significance

Although of ancient origin, siege is not an obsolete method of warfare. Modern sieges include the World War II sieges of Leningrad, Berlin, Tobruk, Brest and Lorient, the 1954 siege of Dien Bien Phu, and the 1980 sieges of Abadan and Khorramshahr.

J.M. SPAIGHT, War Rights on Land (1911) 158–174.

J.S. PICTET (ed.), Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War (1958) 128–133, 177–184, 309–312, 319–328.

M. BOTHE, Rechtsprobleme humanitärer Hilfsaktionen zugunsten der Zivilbevölkerung bei bewaffneten Konflikten, in: D. Fleck (ed.), Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte (1973) 24–80.

M. WALZER, Just and Unjust Wars (1977) 160–175.

M. BOTHE, K.J. PARTSCH and W.A. SOLF, New Rules for Victims of Armed Conflict, Commentary to the Additional Protocols to the Geneva Conventions (1982) 292–295, 301–311, 334–342.

WALDEMAR A. SOLF

SINGAPORE OIL STOCKS CASE

Prior to the outbreak of World War II, three Dutch oil companies held all the oil concessions in Sumatra. When Japanese forces occupied the Netherlands East Indies in February 1942, they immediately seized the installations and refineries of the companies. Having repaired the installations which had been partly damaged by the retreating Dutch forces, they extracted and refined substantial quantities of oil. The oil was shipped to Singapore where it was kept in storage tanks until it was required to meet military and civilian demands. When British troops landed in

Singapore in September 1945, they seized as war booty about 66 000 000 gallons of refined and crude oil, all of which had been extracted from the companies' oil reservoirs (→ Booty in Land Warfare). The companies, which had been allowed to withdraw 20 000 000 gallons, claimed compensation from the War Damage Commission in respect of the remaining refined petroleum (→ War Damages). The claim was dismissed by a special Board established under Singapore emergency legislation to consider appeals from the Commission. The Board held that the Japanese forces had acquired title to the oil by extracting or at least by refining it. The Court of Appeal of the Colony of Singapore reversed this decision; Justices Whyatt, Mathew and Whitton agreed unanimously that compensation was payable, but on grounds that differed as described below.

The Singapore Defence (Compensation) Regulations (1940) provided that persons who were entitled to dispose of property seized or otherwise requisitioned (→ Requisition) by the Crown could recover the value of the property. The first issue considered was whether the appellants had a title to the crude oil either *in situ* or on its extraction. The municipal law to be applied was the domestic law of the Netherlands Indies as *lex rei sitae* (→ Private International Law; → International Law and Municipal Law). The Court rejected the view taken by the respondents and the Board that crude oil was *res nullius*. By the granting of concessions, the property interest in the unextracted oil owned by the State vested in the companies; at least these had as complete a title to the oil as anyone could have had during the period of concessions.

The Court further considered whether the Japanese belligerent occupant (→ Occupation, Belligerent) had the right to seize the crude oil still in the ground. Having established that the seizure of the oil installations was carried out as part of a larger plan to supply the military and civilian needs of Japan both at home and abroad, Whyatt, C.J., queried whether the seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war (→ Enemy Property; → Land Warfare; → War, Laws of). He referred to the decision in the → Nuremberg Trials which established the principle that to exploit the resources of occupied territories without considering the needs of the local economy amounted to plunder. In his and Justice Mathew's view, the Japanese had committed an act of → pillage.

In addition, the seizure could not be justified by Art. 53, para. 2 of the Hague Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907, which allows *inter alia*, the seizure of all kinds of *munitions de guerre* (→ Hague Peace Conferences of 1899 and 1907; → War Materials). Whyatt, C.J., and Mathew, C.J., held that crude oil did not fall within the definition of munitions of war, because a sufficiently close connection with direct military use had not been established and, besides, Art. 53 did not apply to immovables. Whitton, J., however, pointed to changes in the nature of warfare (→ Warfare, Methods and Means) and was inclined to follow the Board in considering crude oil as a *munition de guerre*. Nevertheless, in his opinion too, the seizure had violated the Hague Regulations in several ways. Even if Art. 53, in contrast to Art. 52, did not expressly require a receipt to be given, some record of the extracted oil ought to have been kept. The failure to do so rendered the seizure invalid. Furthermore, the occupants had in any case obtained only a provisional title to the seized property; the duty to restore the unconsumed petroleum had not been fulfilled. Moreover, it was in contravention of Art. 53 that a considerable portion of the crude oil had been directed to purposes other than those of → military necessity.

As to whether in a war of → aggression the aggressor State could not in any circumstances acquire any title under the Hague Regulations, Whyatt, C.J., recognized the legal uncertainty surrounding this question, but expressed no views on the matter as this was not necessary to dispose of the case. Whitton, J., however, held that even a State waging an illegal war was entitled to the benefit of the Hague Regulations.

Justices Whyatt and Whitton also considered the effect of the Inter-Allied Declaration of 1943 in which the Governments of the United Kingdom and the Netherlands, among others, had reserved their rights to declare invalid any transactions dealing with property in occupied territories. The appellants contended that this

→ Declaration was a → treaty which, though it did not affect private rights in the absence of legislation, did mitigate the Crown's belligerent rights by prohibiting seizure of any property which had been plundered as war booty. The respondents, however, denied that the Declaration was a treaty creating a binding obligation. In any case, it did not prejudice rights to war booty. But even if the Crown's seizure had been invalid, this could not have conferred any title on the appellants. The Court agreed with this reasoning.

Finally, the Court considered the issue of *specificatio* upon which the respondents had successfully relied before the Board. The doctrine of *specificatio* was contained in Art. 606 of the Netherlands Indies Civil Code: "He who makes of a material not belonging to him a thing of a new sort becomes the owner of such thing. . .." The point for decision was whether the *specificatio* doctrine was available to the Japanese forces after they had seized the crude oil contrary to the Hague Regulations. The respondents did not see any difference between a belligerent occupant and a private individual. Again, they referred to an official Explanatory Memorandum to the Rehabilitation of Rights Ordinance (1947) which stated that where a Japanese body had administered a business for its own purposes during the occupation, any products made from raw materials belonging to another would become the property of the Japanese body by *specificatio*. The appellants argued to the contrary that *specificatio* was an act prohibited by the Netherlands Indies Wartime Legal Relations Ordinance which provided that an act performed without the permission of the Director of Economic Affairs' Committee was void *ipso jure*. They alleged, furthermore, that the doctrine of *specificatio* could not be applied to a *universitas rerum* like an enterprise: If a first person made something new from material belonging to another by means of that other person's enterprise, the product did not become the first person's property.

Mathew, C.J., held that the application of *specificatio* to protect the activities of thieves who continued their depredations for more than three years could not be supported under a proper construction of the Netherlands Indies law.

Whitton, J., stated that Dutch law had not been proved and that it was therefore for the Court to apply English law. (The *lex fori* was the law of Singapore, which was presumed to be the same as English law.) Under English law, ownership could not have been extinguished by the process of refining.

Whyatt, C.J., found it unlikely that the legislature intended Art. 606 to apply to a belligerent occupant. Furthermore, the Hague Regulations and Art. 606 were irreconcilable: Seeking to acquire title under Art. 606, the belligerent occupant must have acquired the raw material in violation of the Hague Regulations. Since the Hague Regulations prevailed, the occupant could not rely on Art. 606. If this construction were not correct, the matter would be at best left in doubt. As a presumption then existed in favour of English law, the plea of *specificatio* failed.

Not directly at issue was whether a British court would apply the Netherlands Indies law if it gave a title by *specificatio*. Nevertheless, Whyatt, C.J., found that it would be inconsistent with public policy for a British court to recognize a foreign law which conferred validity on acts committed in violation of the Hague Regulations. He added that it would be strange if, after having committed a breach of the Hague Regulations, the belligerent occupant could invoke the municipal law of the hostile State. Finally, he pointed out that his conclusion was in accord with the maxim *ex injuria jus non oritur*, which in the international sphere expressed a principle of particular importance.

The Singapore Oil Stocks Case attracted attention due to the English Crown's argument in favour of the Japanese belligerent occupants, and because the case concerned an unusual variety of legal issues. The Court had to consider problems of private and public international law as well as of municipal law. Though not all questions raised during the proceedings were considered, the judgment demonstrates the influence of public international law on municipal law. It is also important for the light it casts on Art. 53 of the Hague Regulations.

N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission, Singapore, Court of Appeal, April 13, 1956, ILR, Vol. 23 (1956) 810–849.

The Case of the Singapore Oil Stocks, ICLQ, Vol. 5 (1956) 84–98.

H.U. GRANOW, Die Ölstreitentscheidung des Obersten Gerichtshofes von Singapur vom 13.4.1956, AVR, Vol. 6 (1956/1957) 331–335.

KLAUS ABMEIER

SOLDIERS, LEGAL STATUS *see* Combatants

SOLDIERS OF FORTUNE *see* Mercenaries

SPIES *see* Espionage

STIMSON DOCTRINE

1. Historical Background

Despite proposals by writers such as Abbé St. Pierre and Jean-Jacques Rousseau in the 18th century to proscribe → conquest and → annexation (→ Peace, Proposals for the Preservation of), classical international law recognized the sovereign right of States (→ Sovereignty) to resort to → war and to the → use of force as means of → international relations and law enforcement (→ History of the Law of Nations). For centuries, no restrictions were imposed upon the right of acquisition of territory (→ Territory, Acquisition) by the use of force. It was not until 1919, with the adoption of the Covenant of the → League of Nations, that the right of States to resort to war in international conflicts was restricted. In 1928, the → Kellogg-Briand Pact outlawed war as a means of conflict resolution, and in 1945 Art. 2(4) of the → United Nations Charter prohibited any threat or use of force in international relations. These restrictions were accompanied by the emerging problem of whether acquisitions or rights obtained by these prohibited means should be recognized (→ Recognition) by other States.

As early as 1890, the first Pan-American Conference in Washington (→ Regional Cooperation and Organization: American States) adopted a treaty on → arbitration and endorsed a recommendation that during the life of the treaty all cessions of territory made under threats of war or as a consequence of the use of armed force should be regarded as void. This initial attempt failed because the treaty never entered into force. At the Second Peace Conference at The Hague (→ Hague Peace Conferences of 1899 and 1907), the Brazilian delegate Ruy Barbosa promoted a similar resolution without success. Since the Covenant of the League of Nations did not deal with the consequences of acquisitions made under violation of its rules, there were several moves by member States in the Assembly to amend the Covenant to create an obligation on all member States to refrain from recognizing the fruits of such violations (Brazil in 1921, Denmark in 1922, and Finland in 1928), but all such attempts were rejected. On the other hand, a 1925 draft of the American Institute of International Law for the Pan-American Union regarding conquest stated that "territorial acquisitions obtained by means of the war or under the menace of war or in presence of an armed force . . . cannot be invoked as conferring a title" (AJIL, Vol. 20 (1926) Special Supp., p. 384).

2. Enunciation of the Doctrine

In 1931 Japanese troops invaded Manchuria in violation of the sovereignty of China. Japan was a party both to the League Covenant and the Kellogg-Briand Pact. The United States wanted to protect her own rights and interests, including those of her citizens in Manchuria, while furthermore desiring to promote the rule of non-recognition of acquisitions which violated both the Covenant and the Pact. Thus in identical Notes of January 7, 1932 (Foreign Relations of the United States (1932) Vol. 3, Far East, p. 8) to China and Japan, Secretary of State Henry Lewis Stimson stated:

> "The American Government . . . cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these two governments or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and . . . it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China

and Japan, as well as the United States, are parties." (→ Territorial Integrity and Political Independence).

Although primarily a statement of United States policy, Stimson intended it also as an initiative to obtain the consent by the other League members in the form of similar notes, and thus to foster the development of a rule of general international law depriving the aggressor of the fruits of → aggression. But as the United Kingdom did not embrace the doctrine, the other powers similarly refrained from doing so. It was the League itself that took up Stimson's initiative and sent a concurring note of the Council to Japan on February 16, 1932 (League of Nations, Official Journal (1932) on p. 383). This was followed by the famous March 11, 1932 resolution of the Assembly that:

"[I]t is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris." (League of Nations, Official Journal, Special Supp. No. 101 (1932) p. 87.)

In fact, most of the States not collaborating with Japan withheld formal recognition of the puppet régime of Manchuko until its dissolution.

3. Acceptance and Modification

The Stimson doctrine subsequently became increasingly the subject of international legal and political instruments, especially between the American States, such as the Declaration of 19 American Republics of August 3, 1932 in the → Gran Chaco Conflict between Bolivia and Paraguay (Foreign Relations of the United States (1932), Vol. 5, The American Republics, p. 159), the → Saavedra Lamas Treaty of October 10, 1933 (LNTS 163, p. 393), the Montevideo Convention on the Rights and Duties of States of December 26, 1933 (LNTS 165, p. 19) and several → declarations of Inter-American Conferences between 1936 and 1938. The Council of the League of Nations also recalled the principles of its resolution of March 11, 1932 in the Resolution on the Leticia Conflict of March 18, 1933. The → International Law Association in its 1934 session in Budapest adopted Articles of Interpretation of the Kellogg-Briand Pact, incorporating the duty of non-recognition of territorial or other advantages acquired *de facto* by violation of the Pact. The 1939 Harvard Draft Convention on the Rights and Duties of States in Case of Aggression (AJIL, Vol. 33 (1939) p. 819) extended this duty to all forms of aggression.

Meanwhile, the League of Nations by its own declaration of May 12, 1938 weakened the doctrine by leaving the question of whether to recognize the annexation of Ethiopia by Italy to the discretion of the member States. Most of them recognized it, but the United States and the Soviet Union refrained. The positions of States towards the German annexation of Austria in 1938 were divided and somewhat unclear, whereas the German annexation of Czechoslovakia in the same year was not recognized, so that this State formally remained a member of the League of Nations until 1945. The Soviet annexation of the → Baltic States has not yet received express recognition by the United States and others.

In 1945 the declaration of an Inter-American Conference, known as "Act of Chapultepec", reiterated the principle of non-recognition as formulated in 1890 at the Pan-American Conference in Washington. The → Bogotá Pact of April 30, 1948 similarly provides in Art. 17 that "no territorial acquisition or special advantages obtained either by force or by other means of coercion shall be recognized". After the coming into force of the general prohibition of the threat or use of force under Art. 2(4) of the UN Charter, the Organization sought to emphasize that the duty of non-recognition of acquisitions in violation of that prohibition was a → sanction implied in the Charter. This was contained in the 1949 Draft Declaration on the Rights and Duties of States prepared by the → International Law Commission (UN Doc. A/CN. 4/Ser. A/1949), and in a slightly modified form was embodied in the → Friendly Relations Resolution of the UN General Assembly of October 24, 1970 (UN GA Res. 2625 (XXV)) and in the Definition of Aggression of January 14, 1974 (UN GA Res. 3314 (XXIX)). Yet in practice, UN organs have failed to reach a conclusion in some concrete cases, e.g. the Indian annexation of the Portuguese colonial territory of Goa in 1961 (→ Colonies; cf. → Decolonization), which was

later recognized by Portugal in a 1974 treaty. The General Assembly based its resolutions relating to the → Namibia problem partly on the principle of the duty of non-recognition and was supported by the → International Court of Justice (ICJ) in its 1971 advisory opinion (→ South West Africa/Namibia (Advisory Opinions and Judgments)), which found a "duty of non-recognition by the Member States imposed by paras. 2 and 5 of resolution 276 (1970)" and further held it incumbent on non-member States to assist by non-recognition (ICJ Reports 1971, p. 16). When Israel in 1980 enacted a law claiming the whole city of Jerusalem as the capital of Israel, which amounted to an annexation of the occupied eastern part of the city, the → United Nations Security Council voted in a resolution of June 30, 1980 (UN SC Res. 478 (1980)) that this act be deemed null and void and that thus the member States had a duty not to recognize it and to withdraw their embassies from Jerusalem. This withdrawal was effected by most of the countries concerned.

4. *Significance*

State practice shows that the Stimson doctrine (subsequently altered in content as to the duty to refrain from recognition of territorial acquisitions obtained in violation of the prohibition of the threat or use of force between States) gradually developed from a unilateral policy statement into regional American treaty law (→ International Law, American; → Regional International Law). Ultimately it became general international law under the UN system, though it may be argued that this had already occurred under the League of Nations Covenant.

The duty of States to refrain from the threat or use of force has become a norm binding not only as treaty law but also as → customary international law applicable to all States which are not yet members of the UN. Furthermore, this norm should be deemed as one of a → *jus cogens* character, the violation of which entails the invalidity of all acquisitions or advantages derived therefrom. It results from that character and from a reasonable interpretation of the prohibition of the use of force that is shared by the member States of the UN and by the ICJ: No State shall recognize such acquisitions. This result is today accepted by States as well as by the overwhelming majority of legal publicists, since it reflects a minimum of reaction on the part of the international community against the violator (Lauterpacht, Wehberg).

Recognition of an act which is illegal under the prohibition of force in Art. 2(4) of the UN Charter cannot validate a title which is void under *jus cogens*. But such recognition may be helpful to the violator in two ways. First of all, the violation might be contested, so that the recognizing State could be precluded from later claiming the illegality. If enough members were estopped from condemning the violation (→ Estoppel), the competence of the UN in the maintenance of peace could be put in jeopardy. Thus it is incumbent on the Security Council (acting under Chapter VII of the Charter) to specify the violation and its consequences without undue delay. Secondly, the recognition of an illegal acquisition by an increasing number of States could prematurely create a situation of consolidation of title that finally results in a validation by the principle of → effectiveness inherent in international law. The use of that principle is not excluded by the Stimson Doctrine. Non-recognition cannot be effective without subsequent sanctions against the violator. If it remains the sole reaction or if sanctions ultimately fail, States cannot, after a certain lapse of time, be prohibited from recognizing the situation (cf. → Acquiescence). As unsatisfactory as this statement may be, it reflects the relative weakness of international law that can only be overcome if the Security Council fully assumes its competences and if States act together in → good faith within the UN Organization.

The duty of non-recognition refers to formal recognition through treaty, diplomatic and consular as well as economic relations (→ Diplomatic Relations, Establishment and Severance). But it does not prohibit the continuance of relations with the violator, which tend to serve to protect citizens in both countries, nor technical contacts on a lower level. This situation has been referred to by many States as *de facto* recognition and was accepted in the Manchurian conflict by the League of Nations (League of Nations, Official Journal, Special Supp. No. 113 (1933) p. 11). The legal boundaries of such recognition are not clearly defined by State practice. Here again, it

should primarily be left to the UN to coordinate the *de facto* relations of its members with the violating State.

O. WRIGHT, The Stimson Note of January 7, 1932, AJIL, Vol. 26 (1932) 342–348.
A.D. MCNAIR, The Stimson Doctrine of Non-Recognition, BYIL, Vol. 14 (1933) 65–74.
R. LANGER, Seizure of Territory (1947).
H. LAUTERPACHT, Recognition in International Law (1947) 409–435.
W. SCHÄTZEL, Die Annexion im Völkerrecht, AVR, Vol. 2 (1950) 1–28.
H. WEHBERG, L'interdiction du recours à la force, RdC, Vol. 78 (1951 I) 1, 86–115.
H. WEHBERG, Krieg und Eroberung im Wandel des Völkerrechts (1953).
H. WEHBERG, Die Stimson-Doktrin, in: Grundprobleme des internationalen Rechts, Festschrift für Jean Spiropoulos (1957) 433–443.
I. BROWNLIE, International Law and the Use of Force by States (1963) 410–423.
R.Y. JENNINGS, The Acquisition of Territory in International Law (1963) 52–68.
H.M. BLIX, Contemporary Aspects of Non-Recognition, RdC, Vol. 130 (1970 II) 593–700.
I. SAGAY, International Law Relating to Occupied Territory, RevEgypt, Vol. 28 (1972) 56–64.
A. GERSON, War, Conquered Territory, and Military Occupation in the Contemporary International Legal System, Harvard ILJ, Vol. 18 (1977) 525–556.

WERNER MENG

SUBMARINE WARFARE

1. History

→ Submarines are submersible → warships capable of combat action on or below the surface of the sea. A British initiative at the First Hague Peace Conference (1899) (→ Hague Peace Conferences of 1899 and 1907) to forbid their use in → sea warfare did not find favour with the other participants, because of submarines' potential for use by weaker naval powers. Neither the naval agreements of the Second Hague Peace Conference (1907) nor the London Declaration of 1909 (→ London Naval Conference of 1908/1909) established specific rules for submarine warfare. During World War I submarines were therefore, bound by the rules of naval warfare in force for surface warships.

At the Washington Conference of 1922 on the Limitation of Armaments, after an unsuccessful Anglo-American proposal for banning submarines altogether, France, Great Britain, Italy, Japan and the United States signed the Submarine and Noxious Gas Convention (LNTS, Vol. 25, p. 202), which restated the traditional rules of international law for cruiser warfare and declared them applicable to submarines. Departure from them on grounds of operational necessity (→ Military Necessity), and even on a claim of → reprisal, was forbidden. Since violation of the rules appeared inevitable in practice, the parties undertook to abstain *inter se* from using submarines against → merchant ships. They further agreed that violations would make a submarine commander and his crew punishable for → piracy (→ Individuals in International Law). However, the Convention never came into force because France refused to ratify it.

For this reason, the London Conference on the Limitation of Naval Armaments took up the question again in 1930. Art. 22 of the resulting London Naval Treaty (LNTS, Vol. 112, p. 65) embodied provisions similar to those in the abortive Treaty of Washington of 1922, omitting, however, the piracy provision and the renunciation of the use of submarines against commercial ships. It stated as an "established" rule of international law that "submarines must conform to the rules . . . to which surface vessels are subject". These rules were thus formulated: Except in cases of persistent refusal to stop on being summoned, or of active resistance to visit and search (→ Ships, Visit and Search), a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed the passengers and crew in a place of safety. For this purpose, the ship's boats are not regarded as a place of safety unless the safety of passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel capable of towing them on board.

Since the London Naval Treaty was to expire on December 31, 1936, the parties embodied the aforementioned rules in a Procès-Verbal (LNTS, Vol. 173, p. 353) which they signed in London on November 6, 1936, inviting all other States to adhere to it. Germany accepted that invitation on November 23, 1936. Since then, no formal change

has taken place in the contractual rules of submarine warfare.

2. *Practice during the World Wars*

Although submarines had been in use earlier, their real importance for naval warfare did not emerge until World War I. In the → war zone around the British Isles, which Germany declared on February 4, 1915, all enemy merchant ships entering the zone ran the risk of being destroyed without prior warning and without regard to the safety of passengers and crew (limited submarine warfare) (→ Enemies and Enemy Subjects). The → *Lusitania* incident shows that these measures, although directed against enemy merchant ships, also affected → neutral nationals. After temporarily relaxing the measures following United States → protests, Germany declared unlimited submarine warfare on January 12, 1917 by extending the war zone measures to neutral merchant ships and by ordering the attack on armed enemy merchant ships (→ Merchant Ships, Armed) outside the zone.

In the period between the world wars, the prevailing opinion considered the departures from the traditional rules of naval warfare which had occurred during World War I as having been due to only temporary circumstances which would not recur. This view inspired the naval instructions of all important States, and even the German Prize Code of August 28, 1939 (→ Prize Law) restated the rules of the London Procès-Verbal of 1936.

Very soon after the outbreak of World War II in 1939, however, the belligerents on both sides took up where matters had been left in 1918. British merchant ships were armed and subjected to direction and control by the British Government. The Defence of Merchant Shipping Handbook of 1938 instructed them to report the position of the enemy by wireless telegraphy and "to open fire on an enemy surface vessel, submarine or aircraft, even before she was attacked or demanded surrender, if to do so would tend to prevent her gaining a favourable position for attacking".

Shortly after the outbreak of the war, a German submarine sank the → *Athenia*, but this fact was denied at the time. On October 4, 1939 Germany ordered the sinking of armed enemy merchantmen without warning. Finally, on August 17, 1940, "as reprisal against the unlawful conduct of naval warfare by Great Britain", Germany declared a "total" → blockade of the British Isles and initiated unlimited submarine warfare against enemy and neutral merchant ships (→ Neutral Trading) in the war zone.

In this war Italy, Japan, Great Britain and, with the outbreak of the → war in the Pacific, the United States followed the German example by declaring war zones of their own.

In view of this general practice, the Nuremberg Tribunal (→ Nuremberg Trials) did not determine the sentences against German Admirals Erich Raeder and Karl Dönitz on the ground of a violation of the laws of war for their conduct of unlimited submarine warfare (International Military Tribunal, Trial of the Major War Criminals (1947–1949), Vol. 1, pp. 310–317 and Vol. 22, pp. 557–559 and p. 563). Dönitz's order of September 17, 1942 (the so-called *Laconia* Order), instructing submarine commanders not to rescue the shipwrecked of ships they had sunk if this would endanger the submarine (following an Allied air attack on the U-156 during rescue operations after the sinking of the British SS *Laconia*), was held by the Nuremberg Tribunal to be ambiguous but not sufficient proof that Dönitz had deliberately ordered the killing of shipwrecked persons (→ Wounded, Sick and Shipwrecked). With the exception of the → *Peleus*, no case in which a German submarine had attacked shipwrecked persons is known from World War II.

3. *Evaluation*

During both wars submarines were in principle bound by the rules of naval warfare in force for surface warships when acting against enemy or neutral merchant ships (→ Armed Conflict, Fundamental Rules). Some but not all of the practice which ran counter to these rules was based on a claim of reprisal. As a development of existing rules, the practice cannot be entirely justified by merely invoking the impossibility of complying with the traditional rules ("new weapons create new law") as was done by some German authors (e.g. Schmitz, p. 671). Nor can it be condemned categorically by simply contending that "the attempt to change existing principles to the advantage of the party which lacks command of the surface of the sea is an attempt to avoid the consequences of naval weakness" (Colombos, p. 512). In order to evaluate the situation properly, it

is necessary to examine two situations which were not explicitly dealt with by the naval treaties but which are the essence of submarine warfare: actions against enemy armed merchantmen and actions in war zones.

The arming of merchant ships, according to the Nuremberg Tribunal in agreement with widely held opinion, is a lawful though "risky" act. The danger which an offensive use of weapons might create for enemy submarines entitles the latter to make appropriate pre-emptive strikes against such ships, including sinking without warning. It is therefore submitted that a development of the law through custom (→ Customary International Law) has taken place in this respect since the London Procès-Verbal of 1936.

The legal qualification of unlimited submarine warfare in war zones depends on the legality of such zones. If the declaration of a war zone is lawful because continuous combat actions are taking place there (→ War, Theatre of), then belligerent warships (not only submarines) may sink enemy merchant ships which enter the zone without warning. The case is more doubtful as regards neutral merchant ships (→ Neutrality in Sea Warfare). This is the essence of new customary law which, according to the view most commonly held among legal writers, has emerged from the practice of World War II.

The Nuremberg Tribunal expressed a different opinion when it stated in the judgment regarding Admirals Raeder and Dönitz that the London Procès-Verbal of 1936 had been concluded with full knowledge that such zones had been employed in World War I and yet had provided for them no exception from the general rules. As a result, the Tribunal concluded that a departure from those rules was not intended. The judgment overlooks, however, the fact that the parties to the Procès-Verbal had intentionally omitted any reference to war zones because they had not agreed on the matter. By leaving the question open, the parties avoided a decision on the applicability of the London Procès-Verbal in such zones.

4. Recent Developments

Since World War II submarines have undergone enormous technical developments. The introduction of nuclear propulsion and nuclear warheads (→ Nuclear Warfare and Weapons; → Nuclear Ships) has increased their speed, especially when submerged, their operational range and their combat capabilities (→ Warfare, Methods and Means). It is impossible to foresee the impact of these developments on the laws of naval warfare in any future war (→ War, Laws of). A general war based on the pattern of the two world wars does not, however, appear to be the most probable future type of war. Nor is it easier to predict what will happen in limited wars. In those which have taken place since World War II (e.g. → Korea; → Vietnam), submarine warfare has taken place in its traditional form rather than in the sense discussed here.

For a discussion of the treatment of submarines as warships in peace-time under customary international law and by → Conferences on the Law of the Sea, see → Warships.

S. HALL, Submarine Warfare, Transactions of the Grotius Society, Vol. 5 (1920) 82–94.
A.P. HIGGINS, Submarine Warfare, BYIL, Vol. 1 (1920/1921) 149–165.
S. MORI, The Submarine in War (1931).
L. RENAULT, Le sousmarin et sa situation dans le droit de gens (1932).
V. LOUVARD, La guerre sousmarine au commerce (1934).
E. SCHMITZ, Sperrgebiet im Seekrieg, ZaöRV, Vol. 8 (1938) 641–671.
O. BÜHLER, Neutralität, Blockade und U-Boot-Krieg in der Entwicklung des modernen Völkerrechts (1940).
G.G. WILSON, The Submarine and Place of Safety, AJIL Vol. 35 (1941) 496–497.
E. CASTRÉN, The Present Law of War and Neutrality (1954) 282–289.
J. STONE, Legal Controls of International Conflict (1954).
BEHRENS, Merchant Shipping and the Demands of War (1955).
R. SCHENK, Seekrieg und Völkerrecht (1958).
W.H. BARNES, Submarine Warfare and International Law, World Polity, Vol. 2 (1960) 121–202.
C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967).
W.T. MALLISON, Jr., Submarines in General and Limited War (1968).

KARL ZEMANEK

SURRENDER

1. Notion

The term "surrender" used in the context of the law of war may first be explained through reference to the closely connected notion of "capitulation". Capitulation (stipulated surrender)

is a convention between local armed forces of belligerents for the surrender of fortresses, towns, vessels and other armed places, or of a body of troops operating within a particular district. (The term "capitulations" has also been used, in another sense in the law of peace, for special régimes governing the privileged status of aliens (→ Consular Jurisdiction).) Capitulations are of local significance and are concluded between the respective military commanders. Another characteristic of a capitulation is the status of inequality between the parties. By contrast, the actual noncontractual surrender can be regarded legally as "simple surrender" but not as a "capitulation".

The Hague Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907) mention but do not define capitulation in the law of war. Chapter IV consists of one brief article (Art. 35) which is worded as follows:

> "Capitulations agreed upon between the Parties must take into account the rules of military honour.
>
> Once settled they must be scrupulously observed by both the parties."

Otherwise, the rules of → customary international law are applicable. By its nature as an agreement, capitulation is to be distinguished from unilateral action or legal measures taken during a state of → war. The essential distinction from an → armistice, regulated by Arts. 36 to 42 of the Hague Regulations, is set by reference to the limitation to purely local military measures, the competence of the local military commanders and the exclusion of a resumption of hostilities. "Suspension of arms", closely related to the term "armistice", is a temporary cessation of military action, limited in time and area, covering a definite theatre of war (→ Suspension of Hostilities; → War, Theatre of); completely absent from this concept is the element of surrendering fortresses, troops and → war materials.

Surrender is also to be distinguished from all legal acts of prospective or immediate termination of war through its episodical appearance during a continuous state of war. The term "capitulation" lacks precision, for it may, depending on the extent of the troop units affected and the regional fortifications, overlap with a partial armistice. In addition, State practice sometimes exhibits unclear, mixed forms of capitulation and armistice, such as the capitulation of Yugoslavia on April 17, 1941 or the series of agreements between the Allied forces and the head of the Italian Government in September and November 1943. In many cases, it shows that no hard and fast line may be drawn between an instrument of surrender and an armistice (Baxter). A special form of surrender, which was hitherto not known to customary international law, is the unconditional surrender of Germany, Japan and Italy at the end of World War II.

2. Conclusion of Surrender

Neither Art. 35 of the Hague Regulations nor general customary international law lays down particular rules on the form for the conclusion of a surrender. The conclusion of an agreement is necessary, but it need not be in writing; oral agreements are thus also permissible. Usually, however, capitulations are laid down in writing, since this is often the only way to ensure that they will be "scrupulously observed". As exact a formulation as possible is necessary in many cases to avoid misunderstandings, particularly since subsequent armistices and → peace treaties may refer back to particular capitulations. The manner in which a treaty was actually negotiated and concluded is also important (→ Treaties, Conclusion and Entry into Force). → Negotiations through intermediaries (Arts. 32 to 34, Hague Regulations; → Flag of Truce) are possible, as well as the use of technical measures, depending on the particular military situation.

Since the capitulation applies exclusively to the local theatre of war, the treaty-making power lies with the local military commanders of the two opposing forces or their authorized negotiators. No other authorization by the military supreme command or by State authorities is therefore necessary. The competence in international law flows from the military jurisdiction of the local commanders. It is generally agreed that, regarding self-contained military units of land armed forces, the commander possesses competence to conclude a surrender, whereas difficulties arise when a close organizational nexus with superior military units exists. In such borderline cases, only the criterion of obvious, externally visible autonomy fulfils the

requirements of international law. There is also a correspondence between these requirements and the fact that the treaty-making power of the commander exists notwithstanding any prohibition under national law, e.g. under criminal law provisions. It also follows from the reference to the local military commanders that in order to be effective, capitulation does not need ratification.

3. Content

Agreements on the surrender of troops, war *matériel* and certain fortifications, on the military evacuation of the areas, and on the care of the wounded and the treatment of the local civilian population (→ Geneva Red Cross Conventions and Protocols; → Wounded, Sick and Shipwrecked; → Civilian Population, Protection) make up the contents of an agreement of surrender. The appointment of the date for the agreement to enter into force is particularly important. Even without an explicit contractual provision, a capitulation is concluded under the obvious condition that all war *matériel* and other public property in the possession of the surrendering party or within the surrendered area or ships are surrendered (Oppenheim/Lauterpacht). To be effective, the capitulation may only affect military matters in the particular local area, and must exclude additional matters (such as termination of war, cession of territory, or political consequences).

To a considerable extent, the treaty contents will actually be determined not by the negotiating parties, but by the peremptory rules of general → international law and the law of war (→ War, Laws of). The norms of humanitarian international law come into primary consideration (→ Humanitarian Law and Armed Conflict), particularly the humane treatment of → prisoners of war. In addition, Art. 35 of the Hague Regulations obliges the observance of the "rules of military honour" and refers to certain rules of the law of war, developed from custom, which could change with the changing face of modern warfare. Moreover, the contents depend on the actual war situation, which also influences to what extent certain units of troops would be allowed to withdraw unhindered.

Even before World War II, it was unanimously agreed that capitulation could be conditional or unconditional, the differences arising from the actual state of military inequality. But this traditional form of "unconditional" surrender also remained within the treaty context presupposed by the Hague Regulations and by customary international law. It thus cannot be seen as a precursor to the "unconditional surrender" of 1945 (see section 5 *infra*).

4. Effects

The surrender agreement (capitulation), an international treaty, is subject to the rule → *pacta sunt servanda*, as expressed in Art. 35 of the Hague Regulations. From an agreed time onwards, the surrender of troops, installations and war *matériel* is legally effective, i.e. there is a duty to withdraw or surrender. At the same time, capitulation excludes the possibility of a resumption of hostilities. At the moment of its entry into force, the enemy soldiers gain prisoner-of-war status. The military power of command, together with the power of disposition held over the surrendered war *matériel*, is transferred.

The timing of the signing of the treaty is important for determining the extent of the troops, installations and war *matériel* being surrendered. Whereas changes made by the capitulating party regarding personnel and *matériel* are allowed beforehand, no destruction of weapons or other war *matériel* is allowed after signature. Such action would constitute a contravention of the capitulation treaty warranting → reprisals and → sanctions; this is equally true for other breaches of the treaty. The effect of the capitulation is limited not only by the relevant rules of international law and possibly by additional special agreements signed between the belligerents. The capitulation is also limited by the duration of the war.

5. General Capitulation and Unconditional Surrender

The traditional meaning of the term "unconditional surrender" was lost at the end of World War II due to the use of certain "instruments of surrender" without any new, clear, legal categories first being established. The term "general capitulation" remains less problematical. General capitulation goes beyond the traditional meaning of unconditional surrender since it can

include the capitulation of the entire armed force or of essential parts of it. The meaning in the sense of the termination of war is equally distinct from the traditional one; an overlapping with armistice here is obvious.

Although certain links, particularly military ones, still exist between a "simple" general capitulation and the traditional meaning, State practice at the end of World War II exhibited with unconditional surrender a special form of general capitulation which has little connection to the legal concepts hitherto developed, or which could have been developed within the framework of the Hague Regulations. Comparisons cannot be drawn between, for example, the unconditional surrender at the end of the → American Civil War of the Confederate forces under General Robert E. Lee on April 9, 1865 and the events of 1945, and thus cannot convey recognition of the term in international law. The most important examples for modern-day unconditional surrender are the capitulation of Italy in 1943, and the instruments of surrender agreed upon between the Allied commanders on the one hand and on the other, the German High Command on May 4, 7, and 8, 1945, and the Japanese Imperial General Headquarters on September 2, 1945 in accordance with the Potsdam Proclamation of July 26, 1945 (→ Potsdam Agreements on Germany (1945)).

The unconditional surrender of the German High Command has to be regarded as being in a special category, owing to its elaborate preparation at the highest political levels during World War II (e.g. Casablanca Conference (1943); → Yalta Conference (1945)). Characteristically, capitulation in this instance was regarded as a method of terminating hostilities with regard to the entire military forces of a belligerent at the highest level of military command. Thus, contrary to the meaning hitherto given to the term in international law, capitulation referred solely to acts of military surrender, while at the same time leaving open the possibility of adding further provisions. The documents of surrender explicitly stated:

> "This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole."

On the basis of this, the declarations of the four Allied Powers on June 5, 1945 contained not only provisions for the surrender of the "supreme authority with respect to Germany", but also various economic and political conditions. The Potsdam Agreements on Germany form a further "instrument of surrender".

Japan's declaration of surrender accepted, *inter alia*, that:

> "Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind. . . . [E]ventual Japanese participation in world trade relations shall be permitted."

The "unconditional surrender" differs from the traditional meaning of capitulation not only by extending beyond the local military limits, but also by expressly influencing the wider political and economic spheres of those defeated and by being seen as a specific way to organize the ending of the war and the order to be established after the war.

Also characteristic is the legal relationship between the parties involved. The unconditional surrender is in theory still within the limits of a treaty agreement, but in practice it results in the complete surrender of the defeated to the victors. To this extent it shows a certain closeness to the factual situation required for a state of → *debellatio*. The legal components required to bring about this state, however, were excluded in Germany's case by the explicit waiver of an → annexation ("The assumption . . . of the said authority and powers does not effect the annexation of Germany," Declaration of June 5, 1945). The unconditional surrender likewise differs from other legal categories of the termination of war through the lack of relevant legal conditions. Thus unconditional surrender does not represent a development in the term "capitulation", but rather a form of surrender *sui generis*.

The legal peculiarities of unconditional surrender led to considerable doubts as to whether it conforms with international law. Sometimes, and particularly in → socialist conceptions of international law, it is expressly and fully recognized as a new legal category. Above all, the problem is to what extent the limits of the international law of

war and peace can be pushed back by unconditional surrender (→ Peace and War). It was expressly stated in the Potsdam Proclamation that, regarding Japan, "[f]reedom of speech, of religion and of thought, as well as respect for the fundamental human rights shall be established". No clear legal rules can, however, be deduced from this and similar conditions. Despite the doubtful legal basis and the controversy over the interpretation of the instruments of surrender, the capitulation instrument, together with related documents, has gained considerable legal significance. In the special case of Germany, apart from certain organizational prescriptions for the administrative organization of the Allies (in the occupied zones), other specific legal consequences could also be derived, such as the continued existence of the "State as such" and the continuance of "Germany as a whole" after 1945 (→ Germany, Legal Status after World War II; → Germany, Occupation after World War II).

6. Significance

The various forms and characteristics of capitulation change as modern warfare and military methods change. Peace treaties or treaties concerning the cessation of hostilities either are no longer resorted to at all, or are concluded only with great difficulty. State practice, therefore, has tended to prefer special types of conflict-resolution, such as those developed within the framework of the → United Nations. Since the end of World War II, the traditionally-employed terms as developed by doctrine have been stretched – if not overstretched – to a considerable degree. The understanding of capitulation as a type of contractually agreed, locally applicable military matter has thus been directly affected.

Nevertheless, the advantages of a somewhat stricter use of terminology are evident, as it clearly would guarantee closer concordance with the governing precepts of customary international law. Moreover, the general rules of international law would be more readily applicable than if the relevant terms were obfuscated by a haze of different meanings. A more precise definition of capitulation would yield better possibilities for controlling its precise extent and the limits which, for instance, the peremptory norms of international humanitarian law impose upon it. Therefore, there would appear to be no cause for separating capitulation and surrender from the original functions assigned to these concepts by the law of war.

A Decade of American Foreign Policy, Basic Documents, 1941–1949 (1950).

J.L. KUNZ, Kriegsrecht und Neutralitätsrecht (1935) 56–61.

R. MONACO, Les conventions entre belligérants, RdC, Vol. 75 (1949 II) 273–362.

L. OPPENHEIM, International Law, Vol. 2 (7th ed. by H. Lauterpacht, 1952) 543–556.

E. CASTRÉN, The Present Law of War and Neutrality (1954) 125–137.

J. STONE, Legal Controls of International Conflicts (2nd ed. 1959).

A. ARMSTRONG, Unconditional Surrender (1961).

LORD MCNAIR and A.D. WATTS, The Legal Effects of War (4th ed. 1966).

R.J. MILLER (ed.), The Law of War (1975).

R. BAXTER, Armistices and Other Forms of Suspension of Hostilities, RdC, Vol. 149 (1976 I) 353–399.

A. KLAFKOWSKI, Les formes de cessation de l'état de guerre en droit, RdC, Vol. 149 (1976 I) 216–286.

M.-F. FURET, J.-C. MARTINEZ and H. DORANDU, La guerre et le droit (1979).

WILFRIED FIEDLER

SUSPENSION OF HOSTILITIES

Before an → armed conflict is ended completely by way of a → peace treaty or by other means, hostilities may be terminated or suspended temporarily by an → armistice, a truce or a cease-fire. Cease-fire, truce, and armistice mark three stages of progress from → war to peace (→ Peace and War). However, no precise legal distinction appears possible between these three terms. Nor can any legal consequence of general validity be derived from the practice of limiting the suspension of hostilities to a certain area in a given conflict.

A suspension of hostilities may be based on an agreement reached at local level between commanding officers of the parties to a conflict, thus giving time for such matters as the evacuation of the wounded in a fixed area (→ Wounded, Sick and Shipwrecked; → Geneva Red Cross Conventions and Protocols). It may also be based on binding decisions of international organizations, such as the → United Nations Security Council,

or on proposals for mediation that are accepted by the parties (→ Peaceful Settlement of Disputes; → Conciliation and Mediation).

A minimum catalogue of ground rules will be necessary in any suspension of hostilities. These will be concerned with the precise time for which hostilities are to be suspended, the duration, the territory covered, and specific acts or activities which will be prohibited during the suspension's currency. Other rules are desirable, such as those dealing with relations between foreign troops and the indigenous population, the treatment of → prisoners of war, and the foreign relations of the parties, in particular with former allies (→ Alliance) not participating in the suspension of hostilities. Good practice would also include rules for the supervision of the cease-fire by a → mixed commission or by representatives of the parties to the conflict, by international organizations or by neutral States (→ Neutrality, Concept and General Rules). Where prohibitive provisions are not expressly included, only belligerent acts will be prohibited during a suspension of hostilities.

A suspension of hostilities is not revocable at will. The principles of → *pacta sunt servanda* and → good faith apply equally to the laws of armed conflict (→ Armed Conflict, Fundamental Rules). Art. 60 of the → Vienna Convention on the Law of Treaties of May 23, 1969 applies ("1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."). Where the suspension of hostilities has already led to a pacified situation, the reopening of hostilities is only permissible within the limits of the → use of force permitted by general international law, especially as a measure of → self-defence. Today, these principles supersede the rules enshrined in Arts. 36 to 41 of the Hague Regulations respecting the Laws and Customs of War on Land, annexed to Convention II of 1899 and Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907).

Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, Sixième Congrès International, La Haye, 22–25 mai 1973, Vol. 1, Le cessez-le-feu (1974).

S.D. BAILEY, Cease-Fires, Truces and Armistices in the Practice of the UN Security Council, AJIL, Vol. 71 (1977) 461–473.

DIETER FLECK

TEHRAN CONFERENCE (1943)

The Tehran Conference took place between November 28 and December 1, 1943 in the capital of Iran, which since August 1941 had been under occupation by British and Soviet troops. It was attended by British Prime Minister Winston Churchill, United States President Franklin D. Roosevelt and Soviet Premier Joseph Stalin, together with their respective advisers Anthony Eden, Harry Hopkins and Vyacheslav Molotov. The purpose of this first summit conference of the three major Allies in World War II was to discuss concrete military cooperation to end the → war and general political aims for the peace. This meeting must be seen in the light of the political and strategic situation that had developed following the collapse of Germany's African front, the Allied occupation of southern Italy, the setbacks suffered by Germany in her U-boat campaign in the Atlantic, the growing strength of → resistance movements in countries occupied by the Axis Powers, and the consequent expectation of victory by the Allies. Since January 1943 these developments had given rise to several conferences which paved the way for the Tehran Conference – which, in turn, laid the foundations for the → Dumbarton Oaks Conference of 1944 and the → Yalta Conference of 1945.

At a meeting at Casablanca between January 14 and 24, 1943, Churchill and Roosevelt (Stalin had declined an invitation to attend), assisted by their political and military advisers, discussed mainly strategic matters – assistance for the Soviet Union, protection of sea lanes and, following the defeat of the Axis forces in North Africa, the invasion of Sicily (Communiqué of January 26, 1943; A Decade of American Foreign Policy, p. 6). They also proclaimed their joint policy (with Stalin's concurrence) of accepting nothing less than unconditional → surrender from Germany, Italy and Japan. The military discussions were continued at the (second) Washington Conference of May 11–27, 1943 and the (first) Quebec Conference of

August 17–24, 1943. At the Quebec meeting, which was also attended by a representative of Generalissimo Chiang Kai-shek, Churchill and Roosevelt agreed to intensify the war against Japan and exchanged views on the new international organization which, based on the principles set out in the → Atlantic Charter, was to replace the → League of Nations when the war was over (→ United Nations). At the (second) Moscow Conference of October 19–30, 1943, Foreign Ministers Eden (Great Britain), Hull (United States) and Molotov (Soviet Union) worked out further details with the aid of their advisers and drew up the agenda for the Tehran summit meeting. They also established a European Advisory Commission in London to assist the three governments in settling non-military matters arising from the war and the subsequent peace. The results of the Moscow discussions were set out in five documents issued on November 1, 1943 (A Decade of American Foreign Policy, p. 9):

(a) the Anglo-Soviet-American communiqué, which dealt mainly with the measures to be taken to shorten the war and confirmed plans for the creation of a new international organization;

(b) the → declaration on → Austria (on the invalidity in international law of the → annexation by Germany);

(c) the declaration of Four Nations on general security (confirmation by the governments of Great Britain, the United States, the Soviet Union and → China of the "unconditional surrender" principle, of plans for the → demilitarization of the Axis Powers, and a declaration on "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security";

(d) the declaration regarding Italy (on occupation and the suppression of Fascism); and

(e) the declaration on German atrocities, signed by Churchill, Roosevelt and Stalin, in which the commitment was undertaken to punish those German officers and members of the Nazi party who were responsible for massacres and other crimes committed in the countries under German occupation, and to deliver them to those countries for trial.

On the way to Tehran, Churchill and Roosevelt met with Chiang Kai-shek (who had not been invited to Tehran because of the Soviet Union's neutrality in the war with Japan; → Neutrality, Concept and General Rules) at the (first) Cairo Conference of November 22–25, 1943. At this meeting they discussed their common strategy in the Far East, the return to China of all the Chinese territories seized by Japan since 1894, in particular, Manchuria, Formosa (→ Taiwan) and the Pescadores, and the establishment of an independent → Korea.

The detailed discussions at Tehran, which initially remained secret, concerned the following matters:

(a) an expansion of the war theatre by bringing in Turkey (which in spite of Turkey's → acquiescence was delayed until February 23, 1945) and by a Soviet declaration of war against Japan (this was confirmed at Yalta);

(b) an intensification in the conduct of the war by invasions in Normandy (Operation "Overlord", begun on June 6, 1944) and southern France (Operation "Anvil/Dragoon" in August 1944) and by reinforcement of the Soviet western front;

(c) the future treatment of Germany, i.e. the establishment of an occupation régime after the war (→ Germany, Occupation after World War II), joint control, and the → dismemberment of the country into five autonomous political entities (Prussia (reduced); Hanover and the northwest; Saxony and Leipzig area; Hesse-Darmstadt, Hesse-Cassel and the section south of the Rhine; Bavaria, Baden and Württemberg) and three internationalized zones (the → Kiel canal and Hamburg; the Ruhr; and the → Saar) (→ Internationalization);

(d) territorial changes in favour of Poland, who was to receive German areas in the north and the west (→ Oder-Neisse Line; → Territory, Acquisition), and of the Soviet Union in the west (in accordance with the → Curzon Line) and in the east (as regulated at Yalta, this mainly meant abrogating the terms of the Russian-Japanese Peace Treaty of September 5, 1905);

(e) establishment of a universal international organization to preserve peace and promote international cooperation as called for in the Moscow Declaration of Four Nations on General Security.

The results of the Tehran Conference were summarized in the Three Power Declaration of December 1, 1943, which in general terms confirmed the five Moscow declarations of November 1, 1943. A declaration concerning Iran was also made, which gave a guarantee of integrity (→ Territorial Integrity and Political Independence) and promised → economic aid. A further communiqué concerning the military conclusions of the conference was issued the same day.

The decisions reached at the Tehran Conference were discussed by Churchill and Roosevelt with Turkish President Inönü when they returned to Cairo for the (second) Cairo Conference (December 2–7, 1943), and were amplified when they met again at the (second) Quebec Conference (September 10–16, 1944), for example, by the adoption of the controversial Morgenthau plan (which was later discarded at Yalta). The decisions had a considerable influence on the subsequent regulation of Germany's legal status (→ Germany, Legal Status after World War II; → Potsdam Agreements on Germany (1945)) and the discussion on the creation of the United Nations during the Dumbarton Oaks Conference in 1944.

Foreign Relations of the United States, Diplomatic Papers, The Conferences at Cairo and Tehran 1943 (1961).

A Decade of American Foreign Policy, Basic Documents 1941–1949 (1950).

W. ARNOLD-FORSTER, Charters of the Peace, A Commentary on the Atlantic Charter and the Declarations of Moscow, Cairo and Tehran (1944).

E.R. BROWDER, Teheran, Our Path in War and Peace (1944).

P.E. CORBETT, Moscow, Teheran and International Organization (1944).

P.B. POTTER, Moscow, Cairo, Teheran, AJIL, Vol. 38 (1944) 108–111.

S. WELLES, The Time for Decision (1944).

J. CIECHANOWSKI, Defeat in Victory (1947).

J.R. DEANE, The Strange Alliance, The Story of Our Efforts at Wartime Co-operation with Russia (1947).

A. DE LA PRADELLE, La paix moderne (1899–1945), De La Haye à San Francisco (1947).

L.W. HOLBORN, War and Peace Aims of the United Nations, From Casablanca to Tokyo Bay, Vol. 2 (1948).

C. HULL, The Memoirs of Cordell Hull, Vol. 2 (1948).

R.E. SHERWOOD, The White House Papers of Harry L. Hopkins, 2 vols. (1948–1949).

H.L. STIMSON and M. BUNDY, On Active Service in Peace and War (1948).

W.L. NEUMANN, Making the Peace 1941–1945, The Diplomacy of the Wartime Conferences (1950).

W.H. CHAMBERLIN, America's Second Crusade (1951).

W.S. CHURCHILL, The Second World War, Vol. 5, Closing the Ring (1951).

M.W. CLAUSS, Der Weg nach Jalta (1952) 147–200.

J.-B. DUROSELLE, De Wilson à Roosevelt, Politique extérieure des Etats-Unis 1913–1945 (1960).

W. WAGNER, Die Teilung Europas (2nd ed. 1960).

J.W. BRÜGEL, Teheran, Jalta und Potsdam aus sowjetischer Sicht, Europa-Archiv, Vol. 29 (1966) 803–816.

K. EUBANK, The Summit Conferences, 1919–1960 (1966) 58–78.

V. BEREŽKOV, Tehran 1943, At the Conference of the Big Three and behind the Scenes (1968). [In Russian].

W.H. BERTHOLD, "Unconditional Surrender", Das Kriegsziel der Alliierten des zweiten Weltkrieges (1973).

HANS-JÜRGEN SCHLOCHAUER

TEST-BAN TREATIES *see* Nuclear Tests

THEATRE OF WAR *see* War, Theatre of

THREAT TO PEACE *see* Peace, Threat to

TOKYO TRIAL

After the Japanese → surrender on September 2, 1945 the victorious Allies carried out a number of → war crimes trials against Japanese politicians and generals. The Tokyo Trial, sometimes referred to as the Asian → Nuremberg Trial, took place from May 3, 1946 to November 12, 1948. The transcript of the proceedings covers 49 858 pages. The Chief Prosecutor called the hearings "the biggest trial in recorded history". Eleven judges from eleven countries which had been at war with Japan formed the International Military Tribunal for the Far East (IMTFE): Sir William Webb, president (Australia), E. Stuart McDougall (Canada), Ju-Ao Mei (China), Lord Patrick (Great Britain), B.V.A. Röling (Netherlands), E.H. Northcroft (New Zealand), I.M. Zaryanov (Soviet Union), M.H. Cramer (replacing J.P. Higgins, United States), H. Bernard (France), R.M. Pal (India) and D. Jaranilla (Philippines).

The list of 28 defendants was comprised mainly of ministers (including three former prime ministers), but also included generals, diplomats, admirals, and one propagandist. Seven of the defendants were sentenced to death (including two of the former prime ministers), sixteen to life imprisonment, and two to shorter terms; two defendents had died during the proceedings and one was declared unfit for trial. No one was acquitted.

The Chief Prosecutor was Joseph B. Keenan (United States), who was assisted by associate counsel from the different countries represented in the Court. The accused were assisted by Japanese counsel, who were not all familiar with Anglo-Saxon court procedure. The Tribunal held that they were entitled to American counsel, and all except Kingoro Hashimoto were defended by Japanese and American Lawyers. This sometimes led to tension among the defence lawyers. The accused and their Japanese counsel were eager to protect the honour of their country and their Emperor, whereas the American counsel concentrated on the fate of their clients.

The jurisdiction of the IMTFE was based on the Tokyo Charter (→ International Courts and Tribunals), issued by the Supreme Commander Allied Forces, General Douglas MacArthur. It was almost identical with the Nuremberg Charter, but no mention was made of criminal organizations and in the formulation of the → "crime against humanity", the words "committed against any civilian population" were omitted in order to allow prosecution of soldiers for killing during battle. Here, the Court was not in agreement with the drafters of the Charter. Just as in the other post-war trials, the line was taken that even an unlawful → war is one to which the laws of war apply (→ War, Laws of) and that the soldier must be seen as a privileged → combatant. The defendants were therefore indicted for → crimes against peace, conventional war crimes and crimes against humanity. Convictions were handed down in respect of the two first-mentioned crimes.

According to the Charter a fair trial was to be held, and principles were provided in order to ensure such a trial (rules regarding the requirements for the indictment, the language used in the proceedings, the provision of counsel for the accused, and rules of evidence). It must be considered whether fairness was possible after a war in which unbridled war propaganda had taken place and feelings of hatred and contempt had been systematically stimulated. Because of this factor, many have found it an easy matter to challenge the objectivity and impartiality of the trial. The accused were denied the opportunity to prove that their fear of communism in China was partly the motive for their country's → intervention there. They were certainly not on an equal footing with the prosecution with respect to examining official documents. For a continental judge, certain features of the Anglo-Saxon trial procedure employed were sometimes disconcerting. Still, all in all the way of handling this important trial was not unacceptable to the judges, apart from the French judge, who dissented from the Tribunal's judgment by reason of what he viewed as defects in the procedure.

Other dissenting opinions were based on different approaches as to the law and the facts. Justice Pal of India took the Asian view: the Pacific War had been a war to expel the European powers from Asia. Such a war, conducted to restore the independence lost in past aggressive wars (→ Aggression), should not be considered as a criminal undertaking. Moreover, individual criminal responsibility for beginning or waging aggressive wars was unknown in international law. According to Justice Pal, the Allied Powers did not have the right to charge the vanquished with grave violations of the laws of war, after they had themselves committed grave crimes, such as the bombing of the Japanese cities culminating in the dropping of atomic bombs on Hiroshima and Nagasaki (→ Air Warfare; → Bombardment; → Nuclear Warfare and Weapons).

The dissenting opinion of Justice Röling (Netherlands) did not cover all the possible points which could have been discussed, but only those which would have led to the acquittal of five of the accused who were found guilty by the majority of the Court: Koki Hirota, Shonuku Hata, Koichi Kido, Shigenori Togo and Mamoru Shigemitsu.

Sir William Webb agreed on conviction of the accused, but in a separate opinion spoke out against imposing the death penalty, because the man who, in his opinion, bore the greatest responsibility, the Japanese Emperor, had not been

put on trial. In a concurring opinion, the Philippine judge protested against the majority judgment's leniency in a few cases. The Russian judge shared the opinion of the majority, without publicly voicing any dissent. It is, however, noteworthy that at the time of the judgment, municipal Soviet law forbade the death penalty.

In America, some hesitance existed as to whether to prosecute Japanese policy-makers for the crime of aggression as a crime against peace. MacArthur opposed a trial along the lines of the Nuremberg trial, and many shared his opinion. They desired only a short trial of those responsible for the surprise attack on Pearl Harbour in a judicial tribunal that would publicly expose the heinousness of this attack, which caused many casualties and loss of ships. Legally, such a charge could have been based on Hague Convention III of 1907 relative to the Opening of Hostilities (→ Hague Peace Conferences of 1899 and 1907), which prescribed that wars should be declared in advance. Yet this would not have been a sound legal basis. At the Hague Conference of 1907 the Dutch delegate had suggested that the → declaration should be made 24 hours in advance, but this proposal was rejected by the American delegate, because it would make a surprise attack impossible. As is known, the declaration handed to the government in Washington which the Japanese considered to be a declaration of war, was delivered at almost the same moment that the bombing in Hawaii took place.

The precedent of the Nuremberg trial compelled the Allied Powers to prosecute Japanese leaders for the crime against peace. Had this charge been omitted, the conclusion might have been that this war had not been an aggressive one. Therefore prosecution could only have been for misbehaviour during the war, consisting of grave violations of the laws and customs of war.

As with the Nuremberg Tribunal, the IMTFE applied its own Charter as the law by which it was bound. It recognized the legal existence of the crime against peace as defined in the Charter (initiating or waging an aggressive war). In so doing, it contributed to the recognition of this crime. Its decision, combined with the later actions taken within the → United Nations, confirmed the crime against peace as a crime under international law. Its findings are significant for ascertaining the criteria of liability for this crime. Certainly, the accused must have been active on the policy-making level. The Tokyo judgment, including the dissenting opinions, is important for a further question: If a person has accepted a "policy-level" position with the aim of contributing to the prevention or termination of the war, but has not succeeded in doing so, to what extent is he liable for a policy which furthers the war? In this connection, the decisions concerning Shigemitsu and Togo, both former ambassadors and foreign ministers, are particularly in point.

The Tokyo judgment is also important because it recognized the criminal responsibility for conventional war crimes of the authorities who had known about them, could have prevented them, and had command responsibility. The Nuremberg Tribunal had less reason to go into this question, because of the abundance of issued orders that were clearly criminal. That was not the case in Japan. Many of the accused were sentenced on Count 55 of the indictment, which charged that they "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws of war. This criminal responsibility for failure to act was not later recognized in the → Geneva Red Cross Conventions of 1949. It is now inserted in the provisions of Protocol I additional to these Conventions which was adopted in 1977.

