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Retaliation and Neutral Rights

Hessel Edward Yntema
University of Michigan Law School

RETALIATION AND NEUTRAL RIGHTS.

The Leonora.

THE readjustment of international law to the ever-changing conditions of maritime warfare has always presented problems of extreme difficulty. Particularly is this the case, when, as in the Napoleonic wars and the recent European conflict, belligerents, falling back upon the exceptional plea of necessity, attempt to modify the rights of neutral powers to their own advantage or even to involve them in the conflict. A question of this character, namely, the extent to which a belligerent in pursuing retaliatory measures against alleged violations of international law by his opponent, may thereby abridge the admitted rights of neutrals, was raised in a recent English prize case, *The Leonora*,[1] and, as the issues were ably argued both for the Crown and the claimants, the judgment rendered merits critical examination. The fact that the decision is rather a diffuse historical disquisition on the rights of belligerents to restrain neutral trade than such a concise statement of principle as we are wont to associate with an English judgment, will perhaps not obscure the simple and fundamental nature of the questions at stake.

The facts, which were undisputed, admit of little difficulty. The Leonora, a small Dutch steamer, chartered by the "G. & L. Beijers Import and Export A/B" of Stockholm, was captured by British cruisers whilst on a voyage from Rotterdam to Stockholm, both neutral ports. She was laden with a cargo of coal produced in Belgian collieries under German control and sold by a German Government department to Beijers as agent for the Stockholm Gas and Electricity Company.[2] The Crown claimed the capture and condemnation of both vessel and cargo under the retaliatory Order in Council of February 16, 1917, by which it was provided that vessels carrying goods with an enemy destination or of enemy origin were liable to condemnation, unless they called at a British or allied port for an examination of their cargoes, and that goods found on examination of any vessel to be of enemy origin or enemy

[1] [1918] P. 182. In order to preclude misunderstanding, it should be noted that *The Leonora* is under criticism in this article as the decision of a British prize court and, therefore, English authorities are largely relied upon. The broader political and diplomatic aspects of the policy which relied upon the Order in Council as a measure of defence form, of course, another question to be decided upon its own merits.

[2] The point was raised by the charterers that the coal was not of enemy origin, but the Court decided, and rightly it seems, that the fact that it was produced under German Government control made it such. [1918] P. 182, 230.

destination were also to be condemned.[3] On the other hand, the claimants, both shipowners and charterers, contended that neither goods nor vessel were liable to condemnation, since the Order was illegal and invalid as against neutrals.

The main issue before the Court may be shortly summarized as follows:—Can a belligerent, as an incident to and in order to enforce measures of retaliation against his enemy, lay hitherto unrecognized restrictions upon neutral trade, involving not merely inconvenience but even serious loss to neutral shipping? This the Court resolved in the affirmative.

The importance of this decision, if it were to be accepted as a modification of the law of neutral rights, is obvious. For *prima facie* it admits practices which offend against international law in at least the following respects:

1. A "quasi-blockade" is established, not satisfying the requirements of legitimate blockade, in particular since it applies specifically to neutral ports.[4] Nor can it probably be regarded as *effectif* in the sense established by the Declaration of Paris, 1856.[5] Of this the Court is not unaware; in fact, it is admitted that the method of blockade instituted by the Order in Council would probably not be accepted as in accordance with prevailing law. To quote the words of the learned President:—

> "It is of course true that according to the existing rules of international law there can be no blockade of neutral ports or coast lines. The Order in Council does not purport to declare a blockade of the ports to which it applies in the strict sense in which that term is used in international law. But the object at which it aimed as regards the enemy is similar. In saying this, I am not suggesting that the method adopted by the Order in Council has been accepted by the

[3] The Order in Council is given in full in the report at page 183. The sections relevant to the present discussion are as follows:

> "2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in Art. 1 shall arise. 3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation." [1918] P. 182, 184.

[4] See *The Frau Ilsabe*, 4 Rob. 63, 64; *The Peterhoff*, 5 Wallace 28, 52; The Declaration of London, 1909, Arts. 1 and 18.

[5] As the counsel for the claimants point out, "the Order is unlimited in its area and would apply to vessels seized, *e. g.* in the Pacific Ocean, if sailing from a port which affords access to an enemy country." [1918], P. 182, 188.

> nations in such a way that it already forms part of established law. * * * It is not a blockade of enemy ports. But it is a stoppage or quasi-blockade of the enemy's maritime trade through adjacent ports."[6]

2. A neutral ship plying between neutral ports is condemned as a carrier of goods of enemy origin. This is clearly contrary to the general principle that neutral traders may carry or deal in enemy goods, subject of course to the well-known restrictions in the case of contraband, blockade, or unneutral service, and that irrespective of whether the trade is through enemy or neutral ports.[7]

3. Enemy goods covered by a neutral flag are condemned, although not contraband of war. This is in direct contravention of article 2 of the Declaration of Paris, 1856, one of the few conventions generally recognized as declaratory of international law, and to which Great Britain is signatory.[8]

4. Neutral ships, in order to avoid condemnation for the carriage of enemy goods, are required to submit their cargoes for examination at British or allied ports. This is a wide extension of the ordinarily accepted rule that, although neutral vessels may be brought in to a belligerent port for adjudication, provided there is reasonable ground for suspicion, the right of visit and search is exercisable by a belligerent only on the high seas or in non-neutral waters.[9]

There are other points in the Order to which exception might be taken, as for instance the presumption that it sets up against a neutral ship sailing to or from a neutral port having access to enemy territory,[10] but as they are not involved in the decision, they need not be treated in this connection.

The legal grounds for the decision may now be examined.

A. It is held that the provisions of the Order in Council of

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[6] [1918], P. 182, 205.

[7] See *Gist* v. *Mason*, 1 T. R. 84, 85; *Barker* v. *Blakes*, 9 East 282, 292; *Bell* v. *Reid*, 1 M. and S., 726, 733; Chitty, Law of Nations, 165, 187; Manning, Commentaries, 193; Phillimore, International Law, III, 204 ff.; Oppenheim, International Law, II, 385; and also the authorities referred to in note 49.

The present case cannot possibly be construed as an application of the doctrine of "continuous transport" to contraband articles, as there is no hostile destination.

[8] 46 British and Foreign State Papers, 27.

[9] See *The Maria*, 1 Rob 340, 360; *The Peacock*, 4 Rob 185, 189; *The Elsebe*, 5 Rob 173, 184; *Cremidi* v. *Powell*, The Gerasimo, 11 Moore P. C. C. 88, 116 In *The Zamora*, [1916], 2 A. C. 77, 108, the Court takes the view, not unreasonable as a suggested change in the law, that the bringing of a vessel into a harbour for search is "a practice which is justifiable because search at sea is impossible under the conditions of modern warfare," but there appears to be no authority for the dictum.

[10] Art. 1, [1918], P. 182, 183.

February 16, 1917, though perhaps not forming a part as yet of established law, at least do not offend against the guiding principles of the law of the nations.

