The Right of Retaliation

IN an article in the current *Political Science Quarterly*, Prof. Munroe Smith criticises certain views developed by our State Department in its correspondence with the British and German Governments as to the position in international law of the right of retaliation. Inasmuch as we are at this moment on the verge of war with the latter of these Governments on account of action for which vindication must be sought, if at all, in the right of retaliation, it will be seen at once that the subject is one of great practical, as well as theoretical, interest.

In its second Lusitania note our State Department declared that "a belligerent act of retaliation is *per se* beyond the law, and the defence of an act as retaliatory is an admission that it is illegal." This assertion Professor Smith characterizes as "quite indefensible," and very justifiably, for the right of a belligerent to resort to retaliatory measures against its enemy when the latter employs illegal methods of warfare is well recognized by all writers on the law of nations.

But, as I take it, the statement just quoted from the note of July 21, 1915, was not altogether intended and went, in fact, much farther than was necessary to support the practical consequences drawn from it. Our Government's real position would seem to have been defined much more accurately in the accompanying assertion that acts of retaliation are "manifestly indefensible when they deprive neutrals of their acknowledged rights." Indeed, at this point the second Lusitania note only repeats its predecessor, where—to cite again Professor Smith's article—"our State Department refused to admit that measures of retaliation 'operate in any degree as an abbreviation of the rights of American shipmasters, or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality.'" The essential question raised by our Government's view of the right of retaliation is, therefore, not whether such a right is recognized by the law of nations—which must be granted—but what are the limits of this right, whether it may trench upon the outstanding rights of neutrals.

Professor Smith holds that rights of neutral subjects, both of person and of property, may be legitimately invaded by a belligerent Power in the exercise of its right to retaliate against its foes for their breaches of international law; and while he enters a caveat in behalf of the rights of humanity, yet, in the last analysis, the only recourse he leaves a neutral state aggrieved through the injuries thus inflicted upon its subjects is to challenge particular measures of retaliation as not justified by, or as disproportionate to, the occasion ostensibly calling them forth. Thus he writes:

> Neutral rights are in some degree abridged when they come into collision with belligerent rights. How far they are abridged in any particular case is a question of international law. In international law it is well settled that if a legitimate act of war on the part of a belligerent state, directed primarily against its enemies, inflicts incidental injury upon the persons or property of neutrals, neither those neutrals nor the states to which they owe allegiance have a right to raise protest or demand satisfaction. And since international law authorizes reprisals, a legitimate reprisal is *per se* a legitimate act of war. In order to find any ground for protest, the protesting state must show that the particular reprisal of which it complains is illegitimate.

And farther along he adds: "It is clear, however, that there must be some limits to the exercise of the right of reprisal. I venture to suggest that such limits are found in a comparison between the alleged offence and the attempted reprisal as regards their respective degrees of illegality and of inhumanity." With these views I cannot agree, nor do I think that they have the support of international law to the extent that Professor Smith apparently believes.

In the first place, it seems a most anomalous proceeding to force a neutral state to pass judgment upon the relative justifiability of the acts of two warring states as preliminary to demanding its own rights, even assuming the neutral state to be in a position to do so intelligently. For instance, which party to the present war first afforded the other party a legitimate occasion for retaliation? Probably the Government at Washington does not know, and if it did know it would not care to say. And as to the question of the relative severity or illegality of the offences of one belligerent and the acts of retaliation of the other, like considerations would again block the neutral's way to an effective protest in assertion of its rights. Thus take the case suggested by Professor Smith when he writes of the German "war zone" proclamation of February, 1915: "The taking of life is no proper retaliation for the taking of goods." The test here suggested was quite warrantably adopted by our State Department in determining the relative urgency of two classes of claims by *its own citizens* for its protection; but I do not gather that our Government has meant at any time to pass upon the question of the relative illegality or inhumanity of German submarine warfare and that of the British embargo, either in the abstract or from the point of view of their effect on the rights of the two belligerents. And it seems to me obvious that it ought not to be compelled to do so as a first step towards securing American rights.

More fundamental, however, is the criticism evoked by Professor Smith's major premise, his proposition that "if a legitimate act of war on the part of a belligerent state, directed primarily against its enemies, inflicts incidental injury upon the persons or property of neutrals, neither those neutrals" nor their Governments have a right to protest. Thus, suppose we assume, by way of argument, that the phrase "incidental injury" in the passage just quoted means, in colloquial phrase, *accidental injury*. The above proposition would then be fairly innocuous from the point of view of neutral rights, but even so it would not be a tenable one as to all those rights. For there are certain rights at international law, as at common law, which cannot be trespassed upon with impunity even "accidentally." So, if in ejecting an intruder from my own premises I toss him into a neighbor's flower garden, I render myself liable for the actual damage done, however inadvertent it was on my part. Likewise, if belligerent forces waging war along the frontiers of a neutral state should harm neutral persons and property across the line, their Governments would, I should suppose, be liable therefor, and of course such forces must not invade neutral soil on any account.