The "Cold War", which emerged after the judgment had been delivered, brought about a fundamental change with respect to German and Japanese war criminals. Soon afterwards, the prisoners began to be discharged. Shigemitsu, who had been sentenced to seven years' imprisonment, was released on November 21, 1950; four years later he was again the Japanese minister of foreign affairs. On April 7, 1958 the last ten prisoners were set at liberty. Six of those who had been sentenced to imprisonment had died in prison.

In 1978 the accused who had been hanged, and those who had died during the trial or in prison were commemorated as martyrs at Yasukuni Shrine. It was said that they too had sacrified their lives for the State and the Emperor; the commemoration expressed the Asian attitude towards

the Pacific War. Most Japanese, one may presume, have never regarded the convicted as criminals.

The attitude in the world at large may be different. But no one since World War II has been sentenced for committing the crime against peace, notwithstanding the fact that many wars have occurred. Prosecution and punishment seem only possible in the case of unconditional surrender. This does not, however, take away the real significance of the post-war judgments. That significance lies in their contribution to a growing tendency of opinion which condemns war: an opinion which is commensurate with the age of nuclear weapons which has made war an unbearable evil.

B.V.A. RÖLING and C.F. RÜTER, The Tokyo Judgment, 3 vols. (1977–1981).

R.J. PRITCHARD and S.M. ZAIDE (eds.), The Tokyo War Crimes Trial, 22 vols. (1981).

S. HOROWITZ, The Toyko Trial, International Conciliation, No. 465 (1950) 473–584.

G. IRELAND, Uncommon Law in Martial Tokyo, Year Book of World Affairs, Vol. 4 (1950) 54–104.

R.H. MINEAR, Victor's Justice, The Tokyo War Crimes Trial (1971).

P.R. PICCIGALLO, The Japanese on Trial (1979).

BERT V.A. RÖLING

TLATELOLCO, TREATY OF *see* Nuclear-Free Zones

TRADING WITH THE ENEMY

1. Historical Background

The restriction of commercial intercourse with an enemy during hostilities has long been regarded as an incident of war. International practice has not, however, demonstrated any common consent to be bound by rules or principles of international law in controlling the commercial acts of their respective nationals with enemy nationals. Even Bynkershoek's early remark (Quaestionum juris publici, 1737) that "commerce is generally prohibited in declarations of war and also in subsequent edicts" owes more to pragmatic grounds than to legal sources. His statement was posited on the general "nature of war", in which context he wrote: "Of what value are commercial rights if . . . the goods of the enemy . . . are confiscated? Certainly all commercial intercourse must cease." Despite the important differences between the nature of the earlier restrictions and what later followed, prohibitions on trading with the enemy were in the realm of public policy from a very early date (→ Enemies and Enemy Subjects; → Enemy Property).

The prohibition of trading with the enemy has been regarded as possessing "respectable antiquity" (McNair/Watts, p. 343), but can only be traced back in law to the *ipse dixit* of Lord Kenyon, C.J., in the English case of Potts v. Bell ([1800] 8 T.R. 549). Before 1800, the prevailing opinion was that trading with the enemy, while illegal in → sea warfare, was not illegal at common law, though some regarded it as a misdemeanour. Thus, while authority for → prize law penalties and confiscation of goods reaches back as far as the 18th century, the common law concept of trading with the enemy must be taken to have originated in 1800 (→ War, Laws of, History).

By the time of the earliest significant trading with the enemy legislation, the British Trading with the Enemy (Extension of Powers) Act (1915, 5&6 Geo. 5, c. 98), it was even considered part of the law of nations that all ordinary commercial intercourse between enemy nations was incompatible with their waging war on one another. (See e.g. Watts & Co. v. Unioni Austriaca di Navigazione, 224 Fed. 188, 192 (E.D.N.Y. 1915), affirmed 229 Fed. 136 (2d Cir. 1915).)

If the Anglo-American experience is taken as the development model for legislation on trading with the enemy, it should be noted that when the common law rules were developed in England, international trade was usually in tangible goods shipped directly between resident nationals of the countries engaged in the transactions. The principal tests of enemy character, i.e. enemy nationality and domicile in belligerent territory, were effective and sufficient. Common law simply prohibited any dealings which tended to be to the country's detriment and to the enemy's advantage (see Pickford, L.J., in Robson v. Premier Gil & Pipeline Co., Ltd. [1915] 2 Ch. 124, 136). Any restrictions on commercial intercourse

ceased to operate when the enemy ceased to be at war.

As international economic relations grew in complexity, the Anglo-American concepts of "trade" and "enemy" gradually expanded. By 1914, these common law doctrines were no longer adequate to respond to new economic and commercial circumstances. Many new forms of foreign trade and complex credit devices supplanted the easily detectable bulk shipments of earlier times and tended to obscure the real destination of certain strategic raw materials crucial to an enemy's war effort (→ War Materials). Consequently, during World War I, Great Britain and the United States both enacted legislation broadening the common law definition of "enemy". To the common law test of residence in enemy territory were added proscriptions on all enterprises incorporated under the laws of an enemy State, as well as on all neutral parties who carried on some business in enemy territory, even though under international law neutral firms had a right to trade freely (→ Neutral Trading). Blacklisting was authorized for neutral firms cooperating with enemy commercial policy on neutral soil. Later law and practice extended proscription to firms, wherever incorporated, which were "controlled" by an enemy, and to transactions which were not necessarily with the enemy but were "for the benefit" of the enemy. Enforcement was by criminal sanctions.

2. Aim and Substance of the Acts

The large number of British statutes and orders issued during World War I made it difficult to discern a clear line of law and policy. Consequently, the United States Trading with the Enemy Act of 1917, modelled after the British Act of the same name, better serves to exemplify the type of legislation from that period. As in Britain, the American legislation (passed six months after the United States entered World War I) was first enacted as a war measure. Though the two Acts do have significant differences, the reasons given by the United States for adopting the legislation show a clear similarity of purpose. Those reasons were: (a) the prevention of aid and comfort to the enemy; (b) the need for access to those funds and property located within the territory and belonging to enemies or their allies in order to finance and successfully prosecute the war; and (c) the protection of interests in the property rights of private persons. To this end, the American Act authorized government seizure, in time of war or national emergency, of all foreign-owned or foreign-controlled property located in the United States, and prohibited trade with the enemy (→ Sequestration).

Section 2 of the Act defined "trade" to include many forms of commercial transaction extending beyond the historical notion of trade, involving, for example: satisfaction of debts; any choses in action or negotiable instruments; contracts or other obligations; the transfer of any form of property; or "any form of business or commercial communication or intercourse" (40 Stat. 412, 50 U.S.C. App. § 2).

"Enemy" was defined in Section 2 as including:

> "Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business with such territory."

Included also were governments and government representatives of belligerent States, as well as any other individuals or group of individuals directly allied with a belligerent State, if required for "the safety of the United States or the successful prosecution of the war" as proclaimed by the President. The words "ally of enemy" were similarly defined in Section 2. In the → Interhandel case, the importance of these definitions was demonstrated in that the petitioner's prospects of success rested on its ability to prove that it was not an "enemy" within the meaning of the United States Trading with the Enemy Act.

The classes of enemies enumerated in the British Act are similar to those of the United States Act: (a) enemy States and sovereigns; (b) enemy corporations; (c) individuals resident in enemy territory; and (d) persons named on the statutory list. These clear-cut categories in the British

legislation did not, however, emerge until the Trading with the Enemy Act of 1939 (2&3 Geo. 6, c. 89) when the World War I measures were redrafted in a more orderly fashion. By 1939, not only had wartime executive powers been increased dramatically, but the implications of → economic warfare had also become major considerations. The Act was a simpler, more comprehensive piece of legislation than its predecessor (e.g. it refers to "war" in general rather than to "the present war"). It was an Act to improve criminal penalties for trading with the enemy and to make provisions regarding the property of enemies and enemy subjects.

The wording of the Act itself was "of the widest possible character, . . . wide enough to take in any transaction of which it can be truly said (and this is a question of fact in each case) that it is for the benefit of an enemy. . . ." (Sir Wilfrid Greene, M.R., in Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd. [1941] 57 T.L.R. 289, 1 All E.R. 257). The Schering case is significant for having established the hardly disputable point that the 1939 Act could not be evaded by "indirect devices or tricks", and for supporting a broad interpretation of the Act: "Trading with the enemy" was set out in a broad but functional formula as any "commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy". The words "for the benefit of" are significant, and go beyond the earlier conception. That meant that an action or transaction for the benefit of an enemy – even if not performed by an enemy or an enemy territory – would be prohibited or penalized. Thus the pre-existing prohibition against trading directly with the enemy evolved into a prohibition of any trading that would ultimately be of benefit to the enemy. The term of "enemy" itself was extended by the British Act of 1939 to include an increasing number of "persons" and "bodies of persons" affected, in response to the growing importance of economic warfare.

Similarly, the meaning of "enemy territory" was expanded by the 1939 Act to encompass enemy-occupied territory (→ Occupation, Belligerent); and the test of "enemy control" was introduced for determining the enemy character of bodies corporate. By a combination of the common law test of "incorporation or constitution" (used in both English and American private international law) with the control test, a "body of persons" – even if not itself an "enemy" – was considered an enemy *ipso facto* if it was controlled by an "enemy". This held true in whatever territory such body was incorporated or had its *siège social* or centre of management, or in whatever territory it carried on business. The "benefit" and "control" doctrines of the 1939 British legislation are not to be found *per se* in the American version, but they have been retained *de facto* as criteria in defining enemy trade in neutral States for the purpose of blacklisting.

Both the British and American Acts still remain technically in force, but through amendments, judicial decisions and sweeping administrative orders, many of the prohibitions, particularly in the American legislation, have been modified. Moreover, the administration of the United States Trading with the Enemy Act has been transferred from the President to the Department of the Treasury. The last major amendment of the British Act was the Emergency Laws (Miscellaneous Provisions) Act, 1953 (ch. 47), which is mainly concerned with administrative details.

The American Act, on the other hand, has undergone substantial revision since its original passage. Its numerous amendments have generally broadened executive emergency powers. Significant in this respect was an act passed by the United States Congress on March 9, 1933 (c. 1, 48 Stat. 1, 50 U.S.C. App. § 5 (b)), making Section 5(b) (relating to serious emergencies) applicable not only during time of war but "during any other period of national emergency declared by the President". Section 5(b) was amended again in 1941, by Title III of the First War Powers Act, to extend the President's authority, both in scope and in substance: in scope by applying it to all foreign property interests, including American and foreign-owned as well as enemy-owned property, and by broadening investigatory, reporting and regulatory powers; and in substance by including exchange control, securities, etc., and signalling the transition of its use in economic defence to one of economic offence (55 Stat. 839, 50 U.S.C. App. § 616 (repealed)). In this regard, a number of regulations have been promulgated under the United States Trading with the Enemy Act strictly limiting trade with communist countries. These regulations extend beyond territorial

limits to enterprises wherever organized or doing business, provided they are owned or controlled by United States nationals, residents or corporations. Though some of these regulations have been relaxed in recent years, during the time they were strictly enforced they inevitably led to diplomatic → protests and confrontations involving questions of extraterritoriality (→ Extraterritorial Effects of Administrative, Judicial and Legislative Acts). The most renowned case reflecting the effect of extraterritorial application of trading with the enemy legislation on foreign interests is the Fruehauf v. Massardy Case ([1968] D.S. Jur. 147, [1965] J.C.P. II 14, 274*bis* (Cour d'appel, Paris)) in which a French court ordered an American-owned French corporation to honour a contract with a third party whose final product was destined for the People's Republic of China, even though in so doing the corporation was in violation of the relevant provisions of the United States Trading with the Enemy Act. That outcome has led to the suggestion that there is no principle of international law which effectively requires a government to moderate its trading with the enemy regulations where foreign corporations owned by its nationals are concerned, but that the government should refrain from enforcing those regulations against foreign corporations not engaged in strategic activities.

The transition of the Act's use from one of economic defence to one of economic offence is again illustrated by the fact that following the Korean conflict in 1950, the emergency powers called into play under the Act remained in force until December 1977. In practice, however, many of the restrictions began to diminish from the mid to late 1960s, apparently as a result, in part, of concern over whether they conformed with international law. The National Emergencies Act of September 14, 1976 (90 Stat. 1255, 50 U.S.C. §§ 1601 et seq.) restricted or eliminated many of the presidential emergency powers. In 1977, Title I of the Wartime or National Emergencies (Presidential Powers) Act (91 Stat. 1625, 50 U.S.C. App. § 5(b) (1)) amended the Trading with the Enemy Act to curtail presidential emergency powers, outside of actual wartime, by restricting presidential trade regulation authority to times of war declared by Congress. At the same time, however, Title II (International Emergency Economic Powers Act) of the 1977 Act granted authority to the President to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat". (91 Stat. 1626, 50 U.S.C. § 1701(a)). Such powers of course reside within the normal exercise of national → sovereignty, and their dissociation with the trading with the enemy legislation has contributed to restoring the latter to its traditional wartime limitations.

3. Concept in International Law

Historically, the overriding purpose and aim of trading with the enemy restrictions has been to preserve and protect national security in time of war. Strictly speaking, it is the export of defence-related materials which has been the central target of related legislation. Examining all such legislation in the light of international law and the → United Nations Charter (see Art. 1(3); Art. 2(3) and (4); Art. 33, and especially Art. 41), as well as international practice and → United Nations resolutions (e.g. → embargoes involving China, South Africa, Rhodesia and Portugal), it is evident that freezes and embargoes are among the major recognized techniques of lawful → economic coercion. Over and beyond freezes and embargoes, modern-day economics, communications and war-making capabilities have in fact resulted in a broader concept of economic warfare which has so far not been fully harmonized with the rules protecting enemy property. In principle, it appears that the agreement on these rules reached in the Hague Convention has never been repudiated. It must, however, be conceded, in the light of the divergent views held in the international community, that clear-cut rules cannot be easily identified on this issue.

A. BLUM and M. ROSENBAUM. The Law relating to Trading with the Enemy (1940).

New Administrative Definitions of "Enemy" to Supersede the Trading with the Enemy Act, Yale Law Journal, Vol. 51 (1941–1942) 1388–1398.

C. PARRY. The Trading with the Enemy Act and the Definition of an Enemy, Modern Law Review, Vol. 4 (1941) 161–182.

E. TURLINGTON. Vesting Orders under the First War Powers Act, 1941, AJIL, Vol. 36 (1942) 460–465.

M. DOMKE, Trading with the Enemy in World War II (1943).
"Enemy" under the Trading with the Enemy Act and Some Problems of International Law, Michigan Law Review, Vol. 42 (1943) 383–408.
S.L. LOURIE, The Trading with the Enemy Act, Michigan Law Review, Vol. 42 (1943) 205–234.
Return of Property Seized During World War II, Judicial and Administrative Proceedings under the Trading with the Enemy Act, Yale Law Journal, Vol. 62 (1953) 1210–1235.
Civil Procedure, Meaning of "Control" in Federal Rule of Civil Procedure 34 Defined to Protect Policy Underlying Trading with the Enemy Act, University of Pennsylvania Law Review, Vol. 107 (1958–1959) 103–109.
LORD MCNAIR and A.D. WATTS, The Legal Effects of War (4th ed. 1966) 170–191.
L. CRAIG, Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans, Reflections on Fruehauf v. Massardy, Harvard Law Review, Vol. 83 (1969–1970) 579–601.
T. SAWYIER, Encouraging Foreign Investment in the United States by Limiting the President's Emergency Authority under the Trading with the Enemy Act, Mercer Law Review, Vol. 27 (1975–1976) 681–715.
A.G. SKOL and C.H. PETERSON, Export Control Laws and Multinational Enterprises, International Lawyer, Vol. 11 (1977) 29–44.

CYNTHIA D. WALLACE

TRAFFIC IN ARMS *see* Arms, Traffic in

TREATIES, EFFECT OF WAR ON *see* War, Effect on Treaties

TRIANON PEACE TREATY (1920)

1. Historical Setting

As it became apparent that the Central Powers had lost World War I, political forces emerged in Hungary which advocated independence from Austria and repudiation of the German → alliance, contending that this would permit a separate peace with the Entente and the preservation of the country's unity. Yielding to popular pressure, King Karl (IV of Hungary, Emperor of Austria) appointed the leader of this movement, Count Mihály Károlyi, prime minister. Károlyi proclaimed Hungary's independence on November 3, 1918. Ignoring the → armistice concluded by the Austro-Hungarian high command on the same day, Károlyi then concluded a separate and less favourable military agreement with the Allied commander in the Balkans at Belgrade on November 8, 1918.

King Karl renounced participation in the affairs of the State on November 13, and on November 16 Hungary was proclaimed a republic with Károlyi as president. This régime was, however, never recognized by the Allies; it was succeeded by a Bolshevik dictatorship under Béla Kun on March 21, 1919, which also never gained → recognition and was overthrown by Romanian → intervention. Finally, a nationalist army under former Admiral Miklós Horthy entered Budapest on November 16, and a government led by Károly Huszár was recognized by the Allies on November 25. Elections were held on January 25, 1920; soon afterwards Hungary became a monarchy again, and Horthy was elected regent on March 1, 1920.

2. Paris Peace Conference and the Treaty of 1920

The Paris Peace Conference was convened in January 1919 to draft the texts of the peace treaties with Germany (→ Versailles Peace Treaty) and the other Central Powers (→ Peace Treaties after World War I). Apart from the Versailles and the Trianon treaties, treaties were signed with Austria (→ Saint-Germain Peace Treaty), Bulgaria (→ Neuilly Peace Treaty) and Turkey (Sèvres Peace Treaty; see → Lausanne Peace Treaty).

The Hungarian delegation to the Paris Peace Conference was handed a draft treaty on January 16, 1920, the territorial provisions of which confirmed the new Hungarian frontiers with Czechoslovakia and Romania that had already been announced by the Supreme Council of the Conference on June 13, 1919. The objections raised by the Hungarian delegation were based both on historical arguments and on the principle of → self-determination; with reference to the latter, → plebiscites were requested in those areas allotted to neighbour States. These demands were summarily rejected, partly on the basis of the presumption that the will of the peoples concerned was clear, and partly to secure economically and strategically advantageous → boundaries for other States.

The Peace Treaty was signed at the Trianon Palace near Paris on June 4, 1920 and was ratified

on November 15, 1920. It reduced Hungary's territory by two-thirds and her population by three-fifths. Apart from Slovakia, Transylvania and the Bánát of Temesvár, Croatia, Slavonia and Serbian Voivodina, which went to Czechoslovakia, Romania and Yugoslavia respectively, and German-speaking Western Hungary, which was given to Austria, Hungary also lost more than three million Magyars, many of them living in areas contiguous to her territory.

Hungary, who had never denied her legal identity with the Hungarian part of the former Habsburg monarchy, was held to be responsible for causing the Allies' war losses and was obligated to pay proportionate → reparations of an unspecified amount. Hungary – now a → landlocked country – was permitted a standing army of only 35 000 men (cf. → Demilitarization). Many of the other provisions of the Treaty were similar to those of the Saint-Germain and, to a certain extent, of the Versailles and the Neuilly treaties. Accordingly, the first 26 articles comprised the Covenant of the → League of Nations. Hungary, who had to undertake the protection of → minorities still within her boundaries, later complained to the League's Council that Magyar minorities in Romania and Yugoslavia did not enjoy the same rights.

2. Subsequent Developments

Hungary regarded the territorial terms of the Treaty as an intolerable → dismemberment; its revision remained a prominent goal of her foreign policy until after World War II. Armed resistance against the transfer of territory to Austria led to the Protocol of Venice of October 13, 1921 (LNTS, Vol. 9, p. 204), whereby Austria consented, under Italian pressure, to a plebiscite in and around Ödenburg. This resulted, although under dubious circumstances, in a majority in favour of continued unity with Hungary, and the town remained Hungarian under the name of Sopron. The payment of the substantial reparations was avoided, and the question was settled by agreements signed on April 28, 1930 (LNTS, Vol. 121, p. 69).

The "new order" which Hitler intended to impose on Europe resulted in some gains for Hungary; two arbitral decisions rendered by Germany and Italy in Vienna on November 2, 1938 and August 30, 1940 awarded Hungary the Magyar-speaking part of Slovakia (cf. → Munich Agreement (1938)), and two-fifths of Transylvania. These and other gains were lost because of Hungarian participation in World War II on the side of the Axis. In the Paris Peace Treaty of February 10, 1947 (→ Peace Treaties of 1947), the Trianon frontiers were restored, with a small correction near Bratislava in favour of Czechoslovakia (→ Peace Settlements after World War II).

Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon, June 4, 1920, British and Foreign State Papers, Vol. 113 (1920) 486–645; Martens NRG3, Vol. 12 (1924) 423–565.

Ministère hongrois des affaires étrangères, Les négociations de la Paix hongroise, 3 vols. (1920).

C.A. MACARTNEY, Hungary and her Successors, The Treaty of Trianon and its Consequences (1937, Repr. 1965).

F. DEÁK, Hungary at the Paris Peace Conference, The Diplomatic History of the Treaty of Trianon (1942).

Z.L. NAGY, The Paris Peace Conference and Hungary 1918–1919 (1965) [in Magyar].

J.K. HOENSCH, Der ungarische Revisionismus und die Zerschlagung der Tschechoslowakei (1967).

HERIBERT FRANZ KÖCK

TRUCE *see* Armistice; Flag of Truce; Suspension of Hostilities

ULTIMATUM

1. Notion and Historical Background

The term "ultimatum" was originally used only in the language of → diplomacy. A generally accepted legal definition does not exist. From a legal viewpoint, however, an ultimatum may be defined as a unilateral → declaration which consists of a peremptory and unequivocal warning by one State to another that unless certain stated conditions are complied with within a fixed period of time, a particular legal relationship between the parties will be created, changed or dissolved (→ Unilateral Acts in International Law). An ultimatum is usually but not necessarily transmitted in writing (→ Note) and may form part of a → *démarche*. It demands a clear and categorical reply; the absence of reply or a dilatory reply is taken to be equivalent to rejection.

Historically, the most important type of warning attached to an ultimatum has been the threat that in case of non-compliance a state of war results between the parties. This ultimatum is a conditional declaration of war. It is mentioned in Hague Convention III of 1907 relative to the Opening of Hostilities as constituting one method of beginning war (→ Hague Peace Conferences of 1899 and 1907). In international law, such an ultimatum does not require any subsequent declaration. The state of war will be the consequence *ipso facto* of the rejection of the demands made or the expiry of the time-limit. This ultimatum must be distinguished from the warning that war will be declared unless the respondent agrees to the demands submitted (→ Peace and War). Apart from the British and French ultimatums of September 3, 1939 submitted to Germany, none of the ultimatums dispatched by governments which became belligerents in the two world wars contained a clearly conditional declaration of war. (For the current law regarding declarations of war in general, see → War; → Use of Force.)

In contrast to an older, more restrictive view, the practice of States and the prevailing legal doctrine justify the conclusion that the legal notion of an ultimatum is not synonymous with a conditional declaration of war but rather covers other forms of warning such as the termination or suspension of treaties (→ Treaties, Termination), the severance of diplomatic relations (→ Diplomatic Relations, Establishment and Severance), or the establishment of a → blockade, provided the entry into force of the legal consequences announced in the warning is clearly made dependent on non-compliance with the stated demands. One of the few examples is the note of June 16, 1919 transmitted to Germany by the Allied Powers stating that unless the → Versailles Peace Treaty in its proposed form were accepted within five days, the → armistice of February 16, 1919 would "then terminate". An ultimatum of this kind may be regarded as a substitute for the formal → notification which otherwise is required to produce the announced legal change.

The legal notion of ultimatum so defined does not cover pressures which, although declared in terms of an ultimatum, represent purely political attitudes and do not entail legal effects. This kind of pressure is traditionally used by States to strengthen their own positions and to weaken those of their opponents (→ Power Politics; → Imperialism; → Economic Coercion). An ultimatum in this broader sense may also be used to reinforce the credibility or effectiveness of a → protest. It may also serve to enforce a certain strategy of treaty → negotiation. As an example, the Soviet note of November 27, 1958 addressed to the British, French and United States governments stated that the Soviet Union would sign a separate peace treaty with the German Democratic Republic unless the Western Powers agreed to withdraw their military forces from West Berlin within a six-month time-limit. The term "ultimatum" here simply denotes a policy that combines a final demand ("the last word") and a time-limit ("the ultimate limit") with a warning or threat.

2. Current Legal Situation

An ultimatum in the legal sense may be declared by (or directed at) any → subject of international law, including international organizations, provided the act is within the scope of its constitutional mandate. The ultimatum should emanate from an authority competent to issue it. It has no legal effect unless it is officially communicated to the other party. As a rule, an ultimatum declared over the broadcasting media or in the press will not be regarded as a sufficient legal substitute for the formal notification which both international law and the needs for regularity and certainty require as a prerequisite of legal change in inter-State relations.

The legality of an ultimatum and the legality of political pressures called "ultimatum" both depend upon their contents. Apart from the case of an → abuse of rights, an ultimatum may violate international law (→ Internationally Wrongful Acts) when the demands or the threatened measures are contrary to international law. The threatened measures may violate the prohibition of the use of force or the general obligation to settle a dispute peacefully (Arts. 2 and 33 of the → United Nations Charter; → Peaceful Settlement of Disputes). An ultimatum "out of the blue" may also violate a specific treaty provision which expresses the willingness of the parties to

adjust certain disputes by agreed means such as direct negotiation or → arbitration. Therefore, the legitimate use of an ultimatum is often substantially restricted. States can, however, be expected to justify an ultimatum, if its legality is questioned, by relying on the law of → reprisals.

H. ASBECK, Das Ultimatum im modernen Völkerrecht (1933).
N. HILL, Was There an Ultimatum before Pearl Harbor?, AJIL, Vol. 42 (1948) 355–367.
F.C. IKLÉ, How Nations Negotiate (1964).
E. JOHANN, Begriff und Bedeutung des Ultimatums im Völkerrecht (1967).

ONDOLF ROJAHN

UNCONDITIONAL SURRENDER *see* Surrender

UNDEFENDED LOCALITIES *see* Open Towns

UNFRIENDLY ACT

In general, an unfriendly act is conceived of as the conduct of one State that is disadvantageous to another State. But it does not imply an → internationally wrongful act entailing responsibility on the part of the first State (→ Responsibility of States: General Principles). The State acting in an unfriendly manner remains within the limits of law, so that no → reprisals against it are allowed. Therefore, the unfriendly act falls into a political or diplomatic category rather than a juridical one (→ Diplomacy).

In terms of violations of international law, a clear definition of an unfriendly act is difficult to find. This is true in reference both to cases in which State responsibility seems evident and to cases in which it is more debatable. This in turn stems from a definition of → domestic jurisdiction which does not go far beyond a few rules regarding minimum standards in international law and generally accepted rights and duties of States (→ States, Fundamental Rights and Duties).

It is nowadays true that → intervention manifesting itself in a show of strength is considered as a wrongful act in international law (see the → Corfu Channel Case, ICJ Reports 1949, at pp. 34–35). On the other hand, the growing economic interdependency in international relations (→ Economic Law, International) has made possible a variety of interventions (mainly achieved through omission) which cannot be judged as offences in international law (→ Economic Coercion). The legal capacity to intervene in the domestic matters of another State may be exercised in the interruption or variation of diplomatic relations, credit and loan conditions, → technology transfers or even shipping freight rates. Also, significant alterations can be made in the time and way → treaties are negotiated or ratified; and the politics and strategy used in international conferences and within international organizations may undergo changes. Last but not least, the → United Nations Charter, in altering the balance in international relations in favour of a better understanding of the social needs of peoples and nations (→ International Economic Order), seems to have enlarged the political field encompassing unfriendly acts.

Traditional positive international law (→ Positivism) adopted the unfriendly act only in a few cases. For example, Art. 3, paras. 2 and 3 of Hague Convention I of 1907 for the Pacific Settlement of International Disputes provides that the offer of → good offices or mediation (→ Conciliation and Mediation) by a third party may not be considered as an unfriendly act by any of the parties in dispute (→ Hague Peace Conferences of 1899 and 1907). Similarly, in → sea warfare, a neutral power's exercise of its rights under Art. 26 of Hague Convention XIII of 1907 concerning the Rights and Duties of Neutral Powers in Naval War (→ Neutrality in Sea Warfare) cannot be considered as an unfriendly act by a belligerent which has accepted the relevant articles of that Convention. In State practice, → recognition of insurgents or *de facto* régimes often will be considered as unfriendly acts because such recognition implies a high degree of international support for the relevant separatists or insurgents (→ Recognition of Insurgency). International support is by no means the least constitutive element in the creation of States or in other questions of → sovereignty. Unfriendly acts therefore may have highly stabilizing effects for the maintenance of the → *status quo* in times of international regroupings or shifting political → alliances.

Recently, in particular within the → United

Nations, more attention has been paid to developing and improving binding international rules and principles through → declarations and resolutions which have the character of recommendations (→ Friendly Relations Resolution; → Helsinki Conference and Final Act on Security and Cooperation in Europe, and the existing and prospective → codes of conduct on liner conferences, transnational corporations, and technology transfer). These trends will continue to influence international policy towards enhanced moral and legal standards which can be accepted generally without entailing loss of sovereignty. Such a minimum order becomes necessary as dependency problems are increasing and the threat of conflicts is intensifying.

Given the background of the changed understanding of the threat and → use of force in international relations (UN Charter, Preamble, Art. 1(1) and (3); and Art. 2(3) and (4)), → sanctions against unfriendly acts of another State have become legally doubtful. On the other hand, unfriendly acts in response to unfriendly acts, i.e. → retorsions, are not only allowed in → customary international law but are a *conditio sine qua non* for every State which seeks to prevent the State committing the unfriendly act from doing any further unfriendly acts. States cannot exist without the possibility of having recourse to retorsions if they wish to maintain their international credibility. Therefore, the unfriendly act can be seen not only as a consequence of the principle of → reciprocity, but even more as a method of exercising the right to → self-preservation, which in other circumstances raises questions of validity under the UN Charter provisions.

However, unfriendly acts and countermeasures necessarily lead to international tensions and may seriously threaten international security (→ Peace, Threat to). Also, unfriendly acts may, for a considerable period, undermine the confidence between States that is indispensable for the continuation of existing legal arrangements and for the resolution of international problems and conflicts. In conflicts such as the Cuban missile crisis (→ Cuban Quarantine) or the → Vietnam War, State practice developed many rules of behaviour (recommendations as well as legally binding rules) whose function was to avoid these conflicts escalating accidentally or unintentionally. These rules meanwhile became important elements of general crisis management. The UN Charter itself contributes to international de-escalation: It calls on all parties to a dispute whose continuance is likely to endanger international peace and security to settle it peacefully (Art. 33), and it gives the → United Nations Security Council and the → United Nations General Assembly concurrent jurisdiction (Arts. 11(2), 35 and 36). Situations which might lead to international frictions are also expected to be handled by these bodies (Arts. 10, 34 and 35).

Looked at from another viewpoint, State practice nowadays accepts the unfriendly act which was in the past qualified as unlawful intervention. In particular, interventions in support of → human rights (→ Humanitarian Intervention) are, according to non-binding resolutions within the UN and elsewhere (for instance the Declaration of the Helsinki Conference of 1975), to be regarded only as unfriendly acts, and not as violations of law. In this way, UN Charter provisions and State practice harmonize to integrate unfriendly acts within the UN system. They allow unfriendly acts in principle, but they seek to exercise control over such acts by UN bodies if international peace becomes endangered.

HERMANN WEBER

UNITED NATIONS FORCES

1. Notion and History

The → United Nations Charter contains in Chapter VII provisions with regard to the use of armed forces by the Organization. The use of → "international" military forces had precedents in → international relations before the establishment of the → United Nations. Apart from combined operations by allied powers (→ Alliance), certain international administrations had resorted to international police forces in the accomplishment of their functions, and *ad hoc* international forces had provided assistance in the organization of internationally supervised → plebiscites. For example, an international force was deployed by the → League of Nations on the occasion of the → Saar Territory plebiscite in 1935.

The UN Charter provisions however, introduced new elements in the use of international forces by devising a framework which would allow future military action under UN auspices without having to resort to *ad hoc* arrangements. The Charter did not go so far as to establish a truly international force unrelated to national armies, but it introduced a system of standing arrangements whereby the details of participation of national contingents in any UN forces would be determined in advance. Attempts to implement these provisions of the Charter have never been successful, however, and the forces that the UN has established on various occasions have all been the subject of *ad hoc* measures taken in the context of a new technique developed by UN practice, namely peacekeeping operations (→ United Nations Peacekeeping System).

The provisions in the Charter explicitly relating to UN forces are linked to the competence of the → United Nations Security Council to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security, as defined in Art. 42. Under Art. 43, all UN members undertake to make available to the Security Council, on its call, the necessary armed forces, assistance and facilities. For this purpose, agreements should be negotiated at the initiative of the Security Council and concluded between the Council and UN members (or groups of members). They should govern the number and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

As early as February 1946, the Security Council directed the UN Military Staff Committee (consisting of the Chiefs of Staff of the permanent members of the Council or their representatives), which was established under Art. 47 to advise and assist the Council on its military requirements, to study the provisions of Art. 43 and to submit the necessary recommendations for their implementation. These efforts had to be abandoned by 1948, however, as it gradually became clear that the growing political rift among the permanent members of the Security Council would prevent agreement on requirements for the implementation of Arts. 42 and 43. The report submitted by the Military Staff Committee on April 1947 proposed some principles which were unanimously accepted, but also expressed disagreements on such basic issues as the total size of the forces and the contributions of each of the five permanent members, the location of the forces and the time of withdrawal after use, the provision of assistance and facilities, including rights of passage, and eventual assistance to UN members unable to provide full logistical support for the forces they contributed.

The need to implement Art. 43 of the Charter has been subsequently voiced, but without any successful follow-up. At the same time, substitute approaches have been attempted for the purpose of providing the Organization with the necessary military machinery. From modest proposals by the → United Nations Secretary-General in the early history of the UN (first for a UN Guard as part of the Secretariat and later for a UN Legion or Volunteer Reserve), only the establishment in 1949 of a Field Service, consisting of uniformed but unarmed Secretariat staff members charged with certain security and logistic services in the field, emerged as a concrete and workable result. One of the recommendations by the → United Nations General Assembly in the → Uniting for Peace Resolution in 1950 was that each member State maintain within its national armed forces elements specially trained, organized and equipped, which could promptly be made available for service with UN forces upon recommendation by the Security Council or the General Assembly. The Collective Measures Committee, established by the same Resolution, produced some guiding principles but fell short of developing a framework to be relied upon for future UN use of military forces (→ Collective Measures).

Notwithstanding the absence of any general framework, it appeared possible for the Organization to create truly international UN forces by relying on improvisation and *ad hoc* arrangements, starting with the UN Emergency Force (UNEF) in 1956. These forces were not established to promote enforcement action, but to perform functions in what gradually came to be referred to as peacekeeping operations. The consent of all parties involved, which is the essential feature of peacekeeping, made it easier for member States to provide military contingents to the UN, whereas they had been reluctant to commit themselves in this respect for the purpose of unknown future enforcement actions.

Although peacekeeping operations thus became

a regular feature of UN activities, with the Organization acquiring considerable experience through the years, it was not yet possible to establish a generally accepted scheme to standardize and facilitate the setting up of any new peacekeeping forces. Efforts to this effect are under consideration in the General Assembly's Special Committee on Peacekeeping Operations. Its present mandate includes, in addition to the consideration of agreed guidelines to govern the conduct of peacekeeping operations, the study of specific questions related to the practical implementation of such operations. Some members of the Committee, including the United States, have emphasized the need for the development of special stand-by arrangements to strengthen UN peacekeeping capabilities, while others, including the Soviet Union, have in this connection urged the implementation of Art. 43 of the Charter.

2. Instances of Use

All UN forces have been peacekeeping forces except for one: the enforcement operations in → Korea, for which the Security Council recommended in 1950 that UN members furnish the necessary assistance to South Korea to repel the armed attack by forces from North Korea and to restore international peace and security in the area (→ Aggression).

In a subsequent resolution, the Security Council recommended that any military forces provided by member States for this purpose should be under a unified command with a commander appointed by the United States, which could use the UN flag (→ Emblems, Internationally Protected). Offers of contributions by member States were forwarded by the Secretary-General to the United States, which in turn entered into the necessary agreements with the contributing States. The organization of these forces was thus entirely in the hands of the United States, while the UN did not exercise any significant strategic or political control. The forces under the unified command in Korea were referred to as UN forces mainly because they originated from Security Council recommendations and were authorized to use the UN flag.

For the peacekeeping functions the UN has resorted to the use of military personnel organized either in small missions of → observers or in larger peacekeeping forces. The major observer missions (the earliest form of peacekeeping by the UN) include: the UN Truce Supervision Organization in Palestine (UNTSO, established in 1948); the UN Military Observer Group in India and Pakistan (UNMOGIP, established in 1949); the UN Observer Group in Lebanon (UNOGIL, 1958); the UN Yemen Observer Mission (UNYOM, 1963–1964); and the UN India and Pakistan Observer Mission (UNIPOM, 1965–1966).

The first fully-fledged UN peacekeeping force was set up in 1956 when the General Assembly, dealing with the → Suez Canal crisis, established a UN Command for an Emergency International Force to secure and supervise the → suspension of hostilities between Egypt, Israel, France and the United Kingdom (UN GA Res. 1000 (ES-1) of November 5, 1956 and 1001 (ES-1) of November 7, 1956). The United Nations Emergency Force (UNEF), since the setting up of a new Emergency Force in 1973 usually referred to as UNEF I, entered into Egyptian territory with the approval of the Egyptian Government (→ Territorial Sovereignty). After Israeli withdrawal, it remained stationed in the Sinai and → Gaza Strip areas until Egypt retracted its consent in 1967 (→ Israel and the Arab States). A second major peacekeeping venture involving a UN force was initiated in 1960 when the Security Council was seised with the crisis in the newly independent Congo (→ Decolonization). The Council authorized the Secretary-General to take the necessary steps to provide the Government of the Republic of the Congo with the requisite military assistance until that government was of the opinion that its national security forces were fully able to meet their tasks (UN SC Res. 143 of July 14, 1960). The military assistance took the form of ONUC (acronym for Opération des Nations Unies pour le Congo), a new UN force modelled on UNEF. ONUC was withdrawn in 1964.

The early 1960s were a period of increasing peacekeeping activities and saw the creation of two other UN forces. One was a UN Security Force (UNSF) to assist the UN Temporary Executive Agency (UNTEA) to its administration of West Irian before the handing over of that territory to Indonesia (1962–1963) (UN GA Res. 1752 (XVII) of September 21, 1962). The other

was a UN Force in Cyprus (UNFICYP) authorized by the Security Council in 1964 to use its best efforts to prevent a recurrence of → armed conflict in → Cyprus and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions (UN SC Res. 186 of March 4, 1964). UNFICYP, financed on a voluntary basis with regularly renewed mandates, is still in existence today. It was able to survive the malaise in UN peacekeeping in the late 1960s caused by the financing crisis resulting from the Congo operation.

The 1970s saw the establishment of three new UN forces in the Middle East. In the wake of the October 1973 war, the Security Council set up a new UNEF in the Sinai as a buffer between Egyptian and Israeli forces (UNEF II; UN SC Res. 340 of October 25, 1973; → Israeli-Occupied Territories). Seven months later, as a result of the same conflict, the Council established the UN Disengagement Observer Force (UNDOF), stationed in a buffer zone on the Golan Heights between Israeli and Syrian forces (UN SC Res. 350 of May 31, 1974). Finally, in 1978, after Israeli military action in southern Lebanon, the Security Council set up the UN Interim Force in Lebanon (UNIFIL) to confirm Israeli withdrawal, maintain peace in the area, and ensure the restoration of Lebanese territorial sovereignty and authority in southern Lebanon (UN SC Res. 425 and 426 of March 19, 1978). UNEF II came to an end in 1979 when the Security Council did not renew its mandate in view of the Peace Treaty between Egypt and Israel, while UNDOF and UNIFIL continue their operations. The most recent plan for a UN force was elaborated in 1978 when the Security Council established a UN Transition Assistance Group (UNTAG) to assist the Special Representative of the Secretary-General to ensure the early independence of → Namibia through free and fair elections (UN SC Res. 435 of September 29, 1978). The plan has not been implemented thus far, pending South Africa's agreement to the UN operation in Namibia (cf. → South West Africa/Namibia (Advisory Opinions and Judgments)).

3. Characteristics

(a) Composition

Although certain patterns have emerged from practice, in the absence of internationally established stand-by arrangements, the setting up of a new UN force each time requires *ad hoc* measures to ensure recruitment of the necessary military personnel and their integration in an efficient military unit with exclusively international functions under the authority of the UN. Military observer missions are composed of individual military officers of various nationalities made available to the UN by member States.

For fully-fledged peacekeeping forces, member States provide military contingents from their national forces, usually of battalion size. Some forces (e.g. ONUC, UNTEA and UNFICYP) may have civilian police components. Military observers may also be added to forces, as in the cases of UNEF II, UNDOF and UNIFIL, which were assisted by observers from UNTSO. Certain States have earmarked elements of their national armed forces for participation in UN forces and provide them with special advance training. This does not necessarily guarantee that their contribution will be accepted for a particular UN force, since recruitment of contingents is subject as much to political considerations as to requirements of competence.

Finding the necessary participants in a force is primarily the task of the Secretary-General, who will have to take into account any requirements laid down by the UN organ establishing the force. Apart from the total size of the force (which in practice has varied between 1600 and 20000), its composition may relate to the need for balanced geographical representation (as with recent forces in the Middle East) and the non-participation of the permanent members of the Security Council (as with all forces except UNFICYP and UNIFIL). Since peacekeeping is based on the consent of all States concerned, the acceptability of specific national contributions for the host State of a peacekeeping force may also have to be taken into account.

The task of recruitment is not only performed at the time of the establishment of a new force, but may also have to be repeated whenever a State decides to withdraw its contingent. It is also the Secretary-General who usually appoints the commander of the force, although the General Assembly appointed the commander of UNEF I. The commander exercises, under authority of the Secretary-General and the UN organ which

established the force, command in the field. The force is also assisted in the field by civilian Secretariat staff, whether belonging to the UN Field Service, detailed from UN Headquarters, or specially recruited internationally or locally.

(*b*) *Status*

The status of UN forces is determined by a variety of legal sources, including the UN Charter, the Convention on the Privileges and Immunities of the United Nations of February 13, 1946 (→ International Organizations, Privileges and Immunities), decisions of the UN organs establishing the forces, agreements between the UN and the States in whose territory the forces are stationed, agreements between the UN and States contributing contingents (→ International Organizations, Treaty-Making Power), and regulations issued by the Secretary-General. The question of status involves various aspects such as the force itself as an international entity, the members of the force as international personnel and the operations of the force.

The basic characteristics of a UN force are laid down in the decision of the Security Council or the General Assembly establishing the force, usually by reference to a plan prepared by the Secretary-General.

UN forces are subsidiary organs of the main organs of the Organization by which they have been established, and their legal personality is identified with that of the UN. As subsidiary organs, they enjoy the legal capacity and privileges and immunities provided for in Arts. 104 and 105 of the Charter as well as in the Convention on the Privileges and Immunities of the United Nations. That Convention protects the forces and their property against any form of legal process (→ International Organizations, Responsibility). It also provides the civilian staff connected with the forces automatically with the privileges and immunities of officials of the UN, provided, of course, that the State hosting a UN force is a party to the Convention.

However, in view of the special composition of UN forces, which consist of large numbers of military personnel belonging to different national contingents, and the special types of activities performed by such forces, the provisions of the Convention do not sufficiently cover all aspects of the relationship between the forces and the States on whose territory they are stationed. This gap is normally filled by the conclusion of special status of forces agreements (SOFAs) between the UN and the host States. Typical SOFA provisions usually confirm the applicability of the Convention and spell out special privileges and immunities for the military personnel of the force. The commander is entitled to the privileges and immunities of senior UN officials, and officers serving on the commander's headquarters staff enjoy the status of experts on mission for the UN. The privileges and immunities of all other military personnel are expressly spelled out in the SOFA. Although they are required to respect local laws and regulations, they are subject only to the exclusive jurisdiction of their respective national States in respect of any criminal offences they may commit, and they are not subject to local civil jurisdiction or to other legal process in any matter relating to their official duties.

SOFAs further deal with the facilities provided by the host State to the forces, such as entry and exit formalities, the premises necessary for the forces, and the use of roads and other traffic facilities, public utilities, and supplies and services. They also contain basic provisions relevant to the operations of the force, such as the principle of freedom of movement, the use of the UN flag and markings, the wearing of uniforms (→ Flags and Uniforms in War), the carrying of arms, and the use of communication equipment. They also provide for the possibility of the setting up of claims commissions (→ Mixed Claims Commissions; → International Organizations, Legal Remedies against Acts of Organs). Formal SOFAs have been concluded with the Governments of Egypt (with regard to UNEF), Republic of the Congo, which became Zaïre (with regard to ONUC) and Cyprus (with regard to UNFICYP). The provisions of these agreements have gradually come to be considered as constituting basic principles governing the status and functions of UN peacekeeping forces; they can be resorted to in connection with any new forces pending the conclusion of specific agreements or in the absence of such agreements.

In addition to the conclusion of a SOFA with the host State, the UN may also formalize its relations with troop-contributing States in separate special agreements, usually in the form of exchanges of letters. Such agreements refer to

the SOFA with the host State as well as to the regulations that may be issued for the force by the Secretary-General. They stress, among other points, the international character of the force and the general responsibility of the force commander for good order and discipline, while disciplinary action remains the responsibility of the commanders of the national contingents. Agreements with participating States also spell out that the forces should observe the principles and spirit of the general international conventions applicable to the conduct of military personnel, including the principles of humanitarian law (→ Humanitarian Law and Armed Conflict).

Members of UN forces are entitled to the legal protection of the UN and are regarded as agents of the UN for that purpose. The UN may present claims on their behalf pursuant to the ruling of the → International Court of Justice on → Reparation for Injuries Suffered in the Service of the UN (Advisory Opinion), while on the other hand, the Organization may be a respondent to claims arising out of the activities of its forces and force members.

4. Special Problems and Significance

Many aspects of the practice relating to the establishment and use of military forces by the UN constitute the major problems of the UN peacekeeping system and are therefore more properly dealt with in the article on that system. They include such matters as the authority to establish peacekeeping forces (respective competences of the Security Council, the General Assembly and the Secretary-General), the duration of the mandate of the forces, their financing and the functions they perform. An important aspect of these functions is the principle of refraining from → use of force except in case of → self-defence. This limitation, together with the principle of consent of the parties, is one of the key questions in understanding and evaluating the role and limitations of present UN forces. On several occasions (in particular with the operations of ONUC, where at one stage an exception was made to the non-use of force principle, and with UNIFIL), the problem caused by this serious limitation on the actions of UN forces has become very apparent. The resultant impression of powerlessness of the UN is often harmful to a just evaluation of the merits of these forces. Such negative impressions are the result of the limitations of the peacekeeping system, however, and do not reflect on the actual performance of UN forces. The forces themselves were set up by the UN with a remarkable degree of ingenuity and have performed at a high level of professional competence. They have provided the essential tool without which the peacekeeping system could not have been developed (→ Peace, Means to Safeguard).

Summary Study of the Experience Derived from the Establishment and Operation of the United Nations Emergency Force: Report of the Secretary-General, 9 October 1958 (UN Doc A/3943, GAOR (XIII) Annexes, Agenda item 65, pp. 8–33).

L.B. SOHN, The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force, AJIL, Vol. 52 (1958) 229–240.

G. ROSNER, The United Nations Emergency Force (1963)

D.W. BOWETT, United Nations Forces, A Legal Study of United Nations Practice (1964).

F. SEYERSTED, United Nations Forces in the Law of Peace and War (1966).

R. HIGGINS, United Nations Peacekeeping 1946–1967, Documents and Commentary, Vols. 1–3 (1969–1980).

J. BALLALOUD, L'ONU et les opérations de maintien de la paix (1971).

W. STRASSER, Die Beteiligung nationaler Kontingente an Hilfseinsätzen internationalar Organisationen, ZaöRV, Vol. 34 (1974) 689–712.

P. DEWAST, Quelques aspects du Statut des "Casques bleus", RGDIP, Vol. 81 (1977) 1007–1046.

R. SOMMEREYNS, United Nations Peacekeeping Forces in the Middle East, Brooklyn Journal of International Law, Vol. 6 (1980) 1–53.

RAYMOND SOMMEREYNS

UNITED NATIONS PEACEKEEPING SYSTEM

1. Background

Art. 1 of the → United Nations Charter sets forth the first purpose of the organization: "[t]o maintain international peace and security". To that end, the → United Nations is: "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by

peaceful means... adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (→ Collective Measures).

More detailed provisions on the methods for the pacific settlement of disputes and concerning action with respect to threats to the peace (→ Peace, Threat to) breaches of the peace and acts of → aggression are to be found in Chapters VI and VII of the Charter. In particular, Chapter VII provides for the use of military personnel by the UN (cf. → International Military Force; → United Nations Forces). The basic principle states that the → United Nations Security Council "may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security" (Art. 42). The UN is thereby authorized to resort to the use of military force for the purpose of enforcing international peace and security; this would normally involve use of strategic forces.

In order to implement this provision for the → use of force, Art. 43 sets out specific procedures through which the necessary military personnel are to be put at the UN's disposal. Armed forces are to be made available to the Security Council by all UN members in accordance with special agreements to be concluded between the Council and members or groups of members. The international political climate prevailing since the earliest days of the UN, however, has prevented such agreements from being concluded. Thus Art. 43 has never been implemented, and thereby the potential implementation of Art. 42 has also been seriously affected.

2. Definition

The peacekeeping system foreseen in the UN Charter has not been realized. Instead, another concept or system has been created and developed through the practice of the organization: the UN peacekeeping operations, which can be defined as actions involving the use of military personnel in situations of international → armed conflict on the basis of the consent of all parties concerned and without resort to armed force except for → self-defence. The main difference from the originally planned system is that these operations cannot be considered as enforcement actions.

3. Constitutional Aspects

In the past, serious doubts were raised about the compatibility of the concept of peacekeeping operations with the provisions of the Charter. These initial doubts stemmed from Chapter VII's inclusion of specific provisions regarding the use of military personnel. It can be argued that those provisions preclude all other operations to which the Charter does not refer.

Because of the political impossibility of implementing Chapter VII, the organization has responded to the need for operational action in the maintenance of international peace and security through means that could not strictly be derived from that provision, but which might be based on other portions of the Charter. Thus, the following operations involving the use of military elements, but without the characteristics of enforcement action, were set up and developed into a well-established UN activity: the UN Truce Supervision Organization in Palestine (UNTSO); UN Emergency Forces (UNEFs I and II); Opération des Nations Unies pour le Congo (ONUC); UN Military Observer Group in India and Pakistan (UNMOGIP); UN Force in Cyprus (UNFICYP); UN Disengagement Observer Force (UNDOF); and UN Interim Force in the Lebanon (UNIFIL). Although operations of this type are now generally recognized as within the UN's constitutional domain, substantial disagreement persists as to which Charter articles provide the exact legal basis for these operations.

The decisions of UN organs authorizing various peacekeeping operations do not refer to the specific provisions of the Charter under which they are taken, although the relevant discussions in the Security Council or the → United Nations General Assembly contain numerous references to the "provisions and principles of the Charter". This absence of explicit reliance has allowed diverse opinions to be expressed by interested commentators. The provision most frequently quoted as suitable for authorizing peacekeeping is Art. 40 in Chapter VII. It allows the Security Council, in order to prevent any aggravation of a situation that constitutes a threat to the peace, breach of the peace or act of aggression, to call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Other commentators, however, con-

sider peacekeeping operations as an exercise in peacemaking and refer to Chapter VI of the Charter as a more appropriate basis, since Art. 36 authorizes the Security Council, at any stage of a dispute or of a dangerous situation, to "recommend appropriate procedures or methods of adjustment". Reference has also been made, by the → International Court of Justice in its advisory opinion on → Certain Expenses of the United Nations and by others, to Arts. 11 and 14 in Chapter IV of the Charter, as provisions on which peacekeeping operations authorized by the General Assembly can be based.

Instead of relying on specific provisions of the Charter, it could be argued that the UN's competence to launch peacekeeping operations can be adequately derived from its general basic purpose of maintaining international peace and security, and that the Charter need not provide any more specific guidance (→ International Organizations, Implied Powers). This view seems to be correct, and there can hardly be any serious doubt about the constitutionality of peacekeeping operations; nevertheless, suggestions have been made that this practice should be properly reflected in the Charter through an amendment.

The phenomenon of UN forces or missions that perform peacekeeping, observation (→ Observers) or similar functions was recognized through the special protection accorded them under the 1980 Convention on Prohibitions or Restrictions on the Use of Conventional Weapons, and its Protocol II on Mines, Booby-Traps and other Devices (→ Mines; → Weapons, Prohibited).

4. Competence to Establish Peacekeeping Operations

In practice, UN peacekeeping operations have involved the action of three principal organs of the organization: the Security Council, the General Assembly and the Secretariat, represented by the Secretary-General (→ United Nations Secretary-General; → International Secretariat).

It was the General Assembly, following a vetoed proposal in the Security Council (→ Veto), which established the first United Nations Emergency Force (UNEF I) in November 1956. This resulted in strong opposition based on the view that the Charter denied the Assembly such a role, mainly because Art. 24 conferred on the Security Council primary responsibility for the maintenance of international peace and security. In addition, Art. 11(2) requires the Assembly to refer to the Security Council any question relating to international peace and security on which action is necessary. Those who defended the competence of the General Assembly, however, argued that "primary responsibility" does not mean exclusive responsibility and that the "action" referred to in Art. 11 only relates to enforcement action and not to peacekeeping. Although this view was endorsed by the ICJ in the Certain Expenses advisory opinion, some member States, including France and the Soviet Union, considered this incompatible with their view of the Charter. When the dominant role of the Security Council was re-established during subsequent practice, these States accepted the legitimacy of the peacekeeping operations, provided they were undertaken under the exclusive authority of the Security Council.

In 1965 the General Assembly established a Special Committee on Peace-keeping Operations (also known as the Committee of 33) for the purpose of examining the problem of peacekeeping in all its aspects. From the work in this Committee as well as the UN practice which developed with regard to subsequent peacekeeping operations, a *modus vivendi* seems to have emerged, under which the members have agreed to let the Security Council assume, to the fullest extent possible, its role as the organ with primary responsibility in the field of peacekeeping.

The opinion of many UN members that primary responsibility does not necessarily mean exclusive responsibility has not been abandoned, but the supporters of this view seem to be willing to shelve the possible alternative of General Assembly action for as long as reliance on the Security Council appears to produce satisfactory results. Thus, all recently established and currently operating peacekeeping forces have been set up and continue to function under the authority of the Security Council. And, since the withdrawal of UNEF I in 1967, the General Assembly has not played any role in relation to peacekeeping operations other than providing for the necessary financing. The efforts of the

Assembly's Special Committee on Peace-keeping Operations are mainly aimed at elaborating guidelines for UN peacekeeping operations under the authority of the Security Council.

The question of the division of powers between the Security Council and the Secretary-General receives continuing attention, both in the work of the Special Committee and in practice. It is generally agreed that the Secretary-General cannot establish peacekeeping forces without express authorization by a political organ. This general consensus, however, does not exist with regard to the various responsibilities that may be exercised by the Secretary-General once an operation is in existence.

Established practice clearly favours the preponderant role of the Security Council even in matters that could be considered as belonging to the daily administration of peacekeeping operations. Successive Secretaries-General have themselves largely contributed to this development by following a strict rule of reporting to the Council on all their actions and proposed actions with regard to the running of the forces so that the Council could formally approve or note them. An assurance to this effect is always included in the general guidelines proposed by the Secretary-General and approved by the Security Council on the occasion of the establishment of every new operation.

5. Host Country Consent

An enforcement action under Chapter VII of the Charter would be based upon a decision by the Security Council to take action, if necessary through various applications of military force against one or more States. Peacekeeping operations differ from enforcement measures in that the consent of the parties, or at least of the States concerned, is a prerequisite for sending military personnel into their territory (→ Sovereignty). This principle was recognized upon the establishment of UNEF I. Later it was confirmed by the Special Committee on Peace-keeping Operations in Art. 9 of its draft guidelines (UN Doc. A/32/394, GAOR, 32nd sess. (1977) Annexes, Agenda item 56): "forces must operate with the full co-operation of the parties concerned, particularly of the Government of the host country, due account being taken of its sovereignty." This consent is also necessary for each renewal of a peacekeeping force mandate.

The necessity of the host country's consent was illustrated dramatically in 1967 when the Government of Egypt demanded the withdrawal of UNEF I from its territory; in view of the consensual character of the operation, the Secretary-General accepted this demand and ordered the evacuation of the UN force, an event which may be seen as precipitating the June 1967 Middle East war (→ Israel and the Arab States). This experience had two major consequences. First, peacekeeping operations ever since have been set up for a limited duration, followed, if necessary, by subsequent extensions for short periods; this device provides the parties with an opportunity to express and renew their consent to the continuing presence of the peacekeeping force. However, even if the parties concerned express their willingness to maintain the forces on their territory, the final decision remains with the Security Council. This was illustrated in 1979 by the discontinuation of UNEF II due to the lack of a necessary decision by the Security Council, although Egypt and Israel had expressed their wish that the operations be continued.

The second major consequence of the 1967 experience has been that the guidelines for the forces in the Middle East provide that all matters that may affect the nature or the continued effective functioning of the forces will be referred to the Security Council for its decision. Thus if the host country should withdraw its consent to the presence of the peacekeeping force during the force's mandate, it would not be for the Secretary-General to decide what action to take, but rather for the Security Council. However, even the Council could then hardly maintain the force without converting the peacekeeping operation into an enforcement action.

In principle, the consent of the host country only relates to the presence of the force on its territory and not to the other aspects of the operation, such as the composition of the force. But, for practical purposes, attempts are made as much as possible to meet the desires of all parties concerned, so as to maintain their consent. This often requires the exercise of extensive, skilful and delicate diplomacy.

6. *Non-Use of Armed Force*

Peacekeeping operations involve the use of military personnel, but not for the purposes stated in Art. 42 of the Charter. Depending upon the nature of the conflict and especially on the modalities of its suspension (→ Suspension of Hostilities), the mandate of peacekeeping forces will be of a differing nature. Sometimes the function is to monitor a cease-fire, truce or → armistice called for by the Security Council (as in the UNTSO); the observations by posts or patrols are reported to the Secretary-General and, through him, to the Council. Sometimes the forces are to interpose themselves so as to interdict movement across the lines of conflict (UNFICYP and UNIFIL). A force may also assist the parties in withdrawing their forces and may occupy a buffer zone (UNEF II; → Occupation, Pacific). They can, in addition, take on the task of verifying limitations of forces and armaments on both sides of the buffer zones (UNEF II and UNDOF; → Verification of Facts). Sometimes, peacekeeping missions are also entitled to take an active part in the settling of internal disputes (ONUC and UNFICYP) or in the transition of a territory to independence (West Irian; → Decolonization). The main importance of a peacekeeping force lies in its mere presence as an impartial international element in a conflict and in its availability as a channel of communications between the parties, rather than in the size or quality of the military forces.