In the first place, the learned President, disregarding the inconvenient technicalities which are ordinarily accepted in the case of contraband and blockade as defining the rights of a belligerent, thus summarizes the principle upon which these rights are based:

> "Broadly, the principle is that the maritime commerce of neutrals is subject to restriction by the acts of States at war, if that commerce tends to assist an enemy either directly in his warlike operations, or indirectly in the carrying on of his own trade upon which his power of continuing the war may largely, or even entirely, depend."[11]

Then, after pointing out that international law is a living organism, adaptable to changing conditions, and in especial that its boundaries have in the course of the nineteenth century been widely extended by the application of this principle of maritime warfare, the Court proceeds to the conclusion that the Order in Council, since it involves restraint of neutral trade for the same purposes as in the case of blockade, may be regarded as a justifiable application of the general principle, even though not yet accepted as international law.

As to this,—aside from the presumption that an appeal to general principles is intended as apology for an evasion of strict law,[12]—it will be remarked at the outset, that the guiding principle of maritime warfare thus laid down by the Court is scarcely in accord with the accepted doctrine that a maritime belligerent may subject neutral trade to restrictions only in so far as it obstructs operations of war. Those practices which interfere more widely with neutral traffic, such as commercial blockade or the interdiction of colonial or coasting trade, either are regarded as abnormal exceptions to the rule or are expressly condemned by the authorities.[13] However, this point need not be pressed too far. For with the increased integration of all national activities as auxiliary to the conduct of war in recent times, it may become necessary to extend the rule in order to recognize the intimate connection between military operations and civilian commerce.

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[11] [1918], P. 182, 202.

[12] This, in the words of Historicus, is "the well-known resort of an advocate who feels that the facts and the law are dead against him, and who is about to invite the court to overrule an Act of Parliament." Letters on International Law, 131.

[13] To refer only to two authorities, representative of different schools, see Hall, International Law, (6th ed.), 75, 625, and Bonfils-Fauchille, Manuel, (ed. 1914), 1052.

But, even so, the fact that the laws of contraband and blockade have, within limits, been elaborated, would, it seems, constitute no precedent in an English prize court for discarding those regulations in their entirety and devising an admittedly different method of interfering with neutral trade with the enemy, even though the object in view be identical. The difficulty with the line of reasoning followed by the Court in *The Leonora,* if international law is really a species of law and not merely a fluctuating statement of international policy, may be perfectly illustrated by an analogous case. A given person can reach a certain point by one of two public highways. Would he then be justified in trespassing upon his neighbor's land in order to reach the same point? Yet the object in view in each of the three possible courses he might take would obviously be the same. To argue that a court by exhibiting a similarity of ends may enforce a dissimilar means, hitherto illegal, is in effect to arrogate to the court a power of legislation which, as we have recently been reminded in *The Zamora,*[14] pertains alone to Parliament.

There is still a further consideration. The rule was laid down by Lord KENYON in *Pollard* v. *Bell,*[15] that "it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations." It is difficult, indeed, to see how the pertinency of this rule to the present case can be denied in view of the protests which have emanated from neutral and enemy against the Orders in Council and in the face of the admission in the judgment that the Orders are not as yet accepted law.

In short, the law of sea warfare, like any other system of law, cannot be said to consist of "guiding principles" which may be warped at discretion by the court, but of definite compromises reached after controversy between neutral and belligerent.

The second ground upon which the decision proceeds is that the Order in Council of February 16, 1917, is a legitimate measure of retaliation against the illegal methods of warfare pursued by the enemy. Of course, if this is to be accepted as the true basis for the decision, and so it seems to be intended, the preceding remarks of the Court as to the extensibility of maritime law by a prize tribunal may be disregarded at once as dicta, which should perhaps be described as dangerous. For a plea of retaliation is unnecessary, if the measure thereby defended be itself legitimate.

[14] [1916], 2 A. C. 77, 90.

[15] 8 T. R. 434, 437, and see *Bird* v. *Appleton,* 8 T. R. 562, 567, and *The Prometheus.* 2 Hong-Kong Law Reports, 217. This was also the view of Lord Eldon and of Lord Erskine, Hansard, Parliamentary Debates, X, 474, 935. The rule referred to in *Pollard* v. *Bell* seems to have been laid down by Lord Mansfield in *Mayne* v. *Walter,* Park Ins. 363, although it does not appear in the report.

And it is to be particularly noted, that the peculiar problem presented by the Order in Council under discussion in *The Leonora,* as contrasted with the previous retaliatory Orders of March 11, 1915, and of January 10, 1917, is that the present Order under the guise of laying stress upon the enemy contemplates a direct and grievous interference with neutral trade, which is equivalent to an assumption of control over neutral commerce and the result of which is to penalize the neutral trader unless he acquiesces. This, with all respect to the view of the Court, can only by a strained construction be described as consequential to operations of war undertaken against the enemy. In fact, it is so extended an application of the alleged principle that in retaliation an enemy may be punished through the sides of a neutral, that, to continue the metaphor, the neutral's sides have become the main object of attack and the effect on the enemy is but secondary.

It may be admitted at once for the purposes of argument that retaliation is admissible as between belligerents themselves, although there is a tendency in the authorities to limit the right as strictly as possible.[16] This, however, leaves open the issue involved in *The Leonora.* To what extent may the rights of neutrals thereby be affected? But before this can be touched upon, we have first to consider the theoretic basis of a doctrine of retaliation and in connection therewith to determine the question whether a retaliatory measure is properly cognizable in an English prize court.

Perhaps the most plausible theory is that retaliation is justifiable upon grounds of self-preservation.[17] If so, retaliation is in reality an application of the broader principle that a State, when faced with national extinction, may violate those rules, the observance of which would jeopardize its existence. This doctrine has certain implications, the first of which is that retaliation is not permissible *per se,* but only as an act of necessity. Thus the mere fact that one

[16] See Hall, 411; Oppenheim, II, 305; Lorimer, Institutes, II, 75.

[17] Although neither develops the doctrine, this seems to be the view of Hall in the passage just cited, 411, and of Bonfils-Fauchille, 728, as well as of Historicus, 95. Compare the statement of Chitty,

> "The absolute rights of neutrals may be summed up in the terms of the rule which has been before mentioned, 'that a neutral is not to be placed in a worse situation by the war, than that in which he would have remained if peace had continued uninterrupted.' To this rule of absolute right the urgent necessities of war form the only exception," 187.

And see the statement of Sir William Scott quoted in note 21.