It is clear, however, that the term "incidental injury," as used by Professor Smith, means much more than "acci-

dental" injury. It means *injury which is the necessary and foreseen concomitant of an act of belligerency, albeit not furnishing such act with its primary purpose nor inflicted with hostile motive;* it means, if we are to judge from the operation of either the British embargo or German submarine warfare upon neutral rights, *the very method and instrumentality whereby injury is inflicted by one belligerent upon the other.* Their supposed incidental quality becomes as capacious an apology for belligerent trespasses upon neutral rights as *Kriegs-raison* itself!

A proposition leading to such sweeping results seems questionable; besides which its applicability to the right of retaliation may be challenged on independent grounds. One should not be misled in this connection by the fact that a belligerent is permitted to impose certain restraints upon neutral overseas traffic with the enemy. The measures of this character which a belligerent may take are carefully defined by international law, and his right to take them is given in return for a relaxation of the diligence which would be otherwise due from neutral governments in preventing activities by their subjects to the service of the enemy.

The really applicable parallel is that between the right of retaliation and the cognate right of states in time of peace to resort to reprisals "for violations of law or international delinquencies," in other words, the right of self-help. This latter right is clearly regarded by the authorities as limited by the rights of third parties. A form of it which has attracted considerable attention in recent years is the "pacific blockade." At first it was denied that a blockade could be instituted except as an incident of war. To-day, however, the "pacific blockade" is generally recognized as a method of coercion short of war, and, in certain cases, a very useful device. But it is also recognized that the pressure thus brought to bear by one state upon another cannot be extended, even incidentally, to the subjects of third Powers, that the measures of blockade cannot be extended to the shipping of nations not parties to the quarrel. This understanding of the matter was registered by the Institute of International Law in 1887, and it is reiterated by all recent writers (Moore's *Digest*, VII, pp. 141-2; Hershey, pp. 345-6; Lawrence, pp. 342-3).

Is there, then, any good reason why war reprisals should receive a broader scope in relation to the rights of third parties than measures of self-help in time of peace? I have found no discussion in the usual authorities bearing directly upon the question, but for a reason which, I think, is very significant. *The entire discussion of these writers is confined to instances of retaliation in no way involving neutral rights;* and certainly, if they had supposed that the belligerent right in this field overshadowed neutral rights, they would not have failed to notice the fact; nor could they have missed the paradox that would result from subordinating to the belligerent's right of retaliation rights carefully safeguarded against all other rights of war.

And the inference to be drawn from the silence of authorities is fairly confirmed by the caution of a recent utterance of the Judicial Committee of the Privy Council touching this very subject. I refer to a passing comment in the Committee's recent decision in the Zamora case upon Lord Stowell's decision in the case of the Fox:

> The actual decision in this case was to the effect 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 orders would not have been justified by international law. The decision proceeded upon the principle that where there is just cause for retaliation, neutrals may by the law of nations be required to submit to *inconvenience from the acts of a belligerent Power greater in degree* than would be justified had no cause for retaliation arisen, a principle which had been already laid down in the Lucy.

As between a claim of right to cause inconvenience, some degree greater than usual, and a claim of right to override neutral rights of person and property generally, there would seem to be a considerable gap. But even if there were not, the standards defined by courts of belligerents in the Napoleonic wars are hardly adequate to measure neutral rights to-day. It is, therefore, a significant fact that the British Government, which originally justified its embargo upon neutral trade with Germany as an act of retaliation, has since come to defend it as an allowable extension of the belligerent right of blockade.

I conclude, in short, that the belligerent right of retaliation is, as a general proposition, limited by and subordinate to neutral rights. No doubt a neutral may, by its own derelictions, furnish justifiable occasion for reprisals by a disadvantaged belligerent. But such measures would have to be defended for what they were, not as incidental to reprisals directed against the enemy Power.

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Argentina's Attitude to the War

THE "Great Conflagration in Europe," as the war is often designated by Argentina's newspapers, is the chief topic of conversation in Buenos Aires. The sympathies of the Argentine people vary, depending upon their ancestry, their interests, and their affiliations. Many residents of Argentina have forsaken their homes to enlist under the banner of England or her allies. In some cases these recruits were adventurers; in many cases they were Englishmen, or descendants of Englishmen; in other cases they were Argentine citizens who had married daughters of subjects of the Allied nations. I saw an enthusiastic young citizen of Argentina, the husband of an aged Belgian's daughter, embark for Havre to serve under Albert I. Thousands of recruits for the Allies have crossed the Atlantic since August 1, 1914. There is no doubt that only the influence of the sea-power has prevented a host of reservists from returning to the Old World to fight under the banners of the Emperor and the Kaiser.

The leaders of the metropolitan press, *La Nación* and *La Prensa*, favor the Allies, and partly on that account, shortly after the outbreak of the war certain German residents of Buenos Aires founded a daily newspaper, *La Unión*, which has since served as an organ of the Teutonic cause in southern South America. Aside from the editorials in that newspaper, it is almost impossible to find in the intellectual centre of South America any published expressions of sympathy for the German cause. Argentine citizens are drawn to England by ties of commerce or of kinship; they sympathize with Italy's ambition to redeem the northern Adriatic; they resent the violation of Belgium's neutrality. But, above all, it is for *la belle France*—so wantonly attacked—