The guidelines for the recent peacekeeping forces in the Middle East confirm that, in performing their functions, they should act with complete impartiality and proceed on the assumption that the parties involved in the conflict will take all the necessary steps to comply with the decisions of the Security Council. Moreover, since the States concerned have consented to the presence of the force, there should be no need to use arms. Accordingly, the peacekeeping forces are provided solely with defensive weapons to be used only in self-defence. However, self-defence is defined as including resistance to attempts by forceful means to prevent a UN force from discharging its duties under the mandate of the Security Council.

An exception to this purely defensive character of peacekeeping operations was made when ONUC was authorized by the Security Council to resort to offensive force against the secessionist forces in Katanga province in order to fulfil its mandate (→ Secession). The Council has also given consideration to empowering UNIFIL to resort to more forceful means against the so-called "*de facto* forces" of Major Haddad in the Lebanon, in order to implement the part of its mandate which consists of "restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area" (UN SC Res. 425 (1978)). Thus situations of use of armed force may occur, and the regulations for certain peacekeeping operations therefore provide that such forces shall observe the principles and spirit of the general international conventions applicable to the conduct of military personnel. These include the rules of → humanitarian law in armed conflict, as contained, *inter alia*, in the 1949 Geneva Conventions and the 1977 Protocols additional thereto (→ Geneva Red Cross Conventions and Protocols).

7. *Organization of Operations*

Peacekeeping operations have taken the form of either observer missions or of peacekeeping forces. Observer missions consist of a certain number of military observers, usually officers with the rank of captain or major, of several nationalities. Peacekeeping forces are composed of military contingents contributed by various national armies. Both types of operations are supported by civilian personnel, normally provided by the Secretary-General from existing UN staff. Operations of both types may become mixed, as in the cases of UNEF II, UNDOF and UNIFIL, which make use of military observers provided by UNTSO.

The practice with regard to the determination of the size, composition and command of peacekeeping forces has not always been uniform, but in recent operations these have been under the tight supervision of the Security Council. Thus, the Council approves the Secretary-General's proposals as to the strength of each force and lays down the principles for the recruitment of the contingents. It also checks on the actual implementation of these principles.

The guidelines under discussion in the Special

Committee on Peace-keeping Operations would provide that equitable geographical balance be one of the guiding principles in the composition of each force. However, there is as yet no agreement on the additional requirement of the overall efficiency of the force. These requirements may not always be compatible, as there is a natural inclination to draw contingents from the forces of those States that conduct special training programmes for service with UN peacekeeping forces. There may therefore be much merit in efforts to increase the preparedness of the national armies of the member States to participate in UN peacekeeping activities. In its resolution 33/114 of December 18, 1978, the General Assembly invited "all interested Member States to consider the possibility of training their personnel for peace-keeping operations . . . and to share . . . experience already gained in peacekeeping operations and in existing national programmes for peace-keeping training".

Although multinational in character, a peacekeeping force functions as an integrated military unit under the command of a force commander appointed by the Secretary-General with the consent of the Security Council.

8. Financing of Operations

Military observer missions are normally financed from the regular UN budget, which is assessed on all members (→ International Organizations, Financing and Budgeting). For peacekeeping forces, which involve much higher expenditures, special accounts outside the regular budget are usually established. The method of financing such accounts as well as their status has been the subject of substantial controversy within the UN membership; disagreements, emphasized by refusals to pay, have resulted in serious financial difficulties for the organization. This situation was basically caused by the unwillingness of several member States to accept the principle that the costs of peacekeeping operations fall under Art. 17 of the Charter as expenses of the organization to be borne by the members as apportioned by the General Assembly. In its Certain Expenses advisory opinion, the ICJ held that the expenditures authorized by the General Assembly to cover the costs of the Congo and the Middle East peacekeeping operations constituted such expenses of the organization.

Notwithstanding the Court's opinion, the controversy continued, and for the peacekeeping operations in Cyprus (UNFICYP) established in 1964, it was decided to rely on financing through voluntary contributions. However, more recent practice has seen a return to the principle of responsibility by the UN membership as a whole for the costs of peacekeeping operations. Thus for UNEF II, UNDOF and UNIFIL the Security Council approved, and the General Assembly implemented, the Secretary-General's proposal that the cost of these forces should be considered as expenses of the organization to be borne by the members in accordance with Art. 17(2) of the Charter. This principle is also contained in Art. 11 of the draft guidelines under consideration by the Special Committee on Peace-keeping Operations.

The apportionment of the costs of recent peacekeeping operations among the members is not based on the same scale of assessments for the regular budget of the organization, but rather on principles which the General Assembly adopted in Resolution 1874 (S-IV) of June 27, 1963. According to these principles, economically more developed countries should carry a larger burden than the less developed ones, and the permanent members of the Security Council have a special responsibility with regard to the financing of peacekeeping. At the same time, voluntary contributions should always be encouraged.

Another principle giving special consideration to the situation of States that are victims of the events or actions leading to the establishment of peacekeeping operations was not taken into account. Some member States feel that such victims should not be obliged to contribute to the costs of these peacekeeping operations but that, instead, such costs should be borne entirely by those States responsible for the need to establish the operations. As a result, some member States have withheld their financial contributions to the present Middle East forces. Other States refuse to participate in the costs for different reasons, such as disagreement with the functions performed by some of these forces or with their very creation.

The growing amounts of uncollected contributions may eventually lead once more to the question of the applicability of Art. 19 of the Charter.

A similar problem arose as a result of unpaid contributions to UNEF I and ONUC; it was eventually agreed in 1965, after a crisis during the 19th session of the Assembly, that the question of the applicability of Art. 19 would not be raised with regard to particular peacekeeping operations. With regard to the present Middle East forces, the question has not yet arisen, but in computing the arrears of member States, the Secretary-General takes into account the ever-mounting uncollected contributions to the peacekeeping operations.

9. Status of Forces in Host Country

Peacekeeping operations – either in the form of a corps of observers or military forces – introduce a substantial international presence into the territory of a host country and therefore raise the question of their legal status. As peacekeeping forces are subsidiary organs of the UN, they are automatically covered by the Charter provisions of Art. 104 relating to legal capacity and of Art. 105 relating to privileges and immunities (→ International Organizations, Privileges and Immunities). Furthermore, if the host country is a party to the 1946 Convention on the Privileges and Immunities of the United Nations, an additional body of quite specific substantive law is available to resolve questions relating to the status of peacekeeping forces, their property and personnel.

The functioning of peacekeeping forces, however, presents special features, the regulation of which is not always adequately covered by the cited general texts. It may therefore be desirable to conclude separate agreements on the status of forces with States hosting peacekeeping operations. Consequently, the guidelines under discussion in the Special Committee on Peacekeeping Operations provide in Art. 13 that, in order to ensure the effective functioning of such operations, UN forces are to enjoy privileges and immunities in accordance with legal arrangements for the status of forces, which are to be decided by agreement between the UN and the host country. Such agreements were concluded with regard to UNEF I with Egypt, ONUC with the Republic of the Congo (now Zaïre), and UNFICYP with Cyprus. For the most recent operations in the Middle East, negotiations have not yet resulted in the conclusion of such agreements. However, the guidelines for these forces, approved by the Security Council at the time of their establishment, contain the principle that forces and their personnel should be granted all relevant privileges and immunities provided for by the 1946 Convention, and that they must be accorded freedom of movement and communication as well as other facilities necessary for the performance of their task.

First among the main features of these status of forces agreements is the system of jurisdiction they provide with regard to the military personnel of peacekeeping forces. The personnel enjoy immunity from criminal jurisdiction in the host country and remain under their respective national (sometimes military) criminal jurisdiction. In matters relating to their official duties only, they are also not subject to the civil jurisdiction of the host State or to other legal process. However, it is provided that local law is to be respected. The functions of the military police of the forces are also regulated by these agreements. A second major set of provisions relates to the facilities accorded to the forces, such as the use of premises, roads and communications, and includes the basic principle of the necessary freedom of movement for the forces to, in and from the area of operations. A third interesting feature is that specific procedures are established for the settlement of claims that may arise out of the presence and activities of peacekeeping forces in the host country.

D.W. BOWETT, United Nations Forces, A Legal Study of United Nations Practice (1964).

F. SEYERSTED, United Nations Forces in the Law of Peace and War (1966).

M. BOTHE, Streitkräfte internationaler Organisationen (1968).

R. HIGGINS, United Nations Peacekeeping 1946–1967, Documents and Commentary, 3 vols. (1969–1980).

J.J. GARVEY, United Nations Peacekeeping and Host State Consent, AJIL, Vol. 64 (1970) 241–269.

R. SWIFT Peacekeeping and Peacemaking, in: L.B. Sohn (ed.), The United Nations (1970) 149–166.

J. BALLALOUD, L'ONU et les opérations de maintien de la paix (1971).

J.M. BOYD United Nations Peace-keeping Operations; A Military and Political Appraisal (1971).

L.L. FABIAN, Soldiers without Enemies, Preparing the United Nations for Peace-keeping (1971).

E. MENZEL, Die militärischen Einsätze der Vereinten Nationen zur Sicherung des Friedens, JIR, Vol. 15 (1971) 11–137.

D.W. WAINHOUSE, et al., International Peacekeeping at the Crossroads (1973).

A. CASSESE (ed.), United Nations Peace-Keeping, Legal Essays (1978).

M. SCHAEFER, Die Funktionsfähigkeit des Sicherheitsmechanismus der Vereinten Nationen (1981).

ERIK SUY

UNNEUTRAL SERVICE *see* Neutral Trading; Neutrality in Sea Warfare

USE OF FORCE

A. Fundamental Significance. – B. History of the Prohibition of the Use of Force: 1. Pre-20th Century. 2. The Hague Conventions. 3. The League of Nations Covenant. 4. The Geneva Protocol of 1924. 5. The Kellogg-Briand Pact. 6. Art. 2(4) of the UN Charter. – C. Content of the Prohibition: 1. Interpretation of Art. 2(4): (a) The problem of "force". (b) Unlawful resort to force and States. (c) The prohibition and international relations. (d) Territorial integrity and political independence. 2. Exceptions to the Prohibition: (a) Measures against former enemy States. (b) Security Council enforcement actions. (c) Self-defence. – D. Special Problems concerning Use of Force: 1. Wars of National Liberation. 2. The So-Called Breshnev Doctrine. 3. Protection of Nationals Abroad. 4. Art. 2(4) as Customary International Law? 5. Art. 2(4) and Criminal Prosecutions. – E. Concluding Remarks.

A. Fundamental Significance

High levels of armaments, prevailing strategic concepts and the development of modern weapons, especially of nuclear weapons and warfare, → biological warfare and → chemical warfare, blur the distinctions between → combatants and non-combatants, and between → military objectives and → civilian objects – distinctions which are basic principles in the laws of → war (→ Armed Conflict, Fundamental Rules; → War, Laws of). Thus today war endangers the survival of mankind, or at least the survival of mankind at the civil, cultural and technical levels it has attained. Prevention of war, therefore, is the predominant problem of international policy. The intellectual response to this situation has been to develop peace research as a separate scholastic discipline (see, e.g. → University for Peace). But a criticism of modern peace research is that it ignores and neglects the contribution of law to the prevention of war. War is a phenomenon of human behaviour, and law is an important means of regulating human behaviour. Although little success may be expected from establishing a rule of law prohibiting war without due regard to the causes of war (as they have been examined, if less than sufficiently so, in other disciplines, e.g. anthropology, biology, sociology, history and economics), law must summarize the relevant results from these other disciplines and shape them into clear rules to prevent war (→ Peace, Historical Movements towards; → Peace, Proposals for the Preservation of).

→ Peace and war are relations between States, and since public international law is the means whereby the relations between States are regulated, juridical efforts to prevent war must take place especially, though not exclusively, in the realm of public international law. In fact, since the beginning of the 20th century, public international law has increasingly dedicated itself to the task of war prevention (→ History of the Law of Nations). Today it is already possible to speak of a system of war prevention in public international law comprising: 1. the prohibition of the use of force; 2. → collective measures to guarantee this prohibition; 3. the obligation to resort to peaceful means for the settlement of disputes; 4. regulations concerning limitation of armaments (→ Arms Control) and → disarmament; and 5. rules, although scarcely developed, for → peaceful change.

Therefore, it would be too narrow a view to equate the prohibition of the use of force with the prevention of war by public international law as a whole. But undoubtedly, the prohibition of the use of force, as the most direct effort to prevent war, is of significance.

B. History of the Prohibition of the Use of Force

1. Pre-20th Century

Prior to this century no prohibition of the use of force existed. States were free to resort to war. The medieval theory of *bellum justum* (just war) was developed by theologians and was never a valid rule of public international law. Furthermore, this theory lost its war-preventing proper-

ties when it became accepted that war could be just for both sides.

> "The present public international law . . . has no rules concerning the problem of when it is allowed to wage war. If a State so decides it can resort to war whenever it wants. In the relations between States the use of force is allowed . . . ." (P. Heilborn, Grundbegriffe des Völkerrechts (1912), p. 23.)

This quotation correctly describes the legal situation almost to 1919.

2. The Hague Conventions

The → Hague Peace Conferences of 1899 and 1907 marked the beginning of the attempts to restrict the liberty to resort to war. Pursuant to Art. 1 of Hague Convention III of 1907 relative to the Opening of Hostilities, the contracting powers recognized that hostilities between them must not commence without previous and explicit warning in the form either of a reasoned declaration of war or of an → ultimatum containing a conditional declaration of war. While Convention III was more than anything else a formalization of the liberty to resort to war, Art. 1 of Hague Convention II of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (→ Drago-Porter Convention) contains a material, although modest, restriction of that liberty. This regulation prohibits the recourse to armed force for the recovery of contract debts. This prohibition, however, is subject to the debtor State's obligation not to refuse or to neglect to reply to an offer of → arbitration. Having accepted the offer, this State could not prevent any → *compromis* from being agreed on, or after the arbitration, fail to submit to the award.

A similarly modest restriction on the liberty to resort to war was introduced by the so-called → Bryan Treaties concluded from 1913 onward between the United States and a number of States. Nineteen of such treaties existed in 1916. The contracting parties were obliged to submit all their disputes to a conciliation commission and not to begin hostilities prior to the commission's report, which had to be delivered within one year at the latest (→ Conciliation and Mediation).

3. The League of Nations Covenant

The experiences of World War I gave rise to a more comprehensive attempt to restrict war within the framework of the Covenant of the → League of Nations. But this attempt still remained far from establishing a general prohibition of war, although Art. 10 of the Covenant at first sight might have lent itself to such an interpretation. Reading Art. 10 together with Arts. 12, 13 and 15, it becomes evident that the League Covenant, in this way similar to the Bryan Treaties, provided for a moratorium in regard to all wars, and definitely deprived League members of their liberty to go to war except in a very special case. The members were obliged not to resort to war before submission of the dispute to inquiry or arbitration, or to the Council of the League. It was further prohibited to resort to war within three months after the arbitrators' award or the Council's report. Definitely forbidden was recourse to war against a State complying with the award or with a unanimously agreed report of the Council (Arts. 13, para. 4 and 15, para. 6). Since in practice most of the disputes which were submitted to the Council did not receive a unanimous report in response, this regulation by the League Covenant did not work as an effective prohibition of war. Furthermore, it must be remembered that the United States was never a member of the League and that the Soviet Union, Germany, Japan and Italy were only members for a short time.

4. The Geneva Protocol of 1924

The → Geneva Protocol for the Pacific Settlement of International Disputes (1924) tried to overcome the deficiencies of the League Covenant by stating in its Art. 2 the obligation of States "in no case to resort to war" except in → self-defence or in the case of collective coercive measures. The Geneva Protocol of 1924, however, never became valid law. Only a general prohibition of war was attained on a regional basis. Art. 2 of the → Locarno Treaty of 1925 prohibited every attack, invasion or war, subject to narrow exceptions. However, this treaty became void in 1935.

5. The Kellogg-Briand Pact

The decisive landmark in the development from the liberty to wage war to a universal and general prohibition of war is the → Kellogg-Briand Pact

signed on August 27, 1928 in Paris. Art. I of this Pact reads as follows:

> "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

By this, for the first time, a general prohibition of war was formulated, subject only to the right of self-defence. This exception was not expressly made in the wording of the treaty but undoubtedly rested on tacit agreement between all the parties. In the years following 1928, nearly all States existing at the time became parties to the Treaty. (Only some States of South America stood to one side. They, however, were bound by the → Saavedra Lamas Treaty, signed on October 10, 1933 at Rio de Janeiro, wherein Art. I is worded almost identically to Art. I of the Kellogg-Briand Pact. The condemnation of war was not restricted to the relations between the parties to the Saavedra Lamas Treaty, but also extended to their relations with other States.) The regulations of the Kellogg-Briand Pact soon became part of general customary international law and as such are still valid today.

Although of utmost importance, the Kellogg-Briand Pact was not without its deficiencies. The prohibition of war was not linked to any system of → sanctions. The → preamble only stated that a State violating the Pact "should be denied the benefits furnished by this treaty". A more serious defect was that the prohibition, at least as far as the wording went, was confined to war and not more generally to the use of force. Consequently, several States camouflaged their military undertakings by not declaring them as war and argued that no offences against the Pact were being committed. The most discouraging example of this kind was the behaviour of China and Japan in 1931 and 1937 as they engaged in extended military operations against each other with heavy casualties and destruction of property. Both governments, however, insisted that no state of war existed between them, as demonstrated by their continuing diplomatic relations.

6. Art. 2(4) of the UN Charter

This particular deficiency of the Pact ought now be remedied with Art. 2(4) of the → United Nations Charter. According to this provision:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Art. 2(4) of the UN Charter is today the basis for discussion of the problem of the use of force. Its predominant significance is emphasized by authors who have called it the "cornerstone of peace in the Charter" (Waldock), the "heart of the United Nations Charter" (Henkin), or the "basic rule of today's public international law" (Jiménez de Aréchaga).

C. Content of the Prohibition

1. Interpretation of Art. 2(4)

Undoubtedly, the wording of Art. 2(4) of the UN Charter marks progress in comparison with Art. I of the Kellogg-Briand Pact. Not only war, but use of force in general is prohibited. Furthermore, the prohibition is not confined to the use of force but extends to the threat of force (→ Peace, Threat to). Moreover, the prohibition, on a literal reading at least, is backed by a system of collective sanctions against any offender (UN Charter, Arts. 39 to 51).

However, the content and extent of the prohibition of the use of force in contemporary public international law cannot be revealed by the interpretation of Art. 2(4) in isolation. The provision is bound up in particular with Arts. 39, 51 and 53 of the Charter. The problem that arises is that these provisions contain a number of similar notions apparently related to each other, but ultimately different. We read of "use or threat of force", "threat to the peace", "breach of the peace", "act of aggression", "armed attack", "aggressive policy". These notions receive no further explanation within the Charter. Their definition and mutual relationship have neither in learned writings nor in State practice been made clear beyond doubt. Thus when dealing with use of force, the clear and solid basis from which a subject of this importance should be approached is not available.

(a) The problem of "force"

Even the fundamental notion of "force" is not

completely undisputed where its extent is concerned. Corresponding to the prevailing and correct view, "force" in Art. 2(4) is limited to armed force. The → developing States and the countries of the Soviet bloc, however, have repeatedly argued that it also comprises other forms of force, for example political, and especially → economic coercion. It must be admitted that the wording of Art. 2(4) of the Charter alone gives no clear answer to this dispute. But para. 7 of the Preamble of the Charter states one of the aims of the → United Nations to be "that armed force shall not be used, save in the common interest", and Art. 44 supports the view that the Charter also uses the notion of "force" in cases where it apparently means "armed force". The prevailing view is further supported by the teleological interpretation of Art. 2(4). Were this provision extended to other forms of force, this interpretation would deprive States of every possibility of coercion against other States violating the law. This is unacceptable at the present stage of development in international society where compliance with the law is not effectively assured by international organs.

That armed force is exclusively the preoccupation of the prohibition of the use of force is demonstrated finally by the genetic history of the Charter. At the San Francisco Conference on May 6, 1945 a proposal by Brazil to extend the prohibition of the use of force to economic coercion was explicitly rejected (Documents of the United Nations Conference on International Organization, Vol. 6 (1945), pp. 334, 609). This result is confirmed by the UN → Friendly Relations Resolution, a → declaration adopted on October 24, 1970 by the General Assembly in Resolution 2625 (XXV). This declaration is the interpretation of the fundamental principle of the Charter. Interpreting the principle that States shall refrain in their international relations from the threat or use of force, the declaration only deals with armed force. Besides this, the declaration states as an additional principle the duty not to intervene in matters within the → domestic jurisdiction of any State (→ Intervention). In this context the declaration states that: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State . . . ." Thus the declaration makes clear that Art. 2(4) is confined to armed force. Economic and other forms of coercion are covered not by Art. 2(4) but by the general principle of → non-intervention. However, this principle does not mean, for example, that economic coercion is forbidden in any extent. Decisive is the relation between means and end.

No such support for the prevailing view in interpreting Art. 2(4) can be derived, however, from the definition of → aggression adopted on December 14, 1974 by the General Assembly in Resolution 3314 (XXIX). Art. 1 of this definition states: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Though this definition uses wording resembling that of Art. 2(4), it must be pointed out that it does not give an interpretation of this provision, but rather an interpretation of the notion of an "act of aggression" (contained in Art. 39 of the Charter) – a fact made clear by the resolution's preamble and its Art. 6. Thus the prohibition of the use of force is confined to armed force, forbidding not only the direct use of armed force but also any indirect use of force (for example, where a State allows its territory, which it has placed at the disposal of another State, to be used by that other State to perpetrate an act of aggression against a third State, or where a State sends or has sent on its behalf armed bands, groups, irregulars or → mercenaries which carry out acts of armed force in the territory of another State).

(*b*) *Unlawful resort to force and States*

Art. 2(4) states that the members of the UN shall refrain from the threat or use of force. According to Art. 4 of the Charter, only States are eligible to become members of the UN. Thus it is indisputable that States are the authors of and the entities protected from unlawful resort to force. It does not matter in this respect whether the States recognize each other (→ Recognition). It is almost generally accepted that also *de facto* régimes (→ De facto Government) peacefully exercising authority are subject to and protected by Art. 2(4).

(*c*) *The prohibition and international relations*

Art. 2(4) of the Charter prohibits the threat or

use of force in the → international relations between States. Not included is the use of force within a State. That means that Art. 2(4) does not prohibit insurgents from starting a → civil war, nor does it hamper established governments from using armed force against insurgents. This legal situation changes when the insurgents have succeeded in becoming a *de facto* régime peacefully exercising authority.

A problem of the utmost practical relevance today is the participation of third States in civil wars. The legal views surrounding this problem are highly controversial. The traditional and perhaps still prevailing doctrine says that third States are entitled to intervene in a civil war in support of the established government with the consent of or following a request from this government. According to this view, giving support to insurgents is forbidden. This opinion, however, leads to a serious problem. It cannot be denied that a State, although not entirely free in the matter, has a large measure of discretion as to whom it recognizes as constituting the established government in another State, because "there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven" (H. Lauterpacht, Recognition in International Law (1948), p.v.) than the field of recognition. One State may recognize the established government, another the government of the insurgents (→ Recognition of Insurgency). Both then intervene at the requests of the respective governments in the civil war. Thus it can happen that armed forces of third States, within the territory of the State undergoing a civil war, wage war against each other without being blamed for a formal breach of Art. 2(4). Practice in recent years has shown that this is not only a theoretical problem.

To avoid this possible consequence of the traditional doctrine, more and more authors hold the view that public international law prohibits intervention in civil wars on either side. They also qualify the traditional doctrine as incompatible with the right of peoples to → self-determination. It is not always easy to see, however, whether this opinion is formulated *de lege lata* or *de lege ferenda*. The → Institut de Droit International during its 1975 session adopted, if by a scant majority, a resolution prohibiting intervention in civil wars (Art. 2), irrespective of whether the intervention was on the side of the established government or on the side of the insurgents (AnnIDI, Vol. 56 (1975), p. 544). Art. 3 of the resolution exempts humanitarian help (→ Relief Actions) and the continuation of technical and → economic aid from the prohibition. On the basis of a general prohibition of intervening in civil wars it would be necessary to admit the following exception: If, in breach of this prohibition, a third State intervenes in support of one side, other States would be entitled to intervene on the other side. A general prohibition of intervening in civil wars, however, seems today to have little chance of being respected. It is clearly in complete contradition to the actual State practice, originating in the rivalry between the superpowers. As nuclear deterrence impedes a direct military confrontation between them, they struggle against each other in the more evasive manner of participating on different sides in civil wars, seeking to influence the outcome. This is the reason for a civil war nowadays seldom remaining an internal affair of a State.

Some authors concur with the practice of States and hold that third States may on request intervene on either side in a civil war. But, this concurrence with State practice is at the cost of a complete renunciation of the regulation of the behaviour of States by public international law. Such a view restricts itself to a mere description of reality. An effort to balance the prohibition of intervention in civil wars and the contrasting State practice is shown by the view that intervention in civil wars on either side is lawful, but only when it remains short of participation in tactical operations. Third States may not send troops or "volunteers", but they may send non-nuclear weapons (→ Nuclear Warfare and Weapons).

(*d*) *Territorial integrity and political independence*

Art. 2(4) states that members shall refrain from the threat or use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The use of the terms "territorial integrity" and "political independence" is not intended to restrict the extent of the prohibition of the use of force. Use of force in the sense of these two qualifications not only occurs when a State's territorial existence or the

status of political independence is altered, removed or abolished (→ Territorial Integrity and Political Independence). These qualifications are also fulfilled by every sort of infringement by armed force in this respect. Incursion into the territory of another State by armed force, for example, remains an offence against Art. 2(4), even if there is no intent to deprive the other State of a part of its territory, and the aim of the incursion is a temporary and restricted one, with the prompt withdrawal of troops. Thus most forms of exercising armed force, especially the graver ones, are already covered by these two qualifications to the prohibition of the use of force. Remaining gaps are closed by the additional qualification prohibiting the threat or use of force "in any other matter inconsistent with the purposes of the United Nations".

The paramount goal of the UN, according to Art. 1(1) of the Charter, is to maintain international peace and security, to prevent and remove threats to the peace, and to suppress acts of aggression or other breaches of the peace. Para. 7 of the UN Charter's preamble, as mentioned above, states as an aim the ensuring that armed force shall not be used, save in the common interest. From these provisions may be derived that the use of force is legal only in those cases which are explicitly stated in the Charter as exceptions to Art. 2(4) (see sections 2(a) to (c)). This interpretation is confirmed by the genetic history of Art. 2(4). The qualifications of the prohibition of use of force were not part of the Dumbarton Oaks proposal (→ Dumbarton Oaks Conference (1944)). At the San Francisco Conference several smaller States pleaded successfully in favour of the insertion of these qualifications into the wording of Art. 2(4). Their wish was to emphasize the protection of territorial integrity and political independence against the threat or use of force. In no way was there any intention to restrict the general and comprehensive prohibition of the use of force contained in the Dumbarton Oaks proposals. The genetic history and the qualification of the prohibition of the use of force "in any other manner inconsistent with the purposes of the United Nations" is neglected by those authors (for example, Bowett and Dahm) who, in opposition to the prevailing view, are of the opinion that the qualifications referring to territorial integrity and political independence restrict the prohibition of use of force.

2. Exceptions to the Prohibition

The UN Charter contains three exceptions to the prohibition of the use of force.

(a) Measures against former enemy States

Art. 107 of the Charter states:

> "Nothing in the present Charter shall invalidate or preclude action in relation to any state which during the Second World War has been an enemy or any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

It is a commonly held view that this provision also precludes Art. 2(4) from taking effect in the relations between a signatory State and a former enemy State (→ Enemy States Clause in the United Nations Charter). Art. 53(1) allows enforcement actions within regional security arrangements against such enemy States without the authorization of the → United Nations Security Council (→ Regional Arrangements and the UN Charter). Both provisions demonstrate that the creation of the UN not only marked a new beginning, but also the continuation of the victorious → alliance in World War II. Today these provisions have become obsolete, as all former enemy States now are UN members. Although not shared by the Soviet Union, it is the commonly held view that Arts. 107 and 53(1) cannot be valid against members, because this would be incompatible with the fact that when States are admitted to the UN, they are qualified as peace-loving (Art. 4). It would also be incompatible with the fundamental principle of the sovereign equality of all members (Art. 2(1); → States, Sovereign Equality).

(b) Security Council enforcement actions

The UN Security Council under Arts. 24 and 12 of the Charter has the primary responsibility for the maintenance of international peace and security. If under Art. 39 it determines the existence of a threat to the peace, a breach of the peace, or an act of aggression, it can decide to take measures involving the use of armed force

(Art. 42; → United Nations Peacekeeping System; → Collective Security). UN members are bound to carry out such a decision (Art. 25).

This exception to Art. 2(4) up to the present day, however, has proved to be of no relevance in practice. A decision of the Security Council corresponding to Art. 39 is incompatible with the power of → veto of any one of the five permanent members. In practice, unanimity of the permanent members is not achievable. Therefore, only in the very special circumstances of one case did the Security Council, on April 9, 1966, decide that the situation in → Rhodesia (now Zimbabwe) was a threat to the peace, and requested the Government of the United Kingdom to impede, with the use of force if necessary, access to the harbour of Beira (Mozambique) by ships with oil bound for Rhodesia (UN SC 221 (1966)).

Until now neither have special agreements under Art. 43 been concluded (under which members undertake to make armed forces available to the Security Council), nor has the Military Staff Committee (as provided for in Art. 47) been established. Therefore, Art. 106 of the Charter is still valid.

When armed force was used in the name of the UN against an aggressor State in the Korean War, it was not exactly on the basis of Arts. 39 and 42 of the Charter. On June 25, 1950 the Security Council, with the Soviet Union absent, did indeed characterize North Korea's invasion of South Korea as a breach of the peace (→ Korea). On June 27 and on July 7, the Security Council *recommended* that the members assist South Korea. However, further decisions under Art. 42 were vetoed by the Soviet Union which from August 1, 1950 took its seat again in the Security Council. Consequently, the General Assembly on November 3, 1950 adopted the → Uniting for Peace Resolution (UN GA Res. 377(V)) which said:

> "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including . . . the use of armed force."

The so-called peacekeeping operations of the UN (→ United Nations Forces) also do not rest on Arts. 39 and 42. In these cases the use of force is not directed against an aggressor State. In the name of the UN, troops are sent to a State, with its consent, for various purposes: to supervise a truce or → demarcation line, to exercise policing functions, or to form a "cordon sanitaire" between hostile parties. Although by no means clear, the legal bases invoked for these peacekeeping operations are Arts. 29 and 34 of the Charter.

(c) *Self-defence*

The most important exception to the prohibition of the use of force is the right of individual and → collective self-defence against armed attack. At the same time, this area is the most disputed one in the whole realm of the problem of the prohibition of the use of force.

A comparison of the wording of Arts. 2(4) and 51 immediately shows that the two provisions do not accord with one another. Not every use of force prohibited by Art. 2(4) amounts to an armed attack allowing the right of self-defence. Although the prevailing opinion holds that an armed attack will only constitute a major use of force, the notion of armed attack has remained ill-defined. The definition of aggression adopted by the General Assembly, and mentioned above, does not define armed attack in terms of Art. 51, but as an act of aggression in terms of Art. 39. Yet one can say that the examples of the use of force in Art. 3 of the definition represent also an armed attack within the terms of Art. 51.

Confining the use of force to self-defence in response to an armed attack means that in all other cases, → reprisals using armed force are today unlawful. The use of force as a method of backing legal claims is equally unlawful. Measures taken by members in exercise of this right of self-defence should immediately be reported to the Security Council and should not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security. Measures taken in self-defence have to correspond to the

requirement of → proportionality. Collective self-defence means that not only the State suffering from an armed attack is entitled to use armed force in defence, but all other States may assist this State, although they are not obliged to do so.

The most crucial and most disputed question is whether Art. 51 is a final regulation of the right of self-defence. In denying this, some authors point out that the wording of Art. 51 provides that "nothing in the present Charter shall impair the *inherent* right of self-defence" (emphasis added). They are of the opinion that Art. 51 only emphasizes the right of self-defence against armed attack, but does not exclude the right of self-defence according to traditional customary international law as expressed by Daniel Webster in the → *Caroline*. Against this, the prevailing view holds that the qualification of the right of self-defence by the word "inherent" in Art. 51 serves to express that this right applies to every State, regardless of whether it is a UN member or not. According to the prevailing view, it is the fundamental purpose of the UN Charter to restrict the use of force by States to the utmost extent possible. Taking into account Art. 1(1) and para. 7 of the Preamble, the prevailing view is a convincing one.

Another disputed question is whether preventive self-defence is allowed. The wording of Art. 51 is against such a view. In fact the possibility of abuse in general does not allow a wide interpretation of Art. 51. Only where one State pre-announces an armed attack against another State, a hardly conceivable practice, would preventive self-defence be lawful. It must be kept in view, however, that the prohibition of preventive self-defence is only compatible with military requirements as long as a so-called second strike capability exists. Any change in this capability naturally will not alter the legal requirements, but it will reduce the readiness to comply with them.

D. Special Problems Concerning Use of Force

1. Wars of National Liberation

The Soviet doctrine of public international law, thus far supported by the majority of Third World States, holds that there is a further exception from the prohibition of the use of force: → Wars of national liberation by peoples under colonial and racist régimes or other forms of alien domination are held to be lawful, as well as the support for these peoples by third States extending as far as use of force (→ Liberation Movements). The arguments in favour of this view have varied depending on the doctrine's stage of development. The present argument is that colonialism may be considered as a permanent armed attack, against which individual or collective self-defence is allowed. This doctrine, seeking to reinsert *bellum justum* as an element of modern public international law, conflicts with the relevant interpretation of Art. 2(4) and Art. 51 of the Charter as set forth above. This interpretation is valid, notwithstanding that this new doctrine now seems to be reflected in Art. 7 of the definition of aggression adopted by the General Assembly. As pointed out above, this definition does not affect Art. 2(4) or Art. 51. Furthermore, being a resolution of the General Assembly, it is only a recommendation and not binding law. Finally, Art. 7 of the definition of aggression is a provision about which divergent views persist. The wording of Art. 7 declares the right of peoples to "struggle" for national liberation. The draft of this Article spoke of the right to "use force". The western countries successfully opposed this formulation, and have consequently interpreted the word "struggle" in the final text in the sense of struggling by peaceful means. In spite of the resolution's genetic history, the countries of the Third World and of the Soviet bloc interpret "struggle" to include the use of force.

2. The So-Called Breshnev Doctrine

Another attempt of the Soviet Union to restrict the prohibition of the use of force in favour of its hegemonial interests is the so-called Breshnev Doctrine, which holds that it is not only the right but the duty of socialist countries to intervene, using force if necessary, in other socialist countries, when its "socialist accomplishments" are endangered, either by external influences or by internal developments (→ Socialist Internationalism). It is argued that this duty to intervene demonstrates the more developed level of public international law between socialist countries. Indeed, the Soviet Union during the past decade succeeded in inserting this doctrine under

the camouflaging notion of "proletarian internationalism" in a number of bilateral treaties with its allies. It is evident that this doctrine and the corresponding treaty provisions are incompatible with the prohibition of the use of force in the UN Charter, and thus are void because Art. 2(4) has the quality of → *jus cogens*.

3. Protection of Nationals Abroad

The governments of several western countries (for example, the United States, the United Kingdom, Belgium, and Israel) on various occasions have expressed the view that the use of armed force to rescue their own nationals whose lives or health are endangered in a foreign country is lawful (→ Humanitarian Intervention). Such rescue operations have taken place repeatedly since the UN Charter has been in force. Noteworthy are the Stanleyville rescue operations in the Congo in 1964 by Belgium and the United States, the raid at Entebbe in 1976 by Israel and the rescue operation in Iran in 1980 by the United States, failing to free the American diplomatic staff held hostage by Iran. In Western legal literature a minority of authors, some renowned, also take the view that such rescue operations are compatible with existing international law. Some of them extend this alleged right of the use of armed force to protect property of nationals abroad.

The arguments defending the legality of such rescue operations are manifold. Some authors argue that no offence is committed under Art. 2(4) since such operations are not directed against the territorial integrity or political independence of the State concerned. Others characterize the treatment endangering the lives or health of their own nationals as an armed attack against their State, authorizing that State to exercise its right of self-defence under Art. 51 of the Charter. The argument most often used is that Art. 51 does not exclude self-defence as developed in customary international law, and thus also allows the use of force by a State to rescue its own nationals abroad. In the light of the interpretation of Art. 2(4) and Art. 51 described in section C above, these arguments are not convincing. The same may be said of a more recently presented argument based on the increasing relevance of the protection of → human rights in modern public international law. According to this view, the obligation of a State to protect victims suffering infringements of human rights extends beyond its own territory where its own nationals are concerned. Even accepting this doubtful premise, it cannot be taken for granted that a State is entitled to protect its nationals by the use of force.

In stating, as the present author does, that such rescue operations do not conform with the law as it stands, it must not be overlooked, that, from the moral and political points of view, such operations have often received explicit approval. For example, the governments of several States and the Assembly of the → European Communities expressed their satisfaction with the result of the Israeli raid on Entebbe. The UN Security Council did not thereafter denounce Israel for an act of aggression, a breach of the peace or a threat to peace. Nor did the Stanleyville rescue operation result in a condemnation of Belgium. In both cases, however, the Security Council also did not express its approval of the operations. In the → United States Diplomatic and Consular Staff in Tehran Case, the → International Court of Justice, in its judgment on the merits of May 24, 1980, declined to adjudicate the issue of the legality of the rescue operation.

In summary, State practice under the UN Charter reveals an unwillingness to consider rescue operations as illegal in every instance. Simultaneously, this specific use of force is met by a relative lack of condemnation by UN organs, thereby indicating a possible development of corresponding customary international law. Today, however, one cannot say that such a legal rule allowing rescue operations already exists. It must also be pointed out that the International Convention against the Taking of Hostages of December 18, 1979 (ILM, Vol. 18 (1979), p. 1457) states in Art. 14 that the convention in no way gives any right to violate the territorial integrity or political independence of a State (→ Hostages).

4. Art. 2(4) as Customary International Law?

The overwhelming majority of legal writers support the view that Art. 2(4) is also a part of general customary international law. A minority maintains that it is not. The correct answer to this question cannot be given by a simple "yes" or

"no". The majority view does not take into account the divergent interpretations of the prohibition of the use of force by Western States, Eastern bloc States, and the States of the Third World. This is demonstrated in some of the most important examples above (see sections D. 1 to 3 above). The minority view overestimates these divergent interpretations, and neglects the existence of a common ambit. The divergent views interpreting Art. 2(4) are not capable of altering this provision as treaty law. They can, however, influence the development of a corresponding rule of customary international law. Although it is difficult to describe the extent of this rule precisely, one can say that it contains those parts of Art. 2(4) as remain after those parts subject to divergent opinions are subtracted.

5. Art. 2(4) and Criminal Prosecutions

Neither Art. 2(4) nor any other provision of the Charter provides a basis for the criminal prosecution of individuals violating the prohibition of the use of force. The international community has not yet succeeded in translating the corresponding principles of the → Nuremberg Trials and the → Tokyo Trial into valid international law. The definition of aggression adopted by the General Assembly in 1974 in Art. 5(2) states: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." As already emphasized, this definition, being a resolution of the General Assembly, is not binding law. Furthermore, the wording of Art. 5 somewhat enigmatically speaks of responsibility. This does point more in the direction of the responsibility of States, and less to that of individuals → Responsibility of States: General Principles).

E. Concluding Remarks

The prohibition of the use of force in present public international law is burdened with uncertainties stemming from the wording of the relevant provisions of the UN Charter not being clear beyond doubt. The same is true of the relations of these provisions to each other. These uncertainties lend themselves to States attempting to interpret the provisions of the Charter according to their particular political interests.

A further serious problem is that the relatively comprehensive prohibition of the use of force is not balanced sufficiently by other means of war prevention by public international law: There exists no comprehensive obligation to submit to the → peaceful settlement of disputes, no procedure for → peaceful change deserving that name and no substantial obligation to disarm. The system of collective coercive measures to maintain the prohibition of the use of force, as foreseen in Chapter VII of the Charter, does not work in practice. It is a bad sign for the present effectiveness of Art. 2(4) that the General Assembly on December 19, 1977 by Resolution 32/150 felt compelled to establish the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, to examine the draft World Treaty on the Non-Use of Force submitted by the Soviet Union. The Report of that Committee to the General Assembly during the 36th session of 1981 (GAOR, Supp. No. 41 (A/36/41)) reflects the divergent views among States.

Given this situation, the question whether the prohibition of the use of force still has any sense has arisen in the legal literature (Röling). Others ask: "Who killed Art. 2(4) of the UN Charter?" (Franck), and answer as follows: The prohibition of the use of force in the Charter depends on the functioning of the system of coercive measures in accordance with Chapter VII. The renunciation of the use of force by the individual State is only reasonable when it is assured that the Security Council is able to take the steps necessary for the prohibition to succeed. As this system does not work, it is argued, Art. 2(4) has become void.

This argument, however, is not correct. Undoubtedly, the functioning of Chapter VII is highly important for the readiness of States to comply with Art. 2(4). But there is no relationship between the two making the legal validity of Art. 2(4) dependent on the functioning of the system of collective coercive measures. Therefore, the present author is also of the opinion that "the reports of the death of Article 2(4) are greatly exaggerated" (Henkin).

However, it must be admitted that States will

find it increasingly difficult to comply with Art. 2(4) without a functioning system of collective coercive measures. This is especially so when the requirements of the prohibition of force contradict moral values, as was, for example, the case with the Israeli raid on Entebbe.

H. WEHBERG, La guerre civile et le droit international, RdC, Vol. 63 (1938 I) 1–127.
Q. WRIGHT, A Study of War, 2 vols. (1942).
J. KUNZ, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, AJIL, Vol. 41 (1947) 872–879.
J. KUNZ, Bellum justum et bellum legale, AJIL, Vol. 45 (1951) 528–534.
C.H.M. WALDOCK, The Regulation of the Use of Force by Individual States in International Law, RdC, Vol. 81 (1952 II) 451–517.
H. WEHBERG, Krieg und Eroberung im Wandel des Völkerrechts (1953).
D.W. BOWETT, Self-Defence in International Law (1958).
J. STONE, Legal Controls of International Conflict (2nd ed. 1959).
M. MCDOUGAL and F.P. FELICIANO, Law and Minimum World Public Order (1961).
Q. WRIGHT, The Role of International Law in the Elimination of War (1961).
G. DAHM, Das Verbot der Gewaltanwendung nach Art. 2(4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten, JIR, Vol. 11 (1962) 48–72.
I. BROWNLIE, International Law and the Use of Force by States (1963).
R. PINTO, Les règles du droit international concernant la guerre civile, RdC, Vol. 114 (1965 I) 451–553.
T.J. FARER, Intervention in Civil War: A Modest Proposal, Columbia Law Review, Vol. 67 (1967) 266–279.
A. GERLACH, Die Intervention (1967).
F.C. SCHROEDER, Die Rechtmäßigkeit des Krieges nach westlicher und sowjetischer Völkerrechtsauffassung, in: B. Meissner and R. Maurach (eds.), Völkerrecht in Ost und West (1967) 178–218.
W. WENGLER, Das völkerrechtliche Gewaltverbot, Probleme und Tendenzen (1967).
R. FALK, Legal Order in a Violent World (1968).
J.A. FROWEIN, Das de facto-Regime im Völkerrecht (1968).
K. SKUBISZEWSKI, Use of Force by States, Collective Security, Law of War and Neutrality, in: M. Sørensen (ed.), Manual of Public International Law (1968) 739–750.
F.J. BERBER, Lehrbuch des Völkerrechts, Vol. 2 (2nd ed. 1969).
R. HIGGINS (ed.), United Nations Peacekeeping, 4 vols. (1969–1981).
B. MEISSNER, Die "Breschnew-Doktrin" (1969).
B. RÖLING, Hat das Kriegsverbot noch einen Sinn?, JIR, Vol. 14 (1969) 174–187.
R.M. DERPA, Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt (1970).
J. DELIVANIS, La légitime défense en droit international public moderne (1970).
T.M. FRANCK, Who killed Art. 2(4)? or: The Changing Norms Governing the Use of Force by States, AJIL, Vol. 64 (1970) 809–837.
R. FALK, The International Law of Civil War (1971).
L. HENKIN, The Reports of The Death of Article 2(4) are Greatly Exaggerated, AJIL, Vol. 65 (1971) 544–548.
W. SCHAUMANN (ed.), Völkerrechtliches Gewaltverbot und Friedenssicherung (1971).
D. BLUMENWITZ, Feindstaatenklauseln, Die Rechtsordnung der Sieger (1972).
B. GRAF ZU DOHNA, Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten (1973).
J.N. MOORE (ed.), Law and Civil War in the Modern World (1974).
J. ŻOUREK, L'interdiction de l'emploi de la force en droit international (1974).
J. ARNTZ, Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen (1975).
B.B. FERENCZ, Defining International Aggression, 2 vols. (1975).
A. RANDELZHOFER, Die Aggressionsdefinition der Vereinten Nationen, Europa-Archiv, Vol. 30 (1975) 621–632.
U. BEYERLIN, Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht, ZaöRV, Vol. 37 (1977) 213–243.
H. NEUHOLD, Internationale Konflikte, Verbotene und erlaubte Mittel ihrer Austragung (1977).
D.C. DICKE, Die Intervention mit wirtschaftlichen Mitteln im Völkerrecht (1978).
A.F. PANZERA, "Raids" e protezione dei cittadini all' estero, RivDirInt, Vol. 61 (1978) 759–775.
G. ARANGIO-RUIZ, The Declaration on Friendly Relations and the System of the Sources of International Law (1979).
E. JIMÉNEZ DE ARÉCHAGA, El derecho internacional contemporaneo (1980).
H.B. REIMANN, Das völkerrechtliche Gewaltverbot im Wandel, in: Festschrift für Rudolf Bindschedler (1980) 549–561.
T. SCHWEISFURTH, Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights, GYIL, Vol. 23 (1980) 159–180.
J.R. D'ANGELO, Resort to Force by States to Protect Nationals, The U.S. Rescue Mission to Iran and its Legality under International Law, Virginia Journal of International Law, Vol. 21 (1981) 485–519.
K. DOEHRING, Intervention im Bürgerkrieg, in: Im Dienste Deutschlands und des Rechtes, Festschrift für Wilhelm G. Grewe (1981) 445–458.

ALBRECHT RANDELZHOFER

VERSAILLES PEACE TREATY (1919)

A. Formalities: 1. Signature. 2. Ratification and Entry into Force. – B. The Peace Conference: 1. Organization and Procedure. 2. Political Background. – C. Contents: 1. Treaty Provisions. 2. Significance for the Development of International Law. – D. Continuing Validity: 1. General Comments. 2. Individual Provisions.

A. Formalities

1. Signature

The → peace treaty signed in Versailles on June 28, 1919 between Germany, on the one hand, and the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), together with their allies, Belgium, Bolivia, Brazil, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay, on the other hand, ended the state of → war that had existed between the Allied Powers and Germany during World War I. The separate peace treaties signed later between the Allied and Associated Powers and the other Central Powers (Austria, Bulgaria, Hungary and Turkey), namely, the → Saint-Germain Peace Treaty of 1919, the → Neuilly Peace Treaty of 1919, the → Trianon Peace Treaty of 1920, and the Sèvres Peace Treaty of 1920 (→ Lausanne Peace Treaty (1923)), form together with the Versailles treaty a uniform system of treaty texts (to some extent with identical wording) known collectively as the Paris peace treaties (→ Peace Treaties after World War I).

With regard to the signing of this historic treaty, the following facts deserve special mention: (a) → China is listed as a signatory in the official text but did not in fact sign the Treaty (due to her opposition to Arts. 156 to 158 concerning Shantung and Kiaochow; → Territory, Lease); she later concluded a separate agreement with Germany (May 20, 1921; LNTS, Vol. 9, p. 271) to end formally the state of war between them. (b) Costa Rica, who had also been in a state of war with Germany, did not attend the Paris Peace Conference; the state of war was declared to be terminated in a Costa Rican decree of February 4, 1920 and in a German law of May 15, 1921. (c) The British dominions (→ British Commonwealth) attached to the British Empire delegation (Australia, Canada, India, New Zealand and South Africa) each signed the Treaty separately.

2. Ratification and Entry into Force

According to Art. 440, the Treaty was to come into force after the deposit of ratifications by Germany and three of the Principal Allied and Associated Powers (→ Treaties, Conclusion and Entry into Force). The hope that the Treaty would come into force simultaneously for all the Principal Allied and Associated Powers proved to be in vain. The United States' failure to ratify delayed the entry into force. The Treaty, therefore, only came into force on January 10, 1920, after the deposit of ratifications by Germany, the British Empire, France, Italy, Japan and some other States.

The United States, Ecuador and the Hedjaz did not ratify the Treaty. The United States signed a separate peace treaty, the Treaty of Berlin, with Germany on August 25, 1921 (→ Germany-United States Peace Treaty).

The Treaty of Versailles came into force for Australia, Belgium, Bolivia, Brazil, the British Empire, Canada, Czechoslovakia, France, Germany, Guatemala, India, Italy, Japan, New Zealand, Siam, South Africa and Uruguay on January 10, 1920; for the Serb-Croat-Slovene State on February 10, 1920; for Cuba on March 8, 1920; for Greece on March 30, 1920; for Portugal on April 8, 1920; for Haiti and Liberia on June 30, 1920; for Romania on September 14, 1920; for Peru and Poland on October 1, 1920; for Honduras and Nicaragua on November 3, 1920; and for Panama on November 25, 1920. With respect to Germany, the Treaty entered into force on the international law level on January 10, 1920. On the level of domestic law, the Treaty was approved by the German Parliament by a law enacted on July 16, 1919; this law entered into force on August 12, 1919, i.e. five months before the Treaty became internationally binding. This anomaly can be explained by the fact that according to Art. 178 of the German Constitution, the Treaty was given precedence over the Constitution.

B. The Peace Conference

1. Organization and Procedure

The Paris Peace Conference, convened to draft the texts of the peace treaties, lasted from January 12, 1919 until August 10, 1920 (the date of signature of the peace treaty with Turkey). For each of the peace treaties the Conference was divided into two phases (→ Congresses and Conferences, International). In the first phase, the peace terms were negotiated among the victorious powers (→ Negotiation). Only when the treaties had been drafted were the terms communicated to the defeated powers. These were then invited to take part in the second phase, which consisted of an exchange of views between the Allies and their former adversaries. For Germany, May 7, 1919 marked the beginning of this second phase; on that day the Allies communicated the peace terms to the German delegation. On May 29, 1919 the German delegation presented the counter-proposals of the German Government; the Allies considered these proposals unacceptable and replied in the form of an → ultimatum on June 16, 1919. The debate between the Allies and the German Government thus consisted of a written exchange of views; the German delegation did not take part in the actual negotiations.

The National-Socialist Government later exploited this fact to justify violations of various Treaty provisions. It maintained the Versailles Treaty was not a treaty, but a *Diktat*. However, as the German signature appears in due legal form under the document, it cannot be regarded as anything but a binding contract.

The various Allied and Associated Powers did not share equality of status. The Conference rules of procedure emphasized the special status of the → Great Powers and listed the following categories: (a) "belligerent Powers with general interests" (the British Empire, France, Italy, Japan and the United States), who were to attend all sessions and commissions; (b) "belligerent Powers with special interests", who were to attend sessions at which questions concerning them were to be discussed; (c) "Powers having broken off relations with the enemy Powers", who were also to attend sessions at which questions of interest to them would be discussed; (d) "neutral Powers and States in process of formation", who, when summoned by the "Powers with general interest", were to be heard "at sessions devoted especially to the examination of questions in which they are directly concerned, and only in so far as those questions are concerned".

2. Political Background

The political programme of the peace settlement had already been formulated in → Wilson's Fourteen Points and in the → armistice agreement of November 11, 1918 between the Allies and Germany. The principle of → self-determination, the reduction of armaments (→ Disarmament) and the participation of States in a → League of Nations on the principle of equality were to form the basis for a new peaceful order. The political situation at the end of the war, however, was not yet ripe for the realization of such ideals. The atmosphere was fraught with mutual resentment, fear and hatred, political and, to an even greater extent, economic self-interest prevailed. The discrepancy between the declared high ideals for the new order and the peace terms decided upon in Paris has tended to bring the Treaty into discredit. In particular, the thesis that Germany and her allies were alone "guilty" for the war introduced an element of moralizing into the talks and thereby interfered with the progress of the conference towards an even-handed settlement.

Seen from an historical perspective, the main criticism to be made of the work of the Paris Peace Conference is not that the Treaty imposed an "intolerable" burden on the vanquished, but rather that the whole concept of the Paris agreements was politically unwise. The notion of creating a new order came to be overshadowed by the claims for → reparations and proposals stimulated by the fear of a resurgence of German might. Thus the provisions of the Paris peace treaties, by failing to incorporate the principles of the new order, merely fortified – perhaps even aroused – the resentment of the vanquished nations, so that only two decades later the peace régime that had been planned to last for generations was in ruins.

C. Contents

1. Treaty Provisions

The Treaty consists of 15 parts (comprising 440

articles) and a number of annexes which are incorporated into the text and have the same legal status.

(a) The → preamble asserts that the war was "originated" by declarations of war by Austria-Hungary against Serbia and by Germany against Russia and France, and by Germany's invasion of Belgium. The state of war was declared to be terminated with the coming into force of the Treaty.

(b) Part I (Arts. 1 to 26) comprises the Covenant of the League of Nations. States who ratified the Treaty therefore automatically became members of the League. An exception was made in the case of Germany, although this was not mentioned explicitly.

(c) Part II (Arts. 27 to 30) fixed the new → boundaries of Germany.

(d) Part III (Arts. 31 to 117) contains the political clauses for Europe, i.e. the clauses concerning Belgium, Eupen, Malmédy and Moresnet, Luxembourg (in particular her withdrawal from the German → customs union), the → demilitarization and occupation of the left bank of the Rhine (→ Rhineland Occupation after World War I), Lorraine to France, the → guarantee of Austria's independence (for a later development regarding this, see → Customs Régime between Germany and Austria (Advisory Opinion)), Germany's relations with Poland (especially regarding German → minorities there; → plebiscites concerning the frontiers; the status of → Danzig) and with Czechoslovakia, plebiscites in East and West Prussia, the establishment of the Free City of Danzig under the protection of the League of Nations (→ Free Cities), plebiscites in Schleswig, the demilitarization of → Heligoland, and the relations of Germany with Russia and the newly-independent States which had previously belonged to the Russian Empire (→ Brest-Litovsk, Peace of (1918); → Rapallo Treaty (1922); → Baltic States).

(e) Part IV (Arts. 118 to 158) concerns German rights and interests outside Germany, i.e. mainly outside Europe. Germany renounced all claims to her former → colonies and her treaty-based rights (in particular → concessions) in China, Siam, Liberia, Morocco, Egypt, Turkey, Bulgaria, Shantung.

(f) Part V (Arts. 159 to 213) provided for the almost complete disarmament of Germany under the supervision of Inter-Allied Commissions of Control.

(g) Part VI (Arts. 214 to 226) regulated questions concerning the return of → prisoners of war and the maintenance of → war graves.

(h) Part VII (Arts. 227 to 230) provided for the punishment of war criminals, including the prosecution of the former Kaiser (→ War Crimes).

(i) Part VIII (Arts. 231 to 247) stipulated the reparations to be paid by Germany, which were based on the so-called "war guilt clause" (Art. 231).

(j) Part IX (Arts. 248 to 263) contains further financial provisions relating to reparations. There is thus a close connection between Parts VIII and IX.

(k) Part X (Arts. 264 to 312) brings together under the heading "Economic Clauses" such heterogeneous matters as customs regulations, shipping, → nationality status, the question of the continuing validity of treaties (→ War, Effect on Treaties), the establishment of → mixed arbitral tribunals, questions of industrial property rights (→ Industrial Property, International Protection) and insurance, and miscellaneous other matters.

(l) Part XI (Arts. 313 to 320) restricted Germany's air traffic rights and granted privileges in German air space to the Allied and Associated Powers (→ Air Law; → Air, Sovereignty over the).

(m) Part XII (Arts. 321 to 386) on → ports, waterways and railways related mainly to international transit through German territory (→ Traffic and Transport, International Regulation), the general principle of the freedom of navigation (→ Navigation, Freedom of) being considerably modified to the advantage of the Allies in German ports, as well as along the German sections of the rivers → Elbe, Oder, Memel, → Danube, → Rhine and → Moselle (→ International Rivers) and also through the → Kiel Canal.

(n) Part XIII (Arts. 387 to 427) is the Constitution of the → International Labour Organisation.

(o) Part XIV (Arts. 428 to 433) provided guarantees for the execution of the Treaty by specifying the gradual withdrawal of Allied occupying troops (→ Occupation, Pacific) from the left

bank of the Rhine and the Rhine bridgeheads and the withdrawal of German troops from territory which had formerly belonged to the Russian Empire.

(p) Part XV (Arts. 434 to 440) dealt with certain marginal matters such as the → free zones of Upper Savoy and Gex, German recognition of the treaty of July 17, 1918 between France and → Monaco, and German recognition of the decisions of Allied prize courts (→ Prize Law). It concluded with the usual formal provisions regarding ratification and entry into force.

2. Significance for the Development of International Law

The Versailles Peace Treaty must be accorded a special place in the → history of the law of nations. It was conceived not only as a peace treaty in the traditional meaning of the term but also as an international pact for a new world order. This intention is shown by the inclusion of the Covenant of the League of Nations as Part I and the Constitution of the International Labour Organisation as Part XIII in the Treaty text. The linking of the peace terms to the new international order guaranteed by the League of Nations (the provisions relating to Danzig, the Saar territory and plebiscites; see also → Mandates) also points in this direction. In the outcome, however, the link proved to be unfortunate, as the League of Nations, intended as an impartial instrument, was heavily mortgaged with political problems from the day of its inception.

In those parts of the Treaty which contain the actual peace terms to be accepted by Germany, the economic and financial burdens imposed on the defeated nation are spelt out in considerably more detail than was usual in peace treaties before 1919. The Versailles Treaty provides the first documentary evidence of the modern tendency to treat → economic warfare on the same level as armed warfare. For the first time Anglo-Saxon legal concepts – for example, that of private as well as public liability (→ Enemy Property) – found their way into an instrument of continental international law. The idea that reparations should be regarded not merely as a means for economic rehabilitation but also as moral amends for Germany's "guilt" in instituting a war of → aggression appears for the first time as the *leitmotiv* of a European peace treaty.

The Versailles Treaty and the other Paris peace treaties manifest numerous developments and innovations in international law. Thus it is asserted in Art. 231 that aggression is prohibited, although such a prohibition appears only for the first time in the Covenant of the League of Nations, i.e. in the Treaty itself. The inclusion in the Treaty of principles that had not yet been generally accepted as international law norms has, both legally and politically, made it vulnerable to criticism. The treatment of the principle of the right of self-determination is an example in point. Without being expressly referred to, this principle clearly underlies the whole complex of the Paris peace treaties (in particular, it dominates the provisions relating to plebiscites and → option of nationality), although it was not then established as a principle of international law.

The preamble to the section on Alsace-Lorraine (Arts. 51 to 79) declares Germany's failure to acknowledge the right of self-determination in 1871 to be a "wrong"; the inverse conclusion must therefore be drawn that the people have a "right" to be consulted before any territorial changes are made (→ Territory, Acquisition). On the other hand, the prohibition against merging with Austria in Art. 80, formulated as a → guarantee of this country's independence, would seem to deny the right of self-determination (cf. also Art. 88 of the Saint-Germain Peace Treaty). In spite of such defects, the Paris peace settlements of 1919/1920 marked the breakthrough for this principle, so that its later → codification in the → United Nations Charter is to be regarded as a mere formality. The same holds true for the recognition of the rights of minorities as they were developed within the framework of the Paris peace settlements. By contrast, the compatibility of the penal clauses of Arts. 227 to 230 with international law is still debated – in spite of the fact that the principles they embodied were confirmed by the International Military Tribunal in 1945 during the → Nuremberg Trials.