This view seems also to be implied in the argument of the Crown counsel in *The Leonora,* and perhaps will serve to explain why the Court in that case took pains to delineate the necessity under which Great Britain lay of retaliating against Germany's submarine campaign, [1918], P. 182, 186, 194, 228.

belligerent has violated a rule, will not justify the other in a corresponding non-observance of law, unless, indeed, the original violation reduces the retaliating party to a state of urgent necessity. Further, the justification for an act of retaliatory necessity must be regarded as moral rather than legal in character. To be sure, the principle is to be admitted on equitable grounds that necessity exempts from the observance of law. But the acts taking place in pursuance of this principle would in any case remain extra-legal, for the determination of the circumstances under which the necessity of retaliation arises and of the measures best adapted to meet the emergency, is made on considerations of policy and not by rule of law. In the words of Sir William Grant:

> "Persons entertained strange notions of the law of nations, when they supposed that a nation could not perform an act of vigour for its own preservation, without violating the rule of its conduct. But this could not be a violation of the rule, for the case was out of the rule."[18]

Indeed, one may well hesitate to accept the principle of necessity, even in its most extenuated form, as anything more than a moral, non-legal justification for the non-observance of law. For as there is no other authority than the necessitous belligerent to determine the cases in which the principle is to be applied, there arises an irresistible temptation to extend the meaning of necessity so as to include military or commercial ends which are regarded as eminently desirable.[19] A reference to the disapprobation which was evoked by the plea of von Bethmann-Holweg in defence of the German violation of Belgian neutrality will illustrate the point.[20]

According to an alternative theory derived from the idea of contract, international law depends upon assent, the final test of which is observance. Hence, it is argued that non-observance of the rules of war ruptures the implied agreement upon which the rules are based and gives just occasion for extra-legal retaliation. Or in more ancient language, the contending parties are thrown back upon the law of nature.[21] This conclusion, however, is not admissible. In-

[18] [1918], P. 182, 213; Hansard, X, 336.

[19] The German view on this point is expounded by Lueder in Holtzendorff, Handbuch, IV, 254. The passage is given at length in Westlake, Collected Papers. 244.

[20] See Collected Diplomatic Documents relating to the Outbreak of the European War, 438.

[21] This appears to be Lueder's view in the passage just cited. Note also the statement by Sir William Scott, that "the law of nations, which being in its nature conventional, was no longer binding than when the rules of this convention were adverted to by all parties concerned. When they were departed from by one party, the other was

ternational law is truly based in the recognized practices of civilized States, in which there may be implied an agreement. But this agreement is one to which the members of the whole group are parties, and is not to be described as a series of disparate contracts between individual States. As a result non-observance of recognized law by a State, unless concurred in by the entire group, will not of itself relieve any other State of its duty to observe the law. Otherwise, we come to the preposterous conclusion that the effect of a rule of international law becomes nugatory at the discretion of a single State which chooses no longer to observe the rule.[22]

A third view is possible,—that retaliation is a penalty which is laid upon a belligerent in case he violates the laws of war, and, therefore, is essentially a legal sanction of these laws, enforceable in a prize court.[23] There are grave objections to this theory. The first is purely of a practical nature. As has been clearly demonstrated by the Balkan wars of 1912-1913 and the European war of 1914, a disposition on the part of belligerents to reply in kind to violations of the laws of war, is in effect to lower the struggle to the level of barbarism. A system of penalties, which instead of efficiently sanctioning encourages a disregard of the rules of war, cannot be recommended. And even on principle the doctrine appears objectionable. In the absence as yet of any real international government and according to the accepted view as to the equality of States, it may well be questioned by what authority any State can exact punishment from another State for alleged violations of the law of nations. Can a State, and this is involved in the principle, gratuitously retaliate against violations of law by which it suffers no injury? It is sub-

left to the guidance of natural justice; and by the laws of natural justice retaliation was authorized as an essential part of self-defence," Hansard, X, 1066.

But, even according to the rules of natural justice, it is extremely doubtful whether in the present case the conclusions of Sir William Scott can be upheld. See, for example, the view of Wolff expressly condemning the principle of "talio" as a portion of the "jus gentium," Jus Gentium, cap. V, §§ 577-579, and the explicit statements of Grotius,

> "At talionem natura non admittit, nisi in ipsos qui deliquerunt: neque sufficit quod hostium unum quasi corpus fictione quadam intelligatur, ut ex iis potest intelligi, quae de poenarum communicatione supra a nobis tractata sunt."

De Jure Belli ac Pacis, lib. III, cap. XI, § XVI, 2, and of Bynkershoek,

> "Retorsio non est nisi adversus eum, qui ipse damni quid dedit, ac deinde patitur, non vero adversus communem amicum."

Quaestionum Juris Publici lib. I, cap. IV, 32.

[22] See the observations of Westlake on this theory, International Law, War, 114.

[23] This has the support of Westlake and, at least by implication, of Hall and Bonfils-Fauchille in the passage cited in notes 17 and 22. The two latter authorities, however, also admit the theory of necessity.

mitted that retaliation must be limited to those cases in which the interests of a State are so affected as to justify an act of necessity.[24]

The rule could not be better stated than in the words of an eminent British authority:

> "Reprisal" (here equivalent to retaliation), "or the punishment of one man for the acts of another, is a measure in itself so repugnant to justice, and when hasty or excessive is so apt to increase rather than abate the irregularities of a war, that belligerents are universally considered to be bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent to which an enemy may be deterred from a repetition of his offence."[25]

The conclusion, then, is that retaliation is an act of policy, not law, and so is scarcely cognizable in a court bound by international law. For how can a court which is bound by the rule enforce an act which is out of the rule? In *The Leonora,* however, the Court, in order to place retaliation on a legal basis, adopts the principle that "the circumstances which call for acts of retaliation extend that law (of nations) so as to cover and comprehend them within its bounds."[26] This is difficult to follow. How can circumstances, which are not legally determined, extend the rule of law? And, in view of what is implied in retaliation, i.e., non-observance of the customary law of civilized States, it seems an obvious self-contradiction to maintain that the plea of retaliatory necessity can do more than admit an exception in which that law does not apply. There is, indeed, a species of sly humor in holding that when circumstances suspend the operation of a series of rules, the rules still apply.

In truth, to admit the principle that retaliation is cognizable in a court of prize, will be seen, if the position of prize courts even in Anglo-American jurisprudence be reflected upon, in substance to constitute a State complainant, judge, and bailiff in its own cause. For it will be recalled that, although upon the doctrine laid down in *The Zamora* the Court may decide whether or not retaliation is admissi-

[24] These objections do not apply with quite the same force to the punishment of "war crimes" by a belligerent, provided they are committed by enemy subjects and unauthorized by their Government. Even in these cases, however, the danger remains that, particularly when the law of war admits of diverse conflicting interpretations, the plea of retaliation will become simply the excuse for further illegality. And, in any event, such justice as is meted out to the individual offender must proceed from an authority, both partial and irresponsible.

[25] Hall, 411.

[26] [1918], P. 182, 226.

ble, yet it is bound by the facts recited by the Executive to show that a case for retaliation exists.[27] This of course precludes the court from inquiring as to whether in point of fact there is a proper case for retaliation, since the all-important circumstances which render retaliation admissible cannot be disputed. The logical solution of the difficulty, if the plea of retaliation is to be admitted in court, is frankly to grant that a court of prize, in so far as it gives effect to a retaliatory measure, is acting, not as a court of international law, but as an administrative organ, subject to executive direction.

