

Section 1.

Envelop 5.

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International Law.

Law of War (Continued).

(Use of Flags)

The proper use of flags and emblems is a matter of consequence in international law as well as in military and civil life. In hostilities, it is, of course, when displayed, an evidence of the nationality of the vessel engaged and is given the same protection as is accorded to the national flag of the country.

-- Lecture No. 5 --

Effect of laws of war as to things and property.      Military  
occupation and government.      Maritime War  
Right of search.      Trade with  
the enemy.

The right of search is a privilege which is accorded to the belligerent navy under the laws of war. The regulations of the United States Navy require that under no circumstances shall an action be fought without the display of the proper national flag.

(Flags of Truce)

A flag of truce is the well known square white flag and is used for a parley between opposing forces. International law extends its protection to this flag and to any other flag used for the same purpose.

Laws of War (Continued).

(Use of Flags)

The proper use of flags and emblems is a matter of consequence in international law as well as in military and civil life. In hostilities, it is, of course, when displayed, an evidence of the nationality of the forces engaged and that those who use the regimental or national colors are of the national forces of the country.

"To sail under false colors" is a more serious offense against international law on land than upon sea. By the code established during the Civil War for the use of our armies in the field, it is declared that the use of the enemy's <sup>national</sup> standard flag or emblem for the purpose of deceiving the enemy in battle is such an act of perfidy that those practising this deceit lose all claims to the protection given by the laws of war. In the same way the use of the Geneva Cross for the protection of magazines or able bodied fighting men is an offense against the laws of war.

But on ships of war it is permissible to use foreign flags to deceive an enemy but they must be hauled down before a gun is fired or a search made upon a merchantman. The regulations of the United States Navy require that under no circumstances shall an action be fought without the display of the proper national flag.

(Flags of Truce)

A flag of truce is the well known square white flag and is used for a parley between opposing forces. International law extends its protection around this flag and to any duly authorized persons carrying it: The protection is extended to all



of the necessary accompanying persons - such as the bearer or flag-carrier, a trumpeter, and a guide or interpreter besides the officer who is to make the parley.

Admission to the opposing lines by the party carrying the flag cannot be claimed as a right. The commander of the forces to whom the flag is sent, may, if he chooses, give general notice to the other belligerent, that he will not receive any flags of truce - or none within a certain period - or except at certain places; or he may warn off any particular flag of truce, but without such warning or notice, to fire upon a flag of truce, or to offer any violence to the bearer, is an offence against the rules of war subjecting the offenders to the most summary punishment.

In 1827 in Navarino Bay the firing upon an English boat carrying a flag of truce by a Turkish Man of War, which killed an officer in the boat, brought on the naval battle of Navarino which in turn led to the destruction of the Turkish fleet and to the independence of Greece. A flag of truce being admitted, precautions may be taken of course, by blindfolding or otherwise, to prevent improper advantage being taken. A bearer of the flag is also bound to act in good faith - if he should in any way abuse ~~his~~ the confidence of the receiving force he loses his privileges and may be detained and tried for violation of the laws of war. If he should, for instance, excite officers or soldiers to desert, or purchase plans, or attempt secret communication he may in extreme cases be held and executed as a spy. (Recent Cuban case

The use of the white flag of truce has sometimes extended beyond the ordinary use as prescribed by the laws of war.

"To show the white flag" has been considered a readiness to surrender and during our late war and even further back has been used as a mark of capitulation. During the late war at times bodies of Confederates marched over over to the Union side with a display of white flags in their muskets. In such cases the irregularity of its use is waived.

In 1652 during a naval engagement between the English and Dutch fleet a narrator quaintly says "We did very good execution on them, and some of their ships that had lost all their masts struck their colors, and put out a white handkerchief on a staff, and hauled in all their guns."

A matter which is not entirely settled under the rules of war is the question of the Exemption of Coast Fisheries. It has not been the rule however to disturb innocent fishermen or their boats along the sea or lake coasts. There may be and have been circumstances however which would justify such destruction.