In view of these international legal innovations, large portions of the law of the United Nations can be traced back to the Versailles Treaty. Its influence can also be seen in the → peace trea-

ties of 1947 with Bulgaria, Finland, Hungary, Italy and Romania and in the occupation régime set up by the Allied Powers in Germany in 1945 (→ Germany, Occupation after World War II). This is true not only of the general structure of the Treaty and the new principles that it embodied, but also of a considerable number of individual provisions (e.g. those relating to property, rights and interests, to the validity of pre-war treaties and to the granting of most-favoured-nation status with or without → reciprocity (→ Most-Favoured-Nation Clause)). Part X in particular offers a wealth of examples for such "models". In this respect the Versailles Treaty is a basic document in the history of international law. On the other hand, neither as a peace treaty nor as a treaty founding a new international order did it fulfil the practical purposes intended. Legal inconsistencies inherent in the Treaty contributed in large part to its ineffectiveness, even though the main reasons for its ultimate failure were of a political nature.

D. Continuing Validity

1. General Comments

The outbreak of World War II did not nullify the Versailles Treaty, as peace treaties do not simply expire when new wars begin. Their application is merely suspended in the relations of the belligerents with one another. Nevertheless, in view of the changed circumstances (→ Clausula rebus sic stantibus), the political clauses must be deemed to have expired. Only the constitutive clauses (e.g. those relating to the International Labour Organisation) can be seen with certainty as having continuing validity.

The procedure to be followed after World War II with respect to treaties concluded by the former German Reich was determined for the occupation régime by Directive No. 6 of the Allied High Commission on March 19, 1951 (→ Germany, Legal Status after World War II). This provided for the formal → notification of those treaties which continued to be applicable. Neither Germany nor the Allies attempted to re-establish the validity of the Versailles Treaty in this way.

2. Individual Provisions

Only to a very limited exten. do individual provisions of the Versailles Treaty continue to be valid – whether *de jure* by a formal act ensuring their reapplication, or *de facto*.

After the founding of the → United Nations, there was no call to resurrect Part I (Covenant of the League of Nations). Part XIII lives on in a revised form as the Constitution of the International Labour Organisation.

Many of the provisions had been fully executed before the outbreak of World War II. Their role had therefore been played out and their revival would have been superfluous. This applies especially to the territorial provisions of Parts II, III and IV. The unilateral denunciation or simple breach of all the territorial provisions of Part II by Germany in the years 1938 to 1940 is, according to the prevailing modern view, legally irrelevant, even in those cases where the Versailles Treaty signatories condoned the new *de facto* situation (e.g. the *Anschluß* of Austria in March 1938; → Acquiescence) or where they took an active part in revising the peace settlement of 1919 (e.g. the → Munich Agreement of September 1938). The International Military Tribunal denounced Nazi Germany's unilateral violations of the Versailles Treaty as → "crimes against peace" (Art. 6(a) of the Tribunal's Charter).

A revival of Part V on the demilitarization of Germany would have been pointless: Some of the provisions had already been fully executed; others have been rendered obsolete by completely changed circumstances.

The same applies to most of the provisions of Part VI on prisoners of war and war graves. The Treaty is, however, indirectly responsible for the continuing care of World War I war graves.

Part VII (penal clauses) is now obsolete. Its demands were partially fulfilled after 1920 by the German *Reichsgericht* (e.g. in the *Llandovery Castle* case) and in certain war crimes trials before French and Belgian courts. The Allies did not insist on full execution, although this was never made explicit.

The validity of the whole of Part XI (aerial navigation) expired on January 1, 1923, the date specified in Art. 320.

More problematic is the question of whether Parts VIII (reparations) and IX (financial clauses), with the exception of those provisions which had either been complied with or revised before

World War II, are basically still in force. The → Young Plan of 1930 provided for reparation payments continuing until the year 1988. The existence of time-limits (→ Prescription) for international legal commitments is disputed. The Federal Republic of Germany implicitly accepted responsibility for German debts resulting from World War I when she signed the → London Agreement on German External Debts in 1953. Art. 5(1) provides that: "Consideration of governmental claims against Germany arising out of the first World War shall be deferred until a final general settlement of this matter." This provision is admittedly binding only on those Versailles Treaty powers which also signed the London Agreement.

Certain provisions of Part XII (ports, waterways and railways) are still being applied *de facto*.

Treaty provisions relating to States which did not sign or ratify the Versailles Treaty (e.g. the United States, China, the Soviet Union and the successor States of the former Russian Empire) must be considered as having been supplanted by bilateral agreements which these States concluded with Germany (see section C.1(d) above).

The provisions of the Versailles Treaty have also in some cases been bilaterally revised as a result of new agreements concluded by Germany and individual parties to the Treaty (→ Treaties, Revision). The other signatories raised no objections. Thus, for example, when Germany and Siam signed an economic "arrangement" on February 28, 1924 (LNTS, Vol. 32, p. 399), numerous provisions of Part X were suspended for the period of validity of that bilateral agreement. The two parties thus avoided invalidating a treaty which had been signed by other States.

Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany, signed at Versailles, CTS, Vol. 225 (1981) 188–393.

Gesetz über den Friedensschluß zwischen Deutschland und den alliierten und assoziierten Mächten, vom 16. Juli 1919, Reichsgesetzblatt (1919) 687–1330.

The Paris Peace Conference, 1919, Papers relating to the Foreign Relations of the United States, 13 vols. (1942–1947).

Ministère des affaires étrangères, Recueil des actes de la Conférence, 8 vols. (1922–1934).

J.M. KEYNES, The Economic Consequences of the Peace (1919).

W. SCHÜCKING (ed.), Kommentar zum Friedensvertrag, 8 vols. (1920).

A. TARDIEU, La Paix (1920).

E.M. HOUSE and C. SEYMOUR (eds.), What Really Happened at Paris (1921).

H. KRAUS and G. RÖDIGER (eds.), Urkunden zum Friedensvertrage, 2 vols. (1921).

H.W.V. TEMPERLEY (ed.), A History of the Peace Conference of Paris, 6 vols. (1921–1924).

R.S. BAKER, Woodrow Wilson and the World Settlement, 3 vols. (1922).

C.H. HASKINS and R.H. LORD, Some Problems of the Peace Conference (1922).

D.H. MILLER, My Diary at the Conference of Paris, 21 vols. (1924–1926).

U. BROCKDORFF-RANTZAU, Dokumente und Gedanken um Versailles (3rd ed. 1925).

W. WILSON, The Public Papers of Woodrow Wilson, 6 vols. (1925–1927 Repr. 1970).

E.M. HOUSE, The Intimate Papers of Colonel House, Arranged as a Narrative by C. Seymour, 4 vols. (1926–1928).

W. CHURCHILL, The World Crisis, Vol. 4, The Aftermath (1929).

G. CLEMENCEAU, Grandeurs et misères d'une victoire (1930).

H. NICHOLSON, Peacemaking 1919 (1933).

W. ZIEGLER, Versailles (4th ed. 1933).

M. ALMOND and R.H. LUTZ, An Introduction to a Bibliography of the Paris Peace Conference (1935).

F. NITTI, La désagrégation de l'Europe (1938).

F. BERBER, Das Diktat von Versailles (1939).

D. LLOYD GEORGE, Memories of the Peace Conference 1919, 2 vols. (1939 Repr. 1972).

A. LUCKAU, The German Delegation at the Paris Peace Conference (1941).

F.S. MARSTON, The Peace Conference of 1919, Organization and Procedure (1944 Repr. 1978).

P. RAIN, L'Europe de Versailles, Les traités de paix, leur application, leur mutilation (1945).

L. VON MURALT, Der Friede von Versailles und die Gegenwart (1947).

H.L. BRETTON, Stresemann and the Revision of Versailles, A Fight for Reason (1953).

P. MANTOUX, Les délibérations du Conseil des Quatre, 2 vols. (1955).

H. HOOVER, The Ordeal of Woodrow Wilson (1958).

S.P. TILLMAN, Anglo-American Relations at the Paris Peace Conference of 1919 (1961).

E. WÜEST, Der Vertrag von Versailles in Licht und Schatten der Kritik (1962).

Lord HANKEY, The Supreme Control at the Paris Peace Conference 1919 (1963).
F. CZERNIN, Versailles 1919, The Forces, Events and Personalities that Shaped the Treaty (1964).
A.J. MAYER, Politics and Diplomacy of Peacemaking, Containment and Counter-Revolution at Versailles, 1918–1919 (1968).
M. GUNZENHÄUSER, Die Pariser Friedenskonferenz 1919 und die Friedensverträge 1919–1920, Literaturbericht und Bibliographie (1970).
N.G. LEVIN (ed.), Woodrow Wilson and the Paris Peace Conference (1972).

ELLINOR VON PUTTKAMER

VISIT AND SEARCH OF SHIPS *see* Ships, Visit and Search

WAR

A. Introduction – B. Concept of War: 1. History. 2. Definition. 3. Compatibility of the Legal Recognition of a State of War with the General Prohibition of the Use of Force. 4. Relationship to the Concept of Armed Conflict. 5. War as a State Recognized by the Law. – C. Commencement of War. – D. Termination of War.

A. Introduction

Peace and war have been in common understanding as well as in traditional international law two distinct statuses in international (inter-State) relations with different legal consequences and rules. War in the sense of → armed conflict between → subjects of international law connected with the → use of force has the consequence that the rules valid in peace-time are at least to a great extent no longer applicable but substituted by the laws of war (→ War, Laws of).

In recent times not only has the traditional clear distinction between peace and war been put into doubt, but also a considerable number of traditional rules of the laws of war have been changed or disputed. These different rules are dealt with in other articles. This article deals only with three basic aspects of war: the general concept of war in the past and present, the commencement of war and the termination of war.

B. Concept of War

1. History

War has been within the province of → international law since ancient times, but it is since the end of the Middle Ages that the major consideration and regulation of this phenomenon has occurred (→ War, Laws of, History; → History of the Law of Nations). As an instrument used in → international relations, it constituted an integral part of a primitive system of international law and, as a form of → self-help, it served as a means of enforcement of the law, acting as a sanction against wrong-doing while also being a means of changing the law. Nevertheless, the law sought to limit the use of force in two modalities: the right to resort to war (*jus ad bellum*) and the laws of war (*jus in bello*).

In antiquity, the right to resort to war was already discussed in terms of the just war (*bellum justum*); this became a recurrent thesis thereafter. The scholastic philosophers, influenced by the writers of antiquity, adopted this approach, and through the later scholastics the idea was received into the emerging modern law of nations. St. Augustine, adopting the ideas of Cicero, justified waging war by the necessity of defence and retaliation. St. Thomas Aquinas laid down the following prerequisites for a just war: the valid authority of the sovereign (*auctoritas principis*), a righteous intention (*recta intentio*) and a just cause (*justa causa*). The notion of a just war soon became linked with the belief in the lawfulness of religious wars against non-Christian States, to which both Suárez and Vitoria gave their qualified support Under the law of Islam the holy war against the infidel (*jihad*) – which is admittedly not quite the same as the sociological or legal concept of war – was not merely a right but a duty. These developments led to "just wars" being asserted in justification for campaigns motivated by fanaticism and intolerance.

Grotius drew certain conclusions from this experience and developed a more objective and refined approach. He required the justification for war to consist of a wrong suffered, but recognized that a war could be considered as just for both sides, a doctrine developed in particular by Zouche. This effectively meant the end of the theory of just war, which could not really be regarded as part of valid international law at any time, but was rather to be seen as a moral rule of conduct (Berber, Kunz). The 17th, 18th and 19th century positivists (e.g. Hobbes, Moser) took the strain of reasoning a stage further and asserted

that in principle every State had the sovereign right to resort to war. The just war theory was revived after World War I in Marxist legal theory. Marxist theory today categorizes → wars of national liberation and liberation from → imperialism waged by oppressed peoples as just wars, a view which has gained many adherents in the Third World.

The Covenant of the → League of Nations was the first multilateral treaty to make significant progress towards limiting the right to resort to war. Arts. 10 to 16 of the Covenant set limits to the resort to war as a means of dispute-settlement for both member States and non-member States. These rules did not amount to a complete prohibition of war, but they did give impetus to the development which led to the proscription of war in the → Kellogg-Briand Pact of 1928 and culminated in the prohibition of every threat or use of force in international relations in Art. 2(4) of the → United Nations Charter. Exceptions were made for → sanctions against States which were enemies of the signatories of the UN Charter during World War II (Charter, Arts. 53 and 107; → Enemy States Clause in the United Nations Charter) and for the inherent right of self-defence (Art. 51; → Self-Defence; → Collective Self-Defence). In the event of a threat to the peace or an act of → aggression, it is now primarily for the → United Nations Security Council to decide whether military sanctions should be applied (→ United Nations Peacekeeping System). Nevertheless, all the limitations and prohibitions of war and the use of force since World War I have been unable to prevent the outbreak of open wars and "wars in disguise", especially since → United Nations sanctions have, for political reasons, offered no effective deterrent. Thus as a continuing phenomenon in fact and in law, war continues to require regulation by modern international law.

2. Definition

It is necessary for the law to distinguish war from peace in order to establish when the laws of war are to be applied in place of the law of peace in relations between two or more parties. The parties to a war in the first instance can be → States or groups of States, but the class can be extended during the course of war to comprise non-State belligerents when these are recognized as such by the States concerned (→ Recognition of Belligerency). Whether a state of war can exist according to international law between States which do not recognize each other (the definition of war for the purposes of international law being in principle entirely independent of definitions adopted in municipal law) depends upon the importance given to → recognition for the purposes of creating subjects of international law. Opinions differ on whether the United Nations, through the use of sanctions, could be party to a war, or, put differently, whether the use of forcible sanctions could attain the status of waging war. In any event, it is undisputed that the United Nations can undertake sanctions of a war-like character, and that the laws of war apply to all military sanctions (Mosler, Baxter, Bindschedler).

Before World War I, the definition of war adopted by writers on international law was based on the factual manifestations of war, namely the use of force and the objective of overpowering the enemy. A characteristic example of this is the formulation, emanating from von Clausewitz, that war is a state of things in which each party uses the maximum force to impose its will on the other. Both criteria also appear in later definitions (Rousseau, Oppenheim, Verdross, Kelsen, Menzel, Reuter, Sauer, Starke). However, uniformity of opinion ended after 1919 under the pressure of legal realities. Armed force was no longer a necessary feature of war. Although war had been declared between the Latin American States and the German Reich in World War II, no active hostilities occurred. Also, in some cases a state of → economic warfare, occupation(→ Occupation, Belligerent; → Occupation after Armistice) or confiscation of → enemy property continued after the cessation of hostilities. Furthermore, limited hostile actions directed towards realizing specific geographical or other material objectives became more prevalent, which did not involve or necessitate a policy of employing the maximum use of force. This meant also that the classical definition of war was no longer adequate to distinguish war from certain intermediate hostile measures short of full-scale war such as → blockade, → intervention or punitive action.

One view, espoused in particular by Grob, denies the existence of a uniform definition of war

in international law, and proposes a relativist test. According to this view, the existence of a state of war must be determined not in general, but for each particular rule by considering its purpose within the broad framework of the *jus in bello*. This theory threatens the function of international law to control the use of force where a state of war exists in fact: It is unable to give a certain determination of the legal position between the parties, or to provide a clear determination of the parties' rights and duties. Other theories retain uniform definitions of war, but either base these exclusively on sociological criteria (McDougal/ Feliciano) or, on the other hand, see it as a purely abstract legal state of affairs (Stone). Both approaches detach war as a social phenomenon from a definition of war based on rules of law. It is, however, necessary to combine the two elements, for war as a social phenomenon in all its diversity requires a clear legal definition, and a purely formal legal view of war in turn runs the risk of losing touch with reality and thus failing to provide an effective definition. The "pure theory of law" finally was the basis upon which the viewpoint was developed that war is a specific action, thus an objective factual state, but not itself a status (H. Kelsen, Principles of International Law (1952) p. 27). However, it is an action that constitutes a status defined by law that brings into operation certain duties and rights as between the belligerent States as well as between belligerent and neutral States.

A clear and unequivocal distinction between war and peace, which has to take account of the realities of warfare, must regard war as a state recognized by law (Green, Mosler). In view of the many different kinds of factual situations which war embraces, this definition of war as a state recognized by international law must have recourse to the intentions of the parties. Thus the laws of war replace the law of peace in relations between the parties for so long as they intend that this should be so and as long as they express this intention in a manner which enables the rest of the world to recognize its existence. Understood in this way, the *animus belligerendi* does not involve circular reasoning, as is sometimes asserted. Rather, it is concerned with establishing a clearly defined legal state, a status *inter se* with effects *erga omnes*. This state can be expressly declared to exist, but it can also be deduced from the nature and extent of hostilities. Accordingly, armed conflicts cannot be regarded as wars if both sides unite in denying the existence of a state of war between them. This is not a new phenomenon. In 1798 the United States engaged in military operations against France at sea, but two years later both States declared that there had been no war in the legal sense. Much the same happened regarding the naval battle of Navarino (1827) in which the Turkish Fleet was destroyed after challenging British, French and Russian naval forces that were blockading Greek ports so as to assist the Greek insurrectionists. At the end of this battle, the parties assured each other that they wished peace to continue.

The intention to wage war need not necessarily lead to the application of all the laws of war. The parties can limit the application of the laws to particular matters and apply, either separately or in combination, the rules of armed combat, those governing economic warfare and those pertaining to the treatment of → enemy property or enemy subjects. These limitations can be expressly declared (→ Declaration) or implied from the parties' conduct before, during or after the commencement of hostilities. In the same way, it is possible to bring a state of war to an end in stages, as for example was the case at the end of World War II (→ Peace Settlements after World War II) and in some of the subsequent conflicts.

One variation of this state of war theory seeks to regard all intermediate stages between a comprehensive state of war based on the parties' intention and peace as a *tertium genus*, a *status mixtus* (Schwarzenberger, Jessup), thus departing from the principle laid down by Grotius, citing Cicero: "inter bellum et pacem nihil est medium". This *status mixtus* ranges from war in the sociological sense, but waged by the parties without the *animus belligerendi*, to *pax bellicosa* (a hostile peace). International law, however, contains no clear rules on the rights and duties of the parties in such a *status mixtus* or on the extent to which the law of peace is replaced by the laws of war. Given that the laws of war are by customary international law also applied to military actions where there is no legal state of war, there nevertheless remains the problem of uncertainty over which laws are supposed to apply to relations

between the parties in such a *status mixtus*. Certainty and clarity are essential if the laws of war are to discharge their regulatory, limiting and protective functions. For this reason, it therefore seems unhelpful to distingusih between war in a formal sense and war in a substantive sense (Kotzsch).

3. Compatibility of the Legal Recognition of a State of War with the General Prohibition of the Use of Force

While even under the Covenant of the League of Nations and the Kellogg-Briand Pact the continued existence of war as a state recognized by the law was a controversial issue, the prohibition of the use of force in Art. 2(4) of the UN Charter has led a number of writers (*inter alia* Wright, E. Lauterpacht) to deny unconditionally the existence of war as a concept of present-day international law. However, this view overlooks the fact that the UN Charter itself admits certain lawful forms of the use of force, namely legitimate self-defence and UN → sanctions under Chapter VII. It is not impossible for a conflict to assume the proportions of a war in these cases. Moreover, one must take into account that even since the UN Charter, war has remained a feature of international affairs and that justification on the ground of the self-defence proviso has been and is frequently advanced. Even if a war is illegal, the fundamental concerns of the laws of war remain as important as ever, namely, the limitation of hostilities, not merely through the humanitarian aspects of the laws of war (→ Humanitarian Law and Armed Conflict), but also through rules such as those governing methods and means of warfare (→ Warfare, Methods and Means), the limits of permissible economic warfare and the law of neutrality (→ Neutrality, Concept and General Rules). To make war a notion no longer known to international law would introduce a legal vacuum in an area of inter-State relations and might actually encourage aggression; this would not only be a retrograde step in the historical development of international law, but also a tragedy for the human race. This is true at least with respect to rules of humanitarian law; it may also in principle apply, for instance, to rules governing economic warfare. It must be emphasized that the recognition of war as a legal state implies no judgment on the legality of war. It does not justify the aggressor but does impose limits upon its actions in war. The consequences in international law of an illegal war remain unaffected by this recognition, as do the right of the UN to take sanctions and the liability of the aggressor.

4. Relationship to the Concept of Armed Conflict

It has already been pointed out that hostilities occurred in the 19th century which the parties concerned did not intend to amount to a state of war between them. The duty of States to refrain from war and indeed from every use of force, as laid down in the Covenant of the League of Nations, the Kellogg-Briand Pact and the UN Charter, has led to the waging of "wars in disguise", with the aim of evading this duty and escaping condemnation as an aggressor (e.g. the Manchurian conflict of 1931–1941, the Italo-Ethiopian war of 1935–1936). Because the parties do not express an intention to be at war, international law does not recognize the existence of a state of war between them.

There has, moreover, been an increase in the number of military conflicts which are not recognized as wars by international law because one or more of the parties are not subjects of international law, as for example in → civil wars and wars of national liberation conducted by → liberation movements. These conflicts also require limitations upon the naked use of force. Thus Arts. 2 and 3 of the Geneva Conventions of 1949 (→ Geneva Red Cross Conventions and Protocols) declared certain humanitarian rules within the laws of war to be applicable to armed conflicts which the parties concerned do not recognize as giving rise to a state of war between them, to unresisted occupations and to armed conflicts not of an international character. The 1977 Protocols additional to these Conventions widen the area of humanitarian protection and also extend several provisions of the laws of war to armed conflicts, which now expressly include the struggles of liberation movements exercising the right of self-determination of peoples. From this it may be deduced that armed conflict is not to be seen as a broad genus of which war has become merely a species, largely without independent significance. On the contrary, it is to

war in the legal sense that the laws of war apply in full as a matter of principle, whereas certain rules of the laws of war are now applied also to situations described as "armed conflicts". The two concepts thus cover different situations and accordingly, each has its own legal importance.

5. War as a State Recognized by the Law

When the laws of war replace the law of peace in accordance with the parties' intentions, changes occur in their mutual rights and duties, without thereby legalizing an illegal war. Thus, it is incorrect to assume that the existence of a state of war furnishes authority *ergo omnes* to use means involving force. The legality of the use of force is always to be determined in accordance with the principles governing the prohibition of the use of force in the UN Charter. The laws of war, however, when they displace the law of peace, place limits on all forms of warfare, and act as the last barrier in the way of unrestrained force, whether it be legal or illegal under the UN Charter. There is thus for war a separate system of limiting rules founded on mutual observance by the parties, breach of which leads to special sanctions, which are not identical with the sanctions against the illegal use of force.

In war, if and for as long as this is the intention of the parties, special rules apply which govern: the limits on intervention by military or economic means or by means of propaganda (→ War, Use of Propaganda in), the legal position of neutrals, the fate of contracts (→ War, Effect on Contracts), of treaties (→ War, Effect on Treaties) and of diplomatic relations between the parties (→ Diplomatic Relations, Establishment and Severance), the treatment of enemy subjects and enemy property, and the right of military occupation and State responsibility in war (→ Responsibility of States: General Principles).

C. Commencement of War

The commencement of war in the legal sense, which need not coincide with the actual commencement of hostilities, is the time when a legally recognized state of war comes into existence, that is to say, when the laws of war replace the law of peace in the relations between the parties. Clear declarations by the parties are the most distinct indication of the commencement of a war. In antiquity wars were frequently initiated by ritual ceremonies. In the Middle Ages a prior declaration of war was considered to be indispensable in order to distinguish war from perfidious attack (→ Perfidy), which was prohibited. Even at the beginning of the modern era, Grotius wrote that a declaration of war by means of an unequivocal expression of intention was required as one of the conditions of lawful war. However, after the 17th century, this rule ceased to be part of international law by desuetude (→ Customary International Law), and attack without prior warning became the rule rather than the exception. Taking note of the surprise Japanese attack on Port Arthur in 1905, the parties to Hague Convention III of 1907 (→ Hague Peace Conferences of 1899 and 1907) endeavoured to restrict the right to resort to war on the basis of a draft by the → Institut de Droit International, by making the right dependent on a prior delivery of a declaration of war or an → ultimatum with a specified time limit. While State practice in World War I observed this requirement, the prohibition of war in the Kellogg-Briand Pact in particular led again to "wars in disguise", which by their very nature were begun without a formal declaration of war. The Manchurian conflict, and the Sino-Japanese conflict which followed (from 1937), were treated as an "incident" lasting from 1931 until 1941, when China first declared war on Japan. Italy's Ethiopian expedition of 1935–1936 took place without a prior declaration of war, as did the German-Russian attack on Poland in 1939, the Japanese attack on Pearl Harbour in 1941 and the German attack on the Soviet Union in the same year. On the other hand, Great Britain and France declared war on the German Reich on September 3, 1939 after the invasion of Poland, and Germany and Italy declared war on the United States on December 11, 1941. Since World War II there has not been a single instance of a war which began following a declaration of war. In some cases States which were attacked have asserted subsequently that they were at war, as for example in the Suez conflict (→ Suez Canal) (1956), in the two Indo-Pakistani conflicts (1965 and 1971) and in the war between Iran and Iraq (since 1980). However, these were all declarations for internal consumption which did not meet the

requirements of international law for a valid declaration of war. In practice, the reasons for the increasing rarity in the use of declarations of war are military and political. The surprise effect of a sudden attack has always given the attacker an advantage. Modern weapons technology tends towards strategies which, without this element of surprise, would be much less effective. Moreover, there is probably also a tendency to avoid the sometimes complex requirements of national laws governing declarations of war. Finally, the prohibition of war and the use of force have had the effect that, in order to present their conduct in a better light, States no longer deliver formal declarations of war, but wage "wars in disguise" instead. It is noteworthy, however, that the signatories of Hague Convention III of 1907 are still bound by the duty to deliver a prior declaration of war. State practice does not reveal the existence of the necessary contrary *opinio juris* of all parties for the rule to be abrogated by desuetude. On the other hand, State practice also demonstrates that the duty to declare war has not become part of universal customary international law (→ Sources of International Law).

At all events, a legally recognized state of war comes into existence, even without a formal declaration of war, if the parties have given a clear indication in some other way that it is their intention to bring a state of war into being. This indication must be sufficiently unambiguous to enable an effective distinction to be drawn between war and measures short of war. The commencement of war accordingly requires either a declaration of war, a conditional ultimatum or the onset of actual hostilities with the intention, made plain to adversaries and neutrals, to enter into a state of war. This entry into war must be made known to neutral States, so that the rules governing the law of neutrality can be applied.

A declaration of war is made by means of a unilateral → notification to the other party. No particular form is required, but reasons must be given. The notification takes effect upon receipt. Thereupon a state of war comes into existence, without the need for subsequent military action, as was the case in the war between the Latin American States and the German Reich in World War II. Under Hague Convention III, the declaration must be delivered before the commencement of hostilities. Nevertheless a state of war also arises if the declaration of war is made at the same time as, or even following, the commencement of hostilities, the effect being in this case purely declaratory, as for example the Soviet Union's declaration of war on Finland, and the German declarations of war on Poland, the Netherlands, Belgium and the Soviet Union in World War II.

A conditional ultimatum calls upon the other party to bring about or remove a particular state of affairs within a period of time deemed sufficient for that purpose, and also informs the other party that a state of war will come into existence between them on the expiry of that period if the demands have not been met. An ultimatum of this kind was contained in the French and British declarations of war on Germany after her invasion of Poland (the declarations were made on September 1, 1939 and gave Germany until September 3, 1939 to comply).

Finally, the actual commencement of hostilities brings a state of war into existence if accompanied by an unequivocal expression of the parties' intention that this should occur. This intention can be found in internal declarations, such as radio broadcasts and press conferences, or implied from the extent of the hostilities, where, for example, the whole territory of the enemy comes under attack.

Whatever form the expression of intention takes, the fact that one of the parties intends to bring a state of war into existence is always sufficient to achieve that result. Rejection of this position by the other party can therefore prevent neither a state of war from arising nor the substitution of the laws of war for the law of peace in the legal relations between the parties. Thus Egypt, in the Suez conflict of 1956, and Pakistan, in the Indo-Pakistani conflict of 1965, both stated, against the objections of the other parties concerned, that they considered themselves to be at war. Even if the other party offers no resistance, an appropriate declaration of intention by an aggressor brings about a state of war, since the laws of war also contain rules which apply where no fighting takes place (for example, the law governing belligerent occupation). This view is, however, not accepted by all writers, and in particular is rejected by those who deny the pos-

sibility of a partial application of the laws of war.

When fighting is taking place on a scale which amounts to war in the sociological sense, yet all parties agree that legally no state of war exists, the laws of war are not applicable in their entirety. The only rules that apply are those which apply generally in any armed conflict. Finally, the parties agree that legally no state of war exists, mencement or during the course of the war to limit the application of the laws of war. For example, they can exclude the application of the rules governing economic warfare. Where the humanitarian provisions of the laws of war are concerned, however, an agreement of this kind would not only be improbable as a matter of fact, but would also be invalid as a breach of the → minimum standards of humanity imposed by law.

Concerning the question of which organs of State are competent to bring about a state of war, international law refers to the constitutional provisions of the States concerned, subject to the proviso that in any event international law regards those organs of State which in principle have the authority to represent the State as also having the right to take the appropriate actions to enter into a state of war (→ Representatives of States in International Relations). States alone can start a war in the legal sense, whereas non-State belligerents may enter a war only through recognition by States.

D. Termination of War

On the termination of war, the law of peace replaces the laws of war which until then have been applicable between the parties. Historically, the → suspension of hostilities was generally followed by a formal → armistice and the armistice by a → peace treaty which then made possible a rapid total conversion of all legal relations through a resolution of the problems created by the war. Classical international law recognized the termination of war not only as a result of peace treaties, but also through the final cessation of all hostilities and through the extinction of the other party (→ Debellatio).

Peace treaties designed to produce a final conversion of all legal relations to the law of peace have become less frequent today, as has the practice of concluding preliminary articles of peace which end a state of war but deal only partially and in general terms with the problems of the conditions of peace. The nomenclature of the peace and friendship treaties of recent times (for example, between India and the Soviet Union in 1971 and between China and Japan in 1978) is misleading, since they were not intended to end a state of war but to promote peaceful cooperation between the parties. While World War I was for the most part brought to an end by treaties such as the → Versailles Peace Treaty of 1919 and the other treaties signed near Paris in 1919–1920 (→ Peace Treaties after World War I) – the exception being the unilateral declaration by the United States terminating the war with Germany in 1921 (→ Germany-United States Peace Treaty (1921)) – such treaties were concluded only in a few cases after World War II (→ Peace Treaties of 1947; → Peace Treaty with Japan (1951)). Japan and the Soviet Union concluded preliminary articles of peace in 1956, re-establishing peaceful relations, but they reserved part of the process of normalization for a later peace treaty. More recently, the Paris Peace Treaty of 1973 ended the Vietnam war, though admittedly the peace lasted for only a short time. In addition to the States of North Vietnam, South Vietnam and the United States, the Vietcong also participated in the peace → negotiations as a recognized belligerent. The Washington Peace Treaty of 1979, based on the principles agreed upon in the Camp David negotiations (→ Israel and the Arab States), ended the war between Israel and Egypt.

The cessation of all hostilities, for example by an armistice agreement, usually only ends the fighting. It may, however, end the state of war if the parties clearly demonstrate their intention that it should. For this purpose it is sufficient that one party declares its intention to end the war and the other party does not object. History records several precedents for this from earlier times (e.g. the wars of Sweden against Poland in 1716, France against Great Britain in 1720, Persia against Russia in 1801, France against Mexico in 1867, and Great Britain against Chile in 1867). The intention to end the state of war can also be shown by internal national measures. But if the other party objects, the state of war continues to exist. People's Commissar Leon Trotsky broke off peace negotiations between Germany and the

Russian Soviet Federation at Brest-Litovsk on February 10, 1918 and declared the war to be at an end without having accepted the German conditions. The Central Powers answered this move by resuming hostilities, which forced Russia to accept the Peace of Brest-Litovsk on March 3, 1918, bringing the war with Russia finally to an end (→ Brest-Litovsk, Peace of (1918)). It is true that Germany had to renounce all rights arising from this treaty in the Treaty of Versailles, but the war remained at an end (see also → Rapallo Treaty (1922)).

Extinction of the other party (→ States, Extinction) is a fact which logically brings a state of war to an end, a consequence of the disappearance of one of the subjects of the bilateral legal relationship involved in a war. This does not occur merely because the territory of the enemy has been conquered (→ Conquest) and the enemy forces have surrendered unconditionally (→ Surrender), as was the case with the German Reich after World War II. Only when the conquest has brought the enemy's functions of State to a complete standstill and wiped out its character as a State is it extinguished as a party to the war. *Debellatio* puts an end to all fighting since, according to classical international law, it places the defeated party at the absolute disposal of the victor and the functions of State are no longer exercised by the defeated party. However, *debellatio* does not in itself bring about the extinction of the defeated State, since the victor can decide to reorganize its government. Only when the victor annexes (→ Annexation) the defeated State is the latter extinguished. In another view, annexation is one of the essential characteristics of *debellatio*, along with subjugation. At present, in the light of the prohibition of the use of force in Art. 2(4) of the UN Charter, annexation must be considered contrary to international law.

The history of the termination of World War II and also of more recent conflicts demonstrates that the concept of a state of war applying to certain matters only (such as economic warfare, treatment of enemy subjects and enemy property) is particularly important in the process of the gradual reduction of a war to a purely technical state. Fighting was ended in World War II, finally and without time limits, by unconditional capitulation or armistice. This first stage in the return to peace made a resumption of fighting contrary to the laws of war. Nevertheless, the *animus belligerendi* continued to subsist in the victorious powers. In the absence of fighting itself, this was reflected particularly in the continuing occupation of Germany (→ Germany, Occupation after World War II), Austria and Japan, but also in the treatment of enemy property and subjects. Inasmuch as no peace treaties were concluded, the state of war was only ended in stages (→ Peace Settlements after World War II). The formal end of the war with Germany was first declared by Brazil (1950), and then by the Western Allies (1951), and finally by all other States apart from those of the Eastern bloc. In some cases the war was ended by purely internal action, in others by notification, and in the case of Italy and Nicaragua by an agreement to enter into diplomatic relations. The settlement in a final peace treaty of outstanding questions affecting Germany as a whole has yet to take place (→ Germany, Legal Status after World War II).

In the Palestinian conflict of 1949, the Korean War of 1953 and the Yom Kippur War of 1973, armistice agreements were expressly designated as steps towards the re-establishment of peace, later to be complemented by a peace treaty. Nevertheless, the only immediate effect was the cessation of fighting. Egypt continued to apply her → prize law against Israel after 1949, for example. The state of war between Egypt and Israel was only brought to an end by the peace treaty of 1979. A state of war continues to exist between Israel and the other belligerents in the Middle East.

Incomplete peace settlements brought the two Indo-Pakistani conflicts of 1965 and 1971 to an end. The Declaration of Tashkent (1966) established the two countries' return to peaceful relations without attempting a final settlement of the consequences of the war. As under the Protocol of 1974 on progress towards normalization after the war of 1971, the final settlement was left as a subject for subsequent negotiations. There are also examples of a state of war being brought to an end in stages. This form of termination of war, which has been the general rule in the conflicts following World War II, demonstrates the extent to which a state of war in the legal sense is determined by the intentions of the parties. Of course, a war will very rarely commence

without fighting. In contrast, the end of a war will often be brought about by a gradual shrinkage of the state of war. The disadvantage of this procedure is that the extent to which the laws of war apply in certain situations can no longer be determined without difficulty. On the other hand, under the laws of war it follows that no further recourse may be had to those aspects in the state of war which the parties have agreed shall no longer apply at each relevant stage, quite apart from the unlawfulness in principle of the use of force under the UN Charter.

F. GROB, The Relativity of War and Peace (1949).
J.L. KUNZ, Bellum Justum and Bellum Legale, AJIL, Vol. 45 (1951) 528–534.
U. SCHEUNER, Anmerkungen zur Frage der Beendigung des Kriegszustandes, Archiv des Öffentlichen Rechts, Vol. 77 (1951/1952) 318–322.
D. OTTENSOOSER, Termination of War by Unilateral Declaration, BYIL, Vol. 29 (1952) 435–442.
G. BALLADORE-PALLIERI, Diritto Bellico (2nd ed. 1954).
I.E. CASTRÉN, The Present Law of War and Neutrality (1954).
P. JESSUP, Should International Law Recognize an Intermediate Status between Peace and War?, AJIL, Vol. 48 (1954) 98–103.
A. GERVAIS, Les armistices palestiniens, coréen et indochinois et leurs enseignements, AFDI, Vol. 2 (1956) 97–121.
L. KOTZSCH, The Concept of War in Contemporary History and International Law (1956).
L.C. GREEN, Armed Conflict, War and Self-Defence, AVR, Vol. 6 (1956/1957) 387–438.
M. GREENSPAN, The Modern Law of Land Warfare (1959).
J. STONE, Legal Controls of International Conflict (1959).
R.R. BAXTER, The Definition of War, RevEgypt, Vol. 16 (1960) 1–14.
J.L. KUNZ, Kriegsbegriff, in: Strupp-Schlochauer (ed.), Wörterbuch des Völkerrechts, Vol. 2 (1961) 329–332.
M. McDOUGAL and F. FELICIANO, Law and Minimum World Public Order (1961).
H. MOSLER, Kriegsbeginn, in: Strupp-Schlochauer, op. cit., 326–329.
H. MOSLER, Kriegsende, ibid., 333–337.
C. SCHWARZENBERGER, The Frontiers of International Law (1962) 234–255.
H. MOSLER and K. DOEHRING, Die Beendigung des Kriegszustandes mit Deutschland nach dem zweiten Weltkrieg (1963).
L. DELBEZ, La fin de la guerre et le droit des gens, Revue politique des idées et des institutions, Vol. 53 (1964) 219–228.
Q. WRIGHT, The Escalation of International Conflict, Journal of Conflict Resolution (1965) 434–442.
H. KELSEN, Principles of International Law (2nd ed. by R. Tucker, 1967) 22–86.
R.R. BAXTER, The Legal Consequences of the Unlawful Use of Force under the Charter, ProcASIL, Vol. 62 (1968) 68–75.
E. LAUTERPACHT, The Legal Irrelevance of the State of War, ibid., 58–68.
B. SMYRNIADIS, La déclaration de guerre au cours de l'histoire, RevHellén, Vol. 21 (1968) 20–32.
F. BERBER, Lehrbuch des Völkerrechts, Vol. 2, Kriegsrecht (2nd ed. 1969).
P. BRETTON, Le droit de la guerre (1970).
J.D. MORLEY, Approaches to the Law of Armed Conflict, CanYIL, Vol. 9 (1971) 269–275.
P. DE VISSCHER, Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies, AnnIDI, Vol. 54 I (1971) 1–159.
R. BINDSCHEDLER, Frieden, Krieg und Neutralität im Völkerrecht der Gegenwart, in: Multitudo legum – Ius Unum, Festschrift für Wilhelm Wengler, Vol. 1 (1973) 27–49.
R. JAGANMOHAN RAO, When Does War Begin?, Indian JIL, Vol. 12 (1973) 368–380.
U. SCHEUNER, Krieg und Bürgerkrieg in der Staatenwelt der Gegenwart, in: Festschrift für Friedrich Berber (1973) 467–487.
R.I. MILLER, The Law of War (1975).
R. OTTMÜLLER, Die Anwendung von Seekriegsrecht in militärischen Konflikten seit 1945 (1978).
Y. TSUR, The State of Non-Belligerency, End of the State of War and a Peace Treaty, International Problems, Vol. 17 (1978) 80–94.
M.F. FURET, J.C. MARTINEZ and H. DORANDEAU, La guerre et le droit (1979).
D. SCHINDLER, State of War, Belligerency, Armed Conflict, in A. Cassese (ed.), The Humanitarian Law of Armed Conflict (1979) 3–20.

WERNER MENG

WAR AND ENVIRONMENT

1. The Problem

Modern warfare techniques may have a number of effects on the environment. Two different ways of producing such effects should be distinguished. Firstly, there are the collateral effects which the use of modern weapons (conventional or non-conventional) may have on the environment. Secondly, natural phenomena may be deliberately manipulated for hostile purposes.

As far as the first category is concerned, massive and repeated area → bombardment of areas of vegetation possessing a delicate ecological balance may permanently destroy vegetation and alter the quality of the soil, which may become

unfertile for many years. The use of nuclear weapons entails not only the destruction of human life, but also of animal and plant life over huge areas (→ Nuclear Warfare and Weapons). Thus, large ecosystems are destroyed. The same holds true for the massive use of highly poisonous chemical weapons or bacteriological weapons (→ Biological Warfare; → Chemical Warfare).

In the second category, the examples under discussion include the artificial modification of climate, the alteration of precipitation through methods such as cloud seeding, the artificial causation of earthquakes and tidal waves, the deviation of tornadic storms, and the modification of lightning. The use of such techniques as an efficient and practicable means of causing harm to the enemy is debatable. Attempts made during the Indochina War to modify the régime of precipitation were apparently not very successful (→ Vietnam). Some methods of warfare are not easy to classify, because the modification of the environment is a direct result of the methods or means employed, but the primary purpose of them is a "conventional" one. Chemical defoliation and vegetation clearance by so-called Rome ploughs, undertaken to deprive the enemy of natural cover during the Indochina War, have had devastating ecological effects over large areas. An older practice, used in particular during World War II, is to cause flooding by destroying dykes and dams. This not only impedes enemy movements, but in some cases also has long-lasting effects on the use of lands.

2. Legal Regulation

The traditional restraint on these methods of warfare provided by the laws of war is the principle of immunity of the civilian population. According to this principle, not only are attacks directed against the civilian population (→ Civilian Population, Protection), and → civilian objects prohibited, but also attacks against → military objectives which may be expected to cause incidental damage or casualties among the civilian population or of civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated (→ Proportionality). These rules have been included in the 1977 Protocol I additional to the Geneva Conventions of 1949 (→ Geneva Red Cross Conventions and Protocols), but they also constitute rules of → customary international law.

Because damages to the environment affect the civilian population, they are, under certain circumstances, prohibited. A certain piece of land may well be a military objective, for instance, because its neutralization offers a definite military advantage. It may therefore in principle be bombarded. But if the ecological consequences of such bombardment would deprive the civilian population of their basis of livelihood for a number of years, it may well be that this damage is excessive in relation to the military advantage gained by the neutralization of the area in question, making the bombardment therefore unlawful. The same line of reasoning could be applied to defoliation actions or deliberate flooding through the destruction of dykes.

As the principle of proportionality requires a difficult balancing of advantages and losses, more specific rules restraining the destruction of the environment are desirable. Such rules have been developed in recent years, and some are of an older origin. They are rules outlawing specific weapons, or rules outlawing certain methods and means of warfare (→ Weapons, Prohibited; → Warfare, Methods and Means). As to specific weapons, the Geneva Protocol of 1925 on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of all analogous liquids, materials or devices, is the most important document. The Protocol prohibits chemical and bacteriological weapons in general, which must be interpreted to include agents causing damage to plants. Thus defoliation procedures are forbidden under the Protocol.

Concerning certain methods and means of warfare, the most specific international treaty is the Convention on the Prohibition of Military or Any Other Hostile Use of Environment Modification Techniques of May 18, 1977 (ENMOD; UN GA Res. 31/72). It only prohibits such actions damaging the environment which involve, in the words of the Convention, "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space" (Art. 2). This does not include the collateral environmental effects of weapons. It thus

covers only methods belonging to the second category mentioned in the introduction.

According to an interpretative understanding reached by the Conference of the Committee on Disarmament (CCD), the body which negotiated the Convention, the phenomena that could be caused by the use of environmental modification techniques include, but are not limited to, earthquakes, tsunamis (seawaves caused by disturbance of the ocean floor or by seismic movement), an upset in the ecological balance of a region, changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms), changes in climate patterns, changes in ocean currents, changes in the state of the ozone layer, and changes in the state of the ionosphere. These environment modification techniques are, however, prohibited only if the effects are "widespread", "long-lasting" or "severe". These terms, which lack precision, are explained by another interpretative understanding (provided by the consultative committee of experts which advised the CCD) to mean: for "widespread", encompassing an area on the scale of several hundred square kilometres; for "long-lasting", lasting for a period of months, or approximately a season; for "severe", involving serious or significant distruption or harm to human life, natural and economic resources, or other assets.

For the implementation of the Convention and action in case of alleged violations, the Convention provides for a complaint procedure with the → United Nations Security Council and for cooperation and consultation, including fact-finding, through appropriate international procedures, including the services of appropriate international organizations and a consultative committee of experts.

The incidental environmental effects of attacks are, on the other hand, covered by Art. 35(3) and Art. 55 of Protocol I additional to the Geneva Conventions. The first provision says: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term *and* severe damage to the natural environment" (emphasis added). This principle is developed by Art. 55(1):

> "Care shall be taken in warfare to protect the natural environment against widespread, long-term *and* severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment *and* thereby to prejudice the health or survival of the population." (Emphasis added.)

Art. 55(2) contains a prohibition of → reprisals. These provisions constitute a less stringent restraint than the ENMOD Convention because the three qualifications of the effects of such warfare are used cumulatively. In addition, there have been declarations to the effect that the meaning of the three terms in Protocol I are not necessarily the same as those to be found in the Convention, leaving open the possibility of a still more restrictive interpretation. According to Art. 55, an attack is clearly unlawful only if it not only causes damage to the environment, but if it also thereby prejudices the health or survival of the population. It must also be stressed that a mere inadvertant collateral environmental effect of an attack does not make an attack unlawful. The effect must have been intended or at least foreseeable.

In addition, Protocol I contains two provisions concerning specific aspects which are important for the preservation of the environment. According to Art. 54(2), "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock," etc. This prohibition applies, however, only where the purpose of the destruction is to deprive the civilian population of the means of sustenance (→ Siege). Thus, the destruction of fields or forests in order to deprive the enemy of a cover could be permissible, subject to the limitations already discussed above.

According to Art. 56(1) of Protocol I,

> "Works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."

This provision clearly outlaws the practice mentioned above of using floods as a means of impeding the enemy's advance, and it takes into

account the threat to human life and the environment which stems from nuclear power plants.

M.A. MATTES and M. BOTHE, Draft Convention on Environmental Warfare, Environmental Policy and Law, Vol. 1 (1975) 136–137.

G. FISCHER, La Convention sur l'interdiction d'utiliser des techniques de modification de l'environnement à des fins hostiles, AFDI, Vol. 23 (1977) 820–836.

Stockholm International Peace Research Institute, Weapons of Mass Destruction and the Environment (1977).

Stockholm International Peace Research Institute, Warfare in a Fragile World, Military Impact on the Human Environment (1980).

W.A. SOLF, in: M. Bothe, K.J. Partsch and W.A. Solf, New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (1982), esp. pp. 192–198, 343–348.

MICHAEL BOTHE

WAR CORRESPONDENT

1. Notion

During → war it is desirable that the general public be kept informed of the operations and the progress of the → armed conflict, subject to the necessity of preserving military secrets. It is an important function of the mass media to collect, evaluate and disseminate all available news from the theatre of war (→ War, Theatre of). For that purpose it is necessary to send journalists to the areas where military actions take place in order to follow as closely as possible the course of events.

War correspondents are journalists who in armed conflicts perform a special role in reporting and commenting on the events of the war taking place in particular on the battlefield. For the accomplishment of their difficult task they need the authorization and the protection of the armed forces which they accompany without, however, their actually being members thereof.

2. Legal Rules

Ever since the codification of the law of war made at the → Hague Peace Conferences of 1899 and 1907, war correspondents have enjoyed special protection. According to Art. 13 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of the same name, newspaper correspondents and reporters following an army without directly belonging to it,

> "who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying".

Thus, war correspondents, who are by no means regarded as → combatants and who are not even members of any army, are nevertheless entitled to be treated as → prisoners of war if they fall into the power of the enemy. Prisoner-of-war status confers protection upon war correspondents, so that they may not be treated less favourably than according to this minimum standard, and in order to exclude the fate that might otherwise await them if they were capable of being regarded as, for instance, spies (→ Espionage).

The provision in Art. 13 of the Hague Regulations of 1907 was reaffirmed in Art. 81 of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War. The → Geneva Red Cross Conventions on the Protection of War Victims of 1949 included a revised and improved wording of Art. 81 and enlarged their protection by extending to them the protections applicable to the → wounded, sick and shipwrecked (→ Humanitarian Law and Armed Conflict).

According to Art. 4A(4) of Convention III of 1949 relative to the Treatment of Prisoners of War, war correspondents who accompany armed forces without actually being members thereof, and who have fallen into the power of the enemy, are prisoners of war "provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card. . . ." The model of such an identity card is to be found in Annex IV(A) of the Convention. The improvement lies in the fact that the authorization to be a war correspondent has become the constituent condition for prisoner-of-war status rather than the possession of a document to that effect. The identity card has no other function but that of proof.

In addition to the protection under Convention

III, war correspondents also enjoy the protection of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (by Art. 3(4)) and of Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (by Art. 13(4)) when they are wounded, sick or shipwrecked.

3. *War Correspondents and "Journalists Engaged in Dangerous Professional Missions"*

War correspondents are to be distinguished from another category of journalists: those who, although engaged in equally dangerous professional missions in areas of armed conflict, do not fall under the notion of "war correspondents" because they are not "accompanying" armed forces. These are journalists who are neither accredited to any such forces nor authorized by them to be in areas of armed conflict.

Under Art. 79 of the 1977 Protocol additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), "journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians. . . ." Paragraph 2 of the same article expressly states that they shall be protected as civilians "without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Art. 4A(4) of the Third Convention".

Such journalists may obtain an identity card which is issued either by their own national government or the government of their residence or of the territory in which the news medium employing them is located.

4. *Evaluation*

The reason for the special protection of war correspondents lies in their close attachment to the armed forces, which may have its advantages (easier access to information) as well as its disadvantages (the possibility of falling into the hands of the enemy). Taking into account the modern methods of warfare and the resulting altered working conditions of journalists, the distinction between war correspondents and other journalists may from a practical point of view lose its significance. However, in terms of legal relevance the distinction is still important.

ERICH KUSSBACH

WAR CRIMES

1. *Concept*

War crimes include all grave violations of the laws of war (→ War, Laws of; → Warfare, Methods and Means) which are committed by the agents of a belligerent State (→ War) against the citizens or property of the enemy (→ Enemies and Enemy Subjects; → Enemy Property), of a conquered nation (→ Conquest; → Debellatio), or of forcibly occupied neutral territory (→ Occupation, Belligerent; → Neutrality, Concept and General Rules). The concept of war crimes is chiefly concerned with military actions in violation of international law and individual acts which occur in their course, such as killing → prisoners of war, stripping the bodies of the dead (→ Pillage), and the arbitrary destruction of private property; the perpetrators are usually → combatants. The concept of war crimes traditionally also includes military actions undertaken by civilians, soldiers in civilian dress, or soldiers wearing the uniform of the enemy belligerent (→ Flags and Uniforms in War). The concept was broadened in the course of the war crimes trials following World War II (→ Nuremberg Trials) to include the arrest and transportation of civilians to labour camps on political or other grounds (→ Forced Labour), the taking of → hostages, the employment of prisoners of war in violation of international law in dangerous areas (→ War, Theatre of); the economic exploitation of occupied territories to enhance the military advantage of the occupying forces; the impressment of foreign workers (including those employed outside the defence industries); participation in the promulgation of laws and regulations whose content violates international law; the pronouncement of grossly unjust criminal judgments; and the performance of medical experiments on unwilling persons (see also → Crimes against Humanity). According to this interpretation, civil servants and private parties can also commit war crimes.

Depending upon the gravity of the offence and the degree of the perpetrator's guilt, war crimes

may be punished with the most serious penalties, including death. The State which the perpetrator served (in the broadest sense) has the primary right and obligation to issue punishment since, even in war, enemy aliens and property and occupied neutral territory must enjoy the minimum protection recognized by international law (→ Minimum Standard). The failure to provide this protection by allowing war crimes to go unpunished is a further violation of international law by the offending State. The State whose interests are injured and even its allies (→ Alliance) also have the right to punish those guilty of war crimes. This criminal punishment may, however, only take place after a fair trial, with the accused being allowed to present his defence. On the other hand, no criminal responsibility attaches to acts which are within the recognized bounds of the laws of war; the mere fact that one is an enemy alien or has engaged in hostilities as a soldier is not punishable. This applies even where one of the belligerent States is engaged in a war in violation of international law (→ Aggression; see also → Crimes against Peace). These principles are now equally applicable to → armed conflicts without an international character within the borders of a State (→ Civil War; → Wars of National Liberation), as a consequence of the identically worded Arts. 3 of the four Geneva Conventions relating to the Protection of the Victims of War of August 12, 1949 (→ Geneva Red Cross Conventions and Protocols).

2. Sources of Law

The underlying principle that criminal responsibility attaches to war crimes is supported in recognized → sources of international law as well as in municipal law. The war crimes convictions following World War II served only to expand the list of forbidden acts. The forging of new law is praiseworthy, insofar as it is a reaction to developments in the technique and practice of armed conflicts; the conceptual boundaries to war crimes must adapt to these changes. The punishment of war crimes by the injured State according to the "customs and usages of war" rested originally on → customary international law, notwithstanding an apparent source of positive law in the → amnesty clauses found in → peace treaties prior to World War I. The → Hague Peace Conferences of 1899 and 1907 neither clarified nor limited the basic principle that criminal responsibility attaches to war crimes. Its continued applicability is inherent in Arts. 41 and 56, para. 2 of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Convention II of 1899 and Convention IV of 1907 (→ Land Warfare). Arts. 227 to 230 of the → Versailles Peace Treaty of 1919 imposed criminal responsibility on individual persons and provided that while the accused were to be delivered to the Allies by the German Reich, their judgment should nonetheless be based on pre-existent municipal law instead of *ad hoc* enacted legal provisions. In the end, however, the trials took place before the Reichsgericht on the basis of the German Law of December 18, 1919, after the Allies declined to exercise their → extradition claim in a → note of February 16, 1920.

Following World War II, the legal sources for the judgment of war crimes differed according to the court and the nationality of the accused. The Germans accused as the major war criminals in the Nuremberg Trials were judged by the International Military Tribunal according to the London Agreement of August 8, 1945 between France, Great Britain, the Soviet Union and the United States. The Agreement included the Tribunal's Charter as well as the applicable criminal provisions. The courts of the four occupying powers in Germany (→ Military Government; → Germany, Occupation after World War II) applied Allied Control Council Law No. 10 of December 20, 1945, which was in content comparable to the Nuremberg Charter. The World War II Japanese leadership was tried before the Tokyo International Military Tribunal, which was created by order of the Supreme Allied Commander in the Far Eastern Theater, General MacArthur, on August 1, 1946 (→ Tokyo Trial). The Charter of this Court also included the criminal law to be applied. The remaining trials of war criminals abroad took place on the basis of municipal law, usually before extraordinary courts applying special statutes (→ Rauter Case). Regrettable defects in the interpretation of the law are evident in these cases. It is nonetheless clear that countless war crimes of the gravest nature took place during World War II and that the judgments were justified in this sense.

The numerous subsequent attempts to preserve or secure rules for the punishment of war crimes in positive international law have met with only partial success. To this date, the General Assembly of the United Nations has devoted only cursory attention to the Nuremberg principles and to the Draft Code of Offences against the Peace and Security of Mankind, which was elaborated in 1950 and 1954 by the → International Law Commission. The reopening of the discussion surrounding the Draft Code following the adoption of the definition of aggression in General Assembly Resolution 3314 (XXIX) of December 14, 1974 does not alter this conclusion.

The intention of the → International Committee of the Red Cross to sponsor a model law for the punishment of war crimes as an example for national legislation is still unrealized. On the positive side, the four Geneva Conventions of August 12, 1949 specify under the title "grave breaches" those acts and omissions which signatory States are to punish as war crimes. Even if these Conventions do not define the elements of a crime in the sense of a continental European codification and instead only impose on signatory States the obligation to enact and enforce appropriate criminal laws to punish "grave breaches", their description is much more exact than that of the London Charter of 1945. The Conventions recognize as war crimes *inter alia*: wilful killing; → torture or inhuman treatment (including biological experiments); intentional infliction of great suffering or serious injury to bodily integrity or health; extensive destruction and appropriation of property, when it is not justified by → military necessity and is carried out unlawfully and wantonly; compelling a prisoner of war to serve in the forces of the hostile power; wilfully depriving a prisoner of war of the right to a fair and regular trial according to the standards set forth in the Conventions; illegal deportation or transport and illegal imprisonment and hostage-taking (I: Art. 50; II: Art. 51; III: Art. 130; IV: Art. 147).

The Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977, specifies other "grave breaches" which constitute war crimes. According to Art. 11(4), certain actions or omissions which seriously endanger the physical or mental health or integrity of protected persons are punishable as "grave breaches". Art. 85(3) establishes another category of grave breaches, chiefly military attacks on the civilian population or targets (→ Civilian Population, Protection), the injury of persons *hors de combat*, and the misuse of the → red cross or similar symbols (→ Emblems, Internationally Protected). Finally, Art. 85(5) specifies that the displacement of populations (→ Population, Expulsion and Transfer), unjustified delay in → repatriation of prisoners of war and civilians, → apartheid practices and similar inhuman or degrading actions, attacks on certain cultural monuments (→ Cultural Property, Protection in Armed Conflict) as well as the refusal of a fair and regular trial to protected persons are also grave breaches. Many States, such as the Netherlands, Sweden, and Switzerland, have incorporated the crimes specified in the four Geneva Conventions in their criminal law (→ International Law and Municipal Law), while others, such as the Federal Republic of Germany, have decided that their pre-existent criminal law is sufficient.

3. The Punishment of War Crimes

Two possibilities exist for the punishment of war crimes; their prosecution may be national or international. The Geneva Conventions of 1949 adopted the practical course of implementing international law through municipal law (→ International Law in Municipal Law: Treaties); the responsibility for creating law sanctioning those violations characterized as grave breaches rests with the individual signatory States. This permits the prosecution in each party State of those violations whose criminal nature is universally acknowledged. Nonetheless, the ancient principle of the direct applicability of international law to punish war crimes remains unaltered (→ International Crimes; → International Criminal Court). Art. 99, para. 1 of Geneva Convention III relating to the Treatment of Prisoners of War expressly recognizes that a judgment can be based on international law's criminal prohibitions. The same is true of Art. 7, para. 1 of the → European Convention on Human Rights (1950). Within the Convention's bounds, a State without sufficient criminal provisions in its municipal law could

empower its courts to apply international law directly in cases of grave violations, at least where a country's constitution does not condition punishment on the pre-existence of a written norm in municipal law (such a written norm is necessary in most countries, e.g. Art. 103, para. 2 of the Basic Law of the Federal Republic of Germany). Disregarding this legal obstacle, it is clear that, due to the minimal definition of the elements of an offence as well as the total lack of provisions specifying suitable penalties, international law provides an incomplete basis for the criminal law treatment of war crimes. A modern, well-considered national criminal law is more effective and provides better protection against arbitrariness and mistakes.