Let us for the nonce waive the point that retaliation, even as between belligerents, is non-legal and, therefore, non-cognizable at law, and, granting its legality, examine the further question to what extent the rights of neutrals may be thereby affected. As to this it may be laid down that on a strict interpretation the circumstances of a dispute to which neutrals are not parties cannot diminish or augment neutral rights.[28] And assuredly none of the theories of retaliation affords ground for the contention that as an incident to retaliatory measures a belligerent may deprive neutrals of the enjoyment of their recognized rights. For how in all justice can an innocent party, which is responsible neither for the existence of war nor for the non-observance of its rules, legally be made to suffer for the infraction of those rules by a belligerent? In answer to the point which might possibly be raised in this connection, that neutrals appearing within the sphere of military operations are liable to suffer loss, it may be stated that this rule applies to legitimate acts of war and not to retaliatory measures. It is not contended here that a belligerent may not extend the war to neutrals or that in case of extreme necessity an infringement of neutral rights may not be considered as morally justifiable, though of course giving rise to legitimate claims on the part of the neutral. As in the analogous case of requisitions, the neutral is to be compensated for his loss.[29]

[27] [1916], 2 A. C. 77, 98.

[28] See, for example, the clear statement of this principle in the instructions of Bryan to Page, March 30, 1915, Department of State, Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Commerce, (May 27, 1915), at page 70:—

> "If the course pursued by the present enemies of Great Britain should prove to be in fact tainted by illegality and disregard of the principles of war sanctioned by enlightened nations, it can not be supposed, and this Government does not for a moment suppose, that His Majesty's Government would wish the same taint to attach to their own actions or would cite such illegal acts as in any sense or degree a justification for similar practices on their part in so far as they affect neutral rights."

[29] See Chitty, 187, and the authorities cited in *The Zamora*, [1916], 2 A. C. 77, 100.

Therefore, it must be insistently urged that, unless the neutral identifies himself to some degree with one or the other belligerent and to that extent loses his neutral character, no violation of international law by either belligerent will legitimize such retaliatory interference with neutral rights as in effect penalizes the neutral for their exercise.

On the other hand, if we admit the principle that necessity exempts from the observance of law, it must be added that necessary acts of retaliation may not unreasonably entail on neutrals a certain amount of inevitable inconvenience, though even here neutral claims should not be precluded. For under such circumstances as give rise to retaliation, the strict letter of one right may not be insisted upon to prevent the exercise of another right, however uncongenial the compromise may appear to abstract justice.

This rule is in substance laid down in the course of the elaborate dicta in *The Zamora*:

> "An Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case."[30]

Probably the decision in *The Stigstad*,[31] that the detention of a neutral ship for twenty-two days was necessary to the application of the Order in Council of March 11, 1915, and hence no claim could be allowed in respect of the detention, could be brought under the principle laid down in *The Zamora* on the ground that the inconvenience to the neutral trader was not unreasonable.

It is significant, however, that in *The Stigstad*[32] the Court bases its decision upon a principle bearing much more hardly upon the neutral:

> "In the result," it is stated, "I am of opinion that the Order in Council is lawful as an Order enjoining reprisals in accordance with the principles of international law. The result, in my opinion, is that whatever delay or inconvenience is in-

[30] [1916], 2 A. C. 77, 98.
[31] [1916], P. 123.
[32] [1916], P. 123.

> evitably or necessarily caused, as in this case, must be suffered by neutrals, as the consequence of the exercise of legitimate belligerent rights on the part of this country."[33]

And in *The Leonora,* substantially the same view is maintained:

> "If, in view of the whole situation between the belligerents, the means for carrying it (i.e., an Order in Council) into effect are not excessive or unreasonable against the enemy, the consequential results to neutrals desiring or willing to trade with the enemy give such neutrals no right to complain, or to claim compensation."[34]

The dictum in *The Zamora,* which has the support of the Judicial Committee of the Privy Council, may be taken as a fair statement of the law. However, it leaves open the important question, What is a reasonable interference with neutral rights? It will be noted that the rule adopted in *The Leonora,* which bears directly upon this point, in reality begs the whole question, unless neutral rights are non-existent. To paraphrase the *ratio decisionis,*—"If the circumstances between the belligerents, apart from the consideration of neutral rights, justify retaliation, then any consequential interference with neutral rights is legitimate." But the whole problem is, whether the circumstances, including the inevitable loss to neutrals, permit the adoption of a particular method of retaliation. We must, therefore, conclude that this decision cannot be supported either on the authority of the rule laid down in *The Zamora* or, in view of the preceding observations, on principle. This is quite apart from the suggestion already made, that, upon the facts presented in *The Leonora,* the retaliation does seem consequential to the interference with neutral trade rather than the converse.

There is another aspect to the question. If one belligerent strikes at his opponent through a violation of neutral rights, in what cases and to what extent may the injured belligerent retaliate in kind through "the sides of the neutral?" And if this question be resolved in favor of the belligerent, can that belligerent, in order to enforce his retaliatory measures, legitimately refuse compensation to the neutral for the violation of his rights which necessarily accompanies the measures of retaliation? The case is a difficult one, since in each instance the decision must rest largely upon its particular circumstances.

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[33] [1916], P. 123, 129.
[34] [1918], P. 182, 228.

It may be laid down, in the first place, however, that the violation of neutral rights by one belligerent in itself gives the other belligerent no right to interfere.[35] This principle, which is a necessary corollary of the immunity of neutral States, has been clearly demonstrated by Historicus. To quote his statement:

> "The right which is injured by the act of the offending belligerent is the right of the neutral Government, and not that of the other belligerent. The important consequence of this proposition is, that it is the neutral, and not the belligerent, who is strictly entitled to claim or to enforce the remedy."[36]

According to this principle, the ground for retaliation is not the interference with neutral rights, but the consequent injury to belligerent interests. It is, therefore, from the neutral point of view *prima facie* illegal, for the necessity of the belligerent cannot deprive the neutral of his rights.

On the other hand, in return for the privilege of immunity, the neutral State is under a duty to maintain strict impartiality in its conduct towards both belligerent parties. Consequently, a neutral State, which acquiesces in the violation of its rights by one belligerent, must concede the same liberties to the other, or else forfeit its neutral position.[37] The rule is thus stated by Manning:

> "If one belligerent attempts to injure his enemy, by acts which violate the rights of neutrals, and if these neutrals offer no resistance to such violation, it cannot be expected that the other belligerent shall submit to be attacked in this manner without retaliating upon his enemy by similar measures."[38]

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[35] See on this point the exhaustive article, "Belligerent Violation of Neutral Rights," by Historicus, 149, and the authorities therein cited. This work, written by W. G. Vernon-Harcourt, is of especial value in the present connection, as it appeared at a time when Great Britain was interested rather in the definition of neutral rights than in the exercise of belligerent power.