In the early English and Dutch wars when it was determined to lay such stress upon Holland and the Dutch as to bring them to terms such measures of destruction were adopted. The Dutch herring fishery was considered so vital to that country that its destruction followed as a measure of war. Three hundred and sixty thousand Dutch people, at that time, depended upon this herring fishery for their subsistence. Amsterdam the principal city of Holland according to the old Dutch proverb was built upon herrings alone.

In 1798 and 1801 the British government ordered the capture of French fishing craft to prevent their use by Napoleon in his proposed invasion of England. But however justifiable these



cases may be the destruction of fishing craft as a rule, the ordinary tools of livelihood of a poor class of people, equivalent to the ploughs and implements of the farmer, is neither humane nor ordinarily justifiable. by the results obtained.

As to deep sea fishing - whale fisheries - Nantucket.  
C.S. Shenandoah's campaign in Bering Sea.

#### -- Military Occupation --Military Government.--

A conquest and occupation of an enemy's territory is followed by a military government of that territory.

The best authorities regard a territory as occupied in a military sense when as a consequence of its invasion by the enemy's forces, the nation from which it has been taken has ceased as a matter of fact to have any regular authority there and the invading forces, alone, find themselves able to maintain order therein. The limits within which this state of affairs exist determines the extent and the duration of the occupation and military government.

Germans (1870) - Nominal occupation - raids - threats and penalties beyond actual control of troops.

The immediate effect of the military occupation of any portion of an enemy's country is the suspension of any and all authority which is derived from the government of the enemy over the occupied territory.

In the jurisprudence of the United States the system of rules established by ~~the~~ <sup>the</sup> invading force is called military government. Such government is peculiar in that it is subject to no constitutional or legal restraints other than those imposed by interna-

national law and the usages of war. The previously existing laws of the district so far as they relate to the exercise of public administration are of no validity against the invader; while on the other hand the occupied territory lies without the bounds of the nation to which the occupying army belongs and hence neither the Constitution, nor the laws of that country can have any force there.

The result then is that the declared will of the military commander, tempered by his instructions, and by the humane sentiment of the times, and also by the established practice of civilized warfare must be regarded as having the force of law within the occupied territory. Chief Justice Chase of the U.S. Supreme Court defined Military Government as a form of "Military Jurisdiction to be exercised by the Military Commander under the direction of the President (who is Military Commander-in-Chief) in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war, within states and districts, occupied by rebels treated as belligerents".

Sometimes military government has been confused with martial law. Martial law however is rather such a suspension of law <sup>which</sup> ~~that~~ has been best defined as being a military rule exercised by the United States or by a single State of the Union, over its own citizens (not being enemies) in an emergency justifying its proclamation. It is declared <sup>at times</sup> to secure the suspension of the writs of habeas corpus. It was declared in portions of the North during the late Civil War by the general government, by the State of Rhode Island during ~~the~~ Dorr's Rebellion and in more recent times in the ~~the~~ territory of Washington, on account



of the anti-Chinese riots, and in 1892 in Idaho by the Governor on account of <sup>a</sup> miners' riot in one county. There is some doubt as to the power of a Governor of a territory to declare martial law although <sup>such power</sup> ~~it~~ has been ~~exercised~~ *exercised in the past.*

Martial law is equivalent to what is known in Continental Europe and latin countries ~~in general~~ as ~~the~~ "the state of siege". So far as the suspension of the writ of habeas corpus is concerned it may be deemed to be settled that the President is not empowered of his own authority to suspend the privilege of the writ of habeas corpus and that a declaration of martial law made by him or a military commander in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of congress.

The authority for military government is the fact of the occupation. A proclamation or public notice to the inhabitants, informing them of the extent of the occupation and the powers proposed to be exercised is customary, but not necessary. Military government whether administered by officers of the Navy or those of the Army of the belligerent, or by civilians, left ~~him~~ <sup>by</sup> him personally in office, or by other civilians appointed by the military commander, is the government of and for all of the inhabitants, native or foreign. The local laws or ordinances may be left in force, and in general as a matter of convenience should be, subject however to their being in whole or in part suspended and others substituted at the discretion of the governing military authority.