According to the Geneva Conventions of 1949, signatory States are not only empowered to punish war crimes, but are also obliged to do so, unless the accused is extradited to another signatory State (*aut dedere aut punire*). The duty to punish attaches not only to the States to which the accused owes his allegiance or to the injured State, but to all signatory States; this duty even extends to neutrals in an armed conflict, and it exists without regard to the → nationality of the perpetrator or victim or to the place where the crime took place. Hence the Geneva Conventions provide universal jurisdiction for the punishment of war crimes coupled with a duty to prosecute, since the goal is the protection of common and universal interests (→ Jurisdiction of States).

The judgment of criminal acts committed under orders presents one of the most disputed problems in criminal doctrine concerning war crimes. The Geneva Conventions make clear that the superior who issues the order is criminally responsible. Doubts exist, however, regarding the responsibility of the subordinate, which are not dealt with in the Geneva Conventions. The London Charter of the Nuremberg International Military Tribunal sought to limit the legal significance of a superior order to the mitigation of punishment for an illegal act, instead of recognizing it as a ground for completely excluding responsibility of the subordinate. The Nuremberg judgments were more lenient on this point, through the acceptance of the defence of necessity. Thus, a soldier may normally assume without further consideration that his superior's orders will be legally correct. The decision to disobey an order is difficult in the face of the subordinate's customary fidelity, the habit of obedience, and the unconditional nature of military discipline. Additionally, all governmental acts of a duly constituted authority are presumed to be correct. It is thus decisive for a finding of guilt whether the subordinate recognized the criminal character of the order or whether this criminal character should have been so obvious to him in the light of his knowledge of the circumstances that his ignorance was inexcusable. Even in cases of ignorance which do not excuse criminal liability, however, the fact that the accused acted under orders must be taken into account as a mitigating circumstance in imposing sentence.

The criminal responsibility of a superior for the war crimes of troops under his command is clear if he orders the said actions. Moreover, the intentional failure to restrain troops from the commission of war crimes should be seen as a determination of the commanding officer's guilt under the principles governing an omission as a part of the *actus reus*. The duty to prevent unlawful actions is inherent in the role of the commander as the representative of a belligerent; he must maintain law and order among the troops under his command and must take decisive steps to suppress illegal acts. This has now been formally recognized in Art. 86(2) and Art. 87 of Protocol I.

On the whole, the most important and lasting criminal law effects of the London Charter and the Nuremberg judgments lie in the general recognition of criminal responsibility for serious violations of the laws of war and in the duty of States to prosecute or extradite accused persons without regard to the location of the war crime, the perpetrator's nationality, or the State's own neutrality in a given conflict. Nevertheless, the general recognition that criminal liability attaches to war crimes has had little practical effect on war's humanization. In numerous wars since 1945, war crimes of the gravest sort have taken place; convictions of the guilty before the eyes of the world, however, have been extremely rare. The conviction of First Lieutenant William L. Calley for the murder, in March 1968, of Vietnamese civilians in My Lai during the → Vietnam war and his sentence of life imprisonment were re-

versed on procedural error, and the accused remained unpunished as a result.

United Nations War Crimes Commission, Law Reports of Trials of War Criminals, 15 vols. (1947–1949).
Trial of the Major War Criminals before the International Military Tribunal Nuremberg, 42 vols. (1947).
R.J. PRITCHARD and S.M. ZAIDE (eds.), The Tokyo War Crimes Trial, 22 vols. (1981).
H. VON MANGOLDT, Das Kriegsverbrechen und seine Verfolgung in Vergangenheit und Gegenwart, Jahrbuch für internationales und ausländisches öffentliches Recht, Vol. 1 (1948) 283–334.
K. HEINZE and K. SCHILLING, Die Rechtsprechung der Nürnberger Militärtribunale (1952).
H.-H. JESCHECK, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht (1952).
H. STREBEL, Die strafrechtliche Sicherung humanitärer Abkommen, ZaöRV, Vol. 15 (1953–1954) 31–75.
J.P. MAUNOIR, La répression des crimes de guerre devant les tribunaux français et alliés (1956).
H.-H. JESCHECK, Die Entwicklung des Völkerstrafrechts nach Nürnberg, Schweizer Zeitschrift für Strafrecht, Vol. 72 (1957) 217–248.
R.K. WOETZEL, The Nuremberg Trials in International Law, with a postlude on the Eichmann case (1962).
H.-H. JESCHECK, Etat actuel et perspectives d'avenir des projets dans le domaine du droit international pénal, Revue internationale de droit pénal, Vol. 35 (1964) 83–106.
T. VOGLER, Zum Einwand des Handelns auf Befehl im Völkerstrafrecht, Revue de droit pénal militaire, Vol. 7 (1968) 111–132.
International Committee of the Red Cross, Report of the Geneva Conventions, Measures Taken to Repress Violations (1971).
M.C. BASSIOUNI and V.P. NANDA, A Treatise on International Criminal Law, 2 vols. (1973).
E. DAVIDSON, The Nuremberg Fallacy, Wars and War Crimes since World War II (1973).
Y. DINSTEIN, International Criminal Law, Israel Yearbook of Human Rights, Vol. 5 (1975) 55–87.
J. POKŠTEFL and M. BOTHE, Bericht über Entwicklung und Tendenzen des Kriegsrechts seit den Nachkriegskodifikationen, ZaöRV, Vol. 35 (1975) 574–640.
G.I.A.D. DRAPER, The Modern Pattern of War Criminality, Israel Yearbook of Human Rights, Vol. 6 (1976) 9–48.
B.V.A. RÖLING, Criminal Responsibility for Violations of the Laws of War, RevBelge, Vol. 12 (1976) 8–26.
B.V.A. RÖLING and C. RÜTER, The Tokyo Judgment, 2 vols. (1977).
M.C. BASSIOUNI, International Law and the Holocaust, California Western International Law Journal, Vol. 9 (1979) 201–305.
O. KIMMINICH, Schutz der Menschen in bewaffneten Konflikten (1979).
J.R. LEWIS, Uncertain Judgment, A Bibliography of War Crimes Trials (1979).
B. FERENCZ, An International Criminal Court, 2 vols. (1980).
H.-H. JESCHECK, Entwicklung, gegenwärtiger Stand und Zukunftsaussichten des internationalen Strafrechts, Goltdammer's Archiv für Strafrecht (1981) No. 2.

HANS-HEINRICH JESCHECK

WAR DAMAGES

A. Notion

The notion of "war damages" is not expressly defined in international law. It denotes the compensation in kind or in money imposed by law for loss or injury resulting from a state of → war. The terms → "reparation" or "compensation for war damage" are used synonymously. The term "war indemnity", previously also used synonymously, was replaced by the term "reparation" after World War I. Use of this term has prevailed in the practice of international law since World War II (→ Reparations after World War II).

B. Current Legal Situation

1. General

The legal content of the notion of "war damages" may be sought in the first sentence of Art. 3 of Hague Convention IV of 1907 respecting the Laws and Customs of War on Land, in Art. 22 of the Hague Regulations annexed thereto, and in Art. 91 of the 1977 Protocol I additional to the Geneva Conventions of August 12, 1949 (→ Hague Peace Conferences of 1899 and 1907; → Geneva Red Cross Conventions and Protocols; → War, Laws of).

According to Art. 22 of the Hague Regulations, belligerents are not absolutely free to select the means of injuring the enemy. Both Art. 3 of Hague Convention IV and Art. 91 of Additional Protocol I provide that the belligerent violating, respectively, the provisions of the Hague Regulations, or of the Geneva Conventions of 1949 or of Additional Protocol I, may be liable to pay compensation. In this context the principle of a limited right to cause damage in → armed conflict applies, on the strength of → customary international law, to any kind of war. Art. 3 of Hague Convention IV and Art. 91 of Additional Protocol I also codify a rule under the so-called "Hague

law" and "Geneva law" which, regarding the direct liability of a party to a conflict for its own acts, represents nothing but the general principle of liability, valid both in times of peace and war (→ Responsibility of States: General Principles).

2. The Concept of War Damage

Even though the right to cause damage in armed conflict is limited, the actual purpose of war is to inflict damage on → enemies and enemy subjects. War damage is thus not only an empirically real concomitant and consequence of any war, but also a conceptually necessary one, according to positive international law. In general, the term "damage" is used when, comparing a state of affairs or the condition of an object at two consecutive times, an unfavourable change – loss, injury, deterioration, decrease in value, and the like – may be detected. War damage is thus the unfavourable change ensuing in connection with war and from the dangers inherent in it. The extent of unfavourable change can frequently but need not be expressed in terms of money (→ Damages).

Wars are normally fought between States; the resulting unfavourable changes will, however, affect not only the belligerent States as such, but usually also the nationals of those States and other countries' nationals staying within the belligerents' territories. Neutral States and → neutral nationals will also frequently suffer damage through war (→ Neutrality, Concept and General Rules).

Consequences of war are unfavourable for a State if they involve adverse changes as to its existence, its territory, its assets and, perhaps, also its constitution (destruction of the State, territorial losses, economic losses and perhaps also restructuring or destruction of the constitution, through war-induced causes). For the individual citizen, such changes may imply harmful interference with his or her life, health, freedom, and/or property or assets. The notions of public and private property must be interpreted extensively in this context. On the one hand, the term "war damage" encompasses the extraordinary expenditures incurred by a State for meeting the costs of fighting a war as well as the relief payments and pensions to its war victims and their survivors. On the other hand, the term may encompass the loss of earnings or the loss or depreciation of civil claims or future rights of individual citizens (Whiteman, p. 956).

Damage to the enemy State as such or its citizens in war is caused either directly or indirectly. The instruments for causing damage directly are in particular weapons intended or suitable for injuring or killing human beings as well as for damaging or destroying structures. Indirect damage to the enemy is caused by interrupting the trade channels and routes of communication and supply, thereby restricting or totally denying the enemy State and its citizens access to the material necessities of existence. Difficulties may arise here in ascertaining the chain of causation inherent in the term "war damage": The causal connection between the international law violation and the resulting damage must always be provable (→ Naulilaa Arbitration (Portugal v. Germany)).

War damage to the civilian population is commonly seen as the injuries and losses sustained by non-combatants with respect to their persons, property or fortunes either through acts of war or occupation by one of the belligerent powers or in direct connection with the war (→ Occupation, Belligerent). It may be classified as follows:

(a) direct war damages as a consequence of devastations, → bombardments and other acts of war in the course of military operations either in the theatre of war (→ War, Theatre of) or in the home territory of a belligerent or a neutral State (→ Neutrality in Land Warfare);

(b) economic war damages due to the seizure of → merchant ships and cargoes as prize (→ Prize Law), the employment of blacklists and other means (→ Economic Warfare) causing losses to commercial and industrial enterprises, and the seizure and liquidation of private property, rights and interests;

(c) damages through belligerent occupation, resulting from measures taken by a belligerent State to control and secure occupied enemy territory, especially from → sequestrations, → requisitions, or → contributions (Hague Regulations, Arts. 42 to 56; Geneva Convention IV, Arts. 47 to 78). Certainly war damage may result to a greater extent if the occupying power commits acts contrary to international law, such as → pillage (Hague Regulations, Art. 47;

Geneva Convention IV, Art. 33), or tolerates the destruction of certain institutions (Hague Regulations, Art. 56; Geneva Convention IV, Art. 53) or carries out detentions without judicial inquiry (Geneva Convention IV, Art 43);

(d) war-induced losses resulting from intervention by the authorities in the home territory of a belligerent State to extract special contributions for purposes of war ("sacrifices for the benefit of the armed forces" and in support of their operations).

The notion of war damage with regard to the civilian population does not encompass war-induced secondary damages to the economy of a belligerent power and its nationals arising from economic crisis, unemployment or interrupted trade as concomitant phenomena of war. Nor does it include damages as after-effects such as erosion of currency value following war, which cannot be deemed direct results of war.

The examples presented above, especially those of damage resulting from belligerent occupation, illustrate that the mere occurrence of loss in fact – the infliction of damage – suffices as a qualifying criterion of war damage: whether the means of warfare employed to cause the damage were permissible under international law is irrelevant in this context.

3. Liability for Compensation

War damage calls for compensation. In accordance with the traditional → interpretation of international law, this tenet is applicable only in so far as the victor nation is entitled to demand compensation from the defeated enemy, but not vice versa. The idea that a defeated nation owed the victorious power compensation for war damage began to take hold in the 18th century. This is evident from provisions *e contrario* which expressly confirmed the victor's renunciation of a compensation for war damage; one of the earliest provisions of a treaty to that effect was Art. 3 of the Austro-Bavarian Peace Treaty of April 22, 1745.

Since under present-day international law initiating armed conflict may violate an accepted obligation not to wage war and may thus be unlawful, the unlawful aggressor would be liable under customary international law for all damages caused to the nation attacked (→ Aggression). Such compensation is regularly called reparation. Art. 231 of the → Versailles Peace Treaty (1919) contains an example of an attempt to bring this rule to bear upon the powers defeated in World War I at a time when no provisions under international law as yet restricted the commencement of a war. In addition to its obligation to pay reparations, the aggressor nation in an illegal war is also liable for → restitution, i.e. for returning any seized property of the nation attacked and of its nationals, even if seized in accordance with *jus in bello*. This liability also encomposses alternative compensation in cases where restitution is no longer possible.

The liability for damages as outlined above belongs to the complex web of problems connected with the legality of war and, as such, must be numbered among the legal norms of the *jus ad bellum*. On the other hand, Art. 3 of Hague Convention IV and Art. 91 of Additional Protocol I, which both establish the liability for compensation in case of violation of the legal obligations set forth therein, must be classed as *jus in bello*. This, too, is subject to the general principles governing the proof of international liability for the wrongful infliction of damage (→ Internationally Wrongful Acts). An act of war covered by the *jus in bello* cannot be wrongful as such, regardless of the damage caused by it. The lawfulness of the act of war represents a legal justification excluding liability. Damage inflicted in such a way can only become subject to liability for compensation if the State causing the damage and/or its armed forces have conducted the war as such unlawfully, i.e. have acted in violation of the *jus ad bellum*.

4. Measurement of Reparations

The general principles of liability also apply in determining the nature and extent of reparations. A claim for damages must, first of all, conform to the nature and extent of the unfavourable change ("the damage") to be compensated. The liabilities consist primarily of restitution of the original condition (restitution in kind) or, should that be impossible, impracticable or unreasonable, compensation in money, commodities of commercial value, or services in an amount equaling the value of restitution in kind (see the decision of the → Permanent Court of International Justice of

July 26, 1927 in one of the → German Interests in Polish Upper Silesia Cases and the advisory opinion of the → International Court of Justice regarding → Reparation for Injuries Suffered in the Service of the UN, ICJ Reports 1949, p. 184). They further include the compensation for recognizable *lucrum cessans* and adequate interest on the amount compensated.

The details regarding the kind and the amount of compensation owed are normally determined by a → peace treaty. The amount of compensation agreed upon in this context usually falls short of the value to be compensated mostly because of insolvency or limited goods-and-services production capability on the debtor's side, or out of considerations of → equity in international law. The words of introduction to the relevant provisions of the Versailles Peace Treaty, Art. 232, are in this respect characteristic:

> "The Allied and Associated Governments recognize that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all . . . loss and damage."

Full compensation was also not demanded in the → Peace Treaty with Japan (1951: Art. 14(a)) and the → Peace Treaties of 1947 with Hungary (Art. 23(1)), with Bulgaria (Art. 21(1)), with Romania (Art. 22(1)) and with Finland (Art. 23(1)).

Such a disproportion between the war damage and the terms of a treaty does not, however, imply that the respective provisions are questionable under international law. Although the notion of war damage marks outer limits by which the parties to a peace treaty are confined in providing for the settlement of pending claims for compensation, the parties are usually free to waive all or part of their claims (→ Waiver).

5. Claimants

Claimants for war damages may be the belligerent powers and/or parties to a conflict themselves, as well as neutral → subjects of international law. The claimants' status and the assertion of the claims follows the acknowledged principle that a State to which an internationally wrongful act is imputed is liable for reparation to the State wronged (see, however, section C *infra*).

Different rules apply if the war damages claimed were suffered by a private person rather than by a State as such. It is most important to distinguish the ownership of a claim from the authority to enforce it. Depending on whether a claim is raised against the belligerent State by one of its own nationals (→ Nationality) or by a citizen of a neutral State or of an enemy State, the following rules hold true:

(a) A State is not under any obligation imposed by international law to indemnify its own nationals for war damages suffered (Amacher, p. 120). In some States (for instance France, Italy and the Federal Republic of Germany), principles derive from public law or from rules of → natural law and → human rights, and are postulated on the basis of national legislation. Municipal law defines the nature and extent of the compensation and the judicial proceedings required. Under certain circumstances, foreign claimants are also entitled to lodge claims personally for war damages as conceded to them under the national law created in the indemnifying State after the war (for example, Bundesversorgungsgesetz of the Federal Republic of Germany of December 12, 1950, § 1 and § 7, para. 3 (Bundesgesetzblatt, 1950 I, 791)).

Occasionally, an obligation to indemnify for specific war damages has also been imposed on a defeated State by a → treaty under international law. The obligation to compensate German nationals adequately for their property seized abroad following World Wars I and II, for instance, was imposed respectively on the German Reich by Art. 297(i) of the Versailles Peace Treaty (1919) and on the Federal Republic of Germany by Chapter 6, Art. 5 of the Convention on the Settlement of Matters arising out of the War and the Occupation, of May 26, 1952, as amended on October 23, 1954 (→ Bonn and Paris Agreements on Germany (1952 and 1954)).

(b) As to war damages suffered by citizens of neutral States, it is well established in accordance with principles of responsibility of States that the belligerent State is responsible for internationally wrongful acts and liable for damages. This not only applies to internationally wrongful acts committed on the territory of a neutral State, such as bombardments by mistake, but also to internationally wrongful acts done against nationals of a neutral

State on the belligerent's own or on enemy territory, such as pillage, wrongful contributions, etc. Even if an offence is not directed against the neutral State as such, but directly against a private person under the protection of the neutral State, it is always the neutral State which is legally affected by the internationally wrongful act, as it infringes upon that State's right to have its nationals abroad treated in accordance with international law. The State asserts this right by exercising its rights concerning → diplomatic protection.

If, therefore, the wronged citizens of a neutral State cannot personally claim damages directly from the State responsible, e.g. on account of its national legislation, they must apply to the authorities of their State of nationality to raise their claims for damages with the State responsible by way of diplomatic protection. This standard principle for raising international claims under international law continues to apply regardless of differing practice after World War I (see Art. 297(e) and (f), and § 4 of the Annex to Art. 298, Versailles Peace Treaty), and after World War II, when the Federal Republic of Germany was confronted with innumerable claims and lawsuits both at home and abroad, with foreign nationals claiming war damages directly against her. The principle also continues to apply regardless of certain trends in modern international law to declare individuals to be subjects of international law with limited liability (→ Individuals in International Law).

(c) Basically the same rules would have to apply concerning war damages suffered by citizens of the enemy State, at least in those cases where the damage resulted from internationally wrongful acts perpetrated by the enemy. Compensation for war damages, however, will always be an essential subject of any peace treaty.

C. Special Problems

In this context, the peace treaty is normally worded in accordance with the above-quoted practice of making the defeated power liable for all war-induced damages, including those suffered by the enemy population. Regarding damages caused by acts of war and occupation, in most cases no distinction is made between acts done in accordance with international law and those done in violation of it. Unfortunately, practice has shown that the victorious State will apply the term "war damage" in its widest sense and try to extract as much as possible from the defeated State without wasting a thought on compensating the defeated State and its nationals at least for those war damages caused by the victor's acts which were contrary to international law. Compensation for war damages at the end of a war, also with respect to damages suffered by the civilian population, is more a matter of the power exercised by the victors than a matter of law or equity. It has, therefore, been dealt with according to the respective circumstances, regardless of the legitimacy of the war, which as a rule is asserted by the victor State. It may be for this reason that no general rules have developed in international law as to the nature and extent of such compensation and for what kinds of war damage it is to be awarded.

Whether and to what extent damages caused to neutral nationals by internationally lawful acts of war and occupation are subject to compensation is a controversial question in both theory and practice. Unless liability based on unlawful infliction of damage can be proved, the question at issue is that of strict or absolute liability, i.e. liability for detrimental consequences of activities incidental to war which, however lawful, by their very nature entail special dangers (→ Responsibility of States: Fault and Strict Liability). No established rules have developed in this context, however. Nor is there any provision of international law obliging a State to treat its own nationals and those of neutral States equally as far as compensation for war damages is concerned.

In a particularly awkward position are → stateless persons and persons who have their permanent place of residence outside of their home country and who, for political reasons, are unable to call upon the authorities of their home country for diplomatic protection (e.g. foreign displaced persons and → refugees). International law does not provide for diplomatic protection in any other way, nor does it grant any active legitimation of a right to sue the responsible State for any war damages sustained. Endeavours towards an improvement of the legal position of these groups, however, have met with some success (→ Refugees, League of Nations Offices; → Refugees, United Nations High Commissioner).

D. Evaluation

Generally accepted criteria for the notion of war damages are not provided by the international law of contract, theories of international law, or court practice. General rules governing the kinds of war damages subject to compensation, the extent of such compensation, and the legal procedures required to claim it are furthermore lacking. To close these legal gaps is less important, however, then to overcome the common practice of compelling the defeated State to make reparations for war damages regardless of the principles of liability under international law which also apply to the victorious State. Considering that an obligation to pay high compensations could represent a further deterrence to starting a war, it ought to be a matter of great importance to the international community to oblige every unlawful belligerent to pay damages. In the same way, an obligation placed on the lawfully belligerent State victor to make reparations for damages caused in contravention of international law could also have positive effects regarding adherence to the *jus in bello*.

E. AMACHER, Kriegsschäden und Völkerverfassung, Thesis, University of Zurich (1935).

M. WHITEMAN, Damages in International Law, 3 vols. (1937–1943).

H.J. CAHN, Das Kriegsschadenrecht der Nationen, Vol. I (1947).

F.G. MARX, L'Affaire de la Burmah Oil et le War Damage de 1965, Revue du Droit Public et de la Science Politique, Vol. 83 (1967) 884–892.

D. KUBE, Private Kriegsschäden in der völkerrechtlichen Praxis: Beitrag zur Staatenverantwortlichkeit im Kriege, Thesis, University of Heidelberg (1971).

T. VAN MINH, Les réparations de guerre au Vietnam et le droit international, RGDIP, Vol. 81 (1977) 1046–1102.

ARMIN A. STEINKAMM

WAR, EFFECT ON CONTRACTS

1. Introduction

The rules of international law largely leave it to the individual State to regulate the rules governing contracts between its nationals and the enemy which are affected by war and similar emergencies. However, certain limitations of the freedom of the individual State may result from the rules governing → economic warfare, in particular those applicable to → enemy property, → requisitions and → sequestration, and those relating to → neutral trading. This article deals mainly with the regulations adopted within domestic legal orders; the rules adopted in France, Germany (Federal Republic), the United Kingdom and the United States are examined as examples of the various solutions chosen by the States concerned. Peace treaty provisions affecting contracts are also examined.

2. General Contract Law and War

In general contract law, the effect of war is discussed in relation to two terms: impossibility and impracticability. The question of foreseeability and the effect of frustration are also examined.

(a) Impossibility

Each domestic law considered here provides that the debtor is discharged from further liability if, owing to the outbreak of war, the performance of the contract is subsequently made impossible. This concept of supervening impossibility is laid down in Art. 1148 of the French Civil Code and section 275 of the Bürgerliches Gesetzbuch (BGB) of Germany. At common law, the theory of the "implied term" used to be seen as the basis of the concept. This theory has been under attack in recent years, and the "change in obligation" theory has received a warmer reception in English courts. At the same time, more and more United States courts have gone further and adopted a kind of "allocation of risk" theory.

The debtor will also be discharged from further liability if a delay (which may be limited to the duration of the war) makes it unreasonable to require the parties to go on, i.e. if the economic nature of the obligation changes. In this context German courts have treated the term "impossibility" with some flexibility. For example, a discharge was granted when payment had been delayed for nearly two years and the seller meanwhile had had to bear the full risk of a cargo's deterioration and loss of value (B. & Co. v. A. & C. [1916] Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 88, 71, at 74), and where cargo being stored on deck for several years would have risked damage to the ship (Firma H. v. Firma R. & Co., AG [1919] Reichsgericht, Juri-

stische Wochenschrift (RG JW) 1919, 717, at 718).

Apart from some exceptional cases, the concept of impossibility in the civil courts of France is narrower than in the German courts. Discharge from further liability is only granted if performance is rendered absolutely impossible and not merely onerous (Maison Agnès v. Maalderinck [1915] Cass.civ., Recueil Périodique et Critique Dalloz, 1916, I, 22, at 23). For example, in cases of physical hinderance, the hinderance has to be permanent, insurmountable and unforeseeable (e.g. Estève v. Dubois et Lacoste [1915] Tribunal commercial de Toulouse, Recueil Périodique et Critique Dalloz, 1916, II, 112). The mere existence of a state of war does not make performance impossible, even though it may become more difficult (Société blanchisserie et teinturerie de Cambrai v. David [1950] Cass.civ., Recueil Dalloz, 1951, sommaire 10). Thus, halts in commercial traffic (G. Sanchez v. Société "les Produits africains" [1945] Cour de Rabat, Recueil Sirey, 1947 II, 41), seizures (Société de la Grande cidrerie-distillerie de Corneilles v. Poullain [1922] Cass.req., Recueil Hebdomadaire Dalloz, 1924, I 186) or → embargoes on imports and exports (→ Sea Warfare) have only the effect of postponing performance. Discharge is only granted when the time of delivery (as in the G. Sanchez case, *supra*) or the origin of the merchandise is an essential element of the contract.

English courts mostly try to uphold the terms of a contract; the decision, however, depends in part upon the probable duration of the interference (Denny, Mott and Dickson, Ltd. v. James B. Fraser & Co., Ltd. [1944] A.C. 265, at 277, per Lord Wright). An embargo for a limited time does not discharge an obligation (Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd. [1916] 1 K.B. 402, at 415, per Swinfen Eady, L.J.), and a time charter party still continues, if the requisition for use as a troop-ship is likely to last for substantially less than the remaining period of the charter party (F.A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Co., Ltd. [1916] 2 A.C. 397, at 403, per Earl Loreburn). Consequently, it was held that a contract terminated when, after the parties agreed to charter a ship for a period of twelve months, the steamer was commandeered from April to September by the government (Bank Line Ltd. v. Arthur Capel & Co. [1919] A.C. 435, at 442, per Lord Finlay, L.C.); cf. also more recently Port Line Ltd. v. Ben Line Steamers Ltd. [1958] Q.B. 146, at 162, per Diplock, J.). Developed from that "commercial" doctrine of the frustration of the adventure, the now so-called "doctrine of frustration" was, for example, also applied to a music-hall artist's ten-year contract when he was called up for service in the army after the outbreak of war in 1940 and demobilized in 1946 (Morgan v. Manser [1948] 1 K.B. 184, at 191, per Streatfield, J.).

United States courts grant releases from contractual obligations in cases of temporary impossibility only if the essence of the contract has been affected. Thus a charter party time contract was deemed as dissolved after a government requisition of the ship for an indefinite period in wartime (Permanente S.S. Co. v. Hawaiian Dredging Co., Ltd., 65 F. Supp. 321, at 325 (N.D.Cal. 1945)). The performance of a contract can be made physically impossible, e.g. by the closure of a trade route (→ Blockade), or legally impossible, e.g. by government order (see sections 3(c) and (d) *infra*). Foreign interference renders performance impossible, according to German (F. v. Forestal Land Timber and Railway Co. [1918] RGZ 93, 182, at 184) and French jurisprudence (Agelasto v. Waller Frères et Co. [1894] Cass.req., Recueil Sirey, 1896 I, 143). In the English and United States courts, performance is only excused when prohibited by the domestic law of the place where the contract is to be performed (Ralli Brothers v. Compania Naviera Sota y Aznar [1920] 2 K.B. 287, at 301, per Scrutton, L.J.; David v. Veitscher Magnesitwerke AG, 35 A.2d 346, at 351 (Supreme Court of Pennsylvania, 1944)).

(*b*) *Impracticability*

Often performance is not made impossible, but is only rendered impracticable. This is the case especially in contracts for the sale of specific goods. The party obligated to perform a contract of carriage is expected to perform even if the distance over which goods have to be delivered is extended, or if the merchandise, though available on the domestic market, is scarce, or if there has been an increase in prices, as happens especially in cases of speculative bargains.

The French Cour de Cassation (the highest court of ordinary jurisdiction) has virtually rejected all of the theories advanced by French authors

and the Conseil d'Etat (the supreme administrative tribunal, which is not concerned with contracts involving a foreign partner) in support of recognizing the legal relevance of impracticability in general contract law (Valot v. Jamet [1950] Cass.com., Recueil Dalloz, 1950, 227; Théatre du Gymnase-Marie Bell v. Dacqmine [1972] Cass.soc., Recueil Dalloz Sirey, 1972, 340).

German courts rely on the doctrine of the *Geschäftsgrundlage* (basis of the contract). In all cases, however, the courts apply the provisions of sections 157 and 242, BGB, which provide that contracts must be interpreted and performed in good faith (St. v. R. [1923] RGZ 107, 78, at 87; [1953] Nachschlagewerk des Bundesgerichtshofes in Zivilsachen (BGH LM) No. 12, section 242 [Bb] BGB). The courts do not hesitate to interfere with contracts if the supervening event lies beyond the influence of the parties (or at least of the claimant) and the claimant has suffered disproportional loss. A discharge was granted, for example, when substitutes could not be supplied by customary means; even the accidental acquisition of goods which had disappeared from the market did not oblige performance of the contract (R. v. Fr. [1919] RG JW 1919, 499).

In some cases, English and United States courts have granted releases from further performance where an agreement had been terminated by supervening events beyond the control of either party. It is not, in these circumstances, strictly necessary that performance has become literally impossible: the doctrine of frustration, see section 2(a) *supra*, may also be applied. For example, a discharge can be granted if the costs of transport rise in response to a shipping shortage, or due to a reasonable fear of seizure, or because of prolongation of traffic routes owing to the dangers, for example, of minefields (→ Mines), → submarines (→ Submarine Warfare), or seizure as → contraband in a blockade (see Bolckow, Vaughan & Co., Ltd. v. Compañía Minera de Sierra Minera, and North Eastern Steel Co., Ltd. v. same [1916] C.A. 115 L.T. 745, at 748, per Swinfen Eady, L.J.; American Foreign S.S. Corp. et al. v. Amtorg Trading Corp., 133 F.2d 765 at 767 (2d Cir. 1943)).

Although *force majeure* in English law depends for its meaning on the particular use made of it in the contract in question, a party may not rely on his own act as constituting *force majeure* to seek release from a contract on the grounds of impracticability. The House of Lords decision in Czarnikow v. Rolimpex ([1979] A.C. 351 *inter alia* at 364, per Lord Wilberforce) highlighted the particular difficulty of making a distinction between a state trading corporation, Rolimpex, and the author of the intervention, the Polish government, which, following the failure of the Polish sugar crop in 1974, had prohibited the export of sugar. It was held nevertheless that Rolimpex was not so closely connected with the government of Poland that it was "precluded from relying on . . . government intervention" to procure release from a contract.

English and United States courts (but see also [1961] BGH, Versicherungsrecht 1961, 821 et seq.) have had the chance to review their rather narrow concept of impracticability. The closure of the Suez canal in 1956 and 1957, and for several years from 1967 onwards, caused increases in the distances of voyages for charter parties. After a split in the lower courts, the English Court of Appeal maintained the narrow concept, and this was affirmed by the House of Lords (Tsakiroglou & Co., Ltd. v. Noblee Thorl GmbH [1962] A.C. 93, with references to other English cases). The United States Courts of Appeal held the same view (see, *inter alia*, American Trading and Production Corp. v. Shell International Marine Ltd., 453 F. 2d 939, at 941 to 943 (2nd Cir. 1972)). Thus new escape clauses were introduced (Achille Lauro Fu Gioacchino & Co. v. Total S.p.A. [1969] 2 Ll.L.Rep. 65; Glidden Co. v. Hellenic Lines, Ltd., 275 F. 2d 253, at 257, note 4 (2nd Cir. 1960)).

New attempts have been made to codify the problem of impracticability: see Art. 74 of the Uniform Law of the Sale of Goods (UNTS, Vol. 834 (1972) 107, at 153; this convention has become domestic law in the Federal Republic of Germany and the United Kingdom) and section 2-615(a) of the United States Uniform Commercial Code. The latter provision has already received some commendation in practice (see recently Louisiana Power & Light Co. v. Allegheny Ludlum Industries Inc. et al., 517 F. Supp. 1319, at 1323 to 1326 (E.D. La. 1981)).

(c) *Foreseeability*

Foreseeability of the event which frustrates the contract is not alone enough to bar its recission if it appears that the parties did not intend the

promissor to assume the risk of the event's occurrence (West Los Angeles Institute for Cancer Research v. Ward Mayer, 366 F.2d 220 at 225 (9th Cir. 1966), certiorari denied, 87 S.Ct. 718 (1967); Transatlantic Financing Corp. v. United States, 363 F. 2d 312, at 318 (D.C. Cir. 1966); see also E. v. A. [1928] RGZ 121, 56 at 57). According to French practice a party liable under a contract cannot be excused where the change is not "*imprévisible*" (Milon v. Laforest [1954] Cass.civ., Recueil Dalloz, 1955, 252) (regarding pertinent French legislation, see section 3(b) *infra*). In the view adopted by the House of Lords, this result follows because there has been no change in the significance of the obligation for the claiming party (cf. Davis Contractors, Ltd. v. Fareham U.D.C. [1956] A.C. 696, at 731, per Lord Radcliffe).

(*d*) *Effects of frustration*

Following the concept based on the *Geschäftsgrundlage* and sections 157 and 242 BGB, German courts have defined equitable provisions under which contracts were made to continue. For example, the Reichsgericht increased the amounts specified in a contract during the runaway inflation of 1923 (B. v. L., L. v. Gebrüder G. [1925] RGZ 110, 371, at 377) and granted fair and just compensation in other cases where severe changes in the contractual obligation occurred (see, *inter alia*, B. v. R. et al. [1940] RGZ 163, 324, at 335). The losses were shared (Firma Z. v. K. [1943] RGZ 172, 20, at 29); the interests of the parties were balanced fairly, considered in the light of the special circumstances (H. v. v.T. [1949] Entscheidungen des Obersten Gerichtshofes für die Britische Zone 1, 386, at 394) and of the economic situation of the parties concerned.

In English common law, the contract is dissolved automatically in cases where total frustration is proved. Since a decision of the House of Lords in 1942 (Fibrosa Spolka Akcyjna v. Fairbarn Lawson Combe Barbour, Ltd. [1943] A.C., 32 at 61, 64, per Lord Wright), money paid on a consideration which has wholly failed has been recoverable; an action for fractional recovery is only possible if the performance is divisible. If the party seeking recovery of the money has received any part, however small, of the performance, the rule in the Fibrosa case does not apply.

It was to clarify the law that the Law Reform (Frustrated Contracts) Act 1943 (6 & 7 Geo. 6. Ch. 40) was passed. The Act provides that in case of impossibility or other frustration, all sums paid are recoverable and that the court may allow a party to retain sums paid over to him to defray the expenses incurred. The court can take into account any valuable benefit other than payment of money, having regard to all the circumstances of the case. The Act does not apply to contracts for the carriage of goods by sea, voyage charters, contracts of insurance, or agreements to sell specific goods when the goods perish before the risk has passed to the buyer, because the agreement is thereby voided. Neither does it apply to any other contract for the sale or the sale and delivery of specific goods, when the goods perish, and the contract is thereby frustrated. There was no decided case under the Act until 1978 (B.P. Exploration Co. (Libya) Ltd. v. Hunt – No. 2 – [1979] 1 W.L.R. 783), when an award under section 1 of the Act was made following the frustration of a contract between the parties. The frustrating event had been the expropriation of the plaintiff's interest by the Government of Libya (→ Expropriation and Nationalization).

Among the cases decided on the basis of frustration in the United States courts, there are relatively few instances where contracts have been declared to be terminated (e.g. the West Los Angeles Institute case, cited in section 2(c) *supra*, where a recovery of sold shares was granted due to frustration of the contract caused by a subsequent government regulation). In this limited way, the United States courts grant recovery and achieve results similar to those of English law. In French law the contract is dissolved; recovery is not granted (see the G. Sanchez case, section 2(a) *supra*).

3. *Special Situations*

(*a*) *Interruption of economic relations under the UN Charter*

Under Art. 41 of the → United Nations Charter, the → United Nations Security Council may call upon members of the → United Nations to apply such measures as the "complete or partial interruption of economic relations" to nations which fail to comply with the provisional

measures taken by or recommendations made by the Security Council (→ United Nations Peacekeeping System). For example, Great Britain has passed an enabling act to give effect to Art. 41 (UN Act 1946 and Orders in Council thereunder: Halsbury's Statutes, 3rd ed., Vol. 6 (1969) 877 et seq., cum. supp. I, 1979, noter-up 1979 (1980)).

(*b*) *War clauses in contracts*

Typically, the parties to an international trade contract try to allocate the abnormal risk of a war or crisis by using a general *force majeure* escape clause or by using a special clause relating to the outbreak of war. In either case, both German and French courts do not hesitate to grant the remedy provided for in the contract (recission or dissolution) if the outbreak of war renders performance impracticable in the sense described above (section 2(b) *supra*; B. v. B. [1917] RG JW 1918, 85; S.A.R.L. L'Hermitage v. Pochet [1946] Cour d'appel de Rouen, La semaine juridique, 1947 IV, 100). In a comparably liberal way, English and United States courts normally interpret escape clauses in the way a commercial person with common sense would understand them in light of the purpose they were intended to accomplish (Kawasaki Kisen Kabushiki Kaisya v. Bantham S.S. Co. [1939] 63 Ll.L.Rep. 155 at 164, per Greene, M.R.; Navios Corp. v. The Ulysses II et al., 161 F.Supp. 932 at 940 (D.Md. 1958), affirmed 260 F. 2d 959 (4th Cir. 1958)).

(*c*) *Special domestic legislation*

In World Wars I and II, the coverage of various German ordinances empowering a court to interfere with contracts increased. The act now in force, Gesetz über die richterliche Vertragshilfe (BGBl, 1952 I, 198, latest amendment BGBl, 1957 I, 1747) empowers the judge to postpone due dates or to reduce obligations in contracts entered into before June 21, 1948 (the date when the new German currency was introduced). Balancing the interests and the economic situations of the parties, the judge has to consider whether an obligated party obligated under a contract should be allowed more time to perform the contract. Regarding money due in particular, the act requires the impracticability to have resulted from wartime events. There are only a few cases still awaiting decision under the act. Similar provisions can be found in several post-war acts still in force concerning expellees (→ Population, Expulsion and Transfer), → refugees and → prisoners of war; likewise, these are no longer of any practical importance.

Under French special legislation, contracts for the sale of goods or long-term contracts could be declared to be terminated with or without the parties being able to recover, if performance would have caused the claiming party considerably greater loss or damage than could have been foreseen (e.g. loi Faillot 1918, Recueil Périodique et Critique Dalloz, 1918, IV, 261). Due dates could be postponed and rents rescinded if wartime events had influenced performance (e.g. Act of April 22, 1949, Recueil Dalloz, 1949, Législation 241); in a limited way, even contracts entered into after the outbreak of war could be rescinded.

In England the Law Reform (Frustrated Contracts) Act of 1943 was passed (see section 2(d) *supra*).

(*d*) *Trading with the enemy*

During the course of the two world wars, German law prohibited financial transactions between German subjects and alien enemies (→ Enemies and Enemy Subjects), but without interfering with the contract itself. Under French and English law, any contract which involved commercial intercourse with the enemy (→ Trading with the Enemy) was automatically dissolved by the outbreak of war or by one of the parties becoming designated as an enemy alien, while United States courts have upheld contracts in an increasing number of decisions. In this way, public law statutes affected the contractual rights of the parties under common law.

Contracts entered into during the war were dissolved automatically in each of the three jurisdictions.

Contracts entered into before the commencement of war continue to be valid under French law (for World War I, Décret of September 27, 1914, Recueil Périodique et Critique Dalloz, 1914, IV, 96; Art. 3(1) as interpreted in Société de l'Hôtel Impérial de Menton v. Ulrich [1924] Cour d'appel d'Aix, Revue de droit international privé, Vol. 19 (1924) 596, at 597; and for World War II, Art. 5(1) of Décret of September 1, 1939 with Décret-loi of the same day, Recueil Dalloz, 1939, IV, 431). In French

courts, performance is merely suspended until the prohibition of commercial intercourse comes to an end after the war. The consequence of this, however, has often been the termination of contracts, as declared either under special legislation (e.g. Art. 4, loi Faillot (see section 3(c) *supra*) or under the operation of the general rules (see section 2 *supra*)).

Under the English doctrine of a present value to the enemy of some post-war benefit, any such contract is automatically dissolved by the outbreak of war, even if it contains a clause suspending its operation during the continuance of a state of war, on grounds of public policy (Ertel Bieber and Co. et al. v. Rio Tinto Co., Ltd. [1918] A.C. 260, at 273, per Lord Dunedin). Accrued rights under such contracts (e.g. for a liquidated sum of money already due) are not affected, and money paid on a consideration which has wholly failed because of the prohibition of trading is recoverable (see section 2(d) *supra*). the enemy alien's right to enforce his claim by suing is, however, suspended under common law (see the Rio Tinto case, *supra*, at 269). In addition, contracts of insurance, where premiums have been fully paid up before the war, negotiable instruments, shares and debentures in British corporations remain valid; leases and mortgages are maintained; and rights in property remain enforceable after the war.

The majority of United States courts hold that any contract may continue to be valid, but its enforcement may be suspended for the duration of the war (e.g. Meijer v. General Cigar Co., Inc., 73 N.Y.S. 2d 576, at 584–585 (New York County Supreme Court 1947); Freeto v. State Highway Commission, 166 P. 2d 728, at 758 (Supreme Court of Kansas 1946)). Generally, performance is excused only if either the operation of the general rules of contract law make it impracticable (see section 2(b) *supra*) or if performance would be of advantage to the enemy. Special rules may apply to contracts of insurance (see Langlas et al., v. Iowa Life Insurance Co., 63 N.W. 2d 885, at 889 (Supreme Court of Iowa, 1954)) and agency (see Allen E.R. Craig v. Paul G.A. Bohack, 244 N.Y.S. 2d 737, at 739 (New York Supreme Court, 1963)).

Under United States law, contracts may not only be affected during a declared state of war (see section 5(b) of the Trading with the Enemy Act 1917, 50 USC App. sections 1 to 44), but also during a declared state of emergency not necessarily amounting to declared war (see section 3 of the International Emergency Economic Powers Act 1977, 50 USC sections 1701 to 1706). The latter act authorizes the President to suspend contracts during national emergencies. On November 14, 1979, President Carter issued Executive Order No. 12170 under this act freezing Iranian assets in the United States. The → United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements) followed. In December 1979 an American firm had obtained, in satisfaction of a contract claim, a prejudgment attachment of assets belonging to certain Iranian banks in the United States; this attachment along with many others was nullified by the United States-Iran Agreement. In one firm's suit to prevent the enforcement of orders implementing the Agreement, the United States Supreme Court upheld the President's power to suspend the claims of American nationals against Iran and to relegate such claims exclusively to binding arbitration in the Iran-United States Claims Tribunal, even though this tribunal could leave the petitioner without a remedy for a contract breach by dismissing the claim on jurisdictional grounds (Dames & Moore v. Regan, 101 S. Ct. 2972 (1981)).

4. Peace Treaty Provisions

The → peace treaties after the two world wars also contain rules regarding the effect of war on contracts. They follow the Anglo-Saxon model (see also section 3(d) *supra*). For examples see the → peace treaties after World War I (Arts. 229 to 303 and Annex of the → Versailles Peace Treaty (1919) and the corresponding provisions in the → Saint-Germain Peace Treaty (1919), the → Neuilly Peace Treaty (1919), the → Trianon Peace Treaty (1920) and Arts. 73 to 84 of the → Lausanne Peace Treaty (1923)), as well as the → Peace Treaties of 1947 with Bulgaria (Art. 27 and Annex V), Finland (Annex V), Italy (Art. 81 and Annex XV), Romania (Art. 29 and Annex V), Hungary (Art. 31 and Annex V) and the → Peace Treaty with Japan (1951) (Art. 18 and the Protocol regarding limitation of contracts). Under these treaties, any contract extant before

the war which required intercourse between enemy subjects for its execution is deemed to have been dissolved from the time when trading between the parties became unlawful under the law to which they were subject (or, as Art. 82 of the Lausanne Peace Treaty provides, when trading has become physically impossible).

The peace treaties after World War I provided that leases and mortgages as well as rights in property arising out of contracts were to be maintained. The Allied and Associated Governments could require contracts to be performed; the party thereby prejudiced was then granted compensation (→ War Damages). Thus Belgium, France and Italy demanded the maintenance of partnership and company agreements, contracts relating to family relations or status, contracts relating to gifts and other agreements of a benevolent character, and Great Britain declared that the proprietary rights of shareholders or debenture holders of companies remained valid, as did the companies' constitutions.

The → peace settlements after World War II do not contain similar provisions; however, contracts relating to family relations or status were not deemed to fall within the concept of trading with the enemy. It is not clear from the peace treaties of 1947, which provide that a contract must require "for its execution intercourse between any of the parties thereto having become enemies", whether only those contracts where an execution was necessary were deemed to be dissolved. According to that interpretation, contracts of mortgage, pledge or lien, concessions concerning mines, quarries or deposits, and leases and agreements for leases of land and houses would have had to be maintained, if the conclusion of the contract created a right *in rem* under the *lex situs*.

Accrued rights (i.e. debts or other pecuniary obligations arising out of a contract) remained in force. Following the peace settlements after World War II, rights *in rem* or rights *in personam* remained valid. Partly performed contracts were maintained as long as no further intercourse had been necessary. Whereas contracts of insurance had received special treatment in the Versailles Peace Treaty, after World War II the subject was reserved to separate agreements.

The effects of both dissolved or maintained contracts are governed by domestic law. The peace settlements after World War II provided that any party to a dissolved contract was obliged to repay amounts received as advances if the corresponding performance did not take place; the Versailles Peace Treaty had no comparable provision.

After World War I, the → Mixed Arbitral Tribunals, and after World War II the Conciliation Commissions, served as judicial bodies for the wind-up of pre-war contracts (→ Conciliation Commissions Established pursuant to Art. 83 of Peace Treaty with Italy of 1947; → Conciliation and Mediation). In contrast, it must be concluded from Art. 28 of the → Austrian State Treaty (1955) that pre-war obligations falling within its ambit remained valid. The settlement of certain debts arising from obligations in which German nationals were involved was dealt with in the → London Agreement on German External Debts (1953).

G. KEGEL, H. RUPP and K. ZWEIGERT, Die Einwirkung des Krieges auf Verträge (1941).

G.J. WEBBER, The Effect of War on Contracts (1946).

M.D. AUBREY, Frustration Reconsidered – Some Comparative Aspects, ICLQ, Vol. 12 (1963) 1165–1188.

H.J. BERMAN, Excuse for Nonperformance in the Light of Contract Practices in International Trade, Columbia Law Review, Vol. 63 (1963) 1413–1439.

R.G. McELROY, Frustration and force majeure, the Common Law and the Common Market, New Zealand Law Journal (1963) 185–209.

A.D. McNAIR and A.D. WATTS, Legal Effects of War (4th ed. 1966).

A. MUELLER, Contract Remedies, Business Fact and Legal Fantasy, Wisconsin Law Review (1967) 833–839.

R.L. BIRMINGHAM, A Second Look at the Suez Canal Cases, Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory, Hastings Law Journal, Vol. 20 (1969) 1393–1416.

J. RAMBERG, Cancellation of Contracts of Affreightment on Account of War and Similar Circumstances (1969).

J.H. SCHLEGEL, Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things, The Doctrine of Impossibility of Performance, Rutgers Law Review, Vol. 23 (1969) 419–448.

R. GOFF and G. JONES, The Law of Restitution (2nd ed. 1978).

K.P.E. LASOK, Government Intervention and State Trading, The Modern Law Review, Vol. 44 (1981) 249–269.

CHRISTOF STEIMEL

WAR, EFFECT ON TREATIES

1. War and Treaties in Historical Perspective

The expanded impact of → war on all spheres of life brings about the ever more complete severance of political and social relations between States. These general consequences of war have also raised the specific problem as to the effect of war on → treaties existing between belligerents prior to the outbreak of hostilities, as well as on treaties concluded between belligerents during war and, finally, on those existing between belligerents and third States. The answers to these questions have varied over time and some writers consider the issue still to be "one of the unsettled problems of the law" (Cardozo, J. in Techt v. Hughes, 229 N.Y. 222 (1920) at 240). Indeed, in view of the changing concepts of war, varying notions of its present legal status and the different legal consequences attributed to the outbreak and continuance of war, it is difficult to state a definite general rule as to the effect of war on treaties. Rather, the present legal situation is to be determined in the light of the answers given to the problem of the relationship between war and the law in general – and on the basis of these – in considering the answers given by legal theory and State practice to the particular problems posed by war with regard to treaties.

(a) War and the international legal order

From a theoretical point of view, the relationship between war and law may be perceived from two radically opposed positions. On the one hand, war as a sociological phenomenon, characterized by the deliberate → use of force by States, may be viewed as a factual situation beyond the realm of law. According to this point of view, the fact of the occurrence of war excludes the continuing operation of law. On the other hand, it has been argued that war is an extreme but – if not in law, then at least in fact – accepted means of international conflict-resolution and may very well itself be accorded a status under law, while the law applicable in times of war may differ from that applying in peace-time.

In fact, both positions have been adopted in the history of State practice and of international law. The first line of argument was followed by most of the early → natural law philosophers. They generally assumed that the natural status of man prior to his entering into a social compact, which established a civil society under law, was the *bellum omnium contra omnes*. Natural law philosophy came to consider war as constituting the break-away by States from this social compact on the inter-State plane, which would signify the resurgence of the natural status of conflict. War thus implied that all legal relations between States were disrupted. Rules of law were no longer applicable to States' interactions: *inter arma sileant leges*. However, as Hugo Grotius pointed out in his "De jure belli ac pacis" (Nos. 25 and 26 of the Prolegomena), this proposition is not confirmed by State practice. According to Grotius, war does not put an end to all legal bonds between States and it is, therefore, not a factual phenomenon outside the realm of law. While it is true that although – as Grotius put it – written laws, that is, the internal laws of the States concerned, are not in force during war, unwritten laws dictated by nature or consented to by the community of nations remain in force.

In modern times this position was reformulated in the resolutions adopted by the → Institut de Droit International in 1912 and later by Justice Cardozo (Techt v. Hughes, *supra*, at 241) when he stated that:

> "[I]nternational law to-day does not [in cases of war] preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules."

From these observations and numerous others to the same effect, it may be concluded that describing the effect of war on treaties is a matter of law and not of fact only. Yet the older natural law approach to this problem has survived in legal doctrine and has influenced the formulation of rules of international law applicable to the problem of the effect of war on treaties. Thus Westlake (International Law, Vol. 2 (1907)), after having discussed the general rule that war terminates the validity of treaties between belligerents, and after having mentioned some exceptions to that rule, concludes by saying that on making peace it is for the parties involved "to define on what

terms they intend to close their interlude of savage life and to re-enter the domain of law".

Although State practice has not been uniform at all times and in all places – or at least has lent itself to different interpretations, especially in the earlier centuries – the overall picture of State practice suggests that war does not mean the total disruption of all legal bonds between States and that the belligerents must observe basic rules of humanity towards each other and must also entertain some legal relations with each other as, for instance, in the case of → armistice agreements, agreements on the exchange of the sick and the wounded, etc. (→ Wounded, Sick and Shipwrecked). This holds true even today, although the concept of war has become less clearly distinguishable from the more general concept of → armed conflict, and although the use of force has been rejected and made illegal as a means of conflict-resolution in international relations through the general prohibition of the use of force in Art. 2(4) of the → United Nations Charter. In fact, the body of humanitarian law (→ Humanitarian Law and Armed Conflict) specifically developed for application during wars has been greatly expanded despite the fact that waging war is now illegal. War may now be illegal, but it has not thereby become a phenomenon outside the realm of law. As this position was clearly reflected by State practice, legal doctrine in the course of time has also come to view the question of the effect of war on treaties as a matter of law, though it did not completely dispense with the older natural law approach to the problem.

(*b*) *Development of legal doctrine*

In legal doctrine three groups of theories attempting to explain or to determine the rules governing the problem of the effects of war on treaties may be distinguished.

The oldest group of theories and the one most strongly influenced by the natural law approach may be termed "the theory of treaty termination by war". Although not all legal relations between belligerent States are severed upon the outbreak of war, all treaty relations are considered to be cancelled, since the maintenance of treaty relations between States as an expression of their peaceful intercourse is incompatible with a state of war. A number of exceptions to this basic rule are recognized, however. These refer mainly to treaties which are specifically designed to regulate the relations among belligerent States and their relations with neutral States (→ Neutrality, Concept and General Rules). Sometimes these exceptions are extended further to cover treaties which are in no way related to the causes of the war in question or which establish arrangements to which third States are parties as, for example, concerning the → Universal Postal Union.

On the other hand, there is a second group of theories which deny any disruptive effect of war on treaties of the type assumed by the first group. According to this second set of theories, aimed at preserving the validity of treaties between belligerents in times of war (see Harvard Draft Convention on the Law of Treaties, AJIL, Vol. 29 (1935), Special Supp., Part III), "ipso facto termination is the exception rather than the rule". Exceptions here are recognized with regard to treaties which in every respect are incompatible with a state of war between the parties to the treaty, as is, for instance, the case with treaties of → alliance and friendship, war being the categorical negation of the aims pursued by the treaty.

Neither of these theories has been wholly accepted in practice. Especially since the turn of the century, legal doctrine – with which State practice has been in accord ever since – has been increasingly characterized by a position which has been termed the "compromise theory" or "theory of differentiation", which in fact does not represent a coherent third theory but is rather the recognition of the fact that a clear-cut general rule as to the effects of war on treaties has not yet evolved and that such a general rule may never adequately address the diverse interests of States. Thus, rather than presenting a consistent theory as to the effect of war on treaties, current legal doctrine appears to be better characterized as a pragmatic approach which systematically merges elements of the aforementioned theories as need be, with a view not only to the interests of belligerent parties to treaties but also to those of the international community at large. The basic idea underlying the present-day approach to the problem of the effects of war on treaties is to minimize the disruptive effects of war in the sphere of treaty law without overlooking the fact that in some areas of

political and social relations between States, the continuing → effectiveness of treaties is incompatible with a state of war.

2. *The Present Legal Situation*

No general rule of → customary international law exists to deal with the problem of the effects of war on treaties. Nor is the problem covered by the → Vienna Convention on the Law of Treaties (1969). Although the Convention deals extensively with the invalidity (→ Treaties, Validity), termination (→ Treaties, Termination) and suspension of the operation of treaties (Arts. 42 to 72), it expressly states in Art. 73 that "the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty ... from the outbreak of hostilities between states". Thus the present legal situation with regard to the effect of war on treaties has to be determined on the basis of today's State practice and legal doctrine. Three main categories of treaties, to which belligerents alone or a multitude of States are parties, may be distinguished: (a) treaties not affected by war and therefore continuing to be in force in time of war, (b) treaties remaining in force during war but whose execution is suspended in full or in part, and (c) treaties terminated by the commencement of war. Each category admits of further subdivisions or overlappings.

(*a*) *Treaties not affected by war*

Under this category, two major subgroups of treaties that are not affected by war may be distinguished along with some subgroups of lesser significance.

The first group is related to the conduct of war itself. There is general agreement that treaties concluded prior to the outbreak of war with the express or implicit intention of their being enforced in times of war – such as Hague Convention IV on the Laws and Customs of Land Warfare of 1907 (→ Hague Peace Conferences of 1899 and 1907) – remain in force or simply become effective between the belligerents. The same is true of bilateral agreements that are addressed to specific problems arising from the conduct of war and are specially concluded between belligerents.

The other major group of treaties which, according to the prevailing view as expressed in State practice and legal doctrine, remains unaffected by war is constituted by treaties creating an "international régime or status" (McNair/Watts; → International Régimes), such as treaties establishing an international organization (→ International Organizations, General Principles), determining borders (→ Boundaries), ceding land (→ Territory, Acquisition), or providing for the → demilitarization or → neutralization of zones or international waterways. Sometimes the continuing operation of such treaties in times of war is expressly provided for, as in the case of the General Act of the → Berlin West Africa Conference (1884–1885) with regard to the free → navigation of merchant vessels (→ Merchant Ships) on the Congo and Niger Rivers. In other cases a treaty allowed for an interpretation that it was intended to continue to be in force during war, as in the case of the Convention on the → Aaland Islands (1921) (→ Interpretation in International Law). Further examples are the Barcelona Conventions on Waterways of International Concern and on Freedom of Transit on Land (→ Barcelona Conference (1921)). The rationale behind this general rule is that the outbreak of war should not affect legal régimes created in the interest of the international community unless this is inevitable. Therefore, States – including the belligerents – are considered to remain bound by such treaties. There is a notable exception to this general rule, however, which says that whenever and wherever the legal régime or status extends to a place or region within the territorial jurisdiction (→ Jurisdiction of States) of one of the belligerent States, the respective treaty obligations are considered to be suspended between the belligerents. In this respect, treaties creating an international régime or status also – at least partially – fall into the category of treaties whose execution is generally suspended by the commencement of war.

Sometimes a third group of treaties not affected by war is distinguished, i.e. treaties which neither depend on the commencement of war for their being brought into effect nor fall within the second group of treaties creating an international regime or status, and yet which remain unaffected by war. Absence of war is not a *conditio sine qua non* to the execution of this type of treaty – in

contrast to treaties commonly referred to as "political treaties" – nor does it show any other incompatibility of its execution with a state of war. Treaties in point are those in the field of → private international law and other treaties regulating private interests (→ War, Effect on Contracts).

Finally, treaties between belligerent and neutral States remain in force as a matter of course, since the commencement of war does not directly affect the legal relations between a belligerent and a neutral State (see further → Recognition of Belligerency).

(b) Treaties suspended in full or in part by war

There is also widespread agreement that certain treaties may be affected by war without necessarily being annulled. Rather, their execution in times of war is considered only to be suspended between the belligerents. This would mainly be the case with multilateral treaties (→ Treaties, Multilateral) – the belligerent parties being temporarily unable to fulfil their obligations because of the impact of the war on the web of international intercourse. But a suspension of treaty obligations as a consequence of the commencement of war is also conceivable with regard to bilateral treaties. In this latter case, however, legal doctrine and State practice seem to indicate a reluctance to accept an automatic revival of treaty obligations on the termination of the war. Instead, the parties involved are generally expected to conclude a specific agreement to that effect. Whether a treaty may be considered to be suspended rather than terminated by the commencement of war is a matter of interpretation of the treaty in the light of the particular political and military conditions prevailing.

(c) Treaties terminated by war

Treaties not falling into one of the categories outlined broadly above are generally considered to be terminated by the commencement of war. These treaties – commonly, but imprecisely, referred to as "political treaties" (other treaties may be just as much of a political nature) – depend on the existence of normal political and social relations between States for their proper functioning. As the factual and legal negation of such normal relations, war is therefore incompatible with the continuing operation and validity of these treaties. No general description of the treaties falling into this last major category is possible at this time. Applying the above criteria, one can, however, enumerate some types of treaties, generally held to be terminated by war. These are → peace treaties, → treaties of friendship and commerce, treaties of alliance or non-aggression (→ Non-Aggression Pacts) and similar treaties presupposing political consensus and normal interaction between their partners. It has to be noted, however, that in some instances where treaties such as those mentioned above have been considered to be terminated by the commencement of war, they have in fact only been suspended, as is illustrated by the practice of belligerents upon termination of war not to negotiate new treaties but rather to agree upon the revival of former treaties. Examples in point are to be found in the political clauses of the → peace treaties of 1947 ("to keep in force or revive").