F. E. Smith, however, takes the line, that "if a neutral Government enjoys as regards one of the belligerents a right, it is bound, as regards the other, to enforce it." International Law, (4th ed.), 202. This, in view of the authorities cited by Historicus, must be regarded very doubtful as a general principle. Indeed, the implication in Art. 5, The Hague Convention V, 1907, which applies the rule only to certain specified cases, is to deny its universal application. See also the instructions of Jefferson to Morris, American State Papers, I, 168. In any event, it will not support the further proposition that the duty may be legally enforced on the neutral by retaliatory illegality.

[36] Historicus, 152.

[37] See, for example, the statements of Lord Erskine, Hansard, X, 938, which are in substance followed by Chitty, 151.

[38] Commentaries, 347.

This much is clear. There remains, however, the prime difficulty of defining the circumstances under which a neutral so acquiesces in the violation of his rights by one belligerent to the detriment of the other, as to legitimize retaliation. Strictly speaking, nothing but a departure from the line of impartiality marked out for the neutral will support this conclusion. But the truth is that in the term, "acquiescence," there lurks an ambiguity which has given rise to much dispute. Thus the term may imply (1) concession of privilege to the enemy, whether or no fraudulently concealed, as of the right to pass enemy troops over neutral territory, (2) tacit acceptance of the situation arising from disregard of neutral rights, covered by *pro forma* protest, (3) inability on the part of the neutral to restrain the enemy from violating neutral rights, even though protest be made *bona fide* and with all the diplomatic means at the neutral's disposal. If there be proof of some sort of agreement between neutral and enemy, as in the first case, the matter is of course settled at once. Nor can it be doubted that "A tame and spiritless submission to infractions of his rights would justly expose the neutral to the imputation of connivance with the party at whose hands they were sustained,"[39] and, it may be added, of allying himself with that party. Even here, however, the neutral may be able to show that submission was made under stress of urgent necessity, and in that case could claim redress for the injury resulting from belligerent acts of retaliation. For the neutral, in the first instance, was made by *force majeure* to hold his rights in abeyance, and, therefore, the injured belligerent, retaliating under plea of urgent necessity, cannot consistently deny the pertinency of the same plea to the case of the neutral's acquiescence, the more so as the belligerent acquires no corresponding legal right through the violation of neutral rights by his opponent.[40] But, on the other hand, it cannot be maintained, as the German Government has contended, that neutral powers, which satisfy themselves with theoretical protests against violations of their rights, actually admit "the vital interests of a belligerent as a sufficient excuse for methods of waging war of whatever description."[41] Still less can the further proposition be supported that a neutral, which has *bona fide* protested unsuccessfully against infractions of its rights by a belligerent, should be denied compensation for retaliatory infractions of its rights by the opposing belliger-

[39] Historicus, 159.

[40] See Phillimore, III, 249.

[41] Memorial of German Government, February 4, 1915. Department of State, Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Commerce, (May 27, 1915), 53.

ent. In a conflict of any magnitude, the effect of these principles would be to place the neutral in a dilemma from which he could scarcely be extricated in honor without casting off a precarious neutrality: the neutral either must go to war to defend his rights or submit to increasingly severe and dishonorable measures of retaliation and counter-retaliation, until his position is that of a shuttlecock buffeted between two adversaries. The self-sacrifice of Belgium at Liége, however heroic, cannot be laid down as the measure of a neutral's duties in this regard, unless, indeed, we are to do away with neutrality.

In short, as between the belligerent and the neutral, retaliation must be based upon the theory of the conflict of interests.[42] In view of the unsatisfactory nature of the law upon this point, it is perhaps permissible to indicate the lines upon which an equitable compromise might proceed. On the side of the belligerent, if a broad view be taken of the practices of States at war, it must be admitted as a legal principle that necessity exempts from the observance of law. Therefore, necessitous retaliation by one belligerent against the illegal practices of the other, is permissible even though consequential injury be thereby inflicted upon neutral rights.[43] But from the neutral's point of view, which is also that of strict justice, the application of this principle must be limited to the least possible extent. Thus, in the first place, the necessity for retaliation must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation,"[44] and, it is to be added, involving not merely the furtherance of desirable strategic or commercial ends but even national existence. Further, nothing short of a positive departure from strict impartiality on the part of the neutral will legitimize retaliation "through the sides of the neutral." In view of

[42] See Westlake, International Law, War, 166. A somewhat similar theory lies at the basis of the law of maritime insurance on a contraband voyage. See *Barker* v. *Blakes*, 9 East 282, 292. The analogy is, however, not complete for in the case of marine insurance there is involved a conflict of rights, whilst in the case of retaliation the conflict is between a necessitous act and neutral right.

[43] No apodictic statement is here intended as to the legitimacy of necessity. For the final decision upon that mooted point, the reader is left to decide between Lueder and Westlake. See passages referred to in note 19. All that is proposed is, that, in consideration of the practice of States as the accepted basis of international law, some legal meaning must be given to necessity, but, further, that it must be limited to creating exceptions to the rule of law, without at the same time implying that the extra-legal acts of necessity occurring within the exceptions are thereby legitimized. In other words, necessity may destroy duties but cannot create rights. At first sight, this distinction will doubtless appear to smack slightly of scholasticism, but it results from the fact that international law is not a complete system of logically developed principles, but is largely constituted of compromises effected between conflicting principles.

[44] Webster to Ashburton, August 6, 1842, to be found in Webster's Works, VI, 301; Moore, Digest, II, 412.

the fact that a neutral has a direct interest in the preservation of its rights, there should be a legal presumption that a neutral, protesting against violations of its rights, is acting in good faith and, hence, fully entitled to insist upon them. The equivocal term, "acquiescence," should, therefore, be discarded in favor of the rule laid down by Dr. Laurence to define the cases in which a neutral has compromised its privilege:

> "It was not what was expressed by the ministers, an acquiescence in the orders of the enemy (if such had been the fact), but an adherence to the cause of the enemy, which was the legitimate ground of measures of retaliation."[45]

Finally, in no case is the inability of the neutral to prevent infractions of his rights, whether arising from weakness or unwillingness to go to war on the issue, to be made the ground for depriving the neutral of the redress to which he is entitled.

It is unnecessary to insist upon the obvious application of these principles to the decision in *The Leonora.*

The Court, however, has still another barb left in its quiver. A definition of neutrality is adopted, which, in the present case, imputes to the neutral a breach of impartiality. In the words of Lord Howick, approved by the Court,

> "Neutrality properly considered does not consist in taking advantage of every situation between belligerent States, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest impartiality, so as not to afford advantage in the war to either; and particularly in so far restraining its trade to the accustomed course which it held in time of peace, as not to render assistance to one belligerent in escaping the effect of the other's hostilities."[46]

In the present development of the law of neutrality,—and it may be seriously questioned whether in 1807 the *ex parte* statement by Lord Howick of British claims, though subscribed to by some English authorities,[47] was generally acceptable,—this doctrine is inadmissible. The duty of impartiality imposed on a neutral State is, with well-defined exceptions in which unneutral acts occurring on neutral territory are to be prohibited, strictly of a negative charac-

[45] Hansard, X, 1067.