Instances of military government in the history of the United States exist in all of our wars. During the revolutionary war military government was exercised by the British during their occupation of Boston, New York and Philadelphia. In the war of 1812 it was exercised at Castine, Maine, during



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British occupation and in the Mexican war by us in the City Of Mexico and elsewhere. During this war when the Pacific port of Mazatlan was captured by our naval forces a military government was provided by the Commodore in command and a Purser of the Navy was made Collector of the Port. During the Civil War of 1861-65 from reason of its exceptional proportions military government was more generally and variously exercised than at any other period of our history.

The population of the occupied territory can not be required to take swear allegiance to the country of the invader nor can the inhabitants be compelled to take military service against ~~the government~~ their own country. Residents who rise against the government of the occupation have been called war rebels, and in our former instructions <sup>to our Armies</sup> the offense was punishable with death but it is doubtful whether the opinion of the present day would sanction such severity. A war traitor however whose offense would be a treacherous one like that of a spy would probably meet the same penalty as a spy.

A temporary success if a raid or of a popular uprising would not destroy the rights of military occupation but <sup>a</sup> recapture of the occupied territory causes the rights of occupation to cease. The rights founded on force, cease when that force is overcome.

An army in occupation generally finds it necessary in a greater or less degree to require from the occupied territory the supplies necessary for its support. If practicable, these military requisitions, as they are called, which are generally articles of daily consumption, are made the subject of formal requisition upon the civil officials or upon the individuals possessing such articles in quantity. They should not exceed the military necessities nor the resources

of the country. The German forces before Paris at Versailles made daily requisitions for the following articles which give an idea of the quantity and extent of their demands. They required:

120,000 loaves of bread	7000 lbs. of coffee.
80,000 lbs. of meat	4000 lbs. of salt
90,000 lbs. of oats	20,000 litres of wine and
27,000 lbs. of rice	<del>20</del> 500,000 cigars

Contributions are sums of money exacted over and above the taxes drawn from the occupied districts or particular portions thereof. They should be imposed only on the order and responsibility of the general or commander in chief or of the superior civil authority established by the forces holding the occupied territory. Receipts should be given in all cases, both for requisitions and contributions, in order, at least, to afford proof, to other commanders, of the amount already exacted from this district and as evidence in case the original government in the invaded and occupied state should decide to pay the amounts after the war was over from the general taxation of funds of the Country. In 1871 <sup>after the war</sup> French government appropriated 100,000,000 francs to districts most impoverished by enemy.

Fines are levied upon localities where offenses against the invaders have been committed and where the guilty persons cannot be ascertained or found. It is of course a species of retaliation which however is legitimate and on the whole humane.

Indemnities are contributions levied at the end of the war to pay in whole or in part the war expenses of the victor. They are arranged for in the treaty of peace and certain territory of the enemy is generally occupied until the indem-



demnity is paid in full. All recent wars have dealt with the subject of indemnity at the close.

Wei-hai-wei in China still occupied by Japanese.

Maritime war-- Maritime war in its relations to International law differs in two great respects from war on land. These are

1. In the existence of the legal right to capture the private property of the enemy upon the high seas and in our own or his waters, and

II. From the fact that neutrals, both as individuals and governments, play an important part in maritime war creating certain rights and obligations that do not exist in land warfare.

The great questions for instance of the rights of search blockade and contraband of war are almost exclusively war maritime questions.

As a result international law in time of war with its great questions as to belligerents and neutrals is more largely concerned with warfare upon the sea than upon the land. In fact its concern with warfare upon land is almost entirely confined to that branch of the laws of nations known as the laws of war.

Notwithstanding the fact that the private property of the enemy is subject to capture at sea and that the seamen of the merchant marine as well as those of the naval service are subject to detention as prisoners of war, wars on the sea are less barbarous than those on land.

This is mainly because of the absence of that large

class of non-combatants that, are tied to the soil, especially the aged and infirm, women and children. The march of large invading armies necessarily leaves ~~distraction~~ in its path. Even with all the amelioration that has come with modern warfare - the substitution of the law of force for that of justice and equity brings results that are felt universally and closely within the limits of the invasion or occupation.

As to requisitions and contributions, where they are paid for upon the presented receipts either by the invader or the invaded State the loss is not great, but if as it is quite possible and probable neither the invader nor the invaded state pay for the property taken by requisitions or contributions, then this action certainly amounts to a confiscation of private property in a manner that is peculiarly hard and in which the loss is shared by the poor as well as by the rich members of the community.