3. Special Problems and Significance

(a) Impact of the changing concept of war

A review of the use of military force in the decades following World War II reveals a remarkable shift away from the traditional concept of war as a phenomenon characterized by the formal commencement of hostilities by declaration of war or other action clearly indicating the intention of a State to go to war with another State. Instead, the use of armed force has in many instances gradually developed into a state of war which, however, more often than not has been referred to by governments as a "police action", a "limited act of → self-defence" or a → "humanitarian intervention", thereby indicating that a full-fledged war is not intended to be recognized. In the present context it may well be asked whether such armed conflicts have the same effect on treaties as war does in the above more limited understanding of the traditional concept. Furthermore, such armed conflicts are generally brought to an end in a step-by-step manner. This poses the further problem as to when a treaty, which may be considered to have been suspended by the conflict, will revive – a problem which occasionally arose when wars in the classical sense were terminated in successive stages such as by ar

armistice or military → surrender, followed later by the conclusion of a formal peace treaty. Although no generally accepted rules governing the legal impact of these changes in the traditional concept of war have as yet been formulated, the solution of the problems posed thereby may have to be sought in an approach somewhat along the lines of the current prevailing approach to the general problem of the effects of war on treaties, i.e. to preserve the effectiveness of treaties as far as possible. Therefore, any armed conflict of a lesser intensity than that traditionally held to constitute war may not be considered to terminate treaties between the parties involved, nor even to suspend the execution of treaties except in cases where such execution of treaty obligations is made impossible by the military action. Thus, for instance, the limited use of force on the → high seas or in the air as a general rule does not adversely affect the operation of treaties. Post-war history abounds with pertinent State practice – a recent example being the air incident involving the United States and Libya in August 1981.

The question of when suspension of treaty obligations ends may be answered along similar lines. The suspension will be considered to end, and treaty obligations to revive, at the earliest possible date after any such use of force has ended, the formal termination of the armed conflict not being a legal prerequisite to ending the suspension. It should be noted, however, that this forms a guiding principle for the States concerned rather than a hard and fast rule of international law. Much depends on the circumstances and the interpretation of the treaties in question.

Another major problem raised by the changed concept of war with regard to the operation of treaties is that of the use of force initiated by the → United Nations according to the Charter or the legal principles developed on the basis of it. Such use of armed force, applied as a → sanction against the violation of basic Charter obligations, is not considered as war in the traditional sense. As such actions are intended to restore the legal order, they are considered as suspending treaty obligations only in cases where the use of force renders their execution impossible in fact.

In this context it goes without saying that all measures taken in the course of an international conflict which fall short of the use of force – such as the severance of diplomatic and consular relations (→ Diplomatic Relations, Establishment and Severance; → Consular Relations) – do not affect the efficacy of treaties except where these relations are a precondition for the execution of particular treaties, as is expressly provided for in Art. 63 of the Vienna Convention on the Law of Treaties.

(*b*) *Significance of present-day law*

Under the modern concepts of war and the use of force, international law governing the effects of war on treaties has shifted away from the old notion that war terminates all legal relations between States, including the operation of treaties. The rather rigid application of the rule that war terminates treaties has gradually been substituted by the flexible procedure of suspending the execution of treaty obligations. Cases of termination of treaties by war have increasingly become the exception to the rule that treaties survive the commencement of war – a development which will most probably continue. Therefore, it may be confidently predicted that the concept of war as it was understood when rules regarding the effect of war on treaties were first developed will be of decreasing relevance in international relations, while the concepts of limited armed conflict and internationally supported police actions will take its place.

A.D. McNAIR, Les effets de la guerre sur les traités, RdC, Vol. 59 (1937 I) 527–585.

H.-J. SCHLOCHAUER, Die Einwirkung des Krieges auf den Bestand völkerrechtlicher Verträge, Deutsche Rechts-Zeitschrift, Vol. 1 (1946) 161–163.

F. KLEIN, Kriegsausbruch und Staatsverträge, JIR, Vol. 3 (1950–1951) 26–57.

R. RÄNK, Modern War and the Validity of Treaties, Cornell Law Quarterly, Vol. 38 (1952–1953) 312–355.

J.F. DYBA, Der Einfluß des Krieges auf die völkerrechtlichen Verträge (1954).

E. KAUFMANN, Die völkerrechtlichen Vorkriegsverträge, in: Festgabe für Alexander N. Makarov, ZaöRV, Vol. 19 (1958) 225–233.

LORD McNAIR and A.D. WATTS, The Legal Effects of War (4th ed. 1966).

T. SCHWEISFURTH, Der internationale Vertrag in der modernen sowjetischen Völkerrechtstheorie (1968) 302–303.

A. BLECKMANN, Die Wiederanwendung deutscher Vorkriegsverträge, ZaöRV, Vol. 33 (1973) 607–635.

W. WENGLER, Die Geltung von Kollektivverträgen im Verhältnis zwischen der Bundesrepublik und der DDR, in: Um Recht und Freiheit, Festschrift für Friedrich August Freiherr von der Heydte, Vol. I (1977) 727–750.

E. KLEIN, Statusverträge im Völkerrecht (1980) 295–300.

JOST DELBRÜCK

WAR GRAVES

1. Historical Development

The idea that the remains of those who die on the battlefield be decently buried and that their graves be maintained and permanently preserved developed during the last century. The United States established the first war cemetery after the → war with Mexico (1846–1848). → Peace treaties in Europe in the second half of the 19th century contained clauses covering the maintenance of war graves. The Geneva Red Cross Convention of 1906 was the first universal instrument to deal with the burial of the dead, and its provisions have been develop and extended by the Geneva Conventions 1929, Geneva Conventions I to IV of 194 d Additional Protocols I and II of 1977 (→ G va Red Cross Conventions and Protocols; → Land Warfare).

After World War I, Arts. 225 and 226 of the → Versailles Peace Treaty stipulated a duty on the parties to maintain decently the graves of former enemy soldiers situated on their territory (→ Enemies and Enemy Subjects). Additional treaties were concluded between various parties, in particular trilateral agreements between Germany, France and Great Britain, and bilateral agreements between Belgium, Italy, Poland and Romania on the one hand and Germany on the other. Agreements on war graves were also concluded between Germany and Estonia, Lithuania, Latvia and the Soviet Union.

After World War II, the peace treaties (→ Peace Settlements after World War II) did not contain provisions on war graves. Germany has concluded a number of agreements with Western European and African States as well as two multilateral treaties with Commonwealth or former Commonwealth countries (→ British Commonwealth). Some States have also enacted national legislation dealing with these matters (Germany: Gesetz über die Erhaltung der Kriegsgräber aus dem Weltkrieg, December 22, 1922, RGBl. 1923 I, 25; Kriegsgräbergesetz, May 27, 1952, BGBl. I, 320).

2. Duty to Bury the Dead and Establish Gravesites

Parties to the → armed conflict are obligated to search for the wounded, sick, and dead (Geneva Convention I, Art. 15; Convention II, Art. 18; Convention IV, Art. 16; Protocol II, Art. 8; → Wounded, Sick and Shipwrecked). The necessary information regarding persons found dead and regarding persons who have died in captivity must be collected and recorded. In particular, their identities have to be established. They must be honourably interred, if possible individually, and according to the rites of the religion which they professed. The gravesites must be properly maintained and marked so that they may always be found. These duties relate to dead members of the enemy armies (Convention I, Arts. 16 and 17), including → prisoners of war (Convention III, Art. 120) and civilian internees (Convention IV, Art. 130; → Internment), but essentially also to other persons who die for reasons related to the conflict, in particular those who had for such reasons been detained (Geneva Protocol I, Arts. 33 and 34).

3. Permanent Maintenance of Gravesites; Exhumation and Return

The long-term fate of these graves should be regulated by agreements between the parties concerned. They are under a duty to conclude agreements (see section 1 *supra*) to protect and maintain such gravesites permanently and to facilitate access to the gravesites by relatives of the deceased and by representatives of the official graves registration services, as soon as circumstances and the relations between the parties permit (Protocol I, Art. 34(2)).

If no such agreement is concluded, the State where the gravesites are situated is not indefinitely obliged to maintain them unless the home country of the deceased persons bears the cost for it (Protocol I, Art. 34(3)). The gravesite country may offer the return of the remains and, if that offer is not accepted, after five years it may

adopt the arrangements laid down in its own laws relating to cemeteries and graves.

As long as the State where the gravesites are situated must maintain them, it is not allowed to exhume the remains except for the purpose of returning them, or in cases of overriding public necessity (Protocol I, Art. 34(4)). This includes requirements of hygiene or criminal investigations, but also covers the necessity of regrouping scattered graves if new cemeteries are established.

As a rule, the return of the remains is regulated by agreements between the countries concerned under Art. 34(2) of Protocol I, and the parties to the conflict are under an obligation to conclude such an agreement. Many agreements thus far concluded provide for the return of the remains upon request of the next-of-kin. Usually, such returns will not be allowed if the home State makes objections. But five years after an offer is made by a State to return the remains, that State is free to return them at the request of the next-of-kin even if the home State objects.

4. Graves Registration Services

Registration of graves, searches for unknown graves, identification of unknown dead persons, transmission of information, collection of personal belongings of dead persons, and establishment and maintenance of proper gravesites and war cemeteries are functions entrusted to registration services. This long-standing assignment is now required in part by the Geneva Conventions.

These graves registration services need not necessarily be government agencies; they may also be private bodies. In the United States, these functions were performed from 1862 onward by the Quartermaster General. In 1917, the American Graves Registration Service was founded, and in 1923, the Battle Monument Commission. In the British Commonwealth, these functions are performed by the Commonwealth (formerly Imperial) War Graves Commission. In France and Italy, special ministerial departments serve the same purpose, while in Germany a private body, the Volksbund Deutsche Kriegsgräberfürsorge is charged with these tasks.

J.S. PICTET (ed.), The Geneva Conventions of 12 August 1949, Commentary, 4 vols. (1952–1960) esp. Vol. 1, pp. 174–202.

M. BOTHE, K.J. PARTSCH and W.A. SOLF, New Rules for Victims of Armed Conflicts, Commentary on the Two Protocols Additional to the Geneva Conventions of 1949 (1982) esp. pp. 168–181.

MICHAEL BOTHE

WAR, LAWS OF

A. Notion and Sources

1. Sources

The laws of war, or *jus in bello*, are those rules and principles of international law which have developed or have been designed to govern the conduct of → war. They cover a wide range of subjects, e.g. the effects of war on the diplomatic, consular and treaty relations between the belligerents (→ War, Effect on Treaties; → Diplomatic Relations, Establishment and Severance; → Consular Relations); the relations between belligerents and third States and their nationals; the ways and means of waging war (→ Warfare, Methods and Means); the distinction between → combatants and civilians (→ Civilian Population, Protection); the protection of certain categories of persons (→ Protected Persons) and objects (→ Cultural Property, Protection in Armed Conflict) from certain consequences of the war.

Like international law in general, the laws of war derive first and foremost from custom (→ Customary International Law) and → treaties (→ Sources of International Law). Another source of singular importance is found in → general principles of law. Resolutions adopted by various international fora, notably the → United Nations General Assembly and the International Conferences of the Red Cross, although technically not direct sources of the laws of war, contribute significantly to their reaffirmation and development. Finally, as provided in Art.

38(1) (d) of the Statute of the → International Court of Justice (ICJ), "judicial decisions and the teachings of the most highly qualified publicists of the various nations" constitute "subsidiary means for the determination of rules of law".

2. *Custom*

Customary rules of war emerge not only in time of war, from the actual conduct of the belligerents, but also in time of peace from military manuals, instructions and training programmes of the armed forces. As a source of the laws of war, custom has long held pride of place. Even today, although it has had to yield this place to treaties regarding the creation of new rules, custom continues to function as a reservoir of general international law, replenished from time to time with the substantive provisions of treaties which have found sufficiently widespread recognition. This process of reception into general international law has in one instance had the effect of neutralizing a particularly undesirable treaty provision. The case in point concerns the ill-famed *si omnes* clause (→ General Participation Clause) in Art. 2 of Hague Convention IV of 1907 respecting the Laws and Customs of War on Land (→ Land Warfare), which provided that the substantive provisions of the Convention and the annexed Hague Regulations would "not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention" (→ Hague Peace Conferences of 1899 and 1907). After World War II the International Military Tribunal at Nuremberg (→ Nuremberg Trials) refused to give effect to this provision, arguing that, "by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war...."

3. *Treaties*

While bilateral agreements between belligerents relating, for instance, to the conclusion of an → armistice or an exchange of → prisoners of war have since ancient times contributed to the development of the laws of war, multilateral treaties (→ Treaties, Multilateral) have become an independent source of the laws of war only since the middle of the 19th century. The oldest example is the Declaration of Paris of 1856, which proclaimed four maxims relating to → sea warfare. In 1864 followed the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (→ Geneva Red Cross Conventions and Protocols), and in 1868 the St. Petersburg Declaration renouncing the use, in time of war, of explosive projectiles weighing less than 400 grammes. In the course of the century which has since elapsed, these modest beginnings were gradually elaborated into an impressive structure composed of multilateral treaties, conventions, protocols, and → declarations regulating in greater or lesser detail many aspects of the conduct of war.

4. *Principles of Law*

Principles of law are of particular significance in the laws of war. While such principles have in the past emerged, and can emerge again, from the municipal law systems of States (through military laws, military manuals, etc.), even greater importance attaches to principles of → international law proper (→ International Law and Municipal Law). Such principles may figure in substantive treaty provisions or in → preambles, or they may not be explicit at all. Examples of the first category are the principle of "unnecessary suffering" in Art. 23(e) of the Hague Regulations on Land Warfare of 1899 and 1907, and the principle of "humane treatment" in the Geneva Conventions of 1949 (→ Military Necessity; → Humanitarian Law and Armed Conflict). An example of the second category is the juxtaposition of "necessities of war" and "requirements of humanity" in the preamble to the St. Petersburg Declaration of 1868. Exemplifying their implicit presentation are: the principle of distinction between civilians and → combatants, which until its recent codification in Art. 48 of the 1977 Protocol I additional to the Geneva Conventions of 1949 had remained the unwritten foundation of an important part of the laws of war (→ Codification of International Law); and the principle of → proportionality, which in its abstract form has not even now found such official expression, although it may be seen to underlie various provisions of Additional Protocol I.

Whether embodied in a treaty or not, these principles all have in common their dependence on further elaboration into more concrete rules

for their practical effect. This was done in the Hague Regulations, the Geneva Conventions, and the 1977 Additional Protocols. Evidently, the less a principle is elaborated on the international plane, the more its implementation by practical measures will be left to the discretion of national authorities. Thus the prohibition of the use of weapons calculated to cause unnecessary suffering has led to very few specific, internationally agreed prohibitions (→ Weapons, Prohibited). For weapons not banned internationally, national authorities are left to decide whether certain weapons developments should not be pursued, for fear of violating the principle of unnecessary suffering.

An intriguing reference to general principles of law is contained in the → Martens' Clause in the preambles to the Hague Conventions II of 1899 and IV of 1907 on land warfare. The clause provides in part that in cases not included in the Hague Regulations:

> "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

This has given rise to much controversy over whether the "laws of humanity" in particular are designated here as an independent source of the laws of war. In an earlier paragraph the parties had declared that the wording of the provisions being adopted had been "inspired by the desire to diminish the evils of war, as far as military requirements permit". It seems therefore likely that the Martens' Clause also confirms the principle that the laws of war rest on a balance of military necessity and the requirements of humanity.

5. Resolutions

It is widely recognized that resolutions do not of themselves constitute an independent source of the laws of war. At the same time, they can serve to reaffirm existing law, and can exert considerable influence on the trends of development of the law. Examples of the first possibility are the resolutions by which the XXth International Conference of the Red Cross (Res. XXVIII, Vienna, 1965) and subsequently the UN General Assembly (Res. 2444 (XXIII), 1968) reaffirmed the principle of protection of the civilian population. Resolutions which have influenced the development of the law include the General Assembly resolutions whereby this body implicitly or expressly characterized → wars of national liberation as international → armed conflicts (the clearest instance being Res. 3103 (XXVIII) of 1973). With these resolutions, the General Assembly set a trend which ultimately led to the recognition of the international status of conflicts "in which peoples are fighting against colonial domination and alien occupation and racist régimes" in Art. 1(4) of the 1977 Additional Protocol I.

The General Assembly also adopted in 1961 and again in 1972 resolutions purporting to prohibit the use of nuclear weapons (Res. 1653 (XVI) and 2936 (XXVII); → Nuclear Warfare and Weapons). Yet because of the strong opposition to these resolutions, the view is widespread that they did not achieve their purpose. Rather, they are regarded as an expression of the sense of frustration among a majority of States at the threat posed by the existence and continued development of nuclear weapons.

6. Tribunals and Publicists

"Judicial decisions and the teachings of the most highly qualified publicists of the various nations" (see section A.1. above) have been of varying importance as sources of the laws of war. It should be noted that, like the → Permanent Court of International Justice before it, the ICJ has never been seised of a case concerning the laws of war. International → arbitration has occurred with some frequency, with the → *Alabama* claims arbitration (1872) as perhaps the best-known instance, along with commissions of conciliation and arbitration set up under various → peace treaties (→ Conciliation and Mediation; → Mixed Commissions). The judgments of the International Military Tribunals at Nuremberg (1946) and Tokyo (1948) (→ Tokyo Trial) stand out as rare instances of unilateral international adjudication in matters of the laws of war, notably the law relating to individual responsibility for → war crimes. An attempt to set up an → International Prize Court foundered when both the 1907 Hague Convention XII rela-

tive to the Creation of an International Prize Court and the 1909 Declaration of London concerning the Laws of Naval War (which would have provided the internationally agreed substantive law to be applied by the Court) failed to secure any ratifications (→ London Naval Conference of 1908/1909).

National courts have made their most important contribution to the laws of war precisely in the field of → prize law, developed through a long series of often very carefully argued decisions. In the aftermath of World War II many → war crimes trials took place before national courts, which made further contributions to the law relating to individual criminal responsibility mainly in the sphere of occupation law (→ Occupation, Belligerent). Mention should finally be made of the judgment of the Tokyo district court in the Shimoda case (1963), which pronounced the illegality of the nuclear attacks on Hiroshima and Nagasaki.

Under the heading of "teachings of publicists" references should be made first to the International Committee of the Red Cross, which on account of its authoritative publications, comments, reports and projects has been of crucial importance for the development of the humanitarian law of war in particular. Other private institutions include the → Institut de Droit International, which in 1880 published the Oxford Manual on the law of land warfare, and the → International Law Association which in the course of its existence published several reports on aspects of the laws of war.

Individual students of the laws of war have also made significant contributions to this branch of international law, whether in the form of publications under their own names or of cooperation in the elaboration of military manuals or instructions. A classical example of the latter is the Instructions for the Government of Armies of the United States in the Field, drafted by Francis Lieber and promulgated by President Lincoln as General Order No. 100 in 1863.

B. General Principles and Rules

1. Different Functions

From one viewpoint the laws of war serve to make permissible in war certain courses of action which would be otherwise illegal. At the same time, however, they place restrictions on the freedom of action of belligerents. These restrictions relate first to the scope of the war by recognizing and regulating the consequences of the neutrality of third parties (→ Neutrality, Concept and General Rules). A second set of restrictions relates to the duration of the war powers of belligerents. While some of these powers, notably their power to engage in active hostilities, are suspended temporarily by a cease-fire (→ Suspension of Hostilities) or indefinitely by an → armistice, they cease altogether with the advent of peace. Even then, certain consequences of the war continue to be governed by the laws of war (→ Peace Treaties).

A third set of restrictions relates to the actual conduct of hostilities. They have developed along two lines: the "law of The Hague" (pertaining to the ways and means of waging war) and the "law of Geneva" (pertaining to the protection of certain categories of persons, notably those in the power of the adversary). Nevertheless, this represents no rigid division, since parts of the Hague law were in the course of time transferred to the Geneva law, and the two bodies of law have many elements in common. Their basic goal, to preserve civilization and humanity even during war and to make the return to peace possible, is the same.

2. Law of The Hague

The law of The Hague starts out from the premise that the right of belligerents to choose methods or means of injuring the enemy is not unlimited (Hague Regulations, Art. 22). The rules flowing from this principle can be divided along various lines: e.g. the theatre of war (law of land, sea and → air warfare; → War, Theatre of) or the interests involved (relations between combatants, protection of cultural property).

With respect to relations between combatants, rules common to all theatres of war include the prohibition to employ means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, the prohibition to kill, injure or capture an adversary by resort to → perfidy, and the prohibition to conduct hostilities on the basis that there shall be no survivors.

The principle of protection of the civilian population logically entails an obligation upon belligerents to distinguish at all times between civilians and combatants, as well as between → civilian objects and → military objectives. There are two main rules for the protection of the civilian population: The civilian population, individual civilians and civilian objects shall not be the object of attack (→ Indiscriminate Attack); and in the conduct of military operations the belligerent parties are to take constant care to spare the civilian population, individual civilians and civilian objects and at all events to avoid disproportionate injury or damage.

The idea of protection of cultural property rests on the dual recognition that on the one hand, the cultural heritage of peoples needs to be protected against destruction as a result of military action, but that on the other hand, each and every object representing a certain cultural value cannot be so protected. A logical proposition is that the more important the value of the cultural property in question, the more it deserves to be spared. An indispensable condition for protection is that the object concerned is not used in support of the military effort. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 provides detailed rules for the protection of cultural objects falling under the definition of "cultural property".

3. Law of Geneva

The law of Geneva is based on the recognition that certain categories of persons stand in special need of protection from the effects of war. The first Convention of Geneva (1864) afforded protection to the wounded and sick of the armies in the field, to ambulances (→ Medical Transportation) and military hospitals, and to the medical and other personnel thereof. In the course of time other categories of persons were brought under the régime of the law of Geneva. By 1949, the categories of "war victims" so protected had grown to include the → wounded, sick and shipwrecked of the armed forces, prisoners of war, and civilians in the power of the enemy.

The basic principle of the law of Geneva is that the persons in question shall be "respected and protected in all circumstances" (with "respect" providing the passive and "protect" the active element in the protection concept) and shall be treated humanely, without discrimination. The four Geneva Conventions of 1949, together with the relevant parts of the 1977 Additional Protocols, translate these basic propositions into a great number of detailed rules.

Equally important is their careful definition of the → "protected persons" who fall under the régime of coverage which they provide. Besides encompassing categories of "war victims" constituting "protected persons", the Conventions and Protocols also extend protection to institutions, establishments, personnel and objects which are functionally connected with the protection of the "protected persons". The system of protection rests in part on the use of certain recognized distinctive emblems, the most important of which are the Red Cross and the Red Crescent (→ Emblems, Internationally Protected).

4. Non-International Armed Conflicts

The laws of war apply in their totality to wars or, avoiding the technical legal implications which the term "war" has acquired in more modern terminology, to "international armed conflicts". This means primarily armed conflicts between States. Traditionally, the laws of war were also considered applicable in major → civil wars. Under the influence of the recent → decolonization movement, a series of UN General Assembly resolutions has sought to include wars of national liberation among the international armed conflicts (see section A.5. above).

Since 1949, certain basic principles of the laws of war have been made applicable in non-international armed conflicts. This was achieved by Art. 3 common to the Geneva Conventions of 1949 for the principles of the law of Geneva. The Hague Convention of 1954 relating to the protection of cultural property likewise contains a section on non-international armed conflicts. The latest development in this field is the 1977 Additional Protocol II to the Geneva Conventions, which makes the principle of protection of the civilian population applicable in this type of armed conflict.

5. Axiom of Equality

Under traditional international law, the equal-

ity of the belligerent parties before the law was axiomatic. Doubts were raised as to the continuing validity of this principle after World War II, following the condemnation of wars of → aggression and the prohibition of the threat or → use of force against another State in Art. 2(4) of the → United Nations Charter. The debate has resulted in widespread acceptance by both academicians and governments that the principle has retained its validity for all those parts of the laws of war which relate to the protection of the human person and are thus of a humanitarian character. Inequality between aggressor and defending party may obtain only in respect of other matters, e.g. the powers of belligerents to take → enemy property; it may obviously also affect traditional neutrality rules.

6. Reciprocity

Another traditional principle is that of → reciprocity, according to which a belligerent cannot expect the adversary to respect a rule which he himself fails to respect. This principle still governs certain parts of the law of war, such as the rules relating to the choice of weapons. A number of States have made the reciprocity principle explicit by making reservations (→ Treaties, Reservations) to this effect to their acceptance of the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925 (→ Biological Warfare; → Chemical Warfare). As far as the rules relating to the protection of the human person are concerned, reciprocity has lost its validity by the provision in the relevant treaties that these rules are to be respected "in all circumstances".

7. Reprisals

A somewhat related point concerns the question of → reprisals. Formally, reprisals can be resorted to as → sanctions in the event of violations of the laws of war, under the conditions prevailing under general international law. In fact, reprisals have more often than not failed to achieve their purpose as sanctions, and have merely led to countermeasures of equal or even greater brutality. Moreover, the persons affected by the reprisal measures have usually been innocent of the violations which evoked the measures. For these reasons, a number of prohibitions on reprisals have been codified in the Geneva Conventions of 1949, Additional Protocol I of 1977 and the Hague Convention on cultural property. To the extent that they are not expressly prohibited, however, recourse to reprisals would still seem to be legitimate.

8. Peace-time Preparations

While the laws of war have to be implemented in time of war, certain obligations must be honoured in time of peace as well. Generally, these obligations relate to the equipment, discipline, instruction and training of the armed forces, and to the dissemination of knowledge of the laws of war among the population. These obligations are the logical consequence of the fact that war is waged not by governments and other responsible persons in authority alone, but by vast masses of combatants, while the non-combatant population can also readily become involved in the war. To start the preparations for the implementation of the laws of war only after the outbreak of war would therefore be simply too late.

In this connection, it should be mentioned that international responsibility for violations of the laws of war arises not only for the State (→ Responsibility of States: General Principles) but equally for the individuals who by their conduct have become guilty of a war crime.

C. Current Problems

1. Nuclear Weapons

Probably the gravest current problem of the laws of war concerns the legality of → nuclear warfare and weapons. While this is not the place to enter into this problem, it may be safely stated that effective steps towards the control of nuclear weapons may be expected in the sphere of → arms control and → disarmament law, rather than in the laws of war.

2. Sea Warfare

Another problem area concerns sea warfare. Except for the Geneva law relating to the wounded, sick and shipwrecked at sea, the traditional law of maritime warfare has not been the subject of any recent codification efforts, so that much of

it must now be considered obsolete. It remains to be seen, however, whether in particular the major naval powers will be prepared to join in a comprehensive effort to update this part of the law.

3. *Problems of Implementation*

The exact opposite of the problem just mentioned arises out of the degree of perfection and technicality which certain other parts of the laws of war have recently acquired. In particular, the Geneva Conventions of 1949 and the 1977 Additional Protocol I contain a wealth of minutely detailed rules, some of which are of a highly sophisticated legal character and which many an armed force might find difficult to implement (e.g. the rules on protection of the civilian population and, in that connection, the rules elaborating the principle of proportionality). Of course, this does not detract from the obligation to respect the underlying principles.

Implementation of parts of the laws of war may become problematical in certain other circumstances as well. This may be the case, first, with respect to guerrilla warfare (→ Guerrilla Forces). In the diplomatic conference of 1974 to 1977 at which the two Additional Protocols were negotiated, the view prevailed that, with one exception, no special rules were required for this type of warfare. The exception concerns the obligation that combatants distinguish themselves from the civilian population; this obligation is greatly mitigated for combatants engaged in what amount to guerrilla activities (Additional Protocol I, Art. 44(3); → Guerrilla Forces). A problem remains, however, as to what extent parties to an armed conflict in which one side resorts to guerrilla tactics can be expected to respect the laws of war.

A comparable problem arises out of what has been styled "asymmetrical war", in which most of the achievements of modern military technology are on one side. The technologically disadvantaged party to the conflict may find difficulty in respecting certain rules which it feels unduly favour its more sophisticated adversary, e.g. rules on the protection of medical aircraft, or rules permitting aerial → bombardment without providing absolute protection for the civilian population.

4. *Other Problems*

A factor which might be even more generally detrimental to the implementation of the laws of war lies in the ideological rifts which divide States, nations and groups in the contemporary world. In the event of armed conflict between parties of opposing ideologies the tendency may be to depict the adversary as belonging to a less-than-human species, in regard to which no standards of civilization need be observed (→ War, Use of Propaganda in). In the worst case, this may entail the virtual breakdown of the laws of war which, as mentioned earlier, are based on the premise of equality of the belligerent parties. In combatting this tendency, the accent should be on the parties' reciprocal interests in observing the laws of war.

A final problem concerns the internationalization of internal armed conflicts. In particular, large-scale third-party involvement (as in the case of the → Vietnam war) may result in a situation in which it becomes extremely difficult to decide which parts of the laws of war apply. This problem is inherent in the dichotomy, reaffirmed during the 1974–1977 diplomatic conference, between international and non-international armed conflicts, with different sets of rules applying in each case.

D. SCHINDLER and J. TOMAN (eds.), The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents (2nd ed. 1981).

J. STONE, Legal Controls of International Conflict (1959).

M.S. McDOUGAL and F.P. FELICIANO, Law and Minimum World Public Order (1961).

G. SCHWARZENBERGER, International Law as Applied by International Courts and Tribunals, Vol. 2, The Law of Armed Conflict (1968).

F. KALSHOVEN, Belligerent Reprisals (1971).

S.D. BAILEY, Prohibitions and Restraints in War (1972).

F. KALSHOVEN, The Law of Warfare (1973).

J. PICTET, Le Droit humanitaire et la protection des victimes de la guerre (1973).

Y. MELZER, Concepts of Just War (1975).

J.H.W. VERZIJL, International Law in Historical Perspective, Vol. 9, The Laws of War (1978).

M.-F. FURET, J.-C. MARTINEZ and H. DORANDEU, La guerre et le droit (1979).

O. KIMMINICH, Schutz der Menschen in bewaffneten Konflikten (1979).

G. BEST, Humanity in Warfare (1980).

A.S. CALOGEROPOULOS-STRATIS, Droit humanitaire et Droits de l'homme (1980).

FRITS KALSHOVEN

WAR, LAWS OF, ENFORCEMENT

A. History, Theory and Definitions

For the purposes of this article, "enforcement" of the law is distinguished from its "implementation". By "enforcement" is meant the various responses known to the law of war when it has not been observed and a violation has occurred (→ War, Laws of; → War). By "implementation" is meant those devices and processes known to the law which are designed to monitor and to ensure its observance. It follows that such devices will have failed by the time that enforcement of the law has to be considered.

A leading authority on the law of war, the late Sir Hersch Lauterpacht, has written: "[I]f international law is . . . at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." (BYIL, Vol. 29 (1952) pp. 381–382.) "[I]t is in particular with regard to the law of war that the charge of a mischievous propensity to unreality has been levelled against the science of international law. The very idea of the regulation of a condition of mere force has appeared to many incongruous to the point of absurdity." (Collected Papers, Vol. 2 (1975) p. 37.)

Nonetheless, the history of warfare and the practices of belligerents display, from early times onwards, the existence of restraints that are felt to be binding upon the participants (→ War, Laws of, History). That these restraints were imposed for motives quite other than those that are felt to be decisive today is beside the point. A number of different forces, in isolation or in combination, operated to impose some modicum of restraint in the conduct of warfare. Such restraints contributed to the development of usages, and later, to customary rules of warfare (→ Customary International Law). Among these was the need for some degree of military discipline effective in attack and defence, as opposed to a disorganized mêlée. Likewise, the concept of military honour, with the powerful sanction of dishonour publicly displayed, was particularly effective among the knights of the military orders of chivalry. On occasions the weight of the Church's discipline of souls acted as some restraint upon the commission of gross excesses in warfare. More importantly, a powerful element in the enforcement of the law was the denial of legal title to certain gains of war, such as ransom and booty (→ Booty in Land Warfare). These could be very large financial gains, the loss of which acted as a severe sanction to men who exposed themselves to the hazards and hardships of war. Such rules of enforcement were virtually devoid of any of the humanitarian content that is the dominant feature of the modern law of → armed conflicts. In former times enforcement of the law of war was highly irregular and spasmodic. Nevertheless, some legal restraints of enforcement existed and were known and accepted by belligerents, even though they were frequently disregarded. Having regard to the nature of warfare, it is perhaps surprising that there were legal rules as to its conduct and secondary rules for their enforcement which were, on occasions, applied.

B. Modes of Enforcement

The enforcement of the law of war is, to some extent, attained through means that are recognized by international law. According to the classical law of war these means comprise three classes: (1) measures of an autonomous nature, of → self-help, namely the taking, and more controversially, the killing of → hostages, the resort to → reprisals and the punishment of enemy soldiers and civilians for committing → war crimes; (2) complaints lodged with the enemy, or with neutral States (→ Neutrality, Concept and General Rules); → good offices, mediation (→ Conciliation and Mediation) and → intervention by neutral States; and (3) rights to compensation (→ War Damages). Of these three classes the first, measures of self-help, are the most important, but not always the most effective.

1. Autonomous Measures

(a) The taking of hostages

In strict legal analysis, the taking of hostages was a means of attempting to secure the implementation of the law of war. It consisted of the taking of innocent enemy persons, often civilians, as a guarantee for the lawful behaviour of the adversary. This was a frequent practice in occupied territory (→ Occupation, Belligerent). Such

hostages were often killed if the belligerent State upon which they depended violated the law of war or the law imposed by the enemy occupant. This was a normal practice of Germany during World War II and was the subject of war crimes trials thereafter (see The Hostages Case, Case 7, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. 11 (1950) p. 757; → Nuremberg Trials). There was a division of opinion among the Allied Powers whether the killing of hostages was necessarily a violation of the law of war. Strictly speaking, the killing of such hostages in response to unlawful acts by the adversary was more in the nature of a reprisal action, but would normally be beyond the legal bounds of such an action. In practice, it was the normal response adopted when the German occupation authorities could not find the persons who had committed some unlawful action against such authorities. As a result of this experience, Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War (→ Geneva Red Cross Conventions and Protocols) expressly prohibited the taking of hostages from the population of the States engaged in armed conflict (Art. 34). Such acts were declared in Art. 147 to be a "grave breach" of the Convention exposing the offender to trial and punishment. Protocol I of 1977 additional to the Geneva Conventions of 1949 repeats this prohibition: "... at any time and in any place whatsoever, whether committed by civilian or by military agents" (Art. 75(2)). Thus, what was a lawful means of enforcement of the law of war has now become a "grave breach" of that law, and exposes the offender to penal proceedings and punishment. The Geneva Conventions of 1949 now bind 149 States while Additional Protocol I binds 17 States.

(*b*) *Reprisals*

Reprisals have a long history as a means of enforcement of the law of war. A reprisal is not to be confused with an act of retaliation. In the classical law of war, the resort to reprisal action was designed to ensure the return of the adversary State, which had initiated an illegality, to the observance of the law. A reprisal action is thus an act, otherwise illegal, performed in response to a previous illegality by the adversary. Such reprisal action required previous warning to the enemy and the subsequent failure of the enemy to cease its illegal action. The act of reprisal had to be proportionate (→ Proportionality) and to cease if the enemy, for whatever reason, ceased the illegality of which complaint had been made. In practice, reprisal actions all too frequently led to an ever mounting scale of illegalities on both sides. However, the apprehension of reprisal action being taken did to some extent inhibit the perpetration of gross violations of the law of war.

The inequality in effectiveness of belligerents, combined with the humanitarian quality of the modern law of war, has led to the virtual prohibition of lawful resort to reprisals. They are prohibited against the → wounded, sick and shipwrecked by Geneva Conventions I (Art. 46) and II (Art. 47) of 1949 and by Additional Protocol I of 1977 (Art. 20), and against → prisoners of war, civilians, and their property (→ Civilian Population, Protection) by Geneva Conventions III and IV of 1949. Reprisals taken against civilians and a wide range of → civilian objects and installations are now prohibited modes of hostilities according to Additional Protocol I. Thus, attacks directed at civilians and civilian objects on land from land, sea or air forces, by way of reprisals for like attacks, are now expressly prohibited and constitute war crimes, and, in the case of reprisal attacks against civilians, are "grave breaches" of the Protocol. Thus, as in the case of hostages, a means of enforcement of the law of war has become a violation of it. There may be a vestigial area in which reprisals remain a lawful means of law enforcement, e.g. in the otherwise illegal use of certain weapons directed against the armed forces of the adversary, but this is conjectural. The prohibition of resort to reprisals against war victims, completed by the Geneva Conventions of 1949, and in hostilities that affect civilians and civilian installations by Additional Protocol I, constitute one of the major changes in the law of war and its enforcement since World War II.

(*c*) *The prosecution of war criminals*

In the light of the prohibition of the taking of hostages and the virtual prohibition of resort to reprisals, the main burden of enforcement of the

law of war now rests upon the trial and punishment of war criminality, i.e. the violation of the law of war. As a result of the war crimes trials held after World War II three main types of war criminality emerged: (i) → crimes against peace, i.e. the illegal resort to war; (ii) → war crimes in the strict sense, i.e. violations of the law of war; and (iii) → crimes against humanity which overlap with (ii), but extend beyond them to gross crimes directed against any civilian population. The Geneva Conventions of 1949 established "grave breaches", i.e. selected violations of the more important humanitarian prohibitions of each Convention designed to ensure the protection of the persons the relevant Convention seeks to protect. This system of "grave breaches" has been extended to the more serious violations of Additional Protocol I, including specified acts in hostilities affecting civilians.

States parties to those Conventions and to the Protocol are bound to bring to trial before their "own courts" any person, irrespective of his → nationality, alleged to have committed any of these "grave breaches", unless the State concerned prefers to hand over the accused to another State party to the Geneva Conventions which has made out a prima facie case against him. However, such handing over is not a duty imposed by the Conventions, but is left to the domestic law of the State detaining the accused. This system is far from a watertight method of ensuring that the accused is brought to trial. The detaining State is not under an international law obligation to hand over the accused to a State holding the evidence against him (→ International Obligations, Means to Secure Performance). Neither is the latter State under any such obligation to hand over the evidence to the detaining State. The Geneva Conventions, due to an anxiety to eliminate a recurrence of the miscellany of *ad hoc* war crimes jurisdictions established after World War II, limit such jurisdiction to the ordinary domestic penal jurisdiction of the detaining State. That therefore precludes any international penal jurisdiction whether of the Nuremberg or Tokyo (→ Tokyo Trial) type or of a standing nature (→ International Crimes; → International Criminal Court). The system for trial of "grave breaches" set up by the Geneva Conventions of 1949 has now been extended to the "grave breaches" introduced by Additional Protocol I of 1977.

2. *Complaints; Good Offices and Mediation; Intervention*

Complaints of illegal acts made directly between belligerents may now become more effective if the International Fact-Finding Commission (→ Fact-Finding and Inquiry) provided for in Additional Protocol I of 1977 is enabled to function. Good offices and mediation by neutral States can follow upon complaints of illegalities made to neutral States by the belligerents. Intervention by neutral States, individually or collectively, may be made whenever illegal acts are committed by belligerents, irrespective of complaints made by the latter. Such intervention is probably now a right, but not a duty, of neutral States parties to the Geneva Conventions of 1949, as reinforced by Additional Protocol I.

C. Compensation

This method of enforcement, though expressly provided for in Hague Convention IV of 1907 respecting the Laws and Customs of War on Land (→ Hague Peace Conferences of 1899 and 1907), and confirmed in Additional Protocol I (Art. 91), is rarely used. Provisions for reparations in treaties of peace could expressly include compensation for illegalities during the war, although defeated belligerents are rarely in a position to pay such reparations.

D. Conclusion

The contemporary law of war governing enforcement is weak, but this is no novelty. Humanitarian considerations removing and reducing the resort to taking hostages and reprisals have thrown an added reliance upon the penal repression of war criminality. International law lacks a penal jurisdiction or convention on → extradition of war criminals. To date there has been no resort to the penal repression of "grave breaches" in the armed conflicts that have occurred since 1950, although many excesses have been committed. Resort to penal repression normally requires a total defeat of one belligerent by its adversary. Belligerents normally invoke their domestic penal law for war crimes committed by their own nationals. The new means of im-

plementation of the law of war, by the giving of instruction in it, and the use of legal advisers under Protocol I, may do much to head off the violations of that law, thus reducing the resort to penal repression for gross war criminality. This enables means of enforcement to fulfil their proper function – a last resort when the modalities of implementation have failed

History of the United Nations War Crimes Commission (1948).

L. OPPENHEIM, International Law, Vol. 2 (7th ed. by H. Lauterpacht 1952) 557–595.

G.I.A.D. DRAPER, The Geneva Conventions of 1949, RdC, Vol. 114 (1965 I) 63–162.

G.I.A.D. DRAPER, The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978, RdC, Vol. 164 (1979 III) 9–52.

G.I.A.D. DRAPER

WAR, LAWS OF, HISTORY

Ancient patterns of behaviour in → armed conflict are known, but they seem to have been adopted within their respective cultures only. Predatory wars, outright → conquest and mass migration (→ Migration Movements) have not obeyed any law. An inventory of past actual war practice would not amount, as Grotius suggests (Jus belli ac pacis, Lib. III, cap. I, §§ II–IV, cap. IV to VIII), to a → natural law of → war. In any case, such vestiges as may exist are not connected directly with our present law (→ War, Laws of; → Armed Conflict, Fundamental Rules).

1. Bellum justum

The discussion of *bellum justum* begins with a theological dispute over whether a Christian may be a soldier. St. Augustine's positive answer was adopted by the Corpus Juris Canonici, Causa 23. Thomas Aquinas (Sec. Sec., qu. 40, Art. 1, §4) permitted war under three conditions: authority from a prince, just cause, and *recta intentio*. Authority distinguished war from private violence and feud, just cause was self-defence and the enforcement of a right (Causa 23, qu. 2, c. 1), and *recto intentio* forbad evil motives such as greed or revenge (Causa 23, qu. 1, c. 4 & 5,.

This doctrine of just war prevailed in scholarly writings for a long time. Parties going to war regularly endeavoured to state the justice of their causes. At the Council of Constance, the Poles argued with the Teutonic Order over their right to employ the help of the heathen Lithuanians. However, evidence pointing to the doctrine's practical effects is lacking; the idea that parties had to offer to submit their cases to → arbitration did not harden into a rule of law.

In feudal law, the vassal was not bound to help his liege in an unjust cause. But Augustine accorded soldiers the benefit of the doubt through the defence of superior orders (Causa 23, qu. 1, c. 4; qu. 5, c. 13). Later, paradoxically, the opinion that *bona fides* may make a war just for both sides gained ground (Grotius, Lib. II, cap. XXIII, §XIII). Vattel set *jus gentium voluntare* over *jus gentium naturale*, so that a war undertaken in due form would be just on both sides (Lib. III, cap. XII, §190). The problem declined in significance; it was, however, revived by the outlawing of war (→ Kellogg-Briand Pact (1928)) and by measures of → collective security, but it remains unresolved.

2. Jus in bello, *Middle Ages*

In the early writings of the Middle Ages, the *jus in bello* seems to have been non-existent. The much lamented horrors of war are accepted as natural:

"*Vis ac terror maxime propria bellorum*" (Grotius, Lib. III, cap. I, §VI, 1). This may explain why *jus ad bellum* was so important, in justification for the cruelties that were committed.

Yet during some eras, violence was restricted. Chivalry, with its ceremonial niceties, was hardly a rational system of strategy and tactics. However, mercenary war in the subsequent period relapsed into sheer violence.

During the Hundred Years War, courts had to deal with points arising out of the law of war, and Commines (Memoirs, Lib. V, cap. 6) discussed whether Charles the Bold could legally hang a nobleman for trying to enter Nancy after the cannon had been fired against the town. Causa 23, qu. 1, c. 3 has been quoted as supporting the right of the enemy abandoning resistance to live. However, it seems that until the modern era it was within an army's discretion to give quarter or to offer none.

Feuds, individual → reprisals, and duels are easier to regulate than war. But it is still not clear whether the *treugae* imposed by the Church (a ban on feuds imposed on Sundays and certain other days) and their secular equivalents are the sources of the restrictions of violence in war, especially of the protection of non-combatants (→ Combatants).

It is probably best to turn away from the written doctrine to the practice of the military profession, as far as the available evidence allows. The essential points seem to be these: In battle and in towns taken by force, combatants and non-combatants were killed and property was destroyed or looted. → Prisoners of war were not slaves. Knights spared each other, and those taken prisoners were held to ransom. Booty belonged to the individual soldier (→ Booty in Land Warfare). Enemy territory was devastated (→ Occupation, Belligerent). If it was held, it fell forthwith under the → sovereignty of the occupant. Capitulations (→ Surrender) and truces were frequent and normally observed, and long truces occurred often in place of → peace treaties (→ Armistice; → Suspension of Hostilities).

It would seem Shakespeare's play King Henry V includes details depicting the law of war at about 1400 A.D.; perhaps the poet had anticipated later humanitarian tendencies in order to do honour to his hero.

3. Jus in bello, *16th to 19th Centuries*

Looting, extortion, booty and ransom turned war waged by → mercenaries into a profitable business for both the soldier and the *condottiere*. This made it all the more disastrous for enemy, neutral and even friendly territory. But at the same time commanders began to stress discipline in the interest of efficiency. Religious and humanitarian feeling began to inspire the public and legal writers (→ Humanitarian Law and Armed Conflict). Grotius' doctrine was still that any actions were permitted in order to win the war (Lib. III, cap. I, § 2), and certainly the threat of war measures served to terrorize smaller political bodies. But Grotius himself (Lib. III, cap. XI to XVI) recommended certain restrictions. The Enlightment and the absolutist prince's own interests reinforced this trend. In addition, military reforms brought the troops under strict control.

The Treaty of September 10, 1785 between Prussia and the United States (CTS, Vol. 49, p. 331) protected enemy residents (→ Enemies and Enemy Subjects) and gave the prisoner of war a quite modern status (Arts. 23 and 24). It is difficult to say with any precision when any particular modern rule of war law emerged between 1700 and 1850. If the 1863 Instructions for United States Armies in the Field (Lieber Code) is scrutinized, it is clear that some contemporary practices in the field were being abolished, in language of some severity.

The last part of this era saw changes in the fundamental principles of warfare. War was waged between armies only, and military convenience, efficiency, and in many cases, even necessity (→ Military Necessity), had to give way to humanitarian objections. Neutrality also became regulated and respected (→ Neutrality, Concept and General Rules).

4. Codification Begins

This trend continued during the 19th century propelled by progressive optimism and a belief in civilization. It led to the codification of the laws of war (→ Codification of International Law). The Lieber Code of 1863 was read as a text of international law. The Geneva Convention of 1864 marked the first modest step toward giving a status to the work of helping the wounded (→ Geneva Red Cross Conventions and Protocols). The Petersburg Declaration of 1868 forbad the use of small exploding projectiles (→ Weapons, Prohibited). The tentative codices of the Brussels Conference of 1874 and of the → Institut de Droit International (Oxford Manual of 1880) led to the → Hague Peace Conferences of 1899 and 1907 which became the basis for the rich development of the contemporary law of war.

The proceedings of these conferences show that the main part of their work met with no great difficulties (the status of the *levée en masse* was more a political problem). Codification was in the interest of the military profession and consisted of putting into writing what had already become its practice, even if this was not in conformity to → customary international law. That may explain why the Hague Regulations on Land Warfare annexed to Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on

Land, were the law in the two world wars, even though subject to the "*si omnes*" clause (→ General Participation Clause). At Nuremberg (→ Nuremberg Trials), these regulations were held to be general → international law.

5. Sea Warfare

The trends in the history of the law of → sea warfare are best illustrated by the four themes of the Paris Declaration of April 16, 1856 (Friedman, p. 156), by which the Concert of Europe (→ Great Powers) put an end to many disputes and uncertainties.

(a) The abolition of → privateering closed an era in which important actions at sea were performed by private individuals. Quite apart from outright → piracy, reprisals to recover debts and volunteer service for belligerents were common practice. At the same time, enemy subjects and → enemy property at sea were victims of war. The 14th century Consolato del Mare, chapters 186 and 187, shows how merchantmen meeting an enemy paid ransom in order to continue their course, or were brought into port and confiscated. → Merchant ships might be armed (→ Merchant Ships, Armed) for → self-defence, but were also employed in war and in reprisal actions.

(b) War at sea also aimed at enemy trade as a whole, whereas merchants insisted on the freedom of the → high seas Sometimes treaties regulated the exemption of a neutral flag or of neutral merchandise from war measures (→ Neutral Trading; → Neutrality in Sea Warfare), but there was no generally recognized system. In 1780 and again in 1800 a group of neutral States resorted to → collective measures (armed neutralities) to enforce their idea of free trade.

(c) Belligerents at sea tend to stop all trade with an enemy (→ Trading with the Enemy), and assume that any trading benefits the enemy. A distinction has been developed between merchandise which would tend to further the war effort (→ Contraband) and merchandise which would not, but the borderline has never been determined with any degree of certainty. Long after 1856 belligerents and neutrals have had to argue the issue.

(d) The entire sea may be the theatre of war (→ War, Theatre of). At the same time, the high seas are open to the use of all. Conflicts have arisen not only over the measure of licit trade with a belligerent, but also over attempts by belligerents to close parts of the sea altogether (→ War Zones). The Paris Declaration reached the compromise that an effective → blockade of enemy → ports and coasts is legal.

Finally, another distinctive feature of the law of sea warfare has been the lack of protection afforded to non-combatants and to enemy property. To some extent, this prevails in modern law. On the other hand, some control does exist on the correct disposal of captured property in → prize law, which in substance is international even if under the jurisdiction of national prize courts. It seems that prize adjudication by courts was introduced very early to ensure the proper execution of reprisal licences and of privateering, but the endeavours to create an → International Prize Court have not met with success. The ancient rule that taking property from the enemy transfers a good title has prevailed throughout the history of the law of maritime warfare. In substance the rule is still in force. The remaining areas in the law of maritime warfare have been rather inconsistent and unsettled.

L. FRIEDMAN (ed.), The Law of War, A Documentary History, 2 vols. (1972).

D. SCHINDLER and J. TOMAN (eds.), The Laws of Armed Conflicts (2nd ed. 1981).

P. REUTER, Etude de la règle: "Toute prise doit être jugée" (1933).

A. GARDOT, Le droit de la guerre dans l'oeuvre des capitaines français du XVIe siècle, RdC, Vol. 72 (1948 I) 395–539.

K.-G. CRAM, Iudicium belli, Zum Rechtscharakter des Krieges im deutschen Mittelalter (1955).

H. WEHBERG, König Gustav Adolf und das Problem der Annexion besetzten feindlichen Gebietes, in: Liber Amicorum Algot Bagge (1955) 248–260.

J.-G. HEIM, Die Rechtsstellung der Zivilbevölkerung im Kriege in ihrer geschichtlichen Entwicklung, Thesis, University of Frankfurt am Main (1957).

K.R. ANDREWS, Elizabethan Privateering, English Privateering during the Spanish War 1585–1603 (1964).

M.H. KEEN, The Laws of War in the Late Middle Ages (1965).

Q. WRIGHT, A Study of War (2nd ed. 1965) 101–165, 196–202, 885–894.

K.-H. BÖHRINGER, Das Recht der Prise gegen Neutrale in der Praxis des Spätmittelalters (1972).

P. KLOSE, Die völkerrechtliche Ordnung der hellenistischen Staatenwelt in der Zeit von 280-168 v. Chr. (1972) 148–169.

J.T. JOHNSON, Ideology, Reason, and the Limitation of War (1975).
F.H. RUSSELL, The Just War in the Middle Ages (1975).
G. JÄGER, Aspekte des Krieges und der Chevalerie im XIV. Jahrhundert in Frankreich, Untersuchungen zu Jean Froissarts Chroniques (1981) 56–257.

FRITZ MÜNCH

WAR MATERIALS

1. Notion

The term "war material" in a narrow sense includes all articles and materials directly and exclusively intended for purposes of → war (→ War, Laws of), such as weapons of war, ammunition, combat vehicles, etc. In a wider sense it encompasses all articles and materials originally intended for civilian use, such as hunting rifles, radio equipment and means of transport or petrol, if used or intended for military purposes, for instance if used or intended for use in support of a belligerent's war efforts.

2. Legal Status

The term "war material" (French: *matériel de guerre*; German: *Kriegsmaterial*) has unfortunately not been defined in international law. There are manifold interpretations and evaluations from various legal perspectives as to what it includes, particularly with reference to the wider sense of the term. There is no doubt that the term in the narrow sense corresponds to that of absolute → contraband in → sea warfare, i.e. "articles exclusively used for war" (Declaration of the → London Naval Conference of 1908/1909, Art. 23). In its wider sense the term corresponds to that of conditional contraband, "articles susceptible of use in war as well as for the purposes of peace" (Art. 25). Articles which cannot be used for purposes of war are not war material: hence the "free list" in the law of → sea warfare (Art. 27). The definition of the term in its wider sense entails the same difficulties as the differentiation between the three above-mentioned categories. Since an a priori enumeration of articles and materials falling within the range of the term war material is impossible, a definition can be provided only on a case-by-case basis.

Both international law → treaties and national legislation frequently provide an explanation of the term or enumerate the individual articles falling within the range of the term (for a specific situation see, e.g., Annex XIII to the → peace treaty between the Allied and Associated Powers and Italy; → Peace Treaties of 1947).

In agreements concerning the laws and customs of war, the term appears as a literal translation of the French term "*matériel de guerre*", as used in the Hague Conventions (→ Hague Peace Conferences of 1899 and 1907), the authoritative text of which is French. Hague Convention XIII of 1907 concerning → neutrality in sea warfare prohibits a neutral State from either directly or indirectly supplying warships, ammunition or any kind of war material to a belligerent State (Art. 6). This is a provision of general validity, and applies also to → neutrality in land warfare. Art. 7, on the other hand, provides that a neutral power need not prevent the export or transit for the use of either of the belligerents of arms, ammunitions or anything which can be of use to an army or a navy. This is identical with Art. 7 of Hague Convention V of 1907 concerning neutrality in land warfare (→ Trading with the Enemy).

3. Special Problems

It is not clear what the term "war material" in Art. 6 of Hague Convention XIII should be understood to include. The extension of the term to all items which are of use in war in the sense of common Arts. 7 of Hague Conventions V and XIII would appear to be too far-reaching. Modern warfare and the extensive requirements of armed forces make such a wide variety of articles and materials seem "useful", that this extension would intolerably restrict State trading by neutral States. Moreover, a broad conception of war material would imply too extensive an interference with private trade, since it would also in practice expose all neutral private trade to defensive measures by belligerents under → prize law and in the economic realm. The connection between the extensive interpretation of the term "war material" and the extension *ad infinitum* of the term "contraband", such as was practised during both world wars, cannot be overlooked. A limitation of both terms is necessary if neutrals are to be allowed to carry on any of their peaceful trade with belligerents, as is their right.

The meaning of the term "war material" also plays an important part in the protection of private property from destruction and appropriation in the case of occupied territory (→ Occupation, Belligerent; → Pillage). Of reference here is the fact that some English writers have translated the French phrase "*munitions de guerre*", as it occurs in Art. 53, para. 2 of the Hague Regulations annexed to Hague Convention IV of 1907, as "war material". If this is considered valid, and if, as has occurred in State practice, the application of the term is extended to items which are connected only very indirectly with war material (such as entire factories producing war materials), then the protection of private property from confiscation by an occupant becomes largely pointless. The Hague Conventions used an expression other than "*munitions de guerre*" when they wished to refer to a wider concept of war material or, indeed, even actually contrasted the two expressions. The definition of war material as "anything that can be made use of for the purpose of offence and defence, including the necessary means of transport" has to be interpreted to the effect that war material includes only such articles that are actually used for warfare or that are to be employed in warfare.

4. Significance

The significance of the term war material becomes evident beyond the problems as outlined if, among other things, it is taken into consideration that: (a) in the case of privately-owned war material the occupant is entitled by → customary international law to destroy such property, or to damage it in any way it sees fit, if such damage or destruction appears justified by necessity of war and is proportionate to these necessities (→ Proportionality); (b) war material falling into the hands of the enemy becomes booty of war (→ Booty in Land Warfare; → Booty in Sea Warfare); (c) war material of the belligerent parties that reaches neutral territory (→ Neutrality, Concept and General Rules) without previous permission for transit must be taken into custody by the respective neutral State and sequestrated (→ Sequestration); (d) the term "war material" is frequently used in → armistice and peace treaties in order to impose restrictions on the defeated enemy concerning the future production, acquisition or possession of war material or to decree its surrender or → demilitarization. (For examples see → Versailles Peace Treaty (1919); → Peace Treaties of 1947 and → Austrian State Treaty (1955).) For the restrictions imposed on the Federal Republic of Germany, see Paris Protocol No. III of 1954 amending the → Western European Union treaties (and see also Art. 26, para. 2 of the Basic Law of the Federal Republic of Germany and section 7 of the Foreign Trade Act.).

With regard to the importance of the term "war material" under international law – and to the difficulty of a definition in view of the fact that most things needed for the existence of the civilian population are also needed to maintain modern armed forces – it remains desirable that the term and its use in international law be further clarified.

E.H. FEILCHENFELD, The International Economic Law of Belligerent Occupation (1942).

E. LAUTERPACHT, The Hague Regulations and the Seizure of 'Munitions de Guerre', BYIL, Vol. 32 (1955–56) 218–243.

I.F. WALLAS, Die völkerrechtliche Zulässigkeit der Ausfuhr kriegswichtiger Güter aus neutralen Staaten, Thesis, University of Hamburg (1970).

ARMIN A. STEINKAMM

WAR, RUSES

1. Historical Background; Notion

Ruses of war have been known and used in combat throughout mankind's history of → armed conflict. The Trojan Horse is only one of numerous examples to be found in the literature of all ages. A prohibition of ruses of war has never been developed. On the contrary, ruses of war have always been regarded as an indication of the skill and prudence of their authors. Consequently, the codification of the international law of warfare has led to ruses of war being expressly permitted. Art. 24 of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Conventions II of 1899 and IV of 1907 states without any restriction that "ruses of war ... are considered permissible" (→ Hague Peace Conferences of 1899 and 1907). This undisputed acceptance of what has been the com-

mon view for centuries has created a problem containing practical and legal implications of a high order: the distinction between permitted ruses of war and prohibited acts of → perfidy (→ Warfare, Methods and Means).

The absence of a legally acknowledged definition of perfidy as well as of ruses of war has given rise to a long-standing debate over where the borderline between the two hostile activities lies. Gradually, the consensus has developed that an act in violation of any rule of warfare in international law could not be legitimated as a permitted ruse of war, not even by recourse to arguments of → military necessity. This consensus has been the basis for the definition of ruses of war laid down in Art. 37(2) of the 1977 Protocol I additional to the Geneva Conventions of August 12, 1949 (→ Geneva Red Cross Conventions and Protocols). According to this provision, ruses of war are "acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law"

2. Elements of the Legal Definition

The definition of ruses of war consists of three elements. First of all, the act in question must be accompanied by the intent to deceive the adversary. The aim of this deception evidently is to expose the adversary to a situation disadvantageous to him. The very core of a ruse of war is that its author wants to gain a military advantage which will be to the adversary's corresponding disadvantage. Art. 37(2) of Protocol I lists as typical examples the use of camouflage, decoys, mock operations and misinformation (→ War, Use of Propaganda in). In modern warfare, the possibilities of optical, electronic and other technical means of deception are nearly inexhaustible.