[46] [1918], P. 182, 207. The note from Lord Howick to Mr. Rist, March 17, 1807, will be found in Hansard, X, 402.

[47] See for example Chitty, 156.

ter,[48] and to extend the obligation as in the present case would in effect require the neutral to assist belligerents in the prosecution of their warlike measures. The theory that a neutral must limit himself quantitatively to the "accustomed trade" of peace, runs counter to the recognized principle that a neutral subject commits no illegality in trading with the enemy:[49] in particular, it would in large measure prevent the legitimate sale of munitions of war by neutral subjects, which notoriously develops enormously during periods of hostilities.[50] Further, the theory proves too much, for it would necessarily rule out the restrictions which a belligerent may lawfully impose on neutral traders by blockade or contraband.[51] And the practical difficulties which the neutral State would face in enforcing the rule are well-nigh insuperable, aside from the problem of determining precisely in each case what is the "accustomed trade." Is the neutral State to keep a spy in each counting-house and a fleet on every sea to prevent its subjects engaged in trade from exceeding the "accustomed" limits? Or, if this is impracticable, to lay an embargo on its shipping? Nor, if we adopt the view accepted by the Court, can we escape the conclusion that, in order to prevent neutral evasions of the rule, the belligerent must necessarily have an intolerable right of interference in every act of neutral commerce.[52] In short, there is no principle of law or justice by which a neutral, who has to suffer by war, may not also derive what profit he can from the circumstances of a dispute in which he bears no responsibility.

In this connection, a misconception in the argument for the Crown should be noted,—that "Neutral carriers must be strictly impartial:

[48] See Art. 5, The Hague Convention V, 1907; Westlake, International Law, War, cap. VII, 161 ff. and Collected Papers, 381.

[49] See authorities cited in note 7. The objection here made to the rule as stated by Lord Howick is, that from its context it implies an attempt to limit neutrals not only qualitatively but quantitatively to their trade in time of peace.

It should, however, be noted that the rule is susceptible of another interpretation, thus set forth by Lord Stowell in *The Immanuel*,

> "The general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade, to the utmost extent of which that accustomed trade is capable," 2 Rob 197, 198.

This was also the view of Lord Erskine, Hansard, X, 936. But it is rejected by both Hall, 633. and Westlake, International Law, War, 254, on the ground that neutrals have a *prima facie* right to engage in trade of any description, at least until the belligerent can show that operations of war are thereby obstructed.

[50] See Art. 7, The Hague Convention V, 1907, and the instructions of Lansing to Penfield, August 12, 1915, Department of State, Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Duties, (October 21, 1915), 194.

[51] See Westlake, International Law, War, 255.

[52] The analogous proposal that neutral States should be under a duty to prevent the export of contraband of war meets with similar objections at the hands of Historicus, 134.

and must not encourage those who commit gross breaches of the law by continuing to trade with them."[53] This contention may be met by a simple traverse. The duty of impartiality applies only to the neutral Government, not to its subjects.[54] Nor can a neutral State under the guise of trade prohibitions take issue with one side or the other without to that extent abandoning its neutrality.[55]

There can be no dispute upon this matter. These are not doctrines of neutrality. According to the most authoritative of recent English writers on international law;—

> "Neutrality enjoins abstinence from taking part in any operations of war, and from interfering with any operation of war which is legitimate as between the belligerents, but not abstinence from anything merely because it strengthens a belligerent."[56]

We must, therefore, conclude, in the absence of any showing that the Dutch Government had failed in its neutrality, that the decision in *The Leonora,* at least in so far as neutral property was condemned because a neutral subject exercised his just rights, is not in accordance with international law.

> B. "The precedents relied upon in favour of the present Order are the Orders in Council of January 7 and November 11, 1807,[57] promulgated during the Napoleonic war in answer to Napoleon's celebrated Berlin and Milan Decrees of November 21, 1806, and December 17, 1807;[58] reliance is also placed on some decisions relating to those Orders."[59]

As the decision in *The Leonora* is based thus squarely upon precedent, an examination, however brief, of the relevancy of the Orders

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[53] [1918], P. 182, 190.

[54] See for example Hall, 77; Kleen, Neutralité, I, 208, and compare Westlake, International Law, War, 166.

[55] See the reply of Bryan to Senator Stone, January 20, 1915, Department of State, Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Duties, (October 21, 1915), 59, 63.

[56] Westlake, International Law, War, 163.

[57] These Orders in Council will be found in Hansard, X, 126, 134; 49 Annual Register (1807) 671, 746. See also Phillimore, III, 411; Edwards Reports, Appendix v, vi. The Berlin Decree will be found in English translation in Edwards, App. vii. The various papers relating to the so-called "Continental System," are collected in Martens, Nouveau Recueil, I, 433. An excellent sketch is given by Manning, cap. X, 330. See also Historicus, 109 ff, and Mahan, The Influence of Sea-Power upon the French Revolution and Empire, II, cap. XVIII, 272 ff.

[58] Unless the report in *The Leonora* is inaccurate at this point, the learned President was evidently nodding, for the Orders in Council referred to could not possibly have been issued in reply to the Milan Decree of later date.

[59] [1918], P. 182, 209.

in Council of 1807, together with the decisions rendered under them, to the present case and of their legitimacy, cannot well be avoided. It will be recalled that the Berlin Decree, declaring a paper blockade of the British Isles, was issued by Napoleon in retaliation against certain methods of sea-warfare pursued by England, which, according to the French view, were not in conformity with the law of nations.[60] In reply, the British Order in Council of January 7, 1807, was issued providing "that no vessel shall be permitted to trade from one port to another, both of which shall belong to, or be in the possession of, France or her allies, or shall be so far under their controul, as that British vessels may not trade thereat."[61] Neutral vessels acting in contravention of this Order, together with their cargoes, were rendered liable to condemnation.

The Order of January 7, 1807, proved ineffective and, consequently, on November 11 a further Order was issued subjecting neutral trade to still more rigorous restriction. In addition to declaring, much as did the Order of January 7, that the ports of France and her allies and of their colonies should "be subject to the same restrictions in point of trade and navigation, with the exceptions hereinafter mentioned,[62] as if the same were actually blockaded by his majesty's naval forces, in the most strict and rigorous manner,"[63] it was ordered,

> "That all trade in articles which are of the produce or manufacture of the said countries or colonies, shall be deemed and considered to be unlawful; and that every vessel trading from or to the said countries or colonies, together with all goods and merchandise on board, and all articles of the produce or manufacture of the said countries or colonies, shall be captured, and condemned as prize to the captors."[64]

The similiarity between the situations under which the Orders in Council of 1807 and those of 1915 and 1917 were issued, is obvious. In each case attempts to enforce an illegitimate system of blockade, purporting to be a measure of retaliation against the maritime practices of Great Britain, provoked further retaliatory measures on her part which provided an effective means of control over neutral commerce. The only important difference between the two cases in the

[60] See the preamble to the Berlin Decree, Edwards, App. vii.