Besides the restraining effect of neutrals upon the excesses of maritime warfare due to their participation therein, all confiscation of private property at sea is more or less regulated by prize courts composed of men of official training and removed from the exciting scenes of warfare and the immediate influences of the captors.

In closing this <sup>discussion</sup> ~~treatment~~ of the relative severity of land and maritime warfare, so far as private property and losses are concerned, I can do no better than to quote the words of the late Mr. Wm. E. Hall upon this subject:

He says-- "It is enough to place the incidents of capture at sea side by side with the practice to which it is most analogous, viz; that of levying contributions. By the latter, which itself is relatively mild, private property is seized under conditions such that hardship to individuals - and the



hardship is often of the severest kind - is almost inevitable. In a poor country with difficult communications an army may so eat up the food as to expose the whole population of a large district to privation. The stock of a cloth or leather merchant is seized; if he does receive the bare value of his goods at the end of the war, which is by no means necessarily the case, he gets no compensation for interrupted trade and the temporary loss to his working capital. Or a farmer is taken with his carts and horses for weeks or months; and to a distance of a hundred or two hundred miles; if he brings back his horses alive, does the right to ask his own government at some future time for so much daily hire compensate him for a lost crop or for the damage done to his farm by the cessation of labor upon it? It must be remembered also that requisitions are enforced by strong disciplinary measures, the execution of which may touch the liberty and lives of the population; and in practice those receipts which are supposed to deprive requisitioning of the character of appropriation are not seldom forgotten or withheld. Maritime capture on the other hand in the words of Richard Henry Dana takes no lives, sheds no blood, imperils no house holds, and deals only with the ~~protection~~ persons and property voluntarily embarked in the chances of the war, for the purposes of gain, and with the protection of insurance which by modern trading custom is invariably employed to protect the owner of the property against maritime war risks, and which effects an immediate distribution of loss over a wide area. Mild however as its operation upon the individual is, maritime capture is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be. In deranging the common course of trade, in stopping raw material on its way to be manufactured, in arresting importation of food and ex-



portation of the produce of the country, it presses upon every body sooner or later and more or less; and <sup>in</sup> rendering sailors prisoners of war it saps the offensive strength of the weaker belligerent. In face of the results that maritime capture has often produced it is idle to pretend that it is not among the most formidable of belligerent weapons; and in face of obvious facts it is equally idle to deny that there is no weapon the use of which causes so little individual misery."

The public vessels of the enemy we have already seen are subject to capture with the exception of the vessels on a voyage of discovery or scientific investigation or cartel ships carrying prisoners of war to be exchanged. The question of public vessels of war naturally brings up the question as to the nature of such instruments of warfare. These vessels are or can be both public and private- they can be vessels of war of the regular navy, or of a volunteer or auxiliary navy, and privateers or vessels acting under letters of marque and reprisal duly issued by the general government.

By the Declaration of Paris, the powers that signed the document agreed to give up privateering. This applies only to the powers signing and with respect to each other. The United States did not sign and so far as she is concerned retains the right of privateering and at the same time all other countries, signatory of the Declaration of Paris or otherwise, retain the right of privateering against the United States.

The United States have taken however a somewhat varying position towards this question. After the Revolutionary War treaties were made for its abolition especially with Russia in 1785. During the War of 1812, privateering was extensively practiced. During the War with Mexico privateers were not used. In 1856 the United States refused to join in the Declaration of Paris un-



less private property at sea was exempted from capture. In the early days of the Civil War the United States expressed a willingness to accede to the Declaration of Paris but later when under the conditions mentioned by the United States, this was not accepted by the European powers, Congress passed an act authorizing the issuing of letters of marque and reprisal, the powers of which act however were never <sup>exercised</sup> ~~exercised~~ and no privateers were commissioned. The law and right remain with us fully in force, the only question being one of its utility and policy. The conditions of modern naval warfare have so lessened the desirability of privateering from the standpoint both of the privateer and of the national government that it is doubtful whether it will be employed in future wars to any extent.