The use of all these possible means of deception is limited by the two elements additionally required. The deceiving act must be in conformity with the international law applicable in international armed conflict (→ Armed Conflict, Fundamental Rules; → War, Laws of; → Weapons, Prohibited). An act violating any rule of this law cannot, by definition, be a legal ruse of war. Thus, for instance, the use of the adversary's military emblems, insignia or uniforms while engaging in attacks or in order to shield, favour, protect or impede military operations cannot under any circumstances constitute a ruse of war, because it is expressly prohibited by Art. 39(2) of Protocol I (→ Flags and Uniforms in War).

The third element is the exclusion of all acts which fall within the definition of perfidy. This exclusion means that the borderline between ruses of war and perfidy is no longer debatable. A perfidious act within the meaning of Art. 37(1) of Protocol I can never constitute a permissible ruse of war.

3. Conclusion

The provision of Art. 37(2) of Protocol I that "ruses of war are not prohibited" did not alter the pre-existing legal situation under the Hague Regulations. The definitions of perfidy and of ruses of war have, however, solved the problem of providing a distinction between the two hostile activities in a clear and precise manner.

A further consequence of both definitions is that → espionage is now clearly to be distinguished from perfidy as well as from ruses of war. As the very purpose of espionage is the clandestine gathering of information, it does not fall under either of these definitions.

D. FLECK, Kriegslisten und Perfidieverbot, in: D. Fleck (ed.), Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte (1973) 105–148.

For further bibliographical material see → Perfidy.

KNUT IPSEN

WAR, THEATRE OF

1. Notion

The international situation between States which amounts to a state of → war is circumscribed by boundaries of time, space, personnel, and, finally, legality. Customary legal norms concerning the spatial limitation of war, i.e. the determination of where belligerent measures are permissible, have been developed (→ War, Laws of). Supplemented in part by general treaty pro-

visions, they remain open for elaboration by the parties to the conflict at any time in the event of actual war.

Three specific terms in this field dominate international legal usage; there is overwhelming agreement concerning their substance. They are: region of war, theatre of war, and theatre of operations. Which rights and duties exist in each of these areas for the warring parties in the military and civilian sectors can be deduced only to a very limited extent from the designated terms themselves. Reference must therefore be made to the regulations on → land warfare, → sea warfare, and → air warfare, as well as to → humanitarian law and armed conflict.

2. *Region of War*

"Region of war" means those areas where any of the parties exercises → territorial sovereignty over and below the earth's surface, over → internal waters and coastal waters, and in the air above the territory (→ Air, Sovereignty over the); it also includes the → high seas as *res omnium communis*. Unclaimed areas (*res nullius*) do not belong to the region of war (Kolb, p. 53). Included in the regions over which territorial sovereignty is exercised are: the actual area of → States, irrespective of whether other → subjects of international law are allowed to execute sovereign acts there; → colonies; and regions governed by a → condominium (whereby, of course, the inclusion of such regions in military activity violates at least the rights of the condominial power not involved in the war). Permanently neutralized sections of a territory (→ Neutralization) do not belong to the region of war, whereas → open towns do, even though they are subject to special regulations. The territories of neutral States only belong to a region of war in so far as one of those parties waging war has been granted a military base there (→ Military Bases on Foreign Territory).

Important stipulations for limiting the region of war were effected by Arts. 14 (hospital and → safety zones) and 15 (neutralized zones) of Geneva Convention IV of August 12, 1949 regarding the Protection of Civilians, Art. 23 (hospital zones) of Geneva Convention I of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field in Land War, and Arts. 59 (non-defended localities) and 60 (demilitarized zones) of the 1977 Protocol I additional to the Geneva Conventions (→ Geneva Red Cross Conventions and Protocols; → Demilitarization).

Whether territory under → mandate could become a region of war is an historical question, no doubt to be answered negatively if one takes into account the purpose of the → League of Nations mandate system. The → United Nations trusteeship system provides for an inclusion of trust territories in the → collective security system in so far as these territories may be declared security areas in full or in part (→ United Nations Charter, Art. 82). They may also be assigned peacekeeping duties in the sense of Art. 84 of the UN Charter (→ United Nations Peacekeeping System). In the cases of permissible individual or → collective self-defence measures under the UN Charter or the execution of → sanctions ordered by the → United Nations Security Council, trust territories belong to the region of war. Otherwise, they are excluded.

The inclusion of → protectorates and regions with similar status in the region of war is likewise rejected. Although an opposing opinion (see Boeckner, p. 103) maintains that such inclusion can be provided for in treaties regarding a protectorate relationship, general protectorate clauses cannot be properly interpreted in this sense.

Whether outer space is included in the region of war depends on which of the theories developed concerning the legal nature of outer space is followed (→ Space and Space Law). In any case, the regulations of the → Outer Space Treaty of January 27, 1967 (UNTS, Vol. 610, p. 205) are to be heeded (see especially Art. IV concerning nuclear weapons (→ Nuclear Warfare and Weapons) and other weapons capable of mass destruction).

3. *Theatre of War*

The term "theatre of war" (*théatre de guerre*, *Kriegsschauplatz*) means that area in which the actual military action takes place. The entire region of war is a potential theatre of war, but, because of strategic and tactical considerations, only one section of the region of war may become the theatre of war. In contrast to the region of

war, the point of departure for the formation and limitation of the theatre of war is not determined by law. On the contrary, actual military action is the decisive factor. In the Boer War of 1899–1902, for example, the whole territory of the British Empire, as well as the territory of the Republics, was the region of war, but the theatre of war was in Southern Africa only. On the other hand, in the two world wars, almost the entire region of war was simultaneously the theatre of war.

Although those areas belonging to the theatre of war usually also belong to the region of war, this is not always the case. Even if the actual military events occur in areas which do not belong to the region of war, a theatre of war nevertheless does exist. In practice, the most frequent case is the inclusion of the territory of a neutral State in military activities. This is normally a violation of the laws of neutrality (→ Neutrality, Concept and General Rules). However, if the neutral State either does not wish to prevent, or is not capable of preventing, the inclusion of its territory in the theatre of war, the other party to the conflict may also engage in military activities there (see the decision of the Greco-German Mixed Arbitral Tribunal of December 1, 1927 in the Cöenca Brothers case, Annual Digest, Vol. 4 (1927–1928), p. 570).

In the Hague Regulations respecting the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907), it was decided that it rests with the signatories of an → armistice to determine "what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other" (Art. 39). Hague Convention V of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land provides in Art. 11 that: "A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them as far as possible, at a distance from the theatre of war." (→ Internment; → Neutrality in Land Warfare).

In the law of sea warfare, special rules regarding the legal situation in the theatre of war have been developed. Thus in both world wars, Germany, Great Britain and the United States declared parts of the maritime regions of war to be → war zones in which the rights of neutral sea navigation would be limited (→ Neutrality in Sea Warfare). The details of the permissibility and the possible scope of such zones are disputed, whereby the view that these zones are always illegal has been advocated (P. Fauchille, Traité de droit international public, Vol. 2 (8th ed. 1921), p. 353). Assuming that the establishment of war zones in sea warfare is not categorically forbidden, modern → customary international law would seem to require a certain level of military effectiveness in the affected regions.

4. Theatre of Operations

The third spatial term in the law of war is "theatre of operations". Substantially smaller in area than the region of war or the theatre of war, it indicates that area of the theatre of war in which combat constantly takes place. "Theatre of operations" therefore is a term which is also limited by the occurrence of actual incidents, namely, the existence of constant military action.

The theatre of war is divided into a theatre of operations, also known as the front or zone of operations on the one hand, and the rear communications zone together with the supply sources (home country) on the other. This division derives its legal significance chiefly from the law of → espionage. According to Art. 29 of the Hague Regulations, to be considered a spy, a person must act clandestinely or on false pretences while obtaining or endeavouring to obtain information in a belligerent's zone of operations, in order to communicate it to the hostile party (cf. the decision of the United States District Court (E.D.N.Y.) of March 2, 1920 in United States *ex rel.* Wessels v. McDonald, Annual Digest, Vol. 1 (1919–1922), p. 431). The Hague Regulations do not address the gathering of information outside the zone of operations. The rules regarding espionage are now supplemented by Art. 46 of Additional Protocol I of 1977. National criminal law ordinances also make reference to the distinction between the theatre of war and the theatre of operation (→ Criminal Law, International).

Furthermore, the protection of non-combatants and civilian institutions (→ Civilian Population, Protection; → Civilian Objects) is traditionally decreased in the theatre of operations, as de-

struction or seizure of → enemy property may be exercised if demanded by → military necessity (Art. 23(g) of the Hague Regulations, subject now to the present legal state of affairs regarding humanitarian law and armed conflict).

O. BOECKNER, Der Kriegsschauplatz, Ein Beitrag zum neuzeitlichen Völkerrecht, Thesis, University of Gießen (1911).
H. HELM, Das Operationsgebiet im Seekriegsrecht (1952).
L. OPPENHEIM, International Law, Vol. 2 (7th ed. by Lauterpacht, 1952) 236–247.
J. SCHMITT, Die Zulässigkeit von Sperrgebieten im Seekriegsrecht (1966).
C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967) 528–546.
K.M. KOLB, Das Kriegsgebiet im Völkerrecht, Thesis, University of Würzburg (1968).

PHILIP KUNIG

WAR, USE OF PROPAGANDA IN

1. Basic Notion, Legality

The "political", "psychological" or "ideological" method of warfare (→ Warfare, Methods and Means) has been a prominent feature of → armed conflicts in our century, although it has a history dating back to ancient times. Its aims are to use information to bolster support for the war effort on the home front, to effect reverses on the enemy's home front and to promote dissension among its allies, as well as to induce demoralization among the enemy's fighting forces and confusion into its military and logistic systems. The enemy may also be disadvantaged by influencing neutrals to join one's own side or at least not to join the enemy's. Wars in our century have witnessed use of, *inter alia*, the following means of propaganda dissemination leaflets, newspapers and journals carried by aeroplanes, balloons or special shells; broadcasting and film; trench loudspeakers: "whispering campaigns" (rumours, especially through "leaks" to neutral news media); postal campaigns; stickers and painted symbols; speeches; and "black" or covert propaganda not revealing the true source of the information (e.g. Britain's secret radio station in World War II, *Soldatensender Calais*).

In principle, the use of propaganda in wartime is lawful, with certain exceptions (see section 3 *infra*). This position is founded on → customary international law as developed concerning subversive propaganda (*infra*); the written laws of war treat the permissibility of wartime propaganda only obliquely and to the limited extent that a particular use of propaganda may be described as a → war ruse.

2. Subversive Propaganda

World War I saw massive leaflet campaigns of defeatist and subversive propaganda, mainly distributed by → aircraft, aimed at inciting troops and citizens to revolt against their rulers and at encouraging desertions. While Germany had already begun to use this type of propaganda in 1914 on the Eastern Front, both she and Austria-Hungary maintained that it was unlawful and claimed the right to try airmen who had disseminated it. Some support was to be found for this assertion in the views of some pre-war continental writers who had advanced a wartime variation of the theory of non-intervention (→ Non-Intervention, Principle of). The Germans, however, acquiesced (→ Acquiescence) to the Allied view of the legality of propaganda-leaflet distribution after the trial and conviction in 1917 of two British airmen (see Spaight, pp. 330–333) was met by a British threat of → reprisals against German → prisoners of war. The men were in fact pardoned by Kaiser Wilhelm II and interned as ordinary prisoners of war. Austria-Hungary also refrained from taking any similar action due to British and French threats of reprisal. The Allies' view later found further support in Art. 21 of the draft Hague Air Warfare Rules, conceived by an International Commission of Jurists (→ Air Warfare). Uniform State practice on all sides regarding subversive propaganda in World War II left its legality unquestioned; such propaganda was simply met with by counter-propaganda.

3. Legal Limits on War Propaganda

Just as with any other weapon that is prima facie legitimate, the use of propaganda is subject to general proscriptions of the laws of war which have the effect of limiting its permissible content.

(a) Propaganda as perfidy

Although it is generally irrelevent whether the content of propaganda is true or false, prop-

aganda "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in an armed conflict, with intent to betray that confidence" constitutes → perfidy and is prohibited (Art. 37(1), Protocol I of 1977 additional to the Geneva Conventions of 1949). An example of such propaganda would be a → declaration made to induce the → surrender of → mercenary forces.

(*b*) *Propaganda in occupied territory*

A belligerent in occupied territory (→ Occupation, Belligerent) is forbidden to use any "pressure or propaganda which aims at securing voluntary enlistment" in its armed or auxiliary forces (Art. 51, para. 1, Geneva Convention IV of 1949). This is the only express mention of propaganda in the binding written laws of war. It was inserted to complement and supplement the prohibition immediately preceding it that outlaws imposing compulsory military service in occupied territory, and accords with the decision of the French Military Tribunal which convicted Robert Wagner and others (1946, Law Reports of Trials of War Criminals, Vol. 3 (1948) p. 23) of → war crimes for their instituting a recruiting campaign for the German Wehrmacht and Waffen SS in occupied French Alsace. However, despite its absolute terms, the provision does not appear to prohibit propaganda for recruitment to voluntary forces to fight alongside the occupant's armies which is sponsored by native "collaborationist" groups. This is precisely how, for instance, the private Légion des volontaires français contre le bolchévisme was recruited both in the occupied and in the unoccupied (i.e. before November 1942) parts of France in World War II.

It is unfortunate that a parallel limitation on propaganda to recruit workers is absent from Geneva Convention IV. Although in certain cases it is forbidden to compel workers to work, it would seem that attracting them to work by propaganda is lawful. Similarly, Geneva Convention III and IV offer prisoners of war and internees (→ Internment) respectively no protection from in-camp propaganda.

(*c*) *Propaganda and war crimes; crimes against humanity*

Rules as to liability for inchoate crimes in international law (→ International Crimes) also place limits on the permissible contents of the propagandist's product. Thus, propaganda inciting either one's own or the enemy's population to treacherous acts, such as murder or assassination, is equally subject to the prohibition in Art. 23(b) of the Hague Regulations which makes these substantive acts unlawful. This principle holds true also for incitements to commit all other war crimes.

To the traditional class of proscriptions may be added, according to the precedent of the → Nuremberg Trials, a prohibition against incitements to commit → crimes against humanity: acts whose notion is not necessarily connected with the existence of a state of → war (see Art. 6 of the International Military Tribunal's Charter). In its judgment against Julius Streicher, the Nuremberg tribunal traced his career of persecution and referred to the anti-Jewish "propaganda of death" which was the staple of Streicher's newspaper, *Der Stürmer*; it then concluded that this incitement to murder and extermination "clearly constituted persecution on political and racial grounds in connection with War Crimes, as defined by the Nuremberg Charter, and constitutes a Crime against Humanity". The elements of incitement to commit this type of crime were, however, left unclear in this judgment. In particular, while Streicher knew of the killings, the Tribunal did not discuss whether such special knowledge was an essential subjective element of the offence. Some light was shed on this question in the judgment acquitting the radio propagandist Hans Fritzsche, head of the Radio Division of the Reich Propaganda Ministry. The Tribunal was not there prepared to hold that his broadcasts "were intended to incite the German People to commit atrocities on conquered peoples", perhaps implying that if he had had that intent he would have been found guilty. The more general question of the legality of "hate" propaganda, such as that generated in World War I concerning purported German "atrocities", was left open by the Tribunal.

(*d*) *Propaganda and other norms of international law*

Propaganda's basically legitimate status under international law remains subject to the fundamental norms of the laws of war (→ War, Laws

of), such as the prohibitions against subjecting war victims to cruel or degrading treatment or mutilating the dead (cf. → War Graves). Similarly, propaganda may not contravene other norms binding upon States even in wartime (an example is the "black" propaganda technique of distributing counterfeit stamps, which can of course reach and disadvantage neutrals).

(e) *Propaganda and crimes against peace*

Propaganda used in connection with the planning and preparation of an aggressive war may entail liability for the persons instigating it who have participated in a conspiracy to commit a crime against the peace. This principle also is derived from the precedents of the Nuremberg and → Tokyo trials. At Nuremberg, the tribunal required evidence of the subjective element of access to the decision-making group to show knowledge of the plans for → aggression (absence of such access being the ground for Fritzsche's acquittal on this count, while the Tokyo tribunal inferred this element from speeches, writings, indoctrination campaigns, and so forth).

4. *Propaganda and Neutrals*

A separate area of consideration concerns propaganda directed to or sent by neutrals in wartime, and here the principles of non-intervention apply on both sides just as fully as in peace-time. It is noteworthy that in contrast to the essence of a neutral's duties in other cases, a neutral is not required to reflect "impartiality of opinion"; and neutrals and belligerents are free to criticize each other's policies, to offer advice or to use persuasion so long as they exercise restraint and do not violate their fundamental duty of respect for → sovereignty owed between friendly nations (→ Comity). Indeed, neutral comment may help create an atmosphere that tends to promote peace.

Above and beyond the limited duties in this area, however, some neutrals have imposed upon themselves a policy approaching impartiality in thought and deed. Thus Switzerland, for instance, introduced extensive censorship measures over her mass media to this end in both world wars. Moreover, treaty obligations in this area which are held to survive the outbreak of war (→ War, Effect on Treaties) also continue to bind neutrals and belligerents to exercise control over their media (e.g. the International Convention concerning the Use of Broadcasting in the Cause of Peace of September 23, 1936 (LNTS, Vol. 186, p. 301); but see also the renunciation of this convention recommended for the duration of World War II by the Inter-American Neutrality Committee in 1940 (AJIL, Vol. 35 (1941) p. 46)).

5. *Propaganda for War*

Last of all, it should be noted that Art. 20 of the International Covenant on Civil and Political Rights of 1966 (→ Human Rights Covenants) – the fruit of decades of discussion – obliges acceding States to prohibit in their municipal law "propaganda for war" (i.e. towards waging war), a prohibition which appears in the constitutions and laws of a large number of States today.

H. LAUTERPACHT, Revolutionary Propaganda by Governments, Transactions of the Grotius Society, Vol. 13 (1928) 143–164.
A. PONSONBY, Falsehood in War-Time (1928).
J.M. SPAIGHT, Air Power and War Rights (3rd ed. 1947) 318–342.
J.B. WHITTON, Propaganda and International Law, RdC, Vol. 72 (1948 I) 541–659.
D. LERNER, Propaganda in War and Crisis (1951).
R. SULZMANN, Die Propaganda als Waffe im Kriege, Bilanz des Zweiten Weltkriegs (1953).
W.L. WHITE, The Captives of Korea (1957, Repr. 1978).
W.E. DAUGHERTY and M. JANOWITZ, A Psychological Warfare Casebook (1958).
L.J. MARTIN, International Propaganda (1958, Repr. 1970).
T.H. QUALTER, Propaganda and Psychological Warfare (1962).
B.S. MURTY, Propaganda and World Public Order (1968).
M. WALZER, Prisoners of War, Does the Fight Continue after the Battle?, in: M. Walzer, Obligations, Essays on Disobedience, War and Citizenship (1970) 146–166.
R.I. MILLER, The Law of War (1976) 125–133, 175–182, 291–293.
I. HUSAIN, Propaganda During Conflict, Strategic Studies, Vol. 1 (1978) 45–52.
M. BALFOUR, Propaganda in War 1939–1945 (1979).
C. CRUICKSHANK, The Fourth Arm, Psychological Warfare 1938–1945 (1981).

KEVIN J. MADDERS

WAR ZONES

1. Concept

War zones were in World War I for → sea warfare and were claimed then and during World War II under different names. Also known as operational zones, barred areas, military areas, areas dangerous to shipping and areas subject to long distance → blockade, they have been used particularly in connection with → submarine warfare and → economic warfare. The common denominator of all war zones is the declaring belligerent's claim to suspend in the zone some or all of the rules of naval warfare. In a war zone's most stringent form and as part of unlimited submarine warfare, enemy and even neutral → merchant ships (→ Neutrality in Sea Warfare) which enter such a zone are liable to be sunk without warning.

2. History

The British Declaration of November 3, 1914, establishing the whole North Sea as a military area in which special defence measures might become necessary, invoked retaliation against alleged indiscriminate laying of → mines by German merchant ships which were purportedly using neutral flags as cover (→ Flag, Abuse of). The declaration did not forbid the entry of neutral merchant ships into the area but declined responsibility for their safety unless they adhered to prescribed routes. In response, on February 4, 1915, Germany declared the waters surrounding the British Isles, including the English Channel, to be a war zone in which enemy merchant ships would be sunk without either prior visit and search (→ Ships, Visit and Search) or prior warning. No responsibility was accepted for the safety of neutral shipping (limited submarine warfare).

Great Britain retaliated in turn by the Order in Council of March 11, 1915 establishing a long distance blockade of Germany in all waters surrounding Europe, including the Mediterranean, and requiring all merchant ships to discharge goods with an enemy destination at an appointed British or allied → port. On January 12, 1917 Germany extended its war zone measures to neutral merchant ships (unlimited submarine warfare), whereupon Great Britain escalated on February 16, 1917, by issuing an Order in Council declaring all ships that did not comply with the régime of the long distance blockade subject to confiscation (→ Booty in Sea Warfare; cf. → Sequestration). After entering the war in April 1917, the United States who, together with other neutrals, had earlier protested against the German as well as the British declarations of war zones, joined in enforcing the British measures.

During World War II Great Britain reintroduced the long distance blockade in an Order in Council of November 27, 1939 and aggravated its measures on July 31, 1940. Moreover, she also declared a war zone around Jutland, where at night any ship could be sunk without warning. Germany had already claimed a submarine area in a → note of November 24, 1939 sent to several of the neutral maritime States. On August 17, 1940, "as reprisal against the unlawful conduct of naval warfare by Great Britain" (→ Reprisals), Germany declared a "total blockade" of the British Isles and again took up unlimited submarine warfare against enemy and neutral merchant ships in the war zone. Italy, Japan and, following the outbreak of the war in the Pacific, the United States also declared war zones.

3. Evaluation

The opinion of legal writers on the legality of claims to war zones is divided, partly because some authors tend to defend or attack only a particular practice. Some justify the British operational zones as reprisals (Colombos, p. 529) and the long distance blockade as a new form of blockade (Colombos, p. 735; Stone, p. 508); others defend the German war zones as a new strategy not prohibited by international law (Schmitz, p. 656). Still others find them unjustifiable even as reprisals (Grob, p. 266; Castrén, p. 314) or confine their observations to a description, characterizing the legality as uncertain and the evidence as conflicting (Smith, p. 198; Tucker, p. 296). The United States Naval Instructions of 1955 treat only the classic blockade and refer to operational zones in footnotes outside the regulatory text.

The claim that war zones are justifiable as reprisals is rather weak. Reprisals are legal → sanctions and as such may affect only the perpetrator of the illegal act. War zones, however, also affect the freedom of neutrals on the → high

seas (→ Navigation, Freedom of). Nor does the establishment of safe routes for neutral merchant ships offer any solution, because it subjects such ships to the control of the belligerents who have no legal claim to them (→ Neutral Trading).

The dubiousness of the reprisal argument and the practice in World War II in which far less reference was made to reprisals than in World War I, have led most modern writers (e.g. Mallison, p. 91) to assume a development of → customary international law. Although it is true that neither the claim of changed circumstances (e.g. transport of → contraband from a neutral port to the enemy on land) nor the technical development in weapons systems alone would create new norms of international law or change existing ones, constant practice by all parties involved does. It seems therefore reasonable to submit that the law of blockade has changed in this sense: The lawfulness of a war zone depends not on the declaring State's ability to enforce it by effectively blocking entry through surface warships (→ Effectiveness), but rather on the probability of danger through continuous combat action (→ War, Theatre of) which may also be created by → submarines or mine fields.

Thus, it would seem that the judgment of the Nuremberg Tribunal (→ Nuremberg Trials), which implicitly held that under the London Protocol of 1936 the sinking of ships in war zones is generally prohibited, was based on the incorrect premise that a State could only lawfully declare a war zone if it could enforce it effectively through surface ships.

The sinking of enemy merchant ships which enter a lawfully declared war zone is, therefore, now legitimate. The exercise of this new belligerent right is, however, limited by the principle of necessity (→ Armed Conflict, Fundamental Rules; → Military Necessity) and by the belligerents' duty towards the neutrals. For this latter reason most modern writers doubt that direct attacks on neutral merchant ships in war zones without prior warning are legitimate. They also question the legality, as far as their effect on neutrals is concerned, of most measures relating to a long-distance blockade.

E. SCHMITZ, Sperrgebiet im Seekrieg, ZaöRV, Vol. 8 (1938) 641–671.

F. GROB, The Relativity of War and Peace (1949).

E. CASTRÉN, The Present Law of War and Neutrality (1954).

J. STONE, Legal Controls of International Conflict (1954).

R.W. TUCKER, The Law of War and Neutrality at Sea (1955).

H.A. SMITH, The Law and Custom of the Sea (3rd ed. 1959).

C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967).

W.T. MALLISON, Submarines in General and Limited War (1968) 55–96.

M. SCHUMANN, Seeblockade (1980).

KARL ZEMANEK

WARFARE, METHODS AND MEANS

A. Concept. – B. General Rules: 1. Weapons. 2. Methods of Warfare. 3. Targets for Attack. 4. Actions. – C. Sea Warfare Rules: 1. Weapons. 2. Methods of Warfare: (a) Blockade. (b) Contraband. (c) Armed merchant ships. (d) Deception. 3. Targets for Attack. 4. Actions. – D. Air Warfare.

A. Concept

The purpose of the laws of war (→ War, Laws of), to use the language of the 1868 St. Petersburg Declaration, is directed towards "alleviating as much as possible the calamities of war". The thrust of the concept is not to obtain absolute mitigation of the calamities of war, but rather to provide relief from them "as much as possible", taking account of the fundamental goal of each belligerent to win the war. The laws of war seek to achieve a compromise situation between → military necessity and humanitarian considerations (→ Humanitarian Law and Armed Conflict). Art. 22 of the Hague Regulations respecting the Laws and Customs of War on Land (→ Land Warfare), annexed to Convention II of 1899 and Convention IV of 1907 (→ Hague Peace Conferences of 1899 and 1907), proclaims: "The right of belligerents to adopt means of injuring the enemy is not unlimited." This general principle lies at the root of the laws of war.

It must be perceived that military history represents a story of evolution, and at times revolution, in the use of different weapons and methods of conducting warfare. Mankind has come a long way from set-piece battles to blitzkrieg and from slings or bows and arrows to atomic, biological and chemical weapons. The

rate of development of weaponry in the modern era has become so rapid that new items are reduced to obsolescence almost as soon as they pass into general use.

From a legal viewpoint, each belligerent is entitled to employ any method or means of warfare that it deems fit (including the introduction of new weapons) subject, however, to specific prohibitions as well as an overall proviso. The latter is reflected in the 1868 St. Petersburg Declaration, which states that it is illegal to employ "arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" (→ Weapons, Prohibited). The 1907 Hague Regulations express the same idea in Art. 23(e) by proscribing the use of arms, projectiles or materials "propres à causer des maux superflus" (rendered in the 1899 English version as "of a nature to cause superfluous injury" and in the 1907 version as "calculated to cause unnecessary suffering"). The 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), clarifies that this interdiction applies not only to weapons but to methods and means of warfare generally. Art. 35(2) of Protocol I declares: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." (→ Geneva Red Cross Conventions and Protocols).

What is "superfluous injury or unnecessary suffering"? The ordinary interpretation of this dual phrase is that the injury or suffering is disproportionate to the military advantage which may be gained by the use of the weapon or the method of warfare (→ Proportionality). The trouble is that it is not always easy to translate this abstract notion into concrete terms.

B. General Rules

Considering specific prohibitions which form an integral part of the existing laws of war, it is useful to distinguish between lawful and unlawful weapons, methods of warfare, targets for attack, and actions.

1. Weapons

The following weapons have been explicitly prohibited for use in any circumstances of warfare.

(a) Explosive or inflammable projectiles weighing less than 400 grammes (St. Petersburg Declaration of 1868: Schindler and Toman, p. 95);

(b) "Dumdum" (i.e. expanding) bullets (Declaration included in the Final Act of the 1899 Hague Peace Conference: Schindler and Toman, p. 103);

(c) Poison or poisoned weapons (Art. 23 (a) of the 1907 Hague Regulations);

(d) Chemical weapons (Geneva Protocol of 1925, UN GA Res. 2303 A (XXIV) of December 16, 1969; → Chemical Warfare);

(e) Bacteriological or biological weapons (Geneva Protocol of 1925, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of April 10, 1972: ILM, Vol. 11 (1972) p. 310; → Biological Warfare);

(f) Weapons modifying or causing damage to the environment (Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of December 10, 1976: Schindler and Toman, p. 131; → War and Environment);

(g) Weapons causing injury by fragments not detectable by X-rays (Convention on Prohibitions or Restrictions of Use of Certain Conventional Weapons of October 10, 1980, Protocol I: ILM, Vol. 19 (1980) p. 1523).

Apart from these general prohibitions, the use of some weapons (especially → mines, booby-traps and incendiary weapons) is now restricted where civilians are concerned (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Protocols II and III). There are other weapons the use of which is highly controversial, particularly nuclear devices (→ Nuclear Warfare and Weapons). But these are not as yet outlawed in clear-cut terms.

2. Methods of Warfare

Unlawful methods of warfare revolve around the three axes of → perfidy, → espionage and → siege. Perfidy, which is prohibited, must be distinguished from ruses of war (→ War, Ruses) which are admissible. Thus, the uses of

camouflage, ambushes, decoys, psychological warfare, forgery of currency, radio jamming and so forth are entirely legal. Conversely, the following methods of warfare are categorically banned *inter alia* by Art. 23 of the 1907 Hague Regulations as well as by Arts. 37 to 39 and 51 of the 1977 Geneva Protocol I:

(a) Feigning of an intent to negotiate under a → flag of truce;

(b) Feigning of a → surrender;

(c) Feigning of an incapacitation by wound or sickness (→ Wounded, Sick and Shipwrecked);

(d) Feigning of civilian, non-combatant, status (→ Combatants; → Civilian Population, Protection);

(e) Improper use of the national flag, or of the military insignia and uniform of the enemy (→ Flags and Uniforms in War);

(f) Improper use of the flags, military emblems, insignia or uniforms of neutral Powers;

(g) Improper use of the distinctive emblems recognized by the Geneva Red Cross Conventions and Protocols (→ Emblems, Internationally Protected; → Red Cross);

(h) Improper use of other internationally recognized protective emblems, e.g. the protective emblem for cultural property (→ Cultural Property, Protection in Armed Conflict);

(i) Feigning of protected status by the use of signs, emblems or uniforms of the → United Nations;

(j) Using the presence of civilians and other → protected persons to render certain points immune from military operations;

(k) Improper use of radio distress signals;

(l) Use of booby-traps attached to sick, wounded or dead persons, children's toys, etc.

Practically all measures for obtaining information about the enemy are legitimate. Notwithstanding some authorities to the contrary, even espionage should be viewed as a permissible ruse of war. Still, inasmuch as a spy carries out his mission clandestinely or under false pretences, he cannot be regarded as a lawful combatant. A spy is not, therefore, entitled to the status of a → prisoner of war. He may be tried and punished in accordance with the national law of the captor State.

Siege means an attempt to take a fortified place through starvation, by cutting off its channels of supply. As long as the besieged place is purely military in character, no special legal problem arises. But the question is whether siege can be laid to a fortified town inhabited by civilians. → Customary international law gives an unequivocally affirmative answer. But the 1977 Additional Protocols proscribe the starvation of civilians as a method of warfare (Art. 54 of Protocol I for international armed conflicts, Art. 14 of Protocol II for non-international armed conflicts). This implies that, at least under certain circumstances and between the parties to these protocols, siege is no longer acceptable.

3. Targets for Attack

As for unlawful targets, the basic division is between civilians and combatants, and therefore also between → civilian objects and → military objectives. It is forbidden to attack civilians (unless they take part in hostilities) and civilian objects, and constant care must be taken to spare them. → Indiscriminate attacks are patently prohibited. Special protection is accorded to the following objects (provided, in most cases, that they are not being used by the enemy for military purposes):

(a) Undefended places (→ Open Towns);

(b) Hospitals and other medical installations, medical vehicles (→ Medical Transportation), and the like;

(c) Buildings dedicated to religion (churches, etc.);

(d) → Cultural property (such as museums and historical monuments);

(e) Objects indispensable to the survival of the civilian population, including foodstuffs, crops, livestock, drinking water installations and irrigation works (it follows that a "scorched earth" policy is excluded as an allowable method of warfare, although a derogation from the prohibition is expressly permitted in defence of the national territory against invasion, where required by imperative military necessity);

(f) Works and installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations (even where these are military objectives);

(g) Civilian → civil defence organizations.

4. Actions

Unlawful actions in warfare consist chiefly of violence against, and particularly the killing of, civilians, wounded and sick combatants, prisoners of war, envoys bearing a flag of truce, medical personnel, religious personnel, and, of late, also journalists (cf. → War Correspondent). Other unlawful actions are destruction of → enemy property not justified by military necessity, → pillage, violation of terms of surrender, and improper treatment of deceased enemy soliders (→ War Graves).

C. Sea Warfare Rules

The rules mentioned in this overview of prohibitions are general in character, but in essence they relate to land warfare. The counterpart rules pertaining to → sea warfare are sometimes different and even in places the opposite of the rules applied in land warfare.

1. Weapons

The question of prohibited weapons in sea warfare relates essentially to mines. Whereas in land warfare the use of mines against military targets is lawful, in sea warfare the position is different, since naval mines are liable to be carried by currents into neutral waters (→ Neutrality in Sea Warfare). Hence there are a number of rules (in particular in Hague Convention VIII of 1907 relative to the Laying of Automatic Submarine Contact Mines) designed to ban the use of floating mines which are not secured by an anchor or which, even when secured, do not become harmless as soon as they have broken loose from their moorings.

In both world wars a practice evolved of setting up closed → war zones in large areas of the → high seas where minefields were laid. The legality of this method of warfare is controversial. Even if it is allowed, regulated lanes must be left for the passage of neutral ships in the war zone.

2. Methods of Warfare

Sea warfare raises four focal problems concerning the legality of methods of conducting hostilities. These are → blockade, → contraband, armed merchant ships (→ Merchant Ships, Armed), and deception.

(a) Blockade

Whatever the current legal position of siege in land warfare is, it is clear that existing international law permits the imposition of blockade on enemy → ports or even on its whole coastline. Thus, starvation of civilians is not ruled out as a method of maritime warfare. On the other hand, a belligerent must allow the free passage of some relief consignments, and particularly medical stores to the civilian population under blockade (→ Relief Actions).

(b) Contraband

Contraband is a cargo of a certain nature – useful for purposes of war and destined for the enemy – which may be seized even when carried by a neutral ship anywhere within the theatre of maritime warfare (→ War, Theatre of; → Neutral Trading; → Ships, Visit and Search). A cargo constituting contraband may be condemned, and this may even "infect" the ship carrying it. Condemnation is carried out by decree of a prize court (→ Prize Law).

(c) Armed merchant ships

While it is indisputable that → privateering is forbidden, a belligerent may in certain circumstances convert a merchant ship into a → warship. The question is, however, whether it is permitted to arm merchant ships, without converting them into warships, by placing guns on board. This measure was taken by the United Kingdom in both world wars, but its legality is debatable.

(d) Deception

The rules against perfidy are laxer at sea than on land. In contrast to the laws of land warfare, in sea warfare a warship is entitled to fly a false flag (of a neutral State or of the enemy) at any stage (pursuit, escape or ambush) before opening fire. The only condition is that the warship must show her true colours prior to going into action.

3. Targets for Attack

Lawful targets at sea include enemy warships, → lighthouses and lightships and even submarine cables (→ Cables, Submarine). On the other hand, enemy merchant ships must not be attacked unless they are attempting to escape or to resist a

warship. But they may be seized and confiscated as prize. In some instances of military necessity they may even be sunk, provided that the crew, the passengers and the vessel's papers have first been removed to safety. Some vessels (coastal → fishing boats, small vessels engaged in religious, scientific or philanthropic missions) are exempt from capture. → Hospital ships may not be attacked or captured unless they commit acts harmful to the enemy outside their humanitarian duties.

→ Submarines must abide by the same legal norms as ships. → Submarine warfare admittedly raises as yet unresolved issues regarding → convoys and armed merchant ships. It is clear all the same that the sinking of unarmed merchant ships not travelling in a convoy is interdicted.

Coastal → bombardment of undefended places is outlawed unless the local authorities refuse to furnish supplies necessary to the naval force requesting them (→ Requisitions). Military objectives can always be bombarded even if located in undefended places.

4. Actions

Acts of violence at sea are prohibited not only against those persons who are protected in land warfare, but also against those who are shipwrecked. That term covers survivors of ships that have been sunk, those who are aboard a disabled vessel, and even survivors of → aircraft wrecks. Shipwrecked persons may be in perfectly good health and need not be sick or wounded in order to qualify for special protection. If fighting occurs aboard a warship, sick-bays must be respected, provided that they are not used for military purposes.

D. Air Warfare

→ Air warfare also has some unique rules regarding methods and means of its manifestation. Although there is no comprehensive international convention on air warfare, the rules elaborated by a Commission of Jurists in 1923 (Hague Rules: Schindler and Toman, p. 147) have found general acceptance.

Whereas the use of explosive or inflammable projectiles weighing less than 400 grammes is prohibited in land as well as maritime warfare (see *supra*), it is expressly permitted in air warfare.

Unlike on ships, the use of false external marks on aircraft is forbidden. Air reconnaissance (→ Military Reconnaissance) is permitted, but trying to obtain information about the enemy clandestinely or by false pretences is considered espionage. The use of aircraft for disseminating → propaganda is a legitimate means of warfare (→ War, Use of Propaganda in). This includes dropping leaflets calling upon enemy soldiers to surrender.

All military aircraft may be attacked in the air or on the ground. A disabled military aircraft remains a legitimate target. It is nevertheless prohibited to attack persons parachuting from an aircraft in distress. This protection does not, however, apply to airborne troops.

Civilian aircraft must not be armed when outside the national territory. They must not engage in hostilities in any form, and must not be used to transmit military intelligence during flight. Civilian aircraft must not be attacked on the ground, but must land upon the approach of enemy military aircraft. If civilian aircraft fly over enemy territory (→ Overflight) or in the immediate vicinity of military operations, they are liable to be fired upon. Subject to certain conditions, medical aircraft are protected under Arts. 24 to 30 of Protocol I of 1977.

The most crucial problem of air warfare relates to strategic bombing, inasmuch as the concept of undefended places or open towns is not easily applicable. As a rule, all military targets may be bombed, and these consist of a wide variety of objects including industrial plants and lines of communication. Whereas indiscriminate attacks are prohibited, if there is an unusual concentration of military objectives, well camouflaged and intensively defended, the practice has developed to treat them all as one "target area". The consequences for civilians in such cases may be catastrophic. Protocol I forbids treating as a single military objective a number of "clearly separated and distinct" military objectives located in an area where there is a concentration of civilians. But target area bombing is not excluded when the military objectives are not clearly separated or distinct.

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons of 1980 proscribes attacks by air-delivered incendiary weapons, even against military objec-

tives, when these are located within an area with a concentration of civilians.

L. FRIEDMAN (ed.), The Law of War, A Documentary History, 2 vols. (1972).
D. SCHINDLER and J. TOMAN (eds.), The Laws of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents (2nd ed. 1981).
For further literature see the bibliographies of the articles to which cross-references appear in the text.

YORAM DINSTEIN

WARS OF NATIONAL LIBERATION

A. Definition; Scope

A war of national liberation refers to an → armed conflict in which a people or a nation, lacking statehood (→ State), but organized within the framework of a national → liberation movement, struggles for independence so as to achieve → self-determination. It is generally accepted that inter-State conflicts and clearly domestic conflicts are excluded from this concept (e.g. India's annexation of Goa, the Indonesia-Malaysia conflict over North Borneo. Problematical are secessionist movements (→ Secession), such as the Biafran and Bangladesh movements, and such struggles as for example occurred between Ethiopia and rebel → Eritrea, where alien occupation was alleged by the Eritreans but the incumbent government successfully asserted its → domestic jurisdiction.

The 1977 Protocol I additional to the Geneva Conventions of 1949 (→ Geneva Red Cross Conventions and Protocols) restricts the notion of wars of national liberation to "armed conflicts in which peoples are fighting against colonial domination", "alien occupation", and "racist régimes" (Art. 1(4) (→ Colonies; → Apartheid)). Within the United Nations a clear tendency of the majority of members has been to restrict the notion of such wars to traditional colonial situations ("salt-water colonialism") and to apply the principle of → territorial sovereignty once a non-white anti-colonial régime has been established on the territory of a former colony. This is evidenced by resolutions of the → United Nations General Assembly (Res. 1514 (XV) of December 14, 1960 on the granting of independence to colonial countries and peoples, and subsequent implementations; Res. 2225 (XXV) of October 24, 1970, the → Friendly Relations Resolution) and by pronouncements of the → Organization of African Unity.

A war of national liberation is defined in accordance with the following distinctive features: a non-State community (nation, people), perceiving itself to be distinct from the dominating State (nation, people) and unable to achieve self-determination (independence, statehood) by pacific (democratic, political) means, which resorts to armed violence to realize that goal and claims a special status under international law (i.e. pursuant to the principles contained in the → United Nations Charter, and expanded upon in UN resolutions) in order to be treated differently from insurgents and others acting against the State's authority (rebels, rioters, terrorists).

B. Historical Perspective

→ Decolonization, a stated major goal of the → United Nations, has not always been achieved peacefully. Traditionally, anti-colonial wars were regarded by the incumbent governments and by a majority of States as → civil wars and domestic affairs of the metropolitan State only (for example, this was the official British view of the Mau-Mau War in Kenya of 1952 to 1955 and the Cyprus situation of 1955 to 1960, as well as the French approach during the Algerian War of 1954 to 1962).

The resolution on the granting of independence (UN General Assembly Res. 1514 (XV)) marked a clear turning-point with regard to the legitimacy of colonialism, by explicitly condemning alien subjugation, domination and exploitation, reaffirming the right to self-determination and calling on all colonial States immediately to cease all measures of force directed against dependent peoples. The historical setting to this resolution was the step-by-step liquidation of the British colonial empire and the defeat of France in the Algerian war. A whole series of UN General Assembly resolutions followed, announcing first the legitimacy of struggle against colonial subjugation, in Res. 2105 (XX) of December 20, 1965, and then accepting the application of armed force to this end, beginning with Res. 3070 (XXVIII) of November 30, 1973.

The UN General Assembly has pronounced

itself in favour of armed action by liberation movements in various specific colonial situations (Angola, → Rhodesia/Zimbabwe, → Namibia) and has explicitly recognized some liberation movements as legitimate representatives of certain peoples (e.g. the Popular Movement for the Liberation of Angola (MPLA), the South-West Africa People's Organisation (SWAPO) and the → Palestine Liberation Organization (PLO)). In Res. 3314 (XXIX) of December 14, 1974 on the Definition of Aggression, Art. 7 excludes struggles for independence and the giving of assistance for these from the notion of → aggression.

C. Legal Problems

On the key issue – the legitimacy of the resort to armed action by liberation movements – there is an absence of unanimity both among States and among publicists. Nevertheless, the permissibility of providing → war material and personnel support to either side in a war of national liberation, and possibly the very application of the rules of warfare to the conflict, depend upon determination of this legal status. (UN General Assembly Res. 2465 (XXIII) of December 20, 1968, for instance, prohibits employment of → mercenaries by incumbent governments.) Questions of international humanitarian law (→ Humanitarian Law and Armed Conflict; → Prisoners of War), although interwoven with the key issue, could also be handled separately, since respect for basic → human rights in armed conflicts should neither depend upon the legitimacy of the cause of the parties to the conflict nor prejudice the legal status of the actual → combatants.

1. Legitimacy of Resort to Armed Violence

The UN Charter generally prohibits the → use of force in international relations. If, under traditional international law, wars of national liberation were regarded as civil wars, resort to force by liberation movements would not be forbidden, but the conflict would be a domestic affair of the incumbent government with the resulting detrimental consequences for the liberation movement. Active external assistance to them would clearly be prohibited. Due to the strong emphasis laid on self-determination and decolonization by the UN, wars of national liberation have ceased to be simply a matter strictly between the colonized and the colonizer. Many resolutions of the UN General Assembly (starting with Res. 1514 (XV)), as well as more recently Art. 1(4) of Additional Protocol I, state that such wars are international conflicts. Since Art. 2(4) of the UN Charter should then apply, several theories on the legitimacy of force used by liberation movements have been developed in various fora (e.g. UN General Assembly Special Committees); they are as follows:

(a) A right to forcible measures of → self-defence against colonial domination under Art. 51 of the UN Charter has been invoked (*inter alia*, by the UN General Assembly Committee on Friendly Relations), arguing that if force were used to deprive peoples of their right of self-determination, the peoples would have the right to rebel or to resort to armed violence to implement their underlying right. The weak point of this argument is that colonialism does not in itself always involve an armed attack or an imminent use of force.

(b) Another argument put forth has been that colonialism in itself constituted an aggression *ab initio*, since colonial régimes were installed in the past by force. This argument disregards the legitimacy in former centuries of territorial acquisition by force (→ History of the Law of Nations) and the non-retroactivity of contemporary international law norms (→ International Law, Intertemporal Problems). Furthermore, Art. 51 of the UN Charter allows for immediate action in self-defence, and the right to self-defence against an armed attack which occurred long ago would therefore have been forfeited in any event.

(c) Aware of the futility of the self-defence arguments, a third theory of the legitimacy of the resort to force has been developed and has attracted strong support, particularly from communist States: that the use of force by liberation movements is a right *sui generis*, emanating from the strong condemnation of colonialism by the international community (Res. 1514: colonialism may "constitute a serious threat to peace"; Res. 1654: "further delay [in applying Res. 1514] ... may threaten international peace and security"; Res. 2105: "the continuation of colonial rule and the practice of apartheid ... constitute a crime against humanity"). This new *bellum justum*

theory tries to assert that wars of national liberation are not directed against the → territorial integrity of a State and are not inconsistent with the purposes of the UN, which condemns colonialism in all forms. Communist States even go so far as to try to extend this idea of the just war to any struggle to eliminate Western influence or to replace a traditional élite with a socialist one in post-colonial milieux (→ Socialist Conceptions of International Law).

2. External Assistance to Parties

External material aid and personnel (advisers, active combatants) given to liberation movements has in most cases in the past played a significant role in the success of anti-colonial wars. The legitimacy of such aid, constantly proclaimed by General Assembly resolutions, is thus a topical question in international law closely connected with the legitimacy of the resort to force by various liberation movements.

In a civil war, aid to the incumbent government is legal, but aid to the rebels is forbidden. In an international conflict only rules of neutrality (→ Neutrality, Concept and General Rules) would prohibit the unbalanced aid to one of the parties. In case of legitimacy of resort to arms by liberation movements, aid to incumbent governments would become illegal. (The tenor of General Assembly resolutions from 1970 onwards seems to support this assertion.) And, aid to liberation movements would become legitimate. (UN General Assembly resolutions have repeatedly called upon States to render moral and material assistance to peoples struggling for freedom, independence and self-determination, thus trying even to promote the idea of an obligation to aid liberation movements. See e.g. Res. 2105 (XX), or with regard to particular situations such as the rights of the Palestinians, and the peoples of southern Africa, Res. 2787 (XXVI) of December 6, 1971.)

3. Treatment under International Humanitarian Law

In wars of national liberation considered as civil wars under traditional international law, liberation movements would receive special status only upon recognition as belligerents by the incumbent government (→ Recognition of Belligerency). They would then enjoy only basic rights by virtue of the common Art. 3 of the 1949 Geneva Conventions. After 1968, UN General Assembly resolutions called for prisoner-of-war protection for combatants in liberation movements, culminating in Res. 3103 (XXVIII) of December 12, 1973 on the legal status of combatants struggling against colonial and alien domination, which provides for the application of the Geneva Conventions of 1949 to all such conflicts. Moreover, Art. 1(4) of Additional Protocol I of 1977 clearly states that armed conflicts "in which peoples are fighting against colonial domination . . . in the exercise of their right of self-determination" should be covered by the Protocol, and gives them the legal status of combatants. It can be presumed that States against which wars of national liberation will be fought will not accede to this Protocol (as of July 1981 only 16 States had ratified it). The Geneva Conventions of 1949 will thus keep their relevance. It is also conceivable that liberation movements could be regarded as "powers" in the meaning of Art. 2, para. 3 common to these Conventions and could themselves also meet the requirements of accession to them.

D. Significance; Policy Considerations

Legitimacy of resort to armed violence by liberation movements, constantly denied by the colonial powers affected and by some other Western States, but steadily pronounced by UN General Assembly resolutions, largely depends on the legal significance and authority of the latter. Here the voting behaviour of UN members is of importance. Whereas Res. 1514 (XV) and some moderate subsequent resolutions were adopted without negative votes, the later Res. 2105 (XX) – recognizing the legitimacy of liberation movement struggles – met with negative votes. The inclusion of the legitimacy of their armed struggle into Res. 3070 (XXVIII) encountered even more negative votes and abstentions. Res. 34/94 of December 13, 1979 was adopted with 125 votes in favour, 7 against, 7 abstentions and 12 absent. It can thus be concluded that there is no absolute *opinio juris* (→ Sources of International Law) in favour of the application of force in the implementation of the right to self-determination.

Serious problems may arise if several groups

pretend to represent a colonially or otherwise oppressed people and one group is recognized either by the UN or another international organization as sole representative, irrespective of any democratic legitimization by the people concerned (e.g. MPLA in Angola, SWAPO for Namibia, Frelimo in Mozambique, PLO, etc.). Such recognition gives this group the monopoly on power, including the right to use armed force, which could be used both against the colonial power and also against other groups. It has frequently occurred that the ultimate victory of this group was achieved by massive support from abroad, perhaps distorting the wishes and claims of the majority of the people concerned.

Another serious problem is the difficulty of persuading incumbent governments to treat liberation movements as combatants in wars of national liberation. In the past their actions have been regarded frequently as acts of → terrorism against the civilian population. National liberation movements have in fact often directed their activities against → protected persons and have thus not applied the general rules of warfare (→ Armed Conflict, Fundamental Rules), repeatedly invoking their "just cause" and asserting that the imbalance of power disadvantages their struggle.

The concept of wars of national liberation as giving rise to a special subset of rules both of *jus ad bellum* and *jus in bello* creates a danger of watering down the general prohibition of force in Art. 2(4) of the UN Charter, and of the responsibility of the → United Nations Security Council for the maintenance of peace (→ United Nations Peacekeeping System). This approach is open to abuse as long as the definition of the right of self-determination has not been determined by the general consent of the international community.

G. ABI-SAAB, Wars of National Liberation and the Laws of War, Annales d'études internationales, Vol. 13 (1972) 93–117.

D.P. FORSYTHE, The 1974 Diplomatic Conference on Humanitarian Law; Some Observations, AJIL, Vol. 69 (1975) 77–96.

H. FUJITA, La guerre de libération nationale et le droit international humanitaire, Revue de droit international de sciences diplomatiques et politiques, Vol. 53 (1975) 81–142.

K. IPSEN, Zum Begriff des "internationalen bewaffneten Konfliktes", in: Recht im Dienst des Friedens, Festschrift für Eberhard Menzel (1975) 405–425.

N. RONZITTI, Resort to Force in Wars of National Liberation, in: A Cassese (ed.), Current Problems of International Law (1975) 319–353.

N. RONZITTI, Wars of National Liberation, A Legal Definition, ItalYIL, Vol. 1 (1975) 192–205.

J. TOMAN, La conception soviétique des guerres de libération nationale, in: A. Cassese (ed.) Current Problems of International Law (1975).

E. KLEIN, Nationale Befreiungskämpfe und Dekolonialisierungspolitik der Vereinten Nationen, ZaöRV, Vol. 36 (1976) 618–653.

G. ABI-SAAB, Les guerres de libération nationale et la conférence sur le droit humanitaire, Annales d'études internationales, Vol. 8 (1977) 63–77.

H. NEUHOLD, Internationale Konflikte, Verbotene und erlaubte Mittel ihrer Austragung (1977) 141–143, 191–195, 225–227.

R.E. GORELICK, Wars of National Liberation, Jus ad Bellum, Case Western Reserve Journal of International Law, Vol. 11 (1979) 71–93.

A. GRAHL-MADSEN, Decolonization, The Modern Version of a 'Just War', GYIL, Vol. 22 (1979) 255–273.

D. SCHINDLER, The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols, RdC Vol. 163 (1979) II 121–160.

R.J. TYNER, Wars of National Liberation in Africa and Palestine, Yale Studies in World Public Order, Vol. 5 (1979) 234–291.

HENN-JÜRI UIBOPUU

WARSHIPS

1. Definition

Warships are one form, perhaps the most ancient, of → State ships. The definition of warships developed in → customary international law, but it has been taken up in several international → treaties. The first treaty was Hague Convention VII relating to the Conversion of Merchant Ships into War-Ships (→ Hague Peace Conferences of 1899 and 1907; → Merchant Ships). Of a similar nature were the proposals of the → International Law Commission which led to the adoption of Art. 8(2) of the 1958 Geneva Convention on the High Seas (→ Conferences on the Law of the Sea; → High Seas). Art. 8(2) defines "warship" as:

> "a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command

of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline".

This Treaty, which according to its → preamble is "generally declaratory of established principles of international law", was binding on 57 States as of December 31, 1980. Among the States parties are the United States, the Soviet Union, the United Kingdom and the Federal Republic of Germany.

The definition question has also been taken up at the Third United Nations Conference on the Law of the Sea (UNCLOS III). Art. 29 of the Draft Convention on the Law of the Sea in the August version (abbreviated here as Draft Convention), uses the same definition except for three minor variations: "armed forces" is substituted for "naval forces"; "appropriate service list or its equivalent" replaces "Navy List"; and the crew, instead of being "under regular naval discipline" must now be "under regular armed forces discipline".

The definitions in each of these treaties apply only to the treaty in question. The first two treaties are binding merely on a minority of States, and the third is only in its draft form, with its fate still uncertain. Even so, legal doctrine now assumes that the definition of warships in the 1958 Convention on the High Seas is the expression of a general → consensus and of customary international law. One may presume that the extension of this definition by the Draft Convention will eventually become customary international law.

The 1958 and 1980 definitions not only include fighting ships, but also, for instance, troop transports and tender ships if they meet the specifications stated above. If a merchant ship is converted into a warship (→ Merchant Ships, Armed), Art. 6 of Hague Convention VII of 1907 requires that the flag State (→ Flag, Right to Fly) announce the conversion in its navy list as soon as possible (→ Notification). In practice this rule has never been strictly observed: The number of naval powers that became parties to this convention was limited; the treaty contains a → general participation clause; and in both world wars the interest in military secrecy proved stronger than the demand for publication.

The following remarks deal only with the legal status of warships in peace-time, a very small part of → maritime law and → maritime jurisdiction. For the legal position of warships in the law of war, see → Sea Warfare; → Neutrality in Sea Warfare; → Blockade; → Prize Law; → Privateering; → Ships, Diverting and Ordering into Port; → Ships, Visit and Search; and → Submarine Warfare.

2. Legal Position on the High Seas

Freedom of the high seas is a basic tenet of international law. From the principles of freedom of navigation and sovereign equality of States (→ Navigation, Freedom of; → States, Sovereign Equality) it follows that in peace-time ships on the high seas are, as a rule, under the exclusive jurisdiction of their flag State (→ Ships, Nationality and Status; → Jurisdiction of States). The degree of this jurisdiction depends on the national law of the flag State (→ Lotus, The). In exceptional cases, however, warships have a certain jurisdiction over ships of a different nationality. In some treaties States have accorded to each others' warships a limited jurisdiction over each others' non-military vessels, e.g. in Art. 10 of the 1884 International Convention for the Protection of Submarine Telegraph Cables (→ Cables, Submarine).

More important are rules of customary international law based on the common interest of all States in suppressing certain acts on the high seas. Each warship is entitled to seize pirate ships or ships taken by → piracy and under the control of pirates, arrest the persons and seize the property on board (cf. Art. 19 of the 1958 Convention on the High Seas). Art. 22 of the 1958 Convention on the High Seas confers on warships the right to board foreign merchant ships reasonably suspected of engaging in piracy or slave trade (→ Slavery; see also Draft Convention, Arts. 99, 105, 107 and 110). Warships may also board a merchant ship flying a foreign flag or refusing to show its flag, if such vessel is reasonably suspected to be of the same nationality as the warship (Art. 22(1) (c) and (2) of the 1958 Convention on the High Seas; Draft Convention, Art. 110(1) (e) and (2)).

In addition to these traditional rules, Art. 110(1) (d) of the Draft Convention accords these rights where reasonable grounds exist for suspicion that the foreign ship is without any nationality (→ Flag, Abuse of). Moreover, Art. 110(1) (c);

grants a right to board foreign ships if there are reasonable grounds for suspecting that such a ship is engaged in unauthorized broadcasting, provided the warship has jurisdiction under Art. 109, in which the basis for such jurisdiction is defined (→ Pirate Broadcasting). It is doubtful that Art. 110(1) (d) expresses already established customary international law; Art. 110(1) (c) certainly does not. If the suspicions of piracy, slave trade or abuse of flag prove to be unfounded and the ship boarded has not committed any act justifying them, it shall, according to Art. 22(3) of the 1958 Convention on the High Seas, be compensated for any loss or damage that may have been sustained. Art. 110(3) of the Draft Convention prescribes the same in all cases of boarding covered by Art. 110(1). Another basis for a warship's jurisdiction over foreign vessels other than warships is the customary right of → hot pursuit (→ I'm Alone, The). In comparison to Art. 23 of the 1958 Convention on the High Seas, Art. 111 of the Draft Convention expands the territorial bases for hot pursuit. In both treaties there is a provision for compensation. Controversial is the relevance of the flag State's right of → self-defence as a basis for the warship's jurisdiction over foreign ships.

Whereas in the exceptional cases mentioned above, warships on the high seas have a limited jurisdiction over foreign ships, warships themselves have "complete immunity from the jurisdiction of any State other than the flag State" (Art. 8(1) of the 1958 Convention on the High Seas; Draft Convention, Art. 95), unless acts of piracy are committed by a warship whose crew has mutinied and taken control (Art. 16 of the 1958 Convention on the High Seas; Draft Convention, Art. 102).

3. Legal Position in the Territorial Sea and Special Zones

International law concerning → territorial waters, the → contiguous zone and other special zones (→ Zones of Peace at Sea) is in a state of flux. It seems safe to say that the limit for the breadth of the territorial sea will be drawn at twelve nautical miles, a claim which many States have already made and which was accepted in Art. 3 of the Draft Convention. It is a rule of customary international law that the → sovereignty of a coastal State extends beyond its land territory and → internal waters over the territorial sea. This sovereignty is subject to certain limitations, especially to the customary right of at least all non-military vessels to innocent passage (→ Passage, Right of). This right was more recently dealt with in Art. 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone (abbreviated here as Convention on the Territorial Sea), as well as in Arts. 17 to 26 of the Draft Convention. Undoubtedly the coastal State may refuse foreign warships the right to stop or anchor in its territorial waters if this is not incidental to ordinary navigation or rendered necessary by *force majeure* or by distress (→ Ships in Distress).