[61] Edwards, App. vi.

[62] These exceptions are to be found in Arts. 4-6 of the Order, Edwards, App. xiv. They are well summarized by Manning, 339.

[63] Art. 1, Edwards, App. xiii.

[64] Art. 2, Edwards, App. xiii.

opinion of Sir Samuel Evans[65] is the fact that Germany had in her hands a novel weapon of maritime warfare, the submarine: this, however, apart from those considerations of humanity which are after all paramount, gave to Germany a means for rendering her blockade effective in a degree to which Napoleon could never attain.

This, however, does not dispose of the matter, for two questions of equal importance remain to be decided. First, is there sufficient analogy between the Orders in Council of 1807 and the Order of 1917 to admit the former as legal precedent? Secondly, if so, were the Orders of 1807 justifiable applications of international law?

It is to be observed at the outset that, in so far as the Orders in Council of 1807 restricted intercourse with belligerent ports or ports in enemy control, they afford scant precedent for the decision in *The Leonora*. For, if regard be had to the maritime practices of that period, they may be defended as not inadmissible extensions of the laws of blockade. Whereas, the Order of 1917 applies in so many words to neutral ports[66] and cannot, therefore, except by an impossible construction be thus considered. In fact, it may be stated at once that the Order in Council of January 7, 1807, at least is not in point. It restrained neutrals from undertaking in collusion with the enemy a colonial and coasting trade to which they were not entitled in time of peace and, hence, according to the practice of the English prize courts of that time, came under the "Rule of 1756."[67] It is to be noted that, although the preamble to the Order recites that a just occasion for retaliation had arisen, the Order itself is not described as retaliatory. It was, therefore, regarded as a legitimate act of war and not a measure of retaliation.[68]

Subject to the preceding observation, the Order in Council of November 11, 1807, may be fairly described as a retaliatory measure largely similar to the Order of February 16, 1917. Each declared trade in enemy goods unlawful and subjected vessels engaged in this trade together with their cargoes to condemnation: each, requiring ships to touch at British ports, admitted exceptions to the general rule, in the one case by license, in the other after submission of the vessel to examination.

But an act of state, such as an Order in Council, is of course no legal precedent unless supported by authority. We are, therefore, left to decide whether the Order in Council of November, 1807,

[65] [1918], P. 182, 209.

[66] Art. 1, [1918], P. 182, 183.

[67] See the authorities referred to by Chitty, cap. V, 153 ff., and Phillimore, III, 312-314.

[68] See the speech of Lord Erskine, Hansard, X, 946, and Chitty, 159.

was regarded as legal, or whether we may not rather conclude with Manning, an English writer who cannot be accused of unfairness towards British maritime pretensions, that

> "The hardships then (in the Napoleonic wars) inflicted upon neutrals were neither consistent with the Law of the Nations, nor were they regarded at the time as any thing more than exceptions justified by the exigency of the conjuncture, nor can they be ever appealed to as precedents by any future governments whatever."[69]

Nothing, in fact, could more clearly set forth the precarious basis of precedent upon which the decision in *The Leonora* rests than the nature of the authorities in which the Court seeks refuge. Instead of relying upon writers, such as Manning or Phillimore,[70] who, removed from the immediate circumstances under which the Orders of 1807 were issued, after impartial consideration pronounce them contrary to international law, the Court introduces *ex parte* statements of ministers made in Parliament in support of measures for which they were responsible. Let us, however, grant the impartiality and authority of these statements and examine their effect. Of the ministers or ex-ministers quoted by the Court, three, Sir William Grant,[71] Sir John Nicholl,[72] and Sir William Scott[73] defend the Order of November, 1807, whilst Lord Erskine[74] and Dr. Laurence[75] maintain its illegality. All admit the right of retaliation; but Lord Erskine alone holds the view that a measure of retaliation is consistent with international law. Even the ministers of the Crown named above, those interested in defending the Order, concede that it is an extra-legal act of necessity, justifiable only on first principles. Nor does the statement of Lord Erskine necessarily involve the principle that, according to international law, a neutral may be denied redress for injury following upon retaliation against the enemy, unless of course he has acquiesced in the enemy's measures.[76] The result of these doubtful authorities is anything but conclusive.

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[69] Commentaries, 322.

[70] International Law, III, 250. See also the view of Historicus, 95,

> "The Orders in Council then were an exceptional and temporary violation of the admitted law of nations, brought about by the original outrage of the Berlin Decree."

[71] [1918], P. 182, 213; Hansard, X, 331, 336.

[72] [1918], P. 182, 214; Hansard, X, 667, 674.

[73] [1918], P. 182, 216; Hansard, X, 1066.

[74] [1918], P. 182, 217; Hansard, X, 929 ff.

[75] Referred to, [1918], P. 182, 213; Hansard, X, 331, 1067.

[76] [1918], P. 182, 219; Hansard, X, 929, 938.

Let us extricate ourselves from this parliamentary morass and return to legal *terra firma.* The Court in *The Leonora* regards it as significant that no decision of a British prize court can be cited against the validity of the Orders in Council of 1807.[77] This fact will not seem so compelling when it is recalled that in *The Fox* Sir William Scott held, and this was also the view of Sir William Grant,[78] that the Orders were declarations of international law, binding upon the court.[79] And Lord Erskine, who maintained the principle which has been adopted in *The Zamora* that Orders in Council are not conclusive as a statement of international law, nevertheless considered the Order of November, 1807, to be binding on the prize court by reason of the facts recited in the preamble.[80] Therefore, the issue involved in *The Leonora,* the legality of re-

[77] [1918], P. 182, 222.

[78] The statement of Sir William Grant is as follows:

> "The Orders in Council did not, could not, alter the law of nations. The king might issue his declaration, because he was not to leave his courts to infer what was the law of nations, but the king's declaration did not alter the law of nations, but was to be justified by that law . . . When the crown was intrusted with the power of making war, it should not be deprived of the means of carrying it on with vigour and effect," Hansard, X, 335.

[79] *The Fox,* Edwards 311, 312.

The point is simply, that, whatever may be the present status of the law, in the cases occurring under the Orders in Council of 1807, the court regarded them as binding declarations of international law which it would not permit to be disputed, and, therefore, never decided the question as to their legality. The dicta in *The Fox,* Edwards, 311, 312-314, if they mean anything, establish this as the view of Lord Stowell. And, with all deference, the color which is given by Lord Parker of Waddington to *The Fox,* as deciding that "there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Order would not have been justified by international law," *The Zamora,* [1916], 2 A. C. 77, 94, must be described as most extraordinary, as it appears on the face of the judgment in *The Fox* that the legality of retaliation was not in issue, *The Fox,* Edwards, 311, 312, 314! Nor does the statement of Lord Stowell in *The Maria,* that the Court was "to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some belligerent," *The Maria,* 1 Rob 340, 350, conflict with this view, for no Order in Council was there involved. And in *The Lucy Edwards,* 122, Lord Stowell did no more than construe an Order in Council conformably to its intention.