It has proven to be much wiser to take vessels from the merchant marine and give them acting commissions or appointments to officers of the merchant service from the national authority. The subsidy acts now in force which require certain structural and other conditions upon the part of merchant steamers carrying the mail looking to their use in time of war already point to a renewal of that policy which was so serviceable in the late Civil war.

The exceptions to the rule of the capture of private property at sea, are those of innocent fishermen already discussed, and of cargo shipped in neutral vessels which will be discussed when <sup>e</sup> ~~trating~~ of the Declaration of Paris.

A certain time at the outbreak of war is generally allowed to enemy vessels to leave the port of the other belligerent. This is a matter concerning which there is a growing liberality but for which there are no present limits of time.



Right of Search. In order that belligerents may exercise the right of capture they possess in war time what is known as the right of search. This is a war right alone (except as to pirates), so far as neutrals are concerned and includes the right to stop, detain and overhaul merchant vessels, including the right to examine the papers of the ship visited and if necessary its cargo. The right of search is allowed by the general consent of nations in time of war and is limited to those occasions only, except as to piracy and with the further exception (which is strictly defined by treaty by the parties concerned) of search in certain latitudes for the suppression of the slave trade.

The right of search does not include the right to search public vessels. A late writer puts it: "It can be exercised upon merchantmen only. They are bound to submit to search from a lawfully commissioned belligerent cruiser. Resistance to it will bring down certain capture and condemnation upon a ship or cargo otherwise innocent. An enemy merchantman may fight when attacked, but unless it can succeed in beating off the foe its resistance will put it in a worse position than before. A neutral merchantman violates international law if it makes an attempt to repel belligerent search by force of arms. Success might save it for the moment but not for long. An international question would be raised between its country and the injured belligerent and, unless its government wished to provoke complications some kind of punishment would fall upon it for its unlawful proceedings."

Upon coming up with chased merchantmen if hailing is impossible or is disregarded, the chasing man of war may order her to come to by firing a blank charge and if that is still disregarded by firing a shot or shell across the bow. The French call this the semonce or affirming gun. Any other signal likely to be under-



stood can be used and is lawful as such, as a message by the international code; but it should be something concerning which there can be no doubt or evasion. Not until this has been given - the shot across the bows or its equivalent - and disregarded as the further application of force permitted.

When the summons of the belligerent is obeyed, the next step on the part of her commander is to send an officer in uniform on board of the vessel to be searched. The boarding officer questions the master of the merchantman and examines her papers. If any suspicious circumstances appears from his examination, but not otherwise, he can call some of his boats' crew on board and direct a thorough search of the vessel. Should this search sufficiently confirm his suspicions, the commander of the belligerent cruiser upon the report of the boarding officer can take possession of the ship, secure her papers, put on board a prize crew and hold her master and crew as prisoners. During the entire proceeding all possible courtesy and consideration should be shown and no more disturbance than necessary given to the internal economy of the ship or to its navigation. The next proceeding, if the vessel is seized and seaworthy is to direct the prize master who is placed in charge to proceed to the most convenient prize court of his own country for the adjudication of the prize.

If the ground upon which the capture was made prove to be sound and good, the vessel will be condemned and sold and the captors will receive their share of the proceeds of the sale as prize money in accordance with the law of the land, the remainder with us going to the naval pension fund.

If the evidence against the vessel is not sufficiently conclusive in spite of justifying circumstances the vessel will be released, the owners bearing the expense of detention and delay.

If however it be found that the capture was effected on friv-



olous (and on the face of it) insufficient grounds, the officer responsible for its capture will be liable for the costs and damages.

The same general rules hold good in the treatment of vessels suspected of piracy by the cruisers of States. As they are at peace they cannot exercise the right of search unless the suspected vessels are pirates and they can not as a rule tell whether they have a right to capture unless they search. They will have to be guided by circumstances. Right of approach. see Commo. Stockton - Mariana Flora - U.S. Supreme Court - <sup>1</sup>Virginia Capture *(see last lecture)*

Ships papers. The papers of a ship are matters of vital importance to a ship. International as well as municipal law requires every vessel not a government vessel to carry certain documents as evidences of her ~~authenticity~~ nationality, of the nature of her cargo, and of her destination and home port. Her name and port are also required to be shown externally. In addition to the papers showing the above various other papers and books are required to be kept according to municipal and international law. They are, generally speaking, the log-book, muster roll of the crew, charter party, bills of lading and certificate of ownership of ship. A list of papers will be found in the appendix of Snow's lectures and most <sup>if not all</sup> of the blank forms in the upper corridor of the College.