Problems, however, arise through the warships' right to innocent passage. According to Art. 24 in the International Law Commission's 1956 Draft on the Law of the Sea, the coastal State could make the passage of warships through the territorial sea subject to previous authorization or notification, but should normally grant innocent passage as long as certain requirements are met. In the First Committee of the Geneva Conference on the Law of the Sea, a large majority accepted this proposal. However, the requirement of previous authorization was eliminated by the plenum of the conference, and that of previous notification did not receive the necessary two-thirds majority there. Thus both restrictions of innocent passage were excluded from the 1958 Geneva Convention on the Territorial Sea. Art. 14 of this Treaty grants the right of innocent passage to all ships, including warships. → Submarines have to navigate on the surface, showing their flag (Art. 14(6); Draft Convention, Art. 20). Art. 16(3) of the Treaty permits the coastal State a temporary suspension of all innocent passage "if such suspension is essential for the protection of its security." According to Art. 23, the coastal State may under certain conditions require the warship to leave the territorial sea. With 86 delegations attending this conference, the 1958 Convention on the Territorial Sea was accepted by 61 delegations; there were two abstentions, but no votes against. As of December 31, 1980 there were 45 States parties to this Convention, including the United States, the United Kingdom and the Soviet Union. However, Bulgaria, Byelorussia, Colombia, Czechoslovakia, Hungary, Romania, the Ukraine and the Soviet Union made reservations regarding

the right of passage of warships. Several other States raised objections against these reservations. Under such circumstances it is doubtful that there was a rule of customary international law which grants to warships the right of innocent passage without the consent of the coastal State.

Most recently, in the Third UN Conference on the Law of the Sea (UNCLOS III), the great sea-powers and their allies, as well as other nations with strong shipping interests, have insisted on the right of innocent passage for warships, and have prevailed. Under Art. 17 of the Draft Convention, all ships have the same right to innocent passage. Art. 19 defines innocent passage more exactly and possibly with a somewhat narrower meaning than does Art. 14(4) of the 1958 Convention on the Territorial Sea. According to Art. 20 of the Draft Convention, "submarines and other underwater vehicles are required to navigate on the surface and to show their flag". The right of the coastal State to regulate innocent passage under Art. 21 and to suspend it temporarily under Art. 25(3) also applies to all ships. In contrast to Arts. 21 and 25, Art. 30 refers only to warships: Under certain conditions the coastal State may require them to leave the territorial sea immediately. This is a necessary rule, as the coastal State is not entitled to enforcement measures against warships (see below). As of 1980, about 25 States had requirements for prior notification and authorization of warship passage through territorial waters, including → straits. other States, including the United States, have not officially recognized these requirements.

At the Ninth Session of UNCLOS III in 1980 about 45 States supported an addition to Art. 21 of the Draft Convention permitting coastal States to regulate innocent passage through the territorial sea with respect to "the navigation of warships, including the right to require prior authorization or notification for passage through the territorial sea". This proposal was, however, not adopted. At UNCLOS III, there have also been efforts to exclude warships from zones outside the territorial sea under the rubric of military defence or military security. Although more than 40 States claim such zones, these efforts have not resulted in a provision in the text.

Art. 31 of the Draft Convention places on the flag State the responsibility for loss or damage caused to the coastal State by a warship in passage through the territorial sea (→ Responsibility of States: General Principles). Some articles of the text, without expressly mentioning warships, have a special bearing on them. According to Art. 22(2), especially → nuclear ships and ships carrying nuclear and other inherently dangerous or noxious substances or materials may be required to confine their passage to → sea lanes and to observe traffic regulation schemes prescribed by the coastal State (see also Arts. 22(1) and 23).

Despite a possibly narrower definition of innocent passage and a possible extension of the coastal State's right in regulating innocent passage, the Draft Convention strengthens the basis for warships' rights of innocent passage in comparison to the present, somewhat uncertain, state of law. This is especially important in the context of a twelve-mile territorial sea. The improvement has the determined backing of the strongest sea powers, namely the United States and the Soviet Union. In view of the opposition of certain other coastal States, the projected preclusion of reservations or exceptions to the Draft Convention (Art. 309) seems particularly significant (→ Treaties, Reservations).

Warships enjoy a large degree of immunity in foreign territorial waters. This is based on the theory that warships embody a foreign State, on the principles of sovereignty, → sovereign immunity and equality of States. The extent of this immunity is, however, controversial. Under customary international law, warships have to comply with the coastal State's laws and regulations concerning passage through its territorial sea. The rule is affirmed in Arts. 17, 22 and 23 of the 1958 Convention on the Territorial Sea as well as in Arts. 21(4) and 30 of the Draft Convention. It is debatable whether all the other laws of the coastal State are binding on a warship in innocent passage. Under Art. 17 of the 1958 Convention on the Territorial Sea, all foreign ships in innocent passage "shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law . . . ." Now, however, Art. 21(1) and (4) of the Draft Convention mentions as binding only laws and regulations of the coastal State in relation to innocent passage as well as all generally accepted international regulations relating to the prevention of collision. This possible restriction of the

coastal State's regulatory powers on all foreign ships must apply *a fortiori* to warships. In any event, the coastal State may not execute its laws, judgments or administrative decrees and orders against the warship or aboard it. Out of respect for the sovereign immunity and equality of the flag State, the immunity of warships in foreign territorial waters must exceed that of merchant ships under Arts. 18 to 20 of the 1958 Convention on the Territorial Sea or under Arts. 27 and 28 of the Draft Convention. Arts. 30 and 32 of the Draft Convention indicate a far-reaching immunity of warships from judical and administrative execution.

Extension of the territorial sea to twelve nautical miles will considerably increase the number of straits forming part of the territorial sea. In the absence of special treaty regulations (e.g. → Dardanelles, Sea of Marmara, Bosphorus), customary international law provides transit rights for warships through straits used for international navigation (→ Corfu Channel Case). Art. 38 of the Draft Convention grants all ships a right of transit passage, subject to certain conditions described in the Convention; and Art. 45 grants a right of innocent passage for all ships in cases not covered by Art. 38. According to both articles, these rights cannot be suspended (see also Art. 44 of the Draft Convention and Art. 16(4) of the 1958 Convention on the Territorial Sea). In this part of the Draft Convention a parallel provision to Art. 14(6) of the 1958 Convention on the Territorial Sea or to Art. 20 of the Draft Convention was purposely omitted. Thus, it appears that submarines have the right to navigate below the surface in transit passage through straits (although this is a matter in controversy).

As far as the passage through the contiguous zone is concerned, neither traditional international law nor Art. 33 of the Draft Convention defining the coastal State's jurisdiction differentiates between warships and other ships. However, the jurisdiction in general, and still more the powers of execution of the coastal State, must as a matter of course be even more restricted in the contiguous zone than in the territorial sea.

Part IV of the Draft Convention extends the sovereignty of archipelagic States over archipelagic waters at the expense of the high sea (→ Archipelagos). Art. 52 provides, however, for a right of innocent passage through archipelagic waters. This right is accorded to all ships, but is subject to temporary suspension. Art. 53 authorizes an archipelagic State to designate sea lanes under a special legal régime which respects the right of archipelagic sea lanes passage. However, "[i]f an archipelagic State does not designate sea lanes . . . the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation" (Art. 53(12)). According to Art. 54, which applies Art. 44 *mutatis mutandis*, this right of archipelagic sea lanes passage is not subject to suspension. As far as archipelagos are concerned, there is no parallel to Art. 14(6) of the 1958 Convention on the Territorial Sea or to Art. 20 of the Draft Convention. Due to the nature of archipelagic waters, the conclusion that submarines are not required to navigate on the surface is even more cogent than in the case of straits. The legal status of warships or even of ships in general in archipelagic waters is only partially regulated in the Draft Convention, namely in Art. 54 applying Arts. 39, 40, 42 and 44 *mutatis mutandis*. Art. 50 authorizes the archipelagic State to delimit the internal waters within the archipelagic waters. In these internal waters the general rules applying to them are valid (see section 4 *infra*). As for the larger balance of the archipelagic waters, a situation of legal uncertainty remains.

Part V of the Draft Convention contains a special legal régime in an → exclusive economic zone which shall not extend beyond 200 nautical miles from the → baselines of the territorial sea. The right of passage of warships through this zone is unquestioned. The text, however, avoids a clear statement as to whether this zone is part of the high seas. The reference in Art. 58 to the law of the high seas includes the right of third States to carry out → naval manoeuvres in exclusive economic zones. This result tallies with the limited rights accorded to the coastal State in Art. 56.

The Draft Convention includes a general rule of specific relevance to the zones mentioned in this section. Art. 236 provides:

> "The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, [or] naval auxiliary . . . . [E]ach State shall

ensure . . . that such vessels . . . act in a manner consistent, so far as is reasonable and practicable, with this Convention."

4. Legal Position in Internal Waters

The 1958 Geneva Conventions on the Law of the Sea and the Draft Convention leave the legal position of warships in internal waters to customary international law, which does not require a coastal State to admit foreign warships to its maritime internal waters, especially its → ports (→ Internal Waters, Navigation in: → Internal Waters, Seagoing Vessels in; → Territorial Sovereignty). Exceptions are *force majeure* and distress. Some States keep their harbours open to foreign warships or are satisfied with advance notice of their arrival. Other States make entrance subject to special permission. With the increase of nuclear ships, this restrictive policy could spread. The coastal State may limit the number of warships or make their admission dependent on → reciprocity or on other conditions such as → waiver of certain military exercises, or of shore leave for the crew.

As warships are not entirely excepted from the coastal State's legal régime while in territorial waters, they can naturally not be exempt in the coastal State's internal waters. Under customary international law, they must at least observe the coastal State's laws on their admission, navigation and the protection of public health. The coastal State may require warships infringing on such laws to leave its internal waters.

As to the binding force of other laws of the coastal State, legal doctrine is divided. If the definition of the coastal State's jurisdiction in Art. 21 of the Draft Convention (see section 3 *supra*) should become general international law, this might have consequences for a restrictive interpretation of the coastal State's jurisdiction even in its internal waters. In any event, there is agreement that military order and discipline aboard are under the exclusive authority of the flag State. In those matters, the ship's commander is entitled to exercise the flag State's jurisdiction on foreign territory (→ Administrative, Judicial and Legislative Activities on Foreign Territory). Warships are not subject to the execution of the coastal State's law, judgments or administrative decrees and orders. Without the permission of the ship's commander, the coastal State's police, customs, tax and other authorities may not perform official functions aboard. Warships must not be seized or detained by the coastal State. Private claims against the ship, arising for instance from supply deliveries, aid in distress, or collisions, must be raised in the courts of the flag State or through diplomatic channels. As a matter of practice, harbour, → lighthouse and similar fees are not levied on warships, provided they are not a remuneration for special service to the warship, as, for instance, pilot fees.

The crew aboard warships is exempt from the coastal State's jurisdiction in private law matters. It is a matter of controversy whether this exemption extends to criminal acts committed on board by crew members against other crew members or against non-nationals of the coastal State. Doctrine is also split as to the jurisdiction over crimes committed aboard by crew members against nationals of the coastal State (→ Criminal Law, International). Some authors assert the exclusive jurisdiction of one State over another; others argue for concurrent jurisdiction. If the coastal State claims jurisdiction in such cases, it is still, however, not entitled to execute a judgment aboard. The coastal State's jurisdiction over crew members ashore is determined by rules governing → military forces abroad.

Report of the International Law Commission to the General Assembly, UN Doc. A/3159, YILC (1956 II) 253–302.

Convention on the High Seas, Geneva, April 29, 1958, UNTS, Vol. 450 (1963) 11–167; AJIL, Vol. 52 (1958) 842–851.

Convention on the Territorial Sea and the Contiguous Zone, Geneva, April 29, 1958, UNTS, Vol. 516 (1964) 205–282; AJIL, Vol. 52 (1958) 834–842.

Third United Nations Conference on the Law of the Sea, Draft Convention on the Law of the Sea of August 28, 1981, UN Doc. A/CONF.62/L.78.

Third United Nations Conference on the Law of the Sea, Official Records (1975 to date).

R. PLATZÖDER (ed.), Dokumente der Dritten Seerechtskonferenz der Vereinten Nationen (1977 to date).

C. BALDONI, Les navires de guerre dans les eaux territoriales étrangères, RdC, Vol. 65 (1938 III) 185–393.

J. LE CLERE, De l'immunité des bâtiments de guerre et des navires d'Etat, Droit maritime français, Vol. 10 (1958) 450–461.

C.J. COLOMBOS, The International Law of the Sea (6th ed. 1967) 259–284.

U. JENISCH, Das Recht zur Vornahme militärischer Übungen und Versuche auf Hoher See in Friedenszeiten (1970).
D.P. O'CONNELL, International Law and Contemporary Naval Operations, BYIL, Vol. 44 (1970) 19–85.
K.-F. STEINERT, Die internationalrechtliche Stellung des Schiffes im fremden Küstenmeer im Frieden (1970).
Y. VAN DER MENSBRUGGHE, Le pouvoir de police des Etats en haute mer, RevBelge, Vol. 11 (1975) 56–102.
Akademie der Wissenschaften der UdSSR, Institut für Staat und Recht, Modernes Seevölkerrecht, Die Rechtsordnung der Gewässer und des Bodens des Weltmeers, translated from the Russian by E. Rauch (1978) esp. 83–86, 101–107, 189–201, 240–243.
G. JAENICKE, Die Dritte Seerechtskonferenz der Vereinten Nationen, Grundprobleme im Überblick, ZaöRV, Vol. 38 (1978) 438–511.
M.F. MADURO, Passage Through International Straits: The Prospects Emerging From the Third United Nations Conference on the Law of the Sea, Journal of Maritime Law and Commerce, Vol. 12 (1980–1981) 65–95.
J.N. MOORE, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, AJIL, Vol. 74 (1980) 77–121.
E. RAUCH, Militärische Aspekte der Seerechtsentwicklung, in: Graf Vitzthum (ed.), Die Bundesrepublik Deutschland und die Dritte Seerechtskonferenz der Vereinten Nationen (1980) 75–121.
W.M. REISMAN, The Regime of Straits and National Security: An Appraisal of International Lawmaking, AJIL, Vol. 74 (1980) 48–76.
H.B. ROBERTSON, JR., Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, Virginia Journal of International Law, Vol. 20 (1980) 801–857.
A. BERG, Das sowjetische U-Boot 137 in schwedischen Hoheitsgewässern, Fragen der Immunität fremder Kriegsschiffe, ZaöRV, Vol. 42 (1982) 295–326.

WILHELM KARL GECK

WEAPONS, PROHIBITED

1. Concept

Prohibitions and restrictions on the use of weapons under the laws of war (→ War, Laws of) are either derived from rules of custom or from treaty provisions specifically restricting the use of particular weapons, or in many cases, they may be derived by necessary implication from general principles and objectives of the law such as the avoidance of unnecessary suffering or indiscriminate harm to → protected persons or objects (→ Armed Conflict, Fundamental Rules; → Indiscriminate Attack). Specificity of restrictive rules has the advantage of precision in application, but has the disadvantage of affording an opportunity and motive for circumvention through the development of new weapons. More abstract prohibitions based on general principles may comprehensively cover the effects sought to be avoided, but their application may depend on flexible, subjective interpretations. Treaty restrictions on the use of weapons are usually conditional on reciprocity of application, and in order to allow for the maintenance of a retaliatory capability, they have seldom included any prohibition on the development or stockpiling of the weapon in question. In this respect they differ from arms control agreements which are generally intended to regulate the military power relationship between the parties in peace-time by limiting the possession of specific types of weapons.

2. Historical Development

(a) Specific weapons restrictions

The regulation of warfare in ancient India, Greece and Rome included prohibitions against the use of poisoned weapons and blazing arrows. The development of new weapons was often condemned because of the threat they posed to existing vested interests in then current methods of warfare. This is exemplified in a later period by the Second Lateran Council's denunciation in 1139 of the use of crossbows, as these threatened the military monopoly of mounted knights *vis-à-vis* peasants and yeomen. On more humanitarian grounds, Vattel condemned → bombardment of besieged places with red-hot shot which tended to start fires affecting non-combatants. Avoidance of unnecessary suffering inspired the 1868 St. Petersburg Declaration prohibiting the use of explosive or incendiary projectiles weighing less than 400 grammes, as the cruel effects of such projectiles added little to the capacity to disable individual → combatants. When small calibre explosive bullets were seen to be effective against aircraft, and when incendiary bullets were recognized to be helpful as tracers, the prohibition was considered not to apply to such uses, as causing unnecessary suffering was not the object of the weapons.

The Hague Peace Conference of 1899 adopted declarations prohibiting the use of dumdum

bullets and artillery-disseminated, asphyxiating gas. Art. 23(a) of the Hague Regulations respecting the Laws and Customs of War on Land annexed to Convention II of 1899 and to Convention IV of 1907 reaffirmed the ancient prohibition against the use of poison or poisoned weapons, a provision which also has the effect of forbidding the intentional pollution of water resources which might cause indiscriminate harm to civilians (→ Hague Peace Conferences of 1899 and 1907). Hague Convention VIII of 1907 relative to the Laying of Automatic Submarine Contact Mines was designed to reduce the risk to peaceful shipping from unanchored automatic contact → mines and torpedoes which had missed their marks (→ Sea Warfare).

The use of chemical agents in World War I produced a general reaction of horror and led ultimately to the adoption in Geneva of the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (→ Chemical Warfare). In the light of reservations expressed by many States, the prohibitions of this Protocol extend only to the first use of chemical weapons. The legal effect of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, however, is to render the use of biological weapons unlawful in all circumstances (→ Biological Warfare; → Arms Control).

(b) Prohibitions implied from general principles

The Hague Peace Conferences of 1899 and 1907 and the 1974–1977 Diplomatic Conference on Humanitarian Law (DCHL) reaffirmed and codified the principle implicit in the 1868 St. Petersburg Declaration prohibiting the use of weapons of a nature to cause unnecessary suffering or superfluous injury (Hague Regulations, Art. 23(e); Protocol I additional to the Geneva Conventions of August 12, 1949, Art. 35(2)). The application of this principle requires a determination of whether the suffering to be expected from the use of the weapon is clearly excessive in relation to the military purpose for which the weapon was designed (i.e. a test of → proportionality is adopted). Art. 36 of Protocol I requires each nation to review under the laws of war the legality of new weapons. Hitherto, the practice of States had established the illegality of such marginal weapons as barbed lances, projectiles filled with glass and irregularly shaped bullets.

Concern for the better protection of the civilian population (→ Civilian Population, Protection) from the increasingly destructive effects of modern weapons inspired initiatives within the → United Nations and the International Red Cross to formulate both general and specific restrictions against the indiscriminate use of weapons (→ Geneva Red Cross Conventions and Protocols). The DCHL did not directly restrict the use of any particular weapons, but the 1977 Protocol I established indirect restraints through explicit rules for the protection of the civilian population. These include a prohibition against indiscriminate attacks including area bombardment of populated places and disproportionate attacks (Art. 51), attacks which may be expected to cause widespread, long-term and severe damage to the natural environment (Arts. 35(3) and 54; → War and Environment), and attacks which may release dangerous forces from dams, dykes and nuclear electrical generating stations (Art. 56).

After the conclusion of the DCHL some commentators suggested that these provisions of Protocol I affect the use of nuclear weapons. However, the context of the negotiations, including the introduction of the Protocol by the → International Committee of the Red Cross (ICRC) and the uncontradicted declarations of the nuclear powers represented at the DCHL, makes it clear that use of nuclear weapons was understood not to be within the scope of the rules in Protocol I relevant to the use of weapons (→ Nuclear Warfare and Weapons).

3. Current Situation

Efforts during the DCHL to supplement the general rules with prohibitions of the use of specific conventional weapons did not result in any agreed texts. The deliberations did, however, indicate those restrictions which had a reasonable chance of adoption and thus provided a foundation for the UN Conference on Prohibitions and Restrictions of Use of Certain Conventional Weapons. That Conference concluded its work on

October 10, 1980 with the adoption of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and three optional protocols dealing with, respectively, non-detectable fragments (Protocol I), restrictions on the use of land → mines and booby traps (Protocol II) and restrictions on the use of incendiary weapons (Protocol III). The Convention provides for periodic review which may lead to the adoption of additional restrictions.

Protocol I is an attempt to achieve the avoidance of unnecessary suffering by prohibiting the use of weapons which implant fragments that are not detectable by X-rays. The other two protocols are mainly premised on securing the avoidance of indiscriminate harm to civilians. Protocol II prescribes procedures to ensure that mines will either be located and removed after the conclusion of active hostilities or be fitted with devices for their destruction when they no longer serve the military purpose for which they were emplaced. Protocol III deals only with weapons such as napalm whose primary effect is to set fires or cause burn injuries, but not with weapons designed to pierce material, which may generate intense heat after penetration. It prohibits air delivery (→ Air Warfare) of such incendiaries against → military objectives located within inhabited places and requires special precautions to avoid civilian damage when other delivery means are used in such places. Because of the military utility of incendiary weapons against combatants efforts to ban all uses of such weapons were unsuccessful.

4. Special Problems

The Conventional Weapons Convention is silent as to measures to ensure reciprocity of application. It thus remains open for signatory or acceding parties to express reservations similar to those made to the 1925 Geneva Gas Protocol. These terminated treaty obligations in relation to an enemy not respecting its norms. → Reprisals by use of otherwise illegal weapons constitute another possible sanction.

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974–1977, 17 vols. (1978).

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, ILM, Vol. 19 (1980) 1524–1536.

M. McDOUGAL and F. FELICIANO, Law and Minimum World Public Order, The Legal Regulation of International Coercion (1961) 641–668.

R.R. BAXTER, Criteria of the Prohibition of Weapons in International Law, Festschrift für Ulrich Scheuner (1973) 41–52.

F. KALSHOVEN, The Law of Warfare (1973) 87–106.

P. ROBBLEE, The Legitimacy of Modern Weaponry, Military Law Review, Vol. 71 (1976) 95–148.

A. CASSESE, Means of Warfare, The Traditional and the New Law, in: A. Cassese (ed.), The New Humanitarian Law of Armed Conflict (1979) 161–198.

WALDEMAR A. SOLF

WILSON v. GIRARD

William Girard, a member of the United States Army, was stationed at Camp Weir, Japan. On January 30, 1957, he was ordered to guard a machine gun on a firing range; while doing so he fired a shot which fatally wounded a Japanese woman who was collecting expended cartridge cases.

A controversy between the Japanese and the United States Governments arose as to whether Girard should be tried by a Japanese court. After a prolonged exchange of → notes, the United States finally decided to waive (→ Waiver) what she consistently maintained was her primary right to try Girard, and he was indicted by the Japanese judicial authorities. Girard thereupon petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia. Although denying the application (152 F. Supp. 21 (1957)), this Court issued an injunction restraining the United States Army from turning Girard over to the Japanese authorities (cf. → Extradition).

The United States Supreme Court subsequently decided, however, that no constitutional or statutory rights would be violated if Girard were delivered to the Japanese (354 U.S. 524 (1957)). In its decision, the Court pointed out that Art. III of the United States-Japan Security Treaty (UNTS, Vol. 136, p. 211), signed on the same day as the → Peace Treaty with Japan (September 8, 1951),

authorized the two governments to conclude administrative agreements to determine "[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan". On the basis of this provision, an administrative agreement was signed on February 28, 1952 (UST, Vol. 2, p. 3341) granting jurisdiction to the United States for offences committed in Japan by members of the United States forces, but providing at the same time that the United States might, in any individual case, waive jurisdiction. Art. XVII (1) of the agreement provided further that, after the entry into force of the Agreement on the Status of Forces of the → North Atlantic Treaty Organization, which had been signed on June 19, 1951 (UNTS, Vol. 199, p. 67), Japan and the United States would conclude an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Agreement. This agreement took the form of a protocol, signed on September 29, 1953, and effective October 29, 1953. As amended by this protocol, para. 3 of Art. XVII of the administrative agreement provides:

"3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

Art. XXVI of the administrative agreement established a joint committee of representatives of Japan and the United States (→ Mixed Commissions) to consult on all matters requiring mutual consultation regarding the implementation of the agreement. If this committee were unable to resolve any matter, it should be referred to the two governments for further consideration.

The United States first claimed the right to try Girard, because the act had been "done in the course of official duty". Japan denied that this had been the case and therefore claimed the primary right of jurisdiction for herself. As the joint committee failed to agree, the United States Government decided to waive whatever jurisdiction it might have in accordance with paragraph 3(c) of the protocol.

In its decision, the Supreme Court pointed out further that a sovereign nation (→ Sovereignty) has exclusive jurisdiction to punish offences committed within its territory (→ Jurisdiction of States; → Territorial Sovereignty), unless it expressly or implicitly surrenders this right. Jurisdiction was transferred by Japan to the United States in Art. XVII (3), but with the reservation that the United States could waive her right. There were no constitutional or statutory barriers to such a provision for waiver: "In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches." Girard was subsequently delivered over to the Japanese authorities, was found guilty of manslaughter by a Japanese court and received a suspended three-year sentence.

From the point of view of international law, the significance of this case lies in the interpretation of the Status of Forces Agreement concluded between the United States and Japan (→ Military Forces Abroad; → Military Bases on Foreign Territory). The Supreme Court's decision would seem correct both in its conclusion and its reasoning.

The historical significance of the case is to be seen in the fact that for the first time since World War II a member of the forces of what had previously been an occupying power (→ Occupation, Belligerent) was surrendered to the juris-

diction of the formerly occupied State, in spite of the fact that a severe penalty was to be expected for the accused (→ Criminal Law, International).

M. SNEE and A.K. PYE, Status of Forces Agreement and Criminal Jurisdiction (1957).

D. VIGNES, L'affaire Girard et le Statut des forces américaines stationées en territoire étranger, AFDI, Vol. 3 (1957) 304–314.

G.B. BALDWIN, Foreign Jurisdiction and the American Soldier, "The Adventures of Girard", Wisconsin Law Review (1958) 52–106.

S. LAZAREFF, Status of Military Forces under Current International Law (1971).

INGO VON MÜNCH

WOUNDED, SICK AND SHIPWRECKED

1. Historical Development

The idea of an obligation to refrain from attacking and to care for the wounded on the battlefield has had a rather tormented history through the ages (→ War, Laws of, History; → Humanitarian Law and Armed Conflict). The modern transformation of this idea into rules of international law was prompted by the shock Henry Dunant experienced on the battlefield of Solferino in 1859 when he saw the suffering of the 40000 wounded caused by that battle. His appeal to form permanent associations for the purpose of caring for the wounded and to conclude a treaty prescribing the respect and protection of the wounded was heeded soon thereafter. The first associations which were later to become the → Red Cross societies were founded in the following years, and in 1864 a diplomatic conference met in Geneva and negotiated the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This Convention was updated and revised by new Conventions in 1906, 1929, 1949, and most recently by the two Additional Protocols of 1977 (→ Geneva Red Cross Conventions and Protocols). The Geneva Conventions of 1864 and 1906, Convention I of 1929, and Convention I of 1949 cover only wounded and sick members of military forces in → land warfare. Certain rules on wounded and sick civilians and civilian medical services are contained in Convention IV of 1949 (Convention relative to the Protection of Civilian Persons in Time of War), but it is only by virtue of the 1977 Protocol I additional to the 1949 Geneva Conventions that wounded and sick civilians and civilian medical personnel and services receive essentially the same protection as military forces (→ Civilian Population, Protection).

The Conventions of 1864, 1906 and 1929 only apply in international → armed conflicts. Art. 3 common to the four Geneva Conventions of 1949 provides basic protection for the victims of non-international conflicts (→ Civil War). This situation was greatly improved by the negotiation of the 1977 Protocol II additional to the Geneva Conventions of 1949. By virtue of this Protocol, respect and protection of the wounded and sick, and of medical personnel, units and transports (→ Medical Transportation), are for practical purposes identical to those provided by the Conventions and Protocol I for international armed conflicts.

As to → sea warfare, an unsuccessful attempt was made in 1868 to extend the advantages of the 1864 Convention to naval forces. The 1868 "Additional Articles" were never ratified. Respect for and protection of the wounded and sick at sea, the shipwrecked, and medical services at sea, especially → hospital ships, became a duty of belligerents under international law only through the 1899 Hague Convention III for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864. The 1899 Convention was replaced by Hague Convention X of 1907. The latter was in turn updated and replaced in 1949 by Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, which has been developed further in some details by the 1977 Additional Protocol I.

While these Hague Conventions and Geneva Convention II of 1949 apply only to wounded, sick and shipwrecked military personnel and military medical services, Convention IV of 1949 contains a provision on "specially provided vessels on sea, conveying wounded and sick civilians" (Art. 21). Through the 1977 Additional Protocol I the protection of wounded, sick and shipwrecked civilians as well as civilian medical services, at sea or in other waters, has been greatly expanded.

As to non-international conflicts, Art. 3 common to the 1949 Conventions, and Additional

Protocol II of 1977, apply also to hostilities at sea or in other waters. However, the special protection of hospital ships provided by Geneva Convention II of 1949 does not apply in non-international conflicts.

2. Protection of the Wounded, Sick and Shipwrecked

The "wounded" and "sick" are persons who, because of trauma, disease, or other physical or mental disorder or disability, are in need of medical assistance or care. The term also covers "maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers" (Protocol I, Art. 8(a)). The "shipwrecked" are persons "who are in peril at sea or in other waters as a result of a misfortune affecting them or the vessel or aircraft carrying them" (Protocol I, Art. 8(b)). As the condition of these persons does not in all cases prevent them from committing acts of hostility, it is a condition of their protection that they refrain from any such act.

Three basic duties exist in relation to the wounded, sick and shipwrecked: (a) the duty to respect, protect, and not attack them (Conventions I and II, common Art. 12; Convention IV, Art. 16; Protocol I, Art. 10; Protocol II, Art. 7); (b) the duty to search for and to collect them (Convention I, Art. 15; Convention II, Art. 18; Convention IV, Art. 16; Protocol II, Art. 8); and (c) the duty to provide them with adequate care and to treat them humanely (Conventions I and II, common Art. 12; Protocol I, Art. 10; Protocol II, Art. 7). The duties apply without → discrimination, regardless of the party to the conflict to which these persons belong. No distinction founded on any grounds other than medical ones may be made among them.

Special provision is made to protect persons who are in the hands of a party to a conflict (→ Prisoners of War) against any interference in their physical or mental health and integrity, especially physical mutilations, medical or scientific experiments, or removal of tissue or organs for transplantation (Protocol I, Art. 11; see also common Art. 12 of Conventions I and II; → War Crimes; → Crimes against Humanity). Only under certain strict conditions are voluntary donations by these persons of blood for transfusion or skin for grafting permitted.

3. Protection of Medical Personnel, Units and Transports

In order to ensure adequate care and treatment for the wounded and sick, persons, organizations and material whose function is to provide such care and treatment, i.e. medical personnel, units and transports, also enjoy a protected status. Medical units are establishments or other units organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or for the prevention of disease. Medical personnel are persons assigned exclusively to these medical purposes by a party to the conflict (→ Protected Persons).

Medical personnel, units and transports are to be respected and protected (Convention I, Arts. 19 and 24; Convention II, Arts. 22, 24, 25 and 36; Convention IV, Arts. 18, 20 and 21; Protocol I, Arts. 12, 15, 21 and 24; Protocol II, Arts. 9 and 11). This means, firstly, that they must not be made the object of attacks. In the event of attacks against → military objectives, all feasible efforts must be made to spare such personnel, units and transports. Under the principle of → proportionality, a prohibition exists on attacks which may be expected to cause incidential casualties among medical personnel or damage to medical units or transports "which would be excessive in relation to the concrete and direct military advantage anticipated" (Protocol I, Art. 51(5) (b); → Indiscriminate Attack). Secondly, medical personnel, units and transports must not unnecessarily be prevented from discharging their humanitarian functions. In particular, civilian medical personnel must be afforded all available help in an area where civilian medical services are disrupted by reason of combat activity, and must have access to any place where their services are essential, subject to certain supervisory or safety measures by a party to the conflict (→ Civilian Objects).

As a rule, the condition of this protected status is an assignment or, as the case may be, authorization or recognition by a party to the conflict. Medical personnel from recognized and authorized relief societies (→ Relief Actions) are

by definition protected. As to medical transports, special requirements exist for the protection of hospital ships under Geneva Convention II. Medical aircraft (→ Air Warfare) are protected without prior agreement in and over areas controlled by friendly forces or sea areas not controlled by any party; but in and over areas physically controlled by an adverse party or in and over neutral territory (→ Neutrality in Air Warfare), protection depends on prior agreement. In and over those parts of the contact zone which are controlled by friendly forces or where control is not clearly established, effective protection also requires a prior agreement between the competent military authorities.

To ensure the protection and identification of medical personnel, units and transports, they may be made recognizable by means of the distinctive emblem of the red cross or the red crescent (→ Emblems, Internationally Protected). The use of the red shield of David by Israel is legally controversial, but is at least *de facto* protected. Additional Protocol I also provides for distinctive signals as additional means of identification. The protection ceases if military units or transports are used outside their humanitarian functions to commit acts harmful to the enemy. It is also prohibited to make improper use of the recognized emblems and signals (Protocol I, Art. 38; → Perfidy).

If they fall into the hands of the enemy, civilian medical personnel, units and transports enjoy protection as civilians or civilian objects. Military medical personnel may only be retained under certain conditions (→ Internment) and shall then not be considered as prisoners of war, but nevertheless shall at least benefit from all the provisions of Convention III (Convention I, Art. 28). Material, buildings and stores of fixed military medical units as well as civilian and military medical ships may be seized (Convention I, Art. 33; Protocol I, Art. 23; → Sequestration). Hospital ships and coastal rescue craft protected under Convention II, however, are not subject to capture (Convention II, Arts. 22 and 25). Medical aircraft having violated the requirements for protection may be seized (Protocol II, Art. 30). As a rule, medical vehicles and ships may not be diverted from their medical mission, at least not as long as they are needed for wounded, sick and, as the case may be, shipwrecked persons (Convention I, Art. 33; Protocol I, Arts. 23 and 30).

4. Special Rules for Occupied Territory

The occupying power has, to the fullest extent of the means available to it, the duty of ensuring the medical supplies of the population and of maintaining the medical and hospital establishments and services, and the public health and hygiene in the occupied territory (Convention IV, Arts. 55 and 56; → Occupation, Belligerent). Therefore, its right to → requisition civilian hospitals and other civilian medical units is strictly limited (Convention IV, Art. 56; Protocol I, Art. 14).

J. PICTET (ed.), The Geneva Conventions of 12 August 1949, Commentary, 4 vols. (1952–1960).

M. BOTHE, Le sort des blessés et malades, Un but fondamental de la Croix-Rouge, Annales d'études internationales, Vol. 8 (1977) 93–110.

M. BOTHE, Le statut de la profession médicale en temps de conflit armé, Annales de droit international médical, No. 28 (1979) 52–59.

H. GIANI, Der Schutz der Zivilkrankenhäuser und ihres Personals, Handbuch des Deutschen Roten Kreuzes zum IV. Genfer Rotkreuzabkommen und zu den Zusatzprotokollen, Vol. 3 (1980).

M. BOTHE, K.J. PARTSCH and W. SOLF, New Rules for Victims of Armed Conflicts (1982).

MICHAEL BOTHE

YALTA CONFERENCE (1945)

1. Background

The Yalta Conference was held between February 4 and 11, 1945 at the Livadia Palace (a former summer residence of the Tsars) on the shores of the Crimean Sea; it is therefore occasionally referred to as the Crimean Conference. Following the → Tehran Conference of 1943 it was the second meeting of British Prime Minister Winston Churchill, United States President Franklin D. Roosevelt and Soviet Premier Joseph Stalin to discuss their war and peace aims. The topics on the agenda included the plans and principles agreed upon by Churchill and Roosevelt at earlier war conferences, in particular, the Casablanca Conference of January 1943, the second Washington Conference of May 1943, the

Quebec Conferences of August 1943 and September 1944, and the Cairo Conferences of November and December 1943. The talks also took into account the declarations of the Three Powers issued at the close of the second Moscow Conference (attended from October 19 to 30, 1943 by Foreign Ministers Anthony Eden, Cordell Hull and Vyacheslav Molotov), and the recommendations of the → Dumbarton Oaks Conference of 1944 (which → China had also attended) regarding proposals for a new world organization (→ United Nations).

The proposal for a further meeting of the three heads of State was transmitted in July 1944 by Roosevelt to Stalin, who agreed in principle, but it was not until after the third Moscow Conference (October 9 to 20, 1944), these being talks between Churchill, Eden and Stalin, that concrete planning began. After it became clear the Stalin was unwilling to leave the Soviet Union, Yalta was selected as the meeting place at his request. Apart from the three heads of State, and their Foreign Ministers Eden, E.R. Stettinius and Molotov, a number of other high government officials, diplomats, and the chiefs of staff of the three countries attended the Conference. In addition to the personal meetings between the heads of State, there were eight plenary meetings and various other meetings of foreign ministers and chiefs of staff. At the close of the Conference on February 11, 1945, Churchill, Roosevelt and Stalin signed a "Report of the Crimean Conference", an "Agreement regarding Entry of the Soviet Union into the War against Japan", and a "Protocol on German Reparation" (→ Reparations). Eden, Stettinius and Molotov signed a "Protocol of the Proceedings of the Crimean Conference". A bilateral document entitled "Agreement between the United States and the Soviet Union concerning Liberated Prisoners of War and Civilians" was signed by the military chiefs (→ Prisoners of War; → Repatriation). The Conference Report, which contains only general information on nine points of discussion, was released on February 12, 1945. The Protocol of Proceedings, which goes into greater detail, and the Protocol on German Reparation were not released until the Moscow Conference of Foreign Ministers in March 1947. The other documents remained secret until 1946.

2. Issues Discussed

The subject matter of the Big Three discussions in Yalta can be divided into five groups:

(a) The treatment of Germany

The plans *vis-à-vis* Germany consisted in the first instance of "military plans... for the final defeat of the common enemy", cooperation for shortening the war, and demands for "unconditional surrender". It was Roosevelt who had insisted on unconditional → surrender at the Casablanca Conference (January 14 to 26, 1943), and after the fortunes of war had changed in favour of the Allies, it had become the final aim of all of them.

Underlying the Yalta talks, but without any further definition, was again the idea of a → dismemberment of Germany. However, plans were outlined for an occupation régime after World War II according to which "the forces of the Three Powers will each occupy a separate zone of Germany", France would also be invited to take over a zone of occupation, and an Allied Control Council would be set up (→ Germany, Occupation after World War II). To "ensure that Germany will never again be able to disturb the peace of the world", all German armed forces were to be disarmed and disbanded and all military equipment destroyed (→ Demilitarization), war criminals were to be punished (→ War Crimes; → Crimes Against Humanity), all Nazis were to be removed from public office and from positions in cultural and economic life, and all German industry that could be used for military production was to be eliminated or controlled.

The apparent intention to decentralize German industry was all that remained of the Morgenthau Plan, which called for the complete destruction of industries in the Ruhr and Saar and the transformation of Germany into an agricultural nation "one of the most fantastic documents which the war was to produce" (Schwarzenberger, p. 382). This plan had been discussed at the second Quebec Conference but it was later discarded because of protests from the American public.

On the insistence of Stalin, who overruled the objections of Churchill and Roosevelt, it was decided to set up an Allied Reparation Commission in Moscow to fix the sum of German

reparations. These were to be paid by the removal of existing national assets and annual deliveries from current production. A total sum of 20000 million dollars was to be taken as a basis for discussion (→ Reparations after World War II). This discussion was not made known until the Moscow Conference of Foreign Ministers in March 1947, by which time, in the aftermath of the → Potsdam Agreements on Germany of 1945 and the Control Council's plan for industrial control and reparations of March 28, 1946, it had become obsolete.

The other Yalta decisions concerning Germany (→ Germany, Legal Status after World War II) were put into a concrete form in the Potsdam Agreements.

(b) Policies in the liberated countries of Europe

In view of the fluid economic and political circumstances prevalent in those parts of Europe emerging from German occupation, the three Allied Powers aimed at achieving political stability for the immediate future by joint action. In a "Declaration on Liberated Europe" included in the Conference Report, the three Heads of State reaffirmed their "faith in the principles of the Atlantic Charter" and their pledge given in the "Declaration by the United Nations" of January 1, 1942, and went on to declare that they would jointly safeguard the right of all peoples to choose their form of government and their right to self-government (→ Atlantic Charter (1941); → Self-Determination).

Differences of opinion concerning the reconstitution of Poland remained between the two Western Powers and the Soviet Union, but a commission set up at the Conference (comprising Sir Clark Kerr, W. Averell Harriman and Molotov) was to try to resolve them. It was to consult with the (Lublin) Provisional Government of Poland, which was to be more broadly based and was to pledge itself to hold "free and unfettered elections . . . on the basis of universal suffrage and secret ballot"; the Government of National Unity thus formed would then be recognized by the three Powers. From the very beginning, however, the work of the commission was sabotaged by the Soviet Union, and this was the first indication of the rapidly developing tension which arose after the Yalta Conference between the Soviet Union and the two Western powers. The eastern frontier of Poland was, with deviations of between five and eight kilometres in favour of Poland, to follow the → Curzon Line, which had been fixed after World War I by decision of the Supreme Council of the Allied and Associated Powers on December 8, 1919; this was later confirmed in the Polish-Soviet treaty of August 16, 1945. At Stalin's instigation, Poland was to receive "substantial accessions of territory in the north and west", but the final delimitation of the western frontier (→ Oder-Neisse Line; → Boundaries) was to await the convening of a peace conference.

The formation of a new Yugoslav government, the Italian-Yugoslav frontier, and Yugoslavia's relations with Italy and Bulgaria were also briefly referred to. The controversial topics of the → Danube and the → Dardanelles were to be discussed at the first Conference of Foreign Ministers.

(c) The Permanent Council of Foreign Ministers

As the meetings of the three foreign ministers at the Yalta Conference were felt to have been "of the utmost value", it was decided to set up a permanent Council of Foreign Ministers. It was also felt that regular meetings of the foreign ministers was the best forum for an initial discussion of the problems arising in Europe after the war (particularly in the case of Germany), and for the preparation of the peace treaties with the Axis Powers (→ Peace Treaties of 1947). The Council was to consist of the foreign ministers of the Big Three, France and China and was to meet in rotation in London, Moscow and Washington. The work of the Council was, however, soon to suffer both under the strain of differences of opinion concerning the status of France and China and the fast-developing political and ideological antagonism between the blocs of States that formed immediately after the war.

(d) Plans in the Far East

The plans for the Far East were the subject of a separate agreement signed by Churchill, Roosevelt and Stalin. The agreement was at first classified "top secret", partly because the Soviet Union was still bound by her 1941 neutrality agreement with Japan (→ Neutrality, Concept and General Rules). According to the terms of the Yalta agreement, the Soviet Union was to

enter into the war against Japan – as urged by Roosevelt at the 1943 Tehran Conference – within two or three months of the war's ending in Europe and was to conclude a pact of friendship and alliance with China (eventually signed on August 14, 1945) As consideration for the Soviet Union's cooperation, recognition was accorded to "the former rights of Russia violated by the treacherous attack of Japan in 1904" and by the Portsmouth Peace Treaty of September 5, 1905. Her right to the → Kurile Islands, exchanged in 1875 for Sakhalin (Karafuto) was also restored. The restoration of these rights entailed the return of the southern part of Sakhalin and the islands adjacent to it, the → internationalization of the port of Dairen and acknowledgment of the Soviet Union's pre-eminent interests there, the restoration of the lease of Port Arthur as a Soviet naval base (→ Military Bases on Foreign Territory), and the establishment of a Soviet-Chinese company to operate the Chinese-Eastern and South-Manchurian Railways.

A further provision in the agreements concerning the "*status quo* in Outer Mongolia (the Mongolian People's Republic)" also referred back to the situation in 1904; according to the formulation chosen, the Soviet Union apparently regarded this area – which in spite of its autonomy still belonged to China (→ Autonomous Territories) – as independent, thus anticipating the formal granting of independence in 1946.

The Soviet Union entered into the war against Japan on August 8, 1945, one week before that country surrendered (the formal instrument of surrender was signed on September 2, 1945). A Far Eastern Commission was set up at the Conference of Foreign Ministers in December 1945 in Moscow to work out the peace terms in light of the Yalta decisions. Its activities continued until the entry into force of the → Peace Treaty with Japan (1951), which was not signed by the Soviet Union or China. The territorial provisions of this treaty, including the restoration of what were formerly Chinese territories, largely conformed to the assurances offered to Stalin at Yalta.

(*e*) *Questions relating to the future world organization*

The structure, aims and functions of a new world organization for the maintenance of international peace and security, already envisaged at earlier war conferences, had been discussed at the Dumbarton Oaks Conference in 1944. Some controversial points had also been clarified at the third Moscow Conference in 1944 and in exchanges of notes. Further progress was made at Yalta when Churchill, Roosevelt and Stalin reached agreement on three points which, being of a political nature, had been left open.

The invitation to become founding members of the United Nations Organization was to be extended to the "United Nations" as they existed on February 8, 1945 and other "Associated Nations" which had declared war on the common enemy by March 1, 1945. At the Dumbarton Oaks Conference, the leader of the Soviet delegation, Andrei Gromyko, had claimed that all the Soviet Republics should become founding members of the United Nations or be eligible to accede later, on the illogical ground that the States in the → British Commonwealth would become independent members. When Stalin renewed this claim at Yalta, Churchill and Roosevelt rejected it, pointing out that the United States would have only one vote in the Organization. They did, however, compromise by agreeing that the Ukraine and White Russia should be admitted to original membership, thus furthering the Soviet Union's aim of increasing the number of Eastern bloc States in the United Nations.

The solution to the question of voting in the → United Nations Security Council was not that the votes of the permanent members should carry more weight, as had been proposed at Dumbarton Oaks, but that each member should have one vote, with the further condition that all decisions would require an affirmative vote of seven members including the concurring votes of the permanent members (except in the case of decisions on procedural matters). Parties to a dispute falling within the scope of further Chapter VI (but not future Chapter VII) of the → United Nations Charter were to abstain from voting. This right of → veto (the "Yalta voting formula") which the Soviet Union gave as a *sine qua non* for her membership in the United Nations was explained and elaborated by the delegations of Great Britain, the United States, the Soviet Union and China at the San Francisco Conference on June 7, 1945 in a Four-Power Statement on Voting Pro-

cedure in the Security Council (→ Voting Rules in International Conferences and Organizations).

As Roosevelt had suggested – in the tradition of one of → Wilson's Fourteen Points – it was agreed to establish an international trusteeship system to replace the League of Nations' system of → mandates. It was to apply only to existing mandates of the League of Nations, territories detached from the enemy as a result of World War II and any territory which was voluntarily placed under trusteeship by the State which had previously administered it (→ United Nations Trusteeship System).

It was agreed to convene a conference to meet at San Francisco on April 25, 1945 to discuss the Dumbarton Oaks proposals. China and France were to be consulted beforehand and invited to sponsor invitations to the conference. The five future permanent members of the Security Council were also to reach preliminary agreement on details concerning the drafting of the UN Charter.

3. Conclusion

The decisions of the Yalta Conference, which exerted considerable influence on the political events of the post-war years, are, in spite of lip service to lofty aims, clear evidence of the → power politics practised by the victorious Great Powers. In so far as they concern the separation of territories and the transfer of populations (→ Population, Expulsion and Transfer), they are contrary to principles of international law. These decisions also violate the principles of the → Atlantic Charter of 1941, endorsed in the Declaration of the United Nations of January 1, 1942 and reaffirmed in the Yalta documents, according to which the victorious powers would "seek no aggrandizement, territorial or other", and there would be no "territorial changes that do not accord with the freely expressed wishes of the people concerned". The biographer of Roosevelt's special assistant, Harry Hopkins, writes: "None of the momentous conferences of the Second World War has provoked more subsequent controversy than this one; Yalta has been blamed for many of the ills with which the world was afflicted in the years following the total defeat of Nazi Germany and Japan". Unsatisfactory attempts have been made to excuse the defects in the conference decisions by claiming that Roosevelt was not conversant with the political, ethnographical and economic relations in Europe and was debilitated by his last illness, and that Churchill, who had tried to mediate in many of the controversial questions, was usually unable to gain acceptance of his views.

In the last section of their Report, Churchill, Roosevelt and Stalin expressed their hope that, with the help of the proposed international organization and

> "with continuing and growing co-operation and understanding among our three countries and among all the peace-loving nations ... the highest aspiration of humanity [can] be realized – a secure and lasting peace which will, in the words of the Atlantic Charter, 'afford assurance that all the men in all the lands may live out their lives in freedom from fear and want'."

The hope that the Big Three would remain in basic agreement among themselves and with other States after the end of the war was unrealistic even at Yalta and, as East-West tensions grew ever more acute, soon proved to be vain. The effect of these tensions can be seen in the Soviet Union's arbitrary use of the veto, contrary to the intention of the "Yalta voting formula", and in her disregard or one-sided interpretation of the Conference decisions. The decisive factor for the failure of American and British efforts to correct the errors of Yalta was the lack of unity among the Great Powers; nevertheless, Roosevelt's death (April 12, 1945) and Churchill's defeat in the British parliamentary elections (July 1945) also contributed to this failure.

Report of the Crimea Conference, British Command Paper, Cmd 6598 (1945).

Foreign Relations of the United States, Diplomatic Papers, The Conferences of Malta and Yalta 1945 (1955).

The Crimea Conference, Report to the House of Commons by Prime Minister Winston Churchill, February 27, 1945, Report to the Congress of the United States by President Franklin D. Roosevelt, March 1, 1945, International Conciliation, No. 410 (1945) 291–334.

The Crimea and Potsdam Conferences of the Leaders of the Three Great Powers, International Affairs [Moscow] (1965) No. 6, 92–109; No. 7, 112–118; No. 8, 108–114; No. 9, 134–140.

United States Senate, A Decade of American Foreign Policy, Basic Documents 1941–1949 (1950).

S. WELLES, The Time for Decision (1944).
H. MORGENTHAU, Germany is our Problem (1945).
H. WRIGHT, Poland and the Crimea Conference, AJIL, Vol. 39 (1945) 300–308.
H.W. BRIGGS, The Leaders' Agreement of Yalta, AJIL, Vol. 40 (1946) 376–383.
J.R. DEANE, The Strange Alliance, The Story of Our Efforts at Wartime Co-operation with Russia (1947).
A. DE LA PRADELLE, La paix moderne (1899–1945), De La Haye à San Francisco (1947).
E.R. SHERWOOD, The White House Papers of Harry L. Hopkins, 2 vols. (1948–1949).
P.E. MOSELY, Dismemberment of Germany, The Allied Negotiations from Yalta to Potsdam, Foreign Affairs, Vol. 28 (1949–1950) 487–498.
E.R. STETTINIUS, Roosevelt and the Russians, The Yalta Conference (1949).
W.L. NEUMANN, Making the Peace 1941–1945, The Diplomacy of the Wartime Conferences (1950).
G. SCHWARZENBERGER, Power Politics (2nd ed. 1951).
M.W. CLAUSS, Der Weg nach Jalta (1952).
S.C.Y. PAN, Legal Aspects of the Yalta Agreement, AJIL, Vol. 46 (1952) 40–59.
W.H. MCNEILL, America, Britain and Russia, Their Cooperation and Conflict 1941–1946 (1953).
W.S. CHURCHILL, The Second World War, Vol. 6, Triumph and Tragedy (1954).
R.F. FENNO (ed.), The Yalta Conference (1955).
R.J. SONTAG, Reflections on the Yalta Papers, Foreign Affairs, Vol. 33 (1955) 615–623.
J.L. SNELL (ed.), The Meaning of Yalta, Big Three Diplomacy and the New Balance of Power (1956).
H. FEIS, Churchill, Roosevelt, Stalin, The War They Waged and the Peace They Sought (1957).
W. MARIENFELD, Konferenzen über Deutschland, Die alliierte Deutschlandplanung und -politik 1941–1949 (1962).
A. CONTE, Yalta ou le partage du monde (11 février 1945) (1964).
K. EUBANK, The Summit Conferences, 1919–1960 (1966) 79–105.
G. KOLKO, The Politics of War, Allied Diplomacy and the World Crisis of 1943–45 (1968) 343–369.
F. FAUST, Das Potsdamer Abkommen und seine völkerrechtliche Bedeutung (4th ed. 1969) 25–35.
F.B. MISSE, Le rôle des Etats-Unis dans les Conférences de Malta et de Yalta, Revue d'histoire de la Deuxième Guerre Mondiale, No. 75 (1969) 41–70.
D.S. CLEMENS, Yalta (1970).

HANS-JÜRGEN SCHLOCHAUER

YOUNG PLAN

1. Background

The efforts of Parker Gilbert, the Agent-General for Reparation Payments, to have the → Dawes Plan revised began during the winter of 1927/1928, as it had become apparent after three years of operation that the capital requirements of the German economy, after experiencing runaway inflation, had been vastly underestimated. Drawn by the prospect of favourable interest rates, capital loans had poured into Germany. This enabled the fulfilment of the Dawes obligations but without achieving a genuine surplus in the balance of payments from which, as intended, German → reparations could be paid. While the dangers threatening from such an artificial transfer were of particular concern to American creditors, France was also interested in reaching a new agreement on German reparations. She deemed that a mobilization of claims against the German Reich through the issue of bonds would provide cover for her own debts in the United States (→ Foreign Debts). On September 16, 1928 the representatives of Belgium, France, Germany, Great Britain, Italy and Japan agreed to set up a committee of experts consisting of members from these six States and the United States. This committee was to offer proposals for amending the Dawes Plan and for the final settlement of the reparations problem.

2. Paris Committee of Experts

The experts from the seven countries met for the first time in Paris on February 11, 1929. Germany was represented by H. Schacht and A. Vögler (after the resignation of L. Kastl), the United States by J.P. Morgan and Owen D. Young, the latter being elected chairman. After long and difficult negotiations, the experts issued their report, which came to be known as the Young Plan, on June 7, 1929 (AJIL, Vol. 24 (1930) Supp., p. 81).

The aim of the plan was to convert the German reparation debt from a political into a commercial obligation. By this process of commercialization, the debt was to be given as far as possible the semblance of a simple business commitment. For this purpose the entire debt was divided into 59 annual payments which, in contrast to the provisions of the Dawes Plan, were not linked to the index of prosperity. The annuities were fixed at an average of 2050 million Reichsmarks (as opposed to 2500 according to the Dawes Plan), a portion of which could be set off during the first ten years against deliveries in kind. They were to consist of a basic amount of 660 million Reichsmarks to be

paid in foreign currencies, without any right of postponement whatever (the so-called unconditional portion), and of the remainder the transfer of which could under certain circumstances be postponed (the so-called conditional portion).

The unconditional portion was until 1966 to be raised in the form of a direct tax levied on the German Railway Company, supplemented if necessary by drawing on the transport tax collected by the Railway Company. The Railway Company was to deliver a certificate acknowledging liability for this obligation.

As to the conditional portion, the rule was to apply that, after 90 days' notice, transfer could be postponed for a period not exceeding two years from the date it fell due. If, however, one year's transfers had already been postponed, a maximum postponement of one year was permitted for the following year. If the German Government availed itself of the possibility to postpone a transfer, the amount owed was to be raised in Reichsmarks and placed at the disposal of the creditors. If, however, a transfer had already been postponed for a year, it was possible to postpone for an additional year payment of 50 per cent of the sum due in Reichsmarks. This percentage could be increased by the decision of a special committee.

In accordance with the policy of commercializing the reparation debt, the creditor States were asked to release all the political controls, special securities, pledges and charges which they still held under the Dawes Plan. In particular, the system of railway mortgage bonds and industrial obligations was to be abolished. And, in theory, the income derived from customs duties, and taxes on consumer goods, such as beer, tobacco, sugar and spirits, was no longer to be mortgaged.

The administration of the transfers was to be entrusted to a common central institution which, because of its financial functions, was to be organized along the lines of a bank. Detailed guidelines were provided for the organization of this bank, which was subsequently established as the → Bank for International Settlements. Its main task was to mobilize the German obligations by serving as the depositary for certificates of indebtedness, to which would be attached coupons representing the unconditional portion of each annuity due. Bonds representing the conditional portion could not, however, be issued without the consent of the German Government.

3. The Hague Conferences

The formal adoption of the Young Plan by Germany and the creditor States took place in two stages. Basic approval of the Plan was formulated in the Protocol of the Hague Conference of August 31, 1929 (AJIL, Vol. 24 (1930) Supp., p. 153). This was of particular significance for Germany as it was coupled with an international agreement on the evacuation of the Rhineland (→ Rhineland Occupation after World War I). An Agreement of January 20, 1930 (*ibid.*, p. 262) provided for the annulment of the Dawes Plan and the definitive adoption of the Young Plan, referred to as the New Plan. The corresponding German act was passed on March 13, 1930 (Reichsgesetzblatt, 1930 II, p. 45).

In Art. III of the 1930 Agreement Germany waived (→ Waiver) her claims relating to property or pecuniary rights of → prisoners of war and all other claims which the German Government had presented or might present for its own account. In exchange, the creditor States accepted the payment in full of the annuities as the final discharge of all of Germany's outstanding liabilities and waived all claims additional to these annuities. In Art. XIII, the German Government reaffirmed all the priorities, securities and rights created for the benefit of the Dawes loan in 1924. This meant that the gross revenue from customs duties and taxes on tobacco, beer and sugar, and the net revenue from the spirits monopoly remained pledged as security (as well as being a collateral guarantee for the annuities).

4. Subsequent Developments

The New Plan came into effect on September 1, 1929; the Bank for International Settlements was founded and its registered office was situated at Basle. In view of the world-wide economic crisis, the Hoover moratorium authorized the suspension of German payments under the Young Plan as early as July 1, 1931, and they were not resumed in the years that followed. It was not until the signing of the → London Agreement on German External Debts in 1953 that new arrangements were made concerning German obligations under the Young Plan (see also

→ Reparations after World War II). Annex I to this Agreement provided for the winding up of the Young loan; the newly issued bonds were to be redeemed by 1980. The debt has now been largely settled, although after the revaluations of the Deutschmark in 1961 and 1969, a dispute arose between Germany and her creditors as to the rates of exchange applicable. In 1971 the dispute was referred to an arbitral tribunal (→ London Agreement on German External Debts (1953), Arbitral Tribunal and Mixed Commission); the tribunal rendered its decision on May 16, 1980 (→ Young Plan Loans Arbitration).

Report of the Committee of Experts on the Settlement of the Reparation Problem, AJIL, Vol. 24 (1930) Supp. 81–143.

Protocol of the Hague Conference (with Annexes), August 31, 1929, *ibid.*, 153–160.

Hague Conference on Reparations, January, 1930, *ibid.*, 259–348.

F. HEYMANN, Der Young-Plan, Einführung und Schlußbericht der Pariser Sachverständigenkonferenz (1929).

E. MARHEFKA, Die Rechtsgrundlage des Young-Planes (1929).

M.J. BONN, Der Neue Plan als Grundlage der deutschen Wirtschaftspolitik (1930).

G.A. FINCH, The Settlement of the Reparation Problem, AJIL, Vol. 24 (1930) 339–350.

A. PEPY, Le Plan Young (1930).

J. WHEELER-BENNETT and H. LATIMER, Information on the Reparation Settlement (1930).

W.J. HELBICH, Die Reparationen in der Ära Brüning, Zur Bedeutung des Young-Plans für die deutsche Politik 1930 bis 1932 (1962).

M. VOGT, Die Entstehung des Youngplans, dargestellt vom Reichsarchiv 1931–1933 (1970).

HELMUT COING

LIST OF ARTICLES*
FOR THE ENTIRE ENCYCLOPEDIA

*This list is subject to minor changes. A number in brackets following an article shows the instalment in which it has appeared.