This contention, of course, in no wise involves a discussion of the further question whether the dicta in *The Zamora* are not to be preferred to the dicta in *The Fox* as an interpretation of the rule laid down in the Answer to the Prussian Memorial, that, by the law of England, "all captures at sea, as prize, in time of war, must be judged of in a court of admiralty, according to the law of nations, and particular treaties, where there are any." Collectanea Juridica, I, 129, 152. It may be observed, however, that in neither case is the rule applied absolutely; in either view, a statute is held to bind the court of prize; and an Order in Council is, according to Lord Stowell, irrebuttable evidence both of the facts recited and of the law of nations; according to Lord Parker, it is conclusive as to the facts, but only highly presumptive evidence as to the law.

[80] Hansard, X, 958.

taliation, was never and, indeed, could not be decided by the Court. Nor can the dictum in *The Snipe,* that

> "These orders were intended and professed to be retaliatory against France; without reference to that character, they have not, and would not have been defended; but in that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice, by which the international communication of independent states is usually governed,"[81]

afford a basis for the conclusion reached in *The Leonora,* for international law is no longer inclusive of natural justice.

It thus appears that the decision in *The Leonora* is not well-founded in precedent, even on the authorities which are cited by the Court. Therefore, it will be unnecessary to advert to two important points, which were not considered by the Court, first, whether the fact that the retaliatory decrees of Napoleon gave rise to legitimate claims on the part of the United States which were recognized by France in 1831,[82] is not precedent for the principle that acts of retaliation are illegal as against neutrals and, secondly, whether the law of neutral rights has not possibly developed beyond the stage which it had reached during the Napoleonic era and, therefore, precedents of that period should not be accepted without reference to more recent authority.

The preceding examination of legal principle and precedent,—and it should be remarked in passing that no criticism of British maritime policy is hereby implied,—has terminated rather disastrously for the decision in *The Leonora.* The result has been simply to rule the plea of retaliation out of court. Hence, the attempt in *The Leonora* to place retaliation upon a legal basis and, consequently, to regard the injury to neutrals which is involved in measures of retaliation as *damnum absque injuria,*[83] must be rejected. It is worse than sheer nonsense to maintain that retaliatory violation of law is no violation, since it encourages the exercise of undisciplined, brute force. Such justification as may be found in cases of retaliation must be placed on the ground of absolute necessity, and neither

[81] *The Snipe,* Edwards, 380, 381 The question might, of course, be raised whether retaliation through "the sides of a neutral" is justifiable even on first principles or by natural justice. See for example, Phillimore, III, 250; Historicus, 94; Lorimer, II, 75; and the authorities referred to in note 21.

[82] In Art. 1, Treaty of Paris, July 4, 1831; 19 British and Foreign State Papers, 594.

[83] This statement of the effect of justifiable retaliation upon neutral rights is made by Lord Eldon, Hansard, X, 992.

deprives the neutral of his right, nor, if it is violated, of his claim to redress.

In truth, it may be suggested,—although these things should not be whispered out of court,—that the learned President was in a grievous predicament. On the one hand, he was tethered to what may be termed the legal fiction that a municipal court is, in the absence of statutory direction, to apply the common law of nations even as against an executive order:[84] on the other, every instinct of patriotism strained against a declaration that the policy deemed absolutely essential to the vital interests of the British Empire should be condemned as not in conformity with that law. Therefore, the attempt to convert illegality into legality. But why should the court be required to sit in judgment on a necessitous act of state? It may well be questioned whether the dictum in *The Zamora,* that the court is to apply the accepted rule of international law even as against an Order in Council, is not a counsel of perfection, scarcely consistent with the position of a court of prize. Why should a court, deriving its authority from an act of prerogative,[85] not be limited by similar prerogative acts, as well as by statute? How can a national court, except under extremely exceptional circumstances, be expected as a matter of fact to question an essential policy of its Government, especially when that policy is in dispute with other States? And in cases such as *The Leonora* it is difficult to see how a satisfactory legal decision can be reached, as the court is precluded from full inquiry into those facts, which, in the final analysis, determine the legality of the act of state. It is very doubtful whether a doctrine such as this tends to the logical development of the law of nations. The view of Lord Stowell, set forth in *The Fox,*[86] that

[84] See *The Zamora,* [1916], 2 A. C. 77, 97.

[85] By the Order in Council authorizing the constitution of the prize court, the court is required to adjudge and condemn "according to the course of the Admiralty and the Law of Nations, and the Statutes, Rules, and Regulations for the time being in force in that behalf." Pulling, Manual of Emergency Legislation, 249.

[86] Edwards. 311, 312.

This, of course, according to the received doctrine of English law is heterodox. But without going into detail, it may be suggested, (1) that a court of prize, as far as the authority constituting it is concerned, is a national court, (2) that there is no logical reason, aside from the British distrust of the prerogative inherited from the period of the Civil War, why the court should not be bound by an executive order as well as by statute, (3) that, in cases such as The Leonora involving vital political problems, the courts do and will attempt, if placed in a position where they must choose between the custom of nations and an Order in Council, to reconcile the two, even though the result be a species of logical acrobatics, (4) that, in any event, the courts will still apply international law, in those cases in which they are not bound by statute or order. See the interesting suggestions of Sir Francis Piggott on this point, The Grotius Society, Problems of the War, III, 99. See also Picciotto, The Relation of International Law to the Law of England and of the United States, Ch. II, 26-47.

there is an irrebuttable presumption in favor of the conformity of an Order in Council to the international law, seems more consistent with the administrative functions of a court of prize. At the least, it would relieve the Court of a responsibility which it is ill qualified to assume, so that occasional strange gestures on its part might be avoided. Nor would it deprive the Court, in all save exceptional cases determined by statute or order, of its proud position as a tribunal apply the common law of nations.[87]

HESSEL EDWARD YNTEMA.

University of Michigan.

[87] Since this article was written, there has come to hand the decision of the Judicial Committee of the Privy Council in *The Stigstad*, L. J. R. 88 p. 33, affirming the judgment of the Court below upon the ground that the detention which relied upon by the neutral claimant as invalidating the Order in Council of March 11, 1915, was not, considering all the circumstances of the case, an unreasonable inconvenience to neutral shipping. It will be noticed that the rule laid down in *The Zamora*, [1916], 2 A. C. 77, 98, already referred to, is applied rather than that expressed by Sir Samuel Evans in *The Leonora*, [1918], P. 182, 228, to which especial objection was made in the course of this article. The Judicial Committee, however, expressly refrains from deciding the issue in *The Leonora*, [1918], P. 182. The effect of the decision, nevertheless, is finally to reognize retaliation as an accepted doctrine of English prize law and, by implication to assert as a principle of international law that neutral rights are liable to restriction by the arbitrary act of a single belligerent during the course of hostilities. To this as well as to the fiction still maintained by the Judicial Committee that Sir William Scot decided that retaliation is in accordance with international law, the writer on the grounds and to the extent already stated, must raise a respectful but vigorous protest.