The absence of papers; a showing of false papers, gross irregularities, or omissions will justify the seizure and detention of the vessel concerned.

The destruction of papers, commonly known as *spoilation* of papers is considered good ground for capture, but with us not necessarily for condemnation. Most European countries con-



sider it sufficient ground for condemnation as well as for capture.

The right of search can only be exercised by regularly commissioned vessels of war of the State which would include vessels to whom were issued letters of marque and reprisal by the sovereign authority of U.S. (See Ins.p.480 Wharton Vol.III)

Sometimes instead of sending in enemy property for adjudication it is from existing circumstances destroyed. The right to do this with enemy property is undoubted and no one but the captors and (with us) the pension fund suffers. But it is another matter with neutral property which may be captured for violation of the law of blockade or of contraband of war. This property of neutrals does not change hands until it is so decreed by the prize courts hence a valid claim for indemnity and damages exists if neutral vessels are destroyed by the captor before adjudication unless a sufficient exigency is established or the ship is in a state of flagrant violation

Neutral property is prima facie innocent property and it is of course the part of wisdom of the naval commander to release a neutral vessel or goods rather than to risk international complications or individual penalties by the destruction of such property. Of course, before destruction, it should if possible be fully ascertained if any private property to be destroyed is enemy property

But so far as the general question of the destruction of ~~many~~ private property afloat is concerned it may be doubted whether so long as private property is subject to capture at sea this destruction will cease or diminish. The rapid movements necessary for the commerce destroyers; the greater distance from the court in home ports, and the tax upon the personnel of the cruisers for prize crews will tend to cause such destruction before adjudication to increase in the future rather than to diminish.



In 1812 the United States instructed their naval officers at the outbreak of the war with Great Britain to destroy all the enemy merchantmen they took unless they were "veryvaluable and near a friendly port". The Confederates destroyed most of their prizes during the Civil War on the grounds that the blockade prevented them being sent in for adjudication. In 1870 the French burnt two German vessels and in 1897 the Russians destroyed some of their prizes in the Black Sea on account of the Turkish blockade of their ports.

(Convoy of Neutral Ships.) A much debated question in international law has arisen as to the exemption of neutral vessels from search and detention when they are convoyed by their own vessels of war. Most continental writers favor such exemption. Great Britain stands alone. ~~Old~~ former Navy Regulations instructed Navy Officers not to permit such search but also to be fully acquainted with all particulars as to the vessels of the convoy and especially to be satisfied that no contraband of war is being carried <sup>to</sup> ~~by~~ a belligerent port. This is virtually what has been recommended by the Institute of International Law.

John Quincy Adams, says very justly that "if we could instruct our officers to give convoy at all, we cannot allow him to submit to the search by foreigners of a vessel under his charge, for it is placing our official and the nation itself in an attitude of inferiority and humiliation."

A neutral vessel placing itself under the convoy of the opposing belligerent makes the act a suspicious one and if captured it is generally considered that such convoy is sufficient for condemnation.

Trade with enemy. The effect of war generally is to put a stop to all trade between enemies both by land and sea.



But notwithstanding this general rule, trade with an enemy is sometimes legal and permitted. England and France during the continental wars gave licenses to trade with the enemy, and during the Crimean War England by order in council gave permission to her subjects to trade freely with unblockaded Russian Ports. During our Civil War Congress authorized the President to grant licenses to trade with the enemy in certain cases. This was availed of to purchase cotton for the north. A license given by one belligerent does not bind the other belligerent, such license having effect only as to the troops and officials of the licensing belligerent.

In 1864 the Secretary of the Treasury was empowered by Act of Congress, with the approval of the President to purchase for the United States the products of insurrectionary States, which, it was provided should be sold and the proceeds paid into the Treasury.